[Cite as *State v. Michael*, 2013-Ohio-3889.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	
		No. 12AP-508
v.	:	(C.P.C. No. 11CR-10-5252)
Shawnquel A. Michael,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on September 10, 2013

Ron O'Brien, Prosecuting Attorney, and *Sheryl L. Prichard*, for appellee.

Yeura R. Venters, Public Defender, and *Timothy E. Pierce*, for appellant.

APPEAL from the Franklin County Court of Common Pleas

KLATT, P.J.

{¶ 1} Defendant-appellant, Shawnquel A. Michael, appeals from a judgment of conviction and sentence entered by the Franklin County Court of Common Pleas. Because the trial court did not err by denying appellant's motion to suppress, we affirm that judgment.

I. Factual and Procedural Background

{¶ 2} On the afternoon of August 30, 2011, Columbus Police Officer Doug Wilkinson was working as part of the police department's community response team, a specialized police safety initiative designed to combat crimes and gun violence. Around 4:30 p.m., he and his partner responded to an officer-in-trouble call in Rainbow Park on

the east side of Columbus. Other officers had responded to an earlier call that persons in the area were pointing guns at each other and that a man with a gun had been seen walking away from that area toward the intersection of Fairwood and East Livingston Avenues. The officers at the scene needed help to control the crowd that had gathered in the area. Wilkinson arrived at the area and observed one suspect who had been tasered and was lying on the ground. After police secured and cleared the scene, Officer Wilkinson began to patrol the area in order to maintain a police presence there.

{¶ 3} About an hour later, while still patrolling the area, Officer Wilkinson observed appellant walking near the intersection of Fairwood and East Livingston Avenues. Officer Wilkinson saw a bulge on the right side of appellant's clothing. Appellant hesitated when he saw the police car and moved his hand to touch the area of the bulge. Based on Officer Wilkinson's training and experience, he concluded that appellant had a gun and, in fact, told his partner that "that guy is carrying a gun right there." (Tr. 20.) Officer Wilkinson got out of his car and approached appellant. Without saying anything, Officer Wilkinson reached for the area where he observed the bulge in appellant's clothing. He lifted appellant's shirt and grabbed a gun from appellant's waistband. Appellant ran away but was later apprehended and arrested.

{¶ 4} As a result of these events, a Franklin County Grand Jury indicted appellant with one count of carrying a concealed weapon in violation of R.C. 2923.12. Appellant entered a not-guilty plea to the charge and filed a motion to suppress the gun found by the officer. He argued that Officer Wilkinson discovered the gun during an unreasonable and warrantless search not supported by reasonable suspicion or probable cause in violation of his Fourth Amendment rights.

{¶ 5} The trial court held a hearing on appellant's motion. Officer Wilkinson testified to the above version of events regarding his search of appellant. The trial court denied appellant's motion to suppress, concluding that the officer's search was reasonable in light of the totality of the circumstances. The trial court noted the officer's belief that appellant had a weapon on him and that the officer's conduct of lifting appellant's shirt was also reasonable.

{¶ 6} After the trial court's decision, appellant entered a no-contest plea to one count of carrying a concealed weapon. The trial court accepted the plea, found appellant guilty, and sentenced him accordingly.

II. The Appeal

{¶ 7} Appellant appeals and assigns the following errors:

> First Assignment of Error
>
> The lower court erred in determining that the stop of the Appellant was supported by the requisite level of suspicion announced in *Terry v. Ohio*, 392 U.S. 1 (1968). All evidence seized as a result of this unlawful encounter should have been suppressed pursuant to the Fourth and Fourteenth Amendments of the United States Constitution and Article I, Section 14 of the Ohio Constitution.
>
> Second Assignment of Error
>
> Assuming the seizure in this manner met the appropriate legal standard of *Terry*, the scope of the search of Appellant's person was unreasonable requiring that all evidence obtained therefrom be suppressed under the Fourth and Fourteenth Amendments of the United States Constitution and Article I, Section 14 of the Ohio Constitution.

A. Standard of Review

{¶ 8} Both assignments of error address the trial court's denial of appellant's motion to suppress. " '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. 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.' " (Citations omitted.) *State v. Roberts*, 110 Ohio St.3d 71, 2006-Ohio-3665, ¶ 100, quoting *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, ¶ 8. Appellant does not challenge any of the trial court's factual findings. He contends that the trial court's legal conclusions were wrong. Thus, we must independently

determine whether Officer Wilkinson had a reasonable, articulable suspicion to stop appellant and whether the officer's search exceeded the scope of that stop.

B. Did the Officer Have Reasonable Suspicion to Stop Appellant?

{¶ 9} In appellant's first assignment of error, he argues that Officer Wilkinson illegally seized him when he lifted up his shirt without reasonable suspicion to do so. We disagree.

