[Cite as *State v. Wise,* 2010-Ohio-2040.]

COURT OF APPEALS
COSHOCTON COUNTY, OHIO
FIFTH APPELLATE DISTRICT

	:	JUDGES:
STATE OF OHIO	:	Julie A. Edwards, P.J.
	:	William B. Hoffman, J.
Plaintiff-Appellee	:	Sheila G. Farmer, J.
	:	
-vs-	:	Case No. 09 CA 0011
	:	
	:	
JEREMIAH WISE	:	O P I N I O N

Defendant-Appellant

CHARACTER OF PROCEEDING:	Criminal Appeal from Coshocton Municipal Court Case No. CRB 0800793
JUDGMENT:	Reversed and Final Judgment Entered
DATE OF JUDGMENT ENTRY:	May 6, 2010

APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellant
JAMES SKELTON Police Prosecutor Coshocton County Law Director 760 Chestnut Street Coshocton, Ohio 43812	BRIAN W. BENBOW Benbow Law Offices 605 Market Street Zanesville, Ohio 43701

Edwards, P.J.

{¶1} Appellant, Jeremiah Wise, appeals a judgment of the Coshocton Municipal Court convicting him of consuming beer or liquor while under the age of 21 in violation of R.C. 4301.69(E)(1). Appellee is the State of Ohio.

STATEMENT OF FACTS AND CASE

{¶2} Appellant's mother, Carolyn Shustar, left work at 11:30 p.m. on December 12, 2008. When she arrived home, appellant's sister Jessica asked if she and appellant could have a beer. Appellant was 19 years old at the time. Ms. Shustar agreed. Appellant drank three beers and his sister drank two.

{¶3} Appellant and Jessica left the home about 1:00 a.m. to walk up the street to a friend's house where they were allowed to smoke indoors. They went to the friend's house because their mother made them smoke outside and the weather was very cold. Their mother did not go with them, but went to bed.

{¶4} About 1:15 a.m. on December 13, 2008, Corporal Morgan Eckelberry of the West Lafayette Police Department saw six or seven young people walking in the area of King Street and 4th Street in the village. They were walking in the street rather than on the sidewalk. When the officer approached the group, they began walking away from the officer at a "fast pace." Tr. 6. The group walked to apartments at the corner of Fourth and King Streets. The officer pulled up and stopped his cruiser without activating the overhead lights.

{¶5} The officer immediately recognized one of the young people in the group and knew the boy was 16 years old. Curfew is 11:00 p.m. for minors under the age of 18 in the village, unless accompanied by a parent or guardian. The officer also

recognized appellant, and knew him to be under 21 but over 18. The officer stopped the group to check for identification to determine if any of the group, in addition to the 16-year-old he recognized, were under the age of 18. The officer detected a mild odor of alcohol coming from appellant, along with two other individuals, and asked if any of the group had been drinking. Appellant told the officer that he had consumed three beers. The officer also noted beer cans and bottles in open containers on the ground near the group. The alcohol was located near a truck owned by the oldest member of the group, who was at least 21.

{¶6} Appellant was charged with underage consumption. His motion to suppress on the grounds that the officer lacked a reasonable suspicion of criminal activity to stop the group was overruled. The case then proceeded to bench trial.

{¶7} At trial, appellant argued that he did not violate the statute because the exception allowing underage consumption under the supervision of a parent applied in the instant case. The court disagreed and found appellant guilty, finding in pertinent part:

{¶8} "Clearly, as long as defendant was in his mother's home and she knew where he was, defendant was being supervised by his parent. However, when she granted him permission to leave, she could no longer 'oversee' or 'direct' the defendant. One could argue that defendant was done consuming alcohol, so he no longer needed to be supervised. However, this would seem to defeat the purpose of the supervision, as anyone knows the effects of alcohol take time to start and time to end. If the officer could detect that defendant was drinking, then he should still have been under the

direction and oversight of his parent. He was not. Therefore, defendant is found guilty of the offense charged in the complaint." Judgment Entry, March 12, 2009.

{¶9} Appellant assigns two errors on appeal:

{¶10} "I. THE TRIAL COURT COMMITTED PREJUDICIAL ERROR BY DENYING APPELLANT'S MOTION TO SUPPRESS.

{¶11} "II. THE TRIAL COURT'S MARCH 12, 2009 JUDGMENT ENTRY FINDING APPELLANT GUILTY OF POSSESSING OR CONSUMING BEER OR LIQUOR WHILE UNDER THE AGE OF TWENTY-ONE IN VIOLATION OF R.C. 4301.60(E)(1) WAS AGAINST THE MANIFEST WEIGHT AND SUFFICIENCY OF THE EVIDENCE."

