

NO. 64699-1-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

REC'D
MAY 27 2010
King County Prosecutor
Appellate Unit

STATE OF WASHINGTON,

Respondent,

v.

J.M.,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY, JUVENILE
DIVISION

The Honorable Julia Garrett, Commissioner
The Honorable Ronald Kessler, Judge

FILED
COURT OF APPEALS DIVISION
STATE OF WASHINGTON
2010 MAY 27 PM 4:00

BRIEF OF APPELLANT

CHRISTOPHER H. GIBSON
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 E Madison Street
Seattle, WA 98122
(206) 623-2373

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A. ASSIGNMENTS OF ERROR

1. A superior court commissioner erred in denying appellant's motions to suppress evidence seized by police in violation of appellant's right to privacy under the Fourth Amendment and Washington Constitution article 1, § 7.

2. The commissioner erred to the extent she found Bellevue Police Officer Michael Fry was at least partly an employee of the Bellevue School District. CP 25 (Finding of Fact 1).

3. The commissioner erred in finding Officer Fry is a "school official" for purposes of assessing his search of appellant and appellant's belongings in the context of Fourth Amendment and article 1, § 7 jurisprudence. CP 26 (Finding of Fact 3).

4. The commissioner erred to the extent she found Officer Fry handcuffed the appellant only after finding the key to the padlock on appellant's backpack. CP 27 (Finding of Fact 18).

5. The commissioner erred in concluding Officer Fry is a "school official" rather than a police officer when working at a school as a "School Resource Officer." CP 28 (Conclusion of Law 2).

6. The commissioner erred in concluding Officer Fry's search of appellant's backpack was "justified at its inception and reasonable in scope." CP 28 (Conclusion of Law 6).

7. The commissioner erred in concluding it was reasonable for Officer Fry "to want to search" appellant's padlocked backpack because he had just found appellant in possession of marijuana. CP 28 (Conclusion of Law 7).

8. The commissioner erred in concluding it was reasonable for Officer Fry to search appellant's padlocked backpack without first obtaining a warrant. CP 29 (Conclusion of Law 8).

9. The commissioner erred in concluding the post-arrest search of appellant's padlocked backpack was lawful and that the evidence recovered from that search was therefore admissible at trial. CP 29 (Conclusion of Law 9).

10. A superior court judge erred in affirming the commissioner's denial of appellant's motion to suppress evidence seized in violation of appellant's rights under the Fourth Amendment and Article 1, Section 7. CP 30-33.¹

11. The superior court judge erred in finding Officer Fry had "reasonable grounds" to open and search appellant's backpack. CP 32.

¹ Unlike the commissioner, the superior court judge did not number his findings of fact or conclusions of law.

12. The superior court judge erred in concluding it made no difference whether the person conducting the search is a school official, a school security guard, or a police officer assigned to a school. CP 33.

Issues Pertaining to Assignments of Error

A commissioner denied appellant's motion to suppress evidence recovered from his locked backpack during a warrantless post-arrest search by a Bellevue police officer on a high school campus. The commissioner concluded the officer needed only reasonable grounds to search, rather than the customary probable cause, because he conducted the search in his capacity as a school official. A superior court judge affirmed the commissioner's ruling and denied appellant's motion for revision.

1. Did the judge and commissioner both err in finding the officer was a "school official" when the officer was paid by the Bellevue Police Department, wore a police uniform and weapon at the school, drove a marked City of Bellevue patrol car, was available for police business unaffiliated with the school's operations during school hours, and searched appellant's locked backpack only after formally placing appellant under arrest and handcuffing him?

2. Even if this Court concludes the officer was a "school official" for purposes of searching appellant's backpack, was the search

nevertheless illegal because the officer lacked reasonable grounds to search the backpack when (a) appellant had been arrested and handcuffed before the search; (b) appellant had no way to access the contents of the backpack; (c) the officer had already seized the backpack; and (d) there were no exigent circumstances justifying the immediate search? ?

B. STATEMENT OF THE CASE

1. Procedural History

The King County prosecutor charged juvenile appellant J.M. with carrying a dangerous weapon at school (a .177 caliber 'Beretta' air gun) and possessing less than 40 grams of marijuana. CP 1; RCW 9.41.280; RCW 69.50.4014. J.M. filed a motion to suppress the air gun seized from inside his locked backpack, which the court commissioner denied. see Supp CP __ (sub no. 13, Respondent's Motion and Affidavit in Support of CrR 3.6 Motion to Suppress...., 6/30/09); CP 25-29; RP 124-26. J.M. thereafter agreed to adjudication on stipulated facts. CP 5; RP 131-32. The court found J.M. guilty as charged. CP 5-7; RP 132-33.

