IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS

DIVISION OF ST. THOMAS AND ST. JOHN

THE PEOPLE OF THE VIRGIN ISLANDS **Plaintiff**)	CASE NO. ST-09-CR-0000456
)	
Vs.)	ACTION FOR: 14 V.I.C. 2253(A)
)	
JAHMARI ISBORN ERSKINE **Defendant**)	

NOTICE OF ENTRY OF MEMORANDUM OPINION AND ORDER

TO: ROBERT A. LEYCOCK, ESQ., ASSISTANT TERRITORIAL PUBLIC DEFENDER
RENEE GUMBS CARTY, ESQ., ASSISTANT ATTORNEY GENERAL
ORDER BOOK
LIBRARIAN
JUDGES & MAGISTRATES, SUPERIOR COURT
IT DIVISION

Please take notice that on February 17, 2010 a(n) MEMORANDUM OPINION AND ORDER dated February 16, 2010 was entered by the Clerk in the above-entitled matter.

Dated: February 17, 2010

Venetia H. Velazquez, Esq.
CLERK OF THE SUPERIOR COURT

Diane Matthew-Turnbull

DIANE MATTHEW-TURNBULL
COURT CLERK II

IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS

DIVISION OF ST. THOMAS AND ST. JOHN

PEOPLE OF THE VIRGIN ISLANDS,	)	
	)	**CASE NO. ST-09-CR-456**
Plaintiff,	)	
	)	
vs.	)	
	)	
JAHMARI ERSKINE,	)	
	)	
Defendant.	)	
	)	
	)	

MEMORANDUM OPINION

This matter is before the Court on Defendant's Motion to Suppress filed on November 9, 2009 ("the Motion"). On November 28, 2009, the People filed its Opposition to Defendant's Motion ("the Opposition"). A suppression hearing was held on December 2, 2009, and the parties were directed to brief two (2) issues: (1) whether an employee of a ferry company who does not exit the vessel has entered the border; and (2) if Defendant was subject to a border search, did the customs agent have reasonable suspicion to search Defendant's bag. Defendant filed his Supplemental Motion to Suppress on January 13, 2010, and the People filed its Supplemental Motion in Opposition to Defendant's Motion on January 11, 2010.

FACTS AND PROCEDURAL HISTORY

Defendant is employed as a crew member on the Caribe Tide ferry ("the Ferry"). On September 7, 2009, Defendant traveled on the Ferry from St. John, USVI, to the Urman Frederick Terminal ("the Terminal") in St. Thomas, USVI. At the Terminal, Customs and Border Patrol agents ("the agents") checked the immigration status of all

passengers disembarking the Ferry. Defendant and another employee remained on the Ferry.

The agents then inspected the Ferry, and during the inspection, Officer Eduardo Milan observed what appeared to him to be two (2) abandoned bags hanging at the stern of the Ferry. Officer Milan picked up the two (2) bags and inquired about the ownership of the bags, and stated that he noticed that one of the bags was "heavier than expected.[1]" Defendant then informed Officer Milan that he was the owner of the heavier bag. After handing the bag to Defendant, Officer Milan testified he asked Defendant to open the backpack. Defendant opened the backpack and removed items from the bag and dropped papers on the deck. Defendant then handed the bag to Officer Milan who squeezed the bag and felt something hard in the bag. Officer Milan asked Defendant if there was a gun in the backpack, and Defendant answered that he had a toy gun in the backpack that he had found on the Ferry. Officer Milan handed the bag to Officer Echaberhea who stated that he saw an object through a slit of the bag between the inner lining and outer portion of the bag. Officer Echaberhea then tore the lining of the bag further and discovered the object was a Raven .25 caliber handgun. The Officers asked Defendant if he had a license to possess a firearm, and Defendant stated that he did not have a license.

STANDARD OF REVIEW

The Fourth Amendment[2] guarantees citizens protection against "unreasonable searches and seizures." Generally, searches "must be conducted pursuant to a warrant based on probable cause." *United States v. Caminos*, 770 F.2d 361, 363 (3d Cir. 1985)

[1] Aubain Aff, pg. 1, line 3.
[2] Made applicable to the Virgin Islands pursuant to section 3 of the Revised Organic Act of 1954, 48 U.S.C. § 1561.

(citing *Coolidge v. New Hampshire,* 403 U.S. 443 (1971)). Searches performed in the absence of a warrant are presumed to be unreasonable unless they fall within one of a few narrowly defined exceptions to the warrant requirement. *Katz v. United States*, 389 U.S. 347 (1967). However, border searches are recognized as an exception to the warrant requirement "where the searched person or item is shown to have crossed the border, where there has been no opportunity for the object or person to have materially changed since the crossing, and where the search is conducted at the earliest practicable time and place." *Camino, supra* at 363. (citing *United States v. Ramsey*, 431 U.S. 606, 619 (1977)). It has been held that, "the island of St. Thomas constitutes a border[3] within the meaning of the border search exception to the warrant requirement." *David v. Gov't of the V.I.*, D.C. Crim.App. No. 2003-123, 2009 WL 1872678, at *4 (D.V.I. June 25, 2009). However, the border exception is limited to warrantless searches used "to regulate the collection of duties and to prevent the introduction of contraband into this country." *Bradley v. United States, et al.*, 299 F.3d 197, 202 (3d Cir. 2002).

