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G&S Vol. 27, No. 25, July 8, 2019

TIBA's Case of the Week

Court of Criminal Appeals

Case Name: *Lauro Eduardo Ruiz v. The State of Texas*

OFFENSE: Attempted Production of Sexual Performance by a Child
COUNTY: Bexar
COURT OF APPEALS: San Antonio 2017
C/A CITATION: 535 S.W.3d 590
C/A RESULT: Trial Court Reversed
CCA. CASE No. PD-1348-17 DATE OF OPINION: July 3, 2019
DISPOSITION: Court of Appeals Affirmed
OPINION: Judge Keel VOTE: 9-0
TRIAL COURT: 186th D/C; Hon. Andrew Carruthers
LAWYERS: Adrian Flores, Alex J. Scharff, and Shawn Brown (Defense); Lauren Scott (State)

(Background Facts): Two female students at a private high school notified Dean of Students Dolores Rodriguez that Appellee, a substitute teacher, was acting inappropriately. The students provided images of Appellee's cell phone, placed on top of his bag, near the podium, with the camera facing up, and allegedly capturing images from underneath the female students' skirts. Rodriguez contacted Academic Dean and Vice Principal Steven Hayward; Hayward summoned Appellee to the administrative offices. Principal Gilbert Saenz was not on campus at the time. Pending Principal Saenz's return to campus, Rodriguez and Hayward began investigating the allegations. Rodriguez posed the initial question to Appellee -- whether “anything happened that day in the classroom.” A very

nervous Appellee acknowledged "he had a problem." Appellee's nervousness and "fidgeting" with his cell phone led Rodriguez to fear the possible deletion of information. Rodriguez requested that Appellee place the cell phone on Saenz's desk; both Rodriguez and Hayward testified that Appellee complied without incident, comment, or objection. Shortly thereafter, Principal Saenz arrived. All three administrators testified that Appellee again admitted that "he had a problem" and that there were inappropriate images on his cell phone. Saenz terminated Appellee's employment and informed Appellee that law enforcement would be notified.

G&S 221 Evidence / Exclusionary Rules / Art. 38.23 (Search & Seizure by Civilian): Principal Saenz advised Appellee that the cell phone would be turned over to law enforcement authorities. Pursuant to his own request, Appellee retrieved several phone numbers from the cell phone. At some point, Saenz saw approximately twenty videos or images on the cell phone. After Appellee obtained the information from his cell phone, he returned the cell phone to Saenz, and Saenz placed the cell phone in a manila envelope and sealed the envelope. Consistent with his statement to Appellee, Saenz contacted the Castle Hills Police Department, made a report, and turned the cell phone over to the officers. Pursuant to a search warrant, the Castle Hills Police Department officers viewed and secured several images depicting the area underneath the students' skirts. Appellee was subsequently charged with multiple counts of attempted production of sexual performance by a child. Appellee filed a motion to suppress any and all tangible evidence seized in connection with the case asserting that Principal Saenz did not obtain a warrant and no exception to the warrant requirement applies. The trial court granted the motion, concluding that because Saenz's actions did not fall under the warrantless search exceptions of either consent to search or exigent circumstances, Saenz's warrantless examination of Appellee's cell phone violated Article 38.23(a), C.Cr.P. The Court of Appeals reversed the trial court's order, holding that that the Fourth Amendment does not apply to the actions of private individuals who are not acting as government agents (see G&S, Vol. 25, No. 28; 07/31/2017). The Court of Criminal Appeals granted Appellee's PDR to consider whether the Court of Appeals "misapplied the standard of review and failed to indulge every presumption in favor of the trial court's ruling."

Holding: Appellee argues that the evidence in this case must be suppressed because a police officer in Saenz's shoes could not have legally searched Appellee's phone. He relies on Article 38.23, C.Cr.P., and *Miles v. State*, 241 S.W.3d 28 (Tex.Cr.App. 2007)(see G&S, Vol. 15, No. 41; 10/22/2007). *** We reject his argument because (1) the Fourth Amendment does not apply to the actions of private individuals, (2) reading Article 38.23 to apply the Fourth Amendment to private individuals would lead to an absurdity, and (3) the context of *Miles*'s holding does not support Appellee's reading of it. *** Appellee argues in the alternative that the evidence had to be suppressed because Saenz committed breach of computer security [under Penal Code § 33.02(a)] when he scrolled through the phone's photos. He failed to disprove the statutory defense to that crime, however, so the evidence will not be suppressed on that basis, either. ***

"A person commits an offense if the person knowingly accesses a computer, computer network, or computer system without the effective consent of the owner." *** It is a defense to breach of computer security that the accused "acted with the intent to facilitate a lawful seizure or search of, or lawful access to, a computer, computer network, or computer system for a legitimate law enforcement purpose." *** The trial court found that Saenz accessed the phone without Appellee's consent. The trial court made no findings about Saenz's intent in accessing the phone, and the undisputed evidence showed that Saenz took the phone and looked through it for the purpose of giving it to the police for investigation. The record thus would not support a finding against the statutory defense of intent to facilitate a lawful search for a legitimate law enforcement purpose, and Appellee failed in his burden of showing a statutory violation.

(David A. Schulman) My first reading of this case caused me to believe it was simply expanding the BS the Court made up from whole cloth and inflicted on us in *Jenschke v. State*, 147 S.W.3d 398, 399 (Tex.Cr.App. 2004)(see G&S, Vol. 12, No. 42; 10/25/2004), and to a considerably less degree in *Cobb v. State*, 85 S.W.3d 258 (Tex.Cr.App. 2002)(see G&S, Vol. 10, No. 22; 06/03/2002), that stealing somebody's property isn't theft if you turn the property over to the police "for investigation." On second reading, it is not clear to me that this case belongs in those abominations, and should be resolved on a "consent" basis. Appellee voluntarily turned his cell phone over to Dean of Students Dolores Rodriguez, and, when Principal Saenz advised Appellee that the cell phone would be turned over to law enforcement authorities, he had already terminated Appellee. Thus, when Appellee didn't ask for his cell phone to be returned, he didn't do that in hopes that he wouldn't be terminated. As he voluntarily left his cell phone in the custody of Saenz, knowing Saenz intended to turn the phone over to law enforcement authorities, I believe Appellee consented to that action and, thus, consented to the police searching his phone.