IN THE UNITED STATES
COURT OF APPEALS FOR THE FOURTEENTH CIRCUIT

ELIZABETH LEMON, and TRACY JORDAN, individually and on behalf of all others similarly situated, Appellees, v. ROCKEFELLER UNITED SCHOOL DISTRICT, and JACK DONAGHY, in his official capacity as Principal of Rockefeller High School, Appellants.	)	CV-07241980

MEMORANDUM AND ORDER
January 7, 2008

BEFORE: MARTINEZ, Chief Judge, GROKE, MAHLER, Circuit Judges

MARTINEZ, J. delivered the Opinion of the Court

The petitioners, students attending Rockefeller High School, appeal the district court's decision granting defendant school district's motion for summary judgment. As there are no disputed issues of fact, we review the district court's decision *de novo*.

We find that the district court erred in determining that the use of drug-sniffing dogs for purposes of locating amphetamines held on the person of public students while in the classroom was not a search for purposes of the Fourth Amendment. However, we find, upon application of fourth amendment standards, that the dog sniffs were nonetheless a *reasonable* search and therefore meet constitutional standards. The District Court's granting of Appellants' summary judgment is therefore **AFFIRMED**.

I. The Fourth Amendment

The Fourth Amendment of the U.S. Constitution states that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches or seizures, shall not be violated" U.S. CONST. amend. IV. The Fourth Amendment prohibits government actors, such as public high schools, from engaging in unreasonable searches. The Fourth Amendment "protects people, not places," *Katz v. United States*, 389 U.S. 347, 351 (1967). But, the amendment's protections may only be invoked if the individual can demonstrate a legitimate expectation of privacy which is invaded by the government action. *Smith v. Maryland*, 442 U.S. 735, 740 (1979). The Fourth Amendment does

not protect those activities or items which are generally expected to be exposed to public scrutiny.

Our inquiry, therefore, is twofold. First, was the use of trained narcotic-sniffing dogs to investigate the smells of public high school students' bodies and belongings a "search" for purposes of the Fourth Amendment? And second, if it was a search, was it "reasonable" and therefore valid, or "unreasonable" and, thus, unconstitutional? We will address each question in turn.

II. A Dog Sniff of a Student's Person is a Search, Entitled to Fourth Amendment Protections

Put simply, an activity constitutes a "search" under the Fourth Amendment if it infringes on reasonable expectations of privacy. It is well established that the use of trained dogs to search luggage and bags for contraband items is not a "search" under the Fourth Amendment because individuals do not hold an expectation that the odors emanating from their belongings will remain private. *U.S. v. Place*, 462 U.S. 696, 707 (1983). However, the issue of whether a student has a reasonabe expectation of privacy relating to the air near and around their bodies has not been addressed by the Supreme Court of the United States and is an issue of first impression in this Circuit.

A number of our sister circuits have addressed this issue. The Ninth and Fifth Circuits have examined similar factual circumstances to the case at bar and determined that body dog sniffs *are* searches for purposes of the fourth amendment. *B.C. v. Plumas Unified Sch. Dist.*, 192 F.3d 1260 (9th Cir. 1999); *Horton v. Goose Creek Indep. Sch. Dist.*, 690 F.2d 470 (5th Cir. 1982) *cert denied*, 463 U.S. 1207 (1983)**.** The Seventh Circuit, by contrast, has held that similar sniffing of a students' person is not a search and thus is not entitled to constitutional protection. *Doe v. Renfrow*, 475 F. Supp. 1012 (7th Cir. 1979) *cert denied*, 451 U.S. 1022 (1981).

Most instructive to our analysis is the Fifth Circuit case of *Horton v. Goose Creek Independent School District*, which involved a similar factual situation to the case at bar. In that case, school officials searched for students possessing drugs by bringing in a drug sniffing dog to sniff at, on and around students ordered to stay seated in their classroom. The court in *Horton* recognized that the protections of the Fourth Amendment apply with particular vigor to intrusions on the human body. 690 F.2d at 478. The court went on to state that people possess a reasonable expectation of privacy in the odors of and around their bodies because our society goes to such great lengths to insure that those odors are not exposed to other people. *Id.* (reasoning that the Supreme Court has only allowed investigation of bodily characteristics that are routinely and regularly exposed to the public, such as fingerprints, handwriting and voice samples). "The intensive smelling of people," the Court stated, "even if done by dogs, [is] indecent and demeaning." *Id.* This is particularly true where the person being sniffed is an adolescent with already heightened fears and concerns about the body. *Id.* at 479.

