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CRIMINAL PROCEDURE

POWERS v. PLUMAS UNIFIED SCHOOL DISTRICT

192 F.3D 1260 (9TH CIR. 1999)

I. INTRODUCTION

In a matter of first impression, the Ninth Circuit in *Powers v. Plumas Unified School District*[1] addresses whether a dog sniff of a person constitutes a search under the Fourth Amendment.[2] Because the United States Supreme Court has yet to address this issue, there is a split among circuit courts.[3] The Fifth Circuit, contrary to the Seventh Circuit, holds that a dog sniff of a person constitutes a search.[4] The Ninth Circuit agrees with the Fifth Circuit.[5] In *Powers*, the Ninth Circuit

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[1] Powers v. Plumas Unified School District, 192 F.3d 1260 (9th Cir. 1999). The appeal from the United States District Court for the Eastern District of California was argued and submitted on December 8, 1998 before Circuit Judges Pregerson and Brunetti and District Judge Aiken. Judge Aiken was sitting in by designation. Judge Pregerson authored the opinion. Judge Brunetti filed a concurring opinion.

[2] The Fourth Amendment provides: "the right of the people to be secure in their persons...against unreasonable searches and seizures shall not be violated ...but upon probable cause...and particularly describing the place to be searched, and the persons or things to be seized." U.S. CONST. amend. IV.

[3] *See Powers*, 192 F.3d at 1266.

[4] *See id.*

[5] *See id.*

found that a dog sniff of the plaintiff deprived him of his constitutional right to be free from unreasonable searches and seizures.[6] However, at the time of the search, guidelines regarding the use of dogs to sniff students in a school setting were not clearly established.[7] Therefore, the unlawful conduct was not apparent in light of preexisting law.[8] The defendants, in their individual capacities, are entitled to qualified immunity.[9]

II. FACTS AND PROCEDURAL HISTORY

B.C., the minor child of Cynthia Ann Powers, was a student at Quincy High School in Plumas County, California.[10] On May 21, 1996, the Principal and Vice Principal instructed students to exit their class.[11] As the students exited, they passed Deputy Sheriff Canalia and a drug sniffing dog, Keesha, sitting outside the class door.[12] Keesha alerted the authorities to a student other than the plaintiff. [13] Subsequently, Keesha entered the classroom sniffing students' backpacks, jackets and other belongings.[14] When the students filed back into the classroom, they passed the Deputy Sheriff and Keesha a second time.[15] Keesha again alerted to the same student.[16]

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[6] *See Powers,* 192 F.3d at 1266.

[7] *See id.* at 1266.

[8] *See id.* at 1268. Named defendants include the Plumas Unified School District Superintendent Joseph Hagwood, Principal Richard Spears, Vice Principal Arturo Barrera, Assistant Sheriff Rod Decrona, Deputy Sheriff Dean Canalia, and Detective Steven Hitch. *See id.* at 1262.

[9] *See Powers,* 192 F.3d at 1268.

[10] *See* Powers v. Plumas Unified School District, 192 F.3d 1260, 1263 (9th Cir. 1999).

[11] *See id.* at 1263.

[12] *See id.* at 1263.

[13] *See Powers,* 192 F.3d at 1263.

[14] *See id.*

[15] *See id.*

The plaintiff, B.C., filed suit alleging deprivation of his Fourth Amendment right to be free of unreasonable searches and seizures.[17] Both plaintiff and defendants filed cross motions for summary judgment.[18] The district court denied the plaintiff's motion for preliminary injunction, class certification and summary judgment.[19] Further, even though the district court determined that a dog sniff constituted an unreasonable search, all defendants were granted qualified immunity.[20] B.C. appealed the district court's decision to the Ninth Circuit. [21] The Ninth Circuit affirmed.[22]

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[16] *See id.* This student was taken away and searched by school officials. No drugs were found on campus that day. *See Powers,* 192 F.3d at 1263.

[17] *See id.* at 1262. The Plaintiff also asserted a civil rights claim under California law and a claim for false imprisonment and spoliation of evidence. The plaintiff, B.C., sought injunctive relief, money damages, and certification of a plaintiff class. *See id.* at 1263.

[18] *See id.* at 1263.