I

{¶12} In his first assignment of error, appellant argues that the officer lacked a reasonable suspicion of criminal activity to justify the stop, and that the officer should be estopped from relying on a curfew violation as the reason for the stop when in the police report, he only wrote that he stopped the individuals for walking away at a fast pace.

{¶13} There are three methods of challenging a trial court's ruling on a motion to suppress on appeal. First, an appellant may challenge the trial court's finding of fact. In reviewing a challenge of this nature, an appellate court must determine whether the trial court's findings of fact are against the manifest weight of the evidence. See *State v. Fanning* (1982), 1 Ohio St.3d 19, 437 N.E.2d 583; and *State v. Klein* (1991), 73 Ohio App.3d 486, 597 N.E.2d 1141. Second, an appellant may argue that 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. See *State v.*

Williams (1993), 86 Ohio App.3d 37, 619 N.E.2d 1141. Finally, an appellant may argue the trial court has incorrectly decided the ultimate or final issues raised in a 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. Claytor* (1994), 85 Ohio App.3d 623, 620 N .E.2d 906.

{¶14} The Fourth Amendment to the United States Constitution prohibits warrantless searches and seizures, rendering them per se unreasonable unless an exception applies. *Katz v. United States* (1967), 389 U.S. 347, 357, 88 S.Ct. 507, 19 L.Ed.2d 576. An investigative stop, or *Terry* stop, is a common exception to the Fourth Amendment warrant requirement. *Terry v. Ohio* (1968), 391 U.S. 1, 88 S.Ct. 1503, 20 L.Ed.2d 381. Because the “balance between the public interest and the individual's right to personal security,” *United States v. Brignoni-Ponce* (1975), 422 U.S. 873, 878, 95 S.Ct. 2574, 45 L.Ed.2d 607, tilts in favor of a standard less than probable cause in such cases, the Fourth Amendment is satisfied if the officer's action is supported by reasonable suspicion to believe that criminal activity “may be afoot.” *United States v. Sokolow* (1989), 490 U.S. 1, 7, 109 S.Ct. 1581, 104 L.Ed.2d 1 (quoting *Terry,* supra, at 30). In *Terry,* the Supreme Court held that a police officer may stop an individual if the officer has a reasonable suspicion based upon specific and articulable facts that criminal behavior has occurred or is imminent. See, also, *State v. Chatton* (1984), 11 Ohio St.3d 59, 61, 463 N.E.2d 1237.

{¶15} The propriety of an investigative stop must be viewed in light of the totality of the circumstances surrounding the stop “as 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* (1991), 57 Ohio St.3d 86, 87-88, 565 N.E.2d 1271; *State v. Bobo* (1988), 37 Ohio St.3d 177, 524 N.E.2d 489. The Supreme Court of the United States has re-emphasized the importance of reviewing the totality of the circumstances in making a reasonable suspicion determination:

{¶16} "When discussing how reviewing courts should make reasonable-suspicion determinations, we have said repeatedly that they must look at the 'totality of the circumstances' of each case to see whether the detaining officer has a 'particularized and objective basis' for suspecting legal wrongdoing. This process allows officers to draw on their own experience and specialized training to make inferences from and deductions about the cumulative information available to them that 'might well elude an untrained person.' Although an officer's reliance on a mere 'hunch' is insufficient to justify a stop, the likelihood of criminal activity need not rise to the level required for probable cause, and it falls considerably short of satisfying a preponderance of the evidence standard.

{¶17} "Our cases have recognized that the concept of reasonable suspicion is somewhat abstract. But we have deliberately avoided reducing it to 'a neat set of legal rules.' In *Sokolow,* for example, we rejected a holding by the Court of Appeals that distinguished between evidence of ongoing criminal behavior and probabilistic evidence because it "create[d] unnecessary difficulty in dealing with one of the relatively simple concepts embodied in the Fourth Amendment." *United States v. Arvizu* (2002), 534 U.S. 266, 273-274, 122 S.Ct. 744, 151 L.Ed.2d 740 (internal citations and quotes omitted).

{¶18} In the instant case, the officer saw a group of individuals who appeared to be young in age walking in the street rather than on the sidewalk at 1:15 a.m. He recognized one member of the group and knew that individual to be under the age of 18 and therefore out after curfew. When the group saw the officer, they began walking away at a fast pace. The officer had reasonable suspicion to stop the group and investigate further.

