[Cite as *State v. Taylor*, 2009-Ohio-5822.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92382

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

DARTANONE TAYLOR

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-502326

BEFORE: Cooney, A.J., Rocco, J., and Stewart, J.

RELEASED: November 5, 2009

JOURNALIZED:

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COLLEEN CONWAY COONEY, A.J.:

{¶ 1} Defendant-appellant, Dartanone Taylor ("Taylor"), appeals his conviction for carrying a concealed weapon. Finding no merit to the appeal, we affirm.

{¶ 2} This case arose in October 2007, when Taylor was charged with carrying a concealed weapon. In July 2008, he moved to suppress evidence of the gun that police found on his person. After a hearing on the issue, the trial court denied the motion to suppress, and Taylor pled no contest to the charge. The trial court sentenced him to two years of community control sanctions.

{¶ 3} Taylor appeals, arguing in his sole assignment of error that the court erred in denying his motion to suppress. He claims that the gun was the fruit of an illegal stop because the arresting officers lacked reasonable suspicion that he was engaged in criminal activity when they stopped him.

{¶ 4} The following facts underlie this appeal. On the night of September 19, 2007, Detective Stephanie Murphy ("Murphy") was working undercover performing "gun suppression duty." She had parked her undercover vehicle near the intersection of Euclid Avenue and Reyburn Road, in a high-crime area known for drug and prostitution activities. It was a clear night with good visibility, and for five minutes, Murphy observed Taylor and another man from across Euclid Avenue, a four-lane street. The two

men were standing on the corner, not doing anything in particular. The detective observed what looked like the handle of a gun protruding from the waistband of Taylor's pants. She later testified that she knew it was not a cell phone or "Walkman" because of its shape and position on his waistband. She notified other police officers in the area that she believed Taylor had a gun. Approximately four officers approached Taylor with guns drawn. Once the officers had Taylor in custody, Murphy left the scene. Taylor was charged with carrying a concealed handgun in violation of R.C. 2923.12(A)(2).

Standard of Review

{¶ 5} The Ohio Supreme Court explained the standard of review for a motion to suppress in *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, 797 N.E.2d 71, ¶8:

> "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, 582 N.E.2d 972. 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, 1 OBR 57, 437 N.E.2d 583. 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, 707 N.E.2d 539."

{¶ 6} The Fourth Amendment to the United States Constitution prohibits warrantless searches and seizures, with some exceptions. *Katz v.*

United States (1967), 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576. In *Terry v. Ohio* (1968), 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889, the United States Supreme Court established one such exception, holding that a law enforcement officer may briefly detain an individual when he or she has reasonable and articulable suspicion that the individual may be engaged in criminal activity. A mere hunch or after-acquired facts cannot justify a *Terry* stop. Id.; *Brown v. Texas* (1979), 443 U.S. 47, 99 S.Ct. 2637, 61 L.Ed.2d 357. In determining the lawfulness of the stop, a court must consider the totality of the circumstances, "viewed through the eyes of the reasonable and prudent police officer on the scene who must react to events as they unfold." *State v. Andrews* (1990), 57 Ohio St.3d 86, 87, 565 N.E.2d 1271. Evidence that law enforcement officers obtain from a stop that violates the Fourth Amendment must be excluded from evidence as "fruit of the poisonous tree." *Wong Sun v. United States* (1963), 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441; *Mapp v. Ohio* (1961), 367 U.S. 643, 655, 81 S.Ct. 1684, 6 L.Ed.2d 1081.

{¶ 7} In the instant case, the arresting officers had reasonable and articulable suspicion that Taylor may have been engaged in criminal activity. At the suppression hearing, Murphy, the sole witness, testified that she observed the handle of a gun protruding from Taylor's waistband. The trial court found Murphy's testimony credible, and we accept the trial court's

determination because the court was in the best position to evaluate her credibility.

{¶ 8} After observing the gun handle, Murphy formed a reasonable and articulable suspicion that Taylor might be engaged in criminal activity. Under Ohio law, only certain individuals may carry concealed weapons. R.C. 2923.12 (allowing exempted individuals, including those possessing licenses, to carry concealed weapons). Individuals carrying partially concealed weapons violate this prohibition, unless they are exempted. E.g. *State v. Sims*, Cuyahoga App. No. 89261, 2007-Ohio-6821. Because Murphy did not know whether Taylor had a permit, she had a reasonable suspicion that he might be carrying a concealed weapon illegally. When she conveyed her observations to the arresting officers, they were justified in conducting a *Terry* stop to investigate.[1] Thus, the arresting officers did not violate the Fourth Amendment in stopping Taylor to inquire about a suspected concealed weapon. We overrule the sole assignment of error.

