UNITED STATES DISTRICT COURT
DISTRICT OF RHODE ISLAND

Juan Lopera, et al.	:	
his parent and next friend, Lilian Giraldo;	:	**C.A. No: 08- 123**
	:	
vs.	:	
	:	
TOWN OF COVENTRY, et al.	:	

PLAINTIFFS' REPLY TO DEFENDANTS' SUPPLEMENTAL MEMORANDUM

This matter came before this Honorable Court on Defendants' Motion for Summary Judgment on all counts of Plaintiffs' Amended Complaint. At issue was whether the Defendant Coventry Police officers had violated the civil rights of the Plaintiffs, members of the Central Falls High School Soccer Team, by singling out the team for a mass search at the Coventry High School on or about September 28, 2006.

The Plaintiffs' Amended Complaint had asserted a failure-to-train claim against the Town and former Chief O'Rourke. The Defendants' original Motion did not address whether this claim ought to be summarily disposed. However, at the hearing of May 26, 2009, after clarifying whether Plaintiffs had indeed asserted such a claim, this Court ordered the Defendants to provide a supplemental memorandum on this aspect of Plaintiffs' claim. At that hearing, another issue arose as to whether Coach Marchand's alleged fear of the crowd's actions created a question of fact relevant to the issue of whether Coach Marchand had validly consented to the search of the boys.

Defendants filed their Supplemental Memorandum on or about June 9, 2009. Plaintiffs now file their Reply thereto.

A. THE DEFENDANTS ARE NOT ENTITLED TO SUMMARY JUDGMENT ON THEIR CLAIMS INVOLVING FAILURE TO PROVIDE APPROPRIATE TRAINING.

Plaintiffs brought a claim pursuant to 42 U.S.C. § 1983 asserting that the Coventry Chief of Police and the Town of Coventry failed to provide adequate training to the Defendant police officers who conducted the mass search. To sustain a § 1983 claim for failure to provide adequate police training, the Plaintiffs must show that the Chief and Town showed "deliberate indifference" to the rights of the individuals with whom their underlings would be in contact. *City of Canton v. Harris*, 489 U.S. 378, 388, 109 S.Ct. 1197, 1204, 103 L.Ed.2d 412 (1989). The Plaintiffs must also show that the lack of adequate training actually caused the deprivation of their constitutional rights. *Id.* at 391. Defendants assert that the Plaintiffs' failure-to-train claim should be summarily disposed of because the Plaintiffs have not adduced evidence of any pattern of previous violations of constitutional rights similar to those sustained by the Plaintiffs. They argue that the lack of such a pattern of previous violations renders it impossible for Plaintiffs to show "deliberate indifference." This argument misstates the law.

The First Circuit has specifically held that is no particular requirement that there be any pattern of constitutional violations similar to those experienced by the Plaintiffs. *Young v. City of Providence*, 404 F.3d 4, 28 (1st Cir. 2005); *Swain v. Spinney*, 117 F.3d 1, 11 (1st Cir. 1997), *citing Bd. of County Comm'rs v. Brown*, 520 U.S. 397, 117 S.Ct. 1382, 1391, 137 L.Ed 2d. 626 (1997); *Gray v. Bostic*, 458 F.3d 1295, 1308-09 (11th Cir. 2006). While evidence of such a pattern is certainly helpful, there are instances in which the need for training is so obvious that such a pattern of similar incidents is not necessary to establish the requisite "deliberate indifference." *Id.* Instead, the requisite "deliberate indifference" may be shown where: 1) the policymaker(s) of the municipality knew to a moral certainty that its employees would confront a

given situation; 2) that the situation either presents the employee with a difficult choice of the sort that training or supervision will make less difficult or that there is a history of employees mishandling the situation; and 3) the wrong choice will frequently cause the deprivation of a citizen's constitutional rights. *Nicholson v. Scoppetta*, 344 F.3d 154, 167 (2nd Cir. 2003).

