STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT III

Case No. 2018AP1730-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

BLONG SIMBA VANG,

Defendant-Appellant.

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

RESPONSE BRIEF OF PLAINTIFF-RESPONDENT

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ISSUE PRESENTED

Did a school liaison officer, with the help of a backup police officer, lawfully search Blong Simba Vang's car on school grounds at the request of the school principal?

The circuit court answered "yes."

This Court should answer "yes."

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State does not request oral argument because the briefs should adequately set forth the issues and arguments on appeal.

Publication of this Court's decision might be warranted. In *New Jersey v. T.L.O.,* 469 U.S. 325 (1985), the Supreme Court adopted a reasonableness standard that governs searches of students on school grounds. Few published Wisconsin cases have analyzed *T.L.O.*, and none of them have decided whether this reasonableness standard applies when the subject of a search is not a student.

INTRODUCTION

Vang pled guilty to one count of conspiracy to commit child abuse. He argues that the circuit court erroneously denied his motion to suppress the two guns that officers found when they searched his car in a parking lot at Appleton East High School.

This Court should affirm because the search of Vang's car was legal. When, as here, police officers search a vehicle on school grounds at the request of a school administrator, the search is legal if it was reasonable, even if the officers did not have probable cause and a warrant. This reasonableness standard applies here even though Vang was not a student at Appleton East High School. Vang and two young men who accompanied him posed a safety threat to the school. School

administrators and the school liaison officer had a responsibility to address this threat by conducting a reasonable search of Vang's car.

STATEMENT OF THE CASE

On April 13, 2017, Jack Taschner was working as a school resource officer at Appleton East High School. (R. 59:10.) Taschner was monitoring the main hallway area at the end of the school day, as he often did. (R. 59:10.) Taschner spotted two young men in the building, later identified at Tou La Thao and T.H., but he did not recognize them as Appleton East students. (R. 59:11.)[1] Thao and T.H. were wearing hats in violation of school policy, so Taschner brought them into the school office to inquire about their identities. (R. 59:10, 13.) Thao and T.H. had also violated school policy by not checking in with the office and receiving visitor badges when they entered the school building. (R. 60: 36, 47.) The school's athletic director, Timothy Zachow, became involved in the questioning because he previously served as an associate principal and because no principals were present on campus at the time. (R. 59:16–17.)

Thao and T.H. said that they were not students and that they were at the school to pick up a student, L.Y., who had a known history of truancy, verbal altercations with other students, and a physical fight. (R. 59:17, 27–28, 45; 60:29–30.) L.Y.'s behavioral issues resulted in her being in the associate principal's office almost daily. (R. 60:38.) She was in truancy court at the time and had gone missing from school for a two-month period. (R. 59:27–28.)

[1] The State refers to T.H. and L.Y. by their initials because they were minors at the time of this search.

Thao or T.H. also said that they had come from Wausau to beat up an Appleton East student. (R. 60:9, 18.) T.H. gave Taschner an incorrect birth date when Taschner attempted to identify him, although Taschner might have just misheard T.H. (R. 40:2; 59:14–15, 36.)[2] Thao or T.H. said that his uncle had driven them to the school. (R. 60:9, 18.)

Zachow began to walk toward a car that was parked in the driveway outside the school to talk to the driver, but L.Y. ran ahead of him and spoke to the driver. (R. 60:9–10.) L.Y. saw that Thao and T.H. had been taken to the office before she ran outside. (R. 32:2.) The driver, who was later identified as Vang, moved the car from the driveway in front of the school to a side parking lot after talking to L.Y. (R. 40:2.) Vang then walked toward the front doors of the school, L.Y. said something to him again, and then Vang began to walk away. (R. 40:2; 60:11.) Officer Taschner approached Vang and asked him to come into the building. (R. 60:11.)

Taschner brought Vang into the office to determine his identity and purpose for being on school grounds. (R. 59:21–22.) Both L.Y. and Vang informed Taschner that Vang was L.Y.'s uncle, but Taschner thought that Vang was too young to be her uncle, and Taschner later determined that this assertion was false. (R. 59:24.) Vang gave Taschner an incorrect birth date. (R. 59:25.)

Taschner requested that additional police officers be dispatched to the school because the presence of several non-students that Taschner could not properly identify raised safety concerns. (R. 59:25–26.) Officer Rohm arrived at the school, and then he and Officer Taschner conducted a dog sniff around Vang's car, which was typical protocol for the situation. (R. 59:26.) Taschner had the school principal's

[2] Taschner did not tell the school principal, who ultimately decided to search Vang's car, that the incorrect birth date was possibly a misunderstanding. (R. 60:57.)