{¶ 9} Judgment is affirmed.

It is ordered that appellee recover of appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

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[1] If Taylor indeed had a permit to carry a concealed weapon, then the law required him to raise his hands and promptly inform the officers who approached him. R.C. 2923.12(B)(1).

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

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COLLEEN CONWAY COONEY, ADMINISTRATIVE JUDGE

MELODY J. STEWART, J., CONCURS (WITH SEPARATE OPINION);

KENNETH A. ROCCO, J., CONCURS IN JUDGMENT ONLY (SEE SEPARATE OPINION).

MELODY J. STEWART, J., CONCURRING:

{¶ 10} I agree with the majority's decision in this case. I write separately to address the circumstances surrounding Taylor's detention.

{¶ 11} The stop and frisk of Taylor were legal so long as the officers had a "reasonable suspicion" to believe that Taylor was illegally carrying a weapon. See *Terry v. Ohio* (1968), 392 U.S. 1. The undercover officer never actually saw a gun because what she saw was completely covered by Taylor's shirt. Nevertheless, the officer testified that, based on her training and experience, she saw what looked like the handle of a gun protruding from the waistband of Taylor's trousers. Unlike cases in which an officer sees a misshapen bulge in clothing or one pocket of a coat riding lower than another, the description of a gun handle provided a degree of specificity which led to a reasonable suspicion that Taylor was carrying a concealed weapon.

{¶ 12} The majority opinion resolves the issue of whether the police officer had a reasonable and articulable suspicion that Taylor may have been carrying a concealed weapon *illegally* by noting that only certain individuals may carry a concealed weapon lawfully, and because the officer "did not know" whether Taylor was one of these individuals, "she had a reasonable suspicion that he might be carrying a concealed weapon illegally." This resolution means that an officer's knowledge, or lack thereof, regarding the legal status of a person carrying a concealed weapon — without more — will always be sufficient to articulate reasonable suspicion that the person's concealed carry is illegal. It is difficult to reconcile this analysis in light of the concealed-carry laws. This difficulty notwithstanding, as the majority also notes, if Taylor had a permit to carry a concealed weapon, the law requires that he raise his hands and notify the officers about the weapon. In this case, however, it does not appear that Taylor was given the opportunity to do so before being detained.

{¶ 13} A *Terry* stop is a brief investigatory detention, not an arrest. An "arrest" is a seizure, and a person has been "seized" within the meaning of the Fourth Amendment if, in view of all of the circumstances surrounding the incident, "a reasonable person would have believed that he was not free to leave." *Michigan v. Chesternut* (1988), 486 U.S. 567, 573. Determining whether a seizure has occurred is a highly fact-bound inquiry, but the

following are relevant factors: whether the encounter took place in a public place or whether police removed the person to another location; whether the police told the person he was not under arrest and was free to leave; whether the police informed the person that he was suspected of a crime or the target of an investigation; whether the person was deprived of identification or other documents without which he could not leave (such as a driver's license or train or airline ticket); and, as relevant to this case, whether there was any limitation of the person's movement such as physical touching, display of a weapon, or other coercive conduct on the part of the police that indicates cooperation is required. *United States v. McCarthur* (C.A.7, 1993), 6 F.3d 1270, 1275-1276.

{¶ 14} The record in this case reveals that after being informed of the undercover officer's observation, the responding officers approached Taylor with their weapons drawn and ordered him to the ground.[2] No reasonable person would have believed that he was free to leave under these circumstances. The intrusive and coercive nature of this detention can only be characterized as a seizure.

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[2]The undercover officer testified that she did not see the officers order Taylor to the ground during the stop, but also said that she left the scene in order to protect her undercover identity. During cross-examination of the undercover officer (the only witness to testify during the suppression hearing), the defense questioned her about the police report for this incident which apparently stated that Taylor had been ordered to the ground. The report was not admitted into evidence.

{¶ 15} The next question is whether the degree of intrusion into Taylor's personal security was reasonably related in scope to the situation at hand or whether Taylor was arrested before there was probable cause. The answer to this question is judged by examining the reasonableness of the officers' conduct given their suspicions and the surrounding circumstances. *Terry*, 392 U.S. at 19-20.

