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Mission Statement

The primary purpose of the Illinois State School Law Quarterly is to provide a forum for the interchange of ideas, theories, and issues on various aspects of school law among practitioners, professors, and attorneys. The emphasis is on analyzing issues in school law for the purposes of developing new theories to explain current and past developments in the law and to provide the theoretical framework which can be used to anticipate and predict future developments in school law.

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A Case of First Impression: A Student Death Threat

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For the past few years schools across our country have become highly sensitive to violence occurring on their premises, especially violence committed by their own students. As reported in the September 2002 issue of *Phi Delta Kappan*, the most recent report of the Phi Delta Kappan/Gallup Poll shows that (1) discipline and (2) fighting, violence, & gangs are very serious problems facing local public schools.[i]

Such data are just a reminder of the nation-shocking event in April 1999 at Columbine High School in Colorado where two students shot and killed twelve students, one teacher, and themselves. Since that time the national perspective on school safety has undergone a radical change. School officials and government officials concerned with school safety, such as police officers and judges, now consider school safety as a serious matter deserving of their close attention. No longer do people say, when they become aware of a threat of violence, "Kids will be kids; not to worry, it's just bravado."

It is within this current period of hyper-sensitivity that a relatively unknown education law case, a case involving a student-to-student death threat, arose in the relatively unknown small town of Winner, which is located in south central South Dakota. This article will explore the decision rendered by the Supreme Court of South Dakota subsequent to the arrest of the student threat-maker, his conviction by the local juvenile court, and his appeal to the state's highest court. After an examination of the court's decision in *People ex.rel. C.C.H.*[ii], this article will offer some implications for our schools.

Pertinent Facts.[iii] On February 13, 2001, C.C.H., a middle school eighth-grade boy, was staring across the room at another boy, B.C., instead of working on his assigned home economics sewing project. C.C.H.'s teacher spoke with him about his behavior. The boy stated in a "serious tone" to his teacher that he was angry at some of the other students and wanted to kill B.C. The teacher did not discuss this comment with C.C.H. later that day she notified her school administrators about the situation via e-mail and requested their help: "I am not sure what I should be doing. C.C.H. is my 8th period FACS [home economics] class. When he is here, he will not work for me. He wanted to [kill B.C.] and [S] is irritating him. And the White Girls are looking at him. As a result he gets nothing done. I am open to suggestions. There is a potential explosion about to happen, and I want some way to deal with the problem ahead of time. Thanks for your help."[iv] The teacher, who at that time had 27 of teaching experience in South Dakota schools and had taught in the Winner Middle School for 13 years, including two years with C.C.H., clarified that by "potential explosion" she meant that she feared the boys would fight. She also said that she had a good, trusting relationship with C.C.H.

The middle school principal responded by e-mail to the teacher, advising her only that she "should send C.C.H. to the office if he was not doing his work or 'punking out' other students." The teacher testified that on Feb. 14 C.C.H. had a very good day in class, working well on his individual sewing project. Just before the class ended, C.C.H told his teacher in response to her solicitation that he still wanted to kill B.C. because of the things that had been going on.

In another e-mail, despite the fact that C.C.H.'s statement "scared" her, the teacher wrote: "All went well today!!! The only comment was at the end of class he wanted to kill B.C. for the things that had been happening forever. Thanks for the help." The Winner Chief of Police said that C.C.H. denied to him that he had threatened B.C.

On February 15, the school administrators notified the local police officials, who then charged C.C.H. with one count of simple assault and two counts of disorderly conduct. The trial judge subsequently dismissed the assault charge and one count of disorderly conduct. The judge adjudicated C.C.H. to be delinquent and a child in need of supervision (ChINS).

In South Dakota such an adjudication in a juvenile court is the equivalent of a guilty verdict in an adult court. Under South Dakota law a delinquent child is defined as "any child ten years of age or under who... violates any federal, state, or local law or regulation for which there is a penalty of a criminal nature for an adult...."[v] C.C.H. appealed the local judge's decisions to the South Dakota Supreme Court.

