Case No. 15-2154

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Quentin Scott,	)
	)
Plaintiff - Appellant,	)
	)
v.	)
	)
City of Albuquerque, et al.,	)
	)
Defendants - Appellees.	)

On Appeal from the United States District Court
For the District of New Mexico
Honorable Scott W. Skavdahl, presiding

No. 1:14-CV-0665-SWS-WPL

APPELLANT'S SUPPLEMENTAL BRIEF

Respectfully Submitted,

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ORAL ARGUMENT REQUESTED

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I. SUMMARY OF A.M. PANEL OPINION

In A.M. v. Holmes, No. 14-2066, 2016 WL 3999756, at *1–2 (10th Cir. July 25, 2016), the panel opinion affirmed summary judgment for Arthur Acosta, who arrested a middle school student for intentionally burping in class. The panel's qualified immunity analysis focused exclusively upon the second prong of the qualified immunity analysis. Id. at *10. ("We elect to center our analysis on the clearly-established-law question."). Thus, the panel opinion's qualified immunity analysis focused on whether Arthur Acosta had "arguable probable cause" to arrest F.M.

Judge Holmes took care in analyzing the arguable probable cause standard with the particular facts that lead to Acosta's arrest of F.M. Judge Holmes carefully explained the misconduct that lead to Acosta's decision to arrest. F.M.'s teacher had complained to Acosta that "F.M. had generated several fake burps, which made the other students laugh and hampered class proceedings." Id. at *1. The teacher complained to Acosta that F.M. ignored requests to stop and that she told him to sit outside in the hallway. Id. Judge Holmes wrote that once F.M. was in the hallway, "he leaned into the classroom entranceway and continued to burp and laugh." The teacher was forced to deal with F.M. "repeatedly" Id. Ultimately, Acosta based his arrest on (1) the teacher's statement that "F.M.'s (fake) burping and other specified misconduct prevented her from controlling her class, and (2)

his observation that, when he responded to [the teacher's] call, 'there was no more teaching going on,' . . .because [the teacher] was monitoring F.M. in the hallway." Id. at *1-2. Judge Holmes summarized Acosta's basis for the arrest as a belief that "F.M.'s behavior constituted an obvious and willful interference with the educational process." A.M. v. Holmes, No. 14-2066, 2016 WL 3999756, at *12 (10th Cir. July 25, 2016); N.M. Stat. Ann. § 30-20-13(D) (Willful Interference with the Educational Process).

In applying the Willful Interference with the Educational Process statute, Judge Holmes wrote: "The ordinary meaning of these statutory terms would seemingly encompass F.M.'s conduct because F.M.'s burping, laughing, and leaning into the classroom stopped the flow of student educational activities, thereby injecting disorder into the learning environment, which worked at cross-purposes with [the teacher's] planned teaching tasks." A.M. v. Holmes, No. 14-2066, 2016 WL 3999756, at *13 (10th Cir. July 25, 2016). Judge Holmes found that F.M.'s burping and laughing disturbed "the good order of [the] classroom" and brought "the activities of that classroom to a grinding halt." Id. at *18.

Quentin Scott has argued here that State v. Silva, 1974-NMCA-072, 86 N.M. 543, 547, 525 P.2d 903, 907, provided sufficient notice to Officer Hensley that Willful Interference with the Education Process required a physical disruption of school and a disruption that affected the mission of the school as a whole. Id.

("Its operative verbs (disrupt, impair (as construed), interfere with, obstruct), read as a whole, denote a more substantial, more physical invasion."). The panel opinion rejected Silva as a basis for providing fair notice to officers of how the language in the statute was intended to be applied. A.M. v. Holmes, No. 14-2066, 2016 WL 3999756, at *16 (10th Cir. July 25, 2016). In the same manner, the A.M. panel rejected any claim that the standard in evaluating handcuffing claims for minors is any different than adults. A.M. supra at * 24. This Court cannot disregard or overrule circuit precedent. United States v. Foster, 104 F.3d 1228, 1229 (10th Cir. 1997) (citations omitted). However, given the distinct facts in this appeal, Scott contends that this Court should overrule the judgment of the district court.

II. QUALIFIED IMMUNITY

Judge Holmes acknowledges that the Tenth Circuit employs a sliding scale approach in qualified immunity. A.M. v. Holmes, No. 14-2066, 2016 WL 3999756, at *6 (10th Cir. July 25, 2016) ("We have therefore adopted a sliding scale to determine when law is clearly established. 'The more obviously egregious the conduct in light of prevailing constitutional principles, the less specificity is required from prior case law to clearly establish the violation.'") (citations omitted). However, on the arrest claim, Judge Holmes never squarely addressed the "sliding scale." In contrast, on A.M.'s excessive force claim, Judge Holmes clearly commented in footnote 17 that the handcuffing of a fourteen-year-old,

compliant student was not so egregious as to allow A.M. to simply rely upon generalized excessive force principles. As Judge Holmes wrote, the specificity of the law required is lessened when the egregiousness of the alleged conduct increases. A.M. v. Holmes, No. 14-2066, 2016 WL 3999756, at *21 (10th Cir. July 25, 2016), citing Pauly v. White, 814 F.3d 1060, 1075 (10th Cir. 2016) for the proposition that "when an officer's violation of the Fourth Amendment is particularly clear from *Graham* itself, we do not require a second decision with greater specificity to clearly establish the law" and Browder v. City of Albuquerque, 787 F.3d 1076, 1083 (10th Cir. 2015) for the proposition that "hardly any caselaw specificity was necessary in our clearly-established-law inquiry because the appeal involved a deadly motor-vehicle accident where the officer was 'speeding on [his] own business.'"