{¶ 10} The Fourth Amendment to the United States Constitution, as well as Ohio Constitution, Article I, Section 14, protects individuals from unreasonable searches and seizures. *State v. Kinney*, 83 Ohio St.3d 85, 87 (1998); *Katz v. U.S.*, 389 U.S. 347, 351 (1967). The touchstone of Fourth Amendment analysis is reasonableness, *Pennsylvania v. Mimms*, 434 U.S. 106, 108-09 (1977), which depends on the facts and circumstances of each case and a balance of competing interests of the public and the individual. *Terry v. Ohio*, 392 U.S. 1, 29 (1968).

{¶ 11} Searches and seizures conducted without a warrant are per se unreasonable unless they come within one of the few specifically established and well delineated exceptions. *Minnesota v. Dickerson*, 508 U.S. 366, 372 (1993), citing *Thompson v. Louisiana*, 469 U.S. 17, 20 (1984). An investigative stop by a police officer is one of the common exceptions to the Fourth Amendment warrant requirement. *Terry at* 20-22. Under *Terry*, a police officer may constitutionally stop or detain an individual without probable cause when the officer has reasonable suspicion, based on specific, articulable facts, that criminal activity is afoot. *Id.* at 21; *State v. Latson*, 10th Dist. No. 09AP-1212, 2010-Ohio-6297, ¶ 12. Accordingly, "[a]n investigative stop does not violate the Fourth Amendment to the United States Constitution if the police have reasonable suspicion that 'the person stopped is, or is about to be, engaged in criminal activity.' " *State v. Jordan*, 104 Ohio St.3d 21, 2004-Ohio-6085, ¶ 35, quoting *United States v. Cortez*, 449 U.S. 411, 417 (1981). "Reasonable suspicion entails some minimal level of objective justification, 'that is, something more than an inchoate and unparticularized suspicion or "hunch," but less than the level of suspicion required for probable cause.' " *State v. Jones*, 188 Ohio App.3d 628, 2010-Ohio-2854, ¶ 17 (10th Dist.), quoting *State v. Jones*, 70 Ohio App.3d 554, 556-57 (2d Dist.1990).

{¶ 12} The propriety of an investigative stop by a police officer must be viewed in light of the totality of the surrounding circumstances. *Jordan* at ¶ 52, quoting *State v. Bobo*, 37 Ohio St.3d 177 (1988), paragraph one of the syllabus. "[T]he circumstances surrounding the stop must 'be viewed through the eyes of a reasonable and cautious police officer on the scene, guided by his experience and training.' " *Bobo* at 179.

{¶ 13} The state does not dispute that Officer Wilkinson's brief detention of appellant to lift his shirt constitutes a *Terry* stop for purposes of the Fourth Amendment. However, the state argues that the officer had reasonable suspicion to stop appellant. We agree. In light of the totality of the circumstances, including (1) the radio call regarding armed men in the area;[1] (2) appellant's presence at the location where there had been reports one hour earlier that a man with a gun was walking toward the intersection of Fairwood and East Livingston Avenues; and (3) the officer's observation of a bulge in appellant's clothing, which according to his experience and training was consistent with the presence of a gun, and (4) appellant's act of touching that precise part of his waistband when he saw the police car, we conclude that Officer Wilkinson had reasonable suspicion to conduct a *Terry* stop. We overrule appellant's first assignment of error.

C. Did the Officer's Actions Exceed the Scope of a *Terry* Search?

{¶ 14} Appellant contends in his second assignment of error that, even if the *Terry* stop was permissible, Officer Wilkinson exceeded the scope of a *Terry* search by reaching into his clothes without first performing a pat-down search. We disagree.

1. Is a *Terry* Search Limited to a Pat-Down of the Suspect?

{¶ 15} After an officer makes a lawful *Terry* stop, the officer may conduct a "pat-down" of the person, a limited protective search for weapons, if the officer has a reasonable suspicion that the suspect might be armed and dangerous. *State v. Evans*, 67 Ohio St.3d 405, 407 (1993); *Terry* at 27. The sole justification for such a search is the protection of the officer and others nearby and, therefore, the search must be confined to an intrusion "reasonably designed to discover guns, knives, clubs, or other hidden instruments for the assault of the police officer." *Id.* at 29. Such actions should be the

1 We reject appellant's argument that the police radio call cannot be taken into account in this analysis. Appellant did not make this argument in the trial court and has, therefore, forfeited it on appeal. *State v. Parsley*, 10th Dist. No. 09AP-612, 2010-Ohio-1689, ¶ 18.

least intrusive means reasonably available to verify or dispel the officer's suspicion in a short period of time. *Florida v. Royer*, 460 U.S. 491, 500 (1983).

