

FOR OFFICIAL PUBLICATION

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

PEOPLE OF THE VIRGIN ISLANDS,	)	
Plaintiff,	)	
	)	CASE NO. SX-16-CR-001
v.	)	
	)	
ABDUL ALAND PEMBERTON,	)	
Defendant.	)	
	)	

Cite as: 2019 VI Super 118

Appearances:

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MEMORANDUM OPINION

MOLLOY, Judge

¶1 **THIS MATTER** comes before the Court on Defendant's Motion to Suppress filed on June 14, 2016. The People of the Virgin Islands (the "People") filed an opposition on August 5, 2016. The Court held a suppression hearing on September 23, 2016. For the reasons stated below, the Court will deny the motion.

I. FACTUAL AND PROCEDURAL BACKGROUND

¶2 On the evening of December 31, 2015, officers of the Virgin Island Police Department ("VIPD") and officers of the Virgin Islands National Guard were conducting a crime-reduction initiative called "Operation Build Back" in the area of Frederiksted, St. Croix. "Operation Build Back" was a crime reduction initiative focused on reducing the amount of violent crime in and around Frederiksted. Between 10:45 and 11:00 p.m. that night, VIPD Officers Orlando Benitez ("Benitez")

and Terrance Parris (“Parris”) were on patrol in an unmarked vehicle on King Street, near the Governor’s parade review stand. While on King Street, they observed that several individuals were sitting in a low-lit area which was well-known to law enforcement officers for illegal drug transactions and use during Christmas and Carnival Season. Both officers testified that they observed one of the individuals, later identified as Abdul Pemberton (“Pemberton”), making and holding what Benitez suspected was a marijuana cigarette. When Parris used a flashlight to illuminate the area, Pemberton quickly dropped the marijuana cigarette in his lap.

¶3 As the officers approached, Pemberton continued to conceal the marijuana cigarette. Benitez testified that Parris, and a military police officer with the Virgin Islands National Guard, walked to where Pemberton was seated. On arrival, Benitez identified and confiscated the suspected marijuana and conducted a brief pat down for officer safety at which time Benitez felt the butt of a gun in the waistband of Pemberton’s jeans. Benitez testified that, in accordance with police procedure, he yelled out “gun” to alert his partners of the fact that a gun was found on one of the individuals. Benitez asked Pemberton if he had a license to carry the gun. Pemberton replied that he did not. After Benitez confiscated the Smith & Wesson .38 caliber revolver which had five live rounds of ammunition in its cylinder, Benitez then placed Pemberton in handcuffs and immediately transported Pemberton to the police station.

¶4 While being transported to the police station, Pemberton spontaneously stated several times that he carried the gun for his own protection. After arriving at the precinct, Pemberton was more thoroughly searched and police found the following: (1) a camouflage “gravity” knife in his right front pants pocket; (2) three live .38 caliber rounds of ammunition in a rolled-up blue stocking cap inside the right pant leg of his jeans; (3) a small amount of suspected marijuana in a clear plastic

vial in his right front pants pocket; and (4) a small amount of suspected marijuana in a plastic bag in a shirt pocket. Officer Karen Stout, of the Firearms Bureau, confirmed that Pemberton did not have a license to possess a gun. Pemberton was informed of his rights and placed under arrest, processed, booked and transported to the Bureau of Corrections.

¶5 On January 19, 2016, the People filed an information charging Pemberton with the following offenses: unauthorized possession of a firearm, in violation of 14 V.I.C. § 2253(a); unauthorized possession of ammunition, in violation of 14 V.I.C. § 2256(a); failure to report firearms obtained outside or brought into the Virgin Islands, in violation of 23 V.I.C. § 470(a); and possession of a deadly weapon, in violation of 14 V.I.C. § 2251(a)(1). Pemberton filed a motion to suppress evidence of the items discovered.

II. LEGAL STANDARD

¶6 The Fourth Amendment protects against unreasonable searches and seizures. *Simmonds v. People*, 53 V.I. 549, 555 (2010) (citing *United States v. Karo*, 468 U.S. 705, 714 (1984)); U.S. CONST. amend. IV.¹ Generally, for a seizure to be reasonable under the Fourth Amendment, it must be executed pursuant to a search warrant based on probable cause. See *Nicholas v. People*, 56 V.I. 718, 739 (2012) (quoting Revised Organic Act § 3 (“No warrant for arrest or search shall issue, but upon probable cause[.]”). Warrantless searches, therefore, are per se unreasonable absent a few “well-delineated exceptions.” *Brown v. People*, 56 V.I. 207, 217 (2012) (quoting *Katz v. United States*, 389 U.S. 347, 356-57 (1967)).

¶7 “Reasonableness is an objective inquiry measured by examining the totality of the

¹ “The Fourth Amendment to the U.S. Constitution [applies] to the U.S. Virgin Islands pursuant to section 3 of the Revised Organic Act of 1954.” *People v. Berkley*, No. SX-15-CR-383, SX-15-CR-384, 2019 VI LEXIS 57, *7 (quoting *People v. Turnbull*, 61 V.I. 46, 51 (Super Ct. 2014) (remaining citation omitted)).

circumstances surrounding the search and the nature of the search itself.” *Prentice v. People*, 64 V.I. 79, 89 (Super. Ct. 2016) (citing *United States v. Montoya de Hernandez*, 473 U.S. 531, 537 (1985)). If the People fail to satisfy this burden, the Court must suppress the evidence and exclude it from trial under the “fruit of the poisonous tree” doctrine. *Castillo v. People*, 59 V.I. 240, 255-56 (2013) (citing *Simmonds*, 53 V.I. at 561).

