STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 22, 2021
v MARCUS MARTELL MCCLOUD, Defendant-Appellant.	No. 352158 Wayne Circuit Court LC No. 19-004033-01-FH

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	
v BRUCE CLIFFIN EDWARDS, Defendant-Appellant.	No. 352280 Wayne Circuit Court LC No. 19-004033-02-FH

Before: BECKERING, P.J., and FORT HOOD and RIORDAN, JJ.

PER CURIAM.

In these consolidated appeals, defendants appeal as of right their bench trial convictions arising out of a police investigation of a social club in Detroit. In Docket No. 352158, defendant Marcus Martell McCloud appeals his conviction of carrying a concealed weapon, MCL 750.227(2). The trial court sentenced him to 2 years' probation. In Docket No. 352280, defendant Bruce Cliffin Edwards appeals his conviction of carrying a concealed weapon. The trial court sentenced him, as a fourth-offense habitual offender, MCL 769.12, to 2 years' probation. Because the trial court erred in denying defendants' motions to suppress, we reverse their convictions and remand for further proceedings.

I. RELEVANT FACTS

In August, 2019, the Detroit Police Department was conducting an undercover investigation of an establishment called VIP Lyfe Social Club[1] because it had received several complaints from a neighboring precinct that the club was selling liquor without a license. The department verified that the club did not have a liquor license, and it planned an undercover operation to determine whether the club was in fact selling liquor. Officers Lamar Kelsey and Quinton Lindsay were part of the operation and were specifically charged with removing security from the club so that undercover officers could enter the club and attempt to purchase alcohol.

On the night of the incident, Officers Kelsey and Lindsay approached the club with other officers. They did not have a warrant, and no undercover officer had yet made a purchase. An officer knocked on the door and identified himself to the man who opened the door. After the man who opened the door identified himself as security, the officer grabbed the man's arm and escorted him out of the building. Officer Lindsay then went inside the building and saw Edwards standing in-between the doorway of the vestibule and the entrance of the club; Edwards also identified himself as security. Officer Lindsay detained Edwards and identified himself as a police officer. Edwards attempted to reenter the club, but Officer Lindsay grabbed Edwards's arm and escorted him outside. Once outside, Officer Lindsay placed Edwards's hands up against a wall and asked him if he had any weapons on him or a valid concealed pistol license (CPL). Officer Lindsay then patted down Edwards, and while doing so, he found a handgun.

At the same time Officer Lindsay was detaining Edwards, Officer Kelsey entered the facility, where he encountered McCloud, who also identified himself as security. Officer Kelsey identified himself as a police officer, grabbed McCloud, and took him outside by force. Outside, Officer Lindsay put McCloud up against a wall and asked him whether he had any narcotics or weapons on him, to which McCloud replied that he did not. Officer Kelsey then patted down McCloud, discovered a weapon on McCloud's hip, and arrested him.

The following day, the prosecution charged defendants with carrying a concealed weapon. Defendants moved to suppress any evidence obtained as a result of the detention and search, contending that the police had neither probable cause nor reasonable suspicion to do so without a warrant. During the motion hearing, Officer Kelsey testified that the officers needed to remove security so the decoys could enter the club with their weapons. He agreed that detaining security during these types of operations was common practice, and he explained that he patted down McCloud for "Officer safety." Officer Lindsay also testified at the motion hearing, and he stated

[1] Although police officers identified the name of the establishment by slightly different variants, based on the address given and a review of LARA's (Department of Licensing and Regulatory Affairs) website, the proper name of the establishment is VIP Lyfe Social Club. It is a domestic nonprofit corporation.

https://cofs.lara.state.mi.us/CorpWeb/CorpSearch/CorpSummary.aspx?ID=802004332.

that his assignment was "to detain security, anyone at the door," which was common for this type of operation. Officer Lindsay also testified that "security is always detained," and he explained that security personnel were detained for safety purposes and so they could not alert anyone inside the club about the decoys. At the end of the hearing, the trial court denied defendants' motions, holding that the police had reasonable suspicion to detain defendants and that the police patted them down for safety purposes.

Defendants moved for reconsideration, and the trial court again denied their motions, emphasizing that defendants worked for the club under investigation and that the search and seizure was necessary for the officers' safety. The trial court then held a bench trial at which it found both defendants guilty of carrying a concealed weapon.[2] Afterward, defendants moved for judgment notwithstanding the verdict, which the trial court denied.