DISCUSSION

I. Whether Defendant Entered the Border

Employees who are working in a border area are not immune from border searches, but they may only be subjected to a border search when they are leaving the area of the border. *United States v. Beck*, 483 F.2d 203, 209 (3d Cir. 1974); see also

[3] At the December 2, 2009, Suppression Hearing, the Court concluded that, for the purpose of a border search analysis, Urman Frederick Terminal was a border or a functional equivalent of a border. Upon reflection, however, it would appear that, for persons traveling wholly within the Virgin Islands, their movements between islands on local ferries are no more "crossing a border" than are those of commuters on a ferry traveling between Staten Island and other portions of New York, tourists traveling by excursion boat between San Francisco and Alcatraz, and travelers making hundreds of similar purely intrastate trips in other locales that do not subject them to border searches.

United States v. Glazou, 402 F.2d 8, 13 (2d Cir. 1968) (Employees who work in a border area may be subject to a border search when leaving the area). Otherwise, employees could constantly be subjected to searches throughout the day during the normal course of their work. In *Beck*, a defendant watchman was observed by customs officials carrying a large bag leaving the pier by vehicle. Customs officials stopped the defendant and found stolen items, and the Third Circuit held that the customs officials had reasonable suspicion to conduct a stop and seizure. *Id.* The Third Circuit reasoned that the search was valid because the defendant was observed leaving the border area and displayed suspicious behavior. *Id.* On the other hand, in this matter, Officer Milan stated at the suppression hearing that Defendant was on the Ferry when he observed the bag in question and that there was no indication that Defendant was leaving the Ferry or intended to stay in St. Thomas. Consequently, the Court finds that Defendant was not subject to a valid border search in the absence of reasonable suspicion.

II. Reasonable Suspicion to Search the Bag

Assuming *arguendo* Defendant was subject to a border search, reasonable suspicion was required to search and tear Defendant's backpack. See *Glazou, supra,* at 13-14 (holding "...when an individual has direct contact with a border area, or an individual's movements are reasonably related to the border area, that individual is a member of the class of persons that a customs officer may, if his suspicions are aroused, stop and search while the individual is still in the border area). (citations omitted). Officer Milan indicated at the suppression hearing that he had already completed his inspection regarding the passengers before he observed the bags. He also testified that

during his routine border search he did not check Defendant's immigration status because Defendant was employed by the Ferry and he assumed he was a citizen. However, Officer Milan proceeded to feel the exterior of Defendant's backpack after finding it hanging on the bulkhead and determining that it belonged to Defendant. Thus, at the time of the search, Officer Milan knew the bag was not abandoned as he had originally believed. In *Bond v. United States,* 529 U.S. 334, 339 (2000), the Supreme Court determined that, during a routine border search on a bus, an officer's physical manipulation of a passenger's bag was an unreasonable search and seizure violating the Fourth Amendment. The court reasoned that tactile observation is more invasive than visual observation and that the passenger's expectation of privacy that his bag would be free from manipulation was reasonable. *Id.* 338-39. Similarly, in this matter, Officer Milan squeezed the bag, which was clearly a manipulation of Defendant's personal property that could not in any way be intended to uncover an immigration or customs violation, since the bag was not being removed from the border area.

Furthermore, in *United States v. Ellis*, 330 F.3d 677, 680-81 (5th Cir. 2003), after completing an immigration check at a routine border search, an officer began squeezing and sniffing a passenger's baggage, and the court held that "[t]he delay to manipulate the baggage impermissibly extended the seizure because it was not supported by reasonable suspicion." *Id.*; see also *Caminos*, *supra* at 365 ("...the 'reasonable suspicion' showing is justified where the later search is unexpected, or entails a great intrusion on expectations of privacy.") In the case at bar, once Officer Milan was aware that the

backpack was not abandoned and in fact belonged to Defendant, he needed reasonable suspicion[4] to search Defendant's belongings.

In determining whether Officer Milan had reasonable suspicion, the Court must consider the totality of the circumstances. See *Terry v. Ohio*, 392 U.S. 1, 27 (1968). An Officer's mere hunch does not create reasonable suspicion. *Id.* Officer Milan further testified that when he picked up the "abandoned bag" and noticed it was "heavier than expected," he thought it gave him reasonable suspicion to search the bag under the border exception. He also indicates that his suspicion was heightened when Defendant threw papers from the bag on the deck after being told to open the bag. Simply concluding that a backpack is "heavier than expected" (whatever that entirely subjective standard means) does not create reasonable suspicion of a crime or border violation. Defendant worked on the Ferry, and it is not unreasonable for an individual to bring a heavy bag to work. Also Defendant's action in dropping papers from inside his bag onto the deck did not rise to the level of reasonable suspicion, since Defendant was ordered to empty the contents of his bag, with no other readily available, convenient place to put the contents. Therefore, it seems reasonable that in order to empty his bag, he would need to place items on the deck or elsewhere on the vessel. These two factors did not provide Officer Milan with reasonable suspicion to search the bag.

