[Cite as *State v. Gilmer*, 2010-Ohio-4631.]

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

	:	JUDGES:
STATE OF OHIO	:	Julie A. Edwards, P.J.
	:	W. Scott Gwin, J.
Plaintiff-Appellee	:	John W. Wise, J.
	:	
-vs-	:	Case No. 2009 CA 00283
	:	
	:	
SHALAMAR GILMER	:	O P I N I O N
Defendant-Appellant		

CHARACTER OF PROCEEDING:	Criminal Appeal from Canton Municipal Court Case No. 2009 CRB 3331
JUDGMENT:	Reversed and Remanded
DATE OF JUDGMENT ENTRY:	September 27, 2010

APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellant
KATIE M. ERCHICK Assistant Prosecutor City of Canton Prosecutor's Office 218 Cleveland Avenue, S.W. Canton, Ohio 44701	MARY G. WARLOP Stark County Public Defender Office 200 West Tuscarawas Street Suite 200 Canton, Ohio 44702

Edwards, P.J.

{¶1} Defendant-appellant, Shalamar Gilmer, appeals his conviction and sentence from the Canton Municipal Court on one count of drug abuse (marijuana). Plaintiff-appellee is the State of Ohio.

STATEMENT OF THE FACTS AND CASE

{¶2} On July 8, 2009 at 3:30 p.m., Canton Police Detective Zachary Taylor was inside the D'Elegance Bar on Mahoning Road in the City of Canton, Ohio. Detective Taylor and Detective Fout went to the bar to see if it had a valid liquor license. Detective Taylor testified that the police had received calls that, the night before, an employee of the bar had a gun and several bags of pills in the bar. When the two entered the bar, they asked the bartender to retrieve the liquor license. At the time, there were eight male patrons in the bar.

{¶3} After the Detectives asked all of the patrons to produce identification to prove that they were over the age of twenty-one, only one was able to produce identification. Detective Taylor testified that appellant "was sitting basically right in front of me, visibly nervous." Transcript at 6. Appellant had two drinks in front of him. According to Detective Taylor, appellant appeared to quickly begin drinking the two drinks so that he could leave the establishment.

{¶4} After appellant was unable to produce identification, Detective Taylor had appellant get down from the bar stool and proceeded to pat appellant down for weapons. The following testimony was adduced when Detective Taylor was asked why he patted appellant down:

{¶5} "A. I wanted to ensure- there's only two of us in there, there's eight people, the bar had several calls for disturbances, trouble, and two recently within the week for persons with guns inside the bar. We wanted to ensure my safety as well as the safety of my partner and the other patrons inside the bar. Mr. Gilmer didn't have a weapon on him. Also, since he didn't have any identification, I was gonna have to take out a pen and paper, write down his information, and then transmit that information over my portable radio to teletype officer. Basically, I'm gonna have my hands full while I'm getting that information. It's- it's for officer safety." Transcript at 7.

{¶6} When he patted appellant down, the Detective felt a large sum of money and a bag that he testified that he "could easily recognize as marijuana" in his pocket. Transcript at 8.

{¶7} On cross-examination, Detective Taylor testified that he knew it was marijuana "[c]ause you can feel, it's a bag of- it's not cocaine, it's not crack cocaine, it's not pills. I'm sure it wasn't a bag of crushed up pieces of parsley or anything like that." Transcript at 9. He testified that he was able to feel this through appellant's mesh gym shorts using both his palm and his fingertips. He also testified that he first felt the money and then the bag of marijuana. The following is an excerpt from Detective Taylor's testimony on cross-examination:

{¶8} "Q. Well you said that you touched the bag with your fingertips, so when you were touching the bag with your fingertips, did you at some point move the bag with your fingertips, did you at some point move the bag with your fingertips in order to feel that it was a baggie of marijuana?

{¶9} "A. I'm sure, yeah. I'm sure it moo- I mean, when you touch something, it moves.

{¶10} "Q. Okay.