J.M. challenged the commissioner's suppression ruling in a motion for revision. CP 19-20. A superior court judge denied the motion. CP 30-33. The court imposed a standard range disposition. CP 34-39; RP 164-75. J.M. appeals. CP 41.

2. Substantive Facts

Bellevue Police Officer Michael Fry testified he had a wealth of law enforcement experience, including 15 years as a Bellevue police officer. RP 58-59. For the 12 years preceding trial, Fry's duties as a police officer included assignment as a "School Resource Officer" (SRO) at Robinswood High School and Middle School (Robinswood). RP 36.² According to Fry, the school district pays the Bellevue Police Department \$90,000 a year to have six police officers assigned to the district as SROs. RP 39.

As a Robinswood SRO, Fry parks his marked police car in front of the school, patrols the school grounds in full uniform, and carried his service revolver. RP 60, 62, 72. Fry can respond to police matters elsewhere in Bellevue, but his main duties while at the school included maintaining safety, being available to students with questions or concerns, and providing a positive police presence. RP 37, 39.

Fry was looking inside the school bathrooms one day when he saw J.M. standing at a sink holding what appeared to be a bag of marijuana in one hand and a medicine vial in the other. RP 44-45, 66. Fry seized the

² A letter dated December 9, 2008, from City of Bellevue School District Superintendent Karen Clark to City of Bellevue Police Chief Linda Pillo, purports to designate Fry and several other officers as "school officials." Ex. 4.

suspected marijuana and vial from J.M. and took them, J.M. and J.M.'s backpack to the office of the Dean of Students, Phyllis Roderick. RP 45-47, 68-70.

With Roderick behind her desk, and Fry and J.M. seated in front of her with the backpack between them, Fry explained what he saw J.M. doing in the bathroom. RP 48-49, 71-72. Fry then told J.M. he was under arrest and called for another officer to transport J.M. to the precinct for booking. RP 49-50.

At some point Fry noticed the zipper to the main compartment of the backpack was locked. Although he could not smell marijuana in the pack, Fry suspected J.M. might have more inside. RP 49, 74, 78-79. Fry then searched the pack without asking J.M.'s permission and was able to open the compartment enough to get his hand inside. RP 50-53. When Fry asked J.M. for the key to the lock, J.M. told him he left it at home. RP 53. Fry then handcuffed J.M., searched him, and found the key to the lock in J.M.'s jacket. RP 53-54. Fry undid the lock, opened the backpack, and discovered the air pistol. CP 1; RP 54.

Officer Finney arrived sometime after Fry found the pistol. RP 30. Fry advised J.M. of his rights and Finney transported the youth to the precinct. RP 31, 56-57.

C. ARGUMENTS

OFFICER FRY'S SEARCH OF THE BACKPACK VIOLATED
J.M.'s RIGHTS UNDER THE FOURTH AMENDMENT AND
CONST. ART. I, § 7.

Officer Fry's warrantless search of J.M.'s backpack following J.M.'s arrest for marijuana possession violated J.M.'s constitutional privacy rights. Fry's status as a SRO did not excuse the warrantless search following J.M.'s arrest because under the circumstances, Fry was acting in his capacity as a law enforcement officer rather than as a "school official." Moreover, even if Fry was acting as a "school official," his search of the backpack violated J.M.'s rights because Fry lacked reasonable grounds for the search. This Court should therefore reverse J.M.'s conviction for possession of a dangerous weapon at school.

a. Procedure on review of order on motion to revise

On appeal from a superior court ruling denying a motion to revise a commissioner's ruling, this Court reviews the superior court's ruling rather than the commissioner's. State v. Ramer, 151 Wn. 2d 106, 113, 86 P.3d 132 (2004). The superior court reviews both the commissioner's factual findings and legal conclusions de novo based on the evidence and questions presented to the commissioner. Ramer, 151 Wn. 2d at 113, citing In re Marriage of Moody, 137 Wn.2d 979, 993, 976 P.2d 1240 (1999), and State v. Wicker, 105 Wn. App. 428, 433, 20 P.3d 1007 (2001).

An appellate court's review of a superior court's rulings is more deferential than the superior court's revision of a commissioner's decision. State v. Hoffman, 115 Wn. App. 91, 101, 60 P.3d 1261, reversed on other grounds, 150 Wn.2d 536 (2003). A "more deferential" standard, however, does not amount to a rubber stamp. See, e.g., State v. Fire, 100 Wn. App. 722, 726, 729, 998 P.2d 362 (2000) ("[A]ppellate deference to trial court determinations of the ability of potential jurors to be fair and impartial is not a rubber stamp."), reversed on other grounds, 145 Wn.2d 152 (2001).

