[Cite as *State v. Carpenter*, 2009-Ohio-6614.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF SUMMIT	)	

STATE OF OHIO	C. A. No. 24601
Appellant	
v.	APPEAL FROM JUDGMENT ENTERED IN THE
ERIC T. CARPENTER	COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO
Appellee	CASE No. CR 2008 06 1826

DECISION AND JOURNAL ENTRY

Dated: December 16, 2009

WHITMORE, Judge.

{¶1} Appellant, the State of Ohio, appeals from the judgment of the Summit County Court of Common Pleas, granting Appellee, Eric T. Carpenter's, motion to suppress. This Court reverses.

I

{¶2} At approximately 1:00 a.m. on May 31, 2008, Lieutenant Terry Pasko responded to two complaints of drug activity at the Pegasus Lounge in Akron, Ohio. Lieutenant Pasko, who was wearing plain clothes at the time, entered the bar and observed the patrons for a short while before going into the bar's bathroom. In the bathroom, Lieutenant Pasko encountered a man who told him that he was high because he had consumed Tequila and Xanax. The man returned to the bar while Lieutenant Pasko radioed for backup. Once backup arrived, officers arrested the man with whom Lieutenant Pasko had spoken in the bathroom. Lieutenant Pasko then began to question and perform pat down searches on the bar's other patrons after asking

their permission to do so. The backup officers remained to "keep everybody still" while Lieutenant Pasko frisked the patrons.

{¶3} After talking to three or four patrons, Lieutenant Pasko came upon Carpenter. Carpenter told Lieutenant Pasko that he did not have any weapons, but agreed to a pat down when Lieutenant Pasko asked him for permission. Lieutenant Pasko felt a "bulge" in the pocket of Carpenter's pants and asked him what he had in his pocket. Carpenter replied that it was his money. Lieutenant Pasko then asked Carpenter if he could remove the money, and Carpenter agreed. Lieutenant Pasko removed a stack of money from Carpenter's pants and placed it on the bar. One bill was folded in a small square on top of the stack. Officer Mark Hockman, one of the backup officers who had arrived on scene, witnessed the exchange between Lieutenant Pasko and Carpenter and saw the stack of money that Lieutenant Pasko pulled from Carpenter's pocket. Officer Hockman recognized the square-folded bill on top of the stack as a bindle, a folded piece of paper used to transport narcotics. Officer Hockman opened the folded bill. The bill contained a white powder, which was later identified as cocaine. Officers then arrested Carpenter. While the specific facts are not a part of the record, officers also apparently found methamphetamine on or about Carpenter's person at some point after his arrest.[1]

{¶4} On June 12, 2008, a grand jury indicted Carpenter on the following counts: (1) aggravated possession of methamphetamine in violation of R.C. 2925.11(A)(C)(1); and (2) tampering with evidence in violation of R.C. 2921.12(A)(1). On July 29, 2008, a supplemental indictment issued, charging an additional count of possession of cocaine in violation of R.C. 2925.11(A)(C)(4). On October 7, 2008, Carpenter filed a motion to suppress, challenging the basis for the search of his person. The trial court held a hearing on Carpenter's motion on

December 11, 2008. On January 23, 2009, the trial court granted Carpenter's motion and suppressed the cocaine and methamphetamine police discovered following their unconstitutional search of Carpenter as fruits of the poisonous tree.

{¶5} The State now appeals from the trial court's judgment and raises two assignments of error for our review.

II

Assignment of Error Number One

"THE TRIAL COURT ERRED IN GRANTING DEFENDANT'S MOTION TO SUPPRESS EVIDENCE UNDER *YBARRA V. ILLINOIS* (1979), 444 U.S. 85."

{¶6} In its first assignment of error, the State argues that the trial court erred in suppressing the evidence related to Carpenter's possession of cocaine charge. Specifically, the State argues that *Ybarra v. Illinois* (1979), 444 U.S. 85 does not apply in instances where a person consents to a search.

