Too Cool for School? *State v. Polk* and the Future of Public School Searches

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I *State v. Polk*: Lower court decisions

A Facts and Trial Court ruling.

1 Joshua Polk: senior at Whetstone High School

2 Left backpack on school bus. Timeline unclear from record (apparent backpack was left on bus at morning drop-off; unclear what time of day Polk was seized---security guard unsure seizure took place the same day)

3 Bus driver during a walk-through of the empty bus finds the "unattended" (I call that "lost") backpack. Does not open it but hands to security guard Lindsey.

4 For safety and security reasons, Lindsey unzips backpack to determine a) ownership and b) safety. Claims he did this as part of a "protocol." **FIRST SEARCH.**

5 Whatever the duration of this particular search, Lindsey able to satisfy these two criteria. He determines the backpack belongs to Mr. Polk, and he does not observe any weapons or contraband.

a State characterized this initial search as "cursory," as did the Court of Appeals decision. I disagree with that characterization. It was more detailed than that, enough that the was able to detect papers, notebooks, etc.

b This was contested in oral argument before the Supreme Court. They simply believed that this first search did not satisfy the ownership and safety criteria, and that Lindsey had not completed

his search. Judge Horton (trial court judge) did not believe Lindsey when he testified at the hearing that he intended to conduct a second search of the bag.

6 Lindsey found out the bag belonged to Polk. He then claimed that he recalled a rumor that Polk was possibly in a gang. After this determination he then took the bag to Principal Barrett's office and dumped the contents of it out. **SECOND SEARCH.** About 6-7 bullets fell out of the bag. Polk located later, carrying another bag of some sort (this fuels my belief that the seizure may have taken place on another day from the first search). Police officer summoned. He took over investigation. Search of this bag reveals presence of a gun. **THIRD SEARCH.**

a Supreme Court mentioned the gang affiliation, but did not assign to it the significance that Horton placed on it.

b Judge Horton deeply troubled by this testimony. In his questioning of the trial prosecutor, and in his decision, he did not believe Lindsey when he said he always intended to subject the bag to a further search. And you know, as trier of fact his determination of credibility is subject to great deference.

c Horton concluded that the only reason Lindsey subjected the bag to the second search was not for safety/identification (those had been satisfied) but because of the rumored gang affiliation---in other words, Polk's purported status as a gang member (which was never established) was the basis for a generalized search to discover fruits and instrumentalities of crime.

7 State during suppression hearing barely mentioned the protocol as a justification for the search; rather it went off of a straight TLO reasonable basis (unattended bag is indicia of a violation of school rules or the law).

8 No reasonable basis to believe that the second search would reveal the presence of weapons or fruits/instrumentalities of crime. Applied TLO's reasonable basis test, and because this was lacking no need to examine the TLO "scope" test.

B Court of Appeals

1 Agreed with lower court.

2 Reviewed the first search as one involving lost or mislaid property. Found that first search satisfied safety/identification criteria.

3 Found that Horton's finding was supported by competent, credible evidence that Lindsey was not truthful when he said he would subject the bag to a subsequent search after determining it belonged to a supposed gang member.

4 Rejected the State's exclusionary rule and good faith arguments.

II Supreme Court

A Accepted the existence of protocol. At oral argument I spent most of my allotted time questioning the existence of it. Again, barely mentioned by trial prosecutor as a justification for the search. Not admitted into evidence.

B Characterized the search of bag as a special needs search. These are a slowly expanding category of searches where no quantum of suspicion is needed. Skinner/Acton/Earls.

1 To satisfy the special needs search there must be a policy.

2 In my brief I attacked the protocol as a mere means of evidence gathering which is not a suitable justification for special needs searches. Note that Lindsey and Barrett immediately contacted police when bullets were located---this to me demonstrated an investigatory intent or objective behind this "protocol."

3 Acton and Earls were the school urine screen cases. But note that in those cases there was a specific requirement that the urine screen results would not be turned over to law enforcement. Apparently *this* protocol allowed for this, which indicated an investigatory purpose. Columbus School requirement that, for federal funding, there be a policy for criminally prosecuting kids who bring firearms to schools. Further indicia that there was an investigatory motive behind the policy.

a Protocol more akin to the policy at issue in Ferguson v. Charleston (urine screens of pregnant mothers turned over to law enforcement; choice given to either participate in treatment or be prosecuted).

4 Whetstone school protocol would have been acceptable had this information not been turned over to law enforcement, and instead school discipline procedures used. Here there was both---he was expelled and criminally prosecuted.

5 Lindsey NOT a teacher/coach/counselor. TLO paradigm not really appropriate.

C Court rejected court of appeals' deference to Horton's determination that Lindsey was not to be believed.

1 Did not address exclusionary rule and good faith arguments.

D Some nuggets for defenders from the Supreme Court opinion

1 Good discussion on lost/mislaid property. Did not accept argument that the bus bag had been abandoned.

2 Competent, credible evidence. We usually lose on this issue, but if you have a case where you suspect the officer is lying you can cite Polk as authority when the court credits the testimony of the officer.

3 If faced with school search, get copy of protocol because this will be the first line of defense for a search by a school employee.

III Future

A Right of privacy for public school students virtually non-existent. May still be a right against strip searches (Safford).

B My assumption is that Ohio schools will, if they haven't already, adopt "protocols" that are highly intrusive (where almost any and all school personnel can subject students and their belongings to randomless, suspicionless searches).

1 Again, get a written copy of school policy, either through subpoena or public records request if it's not provided in discovery.

C Argue for solutions other than criminal prosecution. School to prison pipeline.