[19] *See Powers,* 192 F.3d at 1263. B.C. sought to enjoin the school and sheriff's department from arbitrary sniff searches of himself and any other student in the Plumas Unified School District. *See id.* at 1262. The District Court dismissed B.C.'s claim as moot. In addition, the District Court held that the Eleventh Amendment barred B.C's claim for money damages against the school officials in their official capacity. *See id.* at 1263. The Court stated that a high school is not an entity capable of being sued. *See id.* at 1264. B.C. has not appealed this ruling. *See Powers,* 192 F.3d at 1264. Furthermore, the district court dismissed the claim against the sheriff's department in their official capacity. *See id.* at 1264. B.C failed to demonstrate a causal link between an official policy or custom of the Sheriff's Department and his deprivation of constitutional rights. *See id.* at 1264. The Sheriff's Department policy only permits dog sniffs of objects, not persons. Officers are trained in accordance with this policy. *See id.* at 1264. B.C failed to provide evidence refuting the Department's policy. *See Powers,* 192 F.3d at 1265.

[20] *See id.* at 1263. The District Court granted summary judgment in favor of all individual defendants because at the time of the incident the parameters for permissible dog searches were not clearly established. *See id.* at 1265.

[21] *See id.* at 1263.

[22] *See id.* at 1263. The Ninth Circuit affirmed the District Court's grant of summary judgment of all defendant's on all claims. See *Powers,* 192 F.3d at 1263. However, the Ninth Circuit Court affirmed the dismissal of B.C.'s preliminary injunction on the alternate grounds that B.C. lacked standing. *See id.* The named plaintiff in a class must "demonstrate a real or immediate threat that defendants will again subject him to an illegal dog sniff of his person." *See id.* B.C does not attend, nor does he plan to attend, any school within the Plumas Unified School District; thus he is not representative of the plaintiff class and he holds no standing to seek injunction relief. *See*

III. THE NINTH CIRCUIT'S ANALYSIS

To determine qualified immunity, the Ninth Circuit applied a two prong test.[23] First, B.C. must show that the school's action constitutes a deprivation of his Fourth Amendment right to be free from unreasonable searches and seizures.[24] Then, B.C. must show that the right was clearly established at the time of the events in question.[25] If the second prong is not proven then the defendants are entitled to qualified immunity.[26]

"A search occurs when an expectation of privacy that society deems reasonable is infringed."[27] Although the Supreme Court has found that a dog sniff of unattended luggage at an airport does not constitute a search, the Supreme Court has not addressed whether a dog sniff of a person constitutes a search.[28] The Ninth Circuit, however, has recognized that a dog sniff of a person increases the level of intrusiveness.[29] The level of in-

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id. at 1264. The Ninth Circuit also affirmed the dismissal of B.C's claim that defendants subjected him to unreasonable seizure of person. See *Powers,* 192 F.3d at 1269. Students are required to be on school premises during the course of the school day. Requiring students to stand under a covered snack bar area for five minutes while the dog sniff of the classroom occurred is reasonable and not within the meaning of a Fourth Amendment seizure. *See id.*

[23] *See* Powers v. Plumas Unified School District, 192 F.3d 1260,1265 (9th Cir. 1999).

[24] *See id.*

[25] *See id.*

[26] *See id.*

[27] *See Powers*, 192 F.3d at 1265 (citing United States v. Jacobson, 466 U.S. 109, 113 (1984)).

[28] *See Powers*, 192 F.3d at 1265 (citing United States v. Place, 462 U.S. 696, 707 (1983)).

[29] *See Powers,* 192 F.3d at 1266 (citing United States v. Beale, 736 F.2d 1289, 1291-92 (1984)). In *Beale*, the Ninth Circuit states that the sniffing of luggage carried by an individual causes virtually no annoyance and the dog rarely contacts the owner of the bag. See *id.*

trusiveness in the investigative technique is critical to determine whether the technique constitutes a search.[30]

Upon reviewing precedent from other circuits, the Ninth Circuit noted that only the Fifth and Seventh Circuits have directly addressed whether a dog sniff of a student is a search.[31] The Fifth Circuit, in *Horton v. Goose Creek Independent School District,*[32] found that the "intensive smelling of people is indecent and demeaning."[33] Therefore, dog sniffing of a student is a search.[34] In *Horton*, the school used dogs to sniff the students' automobiles and lockers.[35] Furthermore, the dogs were taken into the classroom to sniff the students.[36] Although the dog in *Powers* did not physically touch the students, the proximity of the physical intrusion did not concern the Ninth Circuit.[37]

Conversely, and despite nearly identical facts to *Horton,* the Seventh Circuit, in *Doe v. Renfrow*,[38] found that a dog sniff did

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[30] *See Powers,* 192 F.3d at 1266 (citing *Beale,* 736 F.2d at 1291-92). The holding in *Beale* is based on the Supreme Court decisions of United States v. Place, 462 U.S. 696 (1983) and United States v. Jacobson, 466 U.S. 109 (1984). *See id.* at 1266.

