Supplementary Material

Chapter 11: The Contemporary Era—– Criminal Justice/Search and Seizure

Safford Unified School District No. 1 v. Redding, 557 U.S. 364 (2009)

Savana Redding, a thirteen-year-old middle school student at Safford Middle School, was summoned to the assistant principal's office on October 8, 2003. Kerry Wilson, the assistant principal, had found pain relief pills on another student, and that student claimed that Ms. Redding had supplied her with the pills. A second student had told Mr. Wilson that Ms. Redding had previously been given pain relief pills, banned under school policy without advance notice. When questioned by Mr. Wilson, Ms. Redding denied any knowledge of the pain relief pills. After a search of her backpack and outer garments revealed no banned materials, Mr. Wilson asked the school nurse, Ms. Peggy Schwallier, and an administrative assistant, Ms. Helen Romero, to conduct a far more intrusive search in which Ms. Redding was asked to pull out her bra and pull out the elastic on her underpants. No banned substances were found. After "the most humiliating experience" of her life, Ms. Redding and her family sued the school district, Mr. Wilson, Ms. Schwallier, and Ms. Romero. They claimed the search was unreasonable and, as such, violated her Fourth and Fourteenth Amendment rights. A federal district court and panel of justices from the Court of Appeals for the Ninth Circuit rejected Ms. Redding's claim. Those decisions were reversed by the Ninth Circuit, en banc.[1] The Safford School district and Kerry Wilson[2] appealed to the Supreme Court of the United States. The United States filed an amicus brief urging the Supreme Court to find the search unconstitutional. That brief insisted that

> *school officials may not order a strip search unless they reasonably suspect that the student is hiding contraband in a place that such a search will reveal (and) a particularly intrusive search is permissible only to address an infraction posing an immediate risk to health or safety.*

The Nation School Boards Association filed an amicus brief urging the Supreme Court to reverse the en banc decision. In their view, "school officials should be afforded appropriate deference when making on-the-spot decisions that involve complex legal issues that require the balancing of student privacy rights with a compelling interest in ensuring a safe, orderly drug-free learning environment for all students."

The Supreme Court by an 8-1 vote declared that the search was unconstitutional, but by a 6-3 vote ruled that the school officials enjoyed qualified immunity from the lawsuit for damages. During oral argument in Safford, *Justice Ginsburg chided her male colleagues for asking questions she believed did not recognize how a 13-year-old girl would perceive the school strip search.[3] Her comments were widely interpreted as highlighting the need for both diversity and empathy on the Supreme Court. Read the opinions below in light of other Roberts and Rehnquist Court decisions in which the judicial majorities have sustained school searches. On one reading, Justice Ginsburg's questions might have enabled her male colleagues to gain a better perspective on how Savana Redding experienced the strip search. On another reading, Justice Ginsburg may have failed to appreciate her colleague's sensitivity to the issue. Consider in this vein that Justices Scalia, Alito, and Roberts joined Justice Souter's opinion. Might Justice Thomas's opinion be read as suggesting that the judicial majority empathized too much with Ms. Redding and too little with the needs of school administrators?*

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[1] Justices sitting in panels of three typically decide federal appellate court cases. At times, however, all the justices on a particular court can determine whether a case was correctly decided. When all the justices participate, the Court is said to sit "en banc."

[2] The Ninth Circuit did hold that Ms. Schwallier and Ms. Romero were not liable, because they were merely following Mr. Wilson's directives.

[3] See Dahlia Lithwick, "Search Me," *Slate,* April 21, 2009, http://www.slate.com/id/2216608/.

JUSTICE SOUTER delivered the opinion of the Court.

The Fourth Amendment "right of the people to be secure in their persons . . . against unreasonable searches and seizures" generally requires a law enforcement officer to have probable cause for conducting a search. "Probable cause exists where 'the facts and circumstances within [an officer's] knowledge and of which [he] had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that' an offense has been or is being committed" . . . and that evidence bearing on that offense will be found in the place to be searched.

In *New Jersey v. T.L.O.* (1985), we recognized that the school setting "requires some modification of the level of suspicion of illicit activity needed to justify a search" . . . and held that for searches by school officials "a careful balancing of governmental and private interests suggests that the public interest is best served by a Fourth Amendment standard of reasonableness that stops short of probable cause." . . . We have thus applied a standard of reasonable suspicion to determine the legality of a school administrator's search of a student, . . . and have held that a school search "will be permissible in its scope when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction." . . .