"blanket permission" to conduct a dog sniff around vehicles parked at the school. (R. 59:39.) The dog did not indicate anything. (R. 59:26.)

Associate Principal Mike Slewinski arrived at school, and Taschner informed him of the situation. (R. 59:27; 60:14.) Slewinski went inside and talked to Athletic Director Zachow about whether it was necessary to search Vang's car. (R. 40:2.) Slewinski called Assistant Superintendent Ben Vogel to discuss the situation. (R. 59:29.) Taschner was not involved in the conversation regarding whether to search Vang's car, nor was he involved in the phone call with Vogel. (R. 59:27–29.)

During the phone call, the head principal, Matt Mineau, arrived on campus and joined the conversation with Vogel and Slewinski. (R. 59:26, 29.) Officer Taschner was present for only the "very tail end" of that conversation, and his involvement was limited to asking Principal Mineau what the status of the situation was. (R. 59:29–30.) Mineau told Taschner that he wanted Vang's car searched, and Mineau escorted Vang, Taschner, and Officer Rohm out to the parking lot. (R. 59: 30.) Taschner was not involved in making this decision to search Vang's car, and he and Officer Rohm conducted the search "[a]t Principal Mineau's request." (R. 59:30, 32.) Taschner and Rohm searched Vang's car, found a gun in the backseat, placed Vang under arrest, and then found a gun in the car's trunk. (R. 40:3.)

The State charged Vang with three counts: felony bail jumping, conspiracy to commit physical abuse of a child, and possession of a firearm on school grounds. (R. 12.)

Vang filed a motion to suppress the gun evidence and all statements that he, L.Y., Thao, and T.H. made after the search of Vang's car. (R. 37:19.) After holding an evidentiary hearing on the motion, the circuit court denied the motion in a written decision and order. (R. 40.) It determined that the

search of Vang's car was lawful because the school officials had reasonable safety concerns. (R. 40:3–8.)

Vang pled no contest to the conspiracy count. (R. 63:5, 11.) The State moved to dismiss and read in the other two counts, and the circuit court granted that request. (R. 63:2, 19.) The court later imposed a bifurcated sentence of six years in the Wisconsin State Prison system, with three years of initial confinement and three years of extended supervision. (R. 49; 64:36.)

Vang filed a no-merit notice of appeal. This Court rejected the no-merit report.

Vang then filed a notice of appeal. (R. 52.)

STANDARD OF REVIEW

The reasonableness of a search is a constitutional question, and courts assess this issue "independently, benefitting from the analysis of the lower court." *State v. Angelia D.B.,* 211 Wis. 2d 140, 146, 564 N.W.2d 682 (1997). A reviewing court will uphold the circuit court's evidentiary and factual findings unless they are "against the great weight and clear preponderance of the evidence." *Id.*

ARGUMENT

The officers lawfully searched Vang's car.

A. Under *New Jersey v. T.L.O.*, a search on school grounds must be reasonable but does not need a warrant and probable cause.

"The Fourth Amendment to the United States Constitution and Article I, Section 11 of the Wisconsin Constitution protect '[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.'" *State v. Tullberg*, 2014 WI 134, ¶ 29, 359 Wis. 2d 421, 857 N.W.2d 120 (alteration in

original) (citation omitted). "The Fourth Amendment does not proscribe all state-initiated searches and seizures; it merely proscribes those which are unreasonable." *Id.* (citation omitted).

Although the "underlying command of the Fourth Amendment" mandates that searches and seizures must be reasonable, "what is reasonable depends on the context within which a search takes place." *New Jersey v. T.L.O.*, 469 U.S. 325, 337 (1985). In *T.L.O.*, the United States Supreme Court held that reasonable searches of students on school grounds do not require a warrant or probable cause. *Id.* at 340–41. Instead, these searches should be assessed based on their "reasonableness, under all the circumstances." *Id.*

The Court identified a two-part test to assess the reasonableness of a search: first, one must determine "whether the . . . action was justified at its inception." *Id.* (quoting *Terry v. Ohio*, 392 U.S. 1, 20 (1967)). Second, one must decide "whether the search as actually conducted 'was reasonably related in scope to the circumstances which justified the interference in the first place.'" *Id.* (quoting *Terry*, 392 U.S. at 20).

Here, the *T.L.O.* reasonableness standard applies to the search of Vang's car even though he was not a student at Appleton East High School. This standard applies here because the school principal, rather than police officers, made the decision to conduct the search. Although *T.L.O.* does not address searches of non-students, other jurisdictions have correctly held that this reasonableness standard applies to non-students. This extension is justified because non-students can implicate the safety concerns on which the *T.L.O.* Court relied.