{¶7} The Ohio Supreme Court has held that:

> "Appellate review of a motion to suppress presents a mixed question of law and fact. 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. *State v. Mills* (1992), 62 Ohio St.3d 357, 366. Consequently, an appellate court must accept the trial court's findings of fact if they are supported by competent, credible evidence. *State v. Fanning* (1982), 1 Ohio St.3d 19. 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. *State v. McNamara* (1997), 124 Ohio App.3d 706." *State v. Burnside*, 100 Ohio St.3d 152 2003-Ohio-5372, at ¶8.

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[1] Carpenter's field arrest form indicates that he "disposed of powdered meth in the back [of the] APD wagon 87 before being taken out to [Summit County] jail."

Accordingly, this Court reviews the trial court's factual findings for competent, credible evidence and considers the court's legal conclusions de novo. *State v. Conley*, 9th Dist. No. 08CA009454, 2009-Ohio-910, at ¶6, citing *Burnside* at ¶8.

{¶8} The trial court found that Carpenter was patted down as part of a "bar raid" and that none of the bar's patrons were permitted to leave until officers completed their search for the "stated purpose *** [of] officer safety in case a patron had a weapon." The court determined that Carpenter did nothing to arouse suspicion. Rather, Lieutenant Pasko searched Carpenter simply because he was a patron at the bar that night and officers were searching all the patrons after they arrested one patron for drug activity. Although the court noted that Carpenter consented to Lieutenant Pasko's pat down, it concluded that the pat down was unconstitutional under *Ybarra*. The court reasoned that, absent a search warrant or reasonable suspicion, officers may not conduct pat downs on people who happen to be nearby when criminal activity takes place. Because officers did not have a warrant or reasonable suspicion to search Carpenter, the court held, it was unconstitutional for Lieutenant Pasko to search him.

{¶9} Lieutenant Pasko and Officer Hockman were the only individuals to testify at the suppression hearing. Lieutenant Pasko testified that after officers arrested the man with whom he had spoken in the bathroom he proceeded to talk with the patrons. He testified that he "would ask each [patron] at the bar if they had any weapons, were *** carrying any guns, knives or explosive devices or things that I should be aware of." He further testified that he asked the patrons for permission to pat them down for weapons and "nobody had a problem with that." According to Lieutenant Pasko, the purpose for the pat downs was officer safety because even once backup arrived the officers were outnumbered approximately seven to one by the bar patrons.

{¶10} Lieutenant Pasko testified that he asked Carpenter for permission to perform a pat down after Carpenter said he did not have any weapons. Carpenter obliged Lieutenant Pasko, and Lieutenant Pasko felt an unidentifiable "bulge *** about the size of [his] fist" in Carpenter's pants' pocket. Carpenter identified the bulge as money, and Lieutenant Pasko asked him for permission to remove it from Carpenter's pocket. Once again, Carpenter gave Lieutenant Pasko permission. Lieutenant Pasko removed a stack of money from Carpenter's pocket and placed it on the bar. He testified that the top bill was folded into a perfect square. He further testified that "in 16 years [he'd] never seen a bill folded that way that did not contain drugs." Lieutenant Pasko admitted that Carpenter never took any actions to arouse his suspicions. Rather, Lieutenant Pasko patted down Carpenter because Carpenter gave him permission to do so as part of his inspection of all of the patrons for purposes of officer safety.

{¶11} Officer Hockman corroborated Lieutenant Pasko's testimony that Carpenter gave Lieutenant Pasko permission both to conduct a pat down and to remove the item that Carpenter had in his pocket. Officer Hockman testified that he was the one to pick up the folded bill and open it because, in his training and experience, a folded bill of that kind was used as a method for carrying drugs. As to the actions of the police on the scene, Officer Hockman testified that he and the other backup officers were at the bar to watch everyone, "mak[e] sure nobody was throwing anything on the floor [or] reaching for any type of a weapon[,] *** [and to] keep everybody still until the investigation was complete." Officer Hockman specified that officers kept the patrons still for safety reasons.

{¶12} For a search or seizure to be reasonable under the Fourth Amendment, it generally must be based upon probable cause and executed pursuant to a warrant. *Katz v. United States*

(1967), 389 U.S. 347, 357. Officers need not have a warrant to conduct a search, however, if one of the following exceptions exists:

> "(a) [a] search incident to a lawful arrest; (b) consent signifying waiver of constitutional rights; (c) the stop-and-frisk doctrine; (d) hot pursuit; (e) probable cause to search, and the presence of exigent circumstances; *** (f) the plain view doctrine[;] or (g) an administrative search[.]" (Quotations and citations omitted.) *State v. Scott*, 9th Dist. No. 08CA009446, 2009-Ohio-672, at ¶10, quoting *State v. Price* (1999), 134 Ohio App.3d 464, 467.