[31] *See Powers,* 192 F.3d at 1266.

[32] *See* Horton v. Goose Creek Independent School District, 690 F.2d 470, 479 (5th Cir. 1982).

[33] *See id.* at 1266 (citing *Horton,* 690 F.2d at 479). The Ninth Circuit previously cited *Horton* in *Beale. See id.* at 1266. In *Beale,* the Ninth Circuit also cited a Michigan Law review article that stated a dog sniff of a person is offensive and harrowing to the person in addition to citing Justice Bennan's dissent in Doe v. Renfrow, 631 F.2d 91 (7th Cir. 1980), where he recognized dog sniff cases involved the smelling of inanimate and unattended objects.

[34] *See Powers,* 192 F.3d at 1266.

[35] *See id.*

[36] *See id.* In *Horton,* one of the dogs, a Doberman Pinscher or German Shepherd, put its nose up against one or more of the students. See *id.*

[37] *See Powers,* 192 F.3d at 1266 (citing Katz v. United States, 389 U.S. 347, 353 (1967)). "The reach of the Fourth amendment cannot turn on the presence or absence of a physical intrusion." *Id.* at 1266.

[38] *See* Doe v. Renfrow, 631 F.2d 91 (7th Cir. 1980).

not constitute a search.[39] The Seventh Circuit adopted the district judge's opinion that the presence of the sniffing dog in the classroom, at the request of school officials, was not a search despite evidence that the dogs ran their noses along the pupil's legs and touched their bodies.[40]

The Ninth Circuit agrees with the Fifth Circuit's decision that close proximity sniffs of the person by a canine or human are offensive.[41] Therefore, a dog sniff infringes B.C.'s reasonable expectation of privacy and constitutes a search. [42]

Constitutionality of a search is measured by the reasonableness of the search under the circumstances.[43] To be reasonable under the Fourth Amendment, a search must be based upon individualized suspicion of wrongdoing.[44] In *Powers*, school officials admitted there was no individualized suspicion of wrongdoing by any student.[45] However, under limited circumstances, a suspicionless search may be reasonable where the privacy interests implicated in the search are minimal and an important governmental interest will be jeopardized by the requirement of the individualized suspicion.[46]

In *Powers*, the Ninth Circuit upholds the well-settled notion that students' privacy interests are maintained while in

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[39] *See Powers*, 192 F.3d at 1266 (citing Doe v. Renfrow, 631 F.2d 91, 92 (7th Cir. 1980)).

[40] *See id.* at 1266. Four of the eight Seventh Circuit judges wrote separate dissents from the court's failure to rehear the case en banc. *See* Doe v. Renfrow, 635 F.2d 582 (7th Cir. 1980).

[41] *See Powers*, 192 F.3d at 1266.

[42] *See id.*

[43] *See id.* at 1267 (citing Vernonia School District v. Acton, 515 U.S. 646, 652 (1995)).

[44] *See id.* at 1267 (citing Chandler v. Miller, 520 U.S. 305, 313 (1997)).

[45] *See Powers*, 192 F.3d at 1267.

[46] *See id.* at 1267. A suspicionless urinalysis drug testing of student athletes was upheld in *Vernonia* due to the school's immediate drug crisis; however, in *Vernonia*, the court cautioned against the assumption that drug testing would readily pass constitutional muster in other contexts. *See id.*

school.[47] Moreover, the Ninth Circuit affirmed the district court's finding that a dog sniff is highly intrusive.[48] A dog sniff by itself often illicits irrational fear.[49] Compounded with a sudden and unannounced search the dog sniff now takes on a distressing and intrusive character.[50] In addition, a dog sniff of the body intrudes upon the body and its odors which are highly personal.[51] Thus, the expectation interests of the students are not minimal.[52] Further, the Ninth Circuit finds there was no indication of a drug crisis or drug problem at Quincy High School in May 1996.[53] Although deterrence of drug use is an important, if not compelling, governmental interest, in the absence of evidence of a drug problem of crisis, the governmental interest at Quincy High School would not have been placed in jeopardy by a requirement of individualized suspicion.[54] Therefore, the Ninth Circuit concludes that the random and suspicionless dog sniff search of B.C. was unreasonable in these circumstances.[55]