{¶ 16} Here, Officer Wilkinson did not pat appellant down, i.e., feel his outer clothing in a search for weapons. Instead, the officer reached directly to the area of the bulge in appellant's clothes and lifted appellant's shirt. Appellant argues that the officer was not permitted to reach into his clothes before he first conducted a pat-down search and felt an object that he reasonably believed was a weapon. *See State v. Morris*, 10th Dist. No. 09AP-751, 2010-Ohio-1383, ¶ 23, quoting *Evans* at 416 (" 'when an officer is conducting a lawful pat-down search for weapons and discovers an object on the suspect's person which the officer, through his or her sense of touch, reasonably believes could be a weapon, the officer may seize the object as long as the search stays within the bounds of *Terry*.' ").

{¶ 17} In support of his argument, appellant cites a number of cases in which officers reached directly into a suspect's clothing without first conducting a pat-down search. In those cases, the courts concluded that such actions were unconstitutional searches that exceeded the scope of a *Terry* search.

{¶ 18} For example, the Supreme Court of New Jersey was faced with similar facts to the present case in *State v. Privott*, 203 N.J. 16 (2010). There, an officer received a radio dispatch of a man with a handgun at a street corner. The officer saw a man, Privott, that he recognized from previous encounters and who matched the description of the man in the radio dispatch. When the officer approached the corner, Privott and two other men began to walk away. The officer thought Privott appeared to be nervous and saw him move his hand toward his waistband. *Id.* at 21. Based on all of this, the officer believed that Privott had a gun in his waistband. The officer stopped Privott and ordered him to place his hands on a fence. The officer then lifted Privott's shirt to expose his waistband. Although there was no gun, the officer found a baggie of crack cocaine, for which Privott was later charged. Privott challenged the legality of the officer's search. The Supreme Court of New Jersey concluded that the officer's conduct exceeded the reasonable intrusion permitted by *Terry*. *Id.* at 32. Specifically, the court concluded that the reasonable and least intrusive search would have been for the officer to first conduct a pat-down search of Privott's outer clothing. *See also State v. Burns*, 5th Dist. No.

1997CA00235 (Feb. 9, 1998) ("Clearly, before reaching into the pocket, the officer must conduct a pat-down, and feel an object which he reasonably believes could be a weapon * * *"); *State v. Kratzer*, 33 Ohio App.2d 167, 171-72 (10th Dist.) (officer reached into pocket without first performing a pat-down search and, because officers did not testify, there was no evidence to indicate whether defendant was armed or whether officers feared for their or others' safety); *State v. Sargent*, 2d Dist. No. 17324 (Nov. 20, 1998) (affirming grant of motion to suppress drugs that were obtained when the officers exceeded the scope of *Terry* search by reaching directly into pocket for a bulging object without first performing a pat-down); *State v. Prince*, 9th Dist. No. 21130, 2003-Ohio-723, ¶ 12 (officer reached directly into pocket without first performing pat-down search); *U.S. v. Casado*, 303 F.3d 440, 448-49 (2d Cir.2002) (reversing decision denying motion to suppress where officer reached into pocket without first performing pat-down search, where no valid reason appeared on record for not doing so); *Commonwealth v. Flemming*, 925 N.E.2d 39, 44 (Mass.App.2010) (granting motion to suppress where officer lifted shirt up without first conducting pat-down search).

{¶ 19} Although *Burns* and *Prince* could be read to require a pat-down search before the officer can take any other action, the other cases do not go so far. Our own case, *Kratzer*, notes three times that the officers involved did not testify, so there was no evidence of their fear for themselves or the public, implying that some facts or circumstances could have supported the search in that case even without first conducting a pat-down search. *Kratzer* at 169, 171, 173. Not even *Privott* or *Flemming* required a pat-down search; those cases concluded that the actions taken by the officers were not reasonable. In fact, there are other cases which provide support for the state's position that a pat-down is not the only protective search allowed by *Terry* and that other "limited intrusions" are also permissible.

{¶ 20} In *Adams v. Williams*, 407 U.S. 143 (1972), a police officer received a tip that a man sitting in a car was carrying drugs and had a gun at his waist. The officer approached the car, knocked on the window, and asked the driver to open the door. The man rolled down the window instead. The officer then reached into the car and removed a gun from the man's waistband. *Id.* at 145. In addressing the seizure of the gun, the United States Supreme Court noted that the officer had ample reason to fear for his safety,

even more so when the man opened the car window and did not step out of the car. Under those circumstances, the Supreme Court concluded that the police officer's "action in reaching to the spot where the gun was thought to be hidden constituted a limited intrusion designed to insure his safety, and we conclude that it was reasonable." *Id.* at 148.

