IN THE TERRITORIAL COURT OF THE VIRGIN ISLANDS

DIVISION OF ST. CROIX AT CHRISTIANSTED

GOVERNMENT OF THE VIRGIN ISLANDS, Plaintiff,	)	CRIMINAL NO. 543/1982
v.	)	
GARY ALBERT KALLER, Defendant.	)	

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PETERSEN, Judge

MEMORANDUM OPINION
July 6 , 1983

The defendant herein has been charged with eleven (11) counts of Possession of Unlicensed Firearms in violation of 14 V.I.C. Section 2253(a) and now seeks to have the Search Warrant quashed and to have all physical evidence allegedly seized from his residence suppressed.

Upon review of the evidence adduced on the defendant's Motion to Suppress this Court concludes that the defendant's Motion to Suppress the evidence must be granted and the Search Warrant must be quashed for the reasons herein stated.

FACTS

On December 1, 1982 Police Officers Velasquez and Ovesen went to defendant's residence located at 106 Cane Bay, Frederiksted, St. Croix to await the arrival of Officer Peter Anderson with a search warrant for the defendant's residence. The defendant, an experienced and intelligent police auxiliary, was not at home but arrived shortly thereafter. A pat down search of the defendant was conducted by the officers in a public area adjacent to the defendant's home. The defendant was ordered to turn over a registered firearm located in his pick-up truck. The defendant was not advised of his constitutional rights.

Upon being informed by the police officers of the purpose for their visit, the defendant became visibly upset. He was instructed that he could not enter his home nor could he leave the area until officer Peter Anderson obtained and executed a search warrant for his premises. The defendant requested permission to contact his lawyer. This request was denied. He then inquired as to what he should do as he feared going to jail. The defendant was told by Officer Valasquez that he could either wait for the search warrant to be executed or he could cooperate by giving them what he had now. After further colloquy the defendant invited the two officers into his home and took them to the area where a cache of unlicensed firearms was found.

DISCUSSION

A. Search Warrant

The defendant contends that the search warrant is fatally defective in that it is not supported by probable cause. It is well settled that a constitutionally valid search warrant may issue, even though the affidavit upon which it is based fails to disclose the name of the affiant's informant, if the affidavit provides sufficient information to enable a judge to evaluate the reliability or trustworthiness of the informant and relates enough of the underlying circumstance from which the affiant concluded that his informant was credible and the information received was reliable. Spinelli v. United States 393 U.S. 410, 895 Ct. 584 (1969). United States v. Harris, 403 U.S. 573, 91 S.Ct. 2075 (1971). It should be noted that the affidavit of Officer Anderson recited that he had received information from a "regularly employed citizen who in the past has frequently provided information on criminal cases." This bare allegation in the affidavit, however, did not apprise the judge of an adequate basis for the affiant's characterization that the information was reliable or credible. Additionally, the affidavit failed to relate how the informant obtained information that the defendant had unlicensed firearms. So far as is disclosed by the affidavit, the informant may have overheard some other person or persons repeating a rumor to that effect. In Spinelli, supra, the Supreme Court analyzed its ruling in Aquilar v. Texas, 378 U.S. 108, 84 S.Ct. 1509 (1964), pointing out that the Aquilar affidavit was considered inadequate for two reasons:

> First the application failed to set forth the underlying circumstances necessary to enable the magistrate independently to judge the validity of the informant's conclusion that the narcotics were where he said they were. Second, the affiant - officers did not attempt to support their claim that their informant was 'credible' or his information 'reliable'.

Spinelli, supra, 393 U.S. at 413, 89 S.Ct. at 587.

In Spinelli, it was pointed out that the affidavit was more ample than in Aquilar since it not only contained a report from an anonymous informant but also contained a report of an independent FBI investigator purportedly corroborating the informant's tip. The Supreme Court concluded that the corroborative information, considered with the informant's tip, was not sufficient to provide the basis for a finding of probable cause.

In this case the affidavit contains a bare assertion that an anonymous informant told of having information that the firearms were located in a particular place but did not explain how that information was obtained. The statement of the informant is, in this court's opinion, insufficient to generate the basis for a finding of probable cause for issuing a search warrant.

Additionally, it is well established that "time is the very essence in search warrant cases." Thus the failure to assert when the alleged facts occurred is fatally defective. See Annot. 100 A.L.R.2d 525. In Rosencranz v. United States, 356 F.2d 310 (1966), the court held that an affidavit was inadequate where it was

> "a combination of undated conclusory information from an anonymous source and an undated general allegation of personal observation by the affiant, with no other reasonably specific clues to the time of their happening. Id. at 318.

It is undisputed that this affidavit contains no statement as to times or dates, except the date of notarization. Therefore, the judge had no indication from the application as to when the information was received nor when the facts as stated by the informant were observed. The only indication of time is the use of the past tense by the informant. The court is thus compelled to conclude that the affidavit did not justify the issuance of the warrant.

B. Consent to Search

The Government alternatively argues that the defendant consented to the search, while the defendant has vigorously maintained that his consent to the search and seizure was neither freely nor voluntarily given.

