Recent Case Report

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Greene v. Camreta

(9th Cir. 2009) 588 F.3d 1011

Issue

Did a child protective services caseworker and a deputy sheriff violate a young girl's Fourth Amendment rights by questioning her at school to determine whether she had been sexually molested by her father?

Facts

While investigating a report that Nimrod Greene had molested a seven-year old boy (F.S.), officers in Oregon obtained information from two sources that Greene might have also molested his two young daughters (S.G. and K.G.). Nimrod's wife, Sarah, reportedly told F.S.'s mother that she "doesn't like the way Nimrod makes [their daughters] sleep in his bed when he is intoxicated and she doesn't like the way he acts when they are sitting on his lap." In addition, Nimrod told F.S.'s father that Sarah had accused him of molesting his daughters and also said she "doesn't like the girls laying [sic] in bed with [him] when he has been drinking."

Nimrod was arrested for molesting F.S., and was subsequently released subject to certain court restrictions. A report on the matter was sent to a caseworker with the Department of Human Services, Bob Camreta. Based on this information, Camreta testified he became "concerned about the safety and well-being" of Nimrod's daughters.

Consequently, Camreta and sheriff's deputy James Alford went to S.G.'s elementary school and arranged to interview her in an office. Camreta said he decided to conduct the interview at school because it is a place "where children feel safe" and he would be able to interview S.G. "away from the potential influence of suspects, including parents."

A guidance counselor escorted S.G. to the office, and Camreta questioned her about Nimrod's behavior. (Deputy Alford did not ask questions.) In the course of the interview, S.G. said, among other things:

- When her father drinks, he "tries to touch her on her private parts."
- He started touching her when she was three years old.
- The last incident occurred last week, and she "had tried to tell him to stop."
- Her mother "knew about the touching [and it was] one of our secrets."

S.G.'s account of the interview was quite different. After her mother filed a lawsuit against the two officials, S.G. reportedly said (presumably via interrogatories) that she "remembered all of my dad's touches with fondness" and she denied that he ever touched her private parts. "He was a very loving father," she said, "and I loved hugging and kissing him. These were the touches that I was referring to when I said my dad touched me."[1] She also claimed that Camreta had pressured her, that he "kept asking me the same questions, just in different ways, trying to get me to change my answers," and that at

[1] **NOTE**: It appears these were not, in fact, the words of S.G., but of someone who had an interest in the subsequent lawsuit. After all, it is beyond belief that a child in elementary school would use a word such as "fondness," or the phrase "that I was referring to."

some point "I just started saying yes to whatever he said." S.G. also said the interview lasted two hours; Camreta and Alford said it lasted one.

Based on the interview with S.G. and "other information" that the court did not disclose, Nimrod accepted a plea agreement in which he maintained his innocence about molesting his daughters but admitted that there was sufficient evidence from which a jury could find him guilty of molesting F.S. As a result, the charge that he molested S.G. was dismissed and he was found guilty of molesting F.S.

Sarah Greene subsequently sued Camreta and Alford for money damages, claiming, among other things, that their act of meeting with S.G. at the school constituted a "seizure" under the Fourth Amendment, and that it was an illegal seizure because there was insufficient justification for it. The District Court agreed that S.G. was "seized," but ruled the seizure was objectively reasonable. Sarah Greene appealed to the Ninth Circuit.

Discussion

There were essentially two issues before the court. First, was S.G. "seized" when a guidance counselor escorted her from a classroom to a school office where she was interviewed? Without explaining how it reached its conclusion, the court summarily ruled she was, in fact, "seized."

The second issue was whether the seizure was reasonable. The court ruled it was not for three reasons. First, S.G. was not a suspected criminal, nor was she "suspected of having violated any school rule, nor is there any evidence that her immediate seizure was necessary to maintain discipline in the classroom and on school grounds." Second, the interview was unnecessary because there was no reason to believe that S.G. and her sister were in any immediate danger. Third, the investigators neglected to obtain authorization to interview S.G.

