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Student Guilty as Accomplice in Math Test Heist

SUMMARY: A student, who agreed to act as lookout while other students executed their plan to enter a classroom and steal an upcoming math test, was guilty as an accomplice, even though he silently withdrew his agreement to help the other students and left the scene during the course of the crime. The Supreme Court of New Hampshire decided State v. Formella on November 21, 2008.

BACKGROUND: On Wednesday June 13, 2007, PF was a junior at a New Hampshire high school. He and two friends were studying at a nearby library after school. They returned to the school to get some books from their lockers on the second floor. While there, they encountered a group of students planning to go to the third floor and steal a math test from a classroom. They told PF and his friends to stand guard and to call out, "did you get your math book?," if anyone else showed up.

PF agreed to do this and he and his classmate continued to their lockers. On their way, they looked around to see whether anyone else was present. Once they gathered their books, PF and his friends began to feel that what they were doing was wrong. They decided to go down to the first floor and wait for the others. On their way down the stairs, they encountered some janitors, who told them to leave the building. PF and his friends did so, but they waited in the parking lot for the others. After several minutes the other group appeared with the stolen exam. They all shared the exam questions.

The following week, the dean of students became aware that the exam had been stolen. Police investigated the case and interviewed PF, during which he admitted what he had done the day of the theft. He was charged with criminal liability for the conduct of another and convicted. He appealed his conviction to the state supreme court.

ANALYSIS: PF argued that the trial court failed to determine the timing of the crime relative to his decision to withdraw from serving as a lookout. Had it done so, it would have concluded that PF ceased to participate before the crime was executed and therefore could not properly be called an accomplice.

He also argued that the state's evidence was insufficient to find him guilty beyond a reasonable doubt. His guilt turned upon the courts' interpretation of the state statute on liability for the criminal conduct of another person. Generally, the statute makes it a crime to aid or agree or attempt to aid another person in planning or committing a crime. The statute doesn't apply, however, if the accomplice "terminates his complicity prior to the commission of the offense and wholly deprives it of effectiveness in the commission of the offense or gives timely warning to law enforcement authorities or otherwise makes proper effort to prevent the commission of the offense."

PF argued that this exception applied to his behavior. Although he initially agreed to help the math-test thieves, he reconsidered before they had gotten the exam and then deprived his participation of its effectiveness by leaving the second floor and providing no warning when he passed the janitors.

Where statutory language is clear and unambiguous, courts will apply the law to the case as it is written. The state argued that the law was not clear because it did not indicate what steps, if any, a defendant had to take to deprive his complicity of its effectiveness. Walking away without saying anything to others engaged in the crime, the state argued, was not enough. That was passive behavior and the statute required him to take some active step.

The court agreed with the state that the law was not clear. Because New Hampshire's law on liability for another's conduct was taken from a model law prepared by legal scholars called the Model Penal Code, the court looked at commentary on that code. Comments to the model code indicated that where complicity in a crime came from requesting or encouraging criminal behavior, that complicity could be nullified by expressing disapproval as long as the others involved in the crime heard it in time to reconsider their unlawful actions.

From this language, the New Hampshire court concluded that what PF had done was not enough to wholly deprive his participation of its effectiveness. He said nothing to the students stealing the test and they were unaware of his decision to stop participating and leave his second-floor lookout. Although PF did leave and said nothing when he encountered the janitors, the other students still committed the crime; PF's departure and silence did not spoil the crime, nor did it cause the others to abandon or reconsider the planned theft. His actions had no effect on the others at all; for all they knew PF and his friends were still watching their backs.

Because PF's behavior was inadequate to nullify his participation in the crime, the timing of the crime and his silent decision to withdraw were immaterial. The trial court had all the evidence it needed to conclude, with no reasonable doubt, that PF aided in the criminal conduct of others.

EXCERPTS FROM THE COURT'S OPINION(By Judge Galway): "[The Model Penal Code's] comment states that if 'complicity inhered in request or encouragement, countermanding disapproval may suffice to nullify its influence, providing it is heard in time to allow reconsideration by those planning to commit the crime.' The comments thus indicate that in order to deprive the prior complicity of effectiveness, one who has encouraged the commission of an offense may avoid liability by terminating his or her role in the commission of the crime and by making his or her disapproval known to the principals sufficiently in advance of the commission of the crime to allow them time to reconsider as well

"While there appears to be a paucity of authority on the issue, the view that an accomplice must make some affirmative act, such as an overt expression of disapproval to the principals, accords with

that of other jurisdictions with statutes mirroring the provisions of the Model Penal Code. Additionally, the relevant authorities weigh in favor of requiring any withdrawal to be communicated far enough in advance to allow the others involved in the crime to follow suit. This is not to say that the terminating accomplice must actually prevent the crime from occurring. Instead, he need only make some act demonstrating to the principals of the crime that he has withdrawn, and he must do so in a manner, and at such a time, that the principals could do likewise. We agree with the rationale of these authorities.

