1981 WL 157837 (S.C.A.G.)

Office of the Attorney General

State of South Carolina
June 25, 1981

***1** Sheriff Frank Powell
Post Office Box 143
Columbia, SC 29202

Dear Sheriff Powell:
In a letter to this Office you questioned whether law enforcement officers, using dogs trained to search for narcotics, may enter the public schools for the purpose of sniffing out narcotics stored in lockers and in a student's personal possession. You also asked whether such students can be charged with a drug-regulated violation, such as possession of marijuana, if a drug is found within a student's locker or on a student following such a search.

In a decision rendered on May 26, 1981, the United States Supreme Court denied a Petition for a Writ of Certiorari in a case which concerned a challenge to the constitutional propriety of a drug investigation conducted at a Junior and Senior High School in Indiana. The Court in its decision in the case of Doe v. Renfrow, 29 Cr.L. 4071, indicated that it was adopting most of a lower court's opinion, found in 475 F.Supp. 1012 (1979), which found no Fourth Amendment problems with a warrantless, noncriminal schoolroom drug search, which was conducted by school administrators with the assistance of police and a drug detecting dog and which consisted of a thorough search of clothing of any student to whom the dog alerted. The Court also found that the District Court's condemnation of a nude search of a student based solely on the drug detecting dog's continued alert to her was correct, but the District Court's conclusion that school officials were entitled to immunity under the 'good faith' doctrine for damages stemming from the nude search was reversed and the case was remanded for determination of the damages. Therefore, it appears that particular attention should be paid to the District Court decision cited in determining whether law enforcement officers in this State can, accompanied by dogs trained to search for drugs, enter public schools for the purpose of discovering narcotics stored in lockers or possessed by students.

In Doe v. Renfrow, the court referenced that as a result of reported widespread drug usage in a particular school, school officials requested the police department to conduct an investigation within the school building using canine units trained to detect narcotics. The school officials insisted, and the police agreed, that no criminal investigations would occur as a result of any evidence recovered during the school investigation. It was, however, indicated that the school officials did intend to bring disciplinary actions against any students found in possession of contraband. On the morning of the particular search, students were told to remain in their classrooms and to remain seated at their desks with their hands and any purses placed upon the desk tops while a dog handler lead a trained dog up and down the desk aisles. During the school-wide search, the dogs gave indications of the presence of narcotics on approximately fifty (50) different occasions. After each alert, the student was asked to empty his or her pockets or purse. A body search, which involved an extensive examination of the student's clothing and which required the removal of some of the garments, was conducted with respect to eleven (11) students because the dog continued to respond to the student after the student had emptied his pockets or purse. In one instance a student did undergo a nude search.

***2** In examining the referenced situation, the District Court found that circumstances in which the students were asked to remain in their classrooms while the dog went up and down the classroom aisles was not a search contemplated by the Fourth Amendment, but rather was a justified action taken in accordance with the in loco parentis doctrine [1] . The Court further held that since no search was performed up until the time the dogs alerted, no warrant was necessary in the circumstances of the initial observation by school officials. Such a finding was made in light of the court's recognition of the right and duty of school officials to maintain an educationally sound environment within a school The District Court particularly held that:

This Court now finds that in a public school setting, school officials clothed with the responsibilities of caring for the health and welfare of an entire student population may rely on general information to justify the use of canines to detect narcotics. What level of information is necessary must be determined on a case by case basis, however, this Court holds the lesser standard of a 'reasonable cause to believe' applicable in such a determination. School officials fulfilling their state empowered duties will not be held to the same standards as law enforcement officials when determining if the use of canines is necessary to detect drugs within the schools. This lesser standard applies only when the purpose of the dog's use is to fulfill the school's duty to provide a safe, ordered and healthy educational environment. 475 F.Supp. 1012 at 1021.

The Court also considered the factor that in their opinion, there was an absence of any normal or justifiable expectation of privacy in a school setting.

