**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

**MAY 13, 1998**

**Marilyn L. Graves**
**Clerk, Court of Appeals**
**of Wisconsin**



**No. 97-3735-CR**

**STATE OF WISCONSIN** **IN COURT OF APPEALS**
**DISTRICT II**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**v.**

**JOSEPH W. MAROLA,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment of the circuit court for Waukesha County: DONALD J. HASSIN, Jr., Judge. *Affirmed.*

ANDERSON, J. Joseph W. Marola appeals from a judgment of conviction for possession of marijuana without a prescription within 1000 feet of a school in violation of §§ 161.41(3r) and 161.495, STATS., 1993-94.[1] Marola challenges the trial court's denial of his motion to suppress certain items of physical evidence seized by the authorities after a search conducted by the vice

[1] The judgment of conviction incorrectly recites that Marola was convicted of violating § 161.49(1), STATS., 1993-94. Upon remittitur, the court is directed to amend the judgment of conviction to reflect the charge in the complaint.

principal of Marola's high school. Under the totality of the circumstances, the search of Marola was reasonable and we affirm.

In the winter of 1996, Marola was a student at New Berlin West High School. Between February 9 and March 26, five student behavior reports were filed for Marola's violations of the school's written policy against smoking on school property or on the school bus. Each of these reports was filed with the vice principal, Theresa Weingrod. On March 27, a teacher found Marola in the boys' bathroom when he should have been in his fifth hour class and escorted him to Weingrod's office. The first thing Weingrod noticed was the odor of cigarette smoke coming from Marola. Because of the five incidents involving Marola's violation of the school's no smoking policy, including smoking in the bathroom, Weingrod asked him to empty his pockets. Marola voluntarily complied with the request.

One of the items Marola removed from his pocket was a large black wallet. Weingrod testified that the wallet was approximately five inches long and one inch thick. Because there were no smoking materials in Marola's pockets, Weingrod asked him to open his wallet. Weingrod testified that when Marola opened the wallet a baggie fell out which appeared to contain marijuana. Once she saw the baggie, Weingrod called the city of New Berlin police department. Marola was charged with possession of two grams of marijuana within 1000 feet of a school.

Marola filed a motion to suppress the physical evidence seized in the vice principal's office. In support of his motion, he called the police detective who responded to Weingrod's call. The detective testified that Weingrod told him that after Marola opened his wallet she asked him to open a zippered coin purse

within the wallet, and, although he initially refused, he opened the coin purse. The detective also testified that Weingrod told him that she observed the baggie in the wallet.

Marola argued to the trial court that under the two-pronged test of ***New Jersey v. T.L.O.***, 469 U.S. 325 (1985), the search was unreasonable. He maintained that the search by Weingrod was not justified at its inception. He contended that the five prior incidents were not relevant and could not provide a basis for Weingrod's reasonable suspicion that he was violating the school's smoking policy. He also argued that the scope of the search was too broad and that Weingrod did not have any justification for asking him to open his wallet or the zippered coin purse.

The trial court denied his motion. It found the prior incidents relevant because a teacher found Marola in the boys' bathroom where he had been previously caught smoking. The court concluded that the prior incidents and the odor of tobacco smoke detected by Weingrod provided her with a reasonable suspicion that Marola had been smoking in the boys' bathroom. The court found that the wallet was of excessive size and could have contained smoking materials and that Weingrod did not impermissibly broaden the scope of her search when she asked Marola to open the wallet. On appeal, Marola makes the same arguments.

The reasonableness of a search is a constitutional question of law that we review independently, benefiting from the analysis of the trial court. *See* ***State v. Angelia D.B.***, 211 Wis.2d 140, 146, 564 N.W.2d 682, 689 (1997). The trial court's findings of evidentiary and historical fact as they relate to whether the

search was reasonable will be affirmed unless they are against the great weight and clear preponderance of the evidence. *See* ***id***.

The protections of the Fourth Amendment, including the requirement of a judicial warrant to support a search, extend to searches and seizures conducted by public school officials. *See* ***Vernonia Sch. Dist. 47J v. Acton***, 515 U.S. 646, 651-52 (1995). But, a warrant is not always required; this is true where a warrant would "interfere with the maintenance of the swift and informal disciplinary procedures" needed by public schools. *See* ***T.L.O.***, 469 U.S. at 340. Further, "'strict adherence to the requirement that searches be based upon probable cause' would undercut 'the substantial need of teachers and administrators for freedom to maintain order in the schools.'" ***Acton,*** 515 U.S. at 653 (quoting ***T.L.O.***, 469 U.S. at 341). In ***T.L.O.***, the United States Supreme Court approved warrantless school searches based on individualized reasonable suspicion of wrongdoing but acknowledged that "although 'some quantum of individualized suspicion is usually a prerequisite to a constitutional search or seizure[,] … the Fourth Amendment imposes no irreducible requirement of such suspicion.'" ***T.L.O.***, 469 U.S. at 342 n.8 (quoted source omitted).

