UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2499

September Term, 2014

IN RE: KAVON P.

Friedman,
Raker, Irma S.
(Retired, Specially Assigned),
*Zarnoch, Robert A.
(Retired, Specially Assigned),

JJ.

Opinion by Raker, J.

Filed: May 27, 2016

*Zarnoch, Robert A., J., participated in the conference of this case while an active member of this Court; he participated in the adoption of this opinion as a retired, specially assigned member of this Court.

Appellant Kavon P. appeals from the adjudication by the Circuit Court for Wicomico County, sitting as the juvenile court, that he was involved in carrying and possessing a knife on public school property. At the adjudicatory hearing, appellant moved to suppress the knife as fruit of an unlawful search performed by a public school official. The court denied the motion. He raises the following question for our consideration:

> "Did the trial judge err in denying the motion to suppress evidence recovered in the unlawful search of Kavon P.'s person and property?"

We answer this question in the affirmative, and we shall reverse.

I.

On September 30, 2014, a teacher at James M. Bennett High School observed a bottle of prescription medication on appellant's desk. By school policy, all medication must be dispensed through the nurse's office, thus the teacher reported the incident to Assistant Principal Courtney Lewis. Ms. Lewis went to the classroom and escorted appellant to her office. In response to Ms. Lewis's question, appellant admitted that he had the prescription medication and he gave the bottle to Ms. Lewis. Ms. Lewis saw that the medication had been prescribed to Kavon P. and she ascertained that the medicine was an antihistamine. Ms. Lewis asked appellant if he had any other medication with him, and appellant said no. She asked appellant to empty his pockets, remove his shoes and socks, and then she searched appellant's bookbag. She found a pocket knife with a three- to four-inch blade.

On November 19, 2014, the State filed in the juvenile court a petition charging appellant with one count of carrying and possessing a knife on public school property, in violation of Section 4-102 of the Criminal Law Article. *See* Md. Code (2002, 2012 Repl. Vol.), § 4-102 of the Criminal Law Article. At the adjudication hearing, appellant moved to suppress the knife as fruit of an unlawful search. The parties agreed that the defense motion to suppress the evidence would be reviewed by the trial court on the basis of the testimony presented for adjudication of the delinquency charge.

The State called Ms. Lewis to testify during the suppression portion of the adjudicatory hearing. The following colloquy between Ms. Lewis and the prosecutor took place:

> "[PROSECUTOR]: So you came back in the office, where were the initial pills that you saw?
>
> LEWIS: I think [appellant] had them in his pocket. I don't remember. In the class the teacher had said that [appellant] had had them out, like, on his desk, and the teacher had reported that to me.
>
> So when I went to go and pick him up from class, I think he had them in his, like, pocket of his sweatshirt.
>
> [PROSECUTOR]: Okay. And what's the school protocol about whether students can have even prescription pills in their possession?
>
> LEWIS: Students aren't allowed to have any kind of medication, over-the-counter, prescription, none. It all has to be dispensed through the nurse's office.

[PROSECUTOR]: Okay. So you come back to the office, you first discover that he has these prescription pills?

LEWIS: Yes.

[PROSECUTOR]: Do you recall what they were or what . . .

LEWIS: I think it was like an antihistamine or something like that.

[PROSECUTOR]: Okay. And what is—

LEWIS: It was prescribed to him. I mean, his name was on the bottle. But, nonetheless, he is still not allowed to have it.

[PROSECUTOR]: What, if any, personal possessions did he have with him when he came back to the office?

LEWIS: In his bookbag?

[PROSECUTOR]: Well, I mean, a bookbag, he had a bookbag?

LEWIS: Right, he had a bookbag, yeah, with I think there was some notebooks, paper, pencils.

[PROSECUTOR]: Okay. So at that point what did you feel your obligation under school protocol to determine his possession of items was?

LEWIS: *Because of our protocol that we have, if he is in possession of something we search them to see, to make sure that there's nothing else that they have that they're not supposed to.*

[PROSECUTOR]: And how did you conduct that search?

LEWIS: I just had him in my office and asked him to open his, you know, pull out his pockets.

> We have them take off their shoes, take off their socks, I went through his bookbag, all of the pockets of his bookbag."

During cross-examination, defense counsel questioned Ms. Lewis as follows:

> "[DEFENSE COUNSEL]: Ms. Lewis, you were initially called to a classroom, correct, because of a disturbance in the classroom?
>
> LEWIS: No, it wasn't a disturbance. It was that, it was reported that he had medication.
>
> [DEFENSE COUNSEL]: Okay. So you were initially called to the classroom because you heard that my client had medication?
>
> LEWIS: The teacher had reported that, yes.
>
> [DEFENSE COUNSEL]: So you take my client back to your office, correct?
>
> LEWIS: Correct.
>
> [DEFENSE COUNSEL]: And at some point following that he disclosed to you that he did, in fact, have prescription medication on his person, correct?
>
> LEWIS: Yes.
>
> [DEFENSE COUNSEL]: And he gave you that prescription medication?
>
> LEWIS: Yes.
>
> [DEFENSE COUNSEL]: Did you ask him if he had anything else on his person, any other medication?

