**State v. Tywayne H**
**123 N.M. 42 (N.M.App. 1997)**

APODACA, Chief Judge.

Child was adjudged a delinquent child for unlawfully carrying a deadly weapon on school premises. Child appeals, contending that the search of his person that uncovered the weapon was unlawful. We agree and reverse.

## FACTUAL AND PROCEDURAL BACKGROUND

Mothers Against Drunk Drivers (MADD) co-sponsored an after-prom dance with Clovis High School in the school's gymnasium. Two uniformed police officers from the Clovis Police Department provided security. The dance started between midnight and 12:30 a.m. Students were instructed to enter through the front entrance, where their hands were stamped. Once a student left the gym, he or she was not allowed to return.

Shortly after the dance began, Officer Mondragon and another officer arrived to check on the two officers already present. At about 12:45 a.m., two students, Child and a friend, entered through a side door. Officer Mondragon asked one of the school's coaches standing nearby if students were allowed to enter through that door. The coach said no. The four officers quickly surrounded the two students, and Officer Mondragon put his hand on Child's shoulder. The officers tried to see if the students had stamps on their hands, but it was too dark in the gym to tell. There is no dispute that the smell of alcohol emanated from the friend. This fact was communicated to Officer Mondragon. Officer Jackson testified that he smelled alcohol on Child and that Child admitted drinking one beer outside. Officer Mondragon asked Child to step outside, and Officer Summers asked the friend to follow. Both students were frisked. Officer Mondragon's pat-down search of Child uncovered a loaded semi-automatic handgun. The officers testified that the students fully cooperated at all times and did not show any violent tendencies during the encounter.

Child filed a motion to suppress the evidence seized, arguing that the search was unlawful. The motion was denied, and Child appeals the denial of his motion.

## DISCUSSION

All persons harboring a reasonable expectation of privacy are entitled to be free from unreasonable governmental intrusions. *Terry v. Ohio*, 392 U.S. 1, 9, 88 S.Ct. 1868, 1873–74, 20 L.Ed.2d 889 (1968); *see Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 652, 115 S.Ct. 2386, 2390, 132 L.Ed.2d 564 (1995) ("[T]he ultimate measure of the constitutionality of a governmental search is 'reasonableness.' "). The Federal Constitution, through the Fourteenth Amendment, seeks to protect this freedom by prohibiting unreasonable searches and seizures by state officers. *Terry*, 392 U.S. at 9, 88 S.Ct. at 1873–74. Thus, in general, a state officer must have probable cause, evidenced by a warrant, to conduct a search. *See Horton v. California*, 496 U.S. 128, 133, 110 S.Ct. 2301, 2305–06, 110 L.Ed.2d 112 (1990); N.M. Const. art. II, § 10; *State v. Williams*, 117 N.M. 551, 554–55, 874 P.2d 12, 15–16 (1994). A warrant, however, is not required to establish the reasonableness of every government search, and often when a warrant is not required, neither is probable cause. *Vernonia*, 515 U.S. at ——– – ——, 115 S.Ct. at 2390–91.

## Was The Search Justified As A *T.L.O.* School Search?

The State argued to the children's court that school children do not have a reasonable expectation of privacy, and thus the Fourth Amendment does not apply to them. This is incorrect. School children do not shed their constitutional rights at the schoolhouse gate. *Vernonia,* 515 U.S. at ——, 115 S.Ct. at 2392; *Tinker v. Des Moines Indep. Community Sch. Dist.,* 393 U.S. 503, 506, 89 S.Ct. 733, 736, 21 L.Ed.2d 731 (1969). Ample case law demonstrates that the Fourth Amendment applies to searches conducted by public school authorities. *See, e.g., Vernonia,* 515 U.S. at —— – ——, 115 S.Ct. at 2390–91; *New Jersey v. T.L.O.,* 469 U.S. 325, 336–37, 105 S.Ct. 733, 739–40, 83 L.Ed.2d 720 (1985); *Doe v. State,* 88 N.M. 347, 351, 540 P.2d 827, 831 (Ct.App.1975); *State v. Michael G.,* 106 N.M. 644, 646–48, 748 P.2d 17, 19–21 (Ct.App.1987).