Even without specific facts on the record, a reasonable person could easily perceive the moral certainty that a rank-and-file officer might be faced with the issue of a school official's authority to consent to a search. That situation would arise simply due to the fact that minors necessarily spend a great deal of their time in the custody of school officials. Under R.I.G.L. § 16-19-1, all minors are statutorily required to attend school ". . . during all the days and hours that the public schools are in session in the city or town in which the child resides." Minors who disobey this statute may be found wayward. R.I.G.L. § 16-19-6. Likewise, their parents may be criminally charged. R.I.G.L. § 16-19-1(a). The only exception to this statute is for those minors aged sixteen through eighteen, whose parents have taken the extraordinary step of allowing their children drop out pursuant to procedures established under R.I.G.L. § 16-19-1(b).

By legal necessity, then, all minors must spend a great deal of time in the custody of public school officials, simply because the compulsory education statutes forbid them to be anywhere else during school hours. The great amount of time that minors spend in the custody of school officials alone creates a readily foreseeable strong possibility that a police officer would confront the issue of a school official's authority to consent to search. The possibility that a minor may be drawn into some confrontation with the police while in school custody has only expanded since the passage of our compulsory education statutes. Police today do not go to the public schools only when they are summoned to deal with a specific problem. Today, the police are now present at many schools as a matter of course. An ever-increasing number of districts

now retain "school resource officers" whose specific duty is to assist school officials in maintaining order.[1] By the time of this incident, Coventry had in fact joined the growing number of these districts retaining school resource officers. (Ex. O, p. 11:20-13:23.)

Under these circumstances, it is patently obvious that officers might well be confronted with the issue of whether a teacher could give "consent" to a police search of a student. Simply put, the confluence of the compulsory education statutes and, more recently, the increased reliance upon police to maintain order on the public school campus, creates an extremely good chance of adversarial contacts between students and police while students are in the custody of school officials.[2]

The record evidence confirms that Coventry officers were frequently being drawn into situations involving the searches of students at school – but with a complete lack of training on the point of when a school official could "authorize" a search of a student. (Ex. P, 29:14-30-5; Ex. Q, 32:22-33:13.) Most interestingly, at the time of the incident, Sergeant Richard Sturdahl, had only recently left the School Resource Officer position after having made rank. (Ex. O, 11:20-13:23.) Even he was unable provide any coherent definition of a school official's authority to search, and relied largely upon the antiquated *in loco parentis* concept. (Ex. O, 16:12-18:8.) Nevertheless, Coventry officers' testimony indicated that their duties frequently involved searches of Coventry students at schools on numerous occasions. This duty was not

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[1] *See* Susan Black, *Security and the SRO*, Am. Sch.Board. J., June, 2009 at 30-31. *See also* Tom Pickerell, *Schools and Police: A Sometimes Uneasy Alliance*, *reprinted in School Law in Review, 2005*, National School Boards Association (2005).

[2] Indeed, one of the cases cited by Defendants, that of *Gray v. Bostic*, 458 F.3d 1295 (11th Cir. 2006) describes a factual scenario which demonstrates how readily ordinary student misbehavior may well result in police intervention these days. That case describes a confrontation between a gym teacher and student about the student's failure to participate in exercises. Formerly, in most circumstances such an incident would have ended in the principal's office. In *Gray*, however, an overzealous school resource officer insisted on intervening in this disciplinary matter over the protests of the teacher, and handcuffed the student.

limited to the School Resource Officer, but encompassed a number of other officers. (Ex. P, 29:14-30:5; Ex. R, 25:7-20.)

It is also patently obvious that the failure to provide training on that legal point could lead to gross abrogations of students' Fourth Amendment rights. As we pointed out in our earlier Memorandum, if we hold that a teacher has the ability to authorize a student search by the police, then we have eviscerated students' Fourth Amendment protections against arbitrary searches by their teachers under *New Jersey v. T.L.O.*, 469 U.S. 325, 105 S.Ct. 733 (1985). All that a teacher would need to do to evade the "reasonable suspicion" standard promulgated under *T.L.O.* is to call a police officer and give "permission" for that officer to search that student. Giving school officials the right to consent to student searches also works to remove student protection from unreasonable police searches once those students walked through the schoolhouse door. If a school official had the blanket authority to consent to a search, whether supported by any degree of reasonable suspicion or not, then all an overreaching police officer needs to do to evade the Fourth Amendment is to wait until the child was in school, and then persuade a friendly school official to give "permission" to search a student. For that reason, the rank-and-file officers were in clear need of instruction as to the limitations of school officials' authority to consent to search.