B. The reasonableness standard from *T.L.O.* applies here.

While Vang argues that the probable cause standard for searches applies here, this Court should conclude that the reasonableness standard from *T.L.O.* is the proper standard. The *T.L.O.* standard applies to a search of a car in a school parking lot, even if the subject of the search is not a student at the school. The dispositive issue is whether school officials or outside police officers decided to perform the search. The *T.L.O.* standard applies here because the school principal made the decision to search Vang's car after consulting with other school administrators.

1. The *T.L.O.* standard applies to searches of vehicles in school parking lots, including the search of Vang's car.

The *T.L.O.* reasonableness standard is not confined to searches that occur within a school building. In *State v. Schloegel*, this Court determined that the *T.L.O.* reasonableness standard applies to searches conducted in a school's parking lot. 2009 WI App 85, ¶¶ 16–20, 319 Wis. 2d 741, 769 N.W.2d 130. While this Court recognized that the United States Supreme Court "did not define the term 'school grounds'" in *T.L.O.*, it also noted that "courts have upheld 'a school's substantial interest in maintaining discipline on school grounds,' and have extended the minimal expectation of privacy in the classroom and lockers to the school parking lot." *Id.* ¶ 19. (citation omitted). This extension of the *T.L.O.* standard is rooted in the idea that "a school official has the responsibility to keep students safe on school grounds, and . . . this includes school parking lots." *Id.* ¶ 22. The court concluded that "if a search of a student's vehicle meets the two-part test in *T.L.O.*, the search is reasonable and constitutional." *Id.* ¶ 24.

Under *Schloegel*, the *T.L.O.* standard applies here even though officers searched Vang's car in a school parking lot, because a parking lot is part of the school grounds.

2. The *T.L.O.* standard applies to searches of non-students on school grounds.

This Court should conclude that the *T.L.O.* standard applies to searches of non-students on school grounds. Persuasive authority from other jurisdictions has reached this conclusion.

In *United States v. Aguilera,* the court held that the *T.L.O.* standard applies to searches of non-student visitors on school grounds. 287 F.Supp. 2d 1204, 1209 (E.D. Cal. 2003). The court reasoned that Supreme Court cases had recognized a lower expectation of privacy at schools without distinguishing between students and non-students. *Id.* at 1208–09 (citing *Florida v. J.L.*, 529 U.S. 266, 273–74 (2000); *Vernonia Sch. Dist. v. Acton*, 515 U.S. 646, 655 (1995)). The court also noted "the wave of high school gun violence in recent years, such as the slaughter of students at Columbine High School." *Id.* at 1209. The court further reasoned that "to extend the *T.L.O.* standard to non-student visitors who present a credible threat of physical harm to students on campus would seem a small and logical step." *Id.* at 1209. It noted that a lower expectation of privacy applies on school grounds "because public school administrators have the heightened burden of providing a safe haven for students." *Id.* at 1208 (citing *T.L.O.*, 469 U.S. at 339). In other words, "the rationale in *T.L.O.* stems from the inherent authority and responsibility of school administrators to provide a safe environment for students." *Id.* at 1209. The "same need for a safe environment" applies equally to students and "non-students who pose a threat to that environment." *Id.*

The court reached the same conclusion in *In re D.D.*, 554 S.E.2d 346, 351–52 (N.C. Ct. App. 2001). It reasoned that not applying the *T.L.O.* standard where a non-student posed a safety threat "could lead to absurd results." *Id.* at 352. The court further reasoned that it had found no cases from any jurisdiction supporting the "conclusion that *T.L.O.* does not apply to students who are not the students of the school official conducting the search." *Id.* at 351. To the contrary, case law from the United States Supreme Court and other courts supported application of the *T.L.O.* standard in that context. *Id.* Relying on Wisconsin case law, the court noted that school officials "have a responsibility to protect [their] students and their teachers from behavior that threatens their safety." *Id.* (quoting *Angelia D.B.*, 211 Wis. 2d at 157). Addressing the facts in *D.D.*, the court noted that "the principal had an obligation to confront any trespasser visiting the [school] campus." *Id.* at 355. It concluded that "the *T.L.O.* standard should have been applied . . . despite [D.D.'s] status as a [student of a different school]." *Id.* at 352.

