



IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS  
DIVISION OF ST. CROIX

PEOPLE OF THE VIRGIN ISLANDS,	)	
	)	<b>CRIMINAL NO. SX-10-CR-430</b>
Plaintiff,	)	
	)	INTERFERING WITH OFFICER
vs.	)	DISCHARGING DUTY; OPERATING A
	)	VEHICLE w/o DRIVER'S LIC.; FAILURE
MOSIS C. ROBLES,	)	TO OBEY OFFICER SIGNAL;
	)	EXCEEDING POSTED SPEED LIMIT
Defendant.	)	

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**BRADY, J. A., Judge**

**MEMORANDUM OPINION AND ORDER**

(Filed: December 9, 2010)

THIS MATTER came on for Hearing on September 17, 2010, on Defendant's "Motion To Reconsider Probable Cause Finding And Motion For Preliminary Hearing," pursuant to Super. Ct. R. 320 and 322(b)(1). For the reasons set forth below, the probable cause finding entered at the Advice of Rights Hearing on July 29, 2010 will be set aside.

**FACTS AND PROCEDURAL BACKGROUND**

The Defendant, while driving to her mother's house on the evening of July 27, 2010, was stopped, arrested and charged with Interfering With An Officer Discharging His Duty; Operating a Vehicle Without A Driver's License; Failure to Obey Officer Signal; and Exceeding Posted Speed Limit, after not stopping at a traffic check-point on Midland Road near the entrance to Estate Glynn. During the traffic stop and arrest, Defendant's arm was broken, requiring immediate hospitalization and emergency surgery. Two (2) days later, the Defendant was advised of her rights at the Governor Juan F. Luis Hospital by a Magistrate who found probable cause in support of the charges based solely on the arresting officer's affidavit. An Assistant Attorney General as well as a Public Defender were present for this event, but took no active part in the proceeding.

On September 9, 2010 Defendant's retained counsel filed a motion requesting that a probable cause hearing be conducted by a trial judge because Defendant's Counsel, Attorney Trudy Fenster, was not in the Territory when the advisement of rights was conducted in Defendant's hospital room.<sup>1</sup>

The Transcript of the Hearing by this Court reflects that two (2) items were marked as exhibits by the Defense, but none were formally moved into evidence. Since these items are both relevant and material to this Court's decision, they will be deemed as admitted:

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<sup>1</sup> On August 16, 2010 defense counsel filed a Response to the People's Motion For a Bench Trial. Attached to that Motion were three (3) Affidavits from Defendant, her mother and a friend of Defendant. Since none of these individuals testified at the hearing none of these sworn statements will be considered by the Court in its probable cause determination.

- Defense Exhibit 1: Probable Cause Fact Sheet by Officer Elsworth Jones; and**
- Defense Exhibit 2: Photo of Defendant’s arm.**

The People’s witness in chief was the arresting Officer Elsworth Jones (PO Jones) who related that he, along with Police Officer Dave Looby (PO Looby) and Detective Leon Cruz (Det. Cruz) were conducting a traffic initiative on the Midland Road in the vicinity of Estate Glynn. Police Officer Jones testified that the police vehicle that he used had a radar unit which clocked the vehicle driven by Defendant at 42-45 miles per hour in a 30-mile per hour zone as she approached the checkpoint. He continued that he and PO Looby went to the double yellow line separating the two (2) lanes of traffic and motioned for the driver to stop as the car approached them. While the vehicle slowed down it did not stop, so PO Jones got into his Police vehicle and followed Defendant and he used his flashing lights and siren to alert her to pull over after she turned into Estate Glynn, whereupon Defendant stopped her vehicle. According to PO Jones: “When I proceeded to the car and made contact with her, she began acting boisterous, belligerent, and started going off. And ask me why I stopped her. I explained that she was speeding.” Probable Cause Hr’g Tr. 8-12, Sep. 17, 2010.

Police Officer Jones also stated that the Defendant denied that she was speeding and that he asked her two (2) or three (3) times for her driver’s license and insurance. Moreover, the Officer testified that he told her that if she did not provide the documents that he would put her under arrest and “took out my handcuffs.” *Id.* at 13.

On Cross-examination, Jones stated in response to questions by defense counsel if there were stop signs, cones or any other *indicia* of a traffic initiative like a roadblock and Jones replied "no." *Id.* at 15-16. Further into the cross-examination, PO Jones volunteered that he tried some "verbal judo" in speaking to her.

Q: What is verbal judo? I don't know that term.

A: Verbal judo is a term you use in law enforcement when you get irate or aggressive person to try to get them to comply by reversing the roles and try to manipulate her to see - what you are trying to get, to calm her down. That the term verbal judo. *Id.* at 27.

Upon asking the Officer if he called for backup, he replied that the radio in his vehicle was not working at that time. *Id.* at 28.