Standards of Review. The Supreme Court of South Dakota employed two "beyond-a-reasonable-doubt" standards in reviewing the case. In regard to the delinquency offense the court required the state to prove beyond a reasonable doubt each element of that charge and in reviewing the evidence on delinquency construed inferences in favor of supporting the trial court's decision. In regard to the second adjudication, the court also required the state to prove the ChINS allegation beyond a reasonable doubt and applied a clearly erroneous standard in its review of the trial court's decision.[vi]

Decision of the Supreme Court of South Dakota. The State Supreme Court viewed the decisions of the trial court as two separate issues, the delinquency adjudication as Issue 1 and the Child in Need of Supervision adjudication as Issue 2. Two different judges wrote the majority opinions of the Supreme Court on those issues.

By a 4 – 1 decision the court reversed the delinquency adjudication. Appellant C.C.H. had argued in his initial brief and then his reply brief that the trial court erred in that the State had not proven the three elements of the disorderly court beyond a reasonable doubt: that C.C.H. did not have a criminal intent to threaten B.C. when he spoke privately to his teacher; that no serious public alarm stemmed from C.C.H.'s words; and that C.C.H did not engage in threatening behavior toward B.C. In doing so, C.C.H. argued that his words "I want to kill B.C." were "mere words of frustration," "a crude expression of frustration," and "bluster and hyperbole."[vii]

In this way, C.C.H. raised the issue of what constitutes a true threat, pursuant to the seminal decision of the United State Supreme Court in *Watts v. United States*.[viii] C.C.H. contended, therefore, that his words were protected as free speech under the First Amendment and did not constitute a criminal, true threat to B.C. *Watts* offers two categories of speech, saying that upon consideration of the particular facts of a case, a true threat "must be distinguished from what is constitutionally protected speech."[ix]

Watts deals with a threat against the life of President Lyndon B. Johnson, made at a 1966 political, anti-Vietnam War rally on the Washington Monument Grounds. Eighteen-year old Watts said in one small-group discussion at the rally, "They always holler at us to get an education. And now I have already received my draft classification as 1A, and I have got to report for my physical this Monday coming. I am not going. If they ever made me carry a rifle, the first man I want to get in my sights is L.B.J...."[x]

The Supreme Court reversed the conviction of Watts. Since then conflicting rulings have arisen in various decisions as the lower courts have sought tests to determine specifically what constitutes a true threat. In noting that the U.S. Supreme Court has not established a bright-line test to distinguish a true threat from protected speech, a panel of three judges of the Eighth Circuit,[xi] in a student death-threat case, offered a set of factors to consider. The following five questions which include these factors, are guides to help judges make the necessary distinction between a true threat and speech protected by the First Amendment: (1) Would an objectively reasonable recipient view the speech as a threat? (2) Was the alleged threat communicated directly to the victim? (3) Had the threat-maker made similar statements to the victim previously? (4) Did the victim have reason to believe that the threat-maker had a propensity to be violent? (5) Did the recipient of the threat have reason to conclude that the alleged threat expressed a determination or intent to hurt the victim presently or in the future?[xii] The Eighth Circuit also stated that courts should consider the "entire factual context, including the surrounding events and reaction of the listeners."[xiii]

The Supreme Court of South Dakota adopted and applied the Eighth Circuit's analytic questions. The court acknowledged that the trial record did not provide clear answers to those

questions, except for the second question, and the court answered that question in the negative. That is, the alleged threat was communicated only to the teacher and not directly to B.C. After examining all the available evidence in factual context, the court said, "The evidence presented fails to prove that the solicited comments of C.C.H. constitute true threat.... Thus we refrain from stripping C.C.H. of his right to free speech."[xiv] The court then concluded its decision on the first issue concerning true threats and delinquency by noting that "hostility and competition" are common among our youth but that most of the "unkind" words spoken in regard to them are protected by the First Amendment.[xv] In short, because there was no true threat, there was no disorderly conduct.

The decision on the issue concerning the adjudication of C.C.H. as a ChINS rests on the Fourteen Amendment and the South Dakota constitutional provisions for due process as well as the true threat doctrine supported by the First Amendment in *Watts*. The State had not filed a ChINS petition. Therefore, C.C.H. had received no federal or state due process notice that he would be tried as a ChINS. The majority opinion on Issue 2 explicitly stated that C.C.H. "could not defend against what he was not charged with, tried for, or alleged to be. Due process guarantees that notice and the right to be heard are granted."[xvi]

Furthermore, the court noted that C.C.H. did not meet three of the four statutory definitions of a ChINS: he was not habitually absent from school; he did not run away from home or was beyond his parent's control; and he did not violate any federal, state, or local law. The only definition of a ChINS that fit the trial court's decision is that a ChINS is a person "whose behavior or condition endangers the child's own welfare or the welfare of others."[xvii] However, that definition fit C.C.H. because of the trial court's disorderly conduct adjudication.