III. DISCUSSION

¶8 Pemberton raises two arguments as to why the Court should suppress the evidence discovered in this case. First, Pemberton argues that the officers lacked reasonable suspicion to conduct the investigatory stop because the possession of one ounce or less of marijuana has been decriminalized in the Virgin Islands. Second, Pemberton argues that the officers lacked specific, articulable, objective evidence of criminal activity. The People counter that the penalty for possession of an ounce or less of marijuana is now tantamount to a traffic offense, with a fine and forfeiture of contraband, and that the officers possessed reasonable suspicion to stop Pemberton. Specifically, the People argue that observations by an officer with knowledge and experience identifying marijuana, who observes suspicious activity in an area known for drug activity, creates a reasonable suspicion to conduct a *Terry* stop. Finally, the People argue that when contraband is in plain view, reasonable suspicion is not required to engage a citizen on a public street.

¶9 Because Pemberton was seized and searched without a warrant, the People must show that the investigative stop and all subsequent events fit under an exception to the warrant requirement. *See Simmonds*, 53 V.I. at 574; *see also Prentice*, 64 V.I. at 90.² An applicable exception “is the ‘*Terry*’

² Once a defendant demonstrates that a search or seizure was unreasonable or “when conducted without a valid warrant,” the People bear the burden of showing that the search was reasonable. *Simmonds*, 53 V.I. 549 at 574; *see also Prentice*, 64 V.I. at 89.

stop” or investigatory stop pursuant to *Terry v. Ohio*, 392 U.S. 1 (1968). *Gumbs v. People*, 64 V.I. 491, 508 (2016); *see also Prentice*, 64 V.I. at 90.

¶10 Under *Terry*, a search or seizure is lawful where the “Government’s interest in preventing crimes outweighs . . . the intrusion on a person’s liberty interest.” *Gov’t of the V.I. v. David*, 45 V.I. 100, 107 (Terr. Ct. 2002) (citing *Terry*, 392 U.S. at 1). Brief investigative stops are also valid when based on particularized objective facts, “in light of the officer’s experience,” an officer has reasonable suspicion that “criminal activity is afoot.” *Blyden v. People*, 53 V.I. 637, 648 (2010) (quoting *Terry*, 392 U.S. at 27, 30); *see also People v. Heath*, 63 V.I. 80, 87-90 (Super. Ct. 2015). Reasonable suspicion “is a less demanding standard than probable cause[.]” *People v. Samuel*, 46 V.I. 177, 184 (Super. Ct. 2005)(citing *Illinois v. Wardlow*, 528 U.S. 119, 123 (2000)). To justify the stop, however, the officer must “articulate something more than an ‘inchoate or unparticularized suspicion or hunch.’” *People v. Cannergeiter*, 65 V.I. 114, 122 (Super. Ct. 2016) (quoting *United States v. Sokolow*, 490 U.S. 1, 7 (1989)).

A. The Fourth Amendment permits a brief investigatory stop where officers suspect open and public use of marijuana, a Schedule I controlled substance.

¶11 Pemberton argues that after the Virgin Islands Legislature decriminalized the possession of one ounce or less of marijuana, it removed it as the basis for an investigatory *Terry* stop. Meanwhile, the People counter that the new penalty for possession of an ounce or less of marijuana is tantamount to a traffic offense, with forfeiture of the contraband and a fine, which, if unpaid, becomes a misdemeanor offense with possible jail time. *See* 19 V.I.C. § 607(a).

¶12 A threshold issue in this case is whether, in light of the decriminalization of the possession of one ounce or less of marijuana in this territory, law enforcement officers may conduct an investigatory *Terry* stop of an individual based solely on the observation of that individual making

and handling a marijuana cigarette. Since the modification of the penalties for possession of marijuana, many courts have considered whether the detection of marijuana by a trained law enforcement officer still creates probable cause to stop and search a person.

¶13 This reasoning is echoed in the Virgin Islands Supreme Court's decision in *People v. Looby*, 68 V.I. 683, 689-99 (2018). In *Looby*, the Supreme Court concluded "we agree with the Superior Court that because possession of marijuana remains unlawful in this Territory, officers may establish reasonable suspicion to conduct a *Terry* stop if the officer relied upon his or her experience and training to detect the presence of that contraband." *Id.* (collecting cases).

¶14 This Court also analyzed the effect of decriminalization of marijuana in great detail in *People v. Cannergeiter*, 65 V.I. at 125 (collecting cases). After reviewing cases from New York, Massachusetts, Maryland, Oregon, Colorado, New Mexico and Rhode Island, this Court concluded that the decriminalization of small amounts of marijuana does not alter its status as contraband. *Id.* at 127. This Court reasoned as follows:

[T]he Legislature did not alter marijuana's status as a Schedule I controlled substance under 19 V.I.C. § 595. As such, marijuana is contraband and is still illegal to possess in the Virgin Islands. *See, e.g., Commonwealth v. Cruz*, 459 Mass. 459, 473, 945 N.E.2d 899 (2011) ("[b]ecause marijuana remains unlawful to possess, any amount of marijuana is considered contraband."); *State v. Cabrera*, 2016 R.I. Super. LEXIS 85, *9 (R.I. Super. Ct. July 21, 2016) ("The Decriminalization Statute ... does not remove marijuana's contraband status as it does not deschedule marijuana as a controlled substance ...").