The court then announced a new rule: In the absence of exigent circumstances, officers are prohibited from interviewing the suspected victims of child abuse at their schools unless the officers obtain a search warrant, court order, or parental consent. Although Camreta and Alford had violated its new rule, the court concluded they were both entitled to qualified immunity because the rule was not "clearly established" when the interview occurred.

Comment

Once again, an irresponsible parent tries to cash in on the efforts of officials who were forced to grapple with a serious threat to her child—a threat that the parent created or allowed to continue.[2] And once again, a panel of the Ninth Circuit manufactures a "problem," which it proceeds to "fix" by making a sweeping—and unnecessary—change in criminal procedure.[3]

But this time the panel did much more than change a few rules: it made it difficult or impossible for officers and child welfare caseworkers to investigate one of the most heinous crimes on the books: child abuse. To make matters worse, the panel was not *required* by the law to rule as it did. Instead, it struggled mightily to thrust its exquisite notions of propriety into these difficult and heartbreaking investigations.

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[2] **NOTE**: Another example is found in *Hunsberger* v. *Wood* (4th Cir. 2009) 570 F.3d 546 which we reported on in 2009.

[3] See, for example, *U.S.* v. *Comprehensive Drug Testing, Inc.* (9th Cir. 2009) 579 F.3d 989.

Why would it do such a thing? A promising clue is found at the beginning of its opinion when it said that, according to statistics it had plucked from a law review article, of the millions of child abuse cases investigated in 2007, *"only"* about a quarter of the children "were indeed victims of abuse." Based on this statistic, the court deduced that, "in the name of saving children from the harm that their parents and guardians are thought to pose" the investigations by caseworkers and officers may "ultimately cause more harm to many more children than they ever help."

In hopes that the Ninth Circuit reviews this case en banc, or that the U.S. Supreme Court reverses it, or that the California courts reject its reasoning, we will address the issues upon which it was based.

A "SEIZURE?" For some incomprehensible reason, Camreta and Alford did not contest the district court's determination that the interview was a "seizure." And for some equally baffling reason, the panel accepted their concession without even a perfunctory inquiry as to whether it was warranted.

Because it is likely that other courts will not be so indiscriminate, it should be noted that the United States Supreme Court has ruled that a "seizure" occurs "[o]nly when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen."[4] It is, therefore, hard to imagine that anyone would seriously contend that S.G. was subjected to a coercive "show of authority" when she was escorted by a guidance counselor to an office in her own school, or because a Human Services caseworker interviewed her there.

It is possible that the panel presumed that a seizure resulted because a uniformed sheriff's deputy was present. In fact, the panel pointed out no fewer than three times that the deputy was armed. But this would make no sense because, as the United States Supreme Court has observed, "That most law enforcement officers are armed is a fact well known to the public. The presence of a holstered firearm thus is unlikely to contribute to the coerciveness of the encounter absent active brandishing of the weapon."[5]

NO EXIGENT CIRCUMSTANCES? Having casually ruled that S.G. was "seized," the panel then ruled the "seizure" was unreasonable because there were no exigent circumstances. Specifically, it said there was simply no need to interview S.G. at the school for her safety or the safety of her younger sister because the situation constituted a "non-emergency." The court was able to reach this remarkable conclusion by ignoring all of the following circumstances:

(1) ONGOING MOLESTATION: Nimrod had allegedly molested S.G. since she was three-years old and, based on his recent arrest, it appeared he was continuing to engage in deviant behavior.

(2) SARAH GREEN DID NOT STOP IT: Sarah Greene told F.S.'s mother that she knew Nimrod might be molesting their daughters; i.e., she said "she doesn't like the way Nimrod makes [their daughters] sleep in his bed when he is intoxicated and she doesn't like the way he acts when they are sitting on his lap." Nevertheless, Sarah apparently did nothing to stop it. In addition, Nimrod confirmed that Sarah was aware that he might be molesting his daughters because, as noted, he told F.S.'s

[4] *Terry* v. *Ohio* (1968) 392 U.S. 1, 16, fn.16.

