

IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS

DIVISION OF ST. THOMAS AND ST. JOHN

THE PEOPLE OF THE VIRGIN ISLANDS **Plaintiff**)
)
 Vs.)
)
JERMAINE PERCEL **Defendant**)

CASE NO. ST-09-CR-0000253

ACTION FOR: 14 V.I.C. 2253(A)

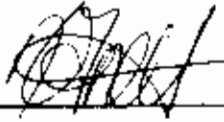
**NOTICE OF ENTRY OF
MEMORANDUM
OPINION AND ORDER**

TO: ORDER BOOK
LOUIS D. FLORI, ESQ.
LIBRARIAN
JULIE SMITH-TODMAN, ESQ.
JUDGES AND MAGISTRATES OF THE SUPERIOR COURT
IT DIVISION
BRENDA SCALES, ESQ.

Please take notice that on December 04, 2009 a(n) MEMORANDUM
OPINION AND ORDER dated December 01, 2009 was entered by the Clerk in the
above-entitled matter.

Dated: December 04, 2009

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


KHALILA FRETT
COURT CLERK II

**IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN**

<p>PEOPLE OF THE VIRGIN ISLANDS,))) Plaintiff,))) v.))) JAMAHL BENJAMIN,)) (D.O.B.: 08-10-79)))) Defendant.))</p> <hr/> <p>PEOPLE OF THE VIRGIN ISLANDS,))) Plaintiff,))) v.))) JERMAINE PERCEL,)) (D.O.B.: 11-21-81)))) Defendant.))</p> <hr/>	<p>CRIMINAL NO. ST-09-CR-252</p> <p>V.I. CODE ANN. tit. 14, § 2253(a)</p> <p>CRIMINAL NO. ST-09-CR-253</p> <p>V.I. CODE ANN. tit. 14, § 2253(a)</p>
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MEMORANDUM OPINION AND ORDER

THIS MATTER is before the Court on Defendants' Motions to Suppress, filed with the Court on September 22, 2009.

The Court held a hearing on the Motions on October 8, 2009. After the Court heard testimony on the Motions, the hearing was continued until October 22, 2009, at which time the parties argued the Motions to the Court. The People were represented by Brenda Scales, Esq., Assistant Attorney General. Defendant Jamahl Benjamin was present at both hearings and represented by Julie Todman, Esq., Territorial Public Defender, and Defendant Jermaine Percel was present and represented by Louis Flori, Esq., of the law offices of Dudley Clark & Chan, LLP. The Court reserved decision on the Motions to Suppress at the October 22, 2009 hearing.

The Court allowed the parties an opportunity to complete their arguments to the Court in the form of written briefs. However, none of the parties filed a post-suppression brief. Considering the Motions and the testimony given at the hearings, the Court will grant Defendants' Motions to Suppress.

FACTS

Defendants are charged with violating V.I. CODE ANN. tit. 14, § 2253(a) (1996) (unauthorized possession of a firearm). This charge stems from an arrest made on the evening of May 25, 2009, by Officer Tracy Richardson ("Richardson") of the Virgin Islands Police Department.

On May 25, 2009, at about 1:53 a.m., Richardson responded to a central dispatch call for an armed robbery that allegedly occurred in the area of Garden Street, St. Thomas, Virgin Islands. At the time, he was accompanied on patrol by Officer Roselyn Pinney ("Pinney"). Richardson and Pinney arrived at the scene of the Garden Street incident around 1:59 a.m. and remained there for about ten minutes interviewing witnesses.

At the scene of the robbery, Richardson spoke with a female bartender who had been robbed during the incident. At the suppression hearing, Richardson stated that the bartender was the only witness with whom he spoke. Richardson testified that he was told that the suspects ran West on Crystal Gade after robbing the bar, and "got into a red four-door vehicle that appears to look like a Volkswagon Jetta. This is what one of the victims told me." (Tr. of Suppression Hrg. 21, Oct. 8, 2009.) The victim was unable to give any description of the suspects' physical appearance other than that they were men, that they were black and that they were wearing all black.