Neither the Fourth Amendment nor Act No. 7700 requires law enforcement officers to turn a blind eye to the suspected presence of an illegal substance in a moving vehicle. Act No. 7700 explicitly provides that marijuana, as contraband, is subject to forfeiture and that "all civil penalties ... may be assessed by the appropriate court." 19 V.I.C. § 607(a). This language expressly permits law enforcement officers, in enforcing the statute, to confiscate the prohibited contraband (marijuana), issue citations, and keep the appropriate records to ensure that the fines are paid in a timely fashion. *See* 19 V.I.C. § 607a(b)(1) (providing that possession of one ounce or less of marijuana is a civil offense punishable by a fine of \$100 and the marijuana "may be subject to forfeiture").

Id.

¶15 Consequently, this Court concluded that decriminalization of the possession of a small amount of marijuana by the Virgin Islands legislature did not alter its status as a “Schedule I controlled substance under 19 V.I.C. § 595.” *See id.* at 124. Additionally, this Court held that marijuana remains a contraband substance and the detection of the odor of which may still form the valid basis for a traffic stop—a moving violation and civil offense subject to forfeiture. *See id.* at 128 (citation omitted).

¶16 As discussed above, although possession of a small amount has been reduced to a civil infraction, the Supreme Court has reiterated that the public use of it continues to be illegal in the Virgin Islands. *See Looby*, 68 V.I. at 698. Pemberton argues that the observation of possession of marijuana cannot support an investigative stop. However, the Fourth Amendment does not prevent traffic stops aimed at investigating non-criminal, non-traffic civil infractions. *See Cannergeiter*, 65 V.I. at 123 (citing *Delaware v. Prouse*, 440 U.S. 648, 663 (1979)). “Just as officers may temporarily seize individuals for violating non-criminal anti-littering laws, officers may also seize people for violating non-criminal marijuana laws.” *Id.* at 130. Therefore, the Court finds Pemberton’s argument that decriminalization of marijuana makes a *Terry* stop unconstitutional unpersuasive.

¶17 In summary, the Court finds that observations by an officer trained in the identification of marijuana, who identifies an individual with sufficient particularity, to be rolling and or handling a marijuana cigarette, may justify a finding of reasonable suspicion and an investigative stop. Additionally, despite the decriminalization of the possession of an ounce or less of marijuana, in accordance with the Virgin Islands Supreme Court, this Court finds that marijuana is still a contraband Schedule I controlled substance. *See Looby*, 68 V.I. at 693, 698. This Court also finds that

the possession of marijuana may form a basis for an investigatory *Terry* stop. *Id.*

B. Officers had reasonable suspicion for an investigatory stop.

¶18 Pemberton argues that the officers did not have a reasonable suspicion of criminal activity because they “failed to elucidate a single specific articulable fact tending to show that Mr. Pemberton engaged in criminal activity.” Def.’s Br. 3. Consequently, Pemberton argues that all evidence obtained should be suppressed as the fruit of the poisonous tree under *Wong Sung v. United States*, 371 U.S. 471 (1963). The People counter that: (1) investigative stops are not based on the actual commission of a crime, but upon the suspicion of criminal activity; (2) officers articulated sufficient objective facts with specificity for reasonable suspicion under the totality of the circumstances; and (3) contraband in plain view does not require reasonable suspicion for an initial intrusion.³ The Court finds that the officers had reasonable suspicion based on their training and experience, the appearance of the object being handled, Pemberton’s furtive gesture, and the location and timing of the observations under the totality of the circumstances.

¶19 As previously mentioned, an investigatory *Terry* stop must be predicated upon reasonable suspicion. *See Blyden*, 53 V.I. at 648 (citing *Terry*, 392 U.S. at 30). The concept of reasonable

³ This third argument appears to refer to the “consensual encounter” exception to the warrant requirement, “in which contact is initiated by police officers without any articulable reason whatsoever and the citizen is briefly asked questions[.]” *See United States v. Alston*, 375 F.3d 408, 411 (6th Cir. 2004). There are three types of permissible encounters between police and citizens: (1) “consensual encounters” where contact is initiated by police without any articulable reasons whatsoever and a citizen is briefly questioned; (2) a temporary involuntary detention, or *Terry* stop, based on reasonable suspicion; and (3) arrests predicated on probable cause. *United States v. Alston*, 375 F.3d 408, 411 (6th Cir. 2004). Officers may approach a citizen in a consensual encounter without implicating the Fourth Amendment. *See Bennett v. City of Eastpointe*, 410 F.3d 810, 821 (6th Cir. 2005). But if an officer restrains an individual’s liberty, “by means of physical force or show of authority,” Fourth Amendment protections attach. *Terry*, 392 U.S. at 19 n.16 (1968). An encounter may become a *Terry* stop, which must be predicted on reasonable suspicion, if a reasonable person under the circumstances believes that he or she is not free to leave or to ignore the officer’s request. *See Bennett*, 410 F.3d at 821. The consensual encounter is not applicable because officers initially had reasonable suspicion of contraband (plain view requires it be readily apparent); contraband was readily apparent after the stop. The officers’ actions in this case was a *Terry* stop (a reasonable person would not feel free to leave VIPD officers and a Military Police Officer carrying an M-16 rifle). *See United States v. Mendenhall*, 446 U.S. 544, 554 (1980).

suspicion has not been “reduced to a neat set of legal rules.” *Cannergeiter*, 65 V.I. at 131 (citing *People v. Turnbull*, 61 V.I. 46, 9 (Super Ct. 2014)(quoting *Sokolow*, 490 U.S. at 7)). Therefore, “[c]alculating whether an officer has reasonable suspicion to warrant a stop and search is often an imprecise judgment.” *Heath*, 63 V.I. at 87 (quoting *United States v. Robertson*, 305 F.3d 164, 168 (3d Cir. 2002)). “[C]ourts give considerable deference to [a] police officer’s determinations of reasonable suspicion[.]” *Id.* (citing *United States v. Mosley*, 454 F.3d 249, 252 (3d Cir. 2006)).