Here, the arrest of a 5'4", 115-pound seventh grader for walking out of his classroom is sufficiently egregious for this Court to relax the specificity required for a qualified immunity analysis. Every commentator and, in particular, the commentators Judge Holmes cites notes the shocking development of the arrest of minor children from schools. For instance, The Economist wrote:

> Of 260,000 pupils referred to the police in the 2011-12 school year, 27% were black, though blacks represented only 16% of the student population. And those who become entangled in the justice system are likely to remain so. The opening of a juvenile criminal record—which may not be scrubbed clean until the age of 21—is an augury of further

> arrests, further convictions and eventual imprisonment, a spiral known to researchers as the "school-to-prison-pipeline."

Police in Schools: Arresting Developments, The Economist, Jan. 9, 2016.

> The growing reliance by schools on policing tactics and exclusionary discipline to address misbehavior on its own raises significant concerns. But it is even more disconcerting given the availability of proven alternatives to securing the school environment that avoid the collateral consequences resulting from arrests and school removals. Positive behavioral interventions and supports, restorative justice practices, and other common-sense alternatives have been proven to reduce misbehavior and lead to greater educational achievements. Yet current safety and discipline practices in many of the nation's schools, including in its largest school district, New York City, largely ignore such alternatives and instead continue to rely on police tactics and exclusionary discipline to maintain safety.

Udi Ofer, Criminalizing the Classroom: The Rise of Aggressive Policing and Zero Tolerance Discipline in New York City Public Schools, 56 N.Y.L. Sch. L. Rev. 1373, 1375 (2012).

Most commentators note that the proliferation of police officers in schools started with the implementation of "zero tolerance" policies in the 1990's and gained more traction after two students at Columbine High School killed twelve students and one teacher and injured twenty-three others in school in 1999. Id. "As a disciplinary approach, zero tolerance mandates that certain behaviors trigger severe responses, regardless of mitigating circumstances. This approach almost always begins with removal of the child from the classroom, and often removal from school, including removal through an arrest. Zero tolerance schools impose suspensions, expulsions, and even arrests for infractions across the spectrum –

from disrespectful behavior and writing on a desk to drug use and weapon possession." Id. at 1375-79.

There exist no countervailing studies to the unanimous conclusion that the arrest of children from schools for minor infractions has a deleterious effect on the individual student arrested and on other school children in the classroom who live under such a regime. Arrested children are more likely to drop out of school and the arrests are often implemented in a discriminatory manner. The policies are more often enforced against male students, students of color, students with disabilities, and students from low-income households.

> The American Psychological Association (APA) commissioned a Zero Tolerance Task Force in 2006 to study the evidence on the effects of zero tolerance on student behavior and achievement. The APA found that removing a misbehaving student from school does not result in a safer school environment for other students. In fact, data on school climate shows that schools that have a higher rate of suspension and expulsion also have less satisfactory school climate ratings and spend a disproportionate amount of school and staff time on disciplinary matters rather than academic performance. Studies have also found "a negative relationship between disciplinary exclusion and measures of achievement." Schools that rely more heavily on exclusionary discipline demonstrate less educational achievement, even when controlling for other factors such as student demographics.

Id. at 1401–03 (2012); See also, Jason B. Langberg & Barbara A. Fedders, How Juvenile Defenders Can Help Dismantle the School-to-Prison Pipeline: A Primer on Educational Advocacy and Incorporating Clients' Education Histories and Records into Delinquency Representation, 42 J.L. & Educ. 653, 657–62 (2013) ("Law enforcement has intervened in areas that are many times "minor incidents formerly viewed as typical childish behavior and 'teachable moments.'")

The A.M. opinion also explained that whether a law enforcement officer's reliance on a statute is reasonable depends on, *inter alia*, "the degree of specificity with which the statute authorized the conduct in question." A.M. v. Holmes, No. 14-2066, 2016 WL 3999756, at *12 (10th Cir. July 25, 2016), citing Mimics, Inc. v. Vill. of Angel Fire, 394 F.3d 836, 846 (10th Cir. 2005) (quoting Roska ex rel. Roska v. Peterson, 328 F.3d 1230, 1253 (10th Cir. 2003)).

