[Cite as *State v. Swonger*, 2010-Ohio-4995.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellant,	:	
		No. 09AP-1166
v.	:	(M.C. No. 2009 CRB 022463)
Thomas Swonger,	:	(ACCELERATED CALENDAR)
Defendant-Appellee.	:	

D E C I S I O N

Rendered on October 14, 2010

Richard C. Pfeiffer, *Jr.*, City Attorney, *Lara N. Baker*, City Prosecutor, and *Melanie R. Tobias*, for appellant.

Yeura R. Venters, Public Defender, and *John W. Keeling*, for appellee.

APPEAL from the Franklin County Municipal Court.

McGRATH, J.

{¶1} Plaintiff-appellant, State of Ohio ("the state"), appeals, pursuant to Crim.R. 12(K), from a judgment of the Franklin County Municipal Court granting the motion to suppress evidence of defendant-appellee, Thomas Swonger.

{¶2} The following factual summary is taken from the transcript of the hearing on appellee's motion to suppress. The only witness called to testify at the hearing was Corporal David Barrick of the Franklin County Sheriff's Office, who testified that on September 12, 2009, he was working in the area of The Ohio State University campus in an effort to identify persons under the age of 21 that were in the possession of alcohol.

Corporal Barrick testified he was walking in the location of 91 Frambes Avenue when he observed a group of people at said address on and around the porch area. Specifically, appellee was on the porch holding a can of Natural Light beer. On this date, Corporal Barrick was not in uniform but was wearing plain clothes, consisting of jeans, a sweatshirt and tennis shoes. Corporal Barrick was also wearing a "neck badge" described as a metal chain with a badge dangling from it that would have been underneath his sweatshirt as he approached the residence. According to Corporal Barrick, appellee was standing by a banister in the area of the porch that was closest to the street, and there was no gate, fence, or other type of enclosure around the yard of the residence. Additionally, Corporal Barrick's view of the porch was completely unobstructed as the porch was free of blinds or other such apparatus that could potentially limit one's view. Suspecting that appellee was under the age of 21, Corporal Barrick walked onto the porch, and before he had a chance to identify himself, appellee set down the can of beer. Corporal Barrick proceeded to ask appellee for identification, and it was determined appellee was indeed under the age of 21. Thereafter, appellee was taken to the mobile command center as were the contents of the Natural Light beer can.

{¶3} A complaint was filed on September 12, 2009, charging appellee with underage possession/consumption of alcohol in violation of R.C. 4301.69(E). On October 16, 2009, appellee filed a motion to suppress the evidence arguing that there was no reasonable suspicion or probable cause to make a warrantless investigatory stop. A hearing was held on December 8, 2009, and at the conclusion of the hearing, the trial court stated:

> And what bothers me more than anything else is that the – had the officer come upon the defendant today, standing in

> his porch with a can of something in his hand, would the same thing result? If he came up, he would find out that the defendant is, in fact, 21. He looks the same. He can't have aged in three months. And that probably bothers me more than anything.

(Tr. 33.) The entry granting the motion to suppress states only that the defendant's motion is granted "based upon evidence in hearing." (Dec. 8, 2009 Entry at 1.)

{¶4} This appeal followed, and the state brings the following assignment of error for our review:

> The trial court erred in granting the Defendant-Appellee's motion to suppress evidence.

{¶5} The state argues Fourth Amendment principles are not implicated here because the interaction between appellee and Corporal Barrick constituted a consensual encounter as opposed to an investigatory stop, the can of beer was in plain view, and appellee's arrest was supported by reasonable suspicion and probable cause. In contrast, appellee contends this situation presents an investigatory stop not supported by reasonable articulable suspicion of the occurrence of criminal activity and a circumstance in which the can of beer was unlawfully seized. Based on the record, we must conclude the facts of this particular case demonstrate that the interaction between Corporal Barrick and appellee was a consensual encounter, and, therefore, it was error for the trial court to have granted appellee's motion to suppress.

