Juvenile Law Summit (June 1, 2017, 11 am to 12: 45 pm)
Fawcett Center, OSU

In *Polk*, the Court found that the second search (emptying the book back) was reasonable. However, is there a timing issue here or with other cases? Can a school wait as long as they want to conduct additional searches?

A There can be a timing issue in the sense that if the protocol has been satisfied there is no further reason to detain the item. This is very similar to the OSSC's decision in *State v. Chatton*, 11 Ohio St.3d 58, 463 NE2d 1237 (1984) where the Court held that once the purpose of the seizure has been satisfied any further seizure/search is unlawful.

1 This was exactly what the trial court and 10th District held, and what I argued in the OSSC. The OSSC decided that the trial court's decision indicating that the initial search (detailed enough to detect papers, books, etc.) verified the ID of bag owner and that it did not contain fruits/instrumentalities of crime was not based on competent credible evidence. OSSC said this initial search was cursory, not thorough enough.

a Opinion ¶ 34 very unusual because courts as triers of fact are usually entitled to great deference, and the trial court had made a factual finding that Lindsey had satisfied the safety and ID criteria when he initially looked in the bag.

(1) *State v. Codeluppi*, 139 Ohio St.3d 165, 2014-Ohio-1574, 10 NE3d 691, ¶ 7 ("when considering a motion to suppress the trial court assumes the role of trier of fact and is therefore in the best position to resolve factual questions and evaluate the credibility of witnesses");

(2) *Ace Bailing, Inc. v. Porterfield,* 19 Ohio St.2d 137, 138, 249 NE2d 892 (1969) (trier of fact "not required to accept the testimony of the sole witness simply because it was uncontradicted, unimpeached, and unchallenged").

b The subsequent search, according to the 10th District, was performed for investigative purposes only, to wit, to find out if he had evidence of gang activity (e.g. weapons). This was entitled to deference but the OSSC "per the record" was not willing to extend it.

B If search is conducted after too much time has elapsed there may be an interference with the possessory interests of the owner.

1 "The brevity of the invasion of the individual's Fourth Amendment interests is an important factor in determining whether the seizure is so minimally intrusive as to be justifiable under reasonable suspicion. Moreover, in assessing the effect of the length

of the detention, we take into account whether the police diligently pursue their investigation." *United States v. Place*, 462 US 696, 709 (1983).

C Another issue is that the longer the personal belonging is held before the search is conducted, and by whom, may effect whether the search is being conducted in accordance with a protocol or procedure to promote safety of students. In other words, if the belonging is held for a prolonged period of time to enable law enforcement to search it, or to conduct a "more thorough" search, it looks less like a special needs search and more like an investigative search.

1 Keep in mind the trial and appeals courts held that had the bag been initially dumped out to satisfy the safety/ID criteria, that would have been acceptable.

2 Arguably the longer they hold onto the bag the less likely it's being held for safety and identification. Those tasks can be performed rather quickly, I'd think.

3 Also, check the protocol. There may be criteria for when such a search is completed, or should be completed. Argue like heck that there should be standards in the protocol for this; otherwise it is left to the discretion of the official. In other words, for special needs searches to be lawful there should be objective measures determining when the search has been completed. It should not be left to the official's discretion.

What are some common school-based search and seizure scenarios that you have seen in practice? Can those other school-based search issues be distinguished from *Polk*?

A Most common searches are those involving lockers. Typically dogs are brought into the school and if they react on a locker there is sufficient cause to search the locker.

B Justice O'Neill in his former capacity as a judge on the 11th District Court of Appeals in *In re Adam*, 120 Ohio App.3d 364, 375, 697 NE2d 1100 (11th Dist. 1997) argued that random, suspicion-less searches of student lockers was unconstitutional because it violated the 4th Amendment. Even though the school issues the locker to the student the latter has a reasonable expectation of privacy in the locker such that it cannot be opened and searched without reasonable suspicion.

1 Columbus City School Bylaw 5771 along with 3313.20(B)(1)(b) are of questionable Constitutionality ((B)(1)(b) permits random searches of student lockers if notices to that effect are posted in the school).