¶20 When reviewing reasonable suspicion, courts consider the facts of “individual significance”⁴ in the “totality of the circumstances,” in light of the officer’s experience and specialized training. *See People v. Murrell*, 56 V.I. 796, 807 n.8 (2012)(citing *United States v. Mathurin*, 561 F.3d 170, 174-75 (3d Cir. 2009)). “Relevant factors include but are not limited to: (1) presence in a high crime area; (2) ‘nervous, evasive [or furtive] behavior’; and (3) behavior that conforms to [an] officers’ specialized knowledge of criminal activity.” *United States v. Lima*, Crim. No. 2012-010, 2012 U.S. Dist. LEXIS 137001, *10 (D.V.I. Sep. 25, 2012) (citing *Brown*, 448 F.3d at 251). Each factor may be innocent by itself, but “taken together [may] warrant[] further investigation.” *Terry*, 392 U.S. at 22.

¶21 To determine whether officers had reasonable suspicion that criminal activity was afoot at the time officers stopped Pemberton on the street, the Court considers the totality of the circumstances surrounding the stop. Benitez’s unrefuted testimony, which the Court finds fully credible, establishes that four factors supported Benitez’s conclusion that Pemberton was engaged in unlawful behavior. These factors were: (1) Benitez’s training and experience; (2) the view and

⁴ The United States Supreme Court has cautioned trial courts that totality of the circumstance standard must use facts of “individual significance” if they are to be considered “in the aggregate.” *United States v. Mathurin*, 51 V.I. 1196, 1204 (3d Cir. 2009) (referring to the United States Supreme Court discussion of reasonable suspicion). An example of a fact that was not of “individual significance” was the “impermissible ex post facto justification” of illegal window tints. *See id.* at 1210 n.6

appearance of the object handled by Pemberton; (3) Pemberton's furtive actions; (4) the location and timing of Benitez's observations; and (5) the totality of the circumstances. The Court will address each factor in turn.

1. Officer's Training and Experience

¶22 An officer is entitled to draw specific reasonable inferences based on the facts, "in light of his [or her] experience." *Looby*, 68 V.I. at 695 (citing *Blyden*, 53 V.I. at 648). Although officer training and experience alone cannot create reasonable suspicion to justify an investigative stop, experienced officers may make inferences from facts that they observe "might well elude an untrained person." *People v. Smith*, No. SX-14-CR-303, 2015 V.I. LEXIS 121, *6 n.3 (V.I. Super. Ct. Sep. 29, 2015) (quoting *United States v. Polanco*, 48 V.I. 744, 750 (D.V.I. 2007)). This experience may lead the officer to "reasonably conclude . . . that criminal activity is afoot." *Looby*, 68 V.I. at 695 (citing *Blyden*, 53 V.I. at 648). "The Supreme Court has repeatedly recognized that a reasonable suspicion may be the result of any combination of one or several factors: specialized knowledge and investigative inferences[.]" *Blyden*, 53 V.I. at 649 (quoting *United States v. Nelson*, 284 F.3d 472, 482 (3d Cir. 2002)(citations omitted)(collecting cases)).

¶23 Accordingly, courts allow "great deference to the officer's knowledge of the nature and nuances of the criminal activity that [the officer has] observed in his experience, almost . . . permitting it to be the focal point of the analysis." *People v. Matthew*, 55 V.I. 380, 390 (Super. Ct. 2011) (quoting *Nelson*, 284 F.3d at 482). At the same time, the officer's experience is tempered by an analysis of the officer's credibility. *See Smith*, 2015 V.I. LEXIS 121 at *4-5 n.15 (citing *Ornelas v. United States*, 517 U.S. 690, 701 (1996)). That being said, seemingly innocent conduct may provide a basis for reasonable suspicion when viewed through the lens of an "officer[']s specialized

knowledge of criminal activity.” *Brown*, 448 F.3d at 251 (citing *Arvizu*, 534 U.S. at 276; *Nelson*, 284 F.3d at 482). *Brown* lists four factors that alone may be insufficient, but when combined together may establish reasonable suspicion: “(1) presence of a suspect in a high crime area[;] (2) . . . presence on a street at a late hour[;] (3) . . . nervous, evasive behavior[; and] (4) a suspect behaves in a way that conforms to police officer’s specialized knowledge of criminal activity.” *Id.* (internal citations omitted).

¶24 In this case, Benitez testified that he is an eleven-year veteran of the VIPD. He also testified that while at the VIPD, he obtained specialized experience in the VIPD Drug Task Force, working primarily with street-level crime and the violence associated with it. He also testified that the area in which Pemberton was stopped was well-known for illicit drug activity and that he had participated in drug arrests in that area while on the VIPD Drug Task Force. Benitez further testified that he had experience encountering individuals handling and rolling marijuana cigarettes. Finally, Benitez testified that he had been involved a number of drug arrests. Thus, Benitez has demonstrated specialized knowledge to make investigative inferences. *See Blyden*, 53 V.I. at 649 (“reasonable suspicion may be the result of any combination of one or several factors, such as specialized knowledge to make investigative inferences.”). As such, the Court finds that Benitez has demonstrated training and experience in the recognition of the preparation, handling and identification of marijuana cigarettes. Consequently, the Court recognizes that he is permitted to draw inferences in accordance with this specialized knowledge and experience.

2. Appearance of the Object Handled

¶25 Benitez testified that he suspected that Pemberton was in possession of marijuana because the object Pemberton was hand rolling and handling appeared to be a marijuana cigarette.