This Court should follow *Aguilera* and *D.D.* because they are consistent with Wisconsin law. Wisconsin case law similarly recognizes that the Supreme Court in *T.L.O.* adopted a reasonableness standard for school searches to better enable school officials to maintain safety and order. *Angelia D.B.*, 211 Wis. 2d at 149–51. The court in *Angelia D.B.* "recognize[d] the special needs of public school officials to maintain a safe environment, free of disruption and conducive to learning." *Id.* at 156. And, like the federal district court in *Aguilera*, the court in *Angelia D.B.* acknowledged "the growing incidence of violence and dangerous weapons in schools." *Id.* at 157. The *Aguilera* court mentioned the Columbine High School shooting as an example, and additional mass shootings occurred in schools since *Aguilera* was decided, such as the 2012 massacre at Sandy Hook Elementary School and the 2018 massacre at Marjory

Stoneman Douglas High School. Likewise, in *Schloegel*, this Court relied on school officials' duty to ensure students' safety on school grounds when it extended the *T.L.O.* standard to school parking lots. 319 Wis. 2d 741, ¶¶ 17, 21–22.

For similar reasons, this Court should hold that the *T.L.O.* standard applies to searches of people who are not students of the school where the search occurs. As the federal district court in *Aguilera* recognized, school officials' duty to keep students safe applies equally to threats posed by students or non-students. Extending the *T.L.O.* standard to visitors or trespassers of a school makes just as much sense as extending it to vehicles in school parking lots. As the preceding discussion shows, the *T.L.O.* standard exists in large part to help school officials keep their students safe. This standard applies when the subject of a search poses a threat to school safety, regardless of whether the person is a student at that school.

Vang seems to argue that the *T.L.O.* standard applies to non-students only when school officials "tak[e] action to maintain school disciplinary standards." (Vang's Br. 17.) That argument does not make sense because school officials have no authority to discipline non-students. As just explained, case law applies the *T.L.O.* standard when school officials conduct searches of non-students for *safety* reasons.

So, the *T.L.O.* standard can apply here even though Vang was not a student at Appleton East High School.

3. The *T.L.O.* standard applies here because the school principal requested the search.

The Wisconsin Supreme Court has held that the *T.L.O.* reasonableness standard "applies to a search conducted on school grounds by a police officer at the request of, and in conjunction with, school authorities." *Angelia D.B.*, 211 Wis. 2d at 144. It noted that most courts apply this standard

in cases where "school officials initiate the search or police involvement is minimal" and in "cases involving school police or liaison officers acting on their own authority." *Id.* at 151–52. The court further noted that "when school officials, who are responsible for the welfare and education of all of the students within the campus, initiate an investigation and conduct it on school grounds in conjunction with police, the school has brought the police into the school-student relationship." *Id.* at 155.

The court in *Angelia D.B.* further noted, by contrast, that courts apply the probable cause standard when "outside police officers initiate a search or where school officials act at the behest of law enforcement agencies." *Id.* at 152. In other words, the *T.L.O.* reasonableness standard does not apply to a search "conducted by police officers acting independently of school officials." *Id.* at 155.

The North Carolina court in *D.D.*, which heavily relied on *Angelia D.B.*, explained why the *T.L.O.* standard applies even to searches initiated by school liaison officers. These officers are employed by a district school board, rather than a police department, and they are responsible for school safety. *D.D.*, 554 S.E.2d at 352. By contrast, "[t]he 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." *Id.* at 352–53 (citation omitted). So, not permitting school administrators to request help from school resource officers "is illogical and indeed defeats the officers' purpose for being on the school campus." *Id.* at 354. This explanation is consistent with *Angelia D.B.*, where the Wisconsin Supreme Court stated that it "may reasonably infer that where a law enforcement official has an office at the school, one of the official's responsibilities as a school liaison officer is to assist school officials in maintaining a safe and proper educational environment." 211 Wis. 2d at 158.

The *T.L.O.* standard applies here because the school principal, rather than police officers, decided that a search of Vang's car was necessary. School Liaison Officer Jack Taschner initiated contact with Thao and T.H., who were standing in the school commons area, because he did not recognize them and because they were wearing hats in violation of school policy. (R. 59:10–13.) The athletic director, Timothy Zachow, became involved in the questioning of Thao and T.H. because he was the highest-ranking school official on campus at the time. (R. 40:2.) Eventually, an associate principal, Mike Slewinski, arrived on campus and discussed with Zachow whether it was necessary to search Vang's car. (R. 40:2.) Slewinski called an assistant superintendent, Ben Vogel, to inform him of what Zachow and Taschner had observed and to obtain input on whether to search Vang's car. (R. 59:27–29.) Taschner was not involved in the conversation regarding whether to search Vang's car, nor was he involved in the phone call with Vogel. (R. 59:27–29.) During the phone call, the head principal, Matt Mineau, arrived on campus and joined the conversation with Vogel and Slewinski. (R. 59:26, 29.) Taschner was present for only the "very tail end" of that conversation, and his involvement was limited to asking Principal Mineau what the status of the situation was. (R. 59:29–30.) Mineau informed Taschner that he wanted Vang's car searched. (R. 59:30.) Officer Taschner was not involved in making this decision to search Vang's car, and he and Officer Rohm conducted the search "[a]t Principal Mineau's request." (R. 59:30, 32.)

