

IN THE OHIO SUPREME COURT

07-1981

STATE OF OHIO

Plaintiff-Appellee,

-VS-

EMMANUEL HAKIM,

Defendant-Appellant.

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On Appeal from the Cuyahoga  
County Court of Appeals  
Eighth Appellate District

Court of Appeals No. 88971.

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MEMORANDUM IN SUPPORT OF JURISDICTION  
FROM APPELLANT EMMANUEL HAKIM

---

EMMANUEL HAKIM #513-693  
Mansfield Correctional Institution  
P.O. Box 788  
Mansfield, Ohio 44901.

(Pro Se Defendant-Appellant)

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FILED  
OCT 28 2007  
CLERK OF COURT  
SUPREME COURT OF OHIO

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EXPLANATION OF WHY THIS CASE IS A CASE OF PUBLIC  
OR GREAT GENERAL INTEREST AND INVOLVES  
A SUBSTANTIAL CONSTITUTIONAL QUESTION

Appellant contends that his case presents a substantial constitutional question because it involves whether a court of appeals errs when they affirm an appellants conviction that the trial court erred by overruling the defense motion to suppress the illegal pat down, search, seizure and subsequent to unlawful arrest of the appellant? (See Terry v Ohio (1968), 392 U.S. 1.)

The evidence in this case was insufficient to allow a so-called Terry pat down as held to the contrary by the appeals court.

Even if a brief questioning of the lease holder were permitted under the Terry standard, the actual pat-down of the appellant, a [guest] in the home, escalated to an improper search then arrest, where there was no probable cause for the initial pat down. The issue presented is whether the detective had the justification to even engage in a Terry pat down, and if so, whether his conduct transformed the pat-down incident to an unlawful search and arrest as it was conducted without probable cause? If so, the fruit of the poisonous tree, or the improperly seized items, would necessarily be suppressed.

On the day in question, the CMHA narcotics office received a complaint of illegal activity, (Tr.p,4.) four officers responded to the apartment, two officers were stationed at the front door while officers knocked at the back door, the leaseholder answered, she allowed the officers to enter. The leaseholder denied being aware of any drug activity. While talking to the leaseholder, officer Harris observed the appellant reaching down behind him while sitting on the couch. Harris told Detective Williams to check the appellant out.

Williams conducted a pat-down. The pat down was violative of the Fourth Amendment protection against a search and seizure without a reasonable articulable suspicion of criminal activity.

The standard for a pat down was first established in Terry v Ohio, supra. In that case, the United States Supreme Court set forth a reasonableness test. Justification for a particular seizure must be based upon "specific and articulated facts which, taken together with rational inference from the facts, reasonably warrant that intrusion." Terry, at 21.

In Terry, the Supreme Court wrote that a reviewing court must use a reasonable man standard. If a reasonable man would believe that in view of the facts available to the officer, the action taken was appropriate, such action does not violate Fourth Amendment restrictions. Anything less would amount to an intrusion of a citizen's constitutionally guaranteed rights based on nothing more than an inarticulate hunch.

The Court of Appeals express these concerns bellow, affirming appellants conviction that raises a substantial constitutional question:

\*\*\*, Hakim does not question the officer's authority to conduct an investigatory stop, he limits his argument to the officer's authority to conduct a pat-down search of his person.

The evidence in the record reveals that Detective Harris did have a reasonable suspicion that Hakim may have been armed or dangerous. Detective Harris and three other CMHA police officers reported to Snyder's apartment in connection with complaints of drug activity from that location. When Detective Harris entered the apartment, with Snyder's permission, he observed Hakim making shoving gestures behind his back.

Detective Harris ordered Hakim to stop moving, but Hakim continued to make shoving motions behind his back. Detective Harris testified at the suppression hearing that in his ten years as a CMHA police officer, he commonly encounters guns and other weapons while investigating drug activity. In addition, Detective Harris testified that when he ordered Detective Williams to pat-down Hakim, his immediate fear was that Hakim was armed. Moreover, although not argued by Hakim, Detective Williams was justified in seizing the crack cocaine from Hakim's person. When Detective Williams patted down Hakim, he felt a bulge. When Detective Williams asked Hakim what the object was, Hakim responded that it was "weed."