Pemberton argues that the observation of the actions of rolling and handling a marijuana cigarette cannot support a reasonable suspicion of criminal activity. The People counter that the observation of the manner of handling and rolling of suspected marijuana may be a factor of reasonable suspicion where the officer has experience identifying marijuana.

¶26 The Court acknowledges that there is a relative “dearth” of cases which deal with the manner of handling and rolling of marijuana in support of reasonable suspicion. *Accord United States v. Coates*, 457 F. Supp. 2d 563, 565 (W.D. Penn. 2006) (an “apparent dearth of federal caselaw pertinent to” the manner of handling and rolling marijuana in support of reasonable suspicion). In the Virgin Islands, *Looby* is the singular case to address the observation of the handling of a marijuana cigarette in support of reasonable suspicion. *See Looby*, 68 V.I. at 693 (the officers’ “observation of Looby holding a marijuana cigarette,” was a factor in “reasonable suspicion of possession of marijuana.”).

¶27 However, *Looby* is slightly distinguished in that the other factors in support of reasonable suspicion included the “scent of burning marijuana, . . . and Looby’s admission” of possession. *Id.* Meanwhile, in this case, the officers observed the “rolling” and “manner of handling” the marijuana cigarette, without detecting the scent of burning marijuana. Because the factors of reasonable suspicion are not precisely analogous to *Looby*, this Court will review how other jurisdictions have treated the appearance as well as manner of handling marijuana cigarettes.

¶28 First, courts have held that the distinctive appearance of a hand-rolled marijuana cigarette, or a cigar that was split open and filled with marijuana (otherwise known as a “blunt”), may contribute to a “reasonable suspicion, or even . . . ‘probable cause’ standard.” *Coates*, 457 F. Supp. 2d at 567-68. Other courts have held that the distinctive appearance of a marijuana cigarette

contributed heavily to probable cause, where it was “bulged in the middle and twisted at both ends[.]” *Id.* (citing *People v. Poole*, 48 Cal. App. 3d 881, 884 (Ct. App. 1975)). An officer’s observation of marijuana cigarettes, and the “way they were rolled and twisted at the end,” was distinctive enough in nature to be identified as contraband. *See Adams v. State*, 375 So. 2d 638, 639 (Fla. Dist. Ct. App. 1979)(*per curiam*).

¶29 Second, courts have held that the distinctive manner of handling or rolling a marijuana cigarette was a valid factor to consider when determining whether reasonable suspicion exists. *See Coates*, 457 F. Supp. 2d at 567-68 (citing *Thomas v. Superior Court*, 22 Cal. App. 3d 972, 980 (Ct. App. 1972)). How marijuana is held is an observation that courts have considered when conducting a reasonable suspicion analysis. *Id.* (citing *State v. Turmel*, 838 A.2d 1279, 1282 (N.H. 2003) (finding that the manner of handling a marijuana cigarette or “blunt” contributes to reasonable suspicion)). Even without the corroboration of odor, courts have held that where an officer observed a person handling a suspected marijuana cigarette, that this was a factor of reasonable suspicion. *See id.* (finding that where an experienced officer observed a person “holding the object ‘between his thumb and forefinger’ with ‘his fingers pinched together at the end[.]’ . . . [that] this manner of smoking is indicative of someone smoking marijuana rather than a tobacco-filled cigar[.]” and that “[o]ther courts have considered observations such as these when conducting a reasonable suspicion analyses”).

¶30 In this case, the officer testified that Pemberton appeared to be rolling and handling a marijuana cigarette. The officer’s experience and training have taught him that marijuana is commonly rolled as a hand-made cigarette, which has a distinctive shape and fashion. Because the officers were approximately twenty feet away from Pemberton’s position, Benitez testified credibly

that he had a clear view of Pemberton's actions and movements. Benitez explained further that he suspected that Pemberton was preparing and holding a marijuana cigarette based on his experience observing individuals who have hand-rolled and handled marijuana cigarettes. *See Looby*, 68 V.I. at 693 ("the observation of Looby holding a marijuana cigarette" was a factor in "reasonable suspicion of possession of marijuana."). Based upon this reasonable suspicion, Benitez approached Pemberton.

¶31 Thus, the Court finds that a specific articulated observation by officers—trained in the identification of marijuana—of the handling or rolling of a marijuana cigarette "based on the officers' knowledge and experience" can be a factor in reasonable suspicion "that criminal activity was afoot." *See id.* Benitez testified that once he was standing in front of Pemberton, he clearly identified the marijuana cigarette resting in Pemberton's lap.

3. Pemberton's Furtive Gestures

¶32 Despite this, courts have been clear that observation alone is insufficient to find reasonable suspicion for an investigatory stop. *See Coates*, 457 F. Supp. 2d at 569. Generally, an additional corroborative fact, or facts, are required to support a finding of reasonable suspicion. *See, e.g., Commonwealth v. Lucas*, 57 Va. Cir. 385, 386 (Cir. Ct. 2002) (collecting cases regarding furtive gestures—or acts of concealment—that provided probable cause to believe an individual possessed contraband). In *Lucas*, officers trained in identification of marijuana observed an individual who appeared to be smoking a cigar filled with marijuana. *Id.* at 386. As soon as the individual saw the officers, he quickly raised his hand to his mouth to remove the cigar. *Id.* at 386-87. In that case, the Court held that "[i]n light of the inference [the officer] drew from his experience and credibility the court afforded his testimony, we find that these facts are sufficient to conclude that [the officer] had

probable cause to arrest appellant for possession of marijuana.” *Id.*

¶33 Similarly, detection of scent alone—without specific articulatable facts “sufficiently particularized” to indicate individual possession or use—would be insufficient to support a finding of reasonable suspicion. *Cannergeiter*, 65 V.I. at 135. For example, in *United States v. Lima*, after officers smelled the odor of marijuana smoke, and after the source was sufficiently particularized, officers then had reason to investigate further. *See Lima*, 2012 U.S. Dist. LEXIS 137001, at *3. The requirement of specific articulated observations is in keeping with *Terry* and its progeny. *See Blyden*, 53 V.I. at 649 (quoting *Brown*, 448 F.3d at 246).