II. ANALYSIS

On appeal, defendants argue that the trial court erred by denying their motions to suppress evidence. Defendants contend that their Fourth Amendment rights were violated by the officers' conduct, and McCloud also argues that he was authorized to possess a concealed weapon pursuant to MCL 750.227(2), because he was at his place of business. We conclude that defendants' Fourth Amendment violation argument has merit.

This Court reviews de novo a trial court's decision regarding a motion to suppress evidence. *People v Moorman*, 331 Mich App 481, 484; 952 NW2d 597 (2002). However, we review for clear error a trial court's factual findings in deciding a motion to suppress evidence. *Id*. "A factual finding is clearly erroneous if it leaves the Court with a definite and firm conviction that the trial court made a mistake." *Id*. (quotation marks and citation omitted). Our review is limited to the evidence presented at the motion to suppress hearing, which means that we may not consider the additional evidence presented at trial. *People v Hammerlund*, 504 Mich 442, 450; 939 NW2d 129 (2019); *People v Kaigler*, 368 Mich 281, 288; 118 NW2d 406 (1962).

The United States and Michigan Constitutions protect individuals from unreasonable searches and seizures. *People v Kazmierczak*, 461 Mich 411, 417; 605 NW2d 667 (2000). See also US Const, Am IV; Const 1963, art 1, § 11. When the police conduct a search or seizure without a warrant and the conduct of the police does not fall within one of the exceptions to the warrant requirement, the search or seizure is considered unreasonable. *People v Hellstrom*, 264 Mich App 187, 192; 690 NW2d 293 (2004). One exception to the warrant requirement is the so-called "*Terry* stop," an exception created by the United States Supreme Court in *Terry v Ohio*, 392 US 1, 30-31; 88 S CT 1868; 20 L Ed 2d 889 (1968). *People v Steele*, 292 Mich App 308, 314;

[2] After the prosecution rested its case, Edwards's counsel moved for a directed verdict of acquittal, which in a bench trial is treated as a motion for involuntary dismissal pursuant to MCR 2.504(B)(2). He argued that MCL 750.227(2) provides exemptions for when a person can carry a concealed weapon without a license. According to Edwards's counsel, because defendants had their weapons on them due to their working security at their place of business, MCL 750.227(2) provides an exemption for their gun possession. McCloud's counsel adopted Edwards's argument. The trial court denied the motion.

806 NW2d 753 (2011). A *Terry* stop is a brief investigative detention that "requires specific and articulable facts sufficient to give rise to a reasonable suspicion that the person detained has committed or is committing a crime." *People v Shankle*, 227 Mich App 690, 693; 577 NW2d 471 (1998). When determining the reasonableness of an officer's suspicion, the trial court must look at the totality of the facts and circumstances and consider whether an officer of reasonable precaution would have suspected that criminal activity was afoot. *Steele*, 292 Mich App at 314. Generally, under the exclusionary rule, the evidence that the police obtained from an illegal search is inadmissible in the criminal proceeding. *Hellstrom*, 264 Mich App at 192.

Two seminal decisions from the United States Supreme Court illustrate the limits of the *Terry* stop. In *Sibron v New York*, 392 US 40; 88 S CT 1889; 20 L Ed 2d 917 (1968), a police officer watched the defendant, Nelson Sibron, talk to people whom he knew were narcotics addicts. The police officer told the defendant, "You know what I am after," before the defendant reached into his pocket. *Sibron*, 392 US at 45. At that moment, the officer also placed his hand in the defendant's pocket and found envelopes of heroin. *Id*. The Supreme Court held that the officer's actions did not qualify as a valid *Terry* stop because the "mere act of" the defendant "talking with a number of known narcotics addicts over an eight-hour period no more gives rise to reasonable fear of life or limb on the part of the police officer than it justifies an arrest for committing a crime." *Id*. at 64.

In *Ybarra v Illinois*, 444 US 85, 92-93; 100 S Ct 338; 62 L Ed 2d 238 (1979), a judge issued a warrant for police to search a tavern and a bartender who worked at the tavern for evidence of controlled substances. When executing the warrant, police officers entered the tavern, announced their purpose, and advised those present that they were going to conduct a cursory search for weapons. *Ybarra*, 444 US at 88. The defendant, Ventura Ybarra, a customer in the tavern, was searched and found to possess heroin inside a cigarette pack located in his pants pocket. *Id*. at 88-89. The Supreme Court held that the "frisk of Ybarra was simply not supported by a reasonable belief that he was armed and presently dangerous, a belief which this Court has invariably held must form the predicate to a patdown of a person for weapons." *Id*. at 92-93. When the police entered the tavern, "they neither recognized him as a person with a criminal history nor had any particular reason to believe that he might be inclined to assault them." *Id*. at 93. Additionally, "Ybarra, whose hands were empty, gave no indication of possessing a weapon, made no gestures or other actions indicative of an intent to commit an assault, and acted generally in a manner that was not threatening." *Id*. The Supreme Court also held that "the *Terry* exception does not permit a frisk for weapons on less than reasonable belief or suspicion directed at the person to be frisked, even though that person happens to be on premises where an authorized narcotics search is taking place." *Id*. at 94.

