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STATE OF WISCONSIN
COURT OF APPEALS DISTRICT II
CASE NO(S) 2018AP001730 - CR

STATE OF WISCONSIN,
Plaintiff-Respondent,
V.

BLONG SIMBA VANG,
Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION ENTERED IN THE CIRCUIT COURT FOR OUTAGAMIE COUNTY, THE HONORABLE VINCENT R. BISKUPIC, PRESIDING

BRIEF AND APPENDIX OF APPELLANT

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BRIEF OF APPELLANT

STATEMENT OF THE ISSUES

1. Did the trial court erroneously exercise its discretion by denying the defendant's Motion to Suppress?

Not considered by the post-conviction court.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The defendant appellant believes that the briefs filed by the parties to this appeal will adequately develop the issues

involved. Therefore, neither oral argument nor publication is requested.

STATEMENT OF THE CASE

On October 26, 2017 the defendant, Blong Simba Vang, appeared before that branch of the circuit court for Outagamie County presided over by the Honorable Vincent R. Biskupic to enter a plea of guilty to an information charging him with one count of conspiracy to commit child abuse – Intentionally Cause Harm, contrary to **Wisconsin Statute** sections 948.03(2)(b) and 939.31. (R. 6-1)

On December 18, 2017, the defendant, Blong Simba Vang, again appeared before that branch of the circuit court for Outagamie County presided over by the Honorable Vincent R. Biskupic for sentencing. The court imposed a bifurcated sentence of three years initial confinement and three years of extended supervision in connection with the pled to charge. (R. 49-1-2; A. App. 101-102)

Mr. Vang is currently incarcerated at the Waupun Correctional Institution in Waupun, Wisconsin.

ARGUMENT

1. The trial court erroneously exercised its discretion in denying the defendant's Motion to Suppress

A. Standard of Review -- Suppression Hearing

The standard for review from and order granting or denying a Motion to Suppress Evidence is firmly established. "When we review a trial court's ruling on a motion to suppress, we uphold [its] factual findings unless those findings are clearly erroneous." **State v. Patton**, 2006 WI App 235, ¶7, 297 Wis. 2d 415, 724 N.W.2d 347. Whether the facts satisfy constitutional principles is a question of law for the reviewing court to decide. See **State v. Kyles**, 2004 WI 15, ¶7, 269 Wis. 2d 1, 675 N.W.2d 449. That court is not bound by the trial court's decision on questions of law, but does benefit from its analysis. **Id**. "The constitutional reasonableness of a search and seizure is a question of law." **State v. Nicholson**, 174 Wis. 2d 542, 545, 497 N.W.2d 791 (Ct. App. 1993). Whether probable cause and exigent circumstances exist are also both questions of law subject to independent, de novo review. See **State v. Faust**, 2004 WI 99, ¶9, 274 Wis. 2d 183, 682 N.W.2d 371; **State v. Kiper**, 193 Wis. 2d 69, 79-80, 532 N.W.2d 698 (1995). "Confronted with the conflict of testimony, it [is] the [circuit] court's obligation to resolve it." **State v. Owens**, 148 Wis.2d 922, 930, 436 N.W.2d 869 (1989). The appellate court defers to and is bound by the circuit court's credibility determinations. See **id**. at 929-930. "The credibility of [witnesses] testifying at a suppression hearing outside the presence of the jury is a question for determination by the [circuit] court." **State v. Flynn**, 92 Wis.2d 427, 437, 285 N.W.2d 710 (1979).

Standard of Review -- Search and Seizure

The Fourth Amendment to the United States Constitution and art. I, § 11 of the Wisconsin Constitution protects persons from unreasonable searches and seizures.(4) **State v. McCray**, 220 Wis. 2d 705, 709, 583 N.W.2d 668 (Ct. App. 1998). The Fourth Amendment "protects people, not places." **Katz v. United States**, 389 U.S. 347, 351 (1967). "Therefore, one may have Fourth Amendment protection outside of one's home." **McCray**, 220 Wis. 2d at 709. Under both the United States and Wisconsin Constitutions, a warrantless search is per se unreasonable, and evidence derived from it will be suppressed, subject to certain exceptions. **State v. Williams**, 2002 WI 94, ¶18 & n.5, 255 Wis. 2d 1, 646 N.W.2d 834; **State v. Boggess**, 115 Wis. 2d 443, 449, 340 N.W.2d 516 (1983). These exceptions are "'jealously and carefully drawn,'" and "the burden rests with those seeking exemption from the warrant requirement to prove that the exigencies made that course imperative." **Id**. (citation omitted).