As to the pocket search of students, the Court, referencing that a student's Fourth Amendment and other constitutional rights are modified by the limited in loco parentis relationship that school officials have with students, determined that there was no violation of any Fourth Amendment rights of a student. The Court considered such to have been a search, but stated that the alert of the dog constituted reasonable cause to believe that a particular student was concealing narcotics. In reaching such conclusion, the Court noted that the school officials were not seeking evidence to be used in a criminal prosecution but instead were concerned with eliminating the drug problem in the school. The Court stated that
(i)t should be noted at this point that had the role of the police been different, this court's reasoning and conclusion may well have been different. If the search had been conducted for the purpose of discovering evidence to be used in a criminal prosecution, the school may well have had to satisfy a standard of probable cause rather than reasonable cause to believe. . . . Furthermore, this court is not here ruling whether any evidence obtained in the search could have been used in a criminal prosecution. This Court is ruling that so long as a school is pursuing those legitimate interests which are the source of its in loco parentis status, 'maintaining the order, discipline, safety, supervision, and education of the students within the school' . . . it is the general rule that the Fourth Amendment allows a warrantless intrusion into the student's sphere of privacy, if any only if the school has reasonable cause to believe that the student has violated or is violating school policies. (Emphasis added.)

***3** As to the nude search of the student, the Court considered such search to have been an unlawful violation of the student's Fourth Amendment rights even under the lesser 'reasonable cause to believe' standard inasmuch as it was conducted solely upon the continued alert of the dog. The Court stressed that before such a search could be performed, the school administrators must articulate facts that provide a reasonable cause to believe that the student possessed contraband. Factors to be considered suggested by the Court were: the student's age, the student's history and record in the school, the seriousness of the drug problem, and the exigency requiring an immediate warrantless search.

While the above indicates Court approval of such referenced searches by school administrators, it cannot be stated that the procedures used by school administrators could be equally implemented by law enforcement officials, particularly where arrests are planned of any students determined to be in possession of narcotics. As was referenced in the above quotes, less strenuous standards were demanded of school officials in conducting searches than if such searches had been conducted by law enforcement officials.

My research has not revealed any cases that are completely dispositive of the questions you raise concerning possible actions by law enforcement officers in schools. Obviously, since you are anticipating making arrests, Fourth Amendment considerations would apply to your actions. While the Court in Doe cited several cases that recognized the use of dogs, which are trained in detecting narcotics, to detect the presence of narcotics in a particular situation, in the cases referenced, law enforcement officers had previously been given information concerning the whereabouts of the drugs that were later detected by the dogs. (See: U. S. v. Fulero, 498 F.2d 748 (1974); U. S. v. Bronstein, 521 F.2d 459 (1975); U. S. v. Solis, 536 F.2d 880 (1976); U. S. v. Venema, 563 F.2d 1003.) Referencing such, it would appear that before officers could use the dogs to detect narcotics, there must be some basis for believing that drugs are present. As referenced earlier by the Court in Doe, the 'reasonable cause

to believe' standard used by the school officials should be replaced by the typical probable cause standard where searches by law enforcement officers are concerned.

Not only are random searches by law enforcement officers of school buildings and students probably not consistent with the Fourth Amendment, if a law enforcement officer desires to search within a school, the strongly preferred approach would be to do so only pursuant to a search warrant. Only when it is impractical or practically impossible to obtain a search warrant should a law enforcement officer consider a warrantless search. A warrantless search, like searches anywhere, must be justified by some recognized exception to the warrant requirement. The United States Supreme Court has in the past recognized exceptions to a search warrant involving searches made incidental to a lawful arrest, those made with the consent of a party empowered to give such consent, and those conducted under emergency circumstances.

***4** As to the particular matter concerning consensual searches of school lockers, a New York court in People v. Overton, 249 N.E.2d 366 (1969), recognized that while students may have a right of exclusive possession of property with respect to fellow students, they had no such right as against school authorities. Because of the Court's consideration that a locker should be deemed to be in the joint possession of both a student and a school administrator, the Court determined that a school official was authorized to consent to a search by police officers. Of course, such case is not considered controlling in this jurisdiction.

Referencing the above, it appears that absent those circumstances where searches without warrants have been recognized, the strongly preferred procedure would be for a search warrant to be obtained prior to a law enforcement officer making any search. Therefore, as to your particular question, it would appear that dogs used to detect narcotics should only be used where an officer has probable cause to believe that narcotics are present and, if a dog in a particular situation indicates that narcotics are probably present, a search warrant should be obtained prior to any search being conducted.

If there are any questions concerning the above, please contact me.
Very truly yours,

Charles H. Richardson
Assistant Attorney General

Footnotes

1 This Office in an earlier opinion stated that
. . . in loco parentis stands for the proposition that the parent specifically has delegated his authority to the teacher or school official so that he may restrain and correct deviant behavior in the interest of all the students at a school just as the parent could. Opinion dated January 23, 1979.

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