{¶19} We disagree with appellant's argument that the officer is limited to the facts as stated in his police report to support his testimony concerning the circumstances surrounding the stop. The officer's statement in the police report is a summary of what occurred. Appellant's argument that the officer did not rely on the curfew violation until the hearing suggests that the officer changed his story and therefore, his testimony is not credible, an argument better made to the trier of fact and not to this court. Nothing in the officer's testimony is inconsistent with his statement in the police report that the group walked away from him at a fast pace.

{¶20} The first assignment of error is overruled.

II

{¶21} In his second assignment of error, appellant argues the judgment is against the manifest weight and sufficiency of the evidence.

{¶22} In determining whether a verdict is against the manifest weight of the evidence, the appellate court acts as a thirteenth juror and "in reviewing the entire record, 'weighs the evidence and all reasonable inferences, considers the credibility of witnesses, and determines whether in resolving conflicts in evidence the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be

reversed and a new trial ordered.'" *State v. Thompkins,* 78 Ohio St.3d 380, 387, 678 N.E.2d 541, 1997-Ohio-52, quoting *State v. Martin* (1983), 20 Ohio App.3d 172, 175, 485 N.E.2d 717. An appellate court's function when reviewing the sufficiency of the evidence is to determine whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt. *State v. Jenks* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus.

{¶23} Appellant was convicted of violating R.C. 4301.69(E)(1):

{¶24} "(E)(1) No underage person shall knowingly order, pay for, share the cost of, attempt to purchase, possess, or consume any beer or intoxicating liquor in any public or private place. No underage person shall knowingly be under the influence of any beer or intoxicating liquor in any public place. The prohibitions set forth in division (E)(1) of this section against an underage person knowingly possessing, consuming, or being under the influence of any beer or intoxicating liquor shall not apply if the underage person is supervised by a parent, spouse who is not an underage person, or legal guardian, or the beer or intoxicating liquor is given by a physician in the regular line of the physician's practice or given for established religious purposes."

{¶25} Appellant argues that the conviction is against the manifest weight and sufficiency of the evidence because he was supervised by a parent at the time the alcohol was consumed. Appellant also argues that he could not be convicted of knowingly being under the influence of beer or intoxicating liquor in a public place because the state failed to prove he was under the influence of the alcohol at the time of the stop.

{¶26} The statute prohibits appellant from being intoxicated in a public place unless supervised by a parent. It is undisputed that appellant was not supervised by a parent at the time the police officer encountered him in the street.

{¶27} The only evidence that appellant was under the influence of alcohol, which he admitted to drinking earlier in the evening, was the officer's testimony that he smelled a mild odor of alcohol coming from appellant. While there were open containers of alcohol nearby, none of the members of the group admitted to possession of the alcohol and the officer did not see any of them drinking or discarding a container.

{¶28} A mere odor of alcohol is not enough by itself to provide probable cause to arrest for driving under the influence of alcohol. See *State v. Taylor* (1981), 3 Ohio App.3d 197, 444 N.E.2d 481, syllabus (act of only nominally exceeding the speed limit coupled with the arresting officers' perception of the odor of alcohol, not characterized as pervasive or strong, and nothing more, does not furnish probable cause to arrest an individual for driving under the influence of alcohol). There is no evidence in the record to prove that appellant was under the influence of the three beers consumed earlier in his home at the time the officer encountered him in a public place.

{¶29} Further, the evidence is insufficient to support a conviction under the statute for consuming alcohol. It is undisputed that at the time appellant consumed the alcohol, he was supervised by a parent. At the point in time where appellant leaves the house, the issue no longer is his consumption of the alcohol under R.C. 4301.69(E)(1), but whether he is under the influence of alcohol in a public place.

{¶30} The conviction is against the manifest weight and sufficiency of the evidence. The second assignment of error is granted.

{¶31} The judgment of the Coshocton County Municipal Court is reversed. Pursuant to App.R. 12(B), we hereby enter final judgment of acquittal.

By: Edwards, P.J.

Hoffman, J. and

Farmer, J. concur

s/Julie A. Edwards

s/William B. Hoffman

s/Sheila G. Farmer

JUDGES

JAE/r0219

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IN THE COURT OF APPEALS FOR COSHOCTON COUNTY, OHIO

FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	
Plaintiff-Appellee	:	
-vs-	:	JUDGMENT ENTRY
JEREMIAH WISE	:	
Defendant-Appellant	:	CASE NO. 09 CA 0011

For the reasons stated in our accompanying Memorandum-Opinion on file, the judgment of the Coshocton Municipal Court is reversed. Pursuant to App.R. 12(B), we hereby enter final judgment of acquittal. Costs assessed to appellee.

s/Julie A. Edwards

s/William B. Hoffman

s/Sheila G. Farmer

JUDGES