"[T]o extricate himself from accomplice liability, the defendant needed to make an affirmative act, such as communicating his withdrawal to the principals. Here, the defendant made no such act. The defendant testified that he and his companions simply left the scene. He did not communicate his withdrawal, discourage the principals from acting, inform the custodians, or do any other thing which would deprive his complicity of effectiveness. In fact, the principals remained unaware of his exit. Thus, the defendant did not do that which was necessary to undo his complicity.

"The defendant contends that because he had been acting as a lookout, leaving the scene so as to no longer be 'looking out' deprived his complicity of its effectiveness, and, therefore, findings regarding the timing of the offense were required. We disagree. While at the point he left the scene he was no longer an effective lookout, the defendant did nothing to counter his prior complicity. According to the defendant, the principals had requested aid in committing the offense, he agreed to provide it, and he agreed to warn the principals if anyone approached, thus encouraging the act. Further, upon reaching the second floor the defendant looked around to 'confirm or dispel' whether anyone was around who might have apprehended the thieves or otherwise spoiled the crime. Thus, it was the complicity of agreeing to aid the primary actors and then actually aiding them that needed to be undone; silently withdrawing from the scene did not, in any way, undermine the encouragement the defendant had provided. As there was no evidence that the defendant had wholly deprived his complicity of its effectiveness, it was not error for the trial court to refuse to make findings on the timing of the offense because such findings would not have altered the result.

"For essentially the same reasons, we reject the defendant's argument that the trial court erred in denying his motion to dismiss for insufficient evidence. To succeed on a motion to dismiss, the defendant bears the burden of establishing that the evidence, viewed in its entirety and with all reasonable inferences drawn in the State's favor, was insufficient to prove beyond a reasonable doubt that he was guilty of the crime charged.

"The defendant argues that the State did not meet its burden to show that he did not effectively terminate his role in the offense. During trial, the State presented the testimony of Captain Francis Moran of the Hanover Police Department, who testified that the defendant had confessed his involvement in the crime. He then recounted the events as the defendant had described them to him. From this testimony, there was sufficient evidence to find that the defendant was an accomplice in the crime."

COMMENTS & QUESTIONS

1. Was it PF's idea to steal the math test?

2. Was it his idea to be a lookout?

3. What did he do that was illegal?

Courts can look to various sources of law when deciding cases that come before them. These sources of law include state and federal constitutions and laws, as well as the common law--that is, the law that derives from prior court decisions. Precedent is the term used to describe prior court decisions on the same legal issue that is before a given court. Some precedent is "binding," which means a court must follow it. On issues of federal law, all federal and state courts must follow the decisions of the U.S. Supreme Court, and federal district courts must abide by decisions from the federal appeals court in their circuit.

On questions of state law, a state supreme court's decision on a particular issue is binding on all lower courts in that state. Other precedent is not binding. For example, the New Hampshire Supreme Court is free to consider a decision on a comparable question by, say, the Alabama Supreme Court, or the South Dakota Supreme Court, but it is not obligated to follow it. When lawyers look for cases supporting their position, they look to the jurisdiction they are in first, and if there is nothing on that question from a higher court there--no binding precedent--they look to other states or federal jurisdictions and encourage the court hearing their case to follow those courts' reasoning

Where a state's laws in a particular area derive from a model code, lawyers and courts may look to comments on that for guidance. A model code is not precedent, however. A model code, and legal treatises, are known as secondary sources and may inform a court in the absence of binding precedent.

In general, a person cannot commit a crime without intending to. In other words, a crime typically requires illegal intent as well as illegal action. Here, PF claims that he reconsidered his role and withdrew from participation during the course of the crime. Are you satisfied that PF had the required illegal intent? Do you think his actions were criminal?

A criminal conviction related to cheating on an exam will have enduring repercussions for PF and could keep him out of colleges or even certain professions. Does his behavior warrant those consequences? Should he be spared conviction, given that he was not yet 18 at the time of his involvement?

What is the lesson here for other students who might find themselves in a situation similar to PF's that afternoon? Is the desire to "send a message" a valid consideration in deciding whether and how much to punish someone?

If a situation virtually identical to this one comes before a New Hampshire trial court, must it find the "lookout" in that case liable for the criminal conduct of another person? Must a Vermont trial court rule the same way because of the decision in PF's case?