LEWIS: I believe I did, but he didn't have anything else.

[DEFENSE COUNSEL]: And did he tell you that he didn't have anything else?

LEWIS: I think when I asked him do you have any other pills or medicine, he said no.

* * *

[DEFENSE COUNSEL]: . . . And these pills, to the best of your knowledge, were antihistamines?

LEWIS: I believe so. It was a prescription bottle with his name on it. They were prescribed to him.

[DEFENSE COUNSEL]: But it didn't immediately jump out to you as a drug of abuse, did it?

LEWIS: Oh, well, I looked at the pill bottle to see what it said, and then I go online to the pill finder website to see exactly what it is. And I think it was an antihistamine.

[DEFENSE COUNSEL]: And it was prescribed to [appellant], correct?

LEWIS: Correct."

The court denied the motion. Following further testimony, the court found appellant involved and released appellant to his mother on GPS monitoring until the disposition hearing. At the disposition hearing, the court committed appellant to the Department of Juvenile Services for a non-community-based residential placement.

This timely appeal followed.

II.

Before this Court appellant argues that the trial judge erred in denying his motion to suppress evidence recovered during the search of his person and bookbag. He argues that the assistant principal's search of his bag violated his rights under the Fourth Amendment to the United States Constitution and Article 26 of the Maryland Declaration of Rights. Appellant contends that the search conducted by the assistant principal was illegal because it was not valid at its inception, as it was not based on a sufficiently reasonable basis to justify the search. He points to the following facts that suggest the search was not reasonable: appellant did not deny that he possessed the medication or make any attempt to conceal it, but instead turned it over to Lewis upon request; the prescription on the bottle was in his name, was "a relatively innocuous allergy medicine," and there was no indication that appellant was attempting to distribute the medication; and, appellant had no history of past disciplinary infractions. Appellant notes that there was no evidence presented that Ms. Lewis did not believe appellant's contention that he had no additional medication on him, and thus there was nothing other than the violation of the school policy offered as a basis for the search. Appellant suggests that in light of these facts, the only purpose of the search was to investigate possible infractions on "an inchoate and unparticularized suspicion," which is not permitted under the Fourth Amendment.

The State argues that the court properly denied appellant's motion to suppress evidence recovered during a search of his bookbag. The State argues that the assistant principal had an objectively reasonable suspicion that a search of appellant's bookbag would reveal other medications beyond those that he had given her initially . The State suggests that appellant's possession of the medication creates the reasonable suspicion to believe that he may have been in possession of additional medications, which is in violation of school rules. The State contends that the school policy is reasonable, because prescription medication that is safe for one person may be unsafe for others, and the presence of medication on appellant's desk could create a disruption for other students.

III.

In the case *sub judice*, we apply the standard of review as set out by this Court in *Brewer v. State*, 220 Md. App. 89, 99 (2014):

> "In reviewing a trial court's denial of a motion to suppress evidence, we base our decision solely upon the 'facts and information contained in the record of the suppression hearing.' We then extend great deference to the suppression judge with respect to the determination and weighing of first-level findings of facts, which we will not disturb unless clearly erroneous, and we view all facts in the light most favorable to the State as the prevailing party. We also apply a *de novo* standard of review, making our 'own independent constitutional appraisal by reviewing the law and applying it to the facts of the case.'"

(internal citations omitted). Here, the parties agreed that the suppression motion would be decided by the trial court based on the testimony presented for adjudication of the delinquency charges. In light of that agreement, we shall do the same.

Searches of students and their personal property performed by public school officials are governed by the Fourth Amendment protection against unreasonable searches and seizures. U.S. Const. amend. IV; *New Jersey v. T.L.O.*, 469 U.S. 325, 333-37 (1985). In *T.L.O.*, the Supreme Court set out that the standard for evaluating the reasonableness of a search conducted by a public school authority is the articulable suspicion standard of *Terry v. Ohio*, 392 U.S. 1 (1968)—as opposed to the probable cause standard for a search by an investigative police officer. *See also In re Devon T.*, 85 Md. App. 674, 701 (1991). In *In re Devon T.*, we explained the reason for rejecting a probable cause standard and adopting the lesser standard of reasonableness is applicable for two reasons:

> "1) because the school authority is not a trained police officer concerned primarily with the discovery of evidence of crime, and 2) because the mixed mission of the school authority is to protect not only the constitutional rights of the student who may be a drug pusher but equally, perhaps more importantly, to protect the health and welfare of the entire school community from the ravages of that drug pusher."