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Th[e] suspicion of Wilson's was enough to justify a search of Savana's backpack and outer clothing. If a student is reasonably suspected of giving out contraband pills, she is reasonably suspected of carrying them on her person and in the carryall that has become an item of student uniform in most places today. If Wilson's reasonable suspicion of pill distribution were not understood to support searches of outer clothes and backpack, it would not justify any search worth making. And the look into Savana's bag, in her presence and in the relative privacy of Wilson's office, was not excessively intrusive, any more than Romero's subsequent search of her outer clothing.

Here it is that the parties part company, with Savana's claim that extending the search at Wilson's behest to the point of making her pull out her underwear was constitutionally unreasonable. . . . The very fact of Savana's pulling her underwear away from her body in the presence of the two officials who were able to see her necessarily exposed her breasts and pelvic area to some degree, and both subjective and reasonable societal expectations of personal privacy support the treatment of such a search as categorically distinct, requiring distinct elements of justification on the part of school authorities for going beyond a search of outer clothing and belongings.

Savana's subjective expectation of privacy against such a search is inherent in her account of it as embarrassing, frightening, and humiliating. The reasonableness of her expectation (required by the Fourth Amendment standard) is indicated by the consistent experiences of other young people similarly searched, whose adolescent vulnerability intensifies the patent intrusiveness of the exposure. . . . The common reaction of these adolescents simply registers the obviously different meaning of a search exposing the body from the experience of nakedness or near undress in other school circumstances. Changing for gym is getting ready for play; exposing for a search is responding to an accusation reserved for suspected wrongdoers and fairly understood as so degrading that a number of communities have decided that strip searches in schools are never reasonable and have banned them no matter what the facts may be. . . .

The indignity of the search does not, of course, outlaw it, but it does implicate the rule of reasonableness as stated in *T.L.O.*, that "the search as actually conducted [be] reasonably related in scope to the circumstances which justified the interference in the first place." . . .

Here, the content of the suspicion failed to match the degree of intrusion. Wilson knew beforehand that the pills were prescription-strength ibuprofen and over-the-counter naproxen, common pain relievers equivalent to two Advil, or one Aleve. He must have been aware of the nature and limited threat of the specific drugs he was searching for, and while just about anything can be taken in quantities that will do real harm, Wilson had no reason to suspect that large amounts of the drugs were being passed around, or that individual students were receiving great numbers of pills.

Nor could Wilson have suspected that Savana was hiding common painkillers in her underwear. Petitioners suggest, as a truth universally acknowledged, that "students . . . hid[e] contraband in or under their clothing," . . . and cite a smattering of cases of students with contraband in their underwear. . . . But when the categorically extreme intrusiveness of a search down to the body of an adolescent requires some justification in suspected facts, general background possibilities fall short; a reasonable search that extensive calls for suspicion that it will pay off. But nondangerous school contraband does not raise the specter of stashes in intimate places, and there is no evidence in the record of any general practice among Safford Middle School students of hiding that sort of thing in underwear; neither Jordan nor Marissa suggested to Wilson that Savana was doing that, and the preceding search of Marissa that Wilson ordered yielded nothing. Wilson never even determined when Marissa had received the pills from Savana; if it had been a few days before, that would weigh heavily against any reasonable conclusion that Savana presently had the pills on her person, much less in her underwear.

In sum, what was missing from the suspected facts that pointed to Savana was any indication of danger to the students from the power of the drugs or their quantity, and any reason to suppose that Savana was carrying pills in her underwear. We think that the combination of these deficiencies was fatal to finding the search reasonable.

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JUSTICE STEVENS, with whom JUSTICE GINSBURG joins, concurring in part and dissenting in part.

[Justice Stevens insisted that the school officials did not enjoy qualified immunity from the lawsuit.]

JUSTICE GINSBURG, concurring in part and dissenting in part.

[Justice Ginsburg insisted that school officials did not enjoy qualified immunity from the lawsuit.]

JUSTICE THOMAS, concurring in the judgment in part and dissenting in part.

. . . The majority imposes a vague and amorphous standard on school administrators. It also grants judges sweeping authority to second-guess the measures that these officials take to maintain discipline in their schools and ensure the health and safety of the students in their charge. This deep intrusion into the administration of public schools exemplifies why the Court should return to the common-law doctrine of in loco parentis under which "the judiciary was reluctant to interfere in the routine business of school administration, allowing schools and teachers to set and enforce rules and to maintain order." *Morse v. Frederick* (2007). . . . But even under the prevailing Fourth Amendment test established by *New Jersey v. T.L.O* (1985) . . ., all petitioners, including the school district, are entitled to judgment as a matter of law in their favor.