{¶6} "Appellate review of a motion to suppress presents a mixed question of law and fact." *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, ¶8. When considering a motion to suppress, the trial court assumes the role of fact finder and, accordingly, is in the best position to resolve factual questions and evaluate witness credibility. Id., citing *State v. Mills* (1992), 62 Ohio St.3d 357, 366. As such, an appellate court must accept the

trial court's factual findings if they are supported by competent, credible evidence. *Burnside* at ¶8, citing *State v. Fanning* (1982), 1 Ohio St.3d 19. Accepting these facts as true, the reviewing court must then independently determine, without deference to the trial court's conclusion, whether the facts satisfy the applicable legal standard. Id. citing *State v. McNamara* (1997), 124 Ohio App.3d 706, 707.

{¶7} The Fourth Amendment to the United States Constitution as applied to the states through the Fourteenth Amendment, as well as Section 14, Article I, of the Ohio Constitution, prohibit the government from conducting warrantless searches and seizures, rendering them per se unreasonable unless an exception applies. *State v. Mendoza*, 10th Dist. No. 08AP-645, 2009-Ohio-1182, ¶11, citing *Katz v. United States* (1967), 389 U.S. 347, 357, 88 S.Ct. 507, 514. Even so, "not all personal intercourse between policemen and citizens involves 'seizures' of persons. Only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a 'seizure' has occurred" within the meaning of the Fourth Amendment. *Terry v. Ohio* (1968), 392 U.S. 1, 19, 88 S.Ct. 1868, 1879, fn. 16; *Brendlin v. California* (2007), 551 U.S. 249, 254, 127 S.Ct. 2400, 2405.

{¶8} The United States Supreme Court recognizes three categories of police-citizen interactions: (1) a consensual encounter, which requires no objective justification, see *Florida v. Bostick* (1991), 501 U.S. 429, 434, 111 S.Ct. 2382, 2386; (2) a brief investigatory stop or detention, which must be supported by reasonable suspicion of criminal activity, see *Terry*, supra; and (3) a full-scale arrest, which must be supported by probable cause, see *Brown v. Illinois* (1975), 422 U.S. 590, 95 S.Ct. 2254.

{¶9} A police officer may lawfully initiate a consensual encounter without probable cause or a reasonable, articulable suspicion that an individual is currently engaged in criminal activity or is about to engage in such conduct. *United States v. Mendenhall* (1980), 446 U.S. 544, 556, 100 S.Ct. 1870, 1878. A consensual encounter occurs when a police officer approaches a person in a public place, engages the person in conversation or requests information, and the person remains free not to answer and walk away. Id. 446 U.S. at 553, 100 S.Ct. at 1876. An officer's request to examine a person's identification does not make an encounter nonconsensual, nor does the officer's neglect to inform the person that he is free to walk away. *Bostick*, supra. The Fourth Amendment guarantees are not implicated in such an encounter unless the officer has by either physical force or show of authority restrained the person's liberty so that a reasonable person would not feel free to decline the officer's requests or otherwise terminate the encounter. *Mendenhall,* 446 U.S. at 554, 100 S.Ct. at 1877.

{¶10} The second type of encounter is an investigatory stop. An investigatory stop is more intrusive than a consensual encounter but less intrusive than a formal custodial arrest. An investigatory stop is limited in duration and purpose and may last only as long as it takes the officer to confirm or to dispel his suspicions that an individual is, or is about to be, engaged in criminal activity. *Terry*, 392 U.S. at 16, 88 S.Ct. at 1877. An investigatory stop constitutes a "seizure" for purposes of the Fourth Amendment. Id.*; State v. Seals* (Dec. 30, 1999), 11th Dist. No. 98-L-206. A person is "seized" under this category when, in view of the totality of the circumstances surrounding the incident, by means of physical force or show of authority a reasonable person would have believed that he was not free to leave. *Mendenhall,* 446 U.S. at 553, 100 S.Ct. at 1876; *Terry,* 392

U.S. at 19, 88 S.Ct. at 1879. Factors suggesting that a person has been "seized" include: a threatening presence of several officers; the display of a weapon by an officer; some physical touching of the person; the use of language or tone of voice indicating that compliance with the officer's request might be compelled; approaching the person in a nonpublic place; and blocking the person's path. *Mendenhall,* 446 U.S. at 554, 100 S.Ct. at 1877.