In Minnesota v Dickerson (1993), 508 U.S. 366, 113 S.Ct. 2130, the United States Supreme Court held that police, while conducting a lawful Terry-type search, may seize nonthreatening contraband when its incriminating nature is "immediately apparent" to the searching officer through his sense of touch. Although Detective Williams did not testify whether he immediately knew the bulge in Hakim's clothes was contraband, Detective Williams remained within the bounds of the law when he asked Hakim what it was. When Hakim responded the bulge was drugs, Detective Williams asked Hakim to hand the drugs over and Hakim complied. Therefore, Detective Williams was within the law when he seized the rocks of crack cocaine. In Short, the evidence in the record justifies the protective pat-down search of Hakim for weapons. \*\*\*

### Articuable Suspicion

An articulable suspicion must be based upon specific factors rather than a generalized hunch. For instance, a generalized suspicion of criminal activity and the presence of a suspect in a high crime area are factors which, standing alone, do not justify a seizure. Brown v Texas, 443 U.S. 47, 52 (1979).

In the present case, the officers were at the apartment to notify the leaseholder of the complaint. All parties were cooperative with the police.

The leaseholder denied involvement. The mere reaching behind one's back while sitting on a couch in a separate room does not rise to articulable suspicion. There were no complaints of violence or weapons. Simply a tip that

drug activity may have taken place at that location. The appellant may have been simply readjusting his pants,

### STATEMENT OF THE CASE

On March 31, 2004, a Cuyahoga County Grand Jury indicted the defendant-appellant, Emmanuel Hakim, (hereinafter the appellant) on one count of Drug Trafficking in violation of R.C. §2923.03; on two counts of Drug Possession in violation of R.C. §2925.11 and on count of Possession of Criminal Tools in violation of R.C. §2923.24.

On May 4, 2004, the appellant entered a plea of not guilty to all counts at his arraignment. On February 1, 2005, a motion to suppress evidence hearing was heard by the trial court. The trial court denied the motion.

On October 11, 2006, the appellant entered a plea of no contest to all the counts. The appellant was sentenced on that same date. The trial court sentenced the appellant to serve a term of incarceration as follows: 12 months on all four counts to run concurrently, but consecutively to CR 442100. The aggregate prison sentence being seven years. A Timely Notice of Appeal was filed.

On October 4, 2007, the Appeals Court affirmed the trial courts decision in not to suppress the illegal pat-down, search, seizure and subsequent unlawful arrest of the appellant. This Notice of Appeal and Memorandum in Support of Jurisdiction to the Ohio Supreme Court timely follows.

### STATEMENT OF THE FACTS

This case arose from a complaint of possible drug activity at 17925 Parkmount Avenue. Cleveland Metropolitan Housing Authority (CMHA) detectives received a call of possible drug related activity at that address. Four officers went to investigate. Two went to the front door and two knocked at the back door.

The leaseholder denied any drug activity, but allowed the officers to enter the apartment.

While relating the information to the leaseholder, Officer Harris observed the appellant reaching behind his back. Harris told Detective Williams to pat down the appellant. Det. Williams did so and felt a plastic bag in his pants. He told the appellant to retrieve the bag. The appellant did so, it appeared to be crack cocaine, the appellant was then arrested and searched. A scale was found in his jacket pocket.

### State's Case

Officer James Harris received a complaint of illegal drug activity out of 17925 Parkmount Avenue (Tr.4). Harris and Sgt. Rucker knocked on the kitchen rear door and the leaseholder answered. They told her why they were there. She invited them in (Tr.6). Another woman was in the kitchen and two men on the couch in the living room (Tr.7). Harris noticed a male take his hand and shove it in the rear of his back area while sitting on the couch (Tr.7). Harris told the male to stop and after a couple more shoves pushing his arm down the couch, Harris advised Detective Williams to secure the male and pat him down (T.8). Williams checked the appellant for weapons (T.9).

Harris had received no information that the appellant was armed and dangerous (T.21). There were no allegations of weapons or violence, just a drug complaint. When he saw the movements by the appellant, he became concerned for the safety of everyone in the apartment (Tr.25).

Detective Thomas Williams was told by Harris that the appellant was making furtive movements and to check him (Tr.36). He asked if the appellant had a weapon. The appellant stated he did not (T.37). He patted him down and felt a large object in his right pocket. He asked what it was and the appellant did not respond (Tr.38). He continued the pat down and felt another bulk and it was inside plastic (Tr.38). He asked the appellant what it was and the appellant said

"a little weed". He advised the appellant of his rights. He told the appellant to give him the drugs and the appellant complied (Tr.38). He arrested the appellant. Williams then took the scale out of the appellant's pocket (Tr.39). The facts will be further detailed in appellants Proposition of Law No.I.

Proposition of Law No. I:

THE APPELLATE COURT VIOLATED APPELLANTS DUE PROCESS AND EQUAL PROTECTION RIGHTS UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION WHEN THEY FAILED TO REVERSE THE TRIAL COURTS JUDGMENT TO SUPPRESS THE ILLEGAL PAT-DOWN, SEARCH, SEIZURE AND SUBSEQUENT UNLAWFUL ARREST OF APPELLANT.