Single Parent Could Not Live With Sex Offender

SUMMARY: An Iowa statute making it a crime for a single parent, with her children, to live with a known sex offender did not violate the equal protection clause of the federal or Iowa constitutions even though there was no prohibition for a married parent to live with a sex offender. The Iowa Supreme Court decided Iowa v. Mitchell on November 14, 2008.

BACKGROUND: Holly Mitchell and her husband Nicholas had two children, born in 1999 and 2003. They separated in 2005, and in 2006 Holly moved in with her boyfriend, Kelly Wade. Wade is a registered sex offender as a result of a conviction in 2000 for indecent exposure to a 17-year-old girl.

In October 2006, Nicholas made arrangements for the children to stay with Holly because he had National Guard duty. He told her that he did not want the kids left alone with Wade. Holly had to work that weekend, so she arranged for her sister and mother to watch the kids. Wade was also present.

When Nicholas heard that the kids had been in Wade's presence without their mother, he called the police and the Iowa Department of Social Services. Holly was charged with child endangerment because she lived with a known sex offender. She filed a motion challenging the Iowa child endangerment statute as unconstitutional, but the trial court denied the motion. A jury convicted her of the charge and she appealed. The Iowa Supreme Court granted review to consider the constitutional challenge.

ANALYSIS: Iowa's child endangerment statute makes it a crime for a parent with care over a minor child to live with a known sex offender. Yet the law expressly excepts a parent who is married to a sex offender. Holly argued that this law, which punishes her in her present relationship but would not punish her if she were married to Wade, violated the Equal Protection Clause for unjustly discriminating against an unwed parent

In most situations, a law that treats people in similar circumstances differently must have a "rational basis" for doing so. For example, a law that requires some people to go outside a restaurant or bar while allowing others to remain inside it has a rational basis where the distinction is based on smoking. Smoking presents a health hazard, so requiring smokers to go outside rather than remaining in a contained space to have a cigarette has a rational basis. A law that required people with yellow shoes to remain outside, however, would not survive an equal protection challenge unless the legislature could somehow provide a rational basis for that distinction. Not just any distinction will do—for example, legislators could not support the law by stating that yellow shoes are annoying. The law must promote some legitimate government interest in a rational way.

Holly argued that a child was no more or less endangered in the company of a known sex offender regardless of whether that individual was married to, or merely living with, the child's parent. In other words, there is no rational basis for the difference under the law and discriminating against unmarried parents in such a situation serves no legitimate government interest.

A majority of the Iowa Supreme Court disagreed. They reasoned that marriage is a greater commitment to the relationship, which, the legislature could rationally conclude, would encourage more respect for any children in the home.

Two justices dissented. They opined that cohabitation was so similar to marriage as to make the distinction irrational, particularly when the law did not make it a crime for a parent to have relationships with less commitment than cohabitation—like dating, employing, or maintaining a close friendship with a sex offender. In all of those situations, the dissenters reasoned, the parent is creating an opportunity for the offender to have access to the children without a strong relationship commitment in place.

.**EXCERPTS FROM THE MAJORITY OPINION (By Justice Baker):** "The Equal Protection Clause does not deny states the power to treat different classes of people differently. It does, however, deny states the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute. A classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation

"To determine whether a statute violates equal protection, we first determine whether the statute makes a distinction between similarly situated individuals. Pursuant to section 726.6(1)(h), a parent commits child endangerment when she cohabits with a person she knows to be a sex offender, but the statute 'does not apply . . . to a person who is married to and living with a person required to register as a sex offender.' In each scenario, the parent is permitting her child to live with a registered sex offender, but the statute clearly makes a distinction between unmarried parents or guardians of minor children who cohabit with a registered sex offender and those who cohabit with and are married to a registered sex offender. But for the marriage distinction, the parents are similarly situated. The statute is, therefore, subject to equal protection review.

"Under the rational-basis standard, a statute is constitutional if the classification is reasonable and operates equally upon each person within the class. A classification does not deny equal protection simply because in practice it results in some inequality; practical problems of government permit rough accommodations. Although the rational basis standard of review is admittedly deferential to legislative judgment, it is not a toothless one in Iowa. Our obligation not to interfere with the legislature's right to pass laws is no higher than our obligation to protect the citizens from discriminatory class legislation violative of the constitutional guaranty of equality of all before the law.

"Mitchell does not argue that the government interest in protecting children from sex offenders is not legitimate. Her argument, rather, is that there is no rational distinction between a child living with a sex offender to whom his or her parent is unmarried and living with a stepparent who is a sex offender. She argues a child's risk of suffering sexual abuse is no greater in cohabiting households than in married households. There is, however, nothing in this record to support Mitchell's assertion, and Mitchell has the burden of negating all reasonable bases that could justify the challenged statute. The State asserts the classification made by the legislature has a reasonable relationship to the government's interest in protecting children from sexual abuse because it is rational to determine that a sex offender married to the parent will have a greater sense of commitment to the family unit created by the marriage and that the marital relationship may impose on the sex offender greater financial and other obligations toward the family, so that the sex offender feels he or she has a stake in the well-being of the children.

