SUPREME COURT NO. 96705-9

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Petitioner,

v.

A.S.,

Respondent.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR SNOHOMISH COUNTY

The Honorable George N. Bowden, Judge

ANSWER TO STATE'S PETITION FOR REVIEW

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A. IDENTITY OF RESPONDENT

Respondent A.S., the appellant below, asks this Court to deny the State's Petition for Review.

B. COURT OF APPEALS DECISION

The State seeks review of the Court of Appeals decision in State v. A.S., ___ Wn. App. 2d ___, 430 P.3d 703 (2018).

C. STATEMENT OF THE CASE

Fourteen-year-old A.S. arrived at Meadowdale Middle School looking for a student with whom she had a dispute. RP 15; CP 46. A.S. was not herself a student at the school. RP 15. Assistant Principal Joseph Webster, who had notice A.S. might be coming, spotted her just outside the school office and asked her to come inside. RP 5, 15. A.S. complied. RP 24.

A.S. was directed to the principal's office and again complied. RP 16. When she would not answer questions concerning her purpose on campus, police were called. RP 16, 25. Rather than wait for police to handle the matter, however – and based on the odor of marijuana – Webster searched A.S.'s backpack without her permission or a warrant, finding marijuana and associated paraphernalia. RP 17-18, 25-26.

Assuming the "school search exception" to the warrant requirement applies to searches of non-students like A.S., the Court of Appeals found the requirements for that exception unmet. A.S., 430 P.3d at 706-710. The Court suppressed the evidence and reversed A.S.'s possession convictions. Id. at 704-705.

D. ARGUMENT WHY REVIEW SHOULD BE DENIED

This Court should deny review because the Court of Appeals decision is correct, based on the facts and law, and this case does not meet any of the criteria for review under RAP 13.4(b).

1. There Is No Conflict With Other Decisions.

Under the "school search exception" to the warrant requirement, school officials may search students "if, under all of the circumstances, the official has reasonable suspicion." State v. McNeese, 174 Wn.2d 937, 943, 282 P.3d 83 (2012). Specifically, "[a] school teacher or administrator may legally search a student without a warrant if she or he has 'reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school.'" State v. E.K.P., 162 Wn. App. 675, 678, 255 P.3d 870 (2011) (quoting New Jersey v. T.L.O., 469 U.S. 325, 341-342, 105 S. Ct. 733, 83 L. Ed. 2d 720 (1985)).

In State v. McKinnon, 88 Wn.2d 75, 81, 558 P.2d 781 (1977), this Court identified several relevant considerations in assessing reasonableness of a search under this exception (child's age, history, school record, prevalence and seriousness of the problem in the school to which search was directed, exigency warranting immediate action, and probative value/reliability of information used to justify search). In A.W.'s case, the Court of Appeals examined these very considerations before concluding the search of her backpack was unconstitutional. See A.W., 430 P.3d at 706.

The State argues the Court of Appeals decision conflicts with prior precedent in several ways.

First, the State notes that not all factors listed in McKinnon need support a warrantless search for it to be justified under the exception. Petition, at 6 (citing State v. Brooks, 43 Wn. App. 560, 568, 718 P.2d 287 (1986)). The State then identifies a potential conflict:

> Here, the Court of Appeals discussed and rejected each factor. To the extent that its decision indicates that all of the factors must be met, it conflicts with a decision of the Court of Appeals.

Petition, at 6. But there is no conflict. Citing Brooks, the Court of Appeals expressly noted that "all of the foregoing factors need not be found . . . ." A.S., 430 P.3d at 706.

Second, citing State v. Brown, 158 Wn. App. 49, 56, 240 P.3d 1175 (2010), the State argues the decision in A.S. "misconstrues the nature of the exigency necessary to justify the search" and notes the proper showing is merely a threat to the order and discipline of the school. Petition, at 6. While the State concedes that A.S. posed no threat while sitting calmly in the principal's office and simply waiting for the arrival of police, it argues (as it did below) that A.S. *could have* chosen to leave the office, and the risk she might do so was sufficient to justify an immediate search of her backpack. Petition, at 6-7.

But the Court of Appeals fully and properly understood the nature of the exigency necessary to justify the search, even discussing at length (and distinguishing) the decision in Brown. A.S., 430 P.3d at 707-708. The Court of Appeals also properly rejected the State's argument that, because of a theoretical possibility A.S. could have walked out of the office and back onto campus, she posed a sufficient threat warranting an immediate search. The Court found that where, in fact, A.S. simply did as she

was told and remained in the office until police arrived, such a purely hypothetical threat did not justify the warrantless search. A.S., 430 P.3d at 707. This is not a conflict, either.

Third, the State argues the evidence was sufficient for school officials to reasonably suspect a violation of school rules or the law, there was reasonable cause to search A.S.'s backpack, and the Court of Appeals' contrary conclusion conflicts with the outcome in State v. Marcum, 149 Wn. App. 894, 205 P.3d 969 (2009). Petition, at 7-10. This is essentially just an argument that the Court of Appeals is wrong on the merits.