Wisconsin courts have consistently followed the United States Supreme Court's decisions regarding the constitutionality of investigatory searches and seizures. **State v. Richardson**, 156 Wis. 2d 128, 137, 456 N.W.2d 830 (1990). Police may, in appropriate circumstances, approach a person for purposes of investigating possible criminal behavior without probable cause to make an arrest. **Id**. at 138 (citing **Terry v. Ohio**, 392 U.S. 1, 22 (1968)). However, in justifying

the intrusion, the officer "must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." **Terry**, 392 U.S. at 21. Furthermore, on the part of the investigating officer, "[a]n inchoate and unparticularized suspicion or hunch will not suffice." **State v. Fields**, 2000 WI App 218, ¶10, 239 Wis. 2d 38, 619 N.W.2d 279; **Brinegar v. United States**, 338 U.S. 160, 174-176 (1949); **State v. Waldner**, 206 Wis. 2d 51, 56, 556 N.W.2d 681 (1996). Underscoring the importance of requiring specificity in the facts relied upon by the officer, the Supreme Court of the United States has long held that "'good faith on the part of the arresting officers is not enough.' If subjective good faith alone were the test, the protections of the Fourth Amendment would evaporate." **Beck v. Ohio**, 379 U.S. 89, 96-97 (1964)

However, not all encounters with law enforcement officers are "seizures." **Florida v. Bostick**, 501 U.S. 429, 434 (1991). The general rule is that a seizure has occurred when an officer, "by means of physical force or show of authority, has in some way restrained the liberty of a citizen." **United States v. Mendenhall**, 446 U.S. 544, 552 (1980) (quoting **Terry v. Ohio**, 392 U.S. 1, 19 n.16 (1968)).

A police officer's actions are judged against a standard of reasonableness, which "depends 'on a balance between the public interest and the individual's right to personal security free from arbitrary interference by law officers.'" **State v. Malone**, 2004 WI 108, ¶21, 274 Wis. 2d 540, 638 N.W.2d 1 (quoting **Pennsylvania v. Mimms**, 434 U.S. 106, 109 (1977)).

In **Illinois v. Caballes**,543 U.S. 405, 407 (2005), the United States Supreme Court stated that "[a] seizure that is justified solely by the interest in issuing a warning ticket to the driver can become unlawful if it is prolonged beyond the time reasonably required to complete that mission." However, if during a valid seizure an officer becomes aware of additional suspicious factors that give rise to a reasonable, articulable suspicion that criminal activity is afoot, that officer need not terminate the encounter. **Malone**, 2004 WI 108, ¶24. At this point, the officer may prolong the seizure to conduct a separate, independent investigation. See id.

The issue therefore is whether there were articulable facts which would warrant a reasonable police officer to suspect that criminal activity was afoot. See **Waldner**, 206 Wis. 2d at 55-56. When determining whether reasonable suspicion exists, the court of review considers the totality of the circumstances. **State v. Williams**, 2001 WI 21, ¶22, 241 Wis. 2d 631, 623 N.W.2d 106. This inquiry must necessarily take into account both the quantity and the quality of the suspicious factors. Id.

B. The court's decision on the Motion to Suppress

SUMMARY OF LEGAL ISSUE RAISED

> Blong Simba Vang (Vang) was arrested after Appleton police officers discovered guns in his car, which was parked on the premises of Appleton East High School in the city of Appleton, Outagamie County, Wisconsin. The search of Vang's car was at the request of the school principal. Vang challenges the search

arguing that the officers did not have probable cause and the school officials did not have a reasonable basis to initiate the search.

As indicated in the case law discussion below, the lower standard of "reasonable suspicion" applies to this case. The officers conducting the search of Vang's car were acting at the behest of the school officials, and the lower standard should apply to anyone on school grounds. Applying that standard, this Court finds that the search was "justified at its inception" and "reasonably related in scope to the circumstances" which justified the search. Principal Mineau made the decision to search Vang's vehicle, and that decision was based on Principal Mineau's belief that Vang and the other non-students posed a threat to the safety of those on school premises and that something related to that safety threat was in the car.