There is conflicting information regarding Pinney's investigation at the scene. At one point in her testimony, Pinney stated that she did not speak with any witnesses at the bar. (Tr. of Suppression Hrg. 68, Oct. 8, 2009.) At another point, however, she stated that a male victim said that the suspects fled in a red Volkswagen. (Tr. of Suppression Hrg. 61, Oct. 8, 2009.)

After leaving the scene of the robbery, Richardson and Pinney began an investigative patrol to locate the suspects. Richardson testified that he saw a "red Volkswagen Jetta" while heading east on Alton Adams Drive. He testified that he saw the red, four-door Jetta near One Stop gas station, and waited for it to leave the gas station so that he could pull it over in a safe area. At the hearing, Richardson testified that he saw the Jetta with "two black males" in the vehicle. Later during the hearing, he stated that when he first saw the Jetta, one of the men was outside the vehicle.

The red car pulled out and left the One Stop area and Richardson pulled it over near the Race Track gas station. Upon ordering the driver, Jermaine Percel ("Percel"), out of the vehicle, Officer Richardson proceeded to frisk him and felt the butt of a handgun in the right waistband of Percel's pants. According to Richardson, Percel was wearing a black-hooded sweater and black pants.

Richardson then ordered the passenger, Jamahl Benjamin ("Benjamin"), out of the vehicle. Benjamin was wearing a black-hooded sweater and black pants. Before interviewing him, Richardson frisked him, finding a weapon in Benjamin's right back pocket. Richardson then asked both men if the weapons belonged to them. Benjamin said that the weapon found on his person was his weapon, but Percel said the one found in his pants was not his weapon.

Richardson initially indicated that he did not ask about gun licenses at the time of the frisk, but rather only asked this question after he had taken the Defendants to Zone A Command

and read them their rights. Later during the same hearing, however, Richardson stated that he questioned them about their licenses or lack thereof at the scene of the arrest and before advising them of their rights.

The female victim of the robbery came to Zone A Command to identify the suspects. She stated that Benjamin and Percel were not the men who robbed her. The men were charged with possession of unlicensed firearms.

At the hearing, the Defendants called Junior Gaston, one of the victims of the robbery, to testify. Mr. Gaston was allegedly the "[H]ispanic male" referred to in Richardson's Offense Report. Although Pinney stated that he told her about the red Jetta, Mr. Gaston testified that he never saw the suspects enter a vehicle, and that he never told the officers that the suspects did so.

Richardson and Pinney were not the only officers to respond to the scene of the robbery. Another patrol car, with Officer Chereese Thomas and Officer Liston Stout, responded, and Officer Thomas also drafted an Offense Report relating to the robbery. Officer Thomas's Offense Report, admitted into evidence at the suppression hearing, did not mention any vehicle.

At the suppression hearing, the Defendants introduced into evidence the audio recordings of the police dispatch calls relative to the robbery on Garden Street. At certain points in the recordings, it is clear that the person who took the dispatch calls made a number of references to the suspects fleeing on foot. At no point during the calls did anyone mention a car of any kind, let alone a red car appearing to be a Volkswagen Jetta.

DISCUSSION

The Fourth Amendment to the U.S. Constitution guarantees security in persons, papers and effects, against unreasonable searches and seizures.¹ U.S. CONST. amend. IV. Evidence obtained as the result of an unreasonable search or seizure can be suppressed. *See Wong Sun v. United States*, 371 U.S. 471, 485-86 (1963) (applying the exclusionary rule to suppress evidence that resulted from illegal police conduct). Searches performed in the absence of a warrant are presumed unreasonable. *Katz v. United States*, 389 U.S. 347, 357 (1967). The Supreme Court has held that stopping an automobile and detaining its occupants constitutes a seizure within the meaning of the Fourth Amendment, even though the stop may be limited and the resulting detention brief. *Delaware v. Prouse*, 440 U.S. 648, 661 (1979).