{¶11} "A. I- I'm not following where you're going with this.

{¶12} "Q. So you're saying that you moved it with your fingertips before you pulled it out of the pocket. Is that correct?

{¶13} "A. Yeah, it's- I'm as I'm going down the exterior of the clothing, I could feel the money, below the money you can feel that there's a bag of marijuana in his pocket underneath- you know, the money sits higher and then the bag of marijuana's at the base of the pocket.

{¶14} "Q. Okay.

{¶15} "A. He's standing up, you know, it's at the bottom.

{¶16} "Q. So, you touched it with your palm, and then you touched it with your fingertips…

{¶17} "A. Well, actually my fingertips probably touched it first cause my hand is going down like this.

{¶18} "Q. Okay. But you said that you moved it around a little bit you're your fingertips. Is that correct?

{¶19} "A. Yeah, I'm sure I did.

{¶20} "Q. Okay. And that was before you were able to determine that it was marijuana.

{¶21} "A. No, I knew immediately that it was marijuana.

{¶22} "Q. You knew before you touched it?

{¶23} "A. No. When I touched it, I knew it was a bag of marijuana.

{¶24} "Q. Okay. As you were moving it with your fingertips. Is that correct?

{¶25} "A. Yeah. If you're saying moving it and touching it is the same thing, then yeah.

{¶26} "Q. No, it's not the same thing. I mean you- you already testified that you did actually move it with your fingertips and that's how you were able to determine that is was marijuana. Correct?

{¶27} "A. Oh, yeah. Okay." Transcript at 10-11.

{¶28} On cross-examination, Detective Taylor further testified that he never saw appellant with a gun or any item that looked like a weapon and that, when appellant stood up, he did not see any object on appellant that looked suspicious. The Detective testified that he patted appellant down because appellant appeared to be very nervous and it "perked" his attention. Transcript at 15. He also testified that Detective Fout patted down the other patrons of the bar.

{¶29} On July 8, 2009, appellant was charged with one count of drug abuse (marijuana) in violation of Canton City Ordinance Section 513.03, a misdemeanor of the fourth degree. At his arraignment on July 10, 2009, appellant entered a plea of not guilty to the charge.

{¶30} On August 5, 2009, appellant filed a Motion to Suppress, arguing that the search of his person and the subsequent seizure of the marijuana were unconstitutional. Following a hearing held on September 10, 2009, the trial court overruled appellant's Motion to Suppress.

{¶31} Thereafter, on October 26, 2009, appellant entered a plea of no contest and was sentenced to 30 days in jail. All but one of the jail days was suspended. In addition, appellant's driver's license was suspended for a period of 180 days.

{¶32} Appellant now raises the following assignment of error on appeal:

{¶33} "THE TRIAL COURT ERRED IN OVERRULING APPELLANT'S MOTION TO SUPPRESS THE EVIDENCE RECOVERED AS A RESULT OF THE ILLEGAL SEARCH AND SEIZURE OF APPELLANT."

I

{¶34} Appellant, in his sole assignment of error, argues that the trial court erred in overruling his Motion to Suppress. We agree.

{¶35} There are three methods of challenging a trial court's ruling on a motion to suppress on appeal. First, an appellant may challenge the trial court's finding of fact. In reviewing a challenge of this nature, an appellate court must determine whether the trial court's findings of fact are against the manifest weight of the evidence. See *State v. Fanning* (1982), 1 Ohio St.3d 19, 437 N.E.2d 583 and *State v. Klein* (1991), 73 Ohio App.3d 486, 597 N.E.2d 1141. Second, an appellant may argue that the trial court failed to apply the appropriate test or correct law to the findings of fact. In that case, an appellate court can reverse the trial court for committing an error of law. See *State v. Williams* (1993), 86 Ohio App.3d 37, 619 N.E.2d 1141. Finally, an appellant may argue the trial court has incorrectly decided the ultimate or final issues raised in a motion to suppress. When reviewing this type of claim, an appellate court must independently determine, without deference to the trial court's conclusion, whether the facts meet the

appropriate legal standard in any given case. *State v. Claytor* (1994), 85 Ohio App.3d 623, 620 N.E.2d 906.