C Other types of searches are those involving students themselves. Lindsey himself indicated that he needed some form of suspicion (odor of marijuana, etc.) to search a student. I think he was correct here. As well, Lindsey testified that a bag or other belonging being carried by the student could not be searched without reasonable suspicion.

1 BUT NOTE that anonymous tips of wrongdoing are probably sufficient to make reasonable suspicion in the school setting.

D Certainly most of the searches I've mentioned above can be distinguished from *Polk* because, consistent with *TLO*, there is an individualized quantum of suspicion that must be satisfied before the search. In *Polk* there was no individualized suspicion but, according to the OSSC, the invocation of the "special needs" protocol meant than no individualized suspicion was necessary to justify the search of the bus bag.

What should juvenile defenders do to preserve these issues? Argue Art. I, Sec. 14 of Ohio Const.

A Obviously the more of a record you make the greater the odds of preserving a favorable ruling below or getting an unfavorable ruling reversed.

B If faced with an unattended belonging search (or a search where the school authorities wish to invoke "special needs") get absolutely the most information you can about the "policy." In *Polk* the OSSC recognized that the policy was unwritten. Find out as much as you can about when the policy was formulated, who drafted it, was it prepared formally, when was it created. Record by the defense was thin in this regard, but at the time it didn't have to be more augmented.

1 May have to contact multiple members of the school to determine if the conditions and procedures of the unwritten policy as stated by the witness are accurate.

2 Obviously if the policy is written subpoena it and/or do a public records request for it. Get familiar with it. Lindsey testified Whetstone had a protocol; I have my doubts, but the OSSC had the final say. I do know that the City of Columbus Board of Education (and Whetstone is a Columbus Public School) has developed a written policy for searches and there is a "reasonable suspicion" component, which is not at all like that testified to by Lindsey. I couldn't raise this in OSSC because it was not part of the record: remember, we won in the trial court and in front of the 10th District, and so based on that we did not submit it.

a I have copies entitled "Columbus City Schools, Bylaws and Policy: 5771-Search and Seizure" that have been distributed. Key language:

"School authorities are charged with the responsibility of safeguarding the safety and well-being of the students in their care. In the discharge of that responsibility, school authorities may search the person or ***property,*** including vehicles, of a student, with or without the student's consent, whenever they ***reasonably suspect*** that the search is required to discover evidence of a violation of law or of school rules."

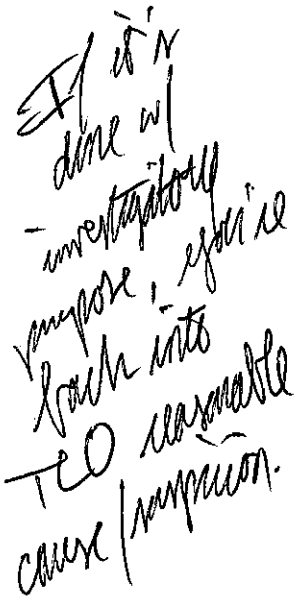
If a security guard says his or her school has an unwritten policy ask them if it complies Directive 5771 and show it to them.

And I doubt seriously that schools are permitted to develop their own individual search protocols within the District.

3 Strive to demonstrate that the "special needs" policy is designed to assist law enforcement in gathering evidence for prosecution. Recall that "special needs" searches cannot be used as a ruse for general criminal investigation. This is especially acute when the policy is unwritten---you can argue that, in practice, it may very well be designed to assist law enforcement. **THESE ARGUMENTS ARE UNADDRESSED IN THE OPINION, SO I THINK YOU CAN STILL RAISE THEM.**

a When cross examining school security guards, and perhaps even teachers and principals, inquire what their objective was in conducting the protocol search. If they indicate that the search was performed to ultimately assist police, I'd say that it has not been performed in good faith.

b I'd argue that if testimony indicates that the protocol search is being conducted for both safety of kids and to assist police by providing them evidence I'd say it violates special needs purposes. Again, the reason special needs searches are permitted is because there is some greater need than general criminal investigation.