The Supreme Court has long recognized that law enforcement officers may conduct brief stops for investigative purposes in the absence of probable cause for an arrest. It is lawful to conduct a brief, investigatory stop if the officer has a reasonable, articulable suspicion that criminal activity is afoot. *Terry v. Ohio*, 392 U.S. 1, 21 (1968). Reasonable suspicion can be formed by the observation of purely legal activity. *Id.* at 22. The reasonable suspicion inquiry is

¹ The protections of the Fourth Amendment of the United States Constitution apply to the Virgin Islands by virtue of Section 3 of the Revised Organic Act of 1954 as amended; 48 U.S.C. § 1561, as amended by Pub. L. No. 90-496, § 11, 82 Stat. 841 (Aug. 23, 1968). That section provides in pertinent part that:

The right to be secure against unreasonable searches and seizures shall not be violated.

No warrant for arrest or search shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.

The United States Constitution, Amendment Four, provides:

The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.

See also United States v. Charles, 290 F. Supp. 2d 610, 614 n.1 (D.V.I. 1999).

determined in reference to the facts and circumstances within the knowledge of the arresting officer at the time of the stop. *Devenpeck v. Alford*, 543 U.S. 146, 152 (2004). If a law enforcement officer stops an individual based on reasonable suspicion that criminal activity is afoot, and the officer reasonably believes that the individual may be armed and dangerous, the officer may conduct a brief, limited pat-down of the individual's outer clothing to discover any weapons that could be used to assault the officer. *Terry*, 392 U.S. at 30.

Generally, the burden is on the party moving for suppression to establish evidence that the information or articles sought to be suppressed were illegally obtained. *Rawlings v. Kentucky*, 448 U.S. 98 (1980); *Government v. Morton*, 15 V.I. 418, 422 (Terr. Ct. 1978). Once it is established, however, that the search or seizure took place without a warrant, the burden shifts to the People to demonstrate by clear and convincing evidence that the activity fell within one of the exceptions to the Fourth Amendment's warrant requirement. *Morton*, 15 V.I. at 422-23.

In this case, the Court must determine whether Richardson had reasonable suspicion sufficient to justify his seizure of Defendants' vehicle and their persons on May 25, 2009. The People have argued that the fact that the officers were told that the robbery suspects fled in a red Volkswagen Jetta provided reasonable suspicion for the stop of the Defendants' red Volkswagen Jetta. However, the People did not provide sufficient evidence that Richardson and Pinney were ever told about a red Jetta. The officers' own testimony about how they supposedly learned this information is in conflict: Richardson said he learned it from the female bartender while Pinney says she heard the male victim mention the car. The Offense Reports indicate that there were at least three victim-eyewitnesses. However, the only victim-eyewitness to testify at the suppression hearing adamantly denied ever seeing a red Jetta or telling the police that he had seen one. None of the other responding officers made note of any vehicle being reported at the

scene. It appears from the dispatch calls that no one called in to dispatch suggesting that there had been a red car or requesting that patrol vehicles search for a red car.

Considering the foregoing, the Court finds that the People have not satisfied the Court that the officers had been told by the victims that the suspects fled in a red vehicle. Therefore, the Court cannot conclude that there is clear and convincing evidence supporting the seizure of the weapons in this case.

In reaching this conclusion, the Court considered whether the People had presented any evidence during the course of the suppression hearing independent of the sighting of the red Volkswagen Jetta which would have formed a basis for reasonable suspicion justifying the stop and frisk of the Defendants. The only other reason that may have justified the stop and frisk of the Defendants and their red vehicle was that the Defendants were dressed all in black, and the victims at the scene of the robbery had stated that their assailants were dressed all in black. Upon consideration, though, of this possible ground justifying the search in this case, the Court rejects it for the reasons stated below.

