[Cite as *State v. King*, 2004-Ohio-2598.]

THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

ASHTABULA COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2003-A-0018**
- vs -	:	
TOMONCO KING,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Court of Common Pleas, Case No. 2002 CR 234.

Judgment: Affirmed.

Thomas L. Sartini, Ashtabula County Prosecutor and *Angela M. Scott*, Assistant Prosecutor, Ashtabula County Courthouse, 25 West Jefferson Street, Jefferson, OH 44047 (For Plaintiff-Appellee).

Marie Lane, Ashtabula County Public Defender, Inc., 4817 State Road, #202, Ashtabula, OH 44004 (For Defendant-Appellee).

CYNTHIA WESTCOTT RICE, J.

{¶1} This cause came to be heard upon the appeal of the Ashtabula Court of Common Pleas' decision overruling Tomonco King's (hereinafter "appellant") motion to suppress evidence.

{¶2} On August 5, 2002, at approximately 7:40 p.m., Ashtabula Police Patrolman John Koski was dispatched to the Ohio Village Apartments in Ashtabula to

investigate a reported fight involving four black males. Koski entered the apartment complex from the west and approached the buildings. Koski testified that he then noticed an individual moving toward one of the apartment buildings; according to Koski, the individual, later identified as appellant, was anxiously looking back in the direction of other police cruisers approaching from the east. Koski stated that appellant appeared upset, was "moving his arms around," and had a fresh wound on his chin with blood on his white shirt. From this, Koski testified that he believed appellant was involved in the fight that he was called upon to investigate.

{¶3} Koski exited his patrol car, let his canine partner out, and advised appellant to approach the patrol car. Appellant was instructed to keep his hands in sight. Appellant hesitated but then ambled toward the patrol car as instructed. Koski told appellant to place his hands upon the patrol car and then behind his back in interest of conducting a "pat down." Koski explained that he so instructed appellant due to concerns for his own safety as the Ohio Village Apartment area is known for its violence and drug activity on a daily and nightly basis.

{¶4} Prior to the pat down, Koski asked appellant if he had any drugs or weapons on him. After reiterating the question, appellant responded that he had a firearm in his right rear pocket. Koski then handcuffed appellant, patted him down, and felt something akin to a firearm or gun in appellant's right rear pocket. Koski removed the object and discovered a loaded .38 caliber, two-shot Derringer. Koski discovered four more rounds of .38 caliber ammunition in appellant's right front pocket. Appellant was placed under arrest and transported to the Ashtabula Police Department.

{¶5} On September 6, 2002, the Ashtabula County Grand Jury indicted appellant with carrying a concealed weapon, a felony of the fourth degree.[1] Appellant pleaded not guilty to the charge. On October 10, 2002, appellant filed a motion to suppress evidence. The trial court conducted a hearing on the motion on October 30, 2002. On November 6, 2002, the court overruled appellant's motion. Appellant subsequently withdrew his not guilty plea and pleaded no contest to the indicted charge. The trial court sentenced appellant to a two-year term of probation and ordered appellant to submit to a drug and alcohol evaluation. Appellant now appeals.

{¶6} In his sole assignment of error, appellant contends that the trial court erred in overruling his motion to suppress.[2] Appellant's argument is twofold: First, appellant maintains that the arresting officer failed to have probable cause to conduct a protective search. Second, appellant asserts that the officer's pat-down search was improper because it was the result of a custodial interrogation wherein *Miranda* warnings were not administered.

{¶7} In reviewing a trial court's ruling on a motion to suppress, we bear in mind that the trier of fact is the arbiter of evidential weight and witness credibility. *State v. Retherford* (1994), 93 Ohio App.3d 586, 592. Thus, we are bound to accept the trial court's factual determinations if they are supported by competent and credible evidence. *State v. Molk*, 11th Dist. No. 2001-L-146, 2002-Ohio-6926, at ¶9. Accepting those facts

1. Carrying a concealed weapon is generally a misdemeanor of the first degree. However, the charge was augmented to a fourth degree felony because the .38 caliber pistol was loaded. See R.C. 2923.12(D).

2. We foremost note that appellant does not designate an actual "assignment of error." Instead, appellant sets forth a "proposition of law." While a "proposition of law" is appropriate in an appellate brief

as true, we must independently determine, as a matter of law, without deference to the trial court's conclusion, whether they meet the applicable legal standard. Id.