{¶11} An officer may perform an investigatory stop without violating the Fourth Amendment as long as the officer is "able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." *Terry,* 392 U.S. at 21, 88 S.Ct. at 1880. Reasonable suspicion has been described by courts as requiring more than an inchoate suspicion or a "hunch" but less than the heightened level of certainty required for probable cause. *State v. Shepherd* (1997), 122 Ohio App.3d 358, 364. "A hunch is not an accepted basis for an intrusion on protected rights." *State v. Rucker* (1990), 63 Ohio App.3d 762, 764. "An officer's belief that someone is 'up to something' or that their actions are 'not normal' does not necessarily justify a reasonable suspicion that criminal activity is afoot." *State v. Lynch* (June 5, 1998), 2d Dist. No. 17028.

{¶12} The third category of police-citizen contact is the formal custodial arrest. In Ohio, an arrest occurs under the following circumstances: (1) there was an intent to arrest, (2) under real or pretended authority, (3) accompanied by an actual or constructive detention, and (4) which is so understood by the person arrested. *State v. Darrah* (1980), 64 Ohio St.2d 22, 26. An arrest is obviously a seizure for Fourth Amendment purposes.

The standard for effectuating a valid arrest is probable cause to believe that the person arrested has committed a criminal offense.

{¶13} Appellee contends this encounter was not of a consensual nature because the police "stormed onto a private porch" to detain appellee. (Appellant's brief at 5.) Despite appellee's consistent description throughout his brief of armed agents "storming" and "rushing" the porch, the record simply does not support this. Indeed, Corporal Barrick testified he walked onto the porch to talk to appellee. The Fourth Amendment's protection against warrantless home entries extends to the "curtilage" of an individual's home. *United States v. Dunn* (1987), 480 U.S. 294, 300, 107 S.Ct. 1134, 1139. "Curtilage" has been defined as an area " 'so intimately tied to the home itself that it should be placed under the home's "umbrella" of Fourth Amendment protection.' " *State v. Payne* (1995), 104 Ohio App.3d 364, 368, quoting *Dunn*, 480 U.S. at 301, 107 S.Ct. at 1140. The central inquiry is " 'whether the area harbors the "intimate activity associated with the sanctity of a man's home and the privacies of life." ' " *Dunn*, 480 U.S. at 300, 107 S.Ct. at 1139, quoting *Oliver v. United States* (1984), 466 U.S. 170, 180, 104 S.Ct. 1735, 1742.

{¶14} *Dunn* set forth four factors for consideration in determining whether a certain area outside the home itself should be treated as curtilage: (1) the proximity of the area claimed to be curtilage to the home; (2) whether the area is included within an enclosure surrounding the home; (3) the nature of the uses to which the area is put; and (4) the steps taken by the resident to protect the area from observation by people passing by. Id., 480 U.S. at 301, 107 S.Ct. at 1139.

{¶15} However, the porch of a residence has been held to be a public place for purposes of Fourth Amendment analysis. *State v. Lomack* (Mar. 11, 1999), 10th Dist. No. 98AP-708 (finding that the defendant was in a public place at the time of his attempted arrest as he was "standing on his porch"), citing *United States v. Santana* (1976), 427 U.S. 38, 42, 96 S.Ct. 2406, 2410; *State v. Higgins*, 8th Dist. No. 86241, 2006-Ohio-178 (a residence's porch is not within the curtilage of a home so as to be subject to Fourth Amendment protections); *State v. Williamson*, 12th Dist. No. CA2003-02-047, 2004-Ohio-2209 (a residence's porch is not within the curtilage of a home); *State v. Eberhart*, 1st Dist. No. C-010346, 2002-Ohio-1140 (a porch may be considered a public place even though it is on the homeowner's property).

{¶16} In the case sub judice, Corporal Barrick testified that appellee was standing by a banister in the area of the porch that was closest to the street. There was no fence or gate enclosing the yard of the residence. Moreover, there were no blinds or other structures obstructing Corporal Barrick's view of the porch from the sidewalk that would indicate an attempt by the homeowner to protect the area from observation by people passing by. Thus, consistent with the above-stated precedent, we find appellee was in a public place for purposes of the Fourth Amendment.