In *Ybarra*, the United States Supreme Court held that the stop-and-frisk exception recognized in *Terry v. Ohio* (1968), 392 U.S. 1 "does not permit a frisk for weapons on less than reasonable belief or suspicion directed at the person to be frisked, even though that person happens to be on premises where an authorized narcotics search is taking place." *Ybarra*, 444 U.S. at 94. Accordingly, it is unconstitutional for an officer to perform a *Terry* frisk on an individual based solely on that individual's proximity to another who has engaged in criminal activity. Id. If an officer receives an individual's consent to perform a pat down, however, it is not necessary for the officer to also possess reasonable suspicion. *State v. Beach* (May 14, 1997), 9th Dist. No. 18058, at *2-3.

> "[E]ven when officers have no basis for suspecting a particular individual, they may generally ask questions of that individual, *** ask to examine the individual's identification, *** and request consent to search *** provided they do not convey a message that compliance to their requests is required." *State v. Arnette* (Jan. 3, 1996), 9th Dist. No. 17219, at *3, quoting *Florida v. Bostick* (1991), 501 U.S. 429, 434-35.

The stop-and-frisk doctrine and the consent doctrine are two distinct exceptions to the warrant requirement. See *Scott* at ¶10.

{¶13} The trial court found *Ybarra* to be dispositive in this case. In *Ybarra*, officers executed a warrant allowing them to search a bar and one particular bartender who police believed was selling heroin. When officers entered the bar, however, they announced that they

were also going to search the patrons for weapons and proceeded to perform multiple pat downs. Officers frisked one of the patrons, Ybarra, twice and removed a cigarette pack containing several packets of heroin from his pocket. The United States Supreme Court held that the search of Ybarra was unconstitutional 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 trial court below, relying upon *Ybarra*, held that Carpenter's search was unconstitutional because officers "did not have a search warrant or specific articulable facts to search [him]." *Ybarra*, however, does not stand for the proposition that reasonable suspicion is a necessary prerequisite to every pat down. Reasonable suspicion to conduct a frisk was necessary in *Ybarra* because no other exception to the warrant requirement was present. Officers need not rely upon reasonable suspicion if they have consent. *Beach*, at *2-3.

{¶14} Both Lieutenant Pasko and Officer Hockman testified that Carpenter consented to a pat down and further consented when Lieutenant Pasko asked him if he could remove the money from his pants' pocket. Carpenter does not dispute the fact that he gave Lieutenant Pasko consent. Rather, Carpenter has focused his argument at both the trial level and on appeal on Lieutenant Pasko's lack of reasonable suspicion to frisk him. Once again, however, reasonable suspicion is unnecessary when an individual consents to a pat down. Id. Because Carpenter gave his consent, Lieutenant Pasko's lack of reasonable suspicion is irrelevant.

{¶15} We recognize that consent to a pat down may be invalidated if officers obtained that consent as the result of an illegal seizure. This Court has held that "consent given during [an investigatory detention] is only valid if the officer had reasonable suspicion to detain the person." *Akron v. Harvey* (Dec. 20, 2000), 9th Dist. No. 20016, at *2. Yet, Carpenter never sought to suppress the evidence in the court below on the basis that he was subject to an illegal

seizure. Carpenter's suppression motion made a passing assertion that there were no facts which "warranted the Akron police to stop Herbert Young." Herbert Young appears to have no relation to this case, nor any of the cases cited by Carpenter in his suppression motion. Consequently, not only did Carpenter's motion fail to accurately state that police had no reason "to stop [Carpenter,]" his motion failed to develop any argument in that regard, or to provide any discussion of facts or law in support of such an argument.

