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Opinion No. 08-106

Constitutionality of HB2858/ SB2653 authorizing student drug testing

QUESTION

Does HB 2858/ SB 2653, authorizing random drug testing for students participating in voluntary extracurricular activities in the absence of individualized reasonable suspicion, raise constitutional questions under the privacy rights afforded by the Tennessee Constitution?

OPINION

While the Tennessee Supreme Court has not yet decided whether a suspicionless search such as that authorized under the proposed legislation violates Article I, Section 7, of the Tennessee Constitution, the legislation, if enacted, is constitutionally defensible.

ANALYSIS

In Op. Tenn. Att'y Gen. 07-096 (July 2, 2007), this Office opined that state law does not presently authorize random drug testing for students participating in voluntary extracurricular activities where there is no individualized reasonable suspicion to support testing under Tenn. Code Ann. § 49-6-4213(a), which reads as follows:

> A student may be subject to testing for the presence of drugs in the student's body in accordance with this section and the policy of the LEA if there are reasonable indications to the principal that such student may have used or be under the influence of drugs. The need for such testing may be brought to the attention of the principal through a search authorized by § 49-6-4204 or § 49-6-4205, observed or reported use of drugs by the student on school property, or other reasonable information received from a teacher, staff member or other student. All of the following standards of reasonableness shall be met:
>
> (1) A particular student has violated school policy;
>
> (2) The test will yield evidence of the violation of school policy or will establish that a student either was impaired due to drug use or did not use drugs;
>
> (3) The test is in pursuit of legitimate interests of the school in maintaining order, discipline, safety, supervision and education of students;

(4) The test is not conducted for the sole purpose of discovering evidence to be used in a criminal prosecution; and

(5) Tests shall be conducted in the presence of a witness. Persons who shall act as witnesses shall be designated in the policy of the local board of education.

This bill would authorize testing of a student participating in voluntary extracurricular activities without individualized reasonable suspicion, provided the standards for reasonableness in (2) through (5) are still satisfied. As noted in our prior opinion, the United States Supreme Court has previously upheld two school policies authorizing random drug testing of students involved in voluntary extracurricular activities in the absence of individualized reasonable suspicion. *See Veronia Sch. Dist. v. Acton*, 515 U.S. 646 (1995), and *Pottawatomie County v. Earls*, 536 U.S. 822 (2002). In each of those cases, the Court analyzed the drug testing policy at issue and concluded that, under the facts and circumstances of each case, the suspicionless search authorized under the policy fits within the "special needs" exception to the warrant and probable cause requirements of the Fourth Amendment.[1]

This request asks whether HB 2858/ SB 2653 would implicate students' privacy rights guaranteed by the Tennessee Constitution. The Tennessee Supreme Court has opined that the Tennessee Constitution guarantees a right to privacy. *Davis v. Davis*, 842 S.W.2d 588, 598-603 (Tenn. 1992). According to the Supreme Court, this "right to privacy, or personal autonomy ('the right to be let alone'), while not mentioned explicitly in our state constitution, is nevertheless reflected in several sections of the Tennessee Declaration of Rights. . . ." *Id.* at 600 (citing Art. I, § 3 (guaranteeing freedom of worship); Art. I, § 7 (prohibiting unreasonable searches and seizures); Art. I, § 19 (guaranteeing freedom of speech and press); and Art. I, § 27 (regulating the quartering of soldiers)). The specific right implicated by HB 2858/ SB 2653 is the right to be free from unreasonable searches and seizures. Therefore, for the purposes of this opinion the privacy right of students subject to random drug testing will be analyzed under Article I, Section 7, prohibiting unreasonable searches and seizures.

Just as the Fourth Amendment provides for "[t]he right of the people to be secure in their persons, houses, paper, and effects, against unreasonable searches and seizures," Article I, Section 7, of the Tennessee Constitution likewise guarantees "[t]hat the people shall be secure in their persons, houses, papers and possessions, from unreasonable searches and seizures." Article I, Section 7, is "identical in intent and purpose with the Fourth Amendment." *Sneed v. State*, 221 Tenn. 6, 423 S.W.2d 857, 860 (Tenn. 1968). The Tennessee Supreme Court is the court of last resort for interpreting the Tennessee Constitution. *Miller v. State*, 584 S.W.2d 758, 760 (Tenn.