¶34 It is well established that otherwise legal or innocent conduct may still create reasonable suspicion of criminal activity. *See People v. Smith*, 49 V.I. 229, 236 (Super. Ct. 2008) (citing *Sokolow*, 490 U.S. at 10 (“[T]he relevant inquiry is not whether particular conduct is ‘innocent’ or ‘guilty,’ but the degree of suspicion that attaches to particular types of noncriminal acts.”)). A nervous gesture, or movement that appears to be an attempt to hide something, can be a factor in reasonable suspicion. *See Prentice*, 64 V.I. at 96-97 (citing *United States v. Yamba*, 506 F.3d 251, 255 (3d Cir. 2007)); *see also Lima*, 2012 U.S. Dist. LEXIS 137001, at *10. Furthermore, a nervous or furtive gesture is an important factor in determining reasonable suspicion. *See Prentice*, 64 V.I. at 96 (citing *Yamba*, 506 F.3d. at 255). A furtive gesture in response to the presence of police can serve as the basis for reasonable suspicion. *See United States v. Lewis*, 50 V.I. 366, 374 (2008)(collecting cases). More specifically, Courts have held that a gesture of concealment was a factor in reasonable suspicion of possession of marijuana. *See Lucas*, 57 Va. Cir. at 386.

¶35 In this case, when the officers flashed a light on Pemberton, Benitez testified that as soon as Pemberton saw the officers, Pemberton made a furtive gesture by immediately dropping the

marijuana into his lap to hide it from view. Benitez also testified that the actions of hand-rolling and handling the suspected marijuana cigarette, coupled with this action of concealment, created the reasonable suspicion that Pemberton may be engaged in illegal activity.

4. Location and Timing of the Observations

¶36 Location is relevant to a reasonable suspicion when an officer knows of a pattern of criminal activity in the area, and the observed activity matches that pattern. *See Nelson*, 284 F.3d at 482; *see also People v. Archibald*, 50 V.I. at 82 (VIPD and DEA designated a location as a “‘high crime area’ based upon a number of incidents or calls . . . [and] from human intelligence and prior arrests in the area.”). While an individual’s presence in an “‘area of expected criminal activities, standing alone, is not enough to support a reasonable particularized suspicion that a person is committing a crime,’ a location’s characteristics are relevant in ‘determining whether the circumstances are sufficiently suspicious to warrant further investigation.’” *Lima*, 2012 U.S. Dist. LEXIS 137001 at *4 (quoting *Wardlow*, 528 U.S. at 124). Courts also consider the time of day that the encounter took place as a factor to determine reasonable suspicion. *See Brown*, 448 F.3d at 251.

¶37 In this case, Benitez testified that the parade stands in Frederiksted—where Pemberton was observed and stopped—is a well-known area for illicit drug use and sales, particularly in the evening hours during the Carnival and Christmas season. Benitez also testified that this particular area was one in which VIPD had made numerous drug arrests, particularly in the late evening hours.

5. The Totality of the Circumstances

¶38 The Court notes that this case presents a unique set of circumstances, distinguishing it from many published opinions regarding reasonable suspicion of possession of marijuana. Most marijuana possession cases corroborated reasonable suspicion of possession with the detection of

the odor of marijuana. *See Cannergeiter*, 65 V.I. at 125 n.2 (commenting that case law is consistent that where a particularized and articulable smell of marijuana is detected, there is reasonable suspicion and probable cause to conduct a search). The People concede that the odor of marijuana was not present in this case.

¶39 “The Third Circuit has ruled that when ‘determining whether a stop is justified, courts review the circumstances in their entirety, giving due weight to the experience of the officers.’” *Archibald*, 50 V.I. at 95 (quoting *United States v. Rickus*, 737 F. 2d 360, 365 (3d Cir. 1984)). “[I]nferences of trained officers may be considered, and probabilities, not certainty, govern.” *Id.* at 86. Based on the totality of the circumstances, the Court finds that officers trained to identify marijuana, who were experienced in making drug arrests, and were in an area known for illicit drug use, possessed reasonable suspicion after observing Pemberton’s actions. Therefore, the Court finds that the officers had reasonable suspicion to approach and conduct an investigatory stop, or *Terry* stop. Considering the totality of the circumstances, the Court finds that the officers’ decision to approach the men and investigate further was “justified at its inception.” *Terry*, 392 U.S. at 20.

C. Officers had reasonable suspicion to perform a *Terry* “Frisk.”

¶40 During the suppression hearing, Pemberton questioned the officers’ concern for their safety. Pemberton argues that the *Terry* frisk, therefore, was not based on reasonable suspicion. Consequently, the fruits of the frisk must also be suppressed. The People counter that officers were reasonably concerned with their safety under the totality of the circumstances and performed a quick pat down, or “frisk” under *Terry*.