{¶8} The Fourth Amendment to the United States Constitution and Section 14, Article I of the Ohio Constitution guarantee "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." The fundamental purpose of these constitutional provisions is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials. *Camara v. Mun. Court of the City & Cty. of San Francisco* (1967), 387 U.S. 523, 528. Further, because the Fourth Amendment protects "people, not places," it applies as much to the citizen on the streets as well as at home or elsewhere. *Terry v. Ohio* (1968), 392 U.S. 1, 9.

{¶9} Although police must generally secure a warrant to engage in a search and make a seizure, that procedure cannot be followed where circumstances merit swift action based upon the "on-the-spot" observations of an officer on the street. Id. at 20. Such stops fall short of a traditional arrest and therefore do not require probable cause. See, e.g., *State v. Martin* (Dec. 29, 2000), 11th Dist. No. 99-A-0018, 2000 Ohio App. LEXIS 6192, at 5. Under such circumstances, the balance between public interest and the individual's right to personal security tilts in favor of a standard less than probable cause. *United States v. Arvizu* (2002), 534 U.S. 266, 273. Therefore, the Fourth Amendment permits an investigatory stop where the officer action is supported by reasonable suspicion to believe that criminal activity may be afoot. Id.

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to the Supreme Court of Ohio, an "assignment of error" is proper in an appellate brief to an Ohio appellate court. See App.R. 16(A)(3); Loc.R. 12; S.Ct.R.P. VI(2)(B)(1).

{¶10} In evaluating "reasonable-suspicion," we must look at the totality of the circumstances and determine whether the police officer's had a particularized and objective basis for suspecting legal wrongdoing. Id. at 273. This process permits officers to draw on their own experience and unique training to make inferences from and deductions about the cumulative information available to them that might well elude an untrained person. Id., citing *United States v. Cortez* (1981), 449 U.S. 411, 418. Although an officer's reliance on a mere "hunch" is insufficient to justify a stop, we cannot reasonably demand scientific certainty from law enforcement officers where none exists. *Illinois v. Wardlow* (2000), 528 U.S. 119, 125. Therefore, the determination of reasonable suspicion must be based on commonsense judgments and inferences about human behavior. Id.

{¶11} Appellant first argues that Officer Koski did not have probable cause to stop and search him. As just indicated, an officer does not need probable cause to make a brief investigatory stop where he has reasonable suspicion of illegal activity. Further, where a reasonably prudent officer is warranted in believing that his or her safety is endangered, he or she may make a reasonable search for weapons of the person believed to be armed and dangerous regardless of whether the officer has probable cause. *Terry,* supra, at 25.

{¶12} In the instant case, Koski testified that he was dispatched to investigate a fight in the Ohio Village Apartments. He immediately noticed appellant moving around one of the buildings. Koski testified that appellant appeared upset, had a wound on his chin, and blood on his white shirt. According to Koski, appellant kept turning around, watching the East entrance of the apartment complex where other officers were arriving.

Koski also stated that the area was known for its violence and drug activity during both day and night.

{¶13} Given the particular circumstances of this case, we believe that Officer Koski had a reasonable suspicion to hale appellant to his car. Koski was on a "fight call." After noticing appellant's wound and bloody apparel, the officer could reasonably infer that appellant was involved in the altercation he was sent to investigate. Moreover, we are satisfied that Officer Koski could have entertained a reasonable suspicion that appellant was armed. After all, the area was known for fights and drug abuse during both the day and night. Weapons are common to both fights and drug dealing. See, *State v. Phinizee* (Jan. 4, 1990), 2d Dist. No. 2603, 1990 Ohio App. LEXIS 6, at 4; see, also, *State v. Taylor* (Dec. 21, 1998), 5th Dist. No. 1998CA00115, 1998 Ohio App. LEXIS 6517, at 8. Thus, the circumstances demonstrate that the officer had a legitimate basis for the pat-down search of appellant producing the weapon in question.[3]

{¶14} Appellant next argues that the search was improper because it was a result of a custodial interrogation wherein *Miranda* warnings were not administered. Appellant correctly notes that *Miranda* warnings must be given before interrogating a party in custody. Appellant contends that he was "in custody" when officer Koski asked