c And just because there is a policy doesn't make it lawful. If the policy is stated in such a way that school security guards/teachers are de facto agents for the police I'd argue the search done pursuant to that policy is unlawful.

d 20 USC Section 7961(h)(1). Federal funding requirement that schools have policy for referring those from whom firearms or weapons are recovered for criminal prosecution. This tells me this statute strongly encourages schools to develop policies designed to recover firearms and weapons and refer for prosecution those who bring them to school. This demonstrates that persons who carry out such policies are surrogates for the police.

e Last but not least, the primary reason the special needs searches were upheld in Acton/Earls/Skinner/Von Raab was because the urine screen results were not turned over to law enforcement. This was a big reason why the urine screen protocol in Ferguson v. Charleston was overturned. Make this argument too.

GREAT CASE: *Doe ex. rel. Doe v. LRSD*, 380 F.3d 349, 355 (8th Cir. 2003) (what are the fruits being used for?)

C Use *Polk* to your advantage. Decent discussion about lost or mislaid property; recognition that a person does not lose an expectation of privacy in lost/mislaid property. See ¶ 30-31.

1 Bothered me that the AG as amici raised an abandonment argument that had never been raised---and in fact repudiated---by appellate counsel before the 10th District. Abandonment was rejected.

D Also cite *Polk* when you wish to argue in an objection to a magistrate's ruling or in the court of

appeals that the decision overruling the suppression is not supported by competent, credible evidence. Opinion at ¶ 34. There the court said "The court of appeals deferred to the trial court's finding that Lindsey's cursory search of the unattended bag satisfied the purposes of identifying its owner and ensuring that its contents were not dangerous. *We conclude, based on this record, that that finding did not warrant the appellate court's deference.*" Recall that trial court did not believe Lindsey when he indicated he always intended to perform a second search of the bag. Use this language to assist you in cases like:

> -if an officer conducts a "cursory patdown" for weapons and he claims he felt something hard argue that such a conclusion is not supported by competent, credible evidence because of the cursory nature of the search. I think any sort of fact gleaned as a result of a cursory inspection is open to question and not entitled to deference.
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> -Representations made by a law enforcement as to what he observed, felt, believed. I'd argue that, per Polk, if other evidence does not support or back up these representations that the officer's testimony is not supported by competent, credible evidence.
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> -For those of you who do appellate work the same applies, perhaps more so.

E Attack also whether the student is adequately informed that leaving unattended personal belongings around the school will result in it being seized and searched per the school's search policy. Is it in the Student Handbook? Is it posted around the school?

> -I'd think a student would want to know that if they accidentally left a book bag on a locker room bench while he's at baseball practice that it will be searched by school personnel.

F *NJ v. TLO*, 469 US at 342 the USSC warned "Exceptions to the requirement of individualized suspicion are generally appropriate only where the privacy interests implicated by a search are minimal and where 'other safeguards' are available 'to assure that the individual's reasonable expectation of privacy is not 'subject to the discretion of the official in the field.'"

> 1 Argue that school search policies that lack individualized suspicion are distinguishable from those recognized by USSC in Acton/Earls/Skinner/Von Raab because those cases involve implied consent---in school cases students had to submit to urine screens to participate in extra-curricular activities, Skinner and Von Raab as a condition of employment or continued employment. Voluntary participation contemplates intrusion. This is an example of a "safeguard" mentioned in TLO.
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> > a Students in public school don't have that choice. Mandatory attendance laws require their attendance.

G Who's doing the search? If law enforcement exclusively, I'd argue it's not being done strictly for safety, but for general crime investigation. See NJ v. TLO n. 7. In fact the standard there

may require a warrant for a personal belonging.

H Exclusionary Rule

Note that Polk at the end of the day is narrow decision based on very narrow, unusual facts. It was for this reason that I implored the OSSC to refuse to take the case.

Questions? Call Tim Pierce (614) 525-8857 or (614) 525-3194.