{¶17} As previously stated, a consensual encounter occurs when a police officer approaches a person in a public place, engages the person in conversation or requests information, and the person remains free not to answer and walk away. *Mendenhall*, supra. Even a request to examine a person's identification does not make an encounter nonconsensual, nor does the officer's neglect to inform the person that he is free to walk away. *Bostic*, supra. Because Fourth Amendment guarantees are not implicated in

consensual encounters unless an officer has by physical force or show of authority restrained a person's liberty, we must consider the actions taken by Corporal Barrick to determine whether or not this scenario constitutes a consensual encounter. After reviewing the limited record in this case, we have no choice but to find that it does.

{¶18} Corporal Barrick testified he was walking in the location of 91 Frambes Avenue, when he observed appellee on the porch holding a can of Natural Light beer. Corporal Barrick was not in uniform but instead was wearing plain clothes. Though he testified he would have been carrying a firearm, there is no evidence it was ever displayed as Corporal Barrick testified that the only thing identifying him as a law enforcement officer was a neck badge that would have been initially concealed under his shirt but exposed as he walked onto the porch. Corporal Barrick testified that he walked onto the porch and before he had a chance to identify himself, appellee set down the can of beer. Corporal Barrick proceeded to ask appellee for identification, and it was determined appellee was indeed under the age of 21. Specifically, with respect to the initial encounter, Corporal Barrick testified as follows:

> Q. At any time before or after that, did you identify yourself as a corporal with the Franklin County Sheriff's Office?
>
> A. Yes, I would have had my badge exposed. And in this specific circumstance, I don't remember whether or not I stated who I was to him directly, or if it was just understood as we approached.
>
> * * *
>
> Q. Which [badge] did you expose?
>
> A. The one that was worn as a necklace.
>
> * * *

> A. Actually, I believe I asked if he was underage, under 21 years of age, and I don't – I can't recall whether or not he responded whether he was or was not, but at that point I asked for his identification.
>
> Q. And did [appellee] comply with you to give you his identification?
>
> A. I cannot specifically remember whether or not he handed me his identification or if he gave us his date of birth. And we were able to run the record to verify that he was, in fact, underage.

(Tr. 12-13.)

{¶19} The trial court made no reference as to whether or not the encounter was consensual or any findings with respect to Corporal Barrick's credibility. Thus, we have no reason to believe the trial court determined Corporal Barrick was not credible in his testimony of the events.

{¶20} In *State v. Guinn* (June 1, 2000), 10th Dist. No. 99AP-630, this court held that the initial encounter of an officer approaching the defendant and asking for identification was not a seizure but rather a consensual encounter not subject to Fourth Amendment protections. In *Guinn*, the defendant was on the porch of an apartment building that had a long history of narcotic-related activity and that was in an area where officers routinely checked for stolen vehicles. The officer, in uniform and in a police cruiser, drove past the apartment and saw three people on the porch, one of whom was the defendant, who was pounding on the door and yelling for someone to let her in. The officer approached, asked the defendant what she was doing, and asked if she had any identification. Because there was no evidence to suggest the officer "used any words or actions to compel" the defendant to comply, nor any evidence to suggest the defendant was not free to leave or restrained of her liberty in any way, this court found that the trial

court's finding that the defendant was seized was not supported by competent, credible evidence and reversed the trial court's decision to grant the defendant's motion to suppress.

{¶21} Similarly in *State v. Chambers* (Nov. 9, 1999), 4th Dist. No. 99CA6, the defendant, charged with underage possession of alcohol, argued the trial court erred in overruling his motion to suppress the contents of his plastic cup. In *Chambers*, an agent from the Department of Public Safety came across the defendant and his friends drinking in a park. The agent, dressed in plain clothes, approached the individuals, identified himself as a liquor control agent, and proceeded to question the individuals. The agent asked the defendant to state his age, and the defendant indicated he was under the age of 21. Regarding the encounter, the *Chambers* court stated:

> The encounter in this case took place in a public park and included Guinther, Chambers, and Chambers' two friends. Guinther was dressed in plain clothes and did not display a weapon. Guinther did not touch Chambers or threaten to do so. While Guinther identified himself to Chambers as a liquor control agent, he did not use language suggesting that Chambers was compelled to comply with his requests. Nor did Chambers behave as if he believed Guinther could compel him to cooperate. To the contrary, Chambers refused Guinther's request to look inside the cooler. Based upon these facts, we find that Guinther's initial contact and conversation with Chambers was a consensual encounter. Consequently, we need not determine whether Guinther possessed a reasonable, articulable suspicion that Chambers was committing a crime.