It is undisputed that without a warrant to search the defendant's premises and in the absence of probable cause and exigent circumstances, the validity of the search depended on the defendant's consent. It is well established that where the validity of a search rests on consent, the Government has the burden of proving that the necessary consent was obtained and that it was freely and voluntarily given. This burden is not satisfied, however, by showing a mere submission to a claim of lawful authority. See Bumper v. North Carolina, 391 U.S. 543 (1968). Florida v. Foyer, 51 L.W. 4293 (1983). This burden is particularly heavy when the defendant is in custody as it has been recognized that nonresistance to orders or suggestions of police is not infrequent in such a situation.

Thus, true consent, free of fear or pressure, is not so readily ascertainable. In the instant case it would be fruitless to contend that the defendant was not in custody at the time of the purported consent. 1/ The police officers' testimony revealed that they had specifically prohibited the defendant from leaving the area, entering his residence or contacting his attorney. Moreover, he had been frisked and a registered weapon located in his truck was seized. As the Supreme Court stated in United States v. Mendenhall, 446 U.S. 544, 100 S.Ct. 1870, 1877 (1980):

> "We conclude that a person has been seized within the meaning of the Forth Amendment only if, in view of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave."

Thus, on the facts of this case a "seizure" of the defendant had occurred.

A preliminary inquiry centers around whether such seizure was reasonable. "The key principle of the Fourth Amendment is reasonableness - the balancing of interests." Michigan v. Summers, 452 U.S. 692, 700 (1981). The

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1/ Albeit, the fact of custody does not alone preclude the giving of a voluntary consent, but it should require a more strict scrutiny.

reasonableness of the seizure turns on the facts and circumstances. The Supreme Court has enunciated three factors that bear on the issue of reasonableness:

(1) the public interest served by the seizure

(2) the nature and scope of the intrusion

(3) the objective facts upon which the law enforcement officers relied in light of their knowledge and expertise. United States v. Mendenhall, 446 U.S. 544, 562 (1980); Brown v. Texas, 443 U.S. 50-51 (1979). Delaware v. Prouse 440 U.S. 648, 654-655 (1979).

This court can take judicial notice of the overwhelming public interest and concern in the licensing and control of firearms. Thus, the court has no difficulty in finding that the first factor has been met. As for the nature and scope of the intrusion, the court finds that the defendant was detained for an unspecified length of time [2/]; that there were no threats made to the defendant; that there was no display of weapons by the police officers and that no fraud nor deceit was used. Moreover, the two officers were aware that the defendant was an auxiliary police officer and it

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[2/] It was incumbent upon the Government to show with considerably more specificity whether the detention was of a limited or extended duration. Under the circumstances herein, however, the court need not dwell on this point.

could be inferred that he might be armed. Thus, it was not unreasonable for the officers to frisk him and remove any firearms from his immediate grasp.

This court also finds that a reasonable suspicion of criminal activity was relayed to the officers on the scene by Police Officer Anderson. The evidence clearly established that the two officers on the scene relied exclusively on the information that Officer Anderson was in the process of securing a search warrant for a search of the defendant's premises for unlicensed firearms. Thus, this court finds that the facts available to the officers at the moment warranted them to believe that their action was appropriate.

This court concludes that the purported consent to search was not preceded by an unreasonable seizure. Thus the defendant's argument that the purported consent to the subsequent search was rendered invalid by an illegal detention must fail.

There remains to be considered whether the defendant's consent to the search was invalid for any other reason.

The consent to search is a question of fact to be determined from all of the circumstances and an effective consent may be given without an intentional relinquishment of a known right to counsel. <u>Schneckloth</u> v. <u>Bustamonte</u>, 412 U.S.

243 (1973). In this case, the defendant specifically demanded to be allowed to consult his attorney before giving consent to search. Having done so, the effectiveness of his consent would thereafter be dependent upon his retraction of the request and waiver of that right. It is incumbent upon the Government to show that the defendant by his own considered choice elected to permit the search without first consulting with his lawyer. An analogy may be made to that of the situation wherein questioning continues after a demand for counsel has been made. Thus in Edwards v. Arizona 451 U.S. 477, 484-85 (1981) the Supreme Court said:

> We now hold that when an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police initiated custodial interrogation even if he has been advised of his rights. We further hold that an accused . . . having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication exchanges or conversations with the police.

The events herein occurred in a continuous fashion.

Thus, there was no showing by the Government of a substantial break in time and communication from the moment of the defendant's demand to consult his attorney to the giving of his consent to the search. The Government failed to show that the defendant made his own independent and considered decision to proceed with the search before he was able to make any contact with his attorney or in the alternative that he initiated further dialogue prior to the giving of consent. See Edwards, supra. After a careful consideration of the defendant's conduct, demeanor and requests and the officers' responses thereto, it is difficult for this court to conclude that the evidence positively proved that the defendant's consent was unequivocal and intelligently given. Viewing the totality of the circumstances, Schneckloth v. Bustamonte, 412 U.S. 218, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973), this court finds that the government has not met its burden of proving that the defendant's consent was freely and voluntarily given. See United States v. Watson, 423 U.S. 411, 96 S.Ct. 820, 46 L.Ed.2d 598 (1975); Bumper v. North Carolina, 391, U.S. 543, 885. Ct. 1788, 20 L.Ed.2d 797 (1968); United States v. Smith 543 F.2d 1141 (5th Cir. 1976) cert. denied, 429 U.S. 1110, 97 St.Ct. 1147, 51, L.Ed.2d 564 (1977).

Eileen R. Petersen

EILEEN R. PETERSEN
Judge