McHugh, C.J., Concurring in part, Dissenting in part Opinion, Case No.23349 Phillip Leon M. v. Greenbrier County Board of Education

Phillip Leon M. v. Greenbrier County Board of Education

No. 23349

McHugh, Chief Justice, concurring, in part, and dissenting, in part:

Although I agree with the majority's statement that providing a safe and secure school environment is a compelling State interest, I disagree with the majority's conclusion that in all circumstances W. Va. Const. art. XII, 1 "requires the creation of an alternative program for pupils suspended or expelled from their regular educational program for a continuous period of one year for the sole reason of possessing a firearm or other deadly weapon at an educational facility." Syl. pt. 4, in relevant part, Phillip Leon M. v. Greenbrier County Board of Education, No. 23349, ___ W. Va. ___, ___ S.E.2d ___ (Dec. 13, 1996).[(1)]

As noted by the majority, education is a fundamental, constitutional right in this State pursuant to W. Va. Const. art. XII, 1. See syl. pt. 3, Pauley v. Kelly, 162 W. Va. 672, 255 S.E.2d 859 (1979). Thus, if the State takes some action which denies or infringes upon a person's fundamental right to an education, then strict scrutiny will apply and the State must prove that its action is necessary to serve some compelling State interest. See syl. pt. 3, Phillip Leon M., supra, and Lewis v. Canaan Valley Resorts, Inc., 185 W. Va. 684, 408 S.E.2d 634 (1991). Furthermore, any denial or infringement of the fundamental right to an education for a compelling State interest must be narrowly tailored. Cf. Wheeling Park Commission v. Hotel and Restaurant Employees, International Union, AFL-CIO, No. 23448, slip op. at 9, ___ W. Va. ___, ___, ___ S.E.2d ___, ___ (Nov. 18, 1996) (When analyzing whether a restriction imposed by the government violates a person's right to free speech is content-based, the government must show that its limitation on the expressive activity "'is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end.'" (citation omitted)).

The majority acknowledges that providing a safe and secure school environment is a compelling State interest. No one can disagree that the increase in the number of students who are bringing firearms and other deadly weapons onto school property is a serious issue currently facing our educational system. The presence of firearms or other deadly weapons in our schools not only disrupts the educational process, but threatens human life. Thus, it is imperative that the leaders in our schools have authority to take the actions needed to protect students, teachers, and other school personnel. The majority and I agree that the state has a compelling State interest in protecting students, teachers and other school personnel. The majority and I disagree, however, on what

actions may be taken without violating our constitution when a student brings a firearm or deadly weapon onto school property.

As previously set forth by the majority, the Greenbrier County Board of Education in the case at bar expelled J.P.M., a ninth grade student, for two full semesters for possessing a firearm on the grounds of Eastern Greenbrier Junior High School. The majority held that

the State, by refusing to provide any form of alternative education, had failed to tailor narrowly the measures needed to provide a safe and secure school environment. Therefore, we find that the 'thorough and efficient' clause of Article XII, Section 1 of the West Virginia Constitution, requires the creation of an alternative program for pupils suspended or expelled from their regular educational program for a continuous period of one year for the sole reason of possessing a firearm or other deadly weapon at an educational facility.

Syl. pt. 4, in relevant part, Phillip Leon M., supra. The premise of the majority's holding is that the State may have a compelling State interest in removing a student who brings a firearm or other deadly weapon onto school property from a "regular" educational facility, but the State may never have a compelling State interest in temporarily removing such a student from all state provided educational experiences. I cannot agree with this premise.

The majority virtually nullifies this Court's holding in Keith D. v. Ball, 177 W. Va. 93, 350 S.E.2d 720 (1986). In Keith D. this Court upheld the school board's decision to suspend four students for a year for making false bomb threats after concluding that "[t]he students in this case have temporarily forfeited their right to education." Id. at 95, 350 S.E.2d at 723 (footnote omitted). Though Keith D. did not expressly hold that an alternative education need not be provided to students who are expelled from school for a year, it nevertheless concluded that

[a]n individual does not have the right to exercise his fundamental constitutional rights at all times, under all circumstances, and by all methods. An exercise of rights in such a fashion that it deprives others of their lawful rights may result in a forfeiture of those rights. See Barker v. Hardway, 283 F. Supp. 228, 238 (S.D.W. Va.), aff'd per curiam, 399 F.2d 638 (4th Cir. 1968), cert. denied, 394 U.S. 905, 89 S. Ct. 1009, 22 L. Ed. 2d 217 (1969).[(2)]

Id. at 95, 350 S.E.2d at 722 (emphasis and footnote added). I believe now as I did when Keith D. was decided, that a right to an education may be denied in some circumstances. This is particularly true when the lives of others are threatened by the dangerous actions of a student.

Though the majority states that "a safe and secure school environment is of paramount importance[,]" it fails to acknowledge the obvious fact that the lives of teachers and

other school personnel who are required to work with the expelled student in an alternative setting will be threatened no less. Phillip Leon M., slip op. at 10 n. 9. The safety of these individuals cannot be ignored or overlooked. It goes without saying that a student with a gun or other dangerous weapon threatens not only other students, but those teachers and school personnel who are required to work virtually side by side with the expelled student.