The constitutionality of a search in a school setting is determined by balancing the student's legitimate expectation of privacy against the interest of school officials in maintaining a safe and orderly learning environment. *See* ***Angelia D.B.***, 211 Wis.2d at 150, 564 N.W.2d at 686. The United States Supreme Court has acknowledged that schoolchildren do not lose all legitimate expectations of privacy once they pass through the schoolhouse doors, but it has noted that the nature of their legitimate expectations is what is appropriate for children in school. *See* ***Acton***, 515 U.S. at 655. They do have a legitimate expectation of privacy in

bringing to school a "variety of legitimate, noncontraband items" including school supplies, personal hygiene items, purses and wallets. *See* ***T.L.O.***, 469 U.S. at 339.

Balanced against this legitimate expectation of privacy is the real urgency of school officials to maintain order in the classroom and on the school grounds. ***T.L.O.*** recognized that "the preservation of order and a proper educational environment requires close supervision of schoolchildren, as well as the enforcement of rules against conduct that would be perfectly permissible if undertaken by an adult." ***Id***.

The United States Supreme Court struck the balance in favor of easing the restrictions on search and seizure that ordinarily apply to public officials. *See* ***id.*** at 340. The Court did not hesitate to adopt a "reasonable suspicion" standard, rather than a "probable cause" standard, to judge the legality of a school search. *See* ***id***. at 340-41. The Court defined the level of reasonable suspicion necessary, "[T]he requirement of reasonable suspicion is not a requirement of absolute certainty: 'sufficient probability, not certainty, is the touchstone of reasonableness under the Fourth Amendment.'" ***Id***. at 346 (quoted source omitted).

The Court held that "the legality of a search of a student should depend simply on the reasonableness, under all the circumstances, of the search." ***Id***. at 341. The Court established a two-part test. First, whether the search was justified at its inception. Second, whether the scope of the search was reasonably related to the circumstances which justified the invasion of the child's legitimate expectation of privacy in the first place. *See* ***id***. at 341. The United States Supreme Court explained:

> Under ordinary circumstances, 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 the rules of the school. Such a search will be permissible in its scope when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction.

***Id***. at 341-42 (footnotes omitted).

Applying this two-part test to the evidentiary and historical facts found by the trial court, we conclude that Weingrod's search of Marola, including the search of his wallet, was reasonable. First, Weingrod was justified in asking Marola to empty his pockets after he was discovered in the boys' bathroom rather than in class. During the forty-six days preceding the search, Marola received five student behavior reports for blatantly flaunting the school's written policy prohibiting smoking on school property or on school buses. One report was for smoking in the boys' bathroom. When Marola was escorted into Weingrod's office, she detected the odor of tobacco smoke.[2] Weingrod's suspicion that Marola had smoking materials was not "'an inchoate and unparticularized suspicion or "hunch,"' rather it was the sort of 'common-sense conclusio[n] about human behavior' upon which 'practical people'—including government officials—are entitled to rely." ***Id***. at 346 (citation omitted; quoted sources omitted). We are satisfied that all of the facts available to Weingrod justified her decision to search Marola for smoking materials.

Second, Weingrod's search of Marola's wallet was sufficiently related to her reasonable suspicion that he was carrying smoking materials. The

[2] Marola's reliance on ***State v. Secrist***, No. 97-2476-CR (Wis. Ct. App. Apr. 1, 1998), is misplaced. ***Secrist*** was concerned with whether the distinctive odor of marijuana was sufficient to establish probable cause to arrest the driver of a motor vehicle. In this case, we are applying the less stringent standard of reasonable suspicion to justify a school search.

trial court found that the wallet was of excessive size; without objection from Marola, it took judicial notice that cigarettes are two to three inches long and, from these two facts, found that the wallet could have held a cigarette or cigarettes.[3] Weingrod appropriately restricted her search to Marola's person. She did not search his locker, containers in his locker or a car that he might have driven to school in an attempt to find smoking materials. Being confronted with a student who brazenly ignored written school policy and who had an oversized wallet easily capable of holding one or more cigarettes, Weingrod's search of the wallet was within the parameters of the guidelines established in ***T.L.O***.[4]

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[3] In his reply brief, Marola contends that the judicially noted fact that a cigarette is two to three inches long is demonstrably false. To prove this assertion, the brief represents actual measurements of one brand of cigarettes. Obviously, Marola is bound by his trial counsel's agreement with the trial court taking judicial notice of the length of a cigarette and on appeal cannot challenge this finding. Also, his assertion of the actual size of cigarettes is not part of the record and will not be considered by this court. *See* ***Nelson v. Schreiner***, 161 Wis.2d 798, 804, 469 N.W.2d 214, 217 (Ct. App. 1991).

[4] Marola, on appeal and in the trial court, focuses on the apparent discrepancy between Weingrod's testimony that the baggie fell out of the wallet and her statement to the detective that she observed the baggie in the zippered coin purse of the wallet. The trial court found that there was no evidence that contradicted Weingrod's testimony regarding the wallet. We are bound by the trial court's rulings on the credibility of a witness. *See* ***Johnson v. Merta***, 95 Wis.2d 141, 151-52, 289 N.W.2d 813, 818 (1980).

*By the Court.*—Judgment affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)4, STATS.