Seizure Defined

A seizure of the person within the meaning of the fourth Amendments occurs when, "taking into account all of the circumstances surrounding the encounter, the police conduct would have communicated to a reasonable person that he was not at liberty to ignore the police presence and go about his business." Florida v Bostick, 501 U.S. 429, 437, (1991) (quoting Michigan v Chesternut, 486 U.S. 567, 569, (1988)). This test is derived from United States v Mendenhall, 446 U.S. 544, 1870 (1980). See California v Hodari D., 499 U.S. 621, 627-628 (1991), which gave several "examples of circumstances that might indicate a seizure, even where the person did not attempt to leave," including "the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or use of language or tone of voice indicating that compliance with officer's request might be compelled." Mendenhall, supra, at 554.

Clearly in this case there was a seizure of the appellant. Two officers stationed at the front door and two at the back door. Certainly no one in that apartment was free to leave. The officers testified that there were at the apartment essentially to share information (Tr.6). They further testified that the four officers were utilized to ensure that no one ran from or tried to dispose of anything (Tr.8). These facts indicate a seizure contrary to the appeals court mandate.

### No Probable Cause For Arrest

Probable cause that an offense has occurred is required by the Fourth Amendment before an arrest may be effectuated. Probable cause to conduct a warrantless arrest when police have, at the moment of the arrest, knowledge of facts and circumstances grounded in reasonably trustworthy information and sufficient in themselves to warrant a belief in a reasonably prudent person that an offense has been committed by the person being arrested. Beck v Ohio 379 U.S. 89, 91 (1964). The arrest must be formed upon greater ground than a mere suspicion. Brinegar v U.S., 338 U.S. 160, 175-76.

Here, it is clear that law enforcement arrested appellant without probable cause. He was allegedly patted down for weapons. Upon feeling a plastic bag, he was told to retrieve it and turn it over. He complied and then was arrested and searched further. The pat down unquestionably constituted an arrest. The appellant was not free to leave. The law has long provided that any search conducted to an unlawful arrest must be suppressed. Carroll v U.S., 267 U.S. 132, 155-56.

Pursuant to the Ohio Criminal Practice and Procedure §54.601.2 -Probable Cause, if a seizure does occur, the police must be able to show that they possess a reasonable and articulate suspicion that the person they have seized is presently engaged in criminal activity. Inarticulate hunches of criminal activity are not sufficient.

While courts will uphold limited investigatory detentions, a warrantless seizure without probable cause results in an illegal detention rendering any evidence gained therefrom inadmissible.

In State v Barrow (1979, Hamilton Co.), 60 Ohio App.2d 335, 397 N.E.2d 422, Police officers stopped the defendant after he drove out of a parking lot after someone had advised him that they were "the cops." The officers had been

observing the defendant and others because this particular lot was known to them as a dumping area for stolen automobiles. The officers followed defendant and, upon observing Indiana license plates on his vehicle and receiving a response to their radio inquiry that no information was available on the Indiana plate, they pulled t the defendant over. When he alighted from the vehicle pursuant to their demand, the officers observed on the front seat a pistol which had been concealed by his leg.

In reversing the conviction for carrying a concealed weapon, the court held that inarticulate hunches that criminal activity is being engaged in, although formulated in good faith, will not support the requirement, in the conduct- ing of a warrantless search, that reasonable suspicion be in existence before the search is made. Terry v Ohio (1968), 20 L.Ed.2d 889, 88 S.Ct. 1868, 392 U.S. 1.

In State v Phillips (2nd Dist-2003) 155 Ohio App.3d 149, after a motion to suppress seizure of drugs during a pat-down after a Terry stop incident to a traffic violation was denied, the defendant was convicted of crack cocaine possession.

The trial court erred in denying the motion to suppress because under the totality of circumstances, there was no reasonable, articulable reason for the pat-down. The defendant was stopped at noon as he was walking from his car to a house in a residential area. There was no nexus between bulges in the pockets of his tight-fitting jogging pants and the defendant's change of temper from cooperative to irritated when police asked for his consent to the pat-down.

Under the Fourth Amendment, every search or seizure by a government agent must be reasonable. The Supreme Court has generally interpreted this requirement to mean that an arrest or search must be based on probable cause and excuted pursuant to a warrant. Katz v U.S., (1967), 389 U.S. 347, 357.

The point of the fourth amendment is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence.

Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.

The Fourth Amendment requirements of probable cause under the United States Constitution mandates such a limitation of government intrusion concerning illegal pat-downs, searches, seizures and subsequent unlawful arrests of its citizens.