The State alternatively argues that the search was a legitimate school search permitted under the holding in *T.L.O.* In *T.L.O.,* the United States Supreme Court rejected the need for school authorities to obtain search warrants before searching students and also lessened the search and seizure standard for school authorities from probable cause to reasonable suspicion. 469 U.S. at 340–41, 105 S.Ct. at 742–43. The reason for this lessening of requirements was a need to balance the privacy interests of students against the school's interests in discipline and order. *Id.* at 341, 105 S.Ct. at 742–43. The test for proper searches by school officials expressed in *T.L.O.* was (1) whether the school authority's action was justified at its inception (i.e., whether there was reasonable suspicion to believe that the student was in violation of a law or school rule and that the search would uncover evidence of the violation) and (2) whether the search was reasonably related in scope to the circumstances that justified the interference. *Id. T.L.O.,* however, limited its application to school authorities acting alone and on their own authority. *Id.* at 341 n. 7, 105 S.Ct. at 743 n. 7. The Court specifically did not address "the appropriate standard for assessing the legality of searches conducted by school officials in conjunction with or at the behest of law enforcement agencies." *Id.*

The search here was not conducted by school authorities on their own initiative or even by school authorities with or at the direction of a law enforcement agency. Instead, it was conducted completely at the discretion of the police officers. The only police contact with a school official was Officer Mondragon's question to the coach concerning whether students were permitted to enter through the side door. The coach answered that they were not but gave no directive to the officers to search the students. During the pat-down search itself, there were no school authorities present.

We thus determine that *T.L.O.*'s lowered standard of reasonable suspicion does not apply under the circumstances of this appeal. Probable cause was therefore required to conduct the search of Child. *See, e.g., Picha v. Wielgos,* 410 F.Supp. 1214, 1221 (N.D.Ill.1976) (probable cause required if police involved in school search); *F.P. v. State,* 528 So.2d 1253, 1254–55 (Fla.Dist.Ct.App.1988) (same); *State v. Young,* 234 Ga. 488, 216 S.E.2d 586, 594 (1975) (minimal standard of suspicion for school authorities applies if search is "free of involvement by law enforcement personnel"); *People v. Bowers,* 77 Misc.2d 697, 356 N.Y.S.2d 432, 435 (Sup.Ct.1974) (same); 4 Wayne LaFave, Search and Seizure § 10.11(b), at 832 (3d ed. 1996) ("Lower courts have held or suggested that the usual probable cause test obtains if the police are involved in the search in a significant way."); *cf. Cason v. Cook,* 810 F.2d 188, 192–93 (8th Cir.1987) (search by plainclothes liaison officer in conjunction with vice-principal where officer's intrusion was minimal held to *T.L.O.* standard of reasonable suspicion); *Martens v. District No. 220, Bd. of Educ.,* 620 F.Supp. 29, 32 (N.D.Ill.1985) (same). *But see People v. Dilworth,* 169 Ill.2d 195, 214 Ill.Dec. 456, 463, 661 N.E.2d 310, 317 (search by police officer acting in capacity as liaison officer for public school governed by *T.L.O.*),*cert. denied,* 517 U.S. 1197, 116 S.Ct. 1692, 134 L.Ed.2d 793 (1996).

Our determination that *T.L.O.* does not apply to the facts of this appeal is buttressed by an analysis of the United States Supreme Court's three-prong test for determining whether a departure from the Fourth Amendment standard of probable cause and a warrant is appropriate. *Vernonia,* 515 U.S. at —— – ——, 115 S.Ct. at 2391–94. The test requires that the conflicting interests of the State and the individual be examined in light of (1) the nature of the privacy interest upon which the search intrudes, (2) the character of the intrusion, and (3) the nature and immediacy of the search. *Id.*