{¶36} Appellant initially argues that Detective Taylor's stop of appellant was unconstitutional. The Fourth Amendment to the United States Constitution prohibits warrantless searches and seizures, rendering them per se unreasonable unless an exception applies. *Katz v. United States* (1967), 389 U.S. 347, 357, 88 S.Ct. 507, 19 L.Ed.2d 576. An investigative stop, or *Terry* stop, is a common exception to the Fourth Amendment warrant requirement. *Terry v. Ohio* (1968), 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889. Because the "balance between the public interest and the individual's right to personal security," *United States v. Brignoni-Ponce* (1975), 422 U.S. 873, 878, 95 S.Ct. 2574, 45 L.Ed.2d 607, tilts in favor of a standard less than probable cause in such cases, the Fourth Amendment is satisfied if the officer's action is supported by reasonable suspicion to believe that criminal activity "may be afoot." *United States v. Sokolow* (1989), 490 U.S. 1, 7, 109 S.Ct. 1581, 104 L.Ed.2d 1 (quoting *Terry,* supra, at 30). In *Terry,* the Supreme Court held that a police officer may stop an individual if the officer has a reasonable suspicion based upon specific and articulable facts that criminal behavior has occurred or is imminent. See, also, *State v. Chatton* (1984), 11 Ohio St.3d 59, 61, 463 N.E.2d 1237.

{¶37} In the case sub judice, Detective Taylor testified that appellant appeared to be nervous after the two officers entered the bar and announced themselves. On such basis, the trial court found that there were "sufficient facts from which a reasonably prudent person could infer that [appellant] may have been engaged in illegal activity, such as underage drinking. We disagree. Assuming, although there was no testimony

to such effect, that the bar was in a high crime area due to the reports, including from the previous night, of persons in the bar carrying guns, we note that such factor alone is not sufficient to justify an investigative stop. *Brown v. Texas* (1979), 443 U.S. 47, 52, 99 S.Ct. 2637, 2641. We find, therefore, that the stop of appellant was unconstitutional because the officer did not have a reasonable suspicion based upon specific and articulable facts that criminal behavior had occurred or was imminent.

{¶38} Appellant next argues that that Detective Taylor's pat down search of appellant was unconstitutional. In *Terry*, supra, the United States Supreme Court held a limited pat down search is justified when an officer reasonably concludes the individual, whose suspicious behavior he is investigating at close range, may be armed and, thus, dangerous to the police officer and others. *Id.* at 24. Officers need not forsake reasonable precautionary measures during the performance of their duties. *State v. Evans*, 67 Ohio St.3d 405, 410, 1993-Ohio-186, 618 N.E.2d 162. The question we must ask is whether the officer had a reasonable, objective basis for frisking appellant. See, *State v. Andrews* (1991), 57 Ohio St.3d 86. In determining whether an officer's beliefs are reasonable, a court must consider the totality of the circumstances involved in the stop. *State v. Bobo* (1988), 37 Ohio St.3d 177, 180, 524 N.E.2d 489. An officer need not testify he was actually in fear of a suspect, but he must articulate a set of particular facts which would lead a reasonable person to conclude a suspect may be armed and dangerous. *Evans*, supra, at 413. Rather, "[e]vidence that the officer was aware of sufficient specific facts as would suggest he was in danger" satisfies the test set forth in *Terry*, supra. *Id.*

{¶39} An officer must have a reasonable *individualized* suspicion that the suspect is armed and dangerous before he may conduct a pat-down for weapons. See *Terry,* supra; *Ybarra v. Illinois* (1979), 444 U.S. 85, 100 S.Ct. 338, 62 L.Ed.2d 238. See also *Maryland v. Buie* (1990), 494 U.S. 325, 334, fn. 2, 110 S.Ct. 1093, 108 L.Ed.2d 276 ("Even in high crime areas, where the possibility that any given individual is armed is significant, *Terry* requires reasonable, individualized suspicion before a frisk for weapons can be conducted.")