[5] *United States* v. *Drayton* (2002) 536 U.S. 194, 204. ALSO SEE *People* v. *Zamudio* (2008) 43 Cal.4th 327, 346 [that the officers "had badges and weapons and were wearing uniforms" has "little weight in the analysis for determining whether a seizure occurred"].

father that "Sarah was accusing him of molesting his daughters and Sarah reportedly doesn't like the girls laying in bed with [him] when he has been drinking."

(3) NIMROD'S M.O.: The molestation of F.S. reportedly occurred when Nimrod "was drunk." This circumstance adds credence to the investigator's belief that Nimrod was continuing to molest S.G. because Sarah reportedly told F.S.'s mother that she "doesn't like the way Nimrod makes [their daughters] sleep in his bed *when he is intoxicated*."

(4) NIMROD'S RELEASE FROM CUSTODY: The investigators were aware that Nimrod had been released from custody.

In light of these circumstances, it is unimaginable that a panel of the Ninth Circuit was able to reach the conclusion that the situation facing S.G. and her sister in their home—especially when Nimrod was drinking—was not sufficiently threatening to warrant an immediate interview.

It is curious—bordering on bizarre—that the court felt such an interview would have been justified if the objective had been to investigate a report that S.G. had violated some school rule. Said the court, "S.G. is not suspected of having violated any school rule, nor is there any evidence that her immediate seizure was necessary to maintain discipline in the classroom." In other words, the panel concluded that the threat resulting from a violation of a school rule, such as running in the corridors or chewing gum in class, was a much greater threat to S.G. than the threat resulting from years of sexual molestation by her father.

A further example of the muddled thinking that went into this opinion, is found in the court's attempt to blunt the affect of its ruling by suggesting that investigators in such cases could obtain legal authorization to interview the child by means of a search warrant. Said the panel, "[We hold] that the general law of search warrants applies to child abuse investigations." Once the police have initiated a criminal investigation into alleged abuse in the home, responsible officials must provide procedural protections appropriate to the criminal context."

It appears the panel was unaware that search warrants are issued for the sole purpose of authorizing officers to search a person, place, or thing for physical evidence of a crime.[6] Furthermore, the idea that a search warrant could ever authorize officers to "search" the mind of a victim to obtain information about the crime under investigation is patently absurd.

The panel also suggested that a court could issue a generic court order that authorized the seizure of the student for the purpose of conducting an interview. But the court neglected to set forth the legal authority for the issuance of such an order, which might indicate that it couldn't find any.

Finally, the panel said that the officers should have asked Nimrod or Sarah for consent to interview S.G. No, this is not a misprint. The court actually said that officers who are investigating a report that a young girl is being molested by her father, and that her mother knows about it and has done nothing to stop it, should seek consent from these same people before interviewing the child.

[6] See *Steagald* v. *U.S.* (1981) 451 U.S. 204, 213 ["A search warrant is issued upon a showing of probable cause to believe that the legitimate object of the search is located in a particular place."].

The question, then, is how can officers obtain interviews at school from suspected victims of child abuse? (Note: The Oregon Attorney General has reportedly filed a petition for en banc review of this opinion.) First, it should be noted that schools do not have a legal right to prohibit officers from interviewing children who are believed to have been the victims of abuse by a parent or anyone else. On the contrary, the California Penal Code specifically states that such a child "may be interviewed during school hours, on school premises."[7]

Second, to guard against an allegation that such an interview constituted a "seizure," it would be helpful that the officers were in plain clothes, and that they began the interview by telling the child that she is not in trouble, that they just want to talk with her but she can leave whenever she wants.

Third, all interviews should be recorded (preferably secretly) so that officers will have proof of the following: (a) that they did not employ coercive or suggestive interviewing methods, (b) that they had advised the child that she did not have to talk with them, (c) that they informed that child of her right to have a member of the school staff present,[8] and (d) the precise duration of the interview.

Fourth, although there is no specific authority that would permit the issuance of court orders to interview students, we posted on our website a court order form and points and authorities based on the Civil Code's "all orders and writs" provision.[9] The address is www.le.alcoda.org. Click on "Forms." POV

[7] See Pen. Code § 11174.3(a).
[8] See Pen. Code § 11174.3(a).
[9] Code Civ. Proc. § 166(a).