"We have previously stated that one aspect of cohabitation is the joint use or ownership of property. It follows that sex offenders who cohabit with a person with control or custody of his or her minor

children also share living quarters with the children and have joint use of the children's home. This living arrangement allows the sex offender access to the children in their home, a place traditionally and constitutionally protected from public intrusion. It also potentially allows unlimited and unmonitored access to children during those early morning and nighttime hours typically devoted to private activities such as bathing, changing clothes, and bedtime. It is this access the State seeks to control.

"Cohabiting is more than simply living together, even though it is not tantamount to marriage. Along with sharing living quarters and expenses and joint use of property, we have identified sexual relations, the continuity of the relationship, and the length of the relationship as appropriate considerations for determining whether a couple is cohabiting. These considerations indicate that, in a cohabiting relationship, the sex offender may have some financial obligation and stake in the children's well-being, but we do not believe that these considerations compel us to find that a cohabiting sex offender would have a financial obligation and stake in the children's well-being as great as that of a stepparent. The legislature could reasonably conclude that unmarried cohabitation of a parent with a sex offender poses greater danger to children than cohabitation between married persons.

"As long as the classificatory scheme chosen by the legislature rationally advances a reasonable and identifiable governmental objective, we must disregard the existence of other methods of allocation that we, as individuals, perhaps would have preferred."

EXCERPTS FROM THE DISSENT (By Justice Wiggins): "The Code does not define cohabitation. Our existing case law defines cohabitation as having two elements. First, an unrelated person must be living or residing in the dwelling. Second, the two unrelated persons must be living together in the manner of husband and wife. In other words, cohabitation is essentially a marriage without the license. The commitment to the family unit, the financial obligations, and other obligations of a cohabiter to maintain the family unit is no more or less than that of a married individual. It is absurd to think that the financial implications of a dissolution will provide a greater deterrent than the stiff criminal penalties the legislature has enacted for sex offenders. Moreover, our present laws allow the department of social services to remove a child from the home of a sex offender.

"Accordingly, I would hold the relationship of the classification, marriage versus cohabitation, to the goal of protecting children living in the home with a sex offender is so attenuated as to render the distinction arbitrary or irrational. The relationships not covered by this statute include persons married to a sex offender, persons living with a sex offender, but not cohabitating, persons having a serious dating relationship with a sex offender, persons having a casual dating relationship with a sex offender, persons who are friends with a sex offender, persons who are acquaintances of a sex offender, persons who are related to a sex offender, and persons who hire a sex offender to do work for them. In each of these situations, the sex offender may have access to a child in the home. Moreover, access by some of these individuals may be unlimited."

COMMENTS & QUESTIONS

1. What crime did Holly Mitchell commit?
2. Who is Kelly Wade? Did he do anything wrong in this case?
3. Is it illegal for Holly to marry Wade? What effect would it have had on this case if they were married?

The Equal Protection Clause of the 14th Amendment to the United States Constitution provides that: "No State shall … deny to any person within its jurisdiction the equal protection of the laws." This clause grants all people "equal protection of the laws" which means that the states must apply their laws equally and cannot give preference to one person or class of persons over another. However, state legislation frequently involves making classifications that either advantage or disadvantage one group of persons, but not another. Equal protection does not require the government to treat all persons exactly the same. The state is only obligated to treat people the same if they are similarly situated.

It is interesting to note several things about the 14th Amendment and the Equal Protection Clause. First, the 14th Amendment was not ratified until 1868. The Bill of Rights, the first 10 Amendments, was ratified in 1791. The Fifth Amendment placed similar prohibitions against federal government action in1791, but similar restrictions were not placed on state action until after the Civil War. Second, the Equal Protection Clause of the 14th amendment applies only to state governmental entities. It does not apply to private parties. Private parties are not restricted by the Equal Protection Clause of the 14th Amendment. Private parties can discriminate.

Holly Mitchell sought to challenge the Iowa child endangerment statute claiming that it denied her equal protection of the laws. It discriminated against her as a single parent living with a known sex offender, vis-à-vis, a parent married to a sex offender. The Iowa Supreme Court reviewed the case using any "rational basis test." Under this standard, the law will be found valid if it is rationally related to a legitimate government interest.

Not all equal protection claims are reviewed using any rational basis test. Where a law distinguishes between individuals with respect to any "fundamental right" or where a suspect classification is involved, the standard is stricter. Courts will review such cases using a standard called "strict scrutiny." Suspect classifications would include race or gender. Fundamental rights would include voting, marriage, procreation and travel.