The Ninth Circuit, generally more liberal in its opinion of what constitutes a search similarly held that a random, suspicionless dog sniff of a student's body and person did constitute a search under the Fourth Amendment. *B.C. v. Plumas Unified Sch. Dist.*, 192 F.3d at 1266.

However, there is certainly not agreement among the circuits. The Seventh Circuit, in

the case of *Doe v. Renfrow*, has held that "because of the constant interaction among students, faculty and school administrators, a public school student cannot be said to enjoy any absolute expectation of privacy while in the classroom setting." 475 F. Supp. at 1022.

In support, the Seventh Circuit reasoned that the school was operating *in loco parentis*, "on behalf of the parent." *Id.* at 1019. Under this rationale, school administrators are permitted to act in ways that would otherwise constitute violations of constitutional or civil rights, so long as those actions are taken in furtherance of the best interests of the child. *See Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646 (1995) (discussing the *in loco parentis* doctrine). Because the state and parents delegate to school officials "the duty and responsibility to maintain order, discipline, safety and education within the school system," those administrators are acting more as parents than as government officials, and thus are not bound by the same fourth amendment standards that, for example, a police officer or a customs official would be required to observe.

Reviewing these precedents, we find the reasoning of the Fifth Circuit to be most persuasive. The use of a dog to sniff among the most intimate areas of a student's body is indeed an "intrusion on dignity and personal security." *Horton*, 690 F.2d at 481. In determining whether an individual has a reasonable expectation of privacy in an area, the inquiry "depends primarily on the private nature of the area or item subjected to the intrusion." *U.S. v. Jacobsen*, 466 U.S. 109, 142 (1984). The body itself is perhaps the most compelling example of an area which is private in nature. *See Roe v. Wade*, 410 U.S. 113, 152 (1973) (recognizing a right to privacy as inherent in the fourteenth amendment's due process clause). People, particularly adolescents, expect that their smells and bodily functions will be free from public scrutiny.

Contrary to the District Court's analysis, a trained dog's alert may signal much more than the mere existence of contraband, as the district court suggested. Dogs, like people, are not infallible and may alert to other "interesting" smells. Indeed, this was exactly the scenario in *Doe v. Renfrow*, 475 F. Supp. at 1017 (young woman was subjected to a strip search after a dog alerted to her - it was later found that the girl had, that morning, been playing with her female dog, who was in heat); *see also Jacobsen*, 466 U.S. at 141-42. The use of techniques that may communicate private information to the public or to government officials rather than solely identify the presence of contraband is a search.

Because "the Fourth Amendment protects people, not places," *Katz v. United States*, 389 U.S. 347, 351 (1967), we are required to find that gathering information from the most intimate physical representation of personhood - the body - is worthy of constitutional protection. Use of dogs to smell the bodies of students in the classroom is a search for purposes of the Fourth Amendment.

III. While the Use of Amphetamine Sniffing Dogs was a Fourth Amendment Search, that Search was, Under the Circumstances, Reasonable, and Therefore No Warrant was Required

The Fourth Amendment guarantees that people will not be subjected to "unreasonable" searches. If a search is "reasonable," it will be found to comport with the Fourth Amendment.

The Fourth Amendment applies to searches conducted by public school officials because they are "representatives of the State, not merely surrogates for the parents." *New Jersey v. T.L.O.*, 469 U.S. 325, 340 (1984). In assessing the constitutionality of searches of student's possessions and persons, the standard is one of reasonableness. *Id.* at 343. But, "the 'reasonableness' inquiry cannot disregard the schools' custodial and tutelary responsibility for children." *Vernonia Sch. Dist. 47J*, 515 U.S. at 656.

"To be reasonable under the fourth amendment, a search must ordinarily be based on individualized suspicion of wrong doing." *Chandler v. Miller*, 520 U.S. 305, 313 (1997). However, a search without individualized suspicion, as is the situation in this case, may be constitutionally conducted when (1) the privacy interests implicated by the search are minimal, and (2) an important governmental interest furthered by the intrusion would be placed in jeopardy by a requirement of individualized *B.C. v. Plumas Unified Sch. Dist.*, 192 F.3d 1260, 1267 (9th Cir. 1999).