- b. Officer Fry was not acting as a "school official" when he searched J.M.'s backpack

Whether Fry was acting as a "school official" or instead as a law enforcement officer at the time of the search is a critical threshold determination for assessing whether the search violated J.M.'s constitutional privacy rights. If Fry was acting as a "school official," the issue is whether the search was reasonably necessary to aid in maintaining school discipline and order. State v. McKinnon, 88 Wn.2d 75, 81, 558 P.2d 781 (1977). If Fry was not acting as a "school official," the search was a per se violation of J.M.'s right to privacy because all post-arrest searches of locked containers by police officers must be authorized by a valid search warrant. State v.

Stroud, 106 Wn.2d 144, 152, 720 P.2d 436 (1986), overruled on other grounds, State v. Valdez, 167 Wn.2d 761, 224 P.3d 751 (1009).³

That the Bellevue School District superintendent identified Officer Fry as a "school official" in a letter is not determinative. Whether someone is a "school official" for purposes of Fourth Amendment⁴/ art. 1, § 7⁵ jurisprudence turns not on whether such a title has been bestowed upon the individual, but instead, on the precise nature of the person's duties are in relation to the school. McKinnon, 88 Wn.2d at 81.

³ The Stroud Court noted:

The rationale for this [rule] is twofold. First, by locking the container, the individual has shown that he or she reasonably expects the contents to remain private. Secondly, the danger that the individual either could destroy or hide evidence located within the container or grab a weapon is minimized. The individual would have to spend time unlocking the container, during which time the officers have an opportunity to prevent the individual's access to the contents of the container.

106 Wn.2d at 152 (citation omitted).

⁴ The Fourth Amendment states, "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

⁵ Const. art. I, § 7 provides, "No person shall be disturbed in his private affairs, or his home invaded, without authority of law."

In McKinnon, the chief of police told the high school principle about a confidential informant's tip that certain students, including McKinnon, were selling drugs at school. The principle and vice principle of the school immediately contacted the suspect students, searched them, found illicit drugs, and then contacted police. The students were arrest by police and eventually found guilty of drug crimes. 88 Wn.2d at 77-78.

The issue on appeal was whether the search violated the Fourth Amendment because the principal and vice principal were acting as agents of the state and therefore had to have a warrant before searching. 88 Wn.2d at 78. In concluding that a more relaxed standard is warranted for school employees, the Court noted the difference between the duties of a public school official, such as a principal, and those of a law enforcement officer:

The high school principal is not a law enforcement officer. His job does not concern the discovery and prevention of crime. His duty as the chief administrator of the high school includes a primary duty of maintaining order and discipline in the school. In carrying out this duty, he should not be held to the same probable cause standard as law enforcement officers. Although a student's right to be free from intrusion is not [to] be lightly disregarded, for us to hold school officials to the standard of probable cause required of law enforcement officials would create an unreasonable burden upon these school officials. Maintaining discipline in schools oftentimes requires immediate action and cannot await the procurement of a search warrant based on probable cause. We hold that the search of a student's person is reasonable and does not violate his Fourth Amendment rights, if the school official has reasonable grounds to believe the search is

necessary in the aid of maintaining school discipline and order.

88 Wn.2d at 81.

As applied here, SRO Fry was responsible for maintaining "a safe learning environment at Robinswood." RP 39. He was specifically prohibited, however, from administering school discipline. Ex. 4; RP 41-42. Moreover, Fry's SRO duties did not preempt his law enforcement duties, but were merely "in addition to [his] law enforcement duties." RP 41. As Fry admitted, he was available to assist other police officers in police matters unrelated to the school even during his shift as SRO. RP 39. This is not surprising; Fry was paid by the Bellevue police department to be a police officer, not by the Bellevue school district to be a SRO. CP 31; RP 39, 58-59

Under these circumstances, Fry's job, unlike that of a school principal, vice principal, teacher or counselor, included the prevention and discovery of crime, in addition to helping maintain a safe learning environment at the school. Under the analysis in McKinnon, Fry was not a "school official." Instead, he was a police officer acting within police authority when he arrested J.M. for possession of marijuana and therefore should have obtained a search warrant before searching J.M.'s locked

backpack. See RP 73 (Fry agrees that only law enforcement officers may arrest a person for a misdemeanor).

- c. Even if Officer Fry was a "school official", his search of J.M.'s backpack was constitutionally improper.

The Fourth Amendment and Const. art. I, § 7 apply to searches conducted by school officials. New Jersey v. T.L.O. 469 U.S. 325, 337, 105 S. Ct. 733, 83 L. Ed. 2d 720 (1985); State v. Brooks, 43 Wn. App. 560, 568, 718 P.2d 837 (1986). The test under each constitutional provision is the same. Brooks, 43 Wn. App. at 568-69. A school search is constitutional “if the school official has reasonable grounds to believe the search is necessary in the aid of maintaining school discipline and order.” McKinnon, 88 Wn.2d at 81.

