

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

GOVERNMENT OF THE VIRGIN ISLANDS,)

Plaintiff,)

v.)

WAYNE DELANO PENN,)

Defendant.)

CRIMINAL NO. 104/2001

**CHARGE: POSSESSION
OF A CONTROLLED
SUBSTANCE WITH
INTENT TO
DISTRIBUTE**

NOT FOR PUBLICATION

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MEMORANDUM OPINION

(January 18, 2002)

THIS MATTER is before the Court on Defendant's Motion to Suppress evidence, including statements, pursuant to *Wong Sun v. U.S.*, 367 U.S. 643 (1962). Defendant contends that he was subjected to a constitutionally invalid stop, therefore the evidence seized and subsequent statements must be suppressed as "fruits of the poisonous tree." The Government contends that the evidence should not be suppressed because the stop was merely a consensual encounter, which did not implicate the Fourth Amendment. A hearing on Defendant's motion was held on October 9, 2001. The Government proffered evidence, set forth below, through the

testimony of four witnesses. The Government's facts are uncontroverted. For the following reasons the Court will deny Defendant's Motion to Suppress.

FACTS

On March 2, 2001 at 12:40 p.m., members of the High Intensity Drug Trafficking Agency Task Force ("H.I.D.T.A.") were conducting surveillance at the Seaborne Aviation dock in St. Croix. While observing the passengers of an inbound flight from St. Thomas, Officer Angel E. Diaz, Jr. observed Defendant, Wayne Delano Penn, leaving the plane carrying a single black backpack. According to Diaz, the Defendant appeared nervous when walking from the dock to the terminal area. Diaz stated Defendant was looking around the parking area for several minutes, in a manner that Diaz described as "counter surveying." According to Diaz, Defendant paid an "abnormal" amount of attention to the baggage handlers who were unloading checked luggage. Diaz also testified that Defendant twice approached the side of the dock where the baggage was being unloaded without collecting any baggage, while still "counter surveying" the parking lot. Defendant then for a third time returned to the side of the dock, where he retrieved baggage in the form of two brown paper bags and headed toward the driveway area. In his motion to suppress, Defendant contends that he did not act in a suspicious manner when he left the plane, but does not deny collecting the brown paper bags.

Detective Christopher Howell and Deputy U.S. Marshall Detective Linda Valerino, dressed in plain clothes without their guns exposed, approached Defendant when he reached the driveway area outside the terminal. Diaz had alerted Howell to Defendant's suspicious behavior via radio call. Howell testified that he stopped Defendant, identified himself, and displayed his Drug Enforcement Agency ("DEA") credentials. Howell then informed Defendant that drugs

and other contraband were being smuggled throughout the Virgin Islands and asked Defendant if it would be okay for a police dog to sniff his bags for controlled substances. According to Howell, Defendant agreed to the canine sniff and placed the brown paper bags on the ground. Defendant claims that after police stopped him, he was "interrogated" and made to "submit" to having his bags sniffed by the canine.¹

Officer Haraldo Charles conducted the canine sniff. Charles testified that the canine began to paw the bags and act frenzied upon sniffing the bags. Such canine behavior, according to Charles, indicates the presence of a controlled substance. Howell testified that after the canine indicated the presence of a controlled substance in the bags, Defendant stated that the bags did not belong to him, but rather to another individual who was still in the terminal area. At this time Defendant then asked Howell if he should retrieve the owner of the bags. Howell testified that he noticed Defendant's name was on the bags, but agreed to look for the individual and escorted Defendant through the driveway area in front of the terminal. Without entering the terminal area, Defendant looked for the alleged "owner" of the bags. The "owner" was never located.

Howell then asked Defendant whether he could search the bags. Howell testified that Defendant said "go ahead", at which time Howell bent down to search the bags. While Howell was searching the bags he observed Defendant "backing up" as if to run. Howell then overheard

¹ Defendant did not testify at the hearing for the Motion to Suppress, nor did he call any witnesses, or offer any exhibits into evidence. The Defendant's only assertions are contained in paragraphs 2 and 4 of his Motion to Suppress, which merely states, "2. That contrary to the government's characterizations, defendant was not doing anything suspiciously, when he was stopped by police. . . . 4. That after being stopped by police, defendant was interrogated and made to submit to having his bags sniffed by a police dog, resulting in defendant's arrest and subsequent statements."

other officers instructing Defendant not to run. Charles testified at the suppression hearing that he was the officer who instructed Defendant not to run.