RELEVANT FACTS FROM MOTION HEARING

At the end of the school day on April 13, 2017, Officer Taschner, the school liaison officer at Appleton East High School, noticed two young men standing in the commons area that he did not recognize as Appleton East students. (Mot. Hr'g Tr. 11:9-20, Jul. 19, 2017.) These young men were wearing hats in violation of the school's dress code, so Officer Taschner approached them. Officer Taschner asked them to go into the main office and asked them to identify themselves. (Mot. Hr'g Tr. 13:10-15, 14:2-3.) One of the males gave Officer Taschner a false birthdate. (Mot. Hr'g Tr. 14:11-15:9.)

The Athletic Director, Timothy Zachow, also became involved in the questioning of these two males because he was the most senior administrator on campus at that time. (Mot. Hr'g Tr. 16:7-17.) The two males stated that they were at the school to pick up a student, L.Y., and that

they were driven there by their uncle. (Mot. Hr'g Tr. 17:16-18:6; Cont. Mot. Hr'g Tr. 9:8-10, Jul. 26, 2017.) The males had traveled from the Wausau area to Appleton. The males' connection to L.Y. was of concern to both Officer Taschner and the school administrators because she had many issues to with other students, including a violent altercation. (Mot. Hr'g Tr. 27:24-28:12; Cont. Mot. Hr'g Tr. 29:22-30:7.)

Officer Taschner asked Athletic Director Zachow to make contact with the driver of the vehicle and ask him to come inside. When Athletic Director Zachow went to do that, L.Y. ran ahead of him and spoke to the driver. The vehicle then moved from the driveway in front of the school to a side parking lot. (Cont. Mot. Hr'g Tr. 9:24-10:12.) After parking the driver, Vang, then walked up to the front of the school and talked with L.Y. Officer Taschner then made contact with Vang and asked him to come into the office. (Mot. Hr'g Tr. 22:11-18.) Upon seeing Vang, it was clear to both Officer Taschner and Athletic Director Zachow that Vang was not the uncle of the two males or of L.Y. (Mot. Hr'g Tr. 23:7-10.) When Officer Taschner attempted to identify Vang, he was given an inaccurate birthdate. (Mot. Hr'g Tr. 24:21-25:15.) At this point, Officer Taschner requested that other officers report to the school to provide him additional cover while he conducted his investigation. (Mot. Hr'g Tr. 25:18-26:4.)

One of the additional officers had a canine unit, so Officer Taschner asked him to conduct a dog sniff of the outside of Vang's vehicle. (Mot. Hr'g Tr. 26:7-9.) The dog did not alert for the presence of illegal drugs. (Mot. Hr'g Tr. 26:19-21.) While the dog sniff was being conducted, Associate Principal Slowinski returned to the school, and he and Athletic Director Zachow began discussing whether it was necessary to search Vang's vehicle. (Cont. Mot. Hr'g Tr. 14:8-20.) They called Assistant Superintendent Vogel

to get additional input over whether they should search Vang's vehicle. (Cont. Mot. Hr'g Tr. 14:20-22.) Towards the end of the call with Assistant Superintendent Vogel, Principal Mineau returned to the campus and was informed of the situation and the suspicions of the officer and administrators. (Cont. Mot. Hr'g Tr. 63:3-17.) Officer Taschner was not part of the conversation with Assistant Superintendent Vogel, and he was not involved in making the decision whether to search Vang's vehicle. (Cont. Mot. Hr'g Tr. 15:10-17, 32:23-33:12.) Principal Mineau made the ultimate decision of whether Vang's car needed to be searched as part of the school's investigation into the three non-students on campus. (Cont. Mot. Hr'g Tr. 63:3-17.) Officers Taschner and Rohm searched Vang's car and found a gun in the backseat. Vang was then placed under arrest. (Mot. Hr'g Tr. 32:23-33:3.) An additional gun was found in the trunk of the car. (Mot. Hr'g Tr. 33:11-12.)

CASE LAW ANALYSIS

What level of suspicion was required to justify the search in this case? The U.S. Supreme Court and the Wisconsin Supreme Court have recognized a lower level of suspicion will justify a search of a student by school officials on school grounds. New Jersey v. T.L.O., 469 U.S. 325, 340-41 (1985); State v. Angelia D.B. (In Interest of Angelia D.B.), 211 Wis.2d 140, 154 (1997). Where school officials conduct an individualized search of a student on school grounds, "the action must be 'justified at its inception'; and … the search, as actually conducted, must be 'reasonably related in scope to the circumstances which justified the interference in the first place.'" In re Angelia D.B., 211 Wis.2d at ¶ 16 (finding the T.L.O. standard more suitable for individualized searches than that set forth in Vernonia Sch. Dist. v. Acton, 515 U.S. 646, 655

(1995)). This standard does not apply where the search is initiated by police even though the search is on school grounds. Id. at ¶ 17. When officers conduct a search on their own, the probable cause standard of the Fourth Amendment applies. Id. at ¶ 20.