{¶ 16} Weapons drawn on a suspect is highly intrusive and under certain circumstances will be tantamount to an arrest, but the mere use of weapons will not necessarily convert a stop into an arrest. *United States v. Hardnett* (C.A. 6, 1986), 804 F.2d 353, 357, citing *United States v. Greene* (C.A.9, 1986), 783 F.2d 1364, 1367, certiorari denied (1986), 476 U.S. 1185; *United States v. White* (C.A.D.C. 1981), 648 F.2d 29, 34, certiorari denied (1981), 454 U.S. 924. The police are generally permitted to effectuate a *Terry* stop with guns drawn when the circumstances surrounding the stop are such that their safety can reasonably be called into question.

{¶ 17} The police were "authorized to take such steps as were reasonably necessary to protect their personal safety and to maintain the status quo during the course of the stop." *United States v. Hensley* (1985), 469 U.S. 221, 235. And although there may be some question whether the police ordered Taylor to the ground during the stop, that fact is immaterial as the courts have held that "the right to make an arrest or investigatory stop necessarily

carries with it the right to use some degree of physical coercion or threat thereof to effect it." *Graham v. Connor* (1989), 490 U.S. 386, 396.

{¶ 18} Determining what constitutes reasonable force during a *Terry* stop "is not capable of precise definition or mechanical application." *Bell v. Wolfish* (1979), 441 U.S. 520, 559. The courts must, however, give "careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." *Graham v. Connor*, supra, at 396-397. In no event, however, is the use of force per se justified — the police must show the circumstances giving rise to the use of force. See *United States v. Ceballos* (C.A.2, 1981), 654 F.2d 177 (finding police stop in which suspect vehicle was blocked and police approached vehicle with drawn guns was overly intrusive and constituted an arrest when there were no articulated facts that the suspect was armed or that warranted the use of force).

{¶ 19} When a *Terry* stop is predicated on the suspicion that a person might be concealing a firearm, the threat to an officer's safety is so manifestly obvious that the use of force is largely justified. In this case, the suspicion that Taylor might be concealing a gun was more than conjecture — the undercover officer saw the shape of a gun handle, not just an amorphous

bulge, sticking out from beneath Taylor's shirt. Moreover, the officer's experience and training led her to conclude that the placement of the object in the rear waistband of Taylor's trouser was a typical place for a gun to be carried. Finally, this encounter occurred during the evening, making perimeter visibility problematic and creating an enhanced concern for officer safety.

{¶ 20} The degree of intrusion into a suspect's personal safety must be in direct proportion to the immediate danger of officer harm. In light of the foregoing analysis, I conclude that the risk of officer harm in this case was sufficient to justify the degree of intrusion and consider the force used to be at the outer limit of what would be constitutionally acceptable.

KENNETH A. ROCCO, J., CONCURRING IN JUDGMENT ONLY:

{¶ 21} Because Ohio statutes allow persons with permits to carry concealed weapons, Detective Murphy did not have probable cause to arrest Taylor when she observed that Taylor had what appeared to be the handle of a gun protruding from his waistband. At most, the police could stop Taylor for further investigation pursuant to *Terry*. While I reluctantly agree that that is what the police did in this case, I write separately to emphasize that (1) the police conduct came dangerously close to the outside boundaries of an

appropriate police response to a "reasonable suspicion" of criminal activity, and (2) the search in this case was ultimately justified as a search incident to arrest.

{¶ 22} To approach Taylor with guns drawn and order him to the ground was an extreme means of protecting officer safety during an investigatory stop, even though the police knew that Taylor was carrying a weapon. Furthermore, once Taylor was immobilized on the ground, officer safety was assured for the duration of the encounter, making a "frisk" unnecessary for safety purposes. Therefore, I cannot agree with my colleagues that the search of Taylor's person was justified as a "frisk" for officer safety. However, the search of Taylor's person need not be justified as a "frisk" for officer safety, because it was justified as a search incident to arrest.

{¶ 23} Murphy's observation that Taylor had a weapon, combined with the fact that Taylor did not inform the officers that he had a permit and was carrying a concealed weapon, as required by R.C. 2923.12(B)(1), provided probable cause to believe that Taylor was not permitted to carry a concealed weapon. Cf. *State v. Nelson*, Montgomery App. No. 22718, 2009-Ohio-2546, ¶46. Therefore, the stop almost immediately escalated to an arrest. The search of Taylor's person incident to his arrest was justified.

{¶ 24} Accordingly, I concur in judgment only.