Q: She had not been arrested at that time when you told her to follow you; had she?

A: No.

Q: So, you just simply told her you are given her a lawful order to follow you? Is that right?

A: No, I ask her - - When I ask her to follow me, I again gave her another order; finally, when she refused to follow me, I said I'm going to give you a lawful order, can I have your documents; if you don't provide your documents, I will place you under arrest.

Q: But when you initially told her to follow you, she had not been under arrest; had she?

A: No, neither when I was asking her prior.

Q: Sir. You then told her that she was under arrest, at that point; is that right?

A: Yes.

Q: Then you said you put your handcuffs on her left wrist. Is that right?

A: Yes.

Q: So, you had handcuffed her while she was seated in her car?

A: Yes.

*Id.* at 28-29.

#### Defense Testimony

Rochelle Brown (Brown), a Corrections Officer, who resides in Estate Glynn in the vicinity of Defendant's mother, Laurene Robles, testified for the defense. On direct examination Brown testified that she was next door at her cousin's house on the night of July 27, 2010 and that her attention was attracted by a scream from the yard in front of her cousin's house.

Q: Were you home on the evening of July 27, 2010?

A: I was at my cousin's house. We all live in one yard. My house is at the back. I was at her house, which is at the front.

Q: Did you observe anything extraordinary that evening?

A: We was in the house folding clothes. And I heard a scream. So I went and watch through the window. And I say, 'oh, gosh, Jesse, come and see this, come and see this.' We were looking through the window, and I saw Mosis. It look like she was coming from the yard where her car was parked.

Q: When you say "Mosis," you are referring to the defendant seated here?

A: Yeah. And the Officer Jones was standing up close to her car. And it look like she was walking back from the yard.

Q: One second. This is Officer Jones that's seated in the courtroom?

A: Yeah.

Q: What else did you observe?

A: My cousin, he went to her while she was walking back up. He grabbed her and slammed her against the car. I say 'Jesse, let's go outside so he could see people watching.' We went outside with the kids and stand up outside to watch. *Id.* at 78-79.

As Brown continued her statement she said that when she initially saw Defendant she was not handcuffed until PO Jones applied the handcuffs while he held her against her car and then took her to his vehicle and drove off. Shortly thereafter other officers came to the Defendant's car and were writing and she assumed that they were "going to call a wrecker." *Id.* at 81-86. She further stated that Defendant was screaming as PO Jones was driving away from the scene. She also went to Laurene Robles' residence and brought her back to her daughter's car. Brown testified that the key was still in the ignition; "her two slippers were on the driver's side. She had other stuff, a lot of stuff. Her bag was on the driver's seat. The door was still open." *Id.* at 87.

The Court inquired in regard to the handcuffing episode:

The Court: Did you hear any conversation between them?

The Witness: If I hear . . .

The Court: Any conversation . . .

The Witness: Any words exchanged between them.

The Court: What?

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The Witness: I heard Mosis screaming 'Ah yo' break me hand; you break my hand.' Officer Jones say 'I didn't break your hand. I didn't break your hand.' When he was walking toward the car, you see this camera here, it record everything. She was like, 'Ah yo break my hand; you could loosen the handcuff or something because it hurting; you break my hand.' And he say, 'You going to jail. You going to jail.' She keep screaming, 'You break my hand. You break my hand.' He say, 'you going to jail.' Put her in the car. She deh - - (Gesturing.) - - scream loud when he was turning the car to go. While he was driving off, I still hear her screaming inside the car.

*Id.* at 93-95.

At a side bar conference Assistant Attorney General Saafir indicated that because the Defendant did in fact have a driver's license she would dismiss the charge of Operating a Vehicle Without a Driver's Licence – and she did so. *Id.* at 98-102.

**LEGAL STANDARD**

Pursuant to Super. Ct. Rule 320(c) & (3) a judge of the Superior Court may reconsider any pretrial matter assigned to a magistrate, *sua sponte* or on motion by a party. The trial judge assigned to the case shall review the issues timely objected to and set aside any part of the order that is clearly erroneous or contrary to law. The trial judge shall enter an order granting or denying the motion for reconsideration and stating the reasons therefore. Superior Court Rule 123 governs the conduct of preliminary proceedings, otherwise known as Initial Appearance Hearings, or more commonly, Advice of Rights Hearings, and provides that the court shall examine the complaint, arresting officer, and or any other witnesses under oath. If the court finds probable cause for the arrest and charge(s),



the Defendant shall be held to answer the complaint. If the court determines that there is no probable cause the charge(s) shall be dismissed and the accused discharged. Further, the Virgin Islands Supreme Court has held that Rule 123 permits Superior Court Judges broad flexibility in selecting the types of evidence used to make a probable cause decision. *In Re People of the Virgin Islands, Petitioner, concerning Hon. Leon A. Kendall, Judge of the Superior Court of the Virgin Islands, Nominal Respondent, and Elbe Brathwaite, Respondent*, 49 V.I. 297, 307 (V.I. 2007).