"Although the underlying command of the Fourth Amendment is always that searches and seizures be reasonable, what is reasonable depends on the context within which a search takes place." . . . Thus, although public school students retain Fourth Amendment rights under this Court's precedent . . ., those rights "are different . . . than elsewhere; the 'reasonableness' inquiry cannot disregard the schools' custodial and tutelary responsibility for children." . . .

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A "search of a student by a teacher or other school official will be 'justified at its inception' when there are 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." . . . As the majority rightly concedes, this search was justified at its inception because there were reasonable grounds to suspect that Redding possessed medication that violated school rules. . . .

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The remaining question is whether the search was reasonable in scope. . . . Because the school officials searched in a location where the pills could have been hidden, the search was reasonable in scope under *T.L.O.* . . .

. . . [I]n the majority's view, although the school officials had reasonable suspicion to believe that Redding had the pills on her person . . ., they needed some greater level of particularized suspicion to conduct this "strip search." There is no support for this contortion of the Fourth Amendment.

The Court has generally held that the reasonableness of a search's scope depends only on whether it is limited to the area that is capable of concealing the object of the search. . . .[4]

. . . A search of a student therefore is permissible in scope under T.L.O. so long as it is objectively reasonable to believe that the area searched could conceal the contraband. . . .

The analysis of whether the scope of the search here was permissible under that standard is straightforward. Indeed, the majority does not dispute that "general background possibilities" establish that students conceal "contraband in their underwear." . . . It acknowledges that school officials had reasonable suspicion to look in Redding's backpack and outer clothing because if "Wilson's reasonable suspicion of pill distribution were not understood to support searches of outer clothes and backpack, it would not justify any search worth making." . . . The majority nevertheless concludes that proceeding any further with the search was unreasonable. . . . But there is no support for this conclusion. The reasonable suspicion that Redding possessed the pills for distribution purposes did not dissipate simply because the search of her backpack turned up nothing. It was eminently reasonable to conclude that the backpack was empty because Redding was secreting the pills in a place she thought no one would look. . . .

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The majority's decision . . . also departs from another basic principle of the Fourth Amendment: that law enforcement officials can enforce with the same vigor all rules and regulations irrespective of the perceived importance of any of those rules. . . . The Fourth Amendment rule for searches is the same: Police officers are entitled to search regardless of the perceived triviality of the underlying law. . . .

The majority has placed school officials in this "impossible spot" by questioning whether possession of Ibuprofen and Naproxen causes a severe enough threat to warrant investigation. Had the suspected infraction involved a street drug, the majority implies that it would have approved the scope of the search. . . . In effect, then, the majority has replaced a school rule that draws no distinction among drugs with a new one that does. As a result, a full search of a student's person for prohibited drugs will be permitted only if the Court agrees that the drug in question was sufficiently dangerous. Such a test is unworkable and unsound. . . .

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Even if this Court were authorized to second-guess the importance of school rules, the Court's assessment of the importance of this district's policy is flawed. It is a crime to possess or use prescription-strength Ibuprofen without a prescription. . . . By prohibiting unauthorized prescription drugs on school grounds—and conducting a search to ensure students abide by that prohibition—the school rule here was consistent with a routine provision of the state criminal code. It hardly seems unreasonable for school officials to enforce a rule that, in effect, proscribes conduct that amounts to a crime.

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School administrators can reasonably conclude that this high rate of drug abuse is being fueled, at least in part, by the increasing presence of prescription drugs on school campuses. . . . The risks posed by the abuse of these drugs are every bit as serious as the dangers of using a typical street drug.

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By declaring the search unreasonable in this case, the majority has "'surrender[ed] control of the American public school system to public school students'" by invalidating school policies that treat all drugs equally and by second-guessing swift disciplinary decisions made by school officials. . . . The

[4] The Court has adopted a different standard for searches involving an "intrusio[n] into the human body." . . . The search here does not implicate the Court's cases governing bodily intrusions, however, because it did not involve a "physical intrusion, penetrating beneath the skin" . . . [footnote by Justice Thomas].

Court's interference in these matters of great concern to teachers, parents, and students illustrates why the most constitutionally sound approach to the question of applying the Fourth Amendment in local public schools would in fact be the complete restoration of the common-law doctrine of in loco parentis.

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If the common-law view that parents delegate to teachers their authority to discipline and maintain order were to be applied in this case, the search of Redding would stand. There can be no doubt that a parent would have had the authority to conduct the search at issue in this case. . . .

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In the end, the task of implementing and amending public school policies is beyond this Court's function. Parents, teachers, school administrators, local politicians, and state officials are all better suited than judges to determine the appropriate limits on searches conducted by school officials. Preservation of order, discipline, and safety in public schools is simply not the domain of the Constitution. And, common sense is not a judicial monopoly or a Constitutional imperative.

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