Regarding the first prong, the nature of Child's "privacy expectations vis-a-vis the State may depend upon the individual's legal relationship with the State." *Id.* at ——, 115 S.Ct. at 2391. Here, although Child's reasonable expectation of privacy is lowered with respect to a search by school authorities, *see T.L.O.,* it is not lowered with respect to a search by a uniformed police officer. *T.L.O.* gave leeway to school officials because "maintaining security and order in the schools requires a certain degree of flexibility in school disciplinary procedures, and we have respected the value of preserving the informality of the student-teacher relationship." 469 U.S. at 340, 105 S.Ct. at 742. This rationale is not applicable to a uniformed police officer conducting a search on his own initiative. As Justice Powell explained in his concurring opinion in *T.L.O.*, 469 U.S. at 349–50, 105 S.Ct. at 747:

> The special relationship between teacher and student ... distinguishes the setting within which schoolchildren operate. Law enforcement officers function as adversaries of criminal suspects. These officers have the responsibility to investigate criminal activity, to locate and arrest those who violate our laws, and to facilitate the charging and bringing of such persons to trial. Rarely does this type of adversarial relationship exist between school authorities and pupils. Instead, there is a commonality of interests between teachers and their pupils. The attitude of the typical teacher is one of personal responsibility for the student's welfare as well as for his education.

We also believe that "[a] school child's expectation of privacy vis-a-vis the State as police officer, even a police liaison officer, is not diminished simply because the child is at school." *Dilworth,* 214 Ill.Dec. at 472, 661 N.E.2d at 326 (Nickels, J., dissenting). Consequently, the nature of Child's privacy interests under the circumstances of this appeal suggests a standard of probable cause.

The second factor, the character of the intrusion, also suggests a probable cause standard in this appeal. It is undisputed that a pat-down search "is a serious intrusion upon the sanctity of the person." *Terry*, 392 U.S. at 17. Additionally, there is a sharp distinction between the purpose of a search by a school official and a search by a police officer. The nature of a *T.L.O.* search by a school authority is to maintain order and discipline in the school. 469 U.S. at 341, 105 S.Ct. at 742–43. The nature of a search by a police officer is to obtain evidence for criminal prosecutions. This involves "a more substantial invasion of privacy than a search for other purposes." *Dilworth,* 214 Ill.Dec. at 473, 661 N.E.2d at 327 (Nickels. J., dissenting); *see Vernonia,* 515 U.S. 646 n. 2, 115 S.Ct. at 2393 n. 2 (evidentiary searches generally require probable cause).

The third factor, the nature and immediacy of the government's concern in ridding the school grounds of weapons, is indisputably of great importance. The occurrence of any violent crime by a child on school grounds is obviously extremely disturbing and completely unacceptable. We note, however, that this concern is already addressed, if only slightly, by the fact that school authorities under *T.L.O.* have the right to search students based on a standard of reasonable suspicion.

Thus, although there is substantial government interest in clearing our schools of weapons, we determine that the undiminished privacy interests of Child with respect to a police officer, combined with the character of the intrusive police search, support our holding that the officer's search here required a standard of probable cause. Because the issue is not before us, we, like the Court in *T.L.O.*, need not decide the standard for searches by school authorities in conjunction with or at the behest of law enforcement agencies.

## Was The Search Justified Under A Probable Cause Standard?

As we previously noted, warrantless searches are only permissible if they fall within an exception to the warrant requirement. *See State v. Valdez*, 111 N.M. 438, 440, 806 P.2d 578, 580 (Ct.App.1990). Exceptions include (1) probable cause plus exigent circumstances and (2) a search incident to an arrest. *Id.* The State argues that Officer Mondragon's search was justified under either of these theories.

## Probable Cause Plus Exigent Circumstances

Exigent circumstances are defined as "an emergency situation requiring swift action to prevent imminent danger to life or serious damage to property, or to forestall the imminent escape of a suspect or destruction of evidence." *State v. Copeland*, 105 N.M. 27, 31, 727 P.2d 1342, 1346 (Ct.App.1986). "We review the sufficiency of exigent circumstances by determining whether a reasonable, well-trained, and prudent police officer could conclude that swift action was necessary." *State v. Ortega*, 117 N.M. 160, 162, 870 P.2d 122, 124 (1994) (internal quotation marks omitted).

