

[Cite as *State v. Holmes*, 2010-Ohio-1745.]

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT  
COUNTY OF CUYAHOGA

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JOURNAL ENTRY AND OPINION  
No. 92720

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**STATE OF OHIO**

PLAINTIFF-APPELLEE

vs.

**SIDNEY HOLMES**

DEFENDANT-APPELLANT

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**JUDGMENT:  
AFFIRMED**

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Criminal Appeal from the  
Cuyahoga County Court of Common Pleas  
Case No. CR-514068

**BEFORE:** Boyle, J., Rocco, P.J., and McMonagle, J.

**RELEASED:** April 22, 2010

**JOURNALIZED:**  
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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief per App.R. 26(A), or a motion for consideration en banc with supporting brief per Loc.App.R. 25.1(B)(2), is filed within ten days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. 2.2(A)(1).

MARY J. BOYLE, J.:

{¶ 1} Defendant-appellant, Sidney Holmes, appeals his conviction for drug possession, arguing that the trial court erred in denying his motion to suppress. After a thorough review of the briefs and testimony presented below, we find that the trial court did

not err in denying Holmes's motion to suppress and affirm.

### Procedural History and Facts

{¶ 2} Holmes was indicted on four counts: (1) drug trafficking, in violation of R.C. 2925.03(A)(2); (2) drug possession, in violation of R.C. 2925.11(A); (3) carrying a concealed weapon, in violation of R.C. 2923.12(A)(2); and (4) having a weapon while under disability, in violation of R.C. 2923.13(A)(3). Counts one and two carried a one-year firearm specification, and all counts included a forfeiture specification for the firearm recovered.

{¶ 3} Prior to trial, Holmes moved to suppress the drugs found on him and his subsequent statements on the grounds that (1) the police acted on an anonymous tip, which he claimed was unreliable and insufficient to justify a warrantless search of his person, and (2) the police never Mirandized him prior to asking about the drugs and gun. The following evidence was presented at the suppression hearing:

{¶ 4} Cleveland police officer Thomas Wise testified that on March 22, 2006, he and his partner, Timothy Maher, responded to a dispatch call, directing them to a duplex located at 1315 West 110th Street in Cleveland. Officer Maher testified that the radio dispatcher stated there had been a 9-1-1 call regarding an ex-boyfriend attempting to unlawfully enter an ex-girlfriend's apartment; the caller indicated that they were arguing. The radio dispatcher provided the officers with a description of the suspect, stating that he was wearing "Army style, camouflage," and that "this man was known to be carrying a firearm."

{¶ 5} Upon arriving at the scene, Officer Wise immediately approached Holmes, who matched the description provided by the radio dispatcher, and "checked him for weapons." Officer Wise indicated that Holmes was arguing with a female when he and his

partner entered the exterior stairwell. He further testified that, upon patting down Holmes for weapons, he felt a “hard object” in Holmes’s vest pocket and was uncertain if it was a weapon. Wise removed the object and discovered “a hard case and a couple of plastic bags.” He described the “hard case” as a “box-type object.” The plastic bags contained marijuana and powder cocaine. Wise arrested Holmes and placed him in his zone car. According to Wise, after informing Holmes the basis of the police’s presence on the scene, i.e., allegation that Holmes was armed and arguing with his ex-girlfriend, Holmes then disclosed that his gun was inside his girlfriend’s vehicle, unbeknownst to her.

{¶ 6} Following the hearing, the trial court denied Holmes’s motion to suppress, finding that the “police had a definite duty to perform an investigation upon the call to 9-1-1 and upon hearing the argument as they entered the building.” The court further found that the officer was justified in performing a pat-down, “having the knowledge that [Holmes] was known to carry a weapon.” And although “Officer Wise found no gun, \* \* \* he did find a hard object which when he pulled it out of the vest pocket turned out to also have the contraband with it.”

{¶ 7} The matter proceeded to a jury trial where Holmes was acquitted of all the charges but a single count of drug possession. The trial court imposed three years of community controlled sanctions and ordered Holmes to pay a \$1,000 fine.

{¶ 8} Holmes appeals, raising a single assignment of error:

{¶ 9} “The trial court erred and/or abused its discretion in denying the motion to suppress.”