Defendant Vang argues that the search should be assessed with the probable cause standard because the search was conducted by officers and the investigation was initiated by Officer Taschner. While Officer Taschner did have the first contact with the two males in the common area and it was Officer Taschner who requested Vang be brought to the office, the record is clear that the actual decision to search Vang's vehicle was made by school officials. (Cont. Mot. Hr'g Tr. 6:23-7:7, 11:11-20, 18:17-20, 32:23-33:12.)

Associate Principal Slowinski and Athletic Director Zachow initiated a call to Assistant Superintendent Vogel to discuss the situation and whether they should search Vang's car. (Cont. Mot. Hr'g Tr. 14:17-15:9.) Officer Taschner was not part of that conversation. (Cont. Mot. Hr'g Tr. 15:10-17, 32:23-33:12.) Towards the end of the phone conversation with Assistant Superintendent Vogel, Principal Mineau returned to the school and was apprised of the situation. Principal Mineau made the ultimate decision of whether Vang's car needed to be searched as part of the school's investigation into the three non-students on campus. (Cont. Mot. Hr'g Tr. 63:3-17.) Officers Taschner and Rohm searched Vang's car at the behest of Principal Mineau.

As required by Angelia D.B., the decision to search in this case was made by school officials. 211 Wis.2d at ¶ 16. Thus, the lower standard of reasonable suspicion applies. Id. The fact that the officers conducted the actual search does not convert this search into a law enforcement initiated search. See id. at ¶ 24

(holding that police involvement in the actual search does not change the standard). In fact, the court in Angelia D.B. found that it would be unsafe to require school administrators and staff to conduct searches because unlike police officers, they are not trained to safely conduct searches. Id. at ¶¶ 31-32.

Defendant Vang's next argument is that the lower level of requisite suspicion only applies to students subject to the rules and policies of the school. While dicta in certain Wisconsin cases suggest that Wisconsin courts would apply the T.L.O. standard to searches of non-students by school officials on school grounds, no Wisconsin court has directly addressed the issue.

A common sense interpretation of the available cases, however, supports finding that the lesser expectation of privacy, which justifies the lower level of suspicion, applies generally on school grounds, not just to students. There are two components to the lower expectation of privacy decisions: (1) students have a lower expectation of privacy as subject to the rules of the school and (2) that lower expectation of privacy applies only "on school grounds" See State v. Schloegel, 2009 WI App 85, ¶¶ 14-15, 319 Wis.2d 741 (emphasizing that the lesser expectation of privacy applies "on school grounds"); see also Florida v. J.L., 529 U.S. 266, 274 (2000) (listing schools as an example of "quarters where the reasonable expectation of Fourth Amendment privacy is diminished").

That second component is equally important as the first. No court has said that it is a juvenile's status as a student alone that allows school officials to search based solely on reasonable suspicion. It is only on the school grounds that school officials have that authority. Therefore, it is not unreasonable to extend the lesser expectation of privacy to others on school grounds. The same desire and responsibility to

provide for the safety of the school environment applies when school officials are dealing with students as when they are dealing with visitors to the school grounds. While the reasoning in T.L.O. and Angelia D.B. focused more on the relationship of students in relation to school administrators, Schloegel emphasized the responsibility that school administrators have to provide a safe environment. Cf. 469 U.S. at 339 (emphasizing administrators' need to maintain order); 221 Wis.2d at ¶¶ 24, 27-28 (discussing the school-student relationship and comparing the search of a student to the search of a probationer but also acknowledging the need to "maintain a safe environment"); 2009 WI App 85 at ¶ 21 (discussing the responsibility to provide a safe learning environment).

