[Cite as *State v. Gilmore*, 2015-Ohio-2931.]

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

STATE OF OHIO Appellee v. DAVID C. GILMORE Appellant	C.A. No. 27344 APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO CASE No. CR 13 10 2743

DECISION AND JOURNAL ENTRY

Dated: July 22, 2015

MOORE, Judge.

{¶1} Defendant, David C. Gilmore, appeals from the judgment of the Summit County Court of Common Pleas. This Court reverses and remands this matter for further proceedings consistent with this decision.

I.

{¶2} On October 1, 2013, following a search of Mr. Gilmore, police officers discovered eleven baggies of marijuana on Mr. Gilmore's person. Thereafter, the Summit County Grand Jury indicted Mr. Gilmore on one charge of trafficking in marijuana in violation of R.C. 2925.03(A)/(C)(3), and one charge of possession of marijuana in violation of R.C. 2925.11(A)/(C)(3). Mr. Gilmore pleaded not guilty at his arraignment, and he later filed a motion to suppress evidence. Following a hearing, the trial court denied the motion in a journal entry dated January 17, 2014. Thereafter, Mr. Gilmore amended his plea to no contest. The trial

court found Mr. Gilmore guilty and imposed sentence. Mr. Gilmore timely filed a notice of appeal, and he now raises one assignment of error for our review.

II.

ASSIGNMENT OF ERROR

> THE TRIAL COURT ERRED IN DENYING [MR. GILMORE]'S MOTION TO SUPPRESS[.]

{¶3} In his sole assignment of error, Mr. Gilmore argues that the trial court erred by failing to grant his motion to suppress the evidence. We agree to the extent that the trial court erred in concluding that the stop was consensual.

> 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.

(Internal citations omitted.) *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, ¶ 8. *Accord State v. Hobbs*, 133 Ohio St.3d 43, 2012-Ohio-3886, ¶ 6 (*Burnside* applied).

{¶4} Here, the trial court did not make findings of fact in its January 17, 2014 journal entry denying the motion to suppress. However, Mr. Gilmore does not appear to dispute most of the pertinent facts as conveyed by the testimony of Officers Nick Manzo and James Hadbavny of the Akron Police Department.[1]

[1] Most of the facts on which we rely in reviewing whether the stop was consensual appear to be undisputed, and those that are disputed do not affect the outcome of our analysis. Thus, we conclude that this is not a case were our review of this issue is hindered by the trial court's failure to make findings as to "disputed facts[]" or to "reconcile the differences in [the] testimony[.]" *See State v. Martin*, 9th Dist. Summit No. 24812, 2009-Ohio-6948, ¶ 14; *State v. Payne*, 9th Dist. Wayne No. 11CA0029, 2012-Ohio-305, ¶ 13, 15; *State v. Foster*, 9th Dist.

{¶5} The officers maintained that, on October 1, 2013, the Akron Police Department advised its officers, including Officers Manzo and Hadbavny, to be on the lookout for drug dealing at a market on the corner of Oakdale Avenue and West Market Street in Akron, Ohio. Later that day, during daylight hours, Officers Manzo and Hadbavny were on their patrol shift, and they parked approximately a block away from the market. At that time, the officers observed Mr. Gilmore walking toward them at a normal pace. Upon observing the officers' cruiser, Mr. Gilmore's "eyes got really big[,]" and he immediately turned around and walked away from the officers at a "brisk" pace, and it appeared that he was leaving that sidewalk to head behind houses in the area. The officers lost sight of Mr. Gilmore, and they took a "cut-thru" and caught up with Mr. Gilmore, who by then was walking at a normal pace on another street. Officer Manzo believed that it was suspicious that Mr. Gilmore had traveled on foot about 100 to 120 yards in only about twenty seconds. The officers then pulled their cruiser up next to him. The officers did not activate their lights or their siren. Officer Hadbavny then exited the cruiser, followed by Officer Manzo, and asked Mr. Gilmore if the officers could speak with him, and he agreed. Officer Hadbavny then asked Mr. Gilmore if he was avoiding the officers, and Mr. Gilmore advised that he was not. Officer Hadbavny then testified as follows:

> I asked him, I said, well we seen you go up, you know, Oakdale – after you seen us, and which he claims he didn't see us. And I said, where did you go? He said, I went to my house which is right there, and I said, well, you live on Oakdale? And he told me yes.
>
> I said, that's weird. I have been working here two years. I have never seen you before, and he said, well, I live there. I said, okay, I'm not going to dispute that. I said, well, is there a reason why you were trying to avoid us?

Summit No. 24349, 2009-Ohio-840, ¶ 7, 10; *State v. Gomez*, 9th Dist. Lorain No. 13CA010389, 2014-Ohio-3535, ¶ 10-11.

> He said I'm not trying to avoid you once again. I said, okay, do you have anything illegal on you? And then Mr. Gilmore said, yes, I have marijuana in my pocket.