{¶40} In *Ybarra,* police officers had a search warrant to search a public tavern and a bartender for narcotics. When the officer entered the bar, they announced that they were also going to search the patrons for weapons. One of the officers frisked *Ybarra*, who was one of the patrons, twice and removed a cigarette pack containing several packets of heroin from his pocket. The United States Supreme Court held that the pat-down search of Ybarra was unconstitutional under *Terry*, supra. because the warrant did not authorize a search of the patrons and officers did not have reasonable suspicion to frisk Ybarra. *Ybarra*, 444 U.S. at 90-93. The United States Supreme Court, in *Ybarra,* stated, in relevant part, as follows: "The initial frisk of Ybarra was simply not supported by a reasonable belief that he was armed and presently dangerous, a belief which this Court has invariably held must form the predicate to a pat-down of a person for weapons. *Adams v. Williams*, 407 U.S. 143, 146, 92 S.Ct. 1921, 1923, 32 L.Ed.2d 612; *Terry v. Ohio, supra*, 392 U.S., at 21-24, 27, 88 S.Ct., at 1879-1881, 1883. When the police entered the Aurora Tap Tavern on March 1, 1976, the lighting was sufficient for them to observe the customers. Upon seeing *Ybarra*, they neither recognized him as a person with a criminal history nor had any particular reason to believe that he might

be inclined to assault them. Moreover, as Police Agent Johnson later testified, *Ybarra*, whose hands were empty, gave no indication of possessing a weapon, made no gestures or other actions indicative of an intent to commit an assault, and acted generally in a manner that was not threatening. At the suppression hearing, the most Agent Johnson could point to was that *Ybarra* was wearing a 3/4-length lumber jacket, clothing which the State admits could be expected on almost any tavern patron in Illinois in early March. In short, the State is unable to articulate any specific fact that would have justified a police officer at the scene in even suspecting that Ybarra was armed and dangerous." Id at 92-93 (footnote omitted).

{¶41} We find, upon our review of the record, that Detective Taylor did not have an individualized suspicion that appellant was armed and dangerous. Detective Taylor testified that he did not go to the bar to find appellant, that he had no reports that appellant was involved in any criminal activity and that he never saw appellant with a gun. He also testified that he did not see a bulge of any metal object on appellant that looked like a weapon and that, when appellant stood up, he did not see any suspicious objects on appellant. Detective Taylor testified that the only reason he believed that appellant might have a weapon on him was because appellant was nervous while everyone else at the bar "seemed to …be okay with the fact that the police are in there checking the liquor license, asking for people's identification." Transcript at 16.

{¶42} Based on the foregoing, we find that Detective Taylor did not have a reasonable *individualized* suspicion that appellant was armed and dangerous and, therefore, that the pat-down search of appellant was in violation of appellant's Fourth Amendment rights.

{¶43} Appellant's sole assignment of error is, therefore, sustained.

{¶44} Accordingly, the judgment of the Canton Municipal Court is reversed and this matter is remanded to the trial court for further proceedings.

By: Edwards, P.J.

Gwin, J. and

Wise, J. concur

s/Julie A. Edwards

s/W. Scott Gwin

s/John W. Wise

JUDGES

JAE/d0723

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FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	
Plaintiff-Appellee	:	
-vs-	:	JUDGMENT ENTRY
SHALAMAR GILMER	:	
Defendant-Appellant	:	CASE NO. 2009 CA 00283

For the reasons stated in our accompanying Memorandum-Opinion on file, the judgment of the Canton Municipal Court is reversed and this matter is remanded to the trial court for further proceedings. Costs assessed to appellee.

s/Julie A. Edwards

s/W. Scott Gwin

s/John W. Wise

JUDGES