The Silva, criminal defendants raised a vagueness challenge to the statute. The New Mexico Court of Appeals limited the reach of the statute through a reasonable interpretation of legislative intent. Otherwise, the statute would indeed be void for vagueness. "Any statute which forbids or requires the doing of an act in terms '. . . so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application . . .', violates due process." State v. Silva, 1974-NMCA-072, 86 N.M. 543, 546, 525 P.2d 903, 906, quoting, Connally v. General Const. Co., 269 U.S. 385 (1926). The challenged language in Silva is the same language that Hensley contends applies herein. The Silva Court found the statute not to be vague or overbroad by reading common sense limitations on the language of the statute. A police officer, especially one who works as a school resource officer, should, at a minimum, be required to apply common sense principles to statutory language. The qualified immunity standard is "arguable

probable cause." Inferred in the standard is "plausible" argument rather than "any" argument.

III. THE ARREST CLAIM

Thus, the arrest of a child for walking away from his classroom approaches, if not, reaches the level of egregiousness that the Court requires for relaxing the specificity of judicial precedent. If the qualified immunity test is a true sliding scale, the arrest of Scott certainly reaches farther on the egregiousness end of the scale than the arrest of F.M. even. The officer is assigned to a school to provide safety for students and staff. Scott threatened no one's safety. An SRO should know of the danger posed to children of arrest. The harmful effects on children should be balanced on the egregiousness end of the sliding scale.

Conducting the same analysis that Judge Holmes conducted under the criminal statute, this panel should find that no reasonable police officer would believe that he had probable cause to arrest Scott for Willful Interference with the Education Process. In A.M., Judge Holmes found that the "ordinary meaning" of disruption and interfere encompassed F.M.'s conduct of "burping, laughing, and leaning into the classroom" since it "stopped the flow of student educational activities, thereby injecting disorder into the learning environment." A.M. v. Holmes, No. 14-2066, 2016 WL 3999756, at *13 (10th Cir. July 25, 2016). Hensley had no such evidence when he arrested Scott. He observed no disruption

of teaching. Scott was sitting with the janitors. Even a plain reading of the statute would not allow a reasonable officer to believe that Scott disrupted or interfered with the school process in any manner.

Judge Holmes relied on a district court opinion in buttressing the panel's interpretation of the statute. A.M. v. Holmes, No. 14-2066, 2016 WL 3999756, at *18 (10th Cir. July 25, 2016); G.M. ex rel. B.M. v. Casalduc, 982 F. Supp. 2d 1235, 1240 (D.N.M. 2013). It is worth noting that District Court Judge Robert C. Brack has found a triable issue of material fact in a similar factual circumstance where a student was alleged to have skipped in school suspension. Judge Brack noted that the statute required willful behavior and that there was a disputed issue of fact related to whether the arresting officer (Hensley) had probable cause to believe that the boy had willfully disrupted school. Castaneda v. City of Albuquerque, et al., 1:14-CV-00103-RB-LAM, Doc. 89, pp. 17-23 (D.N.M. February 4, 2016) (opinion attached).

In short, the A.M. panel opinion's analysis of the effect of Silva on qualified immunity cannot be challenged or disturbed. However, because of the factual differences in the allegations against F.M. and against Quentin Scott, this Court may and should decide that Officer Hensley has no qualified immunity.

IV. THE EXCESSIVE FORCE CLAIM

Scott's handcuffing claim includes contentions that Hensley intentionally made the cuffs right, that he complained of the tightness, and that his wrists were bruised and swollen. Opening Brief at pp. 5-6. F.M. did not complain about tightness. In conjunction with Scott's contention that Hensley mocked his inability to wipe his weeping eyes and runny nose and his contention that Hensley intentionally paraded Scott in front of fellow students, a reasonable jury could find that Hensley intended to and did inflict suffering on Scott through handcuffing him. Fisher v. City of Las Cruces, 584 F.3d 888, 898 (10th Cir. 2009) (plaintiff must show some actual injury, whether physical or emotional).

V. THE ADA CLAIM AND MUNICIPAL CLAIM

The A.M. decision does not affect Scott's arguments on his ADA claim or on his municipal claim. In fact, the panel opinion's focus on the second prong of the qualified immunity analysis allows this panel to determine whether Scott alleged a constitutional violation. Hinton v. City of Elwood, Kan., 997 F.2d 774, 782 (10th Cir. 1993). If this Court finds that Hensley violated Scott's constitutional right to be free of wrongful arrest, it may consider Scott's municipal claim even if Hensley received immunity.

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

As required by Fed. R. App. P. 32(a)(7)(c), I certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) insofar as this brief is proportionally spaced using Microsoft Word 2013 in 14 point Times New Roman.

I certify that the information on this form is true and correct to the best of my knowledge and belief formed after a reasonably inquiry.

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CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify that a copy of the foregoing **APPELLANT'S SUPPLEMENTAL BRIEF**, as submitted in Digital Form via the court's ECF system, is an exact copy of the written document filed with the Clerk and has been scanned for viruses with ESET Endpoint Security™ version 5.0.2228.1, with the most recent update occurring on August 15, 2016; and, according to the program, is free of viruses. 10th Cir. R. 25.3. In addition, I certify all required privacy redactions have been made.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing **APPELLANT'S SUPPLEMENTAL BRIEF** was furnished through (ECF) electronic service to the following on this 16th day of August, 2016:

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