{¶6} Based upon Officer Hadbavny's experience, he believed that "wherever there is drugs, there is weapons (sic.)," and he then conducted a pat-down search of Mr. Gilmore, feeling what he believed to be a marijuana bowl in his pocket. He asked Mr. Gilmore what the object was, and Mr. Gilmore confirmed that it was a bowl. At that point, the officers placed him in handcuffs and told him that he was under arrest. Officer Hadbavny never yelled or brandished his weapon during the encounter. Neither officer placed their hands on Mr. Gilmore prior to the pat-down search. Office Hadbavny indicated that, had Mr. Gilmore not stopped to speak with him when he had asked him if they could talk, he would have detained Mr. Gilmore to ascertain his identity.

{¶7} Here, in his motion to suppress, Mr. Gilmore argued that the officers lacked a reasonable articulable suspicion of criminal behavior to justify stopping him, and that the officers improperly obtained a statement from him that he had marijuana on his person without advising him of his *Miranda* rights. The State responded that the officers' encounter with Mr. Gilmore was consensual, or, alternatively, that the officers properly performed an investigative stop of Mr. Gilmore, and that *Miranda* was not implicated at the time that Mr. Gilmore stated that he had marijuana on his person. Although the trial court did not in its journal entry indicate the basis for denying Mr. Gilmore's motion, after the hearing on Mr. Gilmore's motion, the trial court stated that it believed the police encounter was consensual.

{¶8} The Fourth Amendment to the United States Constitution and Article I, Section 14, of the Ohio Constitution prohibit law enforcement officers from conducting unreasonable and warrantless searches and seizures. Courts are required to exclude evidence obtained by

means of searches and seizures that are found to violate the Fourth Amendment. *Mapp v. Ohio*, 367 U.S. 643, 657 (1961). However, "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." *Terry v. Ohio*, 392 U.S. 1, 19 (1968), fn. 16. This Court has previously recognized that a consensual encounter does not involve a seizure of an individual for purposes of the Fourth Amendment. *Akron v. Harvey*, 9th Dist. Summit No. 20016, 2000 WL 1859838, *3-*4 (Dec. 20, 2000), citing *Florida v. Royer*, 460 U.S. 491, 501-07 (1982). We stated in *Harvey*:

> "Encounters are consensual where the police merely approach a person in a public place, engage the person in conversation, request information, and the person is free not to answer and walk away." *State v. Taylor*[, 106 Ohio App.3d 741, 747 (2d Dist.1995)], citing *United States v. Mendenhall*[, 446 U.S. 544, 553 (1980)]. "The Fourth Amendment guarantees are not implicated in such an encounter unless the police 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." *Taylor* [] at 747-748. In *Mendenhall* the United States Supreme Court gave examples of circumstances that would indicate a seizure of a person as follows: "the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled." *Mendenhall* [] at 554. The United States Supreme Court went on to note that "in the absence of some such evidence, otherwise inoffensive contact between a member of the public and the police cannot, as a matter of law, amount to a seizure of that person." *Id.* at 555.

Harvey at *1.

{¶9} Here, based upon the facts as presented by the officers, we cannot agree with the trial court that the officers' encounter with Mr. Gilmore was consensual. Critical to our conclusion is the repeated emphasis that the officers placed on Mr. Gilmore purportedly

attempting to evade them. The officers maintained that Mr. Gilmore, upon first seeing the officers, immediately attempted to avoid them. Thereafter, when they regained sight of Mr. Gilmore on a different street, they pulled alongside Mr. Gilmore, and both officers exited the car. Officer Hadbavny first confronted Mr. Gilmore by asking why he was trying to avoid the officers. Mr. Gilmore denied that he was trying to avoid the officers. Officer Hadbavny then told Mr. Gilmore that the officers saw him retreat on Oakdale after seeing the officers, and Mr. Gilmore denied seeing them. After Mr. Gilmore informed the officers that he lived in the neighborhood, Officer Hadbavny again asked him why he was avoiding them. Based upon the particular circumstances presented in this case, a reasonable person in Mr. Gilmore's position would not have believed that he was free to leave. The police officers approached Mr. Gilmore after pursuing him for some distance and onto a different street, a fact that would have been known to Mr. Gilmore if he had in fact avoided the officers upon seeing them, or, if he had not, from Officer Hadbavny's repeated inquiries of Mr. Gilmore as to why he was avoiding them. *See State v. Walker*, 9th Dist. Summit No. 25744, 2011-Ohio-5779, ¶ 15; *see State v. Purvis*, 9th Dist. Wayne No. 13CA0019, 2014-Ohio-2865, ¶ 14, citing *State v. Goodloe*, 10th Dist. Franklin No. 13AP-141, 2013-Ohio-4934, ¶ 14; *Goodloe* at ¶ 14 (where officers drove past defendant "and then turned around, stopped their cruiser close to him, and then approached him as he walked on the sidewalk[,]" such facts were relevant in indicating "that a reasonable person would believe the officers had focused their attention on him and that he was not free to leave or ignore the officers"), and *State v. Hurt*, 2d Dist. Montgomery No. 14882, 1995 WL 259176, *5 (May 5, 1995) (noting that "the type of questions forwarded by officers may lead a reasonable person to believe he is not free to leave[]"). *See also State v. Rackow*, 9th Dist. Wayne No. 06-CA-0066, 2008-Ohio-507, ¶ 16 (an encounter may become a seizure where "[t]he circumstances,

