



May 31, 2016

TWO RECENT DEVELOPMENTS REGARDING SEARCHING STUDENT CELL PHONES

- A. **Firearm Found in a Campus Trash Can, in Conjunction with Odd Behavior and Use of a Cell Phone, Justified a Search of the Student's Cell Phone.** (*In re Rafael C.*, 245 Cal.App.4th 1288 (Cal.App. 1st Dist. 2016).)

Facts

On the morning of February 21, 2014, a firearm and its magazine cartridge were seized from a trash can where they had been hidden on a California high school campus. The firearm was a 22-caliber Ruger rifle. Portions of the buttstock and barrel had been cut to form a pistol grip and to shorten the weapon to an 18.5-inch overall length with a six-inch barrel. A 30-round magazine was found with the firearm. A function check showed the gun was operable.

Two students who were believed to have been in possession of the firearm were brought into the vice principal's (VP) office for questioning. During a five-minute passing period, students passed the VP's office in the main arcade of the school. This was normal behavior as students were changing classrooms in that time frame. However, a third student kept walking back and forth past the VP's office. He passed by a number of times and looked into the office. At one point, he entered the office without permission. When directed to leave, he lingered by the door. When instructed to come into the office and explain why he was there, he ignored the directive, walked away quickly and ignored a further directive to stop.

When he was returned to the VP's office and questioned, he immediately reached down into his pocket. When he reached into his pocket, the VP became concerned that the student may be reaching for a concealed weapon. The VP then sought to take possession of the item in the student's pocket. The student resisted and they fell to the ground struggling with each other.

Shortly, the VP realized that the item was not a firearm but a cell phone. The student had been trying to manipulate the cell phone while it was in his pocket. When questioned, he refused to explain why.

The VP was aware that the third student knew the two students who brought the firearm on campus and was concerned that he had used the phone to communicate with others about the firearm or possibly about another firearm or weapon.

The VP was able to access the data which consisted of a collection of text messages and photographs. The photographs were of students holding the firearm, including the subject student.

Court Summarizes the Applicable Law - (*New Jersey v. T.L.O.*)

The search must be justified at its inception and, as actually conducted, must be reasonably related in scope to the circumstances which justified it in the first place. Under ordinary circumstances, a search of a student by a teacher or other school officials will be justified at its inception when there are reasonable grounds for suspecting that the search will turn up evidence that the student perpetrator has violated or is violating either the law or rules of the school.

A search is 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 misconduct.

Teachers and school officials need not obtain a warrant or have probable cause to search a student. Rather, the legality of a search of a student depends simply on the reasonableness of the search under all the circumstances.

Decision of the Court

The court held that the search of the third student's cell phone was reasonable in these circumstances. In arriving at this conclusion, the gravity of the situation which initially gave rise to the search may be considered. Given the danger posed by the possible presence of firearms on campus, the circumstances justified the use of swift and informal procedures to ascertain the extent of the threat.

The student's evasive behavior and resistance to school officials suggested he was either involved in a crime or trying to hide evidence of one. His cell phone appeared to be a tool to further the endeavor. Consequently, school officials had reasonable grounds for suspecting that the search of the cell phone would turn up evidence that the student had violated or was violating either the law or rules of the school.

B. SB 178 - Effective 1/1/2016 - Appears to Limit the Authority of School Officials to Search Student Cell Phones

SB 178, regarding Governmental Searches of Cell Phones and Other Electronic Devices, adds Penal Code section 1546, et seq. The new legislation provides that government entities, including political subdivisions of the state (such as school districts) and persons acting on behalf of such entities (such as school administrators), are prohibited from compelling information from

service providers or from anyone other than the authorized possessor of an electronic device or accessing information by physical or electronic searches without (1) a warrant; (2) wiretap order; (3) specific consent of the authorized owner or possessor of device; (4) good faith belief of an emergency to prevent death or serious physical injury; (5) good faith belief that device is lost, stolen or abandoned and then only to identify an owner or authorized possessor; or (6) if the device is seized from a correctional inmate.

As presently enacted, SB 178 appears to apply to investigations by a school district, charter school or county office of education of student misconduct that may result in student discipline. The effect appears to be that in order to search a student's cell phone, a school official would have to have consent of the owner, a search warrant issued by a judge, a life or death emergency circumstance, or a belief that the cell phone is lost or stolen. It appears that this standard may supplant the *New Jersey v. T.L.O.* reasonable suspicion standard discussed in *In re Rafael C.*. The issue, however, at present is unresolved. Nevertheless, a plain reading of the statute in its current form strongly suggests that it applies to the investigation of student discipline matters by school officials.

Recommendation

At the present time, the safest course of action is to assume that SB 178 applies to any cell phone search school officials wish to conduct. That means, for the time being at least, a school official should avoid searching a student's cell phone unless first either (1) consent of the owner has been given, (2) a search warrant issued by a judge, (3) a life or death emergency circumstance exists, or (4) a school official has a reasonable belief that the cell phone is lost or stolen.

In light of SB 178, at present, searching a student's cell phone without consent can be a dicey course of action. Should the need to search a cell phone arise, please contact us to discuss the circumstances and appropriate course of action.

If you have any questions concerning this or related issues, do not hesitate to contact our office.

— Alan B. Harris

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