Therefore, in a 3- 2 decision the court ruled that the trial court did not demonstrate beyond a reasonable doubt that C.C.H. endangered anyone's welfare. The court reasoned that if there had to be a First Amendment true threat to constitute disorderly conduct, then there had to be a true threat to endanger someone's welfare because the same conduct and the same burden of proof applied to both issues for adjudication.[xviii] In short, it is "not a ChINS offense to articulate bad thoughts unless they

are a true threat."[xix] Thus, based on a lack of due process and the absence of a true threat, the South Dakota Supreme Court reversed the trial court on the ChINS adjudication.

Commentary. The five members of the court were split in their decisions regarding this case. Two justices were in the majority on both Issue 1 and Issue 2 for reversal of the trial court. The other three justices split their votes, each switching from the majority to the dissent or vice versa from the first issue to the second issue. It appears that there was a sense that something was wrong with what C.C.H. did, but there was no complete agreement on the legality of what it was. The overall result was that even though we are in period of retrenchment regarding student rights by the U.S. Supreme Court (witness *Bethel v. Fraser,*[xx] *Hazelwood v. Kuhlmeier*,[xxi] *New Jersey v. T.L.O.*,[xxii] *Vernonia v. Acton*,[xxiii] and last year's *Board of Education v. Earls*[xxiv]) the Supreme Court of South Dakota supported the First Amendment right of protected free speech and the Fourteenth Amendment due process right of student C.C.H. The court wisely quoted from *Tinker v. Des Moines*, saying that in our government "undifferentiated fear or disturbance is not enough to overcome the right to freedom of expression."[xxv]

The key to the double reversal by South Dakota's highest courts lies in that court's focus and reliance on *Watts* for the principle that a true threat is not protected speech but a threat that is not true is protected speech. That reliance correctly led the South Dakota Supreme Court to the Eighth Circuit's set of factors for analyzing the case against C.C.H.

The true threat doctrine and Eighth Circuit's analytic approach explain how the court arrived at a thoughtful and discerning two-part decision, one that has kept a criminal conviction out of C.C.H 's life-long file. What was unexplained in the *C.C.H.* decision is the fact that C.C.H. "was held in pretrial detention for 66 days."[xxvi] The court merely said that this aspect of the procedure was "troubling."[xxvii] Though it was troubled, the court did nothing about that fact. It did not seek further and clarifying information from the trial court. Apparently somehow someone violated a state statute, according to which a "ChINS cannot be held in pretrial detention for more than 24 hours unless the child has violated a valid court order."[xxviii] However it happened that C.C.H. spent so much time in pretrial detention, it is fair to ask how the apparently excessive pretrial punishment occurred.

It is also fair to ask what prompted the trial judge to adjudicate a ChINS matter without an explicit petition field by the State. Did the trial judge base her decision on prior decisions of the State Supreme Court or some uncited statute?

All in all, this is a case of first impression for the Supreme Court of South Dakota on the true threat doctrine,[xxix] and it illustrates the value of appellate courts that follow the statutory and common law. It also illustrates the value of protected free speech over threats that are not deemed to be true threats. Importantly, the case is a victory of the provisions for due process over arbitrary behavior.

Nevertheless, I am left wondering about the school teacher and school official who allowed C.C.H. and B.C. to leave the school two days in a row and did not notify the police department until two days after the initiating events. They did so even though the teacher felt scared by the boy's serious tone and even though a potential explosion was about to happen. I wonder about the middle school principal who, upon reading the teacher's e-mail call for help, apparently replied only with his own e-mail message. It seems to me that he was not appropriately responsive to the teacher's message and reflected little concern for his school's safety. I also wonder what finally led the school officials to contact the local police two days after the initial incident, given the teacher's mixed signals (her e-mail and her behavior) about the severity of C.C.H.'s condition and given the principal's casual, business-as-usual reaction to the matter.