Do you think that the Iowa Supreme Court used the appropriate standard in reviewing this law? Do you agree with their conclusion that there was a rational basis for classifying a single parent living with a known sex offender different from a parent married to a sex offender? Two justices disagreed with this conclusion. Do you think that the distinction was arbitrary or irrational as found by the dissent? Do you think that the statute fulfills its purpose in protecting children?

Do you think Holly did anything wrong? How would her being married to Wade have change what happened in this case? Do you think that marrying Wade would have given the children of more protection in this case?

Wade is a convicted sex offender. What did he do? Do you think he poses a threat to young children (one of Holly's kids is 10, the other is 6)? Convicted sex offenders are now required to register on sex offender databases. They are restricted from a living in certain places or having employment in certain professions. These restrictions are oftentimes lifetime restrictions. Do you think this is fair orjust? If a convicted sex offender has served his or her time in jail, should he or she be branded for life? Should sex offenders have any rights in society?

Lead Paint Not a "Nuisance" Under Rhode Island Law

SUMMARY: Rhode Island could not use the ancient nuisance doctrine to recover from paint manufacturers for injuries to Rhode Island children caused by lead poisoning. The Rhode Island Supreme Court decided State v. Lead Industries Association, Inc. on July 1, 2008.

BACKGROUND: According to the former director of the Rhode Island Department of Health, at least 37,363 children in the state suffered lead poisoning between January 1993 and December 2004. In 2004, 1,685 children were affected by lead poisoning. Of these, over 1,100 were newly poisoned in 2004.

Congress responded to the dangers of lead in paint in 1971, when it passed the Lead-Based Paint Poisoning Prevention Act, which prohibited lead paint in federal or federally financed housing. In 1978, the Consumer Product Safety Commission banned paint with a lead content exceeding .06 percent.

Despite these federal acts to reduce lead's health threat, Rhode Island's children were still succumbing to its dangerous health effects 30 years later. Rhode Island's attorney general sued paint manufacturers whose products were on the market and in use in the state during the lead-paint era. After a four-month trial, the longest civil jury trial in the state's history, jurors returned a verdict finding the defendant paint manufacturers guilty of creating a public nuisance. The remedy is abatement—removing lead paint from public and private structures.

The defendants appealed to the Rhode Island Supreme Court.

ANALYSIS: Nuisance law is an ancient legal doctrine in the Anglo-American legal system going back to twelfth-century England. Its purpose was to redress injuries to public health, safety, or welfare. Nuisance law has commonly been used for such things as addressing noxious smells or loud and disruptive sounds.

Rhode Island argued that the paint manufacturers were harming public safety and welfare by exposing its children to lead. This exposure produces severe mental and physical health effects, including death. Because the defendants sold lead-based paints, which were then applied to buildings around the state, the defendants had a duty to alleviate the nuisance by removing all lead paint from public and private properties.

The paint manufacturers asked the court to dismiss the case, arguing that nuisance was not an appropriate theory of recovery. To prevail on that theory, the defendants maintained, the state would have to show that defendants' conduct interfered with a public right and that defendants were in control of the lead pigment at the time it injured the children harmed.

The definition of "public right" was key to the court's opinion. Historically, the court determined, public rights describe access to some public good, such as water, air and public rights of way. A public right is not the right of individuals to be free from certain harm, such as physical injury. Thus, "public right" does not describe the collective possession of individual rights.

The court also noted that products do not form the basis of public rights under nuisance law, even if a product is dangerous and can harm members of the public. The public does not have access to products that individuals purchase. Instead, the public has only the right to buy the same product. The ability to purchase a product is not a public right in this sense. Publicly sold products that may be dangerous can form the basis of products liability lawsuit, which is different from nuisance. If any harm traceable to a product that may be obtained by the public could form the basis for a nuisance action, nuisance could be employed as a remedy for virtually any injury. That is not the purpose of nuisance law, which typically addresses air, land and water.

Once members of the public purchased paint and took it to their various properties, the paint was no longer in its manufacturer's control. The manufacturer therefore did not have the ability to abate the nuisance.

Because lead paint was a product, not a public right, and because it was not under the defendants' control at the time the children were injured, nuisance law was an inappropriate remedy for Rhode Island children's lead-paint injuries.

EXCERPTS FROM THE COURT'S OPINION (By Chief Justice Williams): "This Court recognizes three principal elements that are essential to establish public nuisance: (1) an unreasonable interference; (2) with a right common to the general public; (3) by a person or people with control over the instrumentality alleged to have created the nuisance when the damage occurred. After establishing the presence of the three elements of public nuisance, one must then determine whether the defendant caused the public nuisance.