Further, without a review from this court mapping out, with precision and clarity, the limitations to this issue that presents a substantial constitutional question, leads to the misapplication of the Fourth Amendment right to legal pat-downs, seizures and subsequent arrests of citizens absent probable cause.

#### CONCLUSION

For the reasons discussed above, Appellant Hakim respectfully requests this Court to accept review of this case, as he has shown and presented a substantial constitutional question, and reverse the decision of the courts below, and order a new trial.

Respectfully submitted,

  
Emmanuel Hakim, pro se  
(ManCI) #513-693  
P.O. BOX 788  
Mansfield, Ohio 44901.

(Pro Se Litigant On Appeal)

CERTIFICATE OF SERVICE

I hereby swear that a true and correct copy of appellants Memorandum in Support of Jurisdiction to the Ohio Supreme Court herein has been sent via U.S. mail to appelle, prosecuting attorney for the state located at 1200 Ontario Street Cleveland, Ohio 44113 on this 18<sup>th</sup> day of October 2007.

*Emmanuel Hakim*

Emmanuel Hakim, pro se  
#513-693 Defendant-  
Appellant.

(Pro Se Litigant on Appeal)

APPENDIX

Page

Attached herein, the judgment entry of the Cuyahoga County Court of Appeals  
entered on October 4, 2007 in Case No. 88971 ..... 1

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT  
COUNTY OF CUYAHOGA

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JOURNAL ENTRY AND OPINION  
No. 88971

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**STATE OF OHIO**

PLAINTIFF-APPELLEE

vs.

**EMMANUEL HAKIM**

DEFENDANT-APPELLANT

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**JUDGMENT:  
AFFIRMED**

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Criminal Appeal from the  
Cuyahoga County Court of Common Pleas  
Case No. CR-450354

**BEFORE:** Kilbane, J., Celebrezze, A.J., and Blackmon, J.

**RELEASED:** October 4, 2007

**JOURNALIZED:**

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Cleveland, Ohio 44103

ANNOUNCEMENT OF DECISION  
PER APP. R. 22(B), 22(D) AND 26(A)  
RECEIVED

OCT 4 - 2007

GERALD E. FUERST  
CLERK OF THE COURT OF APPEALS  
BY \_\_\_\_\_ DEF.

N.B. This entry is an announcement of the court's decision. See App.R. 22(B), 22(D) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(E) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(E). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

MARY EILEEN KILBANE, J.:

Emmanuel Hakim ("Hakim") appeals the trial court's decision denying his motion to suppress. Hakim claims that Cleveland Metropolitan Housing Authority ("CMHA") police officers illegally patted down and searched his person and, therefore, the recovered contraband should have been suppressed. For the following reasons, we affirm the decision of the trial court.

On January 24, 2004, members of the CMHA Police Department went to the apartment of Melissa Snyder ("Snyder") located at 17925 Parkmount Avenue, Cleveland, Ohio. The officers were responding to numerous complaints of drug activity at this location. Four officers responded to the location, two went to the front door, and two went to the back door. Detective James Harris ("Detective Harris") knocked on the back door and Snyder answered. Detective Harris advised Snyder as to why they were there and asked to speak with her. Snyder invited the officers inside her apartment.

Once inside the apartment, Detective Harris observed a second female in the kitchen of the apartment and two males sitting on the couch located in the living room. While Detective Harris was speaking with Snyder, he observed Hakim, one of the two males on the couch, making a furtive movement. Specifically, Detective Harris observed Hakim take his hand and shove it in the

rear of his back area while he was sitting on the couch. Detective Harris told Hakim to stop making these movements, but Hakim continued to shove something behind his back. Detective Harris radioed to Detective Thomas Williams ("Detective Williams") for assistance.

Detective Harris instructed Detective Williams, who had been waiting outside, to secure Hakim. Detective Harris stated that his immediate concern was that Hakim was armed and wanted Detective Williams to ensure the safety of the officers as well as the other occupants of the apartment.

Detective Williams ordered Hakim to stand and began to pat him down. While doing so, Detective Williams felt a hard object in Hakim's jacket pocket. When asked what this item was, Hakim remained silent. Detective Williams also felt a large plastic bulge near Hakim's back area that Hakim stated was "weed." Detective Williams ordered Hakim to remove the marijuana, at which time Hakim admitted that the drugs were actually crack cocaine. Hakim then handed over a plastic baggie containing approximately twenty-two rocks of crack cocaine. Detective Williams advised Hakim of his rights and recovered a metal scale with cocaine residue from Hakim's jacket pocket.