As noted, the *T.L.O.* reasonableness standard does not apply to a search "conducted by police officers acting independently of school officials," but it "applies to a search conducted on school grounds by a police officer at the request of, and in conjunction with, school authorities." *Angelia D.B.*, 211 Wis. 2d at 144, 155. The latter scenario is what occurred here.

4. Vang's arguments against applying the *T.L.O.* standard here are not persuasive.

Vang argues that the *T.L.O.* reasonableness standard does not apply here because Liaison Officer Taschner initiated the questioning of Thao and T.H., called for backup police officers, and asked one police officer to conduct a dog sniff around Vang's car. (Vang's Br. 18–19.) Vang is wrong on all three points.

First, Taschner's decision to approach Thao and T.H. was consistent with his duty to maintain school safety. A school liaison officer, like Taschner, is responsible for "maintaining a safe and proper educational environment." *Angelia D.B.*, 211 Wis. 2d at 158. At the time of the search, Officer Taschner had been employed as a school resource officer at Appleton East High School for over a year. (R. 59:10.) Taschner testified that part of his "common routine" in that capacity included standing in "the main hallway area" of the school to oversee student activity, which is what he was doing on the day in question. (R. 59:10–11.) He stated that making contact with people in the school whom he does not recognize is part of his typical practice at Appleton East High School, as he is "fairly well-versed at identifying faces" of students with whom he is familiar. (R. 59:12–13.) Taschner approached Thao and T.H. because he did not recognize them and because they were wearing hats in violation of school policy. (R. 59:12–13.) The *T.L.O.* standard applies largely to promote school safety, and Taschner confronted Thao and T.H. due to his responsibility for ensuring school safety.

The *T.L.O.* standard applies here even though Taschner acted on his own authority to approach Thao and T.H. Most courts apply the *T.L.O.* standard even in cases where school liaison officers *conduct searches* on their own authority. *Angelia D.B.*, 211 Wis. 2d at 152 (collecting cases). Here,

Taschner did not go nearly that far, though he could have done so without sacrificing *T.L.O.*'s protection. As explained, Taschner brought the athletic director into the questioning of Thao and T.H., and Taschner left the conversation before school administrators discussed the possible need to search Vang's car. Taschner merely used his own authority to confront Thao and T.H., not to search Vang's car.

Second, Taschner's decision to call for police backup does not make the *T.L.O.* standard inapplicable here. School officials "have a responsibility to protect . . . students and teachers from behavior that threatens their safety," and they must be permitted to have "a certain degree of flexibility" in seeking assistance from law enforcement officers "without losing the protections afforded by the reasonable grounds standard." *Angelia D.B.*, 211 Wis. 2d at 157, 160. The *Angelia D.B.* court highlighted the danger of allowing non-law enforcement school officials to conduct searches, as "it could be hazardous to discourage school officials from requesting the assistance of available trained police resources." *Id.* at 159. It is thus "permissible for school officials who have a reasonable suspicion that a student may be in possession of a dangerous weapon on school grounds to request the assistance of a school liaison officer or other law enforcement officials in conducting a further investigation." *Id.* at 160.

Here, Liaison Officer Taschner called for police backup because of safety concerns stemming from the three young men's association with a student who had disciplinary problems, the fact that Taschner "had students in the school that [he] couldn't properly identify," and the fact that Thao and T.H. were waiting in a separate area while he spoke with Vang. (R. 59:18, 24–25.) By calling for police assistance, Taschner did not lose the protections of the *T.L.O.* standard. *See Angelia D.B.*, 211 Wis. 2d at 160.

Third, the dog sniff of Vang's car at Taschner's request has no bearing on which legal standard applies here. Taschner was hardly acting on his own authority when he asked a police officer to conduct a dog sniff around Vang's car. Taschner testified that he had Principal Mineau's "blanket permission" to conduct a dog sniff around vehicles parked at the school. (R. 59:39.) And the dog sniff did not lead to the discovery of guns in Vang's car, so it is unclear why Vang thinks this dog sniff matters. He has not developed an argument to this effect. Besides, as just noted, most courts would apply the *T.L.O.* standard even if Taschner had found the guns in Vang's car while performing a search under his own authority. *See Angelia D.B.*, 211 Wis. 2d at 152 (collecting cases). And, finally, a dog sniff around a car parked in a public place is not a search. *State v. Arias*, 2008 WI 84, ¶ 24, 311 Wis. 2d 358, 752 N.W.2d 748. So, the dog sniff of Vang's car is a red herring because it was a non-search conducted pursuant to Principal Mineau's blanket permission, and it did not produce any evidence. It has no bearing on which legal standard applies here.