"The Restatement (Second) provides further assistance in defining a public right. 'A public right is one common to all members of the general public. It is collective in nature and not like the individual right that everyone has not to be assaulted or defamed or defrauded or negligently injured. Thus the pollution of a stream that merely deprives fifty or a hundred lower riparian owners of the use of the water for purposes connected with their land does not for that reason alone become a public nuisance. If, however, the pollution prevents the use of a public bathing beach or kills the fish in a navigable stream and so deprives all members of the community of the right to fish, it becomes a public nuisance.'

"Indeed, the Connecticut Supreme Court has explained that 'the test is not the number of persons annoyed, but the possibility of annoyance to the public by the invasion of its rights. A public nuisance is one that injures the citizens generally who may be so circumstanced as to come within its influence.' Rather, a public right is the right to a public good, such as 'an indivisible resource shared by the public at large, like air, water, or public rights of way.' Unlike an interference with a public resource, 'the manufacture and distribution of products rarely, if ever, causes a violation of a public right as that term has been understood in the law of public nuisance. Products generally are purchased and used by individual consumers, and any harm they cause—even if the use of the product is widespread and the manufacturer's or distributor's conduct is unreasonable—is not an actionable violation of a public right.... The sheer number of violations does not transform the harm from individual injury to communal injury.'

"'That which might benefit (or harm) 'the public interest' is a far broader category than that which actually violates 'a public right.' For example, while promoting the economy may be in the public interest, there is no public right to a certain standard of living (or even a private right to hold a job). Similarly, while it is in the public

interest to promote the health and well-being of citizens generally, there is no common law public right to a certain standard of medical care or housing.'

"Other courts and commentators likewise have emphasized the element of control. A leading treatise concerning products liability law states that 'a product which has caused injury cannot be classified as a nuisance to hold liable the manufacturer or seller for the product's injurious effects....' Indeed, 'a product manufacturer who builds and sells the product and does not control the enterprise in which the product is used is not in the situation of one who creates a nuisance....'

"In the words of one commentator: 'Despite the tragic nature of the child's illness, the exposure to lead-based paint usually occurs within the most private and intimate of surroundings, his or her own home. Injuries occurring in this context do not resemble the rights traditionally understood as public rights for public nuisance purposes—obstruction of highways and waterways, or pollution of air or navigable streams.'

The enormous leap that the state urges us to take is wholly inconsistent with the widely recognized principle that the evolution of the common law should occur gradually, predictably, and incrementally. Were we to hold otherwise, we would change the meaning of public right to encompass all behavior that causes a widespread interference with the private rights of numerous individuals. Public nuisance focuses on the abatement of annoying or bothersome activities. Products liability law, on the other hand, has its own well-defined structure, which is designed specifically to hold manufacturers liable for harmful products that the manufacturers have caused to enter the stream of commerce."

COMMENTS & QUESTIONS

1. What problem was Rhode Island's attorney general hoping to address with this case?

2. What legal theory did the state use against the defendants?

3. What is a public right?

Every lawsuit must have a theory of recovery. A party has to say why he is entitled to recover for an injury. A party can not just go into court and say they were hurt and expect to recover unless they sate a cause of action against a particular party nad tell the court why they should recover. In this case, the Rhode Island attorney general sought to find paint manufacturers liable for lead poisoning injuries based on a nuisance theory. In order to recover, the allegations by the attorney general had to fit with the legal definition of nuisance. The court found that nuisance law did not apply to this situation.

Not every injury can be redressed with a lawsuit, nor does every type of claim apply to any given injury. The reason for this is that a claim gets harder to prove as time passes because evidence disappears, witnesses move away or die and people's memories start to fade. The court here identifies products liability as the better legal theory to address lead paint injuries than nuisance. It could be that the attorney general did not bring a products liability claim against the manufacturers because it would be barred by the limitations period, which is often two years to six years for various types of claims. A products liability claim might arise as soon as the product's dangerous nature because evident. Since Rhode Island officials knew of lead paint's threat to children for decades any claim using a products liability theory would be barred at the time this suit was brought.

A nuisance, by contrast, presents an ongoing threat to the public. New cases of lead poisoning to children were arising in Rhode Island every year. Since the nuisance was continuing, it would not be subject to a limitations period. The suit could be maintained if the nuisance theory had been found applicable.

Does lead paint threaten the public's health, safety or welfare in Rhode Island? If so, why couldn't the attorney general maintain a nuisance action?

What are some types of problems for which a nuisance action might be appropriate?

Was it within the defendants' power to remove the lead paint threat from the state? If they had the power to remove the lead paint, did they have control over it?