Even if we assume, for purposes of our discussion, that probable cause existed in this appeal under this exception, we fail to see the presence of any exigent circumstances. The officers testified that the two students were not violent in any way and in fact fully cooperated with them. The State presented no evidence of previous violence on school grounds or at school events to suggest the use of extreme caution. The officers did testify that they believed the incident in question was a "safety situation," but none of them could articulate why they thought so, other than that the students came in the wrong door and it was approximately 12:45 a.m. The latter factor is not particularly persuasive in light of the fact that the dance began only a few minutes before. The smell of alcohol added to these facts, in our view, does not indicate a likelihood of violence, thus compelling urgent action by the officer. Additionally, Officer Mondragon testified that he placed his hand on Child's shoulder to prevent him from running away. We also do not see how any evidence would be in danger of imminent destruction if Child were detained by the officers while another obtained a search warrant. *Cf. Copeland*, 105 N.M. at 31–32, 727 P.2d at 1346–47; *State v. Perea*, 95 N.M. 777, 779–80, 626 P.2d 851, 853–54 (Ct.App.1981). We thus determine that a reasonable officer would not believe swift action was necessary to prevent imminent danger, escape or destruction of evidence. This exception to the warrant requirement, therefore, does not apply.

## Search Incident To Arrest

When probable cause exists for an arrest, an officer may make a warrantless search of a suspect contemporaneous to or after the arrest. *See, e.g., In re Doe*, 89 N.M. 83, 85, 547 P.2d 566, 568 (Ct.App.1976). " 'Probable cause' exists when facts and circumstances within the officer's knowledge or on which the officer has reasonably trustworthy information are sufficient to warrant a person of reasonable caution to believe that an offense has been, or is being, committed." *State v. Affsprung*, 115 N.M. 546, 549, 854 P.2d 873, 876 (Ct.App.1993).

The State argues that Officer Mondragon had probable cause to believe that Child wrongfully possessed or consumed alcohol. *See* § 32A–2–3(A)(2); NMSA 1978, § 60–7B–1(B), (E) (Repl.Pamp.1994). Officer Mondragon, however, never testified that he smelled alcohol on Child. There was also no testimony indicating that Officer Jackson told Officer Mondragon that he smelled alcohol on Child. The fact that Child's friend may have smelled of alcohol certainly would not give any of the officers probable

cause to search Child. *See Ybarra v. Illinois*, 444 U.S. 85, 91, 100 S.Ct. 338, 342, 62 L.Ed.2d 238 (1979) ("[A] person's mere propinquity to others independently suspected of criminal activity does not, without more, give rise to probable cause to search that person."); *State v. Jones*, 114 N.M. 147, 150, 835 P.2d 863, 866 (Ct.App.1992) ("[W]e will not dispense with the requirement of individualized, particularized suspicion."). We are also hesitant to impute Officer Jackson's knowledge to Officer Mondragon. *See People v. Mitchell*, 185 A.D.2d 163, 585 N.Y.S.2d 759, 761 (1992) ( "[Although] the police are permitted to rely on the direction of their fellow officers to arrest without simultaneously knowing the underlying facts [that] led to such direction, they cannot be considered to have relied on information possessed by each other without there having been any communication of either the information itself or a direction to arrest.") (citation omitted), *appeal dismissed*, 81 N.Y.2d 819, 595 N.Y.S.2d 390, 611 N.E.2d 291 (1993).