In the present case, Officer Kelsey detained McCloud because McCloud was security. He and the other police officers needed to remove security so decoys could enter the club with their weapons. Officer Kelsey testified at the motion hearing that it was common practice to detain security during undercover operations, but he failed to provide any testimony that indicated he was detaining McCloud because he had a reasonable suspicion that McCloud had committed or was committing any crimes. See *Shankle*, 227 Mich App at 693. At the point that Officer Kelsey grabbed McCloud, he only knew that McCloud was working as security at a place being investigated for selling liquor without a license. Additionally, after Officer Kelsey removed McCloud from the building, he immediately put McCloud against a wall, asked him if he had any

narcotics or weapons on him, which McCloud contended that he did not, and then performed a pat down of his person. Although Officer Kelsey contended that the pat down was for "Officer safety," Officer Kelsey failed to provide any testimony that indicated that McCloud was armed and dangerous. See *Ybarra*, 444 US at 92-93.

Officer Lindsay also failed to provide any testimony indicating that he detained Edwards because he had a reasonable suspicion that Edwards had committed or was committing any crimes. See *Shankle*, 227 Mich App at 693. He testified only that his assignment, made in advance of the execution of the undercover operation, was "to detain security, anyone at the door," that his assignment was common for this type of operation, and that "security is always detained." Additionally, Officer Lindsay failed to provide any testimony that indicated that Edwards had made motions or gestures signifying that he was armed or dangerous at any point. See *Ybarra*, 44 US at 92-93. Officer Lindsay testified at the motion hearing that after he saw Edwards standing in the vestibule, he simply escorted Edwards outside, asked him if he had any weapons on him, and patted him down.

Considering the evidence admitted at the motion to suppress hearing in light of *Sibron* and *Ybarra*, we conclude that the trial court erred by denying McCloud's and Edwards's motions to suppress. Here, as in *Sibron*, the mere act of working security at an afterhours club being investigated for the possibility that it was selling liquor without a license did not provide reasonable suspicion for a *Terry* stop at the time of defendants' seizure and pat down search. See *Sibron*, 392 US at 64. Further, as in *Ybarra*, there was no testimony that either defendant gave any indication that they possessed a weapon or intended to commit an assault. They were simply working at a place being investigated for selling liquor without a license. Moreover, the undercover decoys had not yet attempted to buy alcohol such that the officers could argue that their conduct was associated with an ensuing arrest of involved offenders.[3] The totality of the circumstances at the time of the seizure did not provide reasonable suspicion that criminal activity was afoot. See *Steele*, 292 Mich App at 314. Because the search and seizure of defendants did not meet the requirements of a *Terry* stop and was, therefore, unreasonable, the evidence seized from defendants must be suppressed. See *People v Shabaz*, 424 Mich 42, 65; 378 NW2d 451 (1985); *Hellstrom*, 264 Mich App at 193. There is no indication that the officers would have discovered the weapons but for the illegal search and seizure of defendants. See *Shabaz*, 424 Mich at 65.

[3] With all due respect, we find our dissenting colleague's cases cited in support of his position to be substantively distinguishable from the presenting circumstances. Under our colleague's paradigm, in the name of officer safety a police officer is constitutionally entitled to enter any public establishment without a warrant, be it a social club, a restaurant, an art gallery, or a retail store like Macy's, seize all security employees and remove them from the building, frisk them, disarm them, and then enter the establishment in order to conduct an investigation before even a lick of evidence has been gathered with respect to whether any criminal activity is afoot in that establishment, let alone criminal activity of a violent or dangerous nature. That is simply not the law.

Because the officers lacked the legal right to detain and search defendants at the time of the incident, we reverse the trial court's orders denying the motions to suppress.[4]

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Jane M. Beckering
/s/ Karen M. Fort Hood

[4] Because our resolution of the first issue is dispositive, we need not address McCloud's second issue on appeal.

