[Cite as *State v. Newell*, 2015-Ohio-2641.]

COURT OF APPEALS
PERRY COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	Hon. W. Scott Gwin, P.J.
Plaintiff-Appellee	:	Hon. Sheila G. Farmer, J.
	:	Hon. Craig R. Baldwin, J.
-vs-	:	
	:	
HARRY G. NEWELL	:	Case No. 14-CA-00031
	:	
Defendant-Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Court of Common Pleas, Case No. 14-CR-0036
JUDGMENT:	Affirmed
DATE OF JUDGMENT:	June 29, 2015

APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellant
JOSEPH A. FLAUTT 111 North High Street P.O. Box 569 New Lexington, OH 43764-0569	ERIC E. WILLISON 4876 Cemetery Road 2nd Floor Hilliard, OH 43206

Farmer, J.

{¶1} On May 15, 2014, Lieutenant Kevin Starrett of the Perry County Sheriff's Office was looking through binoculars and observed a "hand to hand transaction" approximately 800 feet away between appellant, Harry Newell, and the driver of a stopped vehicle. Lieutenant Starrett contacted Deputy David Briggs to investigate the situation. Deputy Briggs drove to the scene in a marked police cruiser and parked approximately ten feet away from the stopped vehicle. Deputy Briggs observed the butt of a firearm in appellant's pants pocket. Deputy Briggs ordered appellant to place his hands on the roof of the stopped vehicle whereupon he approached appellant and placed his hands behind his back, retrieved the firearm, and placed him in the police cruiser. Deputy Briggs learned appellant was under a disability to possess a firearm.

{¶2} On May 29, 2014, the Perry County Grand Jury indicted appellant on one count of possessing a firearm while under a disability in violation of R.C. 2923.13 and one count of carrying a concealed weapon in violation of R.C. 2923.12.

{¶3} On July 10, 2014, appellant filed a motion to suppress, claiming an illegal seizure. A hearing was held on August 27, 2014. By entry filed October 6, 2014, the trial court denied the motion.

{¶4} On October 9, 2014, appellant pled no contest to the concealed count. The disability count was dismissed. By journal entry filed October 23, 2014, the trial court found appellant guilty. By termination judgment entry filed November 19, 2014, the trial court sentenced appellant to six months in jail.

{¶5} Appellant filed an appeal and this matter is now before this court for consideration. Assignment of error is as follows:

I

{¶6} "THE TRIAL COURT ERRED WHEN IT FAILED TO SUPPRESS ALL EVIDENCE OF AND THAT WHICH WAS REVEALED BY THE SEIZURE OF THE APPELLANT SINCE A HANDGUN IN 'PLAIN VIEW' CANNOT BE A 'CONCEALED WEAPON' UNDER OHIO REVISED CODE SECTION 2923.12."

I

{¶7} Appellant claims the trial court erred in denying his motion to suppress as the police lacked probable cause to arrest him. We disagree.

{¶8} There are three methods of challenging on appeal a trial court's ruling on a motion to suppress. First, an appellant may challenge the trial court's findings of fact. In reviewing a challenge of this nature, an appellate court must determine whether said findings of fact are against the manifest weight of the evidence. *State v. Fanning,* 1 Ohio St.3d 19 (1982); *State v. Klein,* 73 Ohio App.3d 486 (4th Dist.1991); *State v. Guysinger,* 86 Ohio App.3d 592 (4th Dist.1993). Second, an appellant may argue 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. *State v. Williams,* 86 Ohio App.3d 37 (4th Dist.1993). Finally, assuming the trial court's findings of fact are not against the manifest weight of the evidence and it has properly identified the law to be applied, an appellant may argue the trial court has incorrectly decided the ultimate or final issue raised in the 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. Curry,* 95 Ohio App.3d 93 (8th Dist.1994); *State v. Claytor,* 85

Ohio App.3d 623 (4th Dist.1993); *Guysinger*. As the United States Supreme Court held in *Ornelas v. U.S.,* 517 U.S. 690, 116 S.Ct. 1657, 1663 (1996), "…as a general matter determinations of reasonable suspicion and probable cause should be reviewed *de novo* on appeal."

{¶9} Appellant specifically argues because a portion of the firearm he was carrying was visible, Deputy Briggs lacked probable cause to arrest him. Appellant's position is that under Ohio's open carry law, a partially concealed firearm is not a violation of R.C. 2923.12(A)(2) which states: "No person shall knowingly carry or have, concealed on the person's person or concealed ready at hand***[a] handgun other than a dangerous ordnance." Appellant argues if the firearm was in "plain view," it could not by definition be considered concealed under R.C. 2923.12(A).

{¶10} In *Terry v. Ohio,* 392 U.S. 1, 22 (1968), the United States Supreme Court determined that "a police officer may in appropriate circumstances and in an appropriate manner approach a person for purposes of investigating possible criminal behavior even though there is no probable cause to make an arrest." However, for the propriety of a brief investigatory stop pursuant to *Terry*, the police officer involved "must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." *Id*. at 21. Such an investigatory stop "must be viewed in the light of the totality of the surrounding circumstances" presented to the police officer. *State v. Freeman,* 64 Ohio St.2d 291 (1980), paragraph one of the syllabus. Probable cause to arrest is not synonymous to probable cause for search. Probable cause to arrest focuses on the prior actions of the accused. Probable cause exists when a reasonable prudent person would believe that the person arrested

had committed a crime. *State v. Timson,* 38 Ohio St.2d 122 (1974). A determination of probable cause is made from the totality of the circumstances. Factors to be considered include an officer's observation of some criminal behavior by the defendant, furtive or suspicious behavior, flight, events escalating reasonable suspicion into probable cause, association with criminals, and location. Katz, *Ohio Arrest, Search and Seizure,* Sections 2:13-2:19, at 59-64 (2009 Ed.). As the United States Supreme Court stated when speaking of probable cause "we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life in which reasonable and prudent men, not legal technicians, act." *Brinegar v. United States,* 338 U.S. 160, 175 (1949).