#### Standard of Review

{¶ 10} A motion to suppress presents a mixed question of law and fact. *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, 797 N.E.2d 71, ¶8. “When considering a motion to suppress, the trial court assumes the role of trier of fact and is therefore in the best position to resolve factual questions and evaluate the credibility of witnesses. \* \* \* Consequently, an appellate court must accept the trial court’s findings of fact if they are supported by competent, credible evidence. \* \* \* Accepting these facts as true, the appellate court must then independently determine, without deference to the conclusion of the trial court, whether the facts satisfy the applicable legal standard.” (Internal citations omitted.)  
Id.

#### Fourth Amendment

{¶ 11} The Fourth Amendment to the United States Constitution guarantees “the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”

{¶ 12} The Fourth Amendment thus prohibits warrantless searches and seizures, rendering them per se unreasonable unless an exception applies. *Katz v. United States* (1967), 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576. One such exception to a warrantless search was recognized in *Terry v. Ohio* (1968), 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889, which held that “where a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot,” the officer may briefly stop the suspicious person and make “reasonable inquiries” aimed at

confirming or dispelling his suspicions. *Id.* at 30.

{¶ 13} *Terry* further held that “[w]hen an officer is justified in believing that the individual whose suspicious behavior he is investigating at close range is armed and presently dangerous to the officer or to others,” the officer may conduct a pat-down search “to determine whether the person is in fact carrying a weapon.” *Id.* at 24. A pat-down search for weapons requires reasonable grounds to believe that the suspect is armed and dangerous. *State v. Andrews* (1991), 57 Ohio St.3d 86, 89, 565 N.E.2d 1271.

#### Waiver

{¶ 14} The crux of the appeal is whether the officer had authority to reach into Holmes’s vest pocket because it was not readily apparent that Holmes had a weapon or other contraband therein. Holmes, however, failed to raise this argument below. Indeed, the focus of both his written motion and oral argument centered on the lawfulness of the police’s initial detention of him and the police’s alleged failure to provide *Miranda* warnings before soliciting information about the location of his gun.

{¶ 15} The Ohio Supreme Court has made clear that a defendant who seeks to have evidence suppressed must “raise the grounds upon which the validity of the search or seizure is challenged in such a manner as to give the prosecutor notice of the basis for the challenge. \* \* \* Failure on the part of the defendant to adequately raise the basis of his challenge constitutes a waiver of that issue on appeal.” *Xenia v. Wallace* (1988), 37 Ohio St.3d 216, 524 N.E.2d 889, paragraph one of the syllabus, 218. We find that Holmes has therefore waived this argument on appeal. See *State v. Jones*, 8th Dist. No. 92820, 2009-Ohio-5701, ¶46.

{¶ 16} And, moreover, based on the record before us, we cannot say that the trial court's denial of the motion to suppress was plain error. Initially, we find Holmes's reliance on *Minnesota v. Dickerson* (1993), 508 U.S. 366, 373, 113 S.Ct. 2130, 124 L.Ed.2d 334, misplaced. *Dickerson* dealt with the issue of whether police may search a suspect's pockets during a *Terry* pat-down on the basis of something other than the reasonable suspicion that the suspect possesses a weapon. Here, Officer Wise readily admitted that he did not reach into Holmes's pocket because he felt drugs; instead, he acted out of caution. But contrary to Holmes's assertion on appeal, Officer Wise expressly testified that he was not able to rule the object out as being a weapon. Indeed, given the hardness and shape of the object and Wise's knowledge that Holmes might be armed, we cannot say that Wise's belief that the object might be a weapon was unreasonable. Therefore, we do not find any Fourth Amendment violation by his removal of the object from Holmes's vest pocket. See *State v. Evans*, 67 Ohio St.3d 405, 415, 1993-Ohio-405, 618 N.E.2d 162 (where an officer, through his or her sense of touch as well as through the officer's experience is unable to conclude that the hard object is not a weapon, officer is entitled to remove it).

{¶ 17} Accordingly, Holmes's sole assignment of error is overruled.

Judgment affirmed.

It is ordered that appellee recover of appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution. Case remanded to the trial court for execution of sentence.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

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MARY J. BOYLE, JUDGE

KENNETH A. ROCCO, P.J., and  
CHRISTINE T. McMONAGLE, J., CONCUR