Even if we were to assume that our standard of review on appeal would allow for the inference that Officer Mondragon heard Officer Jackson's exchange with Child about alcohol and could conclude that Child had alcohol on his breath, we are not persuaded that the smell of alcohol on a person's breath is proof of possession of alcohol and thus a misdemeanor in the presence of an officer. *See State v. Lyon*, 103 N.M. 305, 308, 706 P.2d 516, 519 (Ct.App.1985) (a police officer may make warrantless arrest for misdemeanor offense if misdemeanor is committed in officer's presence). One does not "possess" alcohol in one's body. *See State v. McCoy*, 116 N.M. 491, 495, 864 P.2d 307, 311 (Ct.App.1993) (presence of drugs in the body does not constitute possession), *rev'd on other grounds sub nom., State v. Hodge*, 118 N.M. 410, 882 P.2d 1 (1994). Child's admission that he had consumed a beer outside the premises (outside the officers' presence) is insufficient to warrant an arrest or a search incident to such arrest. Past possession cannot sustain an arrest. Even considering all of the facts noted by the dissent that the trial court could determine existed on remand, we believe that those facts only form the basis for a suspicion that Child may have been carrying alcohol. Suspicion alone is not enough to give rise to probable cause. *See Copeland*, 105 N.M. at 31, 727 P.2d at 1346. It is thus too great a leap to conclude that there was probable cause to believe that Child was violating Sections 32A–2–3 and 60–7B–1(B), (E).

The State alternatively contends that Child could have been arrested for trespassing by entering through the wrong door. This argument fails because it was not raised below. *State v. Franks*, 119 N.M. 174, 177, 889 P.2d 209, 212 (Ct.App.1994).

**Was The Search Justified Pursuant To The *Terry* Exception?**

In *Terry*, the United States Supreme Court upheld warrantless seizures as lawful if based upon a reasonable suspicion that criminal activity was afoot. 392 U.S. at 30, 88 S.Ct. at 1884–85. The Court also upheld warrantless searches if limited in scope and if the officer reasonably believed safety was an issue. *Id.* at 27, 88 S.Ct. at 1883 ("[T]he issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger."). Our Court in *State v. Cobbs*, 103 N.M. 623, 630, 711 P.2d 900, 907 (Ct.App.1985), adopting this rationale from *Terry*, stated:

> An officer who stops a suspect on reasonable suspicion of [an inherently dangerous crime] may conduct a protective search. In order, however, to conduct a frisk of a person suspected of engaging in a nonviolent offense, such as possession of small amounts of marijuana, vagrancy, or possession of liquor, additional articulable facts of potential danger must be present, as well as the suspicion of criminal activity.

As we previously noted, there was no evidence presented that would allow a reasonable officer to conclude that the students were armed or presented a threat. In fact, Officer Mondragon testified as such:

[Public defender]: You did not have any facts that you knew of before you did that pat-down search that would give you reason to think [Child] was carrying a weapon, did you?

[Officer Mondragon]: No.

We determine that the facts available to Officer Mondragon would not warrant a reasonably prudent person under the circumstances to believe the action of searching Child was appropriate under a *Terry* analysis. *See Terry*, 392 U.S. at 27, 88 S.Ct. at 1883; *cf. State v. Blakely*, 115 N.M. 466, 468, 853 P.2d 168, 170 (Ct.App.1993) (pat-down search of suspect reasonable when suspect smelled of alcohol, appeared intoxicated, threatened suicide, and was being taken into protective custody). Therefore, even assuming that there may have been reasonable suspicion for the seizure of Child's person there was not reasonable suspicion for the frisk.

The children's court's reliance on *State v. Hilliard*, 81 N.M. 407, 467 P.2d 733 (Ct.App.1970), is misplaced. *Hilliard* discusses the reasonableness of a *Terry*-like stop, not a search.

## CONCLUSION

Crime in schools, especially crime involving weapons, is especially disturbing today. We can appreciate a parent's reaction of outrage toward a student who smuggles a concealed automatic weapon into a school function where the parent's children are present. Yet both the United States and New Mexico Constitutions require that we evaluate the conduct of law enforcement before we evaluate the conduct of the accused. Although making that evaluation may sometimes lead to frustrating results, there exists a paramount reason for doing so:

> In a government of laws, existence of the government will be imperiled if it fails to observe the laws scrupulously. Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the Government becomes a lawbreaker, it breeds contempt for law; it invites every [individual] to become a law unto himself; it invites anarchy. *Olmstead v. United States*, 277 U.S. 438, 485, 48 S.Ct. 564, 575, 72 L.Ed. 944 (1928) (Brandeis, J., dissenting).

We conclude that the search here was unjustified. We therefore reverse the children's court's order denying Child's motion to suppress and remand for further proceedings consistent with this opinion.