#### ANALYSIS

One of the early cases decided by the newly-created Virgin Islands Supreme Court dealt with the issue of probable cause findings pursuant to Rule 123 of the Rules of the Superior Court. The case came before the Supreme Court on a Petition for Mandamus essentially challenging a decision of the Superior Court which held that Judges of the Superior Court were empowered by its Court Rules to make probable cause determinations even when the prosecution was initiated by the Attorney General upon the filing of a complaint. Judge Kendall rejected the argument made by the People that it was "inappropriate for [the] Court to engage in an independent probable cause inquiry once the Attorney General has determined that probable cause existed." *People v. Brathwaite*, 48 V.I. 207, 208-211 (Super. Ct. 2007).

In denying the Government's request for a Writ of Mandamus, the Supreme Court cited the U.S. Supreme Court's *Gerstein v. Pugh*, 420 U.S. 103, 95 S. Ct. 854 (1975). Moreover, the local Supreme Court issued this *caveat*:

And, contrary to the arguments of the Government, it is inconsequential that the prosecution was initiated by a complaint and summons. Superior Court Rule 123(b)(1) plainly does not limit initial appearance probable cause determinations to defendants arrested without a warrant. Instead, the Rule requires a probable cause determination for all defendants brought before the court for an initial appearance. *In Re People of the Virgin Islands, Hon. Leon A. Kendall, Judge of the Superior Court of the Virgin Islands, Nominal Respondent, and Elbe Brathwaite, Respondent*, 49 V.I. 297, 307 (V.I. 2007). (Emphasis added.)

In 1972, Municipal Court Presiding Judge Cyril Michael held that a defendant charged with resisting, delaying, and obstructing an officer in the performance of his duty was entitled to use force to resist any illegal arrest since the use of force by an officer attempting an illegal arrest was itself illegal. *Government of the Virgin Islands v. Fleming*, 10 V.I. 129 (1972).<sup>2</sup>

The reconsideration of probable cause in this matter is largely dependent on the credibility of the witnesses and the evidence adduced by their testimony. As previously noted, the People moved to dismiss the charge of Failure to Provide a Driver's License which motion was granted. The remaining charges will be discussed and decided seriatim.

**Speeding:**

The arresting Officer declared that the radar device in the Police vehicle displayed a speed of 42-45 miles per hour that Defendant's vehicle was traveling at as it approached the traffic checkpoint. When questioned by the Court as to whether or not he "memorialized" the read-out, Officer Jones admitted that the system was equipped with a "locking system that you lock the speed in." Probable Cause Hr'g Tr. 60, Sep. 17, 2010.

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<sup>2</sup> In 1965 the Legislature created the first unified local court system by abolishing the three (3) Police Courts and replacing it with the Municipal Court sitting in each Division (St. Thomas/St. John and St. Croix).

THE COURT: So I'm presuming that you never memorialized it.

THE WITNESS: No, because she never gave me a chance to.

Moreover, no witness for the People testified as to the reliability of the radar device in this case and when, or if, it had been tested prior to this incident for accuracy. *Id.* at 72-73. It would have been appropriate for PO Jones to have locked in the recorded speed before he pursued the Defendant intending to charge her with speeding. Needless to say, the burden of proof is on the People to prove each element of their case using the best evidence. In this instance the Court finds that the arresting Officer failed to record and preserve the only objective, scientifically reliable evidence of speeding. Consequently, the Court finds no probable cause for Defendant's arrest on the charge of speeding.

**Failure to Obey Officer Signal:**

This charge relates to the Defendant driving past the traffic check point. But the evidence as a whole does not support this charge. As developed on PO Jones' cross-examination by defense counsel, he stated that none of the usual *indicia* of a traffic check point were utilized in this traffic initiative. There were no "stop signs, cones or roadblocks" which would have alerted the Defendant that she was supposed to stop her vehicle, notwithstanding the officers' gesticulations. It is clear to this Court that when Officer Jones followed her in his Police vehicle and used the siren and flashing lights, the Defendant quickly responded by stopping her vehicle. Accordingly, this Court does not find that the Defendant was deliberately fleeing from the traffic stop, as asserted by PO Jones.

**Interfering With An Officer Discharging His Duty:**

This Count is, of course, the most serious since it is punishable by a term of one (1) year imprisonment. Since the Defendant chose not to testify at the Hearing there is no direct evidence contradicting PO Jones' insistence that the Defendant not only refused to produce her license and insurance, but "began acting boisterous, belligerent and started going off." There are three (3) principal reasons the Court discredits his sworn testimony in this regard.