School teachers and administrators should take seriously death threats made by students. While they should not panic, they do have an ethical and statutory obligation to protect the safety of their students. School officials should, upon hearing about a potential true threat, quickly assess when, how, and within what context the threat was made; they should assess the extent to which the threat will substantially disrupt[xxx] the operation of the school; they should assess how a reasonable recipient of the threat (including the direct recipient and the intended victim) would perceive the oral or written threat; and they should determine, in consultation with other school officials and in light of relevant local policies , what action to take, including whether to notify the parents of the intended victim and of the threat-maker. In sum, they should act as reasonable educational officials would act

within today's social and school context. After all, if a threat materializes into overt action, the community and the courts will hold the school officials to a standard of reasonable care and protection.

Endnotes

[i.] L.C. Rose and A.M Gallup, "The 34th Annual Phi Delta Kappan/Gallup Poll of the Public's Attitudes Toward the Public Schools." 84 Phi Delta Kappan 51 (Sept. 2002).

[ii.] *The People of the State of South Dakota in the Interests of C.C.H., Minor Child, and Concerning N.C.H. and M.C.H.*, 651 N.W.2d 702 (S.D. 2002).

[iii.] The pertinent facts come from the decision of the South Dakota Supreme Court and the briefs submitted to that court by C.C.H. and the South Dakota Attorney General. These sources quoted and referred to the Law, University of South Dakota in Vermillion, South Dakota.) Nevertheless, these facts are incomplete and unclear, as recognized by the Supreme Court itself in its decision. Because this case came under the jurisdiction of the Juvenile Division of the circuit court many facts remain unavailable to outsiders. Therefore, the article be limited in its scope.

[iv.] The briefs reveal that C.C.H. is a (Native American) Indian. This fact will help the reader to understand the teacher's reference to the "White Girls" in her e-mail message. The Supreme Court of South Dakota did not identify C.C.H. as an Indian in its decision. I assume from this that being an Indian was not a pertinent fact for the judges in the case before them.

[v.] *C.C.H.* at 705.

[vi.] These beyond-a-reasonable-doubt standards are consistent with the fact that C.C.H.'s action was deemed to be criminal, not civil, under South Dakota State Law.

[vii.] See the court's decision and C.C.H.'s briefs for these expressions.

[viii.] *Watts v. United States*, 394 U.S. 705 (1969).

[ix.] *Id.* at 707.

[x.] *Id*. at 706.

[xi.] Doe ex rel. Doe v. Pulaski County Special School, 263 F.3d 833 (8th Cir. 2001).

[xii.] *Id*. at 836-837.

[xiii.] *Id.* (internal citations omitted).

[xiv.] *C.C.H*. at 707.

[xv.] *Id.* at 707-708.

[xvi] *Id*. at 708-709.

[xvii] *Id*. at 709.

[xviii] *Id.*

[xix] *Id*. at 710.

[xx] *Bethel School Dist. V. Fraser*, 478 U.S. 675 (1986) (upholding discipline of student for lewd and vulgar speech).

[xxi] *Hazelwood School Dist. V. Kuhlmeier*, 484 U.S. 260 (1988) (upholding school censorship of student expression in a school-sponsored newspaper).

[xxii] *New Jersey v. T.L.O*, 469 U.S. 325 (1985) (upholding the search of a student's pocketbook based on reasonable suspicion).

[xxiii] *Vernonia School Dist. v. Acton*, 515 U.S. 646 (1995) (upholding random urinalysis tests for interscholastic football players).

[xxiv] *Board of Education of Pottawstonie County v. Earls,* 122 S. Ct. 2559 (2002) (upholding suspicionless consent to urinalysis test for all students participating in extra-curricular activities).

[xxv] *C.C.H.* at 708, quoting *Tinker v. Des Moines Indep. Cmty. School Dist.*, 393 U.S. 503, 508 (1969).

[xxvi] *C.C.H.* at 709.

[xxvii] *Id.*

[xxviii] *Id.*

[xxix] *Id*. at 706.

[xxx] See *Tinker v. Des Moines Indep. Cmty. School Dist.*, 393 U.S. 503, 512-513 (1969) on this standard.