{¶11} As our brethren from the Ninth District explained in *State v. McGinty,* 9th Dist. Medina No. 08CA0039-M, 2009-Ohio-994, ¶ 11:

> The amount of evidence necessary for probable cause to suspect a crime is being committed is less evidence than would be necessary to support a conviction of that crime at trial.***It is necessary to show merely that a probability of criminal activity exists, not proof beyond a reasonable doubt, or even proof by a preponderance of evidence that a crime is occurring. (Citation omitted.)

{¶12} Appellant did not file a transcript of the suppression hearing. In *Knapp v. Edwards Laboratories,* 61 Ohio St.2d 197, 199 (1980), the Supreme Court of Ohio held the following:

> The duty to provide a transcript for appellate review falls upon the appellant. This is necessarily so because an appellant bears the burden of showing error by reference to matters in the record. See *State v. Skaggs,* 53 Ohio St.2d 162 (1978). This principle is recognized in App.R. 9(B), which provides, in part, that "***the appellant shall in writing order from the reporter a complete transcript or a transcript of such parts of the proceedings not already on file as he deems necessary for inclusion in the record.***." When portions of the transcript necessary for resolution of assigned errors are omitted from the record, the reviewing court has nothing to pass upon and thus, as to those assigned errors, the court has no choice but to presume the validity of the lower court's proceedings, and affirm. (Footnote omitted.)

{¶13} Therefore, our review is limited to the facts included in the trial court's October 6, 2014 entry wherein the trial court found the following:

> On May 15, 2014, Lt. Starrett from the Perry County Sheriff's Office was standing in the lot of the Sheriff's Office and witnessed a hand to hand transaction on High Street approximately 800 feet away. A car was parked on the corner of High and Water Street. A man was standing outside the vehicle and reached into the vehicle twice. Lt. Starrett asked Deputy Briggs to investigate the situation. Deputy Briggs was in his

> uniform and a marked patrol vehicle. He parked his patrol car approximately ten feet in front of the vehicle. The Defendant was standing on the passenger side. Deputy Briggs testified the Defendant looked nervous, turned left and reached to his back. The Deputy could see one-half to one inch of the butt of a gun in his pants pocket. He ordered the Defendant to place his hands on top of the car. The Deputy placed the Defendant's hands behind his back and retrieved the gun. He placed him in his cruiser. The Deputy called dispatch and discovered the Defendant had a prior aggravated assault, which was a felony of the fourth degree. He placed him under arrest and advised him he was not permitted to have a gun due to his conviction.

{¶14} In *State v. Herda,* 5th Dist. Licking No. 95 CA 11, 1995 WL 768603 (Nov. 2, 1995), this court found a partially concealed knife may support a charge under R.C. 2923.12(A). Appellant argues this case is distinguishable because the officer in *Herda* did not "see" the partial knife at first glance.

{¶15} In the case sub judice, the trial court noted the following in his October 6, 2014 entry:

> The Defendant acted nervous when Deputy Briggs approached him. He turned to his left and Deputy Briggs could see the butt of a gun in his pants pocket. Because Deputy Briggs could see the gun, he was permitted to perform a limited pat down and retrieve the gun. Although

> Deputy Briggs could see part of the gun, the rest was concealed in his pocket. The Defendant could properly be charged with carrying a concealed weapon. Finally, he saw one half to one inch of the gun in the pocket. Therefore, he saw a small portion of the gun and the majority of the gun of the gun (sic) was concealed in the pocket.

{¶16} The primary focus of probable cause to arrest is on the actions and activity of the person prior to the arrest. Therefore, our inquiry is whether under the facts presented, was it more likely or not that appellant was involved in criminal activity? The specific and limited issue is whether a partially concealed firearm can constitute criminal activity. We answer the question in the affirmative.

{¶17} Although, the facts presented may not withstand a motion for acquittal at trial or the "beyond a reasonable doubt" standard, the facts in this case support a more likely than not belief that when only one-half to one inch of a firearm is exposed, it is a concealed weapon or appellant was involved in criminal activity. There was a probability that a crime had been committed based upon the prior observations of appellant, his nervous and suspicious movements when approached, and his reaching to his back where the firearm was located.

{¶18} Based upon appellant's actions and Deputy Briggs's reasonable conclusion that criminal activity had occurred, we find the existence of a reasonable belief that a partially exposed firearm may be a violation under R.C.2923.12(A)(2).

{¶19} Upon review, we find the trial court did not err in denying the motion to suppress.

{¶20} The sole assignment of error is denied.

{¶21} The judgment of the Court of Common Pleas of Perry County, Ohio is hereby affirmed.

By Farmer, J.

Gwin, P.J. and

Baldwin, J. concur.

SGF/sg 609