Notably, the officers did not articulate on the stand that the reason they suspected the Defendants was because of their attire. Instead, they focused only on the description of the vehicle in which the Defendants were driving. Moreover, it does not appear that the officers could have known that both Defendants were dressed all in black until the Defendants were ordered out of their car. At one point, Richardson testified that when he first saw the vehicle, it was leaving the gas station parking lot. (Tr. of Suppression Hrg. 22, Oct. 8, 2009.) At that time, he could have only seen that the vehicle was occupied by two black men wearing black shirts, rather than dressed all in black, as half of their bodies were obscured by the car in which they were sitting. At another point in his testimony, Richardson stated that the first time he saw the

vehicle at the gas station, one Defendant was outside the vehicle. (Tr. of Suppression Hrg. 39, Oct. 8, 2009.) Even if the Court were to credit this latter testimony rather than the former, Richardson would only have been able to see one of the Defendants dressed all in black, and therefore would not have seen that there were two men dressed all in black until he stopped the vehicle and ordered both men out.

Furthermore, there was no evidence presented that dressing all in black in St. Thomas in the late hours of the evening would support reasonable suspicion that these were the robbery suspects. Indeed, the only evidence presented on the issue of whether this is sufficiently unusual to support reasonable suspicion was a proffer from defense counsel that it is not uncommon for young men in St. Thomas to be out in the late night dressed all in black. There was no other evidence regarding this issue presented at the hearing. Because the wearing of all black by an individual is not unusual in St. Thomas, and since the officers could not have seen both men's full attire at the time their vehicle was stopped, and since this was not advanced as the reason for the stop in the first place, the Court finds that this coincidence would not have supported the stop and frisk for weapons in this case.

CONCLUSION

Based on the evidence introduced at the suppression hearing, therefore, the Court finds that the People have not carried their burden of proof at the hearing to show that the evidence was not seized in violation of the Fourth Amendment and the Revised Organic Act. Specifically, since the facts indicate that the officers' statements that they were told there was a red Volkswagen used as the get-away vehicle in the alleged robbery appears to be false, the Court does not find clear and convincing evidence to justify the stop of the Defendants and seizure of the firearms in this case. Any statements of the Defendants will also have to be suppressed as

the fruits of illegal searches. *Wong Sun v. United States*, 371 U.S. 471, 485-86 (1963). The Motions to Suppress will, therefore, be granted and the firearms and statements will be suppressed.

Accordingly, and for the reasons expressed herein, it is hereby

ORDERED that the Defendants' Motions to Suppress are hereby **GRANTED**; and it is further

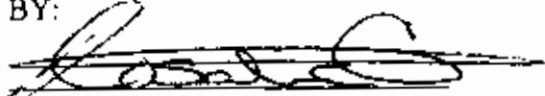
ORDERED that the People are prohibited from introducing at trial any evidence of the firearms seized on the evening of May 25, 2009, or the Defendants' statements made in connection with those firearms; and it is further

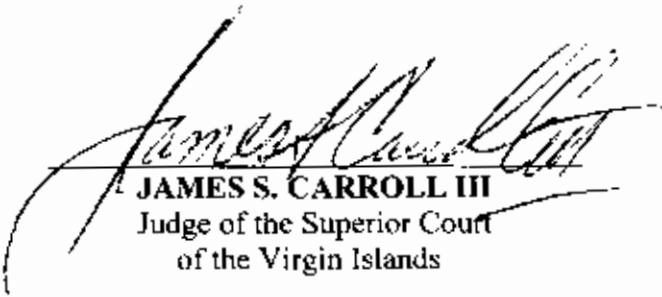
ORDERED that copies of this Memorandum Opinion and Order be directed to Brenda Scales, Esq., Assistant Attorney General; Julie Smith Todman, Esq., counsel for Defendant Benjamin; and Louis D. Flori, counsel for Defendant Percel.


DATED: December 1, 2009

ATTEST:
VENETIA H. VELAZQUEZ, ESQ.
Clerk of the Court

BY:


ROSALIE GRIFFITH
Court Clerk Supervisor 12/1/09


JAMES S. CARROLL III
Judge of the Superior Court
of the Virgin Islands

CERTIFIED A TRUE COPY
Date: 12/1/09
Venetia H. Velazquez, Esq.
Clerk of the Court
By: 
Court Clerk