Id.

The courts utilize a two-prong test to determine the reasonableness of a search. First, a court must determine whether the search was justified at its inception. A search of a

student by a teacher or school official is 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. Second, a court must determine whether the search, as actually conducted, was reasonably related in scope to the circumstances which justified the interference in the first place. Appellant challenges the search only on the first step—that the search of his bookbag was not justified at its inception. A search is 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." *T.L.O.*, 469 U.S. at 342.

School policies alone are insufficient to deprive students of their reasonable expectations of privacy, nor do they, standing alone, provide reasonable, articulable suspicion that justifies a search of a student's belongings. In *Doe v. Little Rock School District*, 380 F.3d 349 (8th Cir. 2004), the United States Circuit Court of Appeals for the Eighth Circuit held that the practice of the Little Rock School District that subjected secondary school students to "random, suspicionless searches of their persons and belongings by school officials" based on a policy added to the "Secondary Student Rights and Responsibilities Handbook" were unconstitutional because such searches "unreasonably invade their legitimate expectations of privacy." *Id.* at 351.

In *In re Devon T.*, this Court found the facts sufficient to show reasonableness at the inception of a search. In that case, a school security officer, in the presence of an assistant principal, asked Devon to empty his pockets, revealing plastic bags containing heroin. Devon's grandmother had called to inform the school that Devon's friends were selling drugs out of her house, a reliable student informant told the school security officer to "check Edward," another student, and after Edward was found with a large quantity of illegal drugs on his person, he named Devon as a co-conspirator. *In re Devon T.*, 85 Md. App. at 701-02. This Court held that the facts in *Devon* supported "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." *Terry*, 392 U.S. at 21.

In contrast to the court in *In re Devon T.*, applying the same *Terry* standard articulated in *T.L.O.* to a search by a school administrator, in *S.V.J. v. State*, 891 So. 2d 1221, 1223-24 (Fla. App. 2005), the Second District Court of Appeal of Florida reversed the denial of a motion to suppress marijuana found in S.V.J.'s bookbag because "the State did not elicit specific and articulable facts that warranted the search." The State elicited the following facts:

> "In the afternoon of December 8, 2003, S.V.J. and another student engaged in a fight. The school resource officer separated the students and took S.V.J. to an administrator's office. Mr. Arroyo, an administrative assistant at the school, testified that after he spoke briefly with S.V.J., he stepped out of his office for a short time to check on the flow of traffic in the

> hallway. When he re-entered the office, S.V.J. 'looked startled' or 'surprised' and put her purse under her arm and her jacket over her shoulder. He stated that '[i]t appeared she was hiding her purse.' Although he normally did not search students after a fight, he decided to have a female school official search S.V.J.'s purse. The search revealed marijuana inside the purse.
>
> Mr. Arroyo acknowledged that no complaint had been made regarding S.V.J. and a weapon, any drug use, or sales; he had no idea what might have been in the purse; and the only reason he had someone search the purse was because of S.V.J.'s startled reaction when he re-entered the office."

Id. at 1222-23. The court held that the search was not justified at its inception because Arroyo:

> " . . . acknowledged that he had no idea what S.V.J. might have had in her possession. He did not give any indication of what he suspected might be in the purse or why the search might reveal evidence of a violation of the law or school rules."

Id. at 1223. The court held that "the search was conducted based on a mere hunch that S.V.J. might have something of interest in her purse," which was not sufficient to justify the search. *Id.*

The Fourth Amendment to the United States Constitution and Article 26 of the Maryland Declaration of Rights protects persons from unreasonable searches and seizures. Police officers, and state officials, therefore, must have a search warrant unless some exception to the warrant requirement applies. *Coolidge v. New Hampshire*, 403 U.S. 443 (1971); *see State v. Wilson*, 279 Md. 189, 194 (1977). When, as here, school officials are

acting under the authority of the State, Fourth Amendment and Article 26 protections apply. *T.L.O.*, 469 U.S. 325; *Fitzgerald v. State*, 384 Md. 484, 506 (2004) (Article 26 of the Maryland Declaration of Rights interpreted in *pari materia* with the Fourth Amendment of the United States Constitution). Some exceptions to the warrant requirement are (1) searches incident to arrest, *Chimel v. California*, 395 U.S. 752 (1969), (2) exigent circumstances, *Wengert v. State*, 364 Md. 76, 84-85 (2001), and (3) searches of students conducted by school authorities, *T.L.O.*, 469 U.S. 325; *In re Devon T.*, 85 Md. App. at 701. We address the school search exception in this case.