There is also a clear causal connection between the lack of training and the constitutional violation visited upon the Plaintiffs. Had the officers received the most rudimentary of training regarding the constraints upon a teacher's right to search their students, then the officers would easily have recognized that they were making a mistake of constitutional proportions when relying upon any purported "consent" from Coach Marchand. As we pointed out in our earlier Memorandum, it was obvious that Coach Marchand lacked the requisite "reasonable suspicion" that would justify a search of his students under *T.L.O.* *Id.* at 341-42. Without that "reasonable

suspicion," he himself could not search the students without violating their Fourth Amendment rights. *Id*. After all, it goes without saying that Coach Marchand could not give permission to do that which he himself was expressly forbidden to do.

As we have seen above, the Coventry Police officers appear to have been left utterly without any idea of the express limitations on Coach Marchand's authority pursuant to established law. Because of their apparent ignorance, it was almost inevitable that students whom the Coventry Police would come into contact with on a near-daily basis would be placed at risk for violation of their Fourth Amendment rights. Accordingly, the failure to provide training rose to the level of "deliberate indifference," and caused the Plaintiffs' injury.

B. THE PRESSURE FROM THE CROWD DID AFFECT THE VALIDITY OF THE SEARCH.

Defendants also challenge the proposition that the pressure from the crowd ought to be considered as a factor in determining whether Coach Marchand's purported "consent" should be deemed truly voluntary and therefore valid. In support of their argument to the contrary, the Defendants point to a string of cases which they believe stand for the proposition that *only* coercion from the police officers can be considered. Not only do the Defendants misread the cases, but they also overlook the fact that the Coventry police themselves acted in such a fashion as to contribute to that coercive atmosphere.

The Defendants' loudest lament is that the "coercion," at least insofar as the crowd is concerned, did not originate from the Coventry Police, at least before they arrived. None of the cases to which Defendants cite positively state that the *only* relevant coercion is that which comes from a police officer. Instead, the legal standard requires that courts engage in ". . . an examination of the totality of the circumstances surrounding the relevant transaction between law-enforcement authorities and the consenting parties." *United States v. Jones*, 523 F.3d 31, 37

(2008), *citing United States v. Pérez –Montañez*, 202 F.3d 434, 438 (1st Cir. 2000). In other words, it has never been said that matters outside of a police officer's conduct could not have some bearing upon the nature of the consent; one looks at *all* of the circumstances.

It is true that a particular mental condition or susceptibility will not in and of itself invalidate consent. That was the underlying theme of the cases relied upon by the Defendants. For example, in *Colorado v. Connelly*, 479 U.S. 157 (1986), the defendant had walked up to an off-duty officer who was still in uniform, and insisted upon discussing a murder that he had committed the year before. *Id.* at 159. It was only later that the police had any way of discovering that the defendant suffered from chronic schizophrenia, and that that mental condition might well have affected his ability to make decisions to waive his legal rights. *Id.* at 161. In that case, it was rightfully decided that the police officers had not acted in an unconstitutional fashion. The officers of course had had nothing to do with any mental condition that might affect the defendant's capacity to decide to confess or remain silent, had no knowledge of that condition, and therefore could not be said to have coerced the defendant in any way. *Id.* at 165. *See also United States v. Barbour*, 70 F.3d 580, 585 (11th Cir. 1995)

Similarly, mere lack of intelligence has not been found to affect consent in most cases in the case of *United States v. Jennings*, 491 F.Supp.2d 1072 (M.D. Ala. 2007), the defendant had argued that his mental limitations had rendered him unable to voluntarily consent to a search and waive his Miranda rights. However, there had been no evidence that would indicate that the law enforcement official could have or should have known of any limitation, much less that that official had taken advantage of that condition. *See id.* at 1076. A similar argument was made and rejected in *United States v. Rosario-Diaz*, 202 F.3d 54, 69 (1st Cir. 2000), where the defendant argued that his low I.Q. obviated his consent (1st Cir. 2000).