3. Under the circumstances, we believe the officer acted reasonably in suspecting appellant had a weapon. Thus, the frisk which produced the weapon was valid. However, it bears noting that appellant admitted to having the weapon in his pocket before the commencement of the pat-down. Consequently, appellant admitted to engaging in criminal activity, viz., concealing a firearm. This admission would be sufficient to provide the officer with probable cause to detain appellant and the exigent circumstances to search him. Therefore, even if this encounter involved a formal arrest, which we believe it did not, the officer was not acting outside the scope of the Fourth Amendment. This footnote foreshadows appellant's next argument.

him whether he had any drugs or weapons on his person, yet the officer failed to provide him with *Miranda* warnings. We disagree with appellant's construction.

{¶15} Pursuant to *Miranda*, police officers are required to read a suspect his rights prior to questioning him if he is in custody. We have previously held that "the determination of whether one is in custody or not focuses on how a reasonable person in the detainee's position would have felt if they were in the same position." *State v. Gaston* (1996), 110 Ohio App.3d 835, 842, citing *Berkemer v. McCarty* (1984), 468 U.S. 420, 434.

{¶16} Appellant argues he was in custody because his "freedom of action" was inhibited when Koski ordered him to his patrol car and required appellant to place his hands behind his back. Although, at some basic level, appellant's "freedom of action" was curtailed by the officer's action, we cannot accord talismanic power to this phrase. See, *Berkemer*, supra, at 437. "Fidelity to the doctrine announced in *Miranda* requires that it be enforced strictly, but only in those types of situations in which the concerns that powered the decision are implicated." Id.

{¶17} As a general rule, *Miranda* warnings are designed to apprise a party of his right against compelled self-incrimination. The on-scene question by Officer Koski was brief, non-compulsory, and done as part of a fact-finding process to determine whether appellant was dangerous to the officer's safety. Therefore, the facts of the current matter do not implicate the problems *Miranda* was designed to eliminate.

{¶18} Furthermore, it is well-settled that an officer whose observations lead him reasonably to suspect that a particular person has committed, is committing, or is about to commit a crime, may detain that person briefly in order to investigate the

circumstances that provoked suspicion. *Berkemer*, supra, at 439. However, the stop and inquiry must be "reasonably related in scope to the justification for their initiation." *Terry*, supra, at 29. Generally, this involves asking the detainee a moderate number of questions to determine his identity and to try to obtain information confirming or dispelling the officer's suspicions. *Berkemer*, supra, at 439. However, the detainee is not obligated to respond. Id. Moreover, when reviewing a *Terry*-level stop, we are mindful that the officer's investigative methods must be "the least intrusive means reasonably available to verify or dispel the officer's suspicion in a short period of time." *Florida v. Royer* (1983), 460 U.S. 491, 500.

{¶19} Under the circumstances, the question of whether appellant had any weapons or drugs was simply on-scene investigative questioning, which in no way triggered *Miranda.* Id; see, also, *Gaston*, supra, at 843; *Martin,* supra. at 10; *State v. Matheny* (Mar. 21, 1988), 12th Dist. No. CA87-09-025, 1988 Ohio App. LEXIS 934, at 8. As indicated above, Koski's suspicion that appellant was armed was reasonable such that he was justified in performing the *Terry* pat down. Thus, Koski would have discovered the firearm irrespective of his query regarding whether appellant had any drugs or weapons. Moreover, appellant did not have to answer the question and no answer was compelled by officer Koski. As such, asking appellant whether he had a weapon was the "least intrusive means" to verify Koski's suspicion that appellant might be armed.

{¶20} In sum, a person detained for an investigative stop is only "in custody" for *Miranda* purposes if and when he is "subjected to restraints comparable to those associated with a formal arrest." *Berkemer*, supra, at 441. The brief, on-scene question

of appellant by a single police officer was done as part of a normal, fact-finding process and did not subject appellant to restraints comparable to those associated with a formal arrest. Because appellant was not in custody at the time of the question, *Miranda* was not triggered. Therefore, the trial court did not err in overruling appellant's motion to suppress.

{¶21} Appellant's sole assignment of error lacks merit.

{¶22} For the above reasons, the decision of the Ashtabula County Court of Common Pleas overruling appellant's motion to suppress is affirmed.

Judgment affirmed.

DONALD R. FORD, P.J., andDIANE V. GRENDELL, J., concur.