STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III
CASE NO. 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

REPLY BRIEF OF DEFENDANT-APPELLANT

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TABLE OF CASES CITED

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ARGUMENT

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

The defendant asserted, in his Brief in Chief, that the court in this case failed in its duty to examine the facts of the case in light of the applicable case law. 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 below, 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. Contrary to the State's assertion in its brief, that investigation was initiated by Officer Taschner. School Administration was not involved in any way at that stage. Officer Taschner 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, he, not school officials, called additional police to the scene. by Officer Taschner, not by school officials. On his own initiative, not because he was directed to do so by school administrators, Officer Taschner, directed one of these officers to carry out a dog sniff of the defendant's vehicle. That sniff failed to produce any results that would have justified any search of the vehicle.

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)

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.

The evidence in this case is clear. As of the moment that the school administration “initiated” its investigation into an ongoing investigation that had failed to produce any leads, neither the school administration nor Officer Taschner were in possession of information that implicated any of the three individuals who were, at that time, being held by the school. Nor was the defendant at that time implicated in any violation of the school’s disciplinary rules. The record shows that Officer Taschner wasn’t operating on the basis of articulable facts and circumstances when he obliquely suggested to the school administration that they possessed the key to his dilemma. He wasn’t even operating on the basis of a hunch.

The record therefore clearly establishes that 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 a Hail Mary attempt to find probable cause for a search of the defendant's vehicle. When that failed, and Officer Taschner informed school officials that he 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 1,331 words.

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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 31st day of August, 2020.

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