{¶16} Moreover, it is apparent from the transcript of the suppression hearing that Carpenter never argued that his consent was invalid because it was given during an investigatory detention. At the hearing, he argued that his consent was limited to the retrieval of the money from his pants' pocket and that officers did not have a constitutional basis for actually opening the folded bill on top of the money once it was removed. Thus, his argument at the hearing focused solely on whether the police had the right to open the bindle and did not challenge the stop or subsequent detention. The only questions at the suppression hearing relative to the propriety of the stop were posed by the trial court sua sponte. Despite the trial court's inquiry into such matters, Carpenter's cross examination and closing argument remained focused strictly on the fact that his consent did not extend to the opening of the bindle found in his pocket. "[A]rguments which are not raised below may not be considered for the first time on appeal." *State v. Schwarz*, 9th Dist. No. 02CA0042-M, 2003-Ohio-1294, at ¶14. To the extent that Carpenter attempts to argue on appeal that suppression was proper because his consent was given during an investigatory detention that was not based on reasonable suspicion, that argument is not properly before us. Id. at ¶14.

{¶17} The trial court granted Carpenter's motion to suppress because officers lacked reasonable suspicion to search Carpenter. Because Carpenter consented to a pat down, however,

reasonable suspicion was not required. Accordingly, the trial court erred by granting Carpenter's motion to suppress. The State's first assignment of error is sustained.

Assignment of Error Number Two

"THE TRIAL COURT ERRED IN SUPPRESSING EVIDENCE CONCERNING METHAMPHETAMINE BECAUSE NO EVIDENCE WAS RECEIVED ON THAT DRUG."

{¶18} In its second assignment of error, the State argues that the trial court erred in suppressing the evidence related to Carpenter's aggravated possession of methamphetamine charge. After concluding that officers subjected Carpenter to an unlawful search, the trial court employed the exclusionary rule to suppress the additional evidence that officers found as a result of Carpenter's pat down and arrest. Because Carpenter's search was not unlawful, it was error for the trial court to suppress any additional evidence on the basis of the exclusionary rule. *State v. Hellriegel*, 9th Dist. No. 22929, 2006-Ohio-3335, at ¶10, quoting *Akron v. Recklaw* (Jan. 30, 1991), 9th Dist. No. 14671, at *1 ("The exclusionary rule only pertains to evidence obtained as a result of an unlawful search and seizure."). Inasmuch as the State argues that the trial court erred by suppressing additional evidence, the State's second assignment of error is sustained.

III

{¶19} The State's assignments of error are sustained. The judgment of the Summit County Court of Common Pleas is reversed, and the cause is remanded for further proceedings consistent with the foregoing opinion.

Judgment reversed,
and cause remanded.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellee.

BETH WHITMORE
FOR THE COURT

CARR, P. J.
CONCURS

BELFANCE, J.
DISSENTS, SAYING:

{¶20} I respectfully dissent. In this case, we are confronted with a clear violation of the constitutional rights of the Appellee. Under the facts of this case, the police conducted a blanket seizure and search of the patrons in the Pegasus Lounge which was not constitutionally permissible under *Terry v. Ohio* (1968), 392 U.S. 1. When the United States Supreme Court decided *Terry*, the Court created a very narrow exception to the requirement of probable cause prior to effecting a search or seizure. Id. at 27. In *Terry*, the Court determined that a police officer may momentarily stop and frisk a person where, based on specific facts, the officer

concludes that the person has committed a crime or is about to commit a crime and may be armed and dangerous. Id. at 30. The Court emphasized that it had created very narrowly drawn authority to search for weapons without a warrant. Id. at 27. This narrowly drawn exception was reiterated in *Ybarra v. Illinois* (1979), 444 U.S. 85, 93-94 :

> "The *Terry* case created an exception to the requirement of probable cause, an exception whose 'narrow scope' this Court 'has been careful to maintain.' *Dunway v. New York* (1979), 442 U.S. 200, 210. * * * Nothing in *Terry* can be understood to allow a generalized 'cursory search for weapons' or indeed, any search whatever for anything but weapons. The 'narrow scope' of the *Terry* exception does not permit a frisk for weapons on less than reasonable belief or suspicion directed at the person to be frisked, even though that person happens to be on premises where an authorized narcotics search is taking place."