¶41 “A lawful frisk does not always flow from a justified stop.” *Looby*, 68 V.I. at 695 (quoting *Thomas v. Dillard*, 818 F.3d 864, 876 (9th Cir. 2016)). During the course of an otherwise proper

Terry stop, an officer may frisk the suspect to ensure officer safety when officers have a reasonable suspicion that the suspect has a weapon. *See id.* at 699 (suspicious behavior coupled with presence of marijuana in a high crime area justified a *Terry* frisk). For a lawful *Terry* Frisk, “officers must be able to point to particular facts from which he reasonably inferred that the individual was armed and dangerous.” *Id.* at 695 (quoting *Sibron v. New York*, 392 U.S. 40, 64 (1968); *United States v. Hughes*, 517 F.3d 1013, 1016 (8th Cir. 2008) (“There must be articulable and specific facts as to dangerousness.”)).

¶42 The frisk, like the stop, is independently considered under the “totality of the circumstances.” *Archibald*, 50 V.I. at 85-86 (citing *Cortez*, 449 U.S. at 417). In the case of a self-protective search for weapons, an officer must also be able to point to particular facts which reasonably infer that the individual [i]s armed and dangerous.” *Looby*, 68 V.I. at 695 (quoting *Sibron*, 392 U.S. at 64 (citation omitted)). Where officers are justified in believing the person they are “‘investigating at close range is armed and presently dangerous to officers or others,’ a limited protective search may be conducted for the purpose of discovering any concealed weapons.” *United States v. Stennis*, 475 F. App’x. 494, 501 (6th Cir. 2012) (citing *Adams v. Williams*, 407 U.S. 143, 146 (1972)).

¶43 Courts have noted a “correlation between the presence of drugs and the presence of firearms and have observed that persons carrying drugs are likely to be armed as well.” *Archibald*, 50 V.I. at 96 (citing *Florida v. J.L.*, 528 U.S. 266, 273 (2000)). “An officer’s reasonable belief that someone is involved in drug dealing can support a suspicion that the person is armed and dangerous since weapons are often present incident to the drug business.” *United States v. Binion*, 570 F.3d 1034, 1039 (8th Cir. 2009).

¶44 Despite this correlation, protective searches under *Terry* must be “limited to that which is necessary for the discovery of weapons which might be used to harm the officer or others nearby.” *Archibald*, 50 V.I. at 92 (quoting *Terry*, 392 U.S. at 26). If the “incriminating character of the object [is] immediately apparent[,]” the officer may lawfully seize the object. *Id.* at 87 (quoting *Minnesota v. Dickerson*, 508 U.S. 366, 375(1993)). If a search exceeds what is needed “to determine if a suspect is armed, the search is no longer valid under *Terry*,” and its fruits will be excluded. *Id.* at 89 (quoting *Yamba*, 506 F.3d at 259-60)(internal citations omitted)).

¶45 In this case, Benitez testified that when he approached Pemberton, the marijuana was immediately identifiable. Benitez testified that he performed a quick pat down of Pemberton for officer safety. Benitez cited several factors that supported a reasonable suspicion that Pemberton may be armed: the seizure of marijuana, the lateness of the hour, the number of individuals present, the isolated area, the low lighting and the fact that the area was well-known for drug sales. *See Binion*, 570 F.3d at 1039. Taken together, these factors, independent of the initial stop, support a reasonable suspicion that Pemberton may possess a dangerous weapon and that officer safety reasons supported a self-protective search for weapons. *See Archibald*, 50 V.I. at 86, 88. Therefore, Benitez had reasonable suspicion to perform a *Terry* frisk, or quick pat down, for weapons.

¶46 While performing a quick pat down, Benitez felt the handle of a gun in Pemberton’s waistband, and he immediately notified other officers of its presence. *See id.* (citing *Dickerson*, 508 U.S. at 379). Benitez seized the gun and did not conduct any further search. *See Yamba*, 506 F.3d at 259-60. Benitez testified that Pemberton was handcuffed and transported to the precinct for safety reasons, in order that further investigation would occur in a secure environment. The use of handcuffs does not automatically transform a *Terry* stop into an arrest, provided it is warranted by

the circumstances—especially when officer safety is at issue. *See Smoak v. Hall*, 460 F.3d 768, 781 (6th Cir. 2008).

¶47 Therefore, under the totality of the circumstances, the Court finds that the officer possessed reasonable suspicion that Pemberton may be armed, which supported the need for a *Terry* frisk. The Court also finds that because the pat down was brief, and the search stopped after discovering the revolver, the pat down did not exceed the scope of the *Terry* frisk. *See Archibald*, 50 V.I. at 89.

¶48 During the suppression hearing, Pemberton argued that when the officers approached him a member of the Guard pointed an M-16 rifle at him. Because of this, Pemberton argued that he did not feel free to leave and was under de facto arrest. The People countered that the testimony establishes that the M-16 rifle was strapped to the Guard officer's chest pointed to the ground, and that the guardsman was not handling the rifle when they approached Pemberton.

¶49 “There is no rule per se that pointing guns at people, or handcuffing them, constitutes an arrest.” *Blyden*, 53 V.I. at 648 (quoting *Baker v. Monroe Twp.*, 50 F.3d 1186, 1193 (3d Cir. 1995) (collecting cases)). The Virgin Islands Supreme Court has reiterated that where an officer draws their weapon for their own protection of the officer, this act does not “transform detention into an illegal arrest.” *Id.* (citing *Terry*, 392 U.S. at 27, 30). “There is no bright line to distinguish a valid *Terry* stop from its invalid counterpart (commonly known as a de facto arrest).” *United States v. Pontoo*, 666 F. 3d 20, 30 (1st Cir. 2011) (quoting *Florida v. Royer*, 460 US. 491, 506-7 (1983)). Consequently, “seizures are permissible under the Fourth Amendment where there is a reasonable, articulable suspicion that a person has committed or is about to commit a crime.” *United States v. Wrensford*, 67 V.I. 1037, 1051 (3d Cir. 2017) (citing *Terry*, 392 U.S. at 21, 27). And, a suspect can be moved from one place to another for safety and security reasons. *See id.* (citing *Royer*, 460 U.S. at

504).