The controlling case for purposes of our analysis here is *Vernonia Sch. Dist. 47J*, 515 U.S. 646, in which the Supreme Court examined the reasonableness of subjecting high school athletes to urinalysis testing without individualized suspicion. In that case the court recognized that the students had a privacy interest in their bodily fluids, necessitating that the intrusion be considered a search for purposes of the Fourth Amendment. But, noting that students enjoyed a lower expectation of privacy than independent adults, particularly in the realm of "medical examinations and procedures" to which students are routinely subjected as a condition of attendance, the Court determined these privacy interests to be outweighed by the school's legitimate and compelling interest in deterring drug use by students. *Id.* at 656-61. We find the situation in the case at bar to be compellingly similar.

A. The Student Privacy Interest in Bodily Odors is Moderate

As established, society seems willing to acknowledge that individuals, particularly students, have a reasonable expectation of privacy in the air surrounding their bodies and the odors that may be detected in that area. However, this expectation does not establish an impenetrable privacy interest in that area. Particularly among "students within the school environment[, who] have a lesser expectation of privacy than members of the population generally." *Id.* at 657. The privacy interest may be infringed upon when there is a compelling governmental interest that justifies such an intrusion.

In *Vernonia*, the Court recognized that the collection of samples for urinalysis was "an excretory function traditionally shielded by great privacy," but that the degree of actual intrusion of privacy was dependent on how the information was obtained by school officials. *Id.* at 658 (*quoting Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 626 (1989). The Court acknowledged that the procedures utilized to obtain the sample, as well as the innocent information such a test could reveal, such as pregnancy or the presence of certain prescription drugs, both implicated how intrusive of a privacy right the procedure *actually* was. *Id.* The Court reasoned that the method of sample collection was significantly similar to the conditions present in public restrooms and that the actual urinalysis would only test for the presence of illicit substances, rather than other personal information which could be revealed through secreted urine, thereby

lessening the extent of the privacy intrusion. *Id.*

Petitioner students argue that the dog sniffs were overly intrusive, in part, because they detected the presence of legitimate prescription medication and the only way to avoid the alert of the dog would be to either forego medically necessary treatment, or provide the school with information regarding personal medical conditions. However, as the Supreme Court held in *Skinner*, disclosure of medications is "not a significant invasion of privacy." *Skinner*, 489 U.S. at 626. And this is particularly true where, as here, information regarding the medications is being provided only to trusted members of the school administration, rather than to the school community at large. Had the school district, for example, conducted the individualized searches in the classroom, rather than in a separate location, there may be more of a privacy intrusion. But that is not the case before this court.

Having established that the actual invasion of a legitimate privacy interest is merely moderate, we turn to the governmental interest involved.

B. The Governmental Interest in Preventing Drug Use Among Students is High Enough to Outweigh the Students' Privacy Interest

In evaluating the strength of the governmental interest involved in a given student search case, the proper inquiry is whether there exists a governmental concern that is "*important enough* to justify the particular search at hand, in light of other factors that show the search to be relatively intrusive upon a genuine expectation of privacy." *Vernonia*, 515 U.S. at 661. Here, we find that the interest is, indeed, important enough.

Methamphetamine use is, at present, a scar upon our country and our children. It is a powerfully addictive and violent drug, which can cause brain damage, fatal kidney, liver and lung disorders, chronic depression, paranoia and other physical and mental disorders. According to the U.S. Drug Enforcement Administration, methamphetamine abuse causes more damage to the brain than alcohol, heroin or cocaine. *See* Drug Enforcement Administration, Fast Facts About Meth, http://www.dea.gov/pubs/pressrel/methfact03.html.

Further, it is clear that Rockefeller High School is deeply entrenched in a fight to keep its students away from this dangerous drug. The facts surrounding the methamphetamine use at the school are shocking: ten arrests for possession, two arrests for distribution and, most horrifying, the death of a student after a chemical fire in a makeshift methamphetamine lab located in a neighborhood home. The rampant abuse is occurring among young people most likely to make rash and uninformed decisions, and most biologically and developmentally vulnerable to the drug's devastating effects.

It seems that Rockefeller High School is facing a true crisis. In the face of such rampant abuse, the school must be empowered to take the desperate measures necessary to save young lives. The school was justified in utilizing the somewhat drastic measure of drug sniffing dogs to identify those students who have fallen prey to methamphetamine.

IV. Conclusion

We hold today that a school-wide sweep by

drug-sniffing dogs is a search under the Fourth Amendment, but that, under these facts, such a search was a necessary and justified intrusion on students' privacy. The district court decision granting respondent school district's motion for summary judgment is therefore **AFFIRMED.**