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No. 352158
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PEOPLE OF THE STATE OF MICHIGAN,

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v

BRUCE CLIFFIN EDWARDS,

Defendant-Appellant.

No. 352280
Wayne Circuit Court
LC No. 19-004033-02-FH

Before: BECKERING, P.J., and FORT HOOD and RIORDAN, JJ.

RIORDAN, J. (*dissenting*).

I respectfully dissent. In my view, the police officers' seizure and subsequent search of defendants was consistent with the Fourth Amendment, and I would affirm the trial court.

"The Fourth Amendment of the United States Constitution and its counterpart in the Michigan Constitution guarantee the right of persons to be secure against unreasonable searches and seizures." *People v Kazmierczak*, 461 Mich 411, 417; 605 NW2d 667 (2000), citing US Const, Am IV and Const 1963, art 1, § 11. "The right to be secure against unreasonable searches and seizures absent a warrant based upon probable cause is subject to several specifically established and well-delineated exceptions." *Id*.

The majority correctly states that "[o]ne exception to the warrant requirement is the so-called '*Terry* stop,' an exception created by the United States Supreme Court in *Terry v Ohio*, 392 US 1, 30-31; 88 S Ct 1868; 20 L Ed 2d 889 (1968)." "Under this doctrine, if a police officer has a reasonable, articulable suspicion to believe a person has committed or is committing a crime given the totality of the circumstances, the officer may briefly stop that person for further investigation." *People v Barbarich*, 291 Mich App 468, 473; 807 NW2d 56 (2011). Further, as the majority implicitly recognizes, *Terry* also created the so-called "*Terry* frisk" exception, under which a police officer is permitted to engage in "a reasonable search for weapons for the protection of the police officer, where he has reason to believe that he is dealing with an armed and dangerous individual, regardless of whether he has probable cause to arrest the individual for a crime." *Terry*, 392 US at 27.

A police officer also is constitutionally allowed to detain an individual in order to safely conduct an investigation without meeting the higher "reasonable suspicion" identified in *Terry*. For example, in *Maryland v Wilson*, 519 US 408; 117 S Ct 882; 137 L Ed 2d 41 (1997), the United States Supreme Court held that a police officer may order a passenger out of a vehicle during a traffic stop for the purposes of officer safety even in the absence of any individualized reasonable suspicion to detain that passenger. See *id*. at 413. And in *Michigan v Summers*, 452 US 692; 101 S Ct 2587; 69 L Ed 2d 340 (1981), the United States Supreme Court held that the police may detain an occupant of a home during the execution of a search warrant because "[t]he risk of harm to both the police and the occupants is minimized if the officers routinely exercise unquestioned command of the situation." *Id*. at 704-705. Here, even though a search warrant was not executed, "the [United States] Supreme Court has recognized [that] a police officer performing his lawful duties may direct and control—to some extent—the movements and location of persons nearby, even persons that the officer may have no reason to suspect of wrongdoing." *Hudson v Hall*, 231 F3d 1289, 1297 (CA 11, 2000).

> [T]he [United States] Supreme Court has recognized limited situations at the scene of police activity in which it may be reasonable for police to detain people not suspected of criminal activity themselves, so long as the additional intrusion on individual liberty is marginal and is outweighed by the governmental interest in conducting legitimate police activities safely and free from interference. [*United States v Howard*, 729 F3d 655, 659 (CA 7, 2013).]

See also *United States v Lewis*, 764 F3d 1298, 1306 (CA 11, 2012) ("[F]or safety reasons, officers may, in some circumstances, briefly detain individuals about whom they have no individualized reasonable suspicion of criminal activity in the course of conducting a valid *Terry* stop as to other related individuals.").

Officer Kelsey testified at the motion hearing that the vice unit which, after receiving complaints about the operation of the establishment, conducted the investigation at issue. As a routine part of this type of operation, the vice unit regularly detains security guards for officer safety. He explained that the specific reason for doing so is that the undercover officers who attempt to purchase alcohol at unlicensed liquor establishments necessarily must possess service weapons when doing so. However, the officer testified, security guards at such establishments do not allow customers to enter while in possession of firearms. The obvious implication of his testimony, in my view, is that it is dangerous for undercover officers to attempt to purchase alcohol

at an unlicensed liquor establishment without the protection of their service weapons. Because the Fourth Amendment permits police officers to briefly detain individuals in the absence of individualized reasonable suspicion to safely conduct an investigation, *Howard*, 729 F3d at 659, I would conclude that the officers in this case were permitted to briefly detain defendants so the undercover officers could safely conduct their investigation into the activities of the unlicensed liquor establishment.