In *United States v. Baker*, 221 F.3d 438, 445 (3d Cir. 2000), a parolee was stopped by parole officers as being in violation of his parole for driving without a license

[4] In *United States v. Whitted*, 541 F.2d 480, 485-86 (3d Cir. 2008), the Court determined that routine border searches do not require reasonable suspicion. However, Defendant was subject to a non-routine border search because Officer Milan testified that he assumed Defendant was an American citizen and Defendant did not leave the Ferry. Thus, the presence of reasonable suspicion was required. *Id.*

and failing to produce proof of ownership of the car he was driving. The parole officers then searched the trunk of the vehicle and discovered evidence indicating that the vehicle was stolen. The Third Circuit held that "mere suspicion that a car might be stolen" did not rise to the level of reasonable suspicion sufficient to justify the search of the trunk. In the case at bar, Officer Milan had even fewer grounds upon which to base the search than did the parole officers in *Baker*. Moreover, as a parolee, Baker's liberty interest was subject to a far greater restriction than that of Defendant, an ordinary citizen. As a result, the Court finds that Officer Milan did not have reasonable suspicion to search Defendant's backpack.

Finally, the People argue that Defendant consented to the initial search of his backpack and that, once that initial search was completed, the more invasive search of tearing the lining of the bag was supported by reasonable suspicion. The Court disagrees. The People are attempting to bootstrap their unreasonable border search with an assertion of consent. Valid consent requires that "a reasonable person would feel free to decline the requests or otherwise terminate the encounter." *U.S. v. Drayton*, 536 U.S. 194, 195 (2002). After Defendant identified the bag as his, Officer Milan brought the backpack to Defendant and asked him to open the bag.[5] A reasonable person in Defendant's shoes would not feel free to decline because Defendant had witnessed Officer Milan and the other officers routinely searching Ferry passengers for the past week. It is reasonable to conclude that Defendant would feel he had no choice but to comply with Officer Milan's request, at least in part because he was at work and had to remain on the Ferry. The

[5] Aubain Aff, pg. 1, line 4.

People also argued that Defendant's alleged initial consent provided them with reasonable suspicion to manipulate the backpack and tear the lining. However, Officer Milan had neither Defendant's voluntarily and knowing consent nor reasonable suspicion for a further search of the bag. If the prosecution relies on consent as an exception to the warrant requirement, it has the burden of establishing the voluntariness of the consent. *Bumper v. North Carolina*, 412 U.S. 218 (1973). The People have not met this burden.

CONCLUSION

Officer Milan and the other Officers violated Defendant's Fourth Amendment right of "protection from unreasonable search and seizure." Evidence gathered as a result of the unconstitutional search of Defendant may not be admitted into evidence under the exclusionary rule. See *United States v. Zimmerman,* 277 F.3d 426, 436 (3d Cir. 2002). As a result, the firearm seized from the bag will be suppressed. A separate Order shall follow.

Dated: February 16, 2010

HON. MICHAEL C. DUNSTON
JUDGE OF THE SUPERIOR COURT
OF THE VIRGIN ISLANDS

Attest:
Date: February_____, 2010
Venetia H. Velasquez, Esq.
Court Clerk Supervisor___/____/____

by:
Rosalie Griffith
Court Clerk Supervisor 2/17/10

CERTIFIED A TRUE COPY
Date: 2/17/10
Venetia H. Velazquez, Esq.
Clerk of the Court
By: Diane M. Turnbull
Court Clerk

IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS

DIVISION OF ST. THOMAS AND ST. JOHN

PEOPLE OF THE VIRGIN ISLANDS,	)	
	)	**CASE NO. ST-09-CR-456**
Plaintiff,	)	
	)	
vs.	)	
	)	
JAHMARI ERSKINE,	)	
	)	
Defendant.	)	
	)	
	)	

ORDER

The Court having rendered a Memorandum Opinion this date, in accordance with that opinion it is

ORDERED that Defendant's Motion to Suppress is **GRANTED**; and it is

ORDERED that the firearm seized from Defendant's bag is suppressed and it may not be admitted in evidence; and it is

ORDERED that copies of this Order be directed to counsel of record.

Dated: February 16, 2010

HON. MICHAEL C. DUNSTON
JUDGE OF THE SUPERIOR COURT
OF THE VIRGIN ISLANDS

Attest:
Date: February_____, 2010
Venetia H. Velasquez, Esq.
Court Clerk Supervisor____/____/____

by:
Rosalie Griffith
Court Clerk Supervisor 2/17/10

CERTIFIED A TRUE COPY
Date: 2/17/10
Venetia H. Velazquez, Esq.
Clerk of the Court
By: Diane M. Turnbull
Court Clerk