Under the school search exception to the search warrant requirement, school officials may search a student if, under all the circumstances, the search is reasonable. *T.L.O.*, 469 U.S. at 341; *In re Devon T.*, 85 Md. App. at 701. Under the teachings of *T.L.O.*, whether a search is reasonable depends upon the satisfaction of two criteria. First, the action must have been justified at its inception. *In re Patrick Y.*, 124 Md. App. 604, 610 (1999), *aff'd*, 358 Md. 50, 746 A.2d 405 (2000) (quoting *T.L.O.*, 469 U.S. at 341-42). Second, the search conducted must have been reasonably related in scope to the circumstances that justified the interference in the first place. *Id.* The rationale underlying the school search exception is that school teachers and administrators have a substantial interest "in maintaining discipline in the classroom and on school grounds," which weighs against a child's interest in privacy. *T.L.O.*, 469 U.S. at 339; *see also In re Patrick Y.*, 124 Md. App. at 612. In balancing the

schoolchild's legitimate expectation of privacy with the school's equally legitimate need to maintain an environment in which learning can take place, the United States Supreme Court recognized that the "warrant requirement, in particular, is unsuited to the school environment: requiring a teacher to obtain a warrant before searching a child suspected of an infraction of school rules (or of the criminal law) would unduly interfere with the maintenance of the swift and informal disciplinary procedures needed in the schools." *T.L.O.*, 469 U.S. at 340. The Court held that school officials do not need to obtain a search warrant before searching a student who is under their authority. *Id.*

The facts the State elicited during the suppression hearing are insufficient to show an objectively reasonable, articulable suspicion that appellant possessed additional contraband. Ms. Lewis testified that she searched appellant *because school policy* dictates that once a student is discovered to possess an item not permitted by school rules, he and his belongings are searched. The State argues to this Court that appellant's possession of the medication created the reasonable suspicion that he may have been in possession of additional medications in violation of school rules, and that it was reasonable for Ms. Lewis to believe that he turned over the relatively innocuous allergy medication in hopes of avoiding a search that might have uncovered more serious contraband.

T.L.O. teaches that "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." *T.L.O.*, 469 U.S. at 341. The question becomes: What are the reasonable grounds that Ms. Lewis had to suspect that the search of Kavon would turn up evidence that he violated or is violating the law or rules of the school? Because school policy alone is insufficient, what else was there in this case? The unlawful substance in this case was an antihistamine—medication validly prescribed to appellant. The medication was not secreted in his pockets but rather was set out on his desk in plain view. Indeed, his possession of this prescription medication on school property was violative of the school rules, and the teacher and principal acted lawfully in seizing the pills. However, unlike in *T.L.O.*, where the student denied possession of the drugs, here, appellant readily admitted that the pills belonged to him. In *T.L.O.*, the Supreme Court placed heavy emphasis on the student's denial of smoking cigarettes, particularly in light of a teacher's report of smoke in the bathroom. *T.L.O.*, 469 U.S. at 345. In the case before us, there is no indication that Kavon had any other drugs or medication in his bookbag. There was no suspicion that appellant was distributing illicit drugs or pills in the school. Ms. Lewis did not testify that she suspected that appellant had more medication, based on a report from his teacher or any other source, and appellant denied having any other medication with him. Ms. Lewis did not testify as to having received any other reports of appellant carrying contraband. Ms. Lewis testified that the medication appellant possessed was not a drug of abuse.

Our reading of *T.L.O.* and its progeny suggests that the simple possession of a validly prescribed medication, particularly an antihistamine, *albeit* a violation of school rules, does not support an inference or suspicion that a student automatically might possess additional medication or contraband. If that were the case, the Supreme Court need not have engaged in a review of the incident that gave rise to the search in *T.L.O.* Also, just as in *Terry*, every lawful stop does not justify a frisk. We conclude that nothing in the record indicates that Ms. Lewis's actions were based on any articulable fact suggesting that appellant possessed any additional contraband or medicine other than reliance of a school policy. Ms. Lewis testified explicitly that "[b]ecause of our protocol that we have, if he is in possession of something we search them to see, to make sure that there's nothing else that they have that they're not supposed to." Articulable suspicion needs to be more specific to be reasonable. Nothing in the record indicates that Ms. Lewis's actions were based on any articulable fact suggesting that appellant possessed any additional medicine or contraband other than reliance of a school policy. We hold that Ms. Lewis did not have a reasonable, articulable suspicion that appellant possessed evidence that he was violating the law or school rules to justify the search of his bookbag.

JUDGMENT OF THE CIRCUIT COURT FOR WICOMICO COUNTY REVERSED. COSTS TO BE PAID BY WICOMICO COUNTY.