¶50 The record indicates that the officers transported Pemberton to the precinct out of concerns for their safety and security. The line between an investigative stop and a de facto arrest was certainly “crossed” when police “forcibly removed him from a place he was entitled to be and transported him to the police station and detained him in a cell.” *Id. at* 1048. The question is whether the presence of the M-16 constituted such a show of force that it became a de facto arrest.

¶51 To determine whether a Terry stop is valid or whether it is a de facto arrest—which requires probable cause, courts review the totality of the circumstances on a case-by-case basis and have found that “law enforcement interests” in public safety outweighs the individual’s interest to be free of the stop or detention. *Blyden*, 53 V.I. at 648 (quoting *United States v. Hensley*, 469 U.S. 221, 229 (1985) (“it is well-established that during an investigative stop, police officers may take measures ‘reasonably necessary to protect themselves and maintain the status quo.’”)).

¶52 Similarly, other courts have found that having “guns drawn” or “briefly point[ed]” during a Terry stop in which officers expressed reasonable and articulable suspicion of danger such as in “drug areas” or “drug corners” to be lawful. *See Lundstrom v. Romero*, 616 F.3d 1108 (10th Cir. 2010) (lawful to have “briefly pointed gun” at suspect where gun was lowered as soon as the officer saw suspect’s hands); *United States v. Johnson*, 592 F. 3d 442 (3d Cir. 2010) (drawing weapons proper, as police acted on “credible tip that at least one the [vehicle]’s occupants was armed and dangerous.”); *United States v Shoals*, 478 F.3d 850 (7th Cir. 2007) (drawing guns proper “given inherent danger” while responding to late night report of gunfire); *United States v. Sinclair*, 983 F. 2d 598 (4th Cir. 1993) (proper to draw arms incident to stop of suspected drug couriers).

¶53 Assuming, without deciding, that a weapon was pointed at Pemberton, the Court finds that

Benitez had expressed a reasonable and articulatable concern for officer safety. *See Blyden*, 53 V.I. at 648-49 (finding “the fact that the police immediately drew their weapons. . . did not transform his detention into an illegal arrest if the officers had suspicion ‘that criminal activity [was] afoot and that the persons with whom [they were] dealing [was] armed and presently dangerous.’” (quoting *Terry*, 392 U.S. at 27, 30); accord *Smith*, 49 V.I. at 236 (where reasonable suspicion of criminal activity or officer safety *is lacking*, approaching a suspect with guns drawn effected a de facto arrest). Under the circumstances, it would have been lawful to briefly point a gun at Pemberton. Thus, the Court finds that the mere presence of an officer’s gun, and even if pointed at Pemberton, did not create a de facto arrest.

¶54 While at the precinct, Pemberton was more thoroughly searched and police found a gravity knife, live rounds of ammunition, marijuana in a plastic vial and marijuana in a plastic bag. Because the limited pat down of Pemberton’s outer clothing was performed solely to determine if Pemberton was “conceal[ing] objects which might be used as instruments of assault [against an officer],” the seizure of Pemberton’s firearm did not exceed the scope of a *Terry* Frisk. *Id.* at 647-48 (citing *United States v. Brignoni-Ponce*, 422 U.S. 873, 882 (1975)). Therefore, the limited search of a *Terry* Frisk did not violate Pemberton’s rights under the Fourth Amendment. *See id.* (quoting *Sibron*, 392 U.S. at 65).

¶55 While at the station, Officer Karen Stout confirmed that Pemberton did not have a license to possess a gun. After the discovery of the unlicensed firearm, the reasonable suspicion for a *Terry* frisk “ripened reasonable suspicion to stop and frisk . . . into probable cause” to make an arrest. *Blyden*, 53 V.I. at 651 (citing *United States v. Thomas*, 74 F. App’x 189, 191-92 (3d Cir. 2003) (“probable cause to support arrest after officers recovered firearm, suspected to be unlicensed,

during *Terry* stop because reasonably believed criminal activity was afoot.”)); accord *Lima*, 2012 U.S. Dist. LEXIS 137001 at *6 (quoting *United States v. Goode*, 309 F. App’x 651, 654 (3d Cir. 2009) (“When reasonable suspicion surrounding a suspect ripens into probable cause during the course of an investigatory stop, arrest of that suspect is lawful.”)).

IV. CONCLUSION

¶56 For the reasons set forth above, the Court finds that the officers possessed reasonable suspicion to conduct a *Terry* stop of Pemberton. The Court also finds that the officers possessed reasonable suspicion to conduct a *Terry* frisk of Pemberton for weapons for officer safety. Evidence seized as a result of the brief pat down was not an illegal search. Furthermore, the Court finds that although the possession of small amounts of marijuana has been decriminalized in the Virgin Islands, it is still contraband and may form the basis of reasonable suspicion for a *Terry* stop. Therefore, the motion to suppress is denied. An Order consistent with this Opinion shall follow.

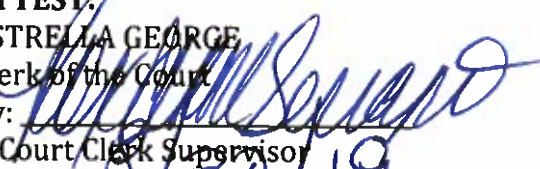
Date: August 30, 2019



ROBERT A. MOLLOY
Judge of the Superior Court

ATTEST:

ESTRELLA GEORGE
Clerk of the Court

By: 
Court Clerk Supervisor

Dated: 8/30/19