Id.

{¶22} In the present case, Corporal Barrick was dressed in plain clothes with only his neck badge exposed, and it is not clear from the record whether Corporal Barrick even verbally identified himself as a police officer. There is no evidence that Corporal

Barrick displayed a weapon, touched appellee, or otherwise threatened to do so. Additionally, there is no evidence that Corporal Barrick used language or a tone of voice to indicate compliance might be compelled, or that Corporal Barrick approached appellee in a non-public place or attempted in any manner to block appellee's path.

{¶23} In light of *Chambers* and the *Mendenhall* factors, and upon the undisputed facts presented in this record, we find Corporal Barrick's initial contact and conversation with appellee was a consensual encounter. *Mendenhall*; *Chambers*. Hence, we need not determine whether Corporal Barrick possessed a reasonable articulable suspicion that appellee was committing a crime.

{¶24} The state next contends the seizure of the beer can was lawful because it was in open, plain view. Under Fourth Amendment law, "[a] 'search' occurs when an expectation of privacy that society is prepared to consider reasonable is infringed." *United States v. Jacobsen* (1984), 466 U.S. 109, 113, 104 S.Ct. 1652, 1656; *State v. Mims*, 6th Dist. No. OT-05-030, 2006-Ohio-862, ¶15; *State v. Israel* (Sept. 26, 1997), 1st Dist. No. C-961006; *State v. York* (1997), 122 Ohio App.3d 226, 231. An individual does not have a reasonable expectation of privacy in possessions that are in plain view to the public, even if those things are in the person's home. *Israel; Mims* ¶18. Thus, a law enforcement officer's observation of activities or things that are in plain view from a vantage point where the officer has a right to be does not constitute a search for purposes of the Fourth Amendment. *Israel; Katz* at 351 ("What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection."). In that situation, Fourth Amendment protections are not implicated because a search does not occur. *State v. Sheppard* (2001), 144 Ohio App.3d 135, 141.

{¶25} In *Chambers*, the state argued, as it does here, that the drink was legally seized pursuant to the plain view exception to the warrant requirement. The court noted the defendant was in a public area where the defendant did not possess a legitimate expectation of privacy and where the agent was able to observe the alcohol in plain, open view. The court stated:

> Upon observing Chambers' drink, Guinther immediately possessed probable cause to associate the drink with a criminal activity. Guinther smelled alcohol in the drink. Additionally, Guinther noticed that Chambers set his drink down, as if to disclaim it, immediately upon Guinther's approach. Chambers stuttered and avoided eye contact with Guinther, but was loud and rowdy before he saw Guinther. In Guinther's experience, such behaviors are characteristic of underage drinkers. Based upon these facts, we find that Guinther possessed probable cause to associate the drink, which Chambers held in open view, with criminal activity. Therefore, Guinther legally seized Chambers' drink.

Id.

{¶26} Here, appellee was holding a Natural Light beer can in an area considered a public place for purposes of Fourth Amendment review. The can was in plain, open view, and Corporal Barrick was able to observe the same from a vantage point where he had a right to be. Like in *Chambers*, appellee set down the can when he observed Corporal Barrick approaching. We have already determined that the evidence does not establish that this initial encounter was an investigatory stop but, rather, was a consensual encounter in which it was determined that appellee was indeed under the age of 21. Accordingly, we find the evidence seized was in plain view and not the actual object of a search.

{¶27} Because the uncontroverted evidence in this case demonstrates the approach of appellee was a consensual encounter for which Corporal Barrick was not

required to have a reasonable suspicion of criminal wrongdoing, and the beer can was in plain, open view, the trial court's finding that appellee was seized for purposes of the Fourth Amendment was not supported by competent, credible evidence. Therefore, we must find it was error for the trial court to grant appellee's motion to suppress.

{¶28} For the foregoing reasons, we hereby sustain appellant's sole assignment of error, reverse the Franklin County Municipal Court's granting of the motion to suppress, and remand this matter to that court for further proceedings in accordance with law and consistent with this decision.

Judgment reversed; cause remanded.

BRYANT and KLATT, JJ., concur.

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