Howell's search uncovered a substance that appeared to be marijuana, at which time Howell instructed another officer to arrest Defendant. Defendant was then advised of his Miranda rights by Detective Samuel Abraham, and transported to the DEA/ St. Croix Resident Office located at the Federal Building. Defendant was processed and advised of his Miranda rights for a second time by Valerino. Upon being advised of his rights, Defendant signed the waiver form, and subsequently confessed.

DISCUSSION

Defendant asserts that the stop was constitutionally invalid because it was not supported by reasonable suspicion or probable cause. Defendant then concludes that the evidence seized and statements made by Defendant must be suppressed as "fruits of the poisonous tree." The Government contends that the evidence should not be suppressed because the stop amounted to a consensual encounter, which does not require reasonable suspicion or probable cause.² The Court agrees with the Government.

The Encounter Between Defendant And The Officers Was Consensual.

The sole issue before this Court is whether the encounter between the officers and Defendant amounted to a seizure, which needs to be supported by reasonable suspicion or probable cause.

² Defendant has not denied that he consented to the search. Rather, Defendant alleges that because the stop was constitutionally invalid, the evidence seized during the search should be suppressed as fruits of the poisonous tree.

The Fourth Amendment prohibits unreasonable searches and seizures, which the Supreme Court has interpreted as requiring probable cause for making an arrest and reasonable suspicion that criminal activity is afoot for making an investigative stop. *See* U.S. CONST. amend. IV; *see also*, *U.S. v. Robinson*, 414 U.S. 218 (1973) and *Terry v. Ohio*, 392 U.S. 1 (1968). When an encounter falls short of an investigatory stop, however, a seizure does not necessarily occur and reasonable suspicion is not always required. *See Florida v. Bostick*, 501 U.S. 429 (1991)(“a seizure does not occur simply because a police officer approaches an individual and asks a few questions.”); *see also*, *U.S. v. Kim*, 27 F.3d 947(3d Cir. 1994)(“[w]hen an encounter is consensual, no reasonable suspicion is required.”).

Whether a seizure has occurred is governed by a totality of the circumstances standard, which provides “ . . . [whether] in view of all the circumstances, a reasonable person would have believed he was not free to leave.” *See U.S. v. Mendenhall*, 446 U.S. 564 (1980); *see also*, *Florida v. Bostick*, (“[s]o long as a reasonable person would feel free ‘to disregard the police and go about his business, the encounter is consensual and no reasonable suspicion is required.’”). The Court in *Mendenhall* further listed examples of circumstances that indicate a seizure has occurred,

[t]he threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer’s request might be compelled. In the absence of some such evidence, otherwise inoffensive contact between a member of the public and the police cannot, as a matter of law, amount to a seizure of that person.

See id., 446 U.S. at 554 (citations omitted)(emphasis added).

For purposes of the case *sub judice*, it is helpful to also list circumstances that indicate that an encounter is consensual. The fact that the officer identifies himself does not convert an encounter into a seizure. *See Mendenhall*, 446 U.S. at 555. Additionally, “. . . no seizure occurs when police ask questions of an individual, ask to examine the individual’s identification, and request consent to search his or her luggage . . .” *Bostick*, 501 U.S. at 437. The fact that the officer is dressed in plain clothes and did not make his gun visible also tends to indicate that an encounter is consensual. *See Kim*, 27 F.3d at 951. Most importantly, the failure to advise a defendant of his right to decline an officer’s requests or terminate the encounter does not make an otherwise consensual encounter a seizure. *See id.* at 954; *see also, Bostick*, 501 U.S. at 436-437 (“[w]hile most citizens will respond to a police request, the fact that people do so, and do so without being told they are free not to respond, hardly eliminates the consensual nature of the response.”).

This Court finds that the encounter between Defendant and the officers was consensual. When Howell and Valerino approached Defendant in the driveway area, they were dressed in plainclothes. Howell identified himself as an officer and displayed his credentials, then asked to speak to Defendant. Howell testified that he told Defendant that drugs and other contraband were being smuggled throughout the Virgin Islands and asked Defendant if it would be okay for a police dog to sniff his bags for controlled substances. According to Howell, Defendant agreed to the canine sniff and set his bags down on the ground. The record does not demonstrate that any of the officers displayed their weapons or touched him in any way. Moreover, there is no evidence that the officers used any force or authority to compel Defendant to remain in the

driveway area³. It is evident, and this Court finds, that the encounter in the instant case was consensual and constitutionally valid.

The Fact That Diaz Alerted Howell To Defendant Does Not Make An Otherwise Consensual Encounter A Seizure.

Defendant argues that the encounter between Defendant and the officers could not have been consensual because Howell would not have stopped Defendant, but for the radio call from Diaz alerting Howell to Defendant's suspicious behavior. The Defendant relies on *U.S. v. Lambert*, 46 F