In short, the *T.L.O.* reasonableness standard applies here because Principal Mineau made the decision to search Vang's car. In other words, the search of Vang's car was "conducted on school grounds by a police officer at the request of, and in conjunction with, school authorities." *Angelia D.B.*, 211 Wis. 2d at 144.

C. The search of Vang's car was lawful under the *T.L.O.* standard.

The *T.L.O.* standard requires evaluation of "whether the . . . action was justified at its inception" and "whether the search as actually conducted 'was reasonably related in scope to the circumstances which justified the interference in the first place.'" *T.L.O.*, 469 U.S. at 341 (citation omitted). Here, the search of Vang's car meets both prongs of this test.

1. The search of Vang's car was reasonable at its inception.

"[A] search of a student by a teacher or other school official will be 'justified at its inception' when there are reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or rules of the school." *Angelia D.B.*, 211 Wis. 2d at 161 (alteration in original) (quoting *T.L.O.*, 469 U.S. at 341–42). This standard requires only "a moderate chance of finding evidence of wrongdoing." *Safford Unified Sch. Dist. No. 1 v. Redding*, 557 U.S. 364, 371 (2009). This test is met here because there were reasonable grounds for suspecting that Vang's car contained a weapon or other contraband.

Thao and T.H. raised the initial safety concern. Liaison Officer Taschner noticed Thao and T.H. in the school commons area, he did not recognize them, and they were wearing hats in violation of school policy. (R. 59:11.) Thao and T.H. had also violated school policy by not checking in with the office and receiving visitor badges when they entered the school building. (R. 60: 36, 47.) Taschner thought that their clothing possibly suggested gang affiliation. (R. 59:48, 50, 57.) Thao and T.H. informed Officer Taschner that they were not students at Appleton East High School. (R. 59:11.) Thao or T.H. said that they had come from Wausau to beat up an Appleton East student. (R. 60:9, 18.) The athletic director, who was questioning Thao and T.H., found this explanation "very concerning." (R. 60:9.)

Thao and T.H. gave another reason for coming to the school that raised a safety concern. They said that they had come to pick up a female student, L.Y. (R. 59:17.) School officials found this connection to L.Y. concerning because L.Y. had a history of truancy, verbal altercations with other students, and a physical fight. (R. 59:27–28, 45; 60:29–30.) L.Y.'s behavioral issues resulted in her being in the associate principal's office almost daily. (R. 60:38.) She was in truancy

court at the time and had gone missing from school for a two-month period. (R. 59:27–28.) A student's record and prior experience with school officials are relevant considerations in this analysis. *L.L. v. Circuit Court of Washington Cty.*, 90 Wis. 2d 585, 602, 280 N.W.2d 343 (Ct. App. 1979). L.Y.'s history of troublemaking reasonably raised the school officials' concerns.

Vang's behavior was also concerning. When Athletic Director Zachow began to walk toward Vang's car to talk to him, L.Y. ran ahead of Zachow and spoke to Vang. (R. 60:9–10.) L.Y. saw that Thao and T.H. had been taken to the office before she ran outside to speak with Vang. (R. 32:2.) Vang then moved his car from the driveway in front of the school to a side parking lot. (R. 40:2; 60:9–10.) This timing suggests that L.Y. warned Vang that school officials would want to speak with him and that he moved his car to hide something in it.

Vang then acted evasively again moments later. After parking his car, Vang walked toward the front doors of the school, L.Y. said something to him, and then Vang began to walk away. (R. 40:2; 60:11.)

These two evasive actions by Vang were suspicious and reasonably suggested that he was trying to hide something in his car. The school officials could reasonably think that Vang was specifically trying to hide a weapon because (1) Vang drove Thao and T.H. to the school so they could beat up a student; (2) Vang was going to give a ride to L.Y., who had a history of altercations with other students; and (3) Thao's and T.H.'s clothing might have suggested gang affiliation.

Vang, Thao, and T.H. also lied to school officials several times, raising the suspicion that they posed a safety risk. Vang and possibly T.H. gave an incorrect birth date to Officer Taschner. (R. 59:14–15, 36; 60:27–26.) L.Y. and Vang falsely said that Vang was her uncle, even though Officer Taschner

observed that Vang looked too young to be her uncle. (R. 59:23–24.)