If the paint manufacturers were pumping fumes into the air or dumping poisonous chemicals into the water, would that be a nuisance? Is putting lead paint on building walls around the state any different?

Passenger Could Be Frisked During Traffic Stop

SUMMARY: A police officer did not violate the Fourth Amendment when she briefly frisked a passenger from a car stopped for a registration infraction. The United States Supreme Court decided Arizona v. Johnson on January 26, 2009.

BACKGROUND: : In April 2002, Officer Maria Trevizo and Detectives Machado and Gittings were on patrol in Tucson, working with Arizona's gang task force. Around 9 p.m., they ran a license check on a vehicle and discovered that its registration had been suspended for an insurance violation. The officers pulled the vehicle over.

There were three occupants in the car—the driver, a front seat passenger and a back seat passenger. The man in the back, Lemon Johnson, watched the officers approach the vehicle. While Machado asked the driver to step out of the car, Gittings checked on the front seat passenger; Trevizo addressed Johnson. She observed that he was wearing a blue bandanna, an item that she knew from her work experience was consistent with membership in the Crips gang.

Trevizo asked Johnson for some identification. He stated his name and date of birth, but said he had no ID with him. He said he was from Eloy, Arizona, a town Trevizo knew was home to a Crips member gang. She also learned that he had been to prison for burglary and had been out for about a year. Trevizo noticed that Johnson had a police scanner in his jacket pocket, which she found unusual. She concluded that his purpose in having this device was to keep track of police activity nearby.

She wanted to question him away from the front seat passenger about his potential gang activity, so she asked him to step out of the car. As he did so, she patted him down over his outer garments. Her hand contacted the butt of handgun by Johnson's waistband. He struggled to get free and she handcuffed him.

Because of his prison term, Johnson was forbidden to possess a handgun in Arizona. He was charged with unlawful possession. At trial, he filed a motion to suppress the gun evidence, arguing that it was the fruit of an unlawful search. The trial court denied the motion and the jury convicted him. He appealed. The Court of Appeals reversed, reasoning that Johnson ceased to be in custody when he exited the car to discuss his potential gang connections. That discussion had nothing to do with the insurance violation that led to the traffic stop and was, in the appeals court's analysis, an unrelated consensual conversation. The Arizona Supreme Court denied review.

The state filed a petition for review with the United States Supreme Court, which granted the request to resolve the constitutional issue.

ANALYSIS: This case involves a type of police encounter known by courts as a "Terry stop." It gets its name from the 1968 United States Supreme Court decision in Terry v. Ohio. In that case, a police officer observed two men walking back and forth in front of a jewelry store, peering into it. The officer determined from the men's behavior that they were planning a robbery. The officer approached them, inquired what they were doing and when their answers did not remove his suspicions, he patted down their outer clothing and discovered weapons.

Frisking, or patting down the men's clothing, was a search. Because the officer did not have probable cause to believe the men were going to rob the store, he would have been barred from searching them under the law at the time. The Supreme Court determined in Terry that the brief and light contact employed by the officer was a just means of protecting his own safety and the public's and was a minimal intrusion on the suspects once they had failed to allay his suspicions concerning their behavior. In other words, the Constitution did not prevent authorities from searching for dangerous weapons by briefly frisking persons who could not provide an innocent and believable explanation for their suspicious conduct.

The Arizona Court of Appeals reasoned that the conduct underlying the police stop here was a vehicle registration violation. Johnson, a passenger, had no connection to that offense. Therefore, Trevizo did not have any reasonable suspicion concerning Johnson's behavior on which to base a patdown search or frisk.

A unanimous United States Supreme Court disagreed. During a traffic stop, the driver and any passengers are temporarily under police control. When Officer Trevizo approached the vehicle, she observed Johnson wearing a bandanna she associated with a criminal gang. Her discussion with him, and the police scanner in his jacket pocket, reaffirmed her suspicions that he was a potential gang member who could be armed and dangerous. The fact that the vehicle was not registered to Johnson did not remove the suspicion necessary to frisk him when other potentially criminal circumstances presented themselves as soon as Trevizo approached the car. He was not free to leave as he stepped out of the car and their conversation was not a casual one lacking reasonable suspicion of criminal activity.

Although Johnson's behavior was not the cause of the traffic stop, the Terry case permitted police to search him because there was reasonable basis to suspect he was involved in criminal activity and the brief exchange he had with Trevizo did not alleviate that suspicion.

EXCERPTS FROM THE COURT'S OPINION: (By Justice Ginsburg)): "Terry established the legitimacy of an investigatory stop in situations where [the police] may lack probable cause for an arrest. When the stop is justified by suspicion (reasonably grounded, but short of probable cause) that criminal activity is afoot, the Court explained, the police officer must be positioned to act instantly on reasonable suspicion that the persons temporarily detained are armed and dangerous. Recognizing that a limited search of outer clothing for weapons serves to protect both the officer and the public, the Court held the patdown reasonable under the Fourth Amendment.