A reasonable search is one justified at its inception and one reasonably related in scope to the facts that justified the interference in the first place. T.L.O., 469 U.S. at 341. A search is justified at its inception only when there are reasonable grounds for suspecting the search will reveal evidence the student has violated or is violating either the law or a school rule. State v. B.A.S., 103 Wn. App. 549, 553-54, 13 P.3d 244 (2000), citing T.L.O., 469 U.S. at 342. Washington courts consider “the child's age, history, and school record, the prevalence and seriousness of the problem in the school to which the search was directed, the exigency to make the search

without delay, and the probative value and reliability of the information used as a justification for the search." Kuehn v. Renton School Dist. No. 403, 103 Wn.2d 594, 598, 694 P.2d 1078 (1985) (citations omitted) (emphasis added), quoting McKinnon, 88 Wn. App. at 81.

The revision court did not apply the McKinnon factors. Rather, the trial court applied the similar but not identical three-part analysis set forth in Vernonia School Dist. 47J v. Acton, 515 U.S. 646, 115 S.Ct. 2386, 132 L.Ed.2d 564 (1995), which includes "(1) the nature of the privacy interest upon which the search intrudes, (2) the character of the search, and (3) the nature and immediacy of the governmental concern at issue, and the efficacy of the means for meeting it." CP 32 (emphasis added); see Vernonia, 515 U.S. at 654-64.

Under either analysis, Fry's search of J.M.'s pack was unreasonable.

because there was no exigency requiring immediate access to its contents. J.M. had been caught with marijuana in his hand, promptly taken into custody and ultimately arrested and handcuffed. At that point, there was no reason to fear J.M. might grab whatever was in the pack and either destroy it or use it against anyone. Fry simply wanted to know what was inside the pack because it was locked, which piqued his curiosity and made him suspect there might be more marijuana inside.

But the need to satisfy curiosity is not a valid basis even for a school official to search a student's backpack. As McKinnon and other cases hold, search of a student or his belongings is reasonable only if there is a reasonable concern of criminal conduct and there is an immediate need to determine whether those concerns are founded. See e.g., B.A.S., 103 Wn. App. at 554-56 (search of student unconstitutional because there was no nexus between violating closed campus policy and no exigent circumstance warranting a search); cf. State v. Slattery, 56 Wn. App. 820, 825-26, 787 P.2d 932, (possibility that student or student's friend might remove car from campus was exigent circumstance warranting immediate search of car for drugs by school security guards), review denied, 114 Wn.2d 1015(1990).

Because there were no exigent circumstances necessitating an immediate search of J.M.'s locked pack, Officer Fry should have sought to satisfy his curiosity only after convincing a judge he had probable cause for a search warrant. It is indisputable that no such probable cause existed at the time of the search. CP 32. Because there was no need, at least not for purposes of maintaining school discipline and order, to conduct an immediate search of J.M.'s backpack, Officer Fry's search of the pack violated J.M.'s constitutional privacy rights, even if Officer Fry qualified as a "school official."

D. CONCLUSION

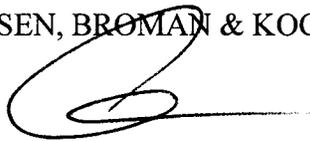
This Court should conclude that Officer Fry was acting in his capacity as a police officer when he searched J.M.'s locked backpack. As such, in harmony with Stroud, this Court should conclude the search constituted a per se violation of J.M. constitutional privacy right and reverse his conviction for possession of a dangerous weapon at school.

In the alternative, if this Court concludes Officer Fry was a "school official" and therefore needed only reasonable grounds to search J.M.'s pack, the search was still a violation of J.M.'s privacy rights because Fry lacked reasonable grounds to conduct the search. Once J.M. was arrested and handcuffed, and the pack was seized, an immediate search was not necessary to maintain school discipline and order, and therefore was unlawful. Thus, reversal of J.M.'s dangerous weapon possession conviction is still warranted.

DATED this 27th day of May, 2010.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



CHRISTOPHER H. GIBSON,
WSBA No. 25097
Office ID No. 91051

Attorneys for Appellant

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
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Respondent,)	
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v.)	COA NO. 64699-1-I
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J.M.,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 27TH DAY OF MAY, 2010, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] J.M.
1377 145 PLAVE SE
APARTMENT B
BELLEVUE, WA 98007

SIGNED IN SEATTLE WASHINGTON, THIS 27TH DAY OF MAY, 2010.

x Patrick Mayovsky