The court in *D.D.* found a school search justified at its inception under similar facts. There, a substitute teacher overheard students say that a group of girls would come to the school for a fight at the end of the day. *D.D.*, 554 S.E.2d at 347–48. The teacher heard the name of one student who would be involved in the fight. *Id.* at 348. The teacher relayed this information to the principal. *Id.* The principal later confronted a group of girls outside, and they kept trying to walk away and gave him false names. *Id.* Police found a box cutter in one girl's purse and a knife in one girl's pocket. *Id.* at 349. The court determined that the search was justified at its inception because the principal had heard that a fight was going to happen at school, he knew that students usually bring weapons to a fight, and the girls he confronted "were evasive, profane, and gave false names." *Id.* at 354–55.

Here, the search was likewise justified at its inception. Like in *D.D.*, the school officials here heard that there was going to be a fight—specifically, two non-students admitted that they were on campus to beat up a student. Like the false names in *D.D.*, here Officer Taschner received false birth dates from Vang and possibly T.H. when he tried to identify them. School officials here further received false information when Vang and L.Y. claimed that he was her uncle. Vang acted evasively by moving his car after L.Y. talked to him and by starting to walk away after L.Y. spoke to him a second time. Although the principal here did not testify that people usually bring a weapon to a fight, this suspicion is a reasonable one to have. And L.Y. had a troubling school record, a factor that apparently was absent in *D.D.* So, the search of Vang's car was even more justified than the search in *D.D.*

One final point on the first prong of the *T.L.O.* test deserves brief attention: the circuit court did not give "much weight" to the concern that Thao or T.H. said that they were on campus to beat up a student, because Principal Mineau did not mention this factor when explaining his decision to search Vang's car. (R. 40:7.) It is unclear whether the circuit court found that Principal Mineau was unaware of this planned fight or just that he did not expressly rely on it as a basis for the search. The State reads the circuit court's decision as supporting the latter view.[3]

This Court should conclude that Vang has abandoned a contrary argument. A party abandons an issue by failing to raise it in the party's main appellate brief, even if the party raised the issue in the circuit court. *A.O. Smith Corp. v. Allstate Ins. Companies*, 222 Wis. 2d 475, 493, 588 N.W.2d 285 (Ct. App. 1998). In the circuit court, Vang argued that the school officials were unaware of any threat to harm a student. (R. 39:3, 9–11.) But he does not advance that argument on appeal, so this Court should deem it abandoned.

This Court should give substantial weight to the planned fight. When the facts are undisputed, this Court independently decides the constitutional significance of the facts. *State v. Schmidt*, 2012 WI App 137, ¶ 6, 345 Wis. 2d 326, 825 N.W.2d 521. In his brief-in-chief, Vang has not disputed that Principal Mineau was aware of Thao's and T.H.'s plan to beat up a student. This Court should

[3] Athletic Director Zachow testified that Thao or T.H. said that they were on school grounds to beat up a student (R. 60:9, 18), and he "filled [Principal] Mineau in on exactly what had happened" (R. 60:16). But Officer Taschner, Principal Mineau, and Associate Principal Slewinski testified that they were not aware of (or did not remember) any threat to harm a student. (R. 59:46; 60:41, 60.)

independently decide to give great weight to this safety concern.[4]

And, even without considering this planned fight, the facts still created reasonable grounds for searching Vang's car. Vang brought Thao and T.H. to Appleton East High School to pick up L.Y., who had a history of altercations, including a physical fight. Thao and T.H. did not comply with the school's visitor policy or dress code, and at least one of them wore clothing that possibly suggested gang affiliation. L.Y. ran past a school official to talk to Vang first, and then Vang moved his car to a side parking lot. Vang and his companions gave false statements when school officials tried to identify them. These facts reasonably suggested that Vang's car might contain a dangerous weapon or other contraband that he was trying to hide from school officials.

In short, the totality of facts justified the search of Vang's car at its inception. The first prong of the *T.L.O.* test is satisfied.

2. The search of Vang's car was reasonably limited in scope.

Under the second prong of the *T.L.O.* test, "a search will be permissible in its scope when the measures adopted are reasonably related to the objectives of the search and are not excessively intrusive in light of the age and sex of the student and the nature of the infraction." *Angelia D.B.*, 211 Wis. 2d at 161 (quoting *T.L.O.*, 469 U.S. at 342). This test is met here.

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[4] The State concedes that this planned fight would not be a relevant factor if this Court interprets the circuit court's decision to mean that Principal Mineau was unaware of the planned fight. "[I]n order for the collective-information rule to apply, such information must actually be passed to the officer before he or she makes an arrest or conducts a search." *State v. Black*, 2000 WI App 175, ¶ 17 n.4, 238 Wis. 2d 203, 617 N.W.2d 210.