Given that a search occurred, the court determines whether, at the time of the search, the government official should have known that his conduct violated a clearly established constitutional right.[56] The contours of the right must be sufficiently clear that a reasonable official would understand

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[47] *Id* at 1267. Students retain their constitutional rights, including an expectation of privacy, upon entering school grounds. *See* Tinker v. Des Moines Independent Community School District, 393 U.S. 503, 506 (1969); Although students have a lesser expectation of privacy than members of the population at large, they still retain an expectation of privacy when entering school grounds. *Vernonia* at 657. *See also* New Jersey v. TLO, 469 U.S. 325, 341 (1985).

[48] *See Powers,* 192 F.3d at 1267.

[49] *See id.* at 1267 (citing *Horton,* 690 F.2d at 483).

[50] *See id.*

[51] *See Powers,* 192 F.3d at 1267 (citing *Horton,* 690 F.2d 483).

[52] *See id* at 1268.

[53] *See id.*

[54] *See id.*

[55] *See Powers,* 192 F.3d at 1268.

[56] *See id.* at 1268.

that what he is doing violates that right.[57] The plaintiff must establish that the unlawfulness of the conduct was "apparent in light of preexisting law," not necessarily that it was unconstitutional.[58] Even if there is no case on point that specifically declares the right, if the right has been disputed, then the defendants would be on notice and would not be eligible for a qualified immunity defense.[59] In *Powers,* the Ninth Circuit finds that at the time in question, the use of dogs to sniff students in a school setting was not clearly established.[60] Therefore, each defendant could have believed his conduct was lawful and each is entitled to the defense of qualified immunity.[61]

IV. IMPLICATIONS OF THE DECISION

Government and school officials can no longer claim qualified immunity since precedent has now been set for dog sniffing of students in schools. However, it seems questionable that the Fourth Amendment extends so far as to define a search as a "walk by" of nearly four feet between the student and the dog. Social encounters in schools, and society at large, take place within closer proximities yet this case claims such close proximity sniffing, whether by human or canine, is offensive.

Judge Brunetti, in his concurring opinion, distinguishes *Horton* from *Powers*.[62] In *Horton,* the dog directly touches the students while in *Powers* the dog is always three to four feet from the students.[63] Such a distance is not taken into account by the majority. Brunetti further states that the majority fails to identify the reasonable expectation of privacy that was in-

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[57] *See id.* at 1268 (citing Anderson v. Creighton, 483 U.S. 635, 640 (1987)).

[58] *See id.* at 1268 (citing *Jensen* 145 F.3d 1085 (9th Cir. 1997)).

[59] *See Powers.* 192 F.3d at 1268 (citing Blueford v. Prunty, 108 F.3d 251,254 (9th Cir. 1997)).

[60] *See id.* at 1268.

[61] *See id.* at 1268.

[62] *See* Powers v. Plumas Unified School District, 192 F.3d 1260, 1270 (9th Cir. 1999).

[63] *See id.*

fringed upon when B.C. walked past the drug dog.[64] To determine whether there has been a search the majority alludes to the *Beale* test, which identifies the level of intrusiveness in the investigative technique.[65] The *Beale* test states that a dog sniff is not a search under the Fourth amendment if it discloses only the presence or absence of contraband and it ensures that the owner (of the property) is not subject to embarrassment and inconvenience entailed in less discriminate and more intrusive investigative methods.[66] The plaintiff in *Powers* was not subject to embarrassment by walking three feet from a dog whose sniff would only disclose the presence of contraband.

In addition, the idea of legitimate governmental interests seems questionable. If the school district must wait until a known drug problem or crisis exists prior to protective and preemptive searches then the school district is not maintaining its duty to keep a drug free school zone. A proper analysis should balance the intrusion on the individual's expectation of privacy with the promotion of legitimate governmental interests, such as a preemptive and protective drug search within a large enough proximity for the average student to avoid embarrassment.

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[64] *See id.* at 1269.

[65] *See* note 30.

[66] *See Powers,* 192 F.3d at 1269 (citing United States v. Beale, 736 F.2d 1289, 1291-2 (9th Cir. 1984)).

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