United States v. Amery, 2002 WL 31027514 (S.D.N.Y.) dealt with a subjective fear of police. The defendant was an Afghani national who had experienced police torture while in his home country, and had also experienced anti-Muslim sentiment in this country after the September 11, 2001 attacks. *Id.* at *1. Understandably, these experiences would tend to make one particularly fearful of refusing a request from a police officer. There was no evidence that the *Amery* officers knew of the defendant's unique experiences and consequent susceptibility. *Id.* at *2. That lack of knowledge by the officers, and the lack of any attempt to exploit that knowledge, weighed against finding the search to be non-consensual.

In all of the above cases, the challenge to the consent failed because the mental condition or susceptibility was such that the officer did not or could not know of. However, *none* of the cases cited have foreclosed the possibility that some particular mental susceptibility cannot be weighed in the "totality of circumstances" analysis. All leave open the possibility that there could be some overreaching *if* the officer actively exploits a particular mental susceptibility to gain consent. *See especially Amery* at *2. There is sufficient evidence on the record to show that the officers both knew of and actively exploited Coach Marchand's fear of that crowd – even going to the point of aggravating it by keeping him in that situation.

As was described at the depositions, at the time the Coventry Police arrived, the Central Falls bus was already blocked in by the mob and could not leave. The Coventry Police similarly blocked in the bus with their vehicles. (Ex. D, 31:15-32:6; Ex. H, 43:15-24.) Coach Marchand expressed fear of the crowd to the Coventry officers, and appealed to them for assistance in extricating him and his players from this dangerous situation, asking them: ". . . what am I going to do, what are they going to do to us." (Ex. H, 27:23-24.) The Coventry Police took no effective action to dissipate the crowd. (Ex. H, 16:3-7, 27:5-9, 45:8-13.) Instead, they chose that

particular moment to inform Coach Marchand that a search was going to be the solution to his predicament. (Ex. H, 28:8-29:13; Ex. K, 44:1-6.)

Under these circumstances, a reasonable jury could find that the Coventry Police had taken advantage of Coach Marchand's expressed fear of the crowd. The Coventry officers had essentially joined the crowd in its illegal detention of the team by blocking in the bus. They also specifically suggested to Coach Marchand that a search would be the only way in which he and his team could resolve the matter and thus regain their freedom to move on.

Furthermore, the Coventry Police's actions in joining in the illegal detention of the team bus should work to obviate any consent by Coach Marchand. The detention of the team bus was plainly illegal. The crowd itself of course had no legal authority to prevent the team from leaving. The Coventry Police had no probable cause or even a reasonable suspicion that anybody on board that bus had engaged in any crime. The Coventry Police therefore had no valid reason to detain the team in any way; nevertheless, that is what they did when they blocked in the bus. It is well-understood that an illegal detention is an inherently coercive situation, and that any "consent" to a search given under those circumstances is therefore invalid. *See State v. Casas*, 900 A.2d 1120, 1134 (R.I. 2006), *citing United States v. Cellitti*, 387 F.3d 618, 622 (7th Cir. 2004).

Under the evidence on record, the actions of the Coventry Police, then, combined exploitation of Coach Marchand's fear of the crowd *and* an illegal detention. For that reason, the Defendants should not be able to obtain summary judgment on the question of whether Coach Marchand's consent was voluntary or coerced.

IV. CONCLUSION

For the above-referenced reasons, Defendants should not be permitted summary judgment on the grounds stated in their Supplemental Memorandum.

Plaintiffs,
By their attorney,

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CERTIFICATION

I hereby certify that the within document has been electronically filed with the Court on July 16, 2009, that it is available for viewing and downloading from the ECF system, and that the counsel of record listed below will receive notice via the ECF system:

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