Cases from other jurisdictions support this interpretation, and a few have found that visitors to school grounds are subject to the lesser expectation of privacy set forth in T.L.O. See United States v. Aguilera, 287 F. Supp.2d 1204 (E.D. Cal. 2003); In re D.D., 554 S.E.2d 346 (N.C. Ct. App. 2001). In Aguilera, the Eastern District of California interpreted Supreme Court precedent to set schools apart for special treatment, finding that the diminished expectation of privacy applied to the school grounds, not the student. 287 F. Supp.2d at 1208-09 (citing J.L., 529 U.S. at 274; Acton, 515 U.S. at 655). The Aguilera court concluded that the school administrators' responsibility to provide a safe environment for students encompassed the conduct of non-students present in that environment. Id. at 1209.

Similarly in In re D.D., the North Carolina Court of Appeals found that it was the fact that the search by school officials took place on school grounds that was decisive in determining whether the lesser expectation of privacy applied to the defendant, a non-student. 554 S.E.2d at 351. The court reasoned that the school

administrators' obligation to report the presence of an unauthorized person on campus and to provide for the safety of students and staff gave the administrator some control over the non-student juvenile. Id. In addition, the court found that it would be absurd to find that school administrators did not have authority to take action with respect to a juvenile who possibly posed a safety threat on school grounds just because he was not a student at that school. Id. at 352. As in In re D.D., it would be absurd to hold that Principal Mineau could not address the safety concern posed by Vang and the other males on campus because they were not Appleton East students.

As described above, where school officials conduct an individualized search of a student on school grounds, "the action must be 'justified at its inception'; and … the search, as actually conducted, must be 'reasonably related in scope to the circumstances which justified the interference in the first place.'" Angelia D.B., 211 Wis.2d at ¶ 16. In Angelia D.B., school officials had a report that the defendant had a knife. Id. at ¶ 3. The search was found reasonable because the presence of a knife on school premises "posed an imminent threat of danger to students and teachers." Id. at ¶ 30. Where a search was found reasonable with less direct information about the danger a non-student on campus posed, the principal had a report that some students were talking about a fight occurring at the end of the school day, the juveniles were in an area where they were not supposed to be, the non-students gave the principal false information about what school they attended, and they were not cooperative with his investigation. In re D.D., 554 S.E.2d at 348-49. The principal stated that he decided the non-students should be searched because "he was aware that when students come on the

school's campus to fight, 'sometimes they bring things to use.'" Id. at 349.

Here, the information available to Principal Mineau was not exactly the same as in the cases of Angelia D.B. or In re D.D. However, Principal Mineau testified that he based his decision primarily on his obligation to protect the safety, security, and well-being of the student body. (Cont. Mot. Hr'g Tr. 49:23-50:1.) He had Officer Taschner's report that the clothing of two of the males possibly indicated gang affiliation, and he knew that the young men were connected with L.Y., a student who had many disciplinary concerns. (Cont. Mot. Hr'g Tr. 50:9-23, 53:3-19, 62:3-13.) Principal Mineau was also concerned about non-students being on campus without complying with the visitor policy and the report that there had been issues in getting the correct identifying information from two of the three young men. (Cont. Mot. Hr'g Tr. 50:2-8.) In addition, there seemed to be an effort to keep school officials away from the car. (Cont. Mot. Hr'g Tr. 37:5-10, 45:9-14.) The combination of these facts made him suspect that there was a school safety issue and that there could be something in the car connected to that safety issue. (Cont. Mot. Hr'g Tr. 53:3-19, 62:3-13.)

The State places emphasis on the testimony of Athletic Director Zachow because he stated that one of the males initially approached in the commons area told him that they came from Wausau to beat up an Appleton East student. (Cont. Mot. Hr'g Tr. 9:1-2, 18:21-19:12.) This testimony is not given much weight, however, because all of the witnesses agreed that the ultimate decision over whether to search the vehicle rested with Principal Mineau, and he did not mention the threat of beating up a student when explaining his decision. An admission that the males were on campus with the purpose of beating up a student is significant and not one that would be easily forgotten. Yet that fact was

> not included in any of the reports made by school officials after the incident, and only Athletic Director Zachow mentioned it at the hearing. Associate Principal Slowinski and Principal Mineau did not reference any admission that the males were on campus to beat up a student when explaining their assessment of the danger posed by these individuals. (Cont. Mot. Hr'g Tr. 50:7-15.)
>
> Although the factors behind Principal Mineau's decision to search Vang's vehicle did not include a plan of a violent altercation, all of the other factors are similar to those present in In re D.D. Principle Mineau knew that the young men were non-students who did not comply with the school visitor policy, there was an attempt to hide their identities, there was an association with a problem student, and there seemed to be an effort to keep school officials away from the car. Added to that was Officer Taschner's belief that the clothing of two of the males indicated gang affiliation. The combination of these factors gave Principal Mineau reasonable suspicion that these individuals posed a threat to school safety and that something connected with that threat was in Vang's vehicle. Accordingly, this Court finds that search was properly supported by reasonable suspicion.
> (R. 40-1-8; A. App. 103-110)