[1]The policy at issue in *Acton* required the parents of students participating in interscholastic athletics to execute a written consent form authorizing drug testing of all such students, after which each student was subjected to urinalysis testing at the beginning of a sport's season. Each week thereafter, ten percent of the students were randomly tested. *Acton*, 515 U.S. at 650. In *Earls*, the policy, as applied, covered all students involved in competitive extracurricular activities and required all students to submit to testing before participating and to random testing thereafter. *Earls*, 536 U.S. at 826.

1979). It may interpret the state constitution to afford greater rights than the federal constitution, even when the provisions are identical. *Planned Parenthood of Middle Tennessee v. Sundquist*, 38 S.W.3d 1, 14-15 (Tenn. 2000).

Federal cases addressing search and seizure issues are "particularly persuasive" for the Tennessee Supreme Court's analysis under Article I, Section 7. *State v. Downey*, 945 S.W.2d 102, 106 (Tenn. 1997). When construing this provision, the court generally will only depart from United State Supreme Court precedent interpreting the Fourth Amendment when "(1) adopting federal Fourth Amendment standards would require overruling 'a settled development of state constitutional law;' and (2) when linguistic differences justify distinct interpretations of state and federal constitutional provisions." *State v. Vineyard*, 958 S.W.2d 730, 733-34 (Tenn. 1997) (quoting *State v. Lakin*, 588 S.W.2d 544, 549 n. 2 (Tenn. 1979)); *see also State v. Randolph*, 74 S.W.3d 330, 334-35 (Tenn. 2002); *State v. Jacumin*, 778 S.W.2d 430, 435-36 (Tenn. 1989).

In construing the Fourth Amendment, the United States Supreme Court has held that a search not supported by probable cause may nevertheless be constitutionally reasonable "when special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable." *Griffin v. Wisconsin*, 483 U.S. 868, 873 (1987). In both *Acton* and *Earls*, the Court applied this "special needs" exception to uphold suspicionless drug testing after considering (1) the nature of the privacy interest asserted, (2) the character of the intrusion to the student, and (3) the nature and immediacy of the governmental concern and the efficacy of the policy in meeting it. In so doing, the Court relied on *New Jersey v. T.L.O.*, 469 U.S. 325 (1985), which had concluded that a search of a student by a school official will generally be lawful if reasonable grounds exist to suspect "that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school," even without probable cause. *Id*. at 341-42. The court in *T.L.O*. left open the question "whether individualized suspicion is an essential element of the reasonableness standard we adopt for searches by school authorities." *Id.* at 342, n. 8.

Recently in *R.D.S. v. State*, 245 S.W.3d 356, 369 (Tenn. 2008), the Tennessee Supreme Court cited favorably to *T.L.O.* and applied it to conclude that a search of a student executed by a law enforcement officer acting in a school setting as a "school resource officer" need not be supported by probable cause if it is supported by reasonable suspicion and "conducted by a law enforcement officer assigned to a school on a regular basis and assigned duties at the school beyond those of a ordinary law enforcement officer such that he or she may be considered a school official as well as a law enforcement officer, whether labeled a 'SRO' or not." *Id*. at 369. But the court did not address the issue raised by this bill, i.e., whether a search absent reasonable suspicion would violate Article I, Section 7.

It is the opinion of this Office that HB 2858/ SB 2653 is constitutionally defensible under Article I, Section 7, based upon the "particularly persuasive" analysis in *Acton* and *Earls*. *Downey*, 945 S.W.2d at 106. This is not a situation where "adopting federal Fourth Amendment standards would require overruling a settled development of state constitutional law" or where "linguistic differences justify distinct interpretations of state and federal constitutional provisions." *Vineyard*,

958 S.W.2d at 733-34. It bears noting that, even under *Acton* and *Earls*, a given policy authorizing a suspicionless search of a student may only pass constitutional muster under the Fourth Amendment following an appropriate weighing of (1) the nature of the privacy interest, (2) the character of the intrusion, and (3) the nature and immediacy of the governmental concern and the efficacy of the policy in meeting it. Presumably, the Tennessee Supreme Court would likewise require such a weighing before approving a search under Article I, Section 7. Indeed, the court has previously applied a similar type of balancing test when weighing the constitutionality of a suspicionless seizure during a roadblock or checkpoint stop. *See State v. Downey*, 945 S.W.2d 102 (Tenn. 1997) (drunk driving checkpoint stop); *State v. Hicks*, 55 S.W.3d 515 (Tenn. 2001) (driver's license checkpoint stop); *State v. Hayes*, 188 S.W.3d 505 (Tenn. 2006) (public housing identification checkpoint stop). This bill is defensible under both the Fourth Amendment and Article I, Section 7.

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