Clearly, whether a student should be provided an alternative education depends on the unique circumstances of his or her case. Thus, when determining whether the State has narrowly tailored the measures warranted to provide a safe and secure school environment, a court must look at all of the circumstances present in each particular case. I, therefore, cannot accept the majority's conclusion that in every case in which a student is expelled from school for one year for possessing a firearm or other deadly weapon on school property, the State must provide an alternative education.[(3)] While in some circumstances, the State should provide an alternative education to a student who has been expelled for possessing a firearm or other dangerous weapon on school property, there should be a point when a student's actions are so egregious, that in order to protect teachers and other school personnel, the State may determine that there is a compelling State interest not to provide an alternative education to that particular expelled student.[(4)] Accordingly, based on the above discussion, I respectfully concur, in part, and dissent, in part.

I am authorized to state that Justice Workman joins in this separate opinion.

1. [1]I recognize that one issue which could be raised is whether it would violate the equal protection provision of our State constitution if one county school system provides alternative education when another county school system does not. However, because this issue is not addressed by the majority, I decline to address it in my dissent.

2. [2]In Barker, supra, the United States District Court was confronted with determining whether Bluefield State College's suspension of students for engaging in a non-peaceful and violent protest demonstration on the college's campus violated, inter alia, their First Amendment right of free speech. The court in concluding that the students' actions "exceeded this constitutional privilege and forfeited its protection . . ." stated: "I have failed to find any case saying that the right of free speech and peaceful assembly carries with it the right to verbally abuse another or to threaten him with physical harm or to deprive him of his right to enjoy his lawful pursuits." Id. at 238. See generally 16A Am. Jur. 2d Constitutional Law 446 (1979) ("Every constitutional right or privilege must be enjoyed with such limitations as are necessary to make its enjoyment by each consistent with a like enjoyment by all, since the right of all is superior to the right of any one." (footnote omitted)). Likewise, the fundamental right to an education does not carry with it the right to endanger the lives of others.

3. [3]Although this dissent focuses only on whether an alternative education must be provided when a student is expelled, another important issue is how school authorities

determine when expulsion is the best solution to a problem. For instance, it is questionable as to whether it would be appropriate to expel a student who carried a knife in his or her lunch box for the purpose of cutting chicken. Although in some circumstances a knife may be used as a deadly weapon, it defies common sense to find that a knife being used to cut one's lunch is a deadly weapon. Thus, the

provision mandating that students possessing a firearm or other deadly weapon be expelled for a minimum of twelve consecutive months in W. Va. Code, 18A-5-1a [1995] raises constitutional concerns. However, as noted by the majority, this case arose prior to the enactment of W. Va. Code, 18A-5-1a [1995]. See Phillip Leon M., slip op. at 2 n. 4. Though W. Va. Code, 18A-5-1a [1995], is not at issue in the case at bar, it is at issue in Cathe A. Guardian of C.E.A. v. Doddridge Board of Education, No. 23350, which is scheduled to be argued before this Court on February 25, 1997.

4. [4]In Doe v. Superintendent of Schools of Worcester, 653 N.E.2d 1088 (Mass. 1995) a student was expelled from school for possessing a lipstick case containing a knife blade. The student had a history of problems including a history of three suicide attempts. The majority of the Supreme Judicial Court of Massachusetts held, in Doe, that the school had a rational basis for expelling the student after concluding that a right to an education was not a fundamental right. Of interest to me, however, is the dissenting opinion of Chief Justice Liacos who not only concluded that a right to education is a fundamental right, but also concluded that expulsion may be the least restrictive alternative when a student's unlawful conduct could be dangerous to others:

[When determining whether the actions of the State were the least restrictive that could be taken or were narrowly tailored, there are many factors which should be considered.] In other contexts, the court looked to various factors [such] as the preservation of life, the protection of innocent persons, the prevention of suicide, and the maintenance of orderly administration. . . . In applying these analytical factors here, especially the protection of students and staff, and the prevention of suicide (given the plaintiff's unfortunate history), it is possible to conclude that because the school has a measure of custody over each student, statutory expulsion is the least restrictive alternative. Transfer to another school, tutoring, or daily searches would not necessarily have eliminated safety concerns. We do not know if home education would have been practical. A short suspension might not have served the compelling State interest. In addition, it is conceivable that a student could use possession of an item such as that at issue to manipulate the administration into providing an alternative educational setting. Deterrence could be impaired. In this context, expulsion could be adequately justified as the least restrictive alternative.

Id. at 1103 (Liacos, Chief J., dissenting) (citations omitted).

Moreover, although the majority did not focus on this point, I think

there is a compelling State interest in maintaining discipline over the students. As suggested in Doe, supra, above, providing an alternative education to some students who bring firearms or other deadly weapons onto school property may not effectively deter that student or other students from engaging in similar dangerous conduct in the future.