{¶ 21} Another case, with facts very similar to the facts of this case, concluded that a police officer's action to lift up the shirt of a person the officer suspected of having a weapon in his waistband was not overly intrusive and not in violation of *Terry*. *U.S. v. Hill*, 545 F.2d 1191, 1193 (9th Cir.1976). There, the officer was speaking to the suspect for an unrelated matter and observed a bulge in his waistband, which the officer suspected was a gun. The officer raised the suspect's shirt and found evidence of another crime. In finding that the act of lifting the shirt was constitutional, the court noted that the search was "confined to the area of the bulge in question and was a direct and specific inquiry." *Id.* The court also noted that *Terry* itself did not limit a weapon search to a pat-down search.

{¶ 22} Other courts do not limit *Terry* searches to a pat-down search. Even a case relied on by appellant, *Flemming*, notes that *Terry* itself did not limit a weapons search to a pat-down search. *Flemming* at 43 (also noting that other courts have upheld searches without requiring preliminary pat-down search). *See also State v. McGlown*, 3 Ohio App.3d 344 (6th Dist.1982) (officer's search of pocket, without first conducting pat-down search, was reasonable and therefore did not exceed scope of *Terry* search); *U.S. v. Baker*, 78 F.3d 135, 138 (4th Cir.1996) (noting that "a patdown frisk is but one example of how a reasonable protective search may be conducted" in affirming officer's action in requiring suspect to raise shirt above bulge in waistband without conducting pat-down); *State v. Mackey*, 141 Ohio App.3d 604, 613 (2d Dist.2001) (permitting officer to skip pat-down and reach into overalls where pat-down was not possible due to suspect's clothing); *U.S. v. Aquino*, 674 F.3d 918, 926 (8th Cir.2012) (noting situations which "may justify by-passing a pat down during an investigatory detention.").

{¶ 23} We conclude that a pat-down is not the only option available to an officer with reasonable suspicion that a suspect might be armed and dangerous. While a pat-down is generally the least intrusive and therefore preferred option, because of the myriad

of encounters that may occur between officers and the public, we must allow for the possibility that, in some circumstances, a pat-down may not be the least intrusive, most effective or safest option for an officer to verify or dispel suspicions that the person is armed. *Adams*; *Casado* at 448-49; *State v. Smith*, 345 Md. 460, 467-68 (1997). We are also persuaded by the language used in the *Terry* opinion approving of the pat-down search conducted in that case. The opinion's ultimate holding concluded that, under certain circumstances, an officer is entitled to perform a pat-down search and that such search is reasonable. *Terry* at 30-31. We interpret that language more as an approval of the type of search conducted in that case and not a limit on the type of searches that are or are not reasonable. For these reasons, we cannot say that Officer Wilkinson had to first conduct a pat-down before lifting appellant's shirt in order to alleviate his fears that appellant was armed.

2. Did Officer Wilkinson Act Reasonably?

{¶ 24} That conclusion, however, does not resolve this matter. Even though Officer Wilkinson did not conduct a pat-down first, we must still determine whether the action he did take, lifting appellant's shirt, was reasonable under the circumstances. *Terry* at 20. That determination involves weighing the competing interests of officer safety versus the nature and quality of the intrusion on appellant's individual rights. *Id*. at 24.

{¶ 25} Applying those considerations to this case, we conclude that Officer Wilkinson acted reasonably for two reasons. First, we consider the totality of the circumstances facing Officer Wilkinson that day. An earlier radio call described men with guns in the area and that one was walking toward the intersection where the officer later observed appellant walking. Perhaps more significantly, the officer saw a bulge in appellant's waistband and also saw appellant's reaction upon seeing the police cruiser. Appellant hesitated and then reached down and touched the area of the bulge. In Officer Wilkinson's training and experience, this "nervous reaction" indicated to him the presence of a gun. (Tr. 20.) Second, we consider the limited scope of Officer Wilkinson's action. His act of lifting appellant's shirt was a minimal intrusion reasonably designed to discover a gun. The officer did not conduct a general exploratory search for evidence but instead limited the scope of the search to the area where he believed he would find a gun

because of the bulge and appellant's conduct. Almost identical searches were approved of in *Hill* and *McGlown*. *See also Baker*.

{¶ 26} In light of the above, Officer Wilkinson acted reasonably and did not exceed the scope of a *Terry* search when he lifted appellant's shirt in the exact area where he suspected the presence of a gun. We overrule appellant's second assignment of error.

D. Conclusion

{¶ 27} Officer Wilkinson had reasonable suspicion to stop appellant pursuant to *Terry* and his actions did not exceed the scope of a *Terry* search. Accordingly, the trial court did not err when it denied appellant's motion to suppress. For these reasons, we overrule appellant's two assignments of error and affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

CONNOR and DORRIAN, JJ., concur.