First, as Corrections Officer Brown testified, the items that the Defendant had in her car were still there after she was taken away by Officer Jones. It takes no stretch of imagination to presume that her driver's license and proof of insurance would have been among those personal items. Indeed, PO Jones in response to a question by the Court said that Defendant's mother showed him her daughter's "driver's license and the information" which he had asked the Defendant to produce. *Id.* at 63. Yet the arresting officer adamantly postulated that Defendant refused to produce them even after he threatened to arrest her and showed her his pair of handcuffs.

The second reason is that the testimony of Corrections Officer Brown completely contradicts PO Jones' account of the arrest. He insisted that he placed one of the cuffs on her left wrist while she was seated in her car and implied that her broken arm resulted from her tugging that arm away from him. He further stated that at that point "she stepped out [of her car] on her own accordance (*sic*) and didn't give any problems from that point." *Id.* at 46-47. Brown's sworn recollection was that the Defendant was walking toward PO Jones who then accosted the Defendant, slammed her against her car, handcuffed both her hands behind her back and shoved her into his Police car.

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Further, Defense Exhibit 2 compels the conclusion that Defendant's broken arm was a serious injury insofar as it shows that the required emergency surgery involved the insertion of at least thirty (30) staples. Moreover, Police Officer Jones' testimony concerning the arrest and handcuffing of Defendant was both evasive and defensive. While this Court makes no finding of responsibility for Defendant's injury – principally because the defense did not present her as a witness – based on the totality of the evidence adduced at the Hearing and inferences based thereon the Court finds that there was no probable cause to arrest the Defendant on any of the charges.

Another portion of PO Jones' testimony indicates that he has a mistaken belief as to his legitimate authority as a law enforcement officer. His misconception is evident from his answer to defense counsel's question that is reproduced at pages 4-5 of this Opinion and Order, namely that the Defendant had not as yet been placed under arrest when PO Jones told her to follow him in her car. After his "no" answer, however, he equivocated by adding that he then gave her "a lawful order [to produce] your documents" or he would arrest her. The reality is that speeding is a traffic violation, not a crime, therefore, in and of itself, it does not empower a lawful arrest nor does it permit an officer to lawfully order a motorist to follow the officer because, in this Court's judgment, such a directive, would be tantamount to an arrest.

At a time when the opinions of the United States Attorney, as the primary prosecutor and legal counsel for the Territory, guided the decisions of governmental entities, U.S. Attorney Leon P. Miller in 1957 opined that minor traffic offenses (including speeding) were not criminal offenses. In so doing he distinguished minor "traffic offenses within the authority of the Violations Clerk of the Municipal Court from those cognizable in the District Court, accidents resulting in property

damage or personal injury, operating a vehicle while under the influence of intoxicating liquor, or a narcotic or habit producing drug." 3 V.I.OpA.G. 277, 278 (December 1957). Currently, the Violations Clerk of the Superior Court still handles all minor traffic offenses (including speeding) by receiving payment of the prescribed fines. All other traffic offenses are routed through the Criminal Division to be tried by either a Magistrate or a Judge.

Finally, Chapter 43 of Title 20 V.I.C. deals with Regulation of Traffic and its first section, 491, specifically authorizes and empowers the Police Commissioner to set all traffic and parking regulations. Needless to say, the Police Commissioner has no authority to create criminal offenses, since that power is vested only in the Legislature of the Virgin Islands. Accordingly, based on existing law, and the evidence adduced at the Hearing, the Court finds that Police Officer Jones gave Defendant an illicit order and effectively arrested her for the minor traffic violation of speeding.

**CONCLUSION**

Consequently, for the reasons herein set forth, it is hereby

ORDERED that the July 29, 2010 finding of probable cause at the Advisement of Rights Hearing is hereby SET ASIDE. It is further

ORDERED that the Complaint herein is DISMISSED WITH PREJUDICE and Defendant is discharged, bail, if any, and all conditions of release are exonerated.

DATED: December 9, 2010.

ATTEST:  
Venetia H. Velazquez, Esq.  
Clerk of the Court

By: Joselyn Maranda  
Court Clerk Supervisor  
12/10/10

Julio A. Brady  
Julio A. Brady, Judge  
CERTIFIED TO BE A TRUE COPY  
This 14th day of Dec. 2010  
VENETIA H. VELAZQUEZ, ESQ.  
CLERK OF THE COURT  
By: Andrea D. King Court Clerk II

By \_\_\_\_\_ Clerk of Court  
CERTIFIED TO BE TRUE AND CORRECT  
CLERK OF COURT  
VENUE OF \_\_\_\_\_  
COUNTY OF \_\_\_\_\_ STATE OF \_\_\_\_\_  
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