The search of Vang's car was reasonably related in scope to the circumstances that justified the search. Part of what created the suspicion regarding Vang's presence on school grounds was the fact that while Officer Taschner was speaking with Thao and T.H., L.Y. ran out of the school building to a speak to Vang, who waiting in the school driveway. (R. 59:18–21; 60:9–10.) Vang then moved his car to a parking lot, walked up to the school building, spoke with L.Y., and started to walk away. (R. 59:20–21; 60:11.) Vang's sudden decision to relocate his car right after speaking to L.Y. was suspicious. This conduct, when considered with the other suspicious facts discussed above, reasonably suggested that Vang was trying to hide a weapon or other contraband in his car. It is reasonable for a school principal to feel the need to search a car that a non-student drove to school and parked under concerning circumstances, especially when the car's driver approaches the school and subsequently gives a school liaison officer false information about his identity.

The pat-down of Vang's person further supports the reasonableness of the search of his car. Liaison Officer Taschner did a pat-down search of Vang before bringing him back outside to search his car. (R. 59:33, 40, 42.) Wisconsin courts have relied on similar facts when finding the second prong of the *T.L.O.* test satisfied. In *Schloegel*, this Court concluded that "it was a reasonable next step for school officials to take the search to Schloegel's car" after searching his person, backpack, and locker for drugs that he reportedly had. 319 Wis. 2d 741, ¶ 22. In *Angelia D.B.*, a school liaison officer reasonably searched a female student's waistband for a knife that she reportedly had because school officials did not find a weapon when they patted down her pants and jacket or when they searched her locker and backpack. 211 Wis. 2d at 162–63. Here, similarly, because the pat-down of Vang did not reveal a weapon or other contraband, "it was a reasonable next step for school officials to take the search to [Vang's] car."

Schloegel, 319 Wis. 2d 741, ¶ 22. This step was especially reasonable because Vang suspiciously moved his car after L.Y. ran out of the school and talked to him.

Vang's age and sex and the nature of the infraction also support the scope of the search. Vang was 21 years old when the search occurred. (R. 2:1.) The court in *Angelia D.B.* found the scope of a search reasonable when a male liaison officer lifted the bottom of a 15-year-old girl's shirt to search her waistband for a knife. 211 Wis. 2d at 162–63. The school officials here likewise had reasonable grounds for thinking that Vang had a weapon in his possession. And the search of Vang's car was less intrusive than a male officer's lifting a teenage girl's shirt. Indeed, Vang does not advance an argument regarding his age and sex or the nature of the infraction.

In short, the search of Vang's car was reasonable in scope, so the second prong of the *T.L.O.* test is satisfied. The search was lawful.

3. Vang's arguments are unavailing.

Vang argues that his car did not pose a safety risk because he and his companions were "effectively sequestered away from the vehicle." (Vang's Br. 18.) But, as Vang recognizes, Liaison Officer Taschner "had no reason to hold onto" Vang and his companions before finding the guns, so "it appeared that Officer Taschner would have to let [Vang] and his companions go." (Vang's Br. 18, 20–21.) When officers have reasonable suspicion that a defendant's car contains a dangerous weapon, they may search the car if the defendant is not under arrest and thus free to return to the car. *See State v. Sutton*, 2012 WI App 7, ¶ 8, 338 Wis. 2d 338, 808 N.W.2d 411. And Vang's argument conflicts with *Schloegel*, which holds that the *T.L.O.* standard allows officers to reasonably search a car on school grounds.

Vang next argues that the search of his car was "a pretext" to find "evidence of a crime," presumably referring to drugs, rather than a search motivated by "discipline, order, or student safety." (Vang's Br. 20–21.) His argument fails on the facts. Principal Mineau testified that he "had reasonable suspicion that there was a question of safety for the individuals in the [school] building." (R. 60:51.) The circuit court found that Principal Mineau had suspected "that there was a school safety issue and that there could be something in the car connected to that safety issue." (R. 40:7.) Vang does not even attempt to show that this factual finding is clearly erroneous.

Vang's "pretext" argument also fails on the law because the *T.L.O.* standard applies to a search for drugs in a car parked on school grounds. *See Schloegel*, 319 Wis. 2d 741, ¶¶ 21–22. For the *T.L.O.* standard to apply, a search must be motivated by special needs of the school, which includes "the need to deter drug use in public schools." *Ashcroft v. al-Kidd*, 563 U.S. 731, 736 (2011). So, the *T.L.O.* standard applies here if the school officials were searching Vang's car for drugs or weapons. Either type of contraband poses a threat to students' safety.

In short, the officers lawfully searched Vang's car because the totality of facts created a reasonable concern that Vang and his companions posed a safety threat and that his car might contain a weapon or other contraband.

CONCLUSION

This Court should affirm Vang's judgment of conviction.

Dated this 13th day of August 2020.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 6951 words.

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

I further certify that:

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

Dated this 13th day of August 2020.

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