Having concluded that a brief detention of defendants is consistent with the dictates of the Fourth Amendment, I would further conclude that the *Terry* frisks also were consistent with the Fourth Amendment as there was reasonable suspicion for the police officers to believe that defendants were "armed and dangerous." See *Terry*, 392 US at 27. It strikes me as elementary that many security guards in the City of Detroit—whether at a store, a bank, or an unlicensed liquor establishment—may be armed with some type of weapon.[1] It also strikes me as elementary that an unlicensed liquor establishment might be the site of heightened criminal activity or potential danger. Indeed, Officer Kelsey testified at the hearing that such investigations are typically performed relatively early in the night "[b]efore a crowd gathers, because we are, like, short handed. And before it gets out of control, we go in early[.]" An armed security guard at such an establishment that has a known propensity to become "out of control" may very well pose a danger to investigating officers. These facts, taken together, established reasonable suspicion that defendants possibly were armed and could pose a danger, thus justifying the *Terry* frisks.[2]

Under the majority's decision, "the mere act of working security at an afterhours club being investigated for the possibility that it was selling liquor without a license" does not justify the type of detentions that occurred here. But if police officers cannot detain security guards in cases such as here, there seem to be only two realistic outcomes—the officers will be required to place themselves in greater danger by entering the unlicensed liquor establishment without service weapons, or the officers simply will be unable to conduct a proper investigation by attempting to purchase alcohol once inside such an establishment. In my judgment, the Fourth Amendment does not compel such a dilemma.[3]

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[1] Of course, *Terry* only requires that the individual be "armed," not specifically armed with a firearm. As such, security guards often may carry other weapons such as pepper spray or stun guns.

[2] I acknowledge that Michigan courts follow a peculiar rule under which an appellate court's review of a trial court's decision on a motion to suppress is limited to the evidence introduced at the motion hearing. See *People v Hammerlund*, 504 Mich 442, 450; 939 NW2d 129 (2019). However, as the prosecution asserts on appeal "for purposes of preservation," this rule is seemingly contrary to the general rule applied by the federal courts. See, e.g., *United States v Newsome*, 475 F3d 1221, 1224 (CA 11, 2007). If this Court was permitted to consider the trial testimony, it is worth noting that the police officers testified that security guards at such establishments are known to be armed.

[3] Contrary to the majority's suggestion, this case is not about whether the police officers possessed a warrant to approach the security guards or enter the public establishment. They had the right to

To summarize, the police officers lawfully detained defendants for officer safety in the absence of individualized reasonable suspicion, and having done so, the officers possessed reasonable suspicion to conduct *Terry* frisks. Therefore, no constitutional violation occurred.[4] I would affirm.[5]

/s/ Michael J. Riordan

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do so in the absence of a warrant. See *Maryland v Macon*, 472 US 463, 469; 105 S Ct 2778; 86 L Ed 2d 370 (1985) ("[R]espondent did not have any reasonable expectation of privacy in areas of the store where the public was invited to enter and to transact business."). Rather, this case is about whether the police officers could engage in routine precautionary conduct to investigate an establishment that was the subject of several complaints of unlawful conduct and was liable to become "out of control."

[4] The majority concludes that the evidence at issue must be suppressed under *Sibron v New York*, 392 US 40; 88 S Ct 1889; 20 L Ed 2d 917 (1968), and *Ybarra v Illinois*, 444 US 85; 100 S Ct 338; 62 L Ed 2d 238 (1979). I respectfully disagree. *Sibron* stands for the proposition that a *Terry* frisk is not warranted when the police officer's only basis for believing that an individual is armed and dangerous is his or her "mere act of talking with a number of known narcotics addicts over an eight-hour period[.]" *Sibron*, 392 US at 64. *Ybarra* stands for the proposition that a *Terry* frisk is not warranted "on less than reasonable belief or suspicion directed at the person to be frisked, even though that person happens to be on premises where an authorized narcotics search is taking place." *Ybarra*, 444 US at 94. Here, the record shows that the police officers possessed far more reason to believe that defendants were armed and dangerous than the officers possessed in *Sibron* and *Ybarra*.

[5] In affirming, I would also reject defendant McCloud's second argument concerning the applicability of the exemption set forth in MCL 750.227(2).