In determining whether a stop itself is permissible, *Terry* established that in order for an officer to temporarily seize an individual without probable cause, the officer must have reasonable articulable suspicion of criminal activity based on "specific and articulable facts" and "rational inferences from those facts." *Terry*, 392 U.S. at 21. This initial inquiry must be satisfied in order to justify the stop at its inception. *Ybarra*, 444 U.S. at 92-93. In the instant matter, it is clear that the officers lacked any reasonable articulable suspicion of criminal activity based upon specific articulable facts to justify the stop of the Appellee as well as the other patrons in the bar. The trial court determined that until the officers completed the search, no one was allowed to leave. Thus, all of the patrons of the bar, including the Appellee, were subjected to a warrantless seizure without consent. The record is devoid of any evidence that police had a reasonable belief that Appellee was armed and dangerous or was in any way independently suspected of any criminal activity. Upon entering the bar, they did not recognize the Appellee and they did not observe anything suspicious about him at all. Thus, the officers had no basis upon which to effectuate a seizure of the Appellee.

{¶21} I disagree that the police obtained the Appellee's valid consent for a *Terry*-type stop and frisk. The record is clear that the police effected the seizure of all of the patrons first and then belatedly "asked" for consent to search them. The record is also clear that the police effectuated this initial seizure without Appellee's consent nor the consent of any of the patrons. As the majority correctly points out, we have recognized "consent given during [an investigatory detention] is only valid if the officer had reasonable suspicion to detain the person." *Akron v. Harvey* (Dec. 20, 2000), 9th Dist. No. 20016, at *2. Further, the *Ybarra* Court expressly rejected the notion that police officers could effectuate a blanket *Terry* stop of all of the patrons of a bar, even under circumstances where the officers actually have a search warrant to search the bar itself. *Ybarra,* 444 U.S. at 93-94.

{¶22} Notwithstanding, the majority concludes that Appellee may not challenge this obvious violation of his Fourth Amendment right to be free from a warrantless seizure because he never sought to suppress the evidence on the basis that he was subjected to an illegal seizure. However, in his suppression motion, the Appellee specifically challenged the seizure itself by claiming that there were "no 'specific articulable facts which taken together with rational inferences from those facts'" warranted that the police stop him. Although Appellee's suppression motion contains an obvious typographical error, it is nonetheless clear that Appellee challenged the seizure itself, thereby placing the State on notice that both the seizure and the search were being challenged. See, e.g., *State v. Breisch,* 2nd Dist. No. 20908, 2005-Ohio-6827, at ¶57 ("Upon review, we do not agree that Breisch waived his challenge to the removal of the crack pipe from his pants. In his suppression motion, Breisch alleged that the search violated the Fourth Amendment. In the accompanying memorandum, he claimed the evidence would show 'that his search exceeded the permissible bounds of a 'stop and pat' frisk pursuant to *Terry v.*

Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889[.]' This assertion was sufficient to put the State on notice that Breisch was challenging the scope of the search and alleging a Fourth Amendment violation."); *State v. O'Neal*, 3rd Dist. No. 1-07-33, 2008-Ohio-512, at ¶18 ("Thus, we find that the arguments in O'Neal's motion to suppress and closing argument, combined with his line of questioning, were sufficient to give the State notice that he was challenging the scope of the stop."). Furthermore, it is clear from the record that the court raised numerous questions about the propriety of the police being able to enter a public establishment and simply stop and search all of its patrons. In light of the fact that the State bears the burden of proof upon the filing of a motion to suppress and it was on notice of the challenge to the initial seizure, it was the State which should have come forward with sufficient evidence to address the propriety of the initial seizure of the Appellee.

{¶23} All of the patrons, including the Appellee, were "clothed with constitutional protection against an unreasonable search or an unreasonable seizure." *Ybarra* 444 U.S. at 91. Under the facts of this case, it is apparent that the initial seizure of the Appellee was constitutionally impermissible. Hence, any subsequent consent for the patdown was invalid. See *Harvey*, at *2. In light of the above, I would find that the trial court properly granted the Appellee's motion to suppress.

APPEARANCES:

SHERRI BEVAN WALSH, Prosecuting Attorney, and RICHARD S. KASAY, Assistant Prosecuting Attorney, for Appellant.

JEFFREY N. JAMES, Attorney at Law, for Appellee.

DAVID LOMBARDI, Attorney at Law, for Appellee.