Both detectives testified that it was Hakim's furtive movements that signaled him out for a search. Detective Harris stated that had it not been for

Hakim's actions, the officers merely would have informed Snyder of the complaints and left the apartment.

A Cuyahoga County Grand Jury returned an indictment charging Hakim with trafficking in drugs, two counts of possession of drugs, and one count of possession of criminal tools. Prior to trial, Hakim filed a motion to suppress, and after an oral hearing on the matter, the trial court denied the motion. Hakim pleaded no contest to the indictment and the trial court found him guilty of all charges. The trial court then sentenced Hakim to seven years in prison. Hakim appeals, raising a single assignment of error.

**“The trial judge erred by overruling the defense motion to suppress the illegal pat down, search, seizure and subsequent unlawful arrest of the appellant.”**

Appellate review of a motion to suppress presents a mixed question of law and fact. *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372. When considering a motion to suppress, the trial court is in the best position to resolve factual questions and evaluate the credibility of witnesses. *Id.* Consequently, an appellate court must accept the trial court's findings of fact if they are supported by competent, credible evidence. *Id.* Accepting these facts as true, the appellate court must then independently determine, without deference to

the trial court's conclusion, whether the facts satisfy the applicable legal standard. *Id.*

In *Terry v. Ohio* (1968), 392 U.S. 1, 20, the United States Supreme Court held that a police officer may make a brief, warrantless investigatory stop of an individual without probable cause where the officer reasonably suspects that the individual is or has been involved in criminal activity. Additionally, under *Terry*, a limited protective search of the detainee's person for concealed weapons is justified only when the officer has reasonably concluded that "the individual whose suspicious behavior he is investigating at close range is armed and presently dangerous to the officer or to others." *Id.* at 24.

In *State v. Evans*, 67 Ohio St.3d 405, 407-408, 1993-Ohio-186, the Ohio Supreme Court stated as follows:

**"The purpose of this limited search is not to discover evidence of a crime, but to allow the officer to pursue his investigation without fear or violence \*\*\*. Where a police officer, during an investigatory stop, has a reasonable suspicion that an individual is armed based on the totality of the circumstances, the officer may initiate a protective search for the safety of himself and others." (Internal citations omitted.)**

Additionally, the *Evans* court also stated that the right to frisk may be "virtually automatic when individuals are suspected of committing a crime, like drug trafficking, for which they are likely to be armed." *Id.* at 405.

In the present case, Hakim does not question the officer's authority to conduct an investigatory stop, he limits his argument to the officer's authority to conduct a pat-down search of his person.

The evidence in the record reveals that Detective Harris did have a reasonable suspicion that Hakim may have been armed or dangerous. Detective Harris and three other CMHA police officers reported to Snyder's apartment in connection with complaints of drug activity from that location. When Detective Harris entered the apartment, with Snyder's permission, he observed Hakim making shoving gestures behind his back. Detective Harris ordered Hakim to stop moving, but Hakim continued to make shoving motions behind his back. Detective Harris testified at the suppression hearing that in his ten years as a CMHA police officer, he commonly encounters guns and other weapons while investigating drug activity. In addition, Detective Harris testified that when he ordered Detective Williams to pat-down Hakim, his immediate fear was that Hakim was armed.

Moreover, although not argued by Hakim, Detective Williams was justified in seizing the crack cocaine from Hakim's person. When Detective Williams patted down Hakim, he felt a bulge. When Detective Williams asked Hakim what the object was, Hakim responded that it was "weed." In *Minnesota*

*v. Dickerson* (1993), 508 U.S. 366, 113 S.Ct. 2130, the United States Supreme Court held that police, while conducting a lawful *Terry*-type search, may seize nonthreatening contraband when its incriminating nature is “immediately apparent” to the searching officer through his sense of touch. Although Detective Williams did not testify whether he immediately knew the bulge in Hakim’s clothing was contraband, Detective Williams remained within the bounds of the law when he asked Hakim what it was. When Hakim responded the bulge was drugs, Detective Williams asked Hakim to hand the drugs over and Hakim complied. Therefore, Detective Williams was within the law when he seized the rocks of crack cocaine.

In short, the evidence in the record justifies the protective pat-down search of Hakim for weapons. Accordingly, we affirm the decision of the trial court denying Hakim’s motion to suppress.

Hakim’s sole assignment of error is overruled.

The judgment of the trial court is affirmed.

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

The court finds there were reasonable grounds for this appeal.

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

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

*Mary Eileen Kilbane*

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MARY EILEEN KILBANE, JUDGE

FRANK D. CELEBREZZE, JR., A.J., and  
PATRICIA A. BLACKMON, J., CONCUR