including the officer's choice of words, would have implied to the reasonable person that he was not free to walk away from the officer[]").

{¶10} Accordingly, we conclude that the trial court erred to the extent that it determined that the officers' contact with Mr. Gilmore amounted to a consensual encounter.

{¶11} The State maintains that, even if we were to conclude that the encounter was not consensual, the officers' detention of Mr. Gilmore did not violate the Fourth Amendment, as it was justified as an investigative detention. Mr. Gilmore disputes that the stop was justified as an investigative detention. He further argues that the officers violated his *Miranda* rights when asking him whether he had anything illegal in his possession without first providing him with *Miranda* warnings.

{¶12} As stated above, the trial court did not set forth its basis for denying Mr. Gilmore's suppression motion in its journal entry, but it concluded, on the record after the hearing, that the encounter was consensual.[2] The trial court did not make any determination as to whether the police officers' approach of Mr. Gilmore was justified as an investigative stop, nor did it make any determination as to whether the officers violated Mr. Gilmore's *Miranda* rights. We decline to do so in the first instance, and instead remand this matter to the trial court to consider these issues. *See State v. Horvath*, 9th Dist. Medina No. 13CA0040-M, 2014-Ohio-641, ¶ 10, citing *State v. Stambaugh*, 9th Dist. Wayne No. 12CA0027, 2012-Ohio-5568, ¶ 20.

{¶13} Accordingly, Mr. Gilmore's first assignment of error is sustained to the extent that he argues that the trial court erred in denying his motion to suppress on the basis that the

[2] We note that the trial court set forth some facts on the record after the hearing on the motion to suppress, but none of those facts appear to pertain to whether the stop was consensual. Instead, in reaching the conclusion that the stop was consensual, the trial court appears to have focused on factors relevant to a reasonable suspicion inquiry, but it made no ruling on whether the officers had reasonable suspicion.

encounter was consensual. We do not reach the remainder of the issues raised by the parties as to suppression of the evidence.

III.

{¶14} Accordingly, Mr. Gilmore's sole assignment of error is sustained, the judgment of the Summit County Court of Common Pleas is reversed, and this matter is remanded for further proceedings consistent with this decision.

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(C). 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.

CARLA MOORE
FOR THE COURT

HENSAL, P. J.
CONCURS.

CARR, J.
CONCURRING IN PART, AND DISSENTING IN PART.

{¶15} I agree with the majority that this matter must be remanded to the trial court for further consideration of Gilmore's motion to suppress. I dissent, however, from the portion of the opinion reversing the trial court's judgment, as I would not determine the merits of the motion in the first instance.

{¶16} This Court's standard of review regarding a trial court's ruling on a motion to suppress is clearly established. We must accept the trial court's findings of fact as true as long as they are supported by competent credible evidence; thereafter, this Court must independently determine de novo whether those facts satisfy the applicable legal standard irrespective of the trial court's conclusions. *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, ¶ 8.

{¶17} A trial court speaks only through its journal entries. *State v. Schulz*, 9th Dist. Summit No. 26875, 2014-Ohio-1037, ¶ 3. In this case, the trial court made no findings of fact in its journal entry denying Gilmore's motion to suppress, but merely summarily denied it. We are, therefore, hindered in our review by the trial court's failure to make the necessary findings of fact. *See State v. Martin*, 9th Dist. Summit No. 24812, 2009-Ohio-6948, ¶ 14, citing *State v. Foster*, 9th Dist. Summit No. 24349, 2009-Ohio-840, ¶ 7. This Court has determined it

is imperative that the trial court make the requisite findings of fact to allow us to review the propriety of the trial court's ruling on the suppression motion, reasoning that "[d]ue to our limited standard of review with regard to the facts, we are not permitted to fill in this gap." *Martin* at ¶ 14. As the trial court failed to enunciate any findings of fact in support of its denial of Gilmore's motion to suppress, I would conclude that this Court is deprived of the ability to review the propriety of the trial court's judgment pursuant to the relevant standard. Accordingly, I would remand the matter to the trial court to set forth its findings of fact in support of its ruling. *See Foster* at ¶ 10 (vacating the trial court's decision and remanding for the trial court to make complete findings of fact).

APPEARANCES:

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