One factual assertion underpinning this argument, in particular, warrants discussion. The State's petition is filled with references to an assertion attributed to school principal Jennifer Kniseley that A.S. appeared under the influence while in Kniseley's office. See Petition, at 1 ("she appeared under the influence of drugs"); at 3 ("Ms. [Kniseley] noted that A.S. appeared to be under the influence of drugs."); at 7 ("she appeared high"); at 8 ("A.S. appeared high"); at 12 ("She appeared intoxicated."); at 12 ("A.S.'s intoxicated appearance."). The State faults the Court of Appeals for failing to consider this "fact" when determining whether a

warrantless search of the backpack was authorized while waiting for police. See Petition, at 8.

The Court of Appeals did not consider this information because Kniseley did not testify at the CrR 3.6 hearing, and Judge Bowden did not find that it happened. The only witness at the CrR 3.6 hearing was Assistant Principal Webster. See RP 4. And while Webster did mention that Kniseley told him A.S. appeared to be under the influence, RP 17, 26, Webster did not testify to a similar observation of A.S. His only testimony was that he smelled marijuana while in the office with her. RP 17-18, 25. Moreover, when defense counsel objected on hearsay grounds to Webster sharing what Kniseley had said to him, the objection was sustained. RP 17. Ultimately, and critically, the trial judge did not make a finding that A.S. appeared to be under the influence. See RP 34-35; CP 33-35. "In the absence of a finding on a factual issue we must indulge the presumption that the party with the burden of proof failed to sustain their burden of proof on this issue." State v. Armenta, 134 Wn.2d 1, 14, 948 P.2d 1280 (1997) (citing cases). This "fact" was properly ignored by the Court of Appeals.[1]

[1] The absence of a finding on this point was highlighted for the Court of Appeals in A.S.'s opening brief, AOB, at 9 n.2, and again at oral argument. Oral Argument, 9/20/18, at 20:37 – 20:51 (available on Court website).

The Court of Appeals properly concluded that the mere smell of marijuana was insufficient to justify a warrantless search of A.S.'s backpack while A.S. and school administrators waited for police to arrive. The Court of Appeals also expressly distinguished Marcum, a case that did not involve a school search. Rather, in Marcum, police conducted a warrantless vehicle search based on a reliable informant's tip that the defendant possessed a substantial quantity of marijuana and after officers had confirmation of that tip based (among other factors) on the strong odor of marijuana coming from the defendant's vehicle. A.S., 430 P.3d at 710. There is no conflict with Marcum, either.

2. There Is No Issue of Substantial Public Interest.

In State v McKinnon, this Court recognized that maintaining discipline in schools sometimes "requires immediate action and cannot await the procurement of a search warrant based on probable cause." McKinnon, 88 Wn.2d at 81. As previously discussed, such a search does not offend constitutional protections "if the school official has reasonable grounds to believe the search is necessary in the aid of maintaining school discipline and order." Id.

The State identifies as a potential issue of substantial public interest whether the school search exception should be expanded to include situations like the one here, "which do not neatly fit within any of the McKinnon factors." Petition, at 11. But the State has not shown why such an expansion would be necessary or permitted. The idea behind the exception is that immediate action is necessary. A.S. waited calmly in the office, police had been called, and officers were on their way. It is difficult to conjure a constitutional expansion of the exception to include these circumstances. There is no issue of substantial public interest.

The State also argues this Court should determine whether the school search exception applies to non-students, an issue the Court of Appeals expressly declined to decide. Petition, at 13. On this subject, the State expresses fear that, because the Court of Appeals mentioned out-of-state cases expanding the school search exception to non-students who presented a credible threat of physical harm to students, school administrators may now mistakenly refrain from conducting searches of non-students when faced with less violent threats. Petition, at 13-14.

There is no need to determine in this case whether the exception applies to non-students because, even assuming it does,

as the Court of Appeals correctly found, its requirements clearly were unmet. Moreover, school administrators will not be confused by the Court of Appeals decision. The Court of Appeals explained that it discussed out-of-state authority only because the parties had done so. A.S., 430 P.3d at 709-710. And the Court made clear that it was not deciding the applicability of the exception to non-students. Id. at 706. One would have to misread the opinion to conclude otherwise.

Someday it may be necessary to explore the scope of the exception for non-students on campus. But since the evidence failed to establish the student search exception even when treating A.S. as a Meadowdale student, the Court of Appeals correctly recognized this is not the case in which to do so.

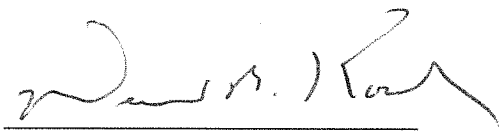
F. CONCLUSION

The Court of Appeals decision is thorough, limited in scope, and correctly decided under existing law. It presents no new questions of substantial public interest. This Court should deny the State's petition.

DATED this 31st day of January, 2019.

Respectfully submitted,

NIELSEN, BROMAN & KOCH



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