D. The trial court erroneously exercised its discretion

As noted above, in considering a trial court's ruling on a motion to suppress, the court will uphold [its] factual findings unless those findings are clearly erroneous." **State v. Patton**, 2006 WI App 235, ¶7, 297 Wis. 2d 415, 724 N.W.2d 347. Whether the facts satisfy constitutional principles is a question of law for the reviewing court to decide. See **State v. Kyles**, 2004 WI 15, ¶7, 269 Wis. 2d 1, 675 N.W.2d 449. The

appellate court defers to and is bound by the circuit court's credibility determinations. **State v. Owens**, 148 Wis.2d 922, 929-930, 436 N.W.2d 869 (1989). "The credibility of [witnesses] testifying at a suppression hearing outside the presence of the jury is a question for determination by the [circuit] court." **State v. Flynn**, 92 Wis.2d 427, 437, 285 N.W.2d 710 (1979).

A reviewing court will uphold a circuit court's evidentiary ruling if the circuit court "examined the relevant facts, applied a proper standard of law, used a demonstrated rational process and reached a conclusion that a reasonable judge could reach." **State v. Hunt**, 2003 WI 81, 263 Wis.2d 1, ¶ 34, 666 N.W.2d 771).

The defendant asserts that the court in this case failed in its duty to examine the facts of the case in light of the applicable case law. As the court notes, in **New Jersey v. T.L.O**., 469 U.S. 325 (1985), the United States Supreme Court weighed the contravening interest of student privacy and "the substantial interest of teachers and administrators in maintaining discipline in the classroom and on school grounds." **T.L.O**., 469 U.S. at 339 It instructed that a school search is legal when it satisfies the two-prong test: (1) the search must be "justified at its inception," and (2) "reasonably related in scope to the circumstances which justified the interference in the first place." **Id**. at 341-42 (citation omitted). In **State v. Angelia D.B.**, 211 Wis. 2d 140, 146, 564 N.W.2d 682 (1997), the Wisconsin Supreme Court applied the less strict minimal privacy standard to a search of a student and

concluded that school searches conducted by law enforcement officials in conjunction with public school officials must be based on reasonable grounds, and that the tip from the student informant sufficed to provide those grounds. **Angelia D.B**., 211 Wis. 2d at 160-62. In **State v. Schloegel**, 2009 WI App 85, 319 Wis.2d 741, 769 N.W.2d 130, the court noted that courts have accepted a variety of scenarios as evidence of reasonableness; for example, a search is reasonable where a student is suspected of violating rules in the school parking lot, the student has received a student handbook regarding vehicle searches parked on school grounds, or when the student has consented to a car search as a condition to being allowed to park in the school parking lot. **Schloegel,** at ¶18. Although the court in **Schloegel** noted that T.L.O. did not define school grounds, "school grounds have included areas where school officials have dominion and control, extending the permissible scope of search to students' cars parked on school property." **Schloegel,** at ¶19.

In each of the cases cited by the court, however, the school administrators were either acting on a tip that implicated an individual at the school or, in the case of non-students, taking action to maintain school disciplinary standards. The search of the defendant's car at issue here meets neither of these standards.

In the first instance, although it is appropriate that the school be able to address concerns with student behavior, whether as a violation of a school rule or criminal law, no case in the State of Wisconsin has ever applied the lower level of

suspicion to a non-student simply because that individual is present on school grounds. **T.L.O.** and its progeny, on their face, speak only to searches of students. Clearly, school officials manifestly do not have the same relationship with non-students as they do with students. Therefore the lower standard has only been applied to students under **T.L.O.**