"Most traffic stops, this Court has observed, resemble, in duration and atmosphere, the kind of brief detention authorized in Terry. Furthermore, the Court has recognized that traffic stops are especially fraught with danger to police officers. The risk of harm to both the police and the occupants of a stopped vehicle is minimized, we have stressed, if the officers routinely exercise unquestioned command of the situation.

"Three decisions cumulatively portray Terry's application in a traffic-stop setting: Pennsylvania v. Mimms, Maryland v. Wilson, and Brendlin v. California. "In Mimms, the Court held that once a motor vehicle has been lawfully detained for a traffic violation, the police officers may order the driver to get out of the vehicle without violating the Fourth Amendment's proscription of unreasonable searches and seizures. The government's legitimate and weighty interest in officer safety, the Court said, outweighs the de minimis

additional intrusion of requiring a driver, already lawfully stopped, to exit the vehicle. Citing Terry as controlling, the Court further held that a driver, once outside the stopped vehicle, may be patted down for weapons if the officer reasonably concludes that the driver might be armed and presently dangerous.

"Wilson held that the Mimms rule applied to passengers as well as to drivers. Specifically, the Court instructed that an officer making a traffic stop may order passengers to get out of the car pending completion of the stop. The same weighty interest in officer safety, the Court observed, is present regardless of whether the occupant of the stopped car is a driver or passenger.

"It is true, the Court acknowledged, that in a lawful traffic stop, there is probable cause to believe that the driver has committed a minor vehicular offense, but there is no such reason to stop or detain the passengers. On the other hand, the Court emphasized, the risk of a violent encounter in a traffic-stop setting stems not from the ordinary reaction of a motorist stopped for a speeding violation, but from the fact that evidence of a more serious crime might be uncovered during the stop. The motivation of a passenger to employ violence to prevent apprehension of such a crime, the Court stated, is every bit as great as that of the driver. Moreover, the Court noted, as a practical matter, the passengers are already stopped by virtue of the stop of the vehicle, so the additional intrusion on the passenger is minimal.

"Completing the picture, Brendlin held that a passenger is seized, just as the driver is, from the moment a car stopped by the police comes to a halt on the side of the road. A passenger therefore has standing to challenge a stop's constitutionality. After Wilson, but before Brendlin, the Court had stated, in dictum, that officers who conduct routine traffic stops may perform a 'patdown' of a driver and any passengers upon reasonable suspicion that they may be armed and dangerous. That forecast, we now confirm, accurately captures the combined thrust of the Court's decisions in Mimms, Wilson, and Brendlin."

COMMENTS & QUESTIONS

1. Where was Lemon Johnson when Officer Trevizo encountered him?
2. Why did Trevizo stop him?
3. Did Officer Trevizo observe Johnson commit a crime?

The Fourth Amendment to the United States Constitution states: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated …"

The Fourth Amendment was added in the Constitution to prevent government authorities from oppressing the public with intrusive searches of their homes, businesses and persons. A corrupt government that can conduct searches and seizures with impunity can overturn the democratic process, quiet dissent, detain dissenters, and seize power permanently. Because unrestrained intrusion into public privacy presents a threat to democracy, the courts discourage unlawful searches with the "fruit of the poisonous tree" doctrine. Under this principle, evidence seized as the result of an unconstitutional search is inadmissible in court. The "poisonous tree" refers to the unreasonable search. The "fruit" is the item that is seized pursuant to the unreasonable search. Without the evidence, the government typically cannot win a conviction, removing the incentive to engage in overzealous and unlawful searches.

The Fourth Amendment has been the subject of more cases than any other single provision in the Constitution. Volume upon volume of legal treatises have been written about this Amendment. There has been much to be examined since every search and seizure is unique, requiring an independent determination as to what is reasonable and unreasonable. Many times, judges disagree as to what is reasonable. However, in this situation, a unanimous Supreme Court found that Johnson could be frisked for weapons as a passenger in an automobile that had been stopped for a traffic violation.

Do you think that this means that any and every passenger in an automobile in an automobile stopped for a traffic violation can be frisked for possible weapons? Can the police now order everyone in a stopped automobile to exit the car and be frisked?

Does a Terry stop require the conduct that catches a police officer's attention to be illegal? Can a person be arrested for acting suspiciously? What does "suspicious" mean? Are suspicious circumstances required to search a passenger in a stopped automobile?

Would Johnson's conviction stand if the police had had no reason to pull over the car he was riding in, or offered an impermissible one, like they pulled over the car because the driver wasn't white?

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