This case, of course, clearly involved an investigation of a group of nonstudents. That investigation was initiated by Officer Taschner. He approached Mr. Her and Mr. Hao. He decided to bring them back to the office, and to detain them. He asked Mr. Zachow to assist him in this investigation. (R. 59-13-17; A. App. 111-115) He then met Mr. Vang at the school doors, escorted him to the office, began asking him questions, detained him, and initiated the events that led to the search of his vehicle. (R. 59-24-25; A. App. 116-117) School officials neither directed Officer Taschner's activities nor, with the exception of Mr. Zachow, were, seemingly aware of them until he chose to inform them. Officer Taschner, however, had no information prior to his interrogation of the defendant and his companions, and developed no information during the course of that interrogation, which would lead any reasonable person to conclude that these non-students presented a danger to discipline, order, or student safety, other than the extraordinarily specious allegation that their association with LY, who had had prior disciplinary issues, somehow made them a disciplinary concern. Nor, since the defendant and his companions were at all times relevant to this matter, effectively sequestered away from the vehicle, was

there any reasonable basis to believe that the vehicle and its contents presented a danger to discipline, order, or student safety. Had Officer Taschner possessed such evidence of course, he would have been in a position to seek a warrant to search the defendant's vehicle. The fact that he did not possess such evidence informed his next actions.

The facts of this case, and the testimony at the hearing, clearly demonstrate that:

> Officer Taschner requested that other officers report to the school to provide him additional cover while he conducted his investigation. (Mot. Hr'g Tr. 25:18-26:4.)
> One of the additional officers had a canine unit, so Officer Taschner asked him to conduct a dog sniff of the outside of Vang's vehicle. (Mot. Hr'g Tr. 26:7-9.) The dog did not alert for the presence of illegal drugs. (Mot. Hr'g Tr. 26:19-21.)
> (R. 40-2; A. App. 104)

The facts are clear: additional police were called to the scene by Officer Taschner, not by school officials. Officer Taschner, on his own initiative, directed one of these officers to carry out a dog sniff of the defendant's vehicle. When that sniff failed to produce any results, Officer Taschner informed school officials that he did not have an independent basis to search the vehicle and that he had no reason to hold onto Mr. Vang, Mr. Thao, and Mr. Her. The school's allegedly independent investigation and decision to search Mr. Vang's vehicle did not take place until after Officer Taschner informed school officials that he lacked a basis to proceed. (R. 59-25-30: A. App. 117-122)

It must be recognized that courts draw a clear distinction between the aforementioned categories of cases and those cases in which outside law enforcement officers search students as part of an independent investigation or in which school official search students at the request or behest of the outside law enforcement officers and law enforcement agencies. **Angelia D.B**., 564 N.W.2d at 687. Courts do not apply **T.L.O.** to these cases but instead require the traditional probable cause requirement to justify the search. See, e.g., **F.P. v. State**, 528 So.2d 1253 (Fla. Dist. Ct. App. 1988); **State v. Tywayne H**., 933 P.2d 251 (N.M. Ct. App. 1997), cert. denied, 123 N.M. 83, 934 P.2d. 277 (1997); **In Interest of Thomas B.D**., 486 S.E.2d 498 (S.C. App. Ct. 1997). The reason for this lies in the fact that the purpose of the search conducted by so-called "outside' police officers" is not to maintain discipline, order, or student safety, but to obtain evidence of a crime. **Josue T.**, 989 P.2d at 436-37.

The evidence is clear. The police here were not "acting on a tip" involving a student or a non-student when they conducted a dog sniff of the defendant's car. They were not acting to maintain discipline, order, or student safety – the transcript is empty of any indication that Officer Taschner, any other police officer, or any school official had any basis for believing that the defendant's presence on school grounds implicated these concerns. Put bluntly, the canine sniff was in furtherance of an attempt to find probable cause for a search of the defendant's vehicle. When that failed, when it appeared that Officer Taschner would have to let the defendant and his

companions go, the officer and school officials, acting in concert, employed the standard of lower level of suspicion as a pretext to circumvent the requirement of probable cause and allow Officer Taschner do what he was otherwise unable to do: search the defendant's vehicle for evidence of a crime.

CONCLUSION

For all of the above reasons the defendant-appellant requests that this court enter an order reversing both the defendant's conviction and the order denying his suppression motion and remanding this matter for further proceedings.

_____
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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in sec. 809.19(8)(b) and (c) for a brief and appendix produced with a proportionally spaced font. The length of the brief is 5,312 words.

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APPENDIX CERTIFICATION

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with s. 809.1 9(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names or persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

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CERTIFICATE OF COMPLIANCE WITH WIS. STAT: § (RULE) 809.19(12)

I hereby certify that

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the

requirements of Wis. Stat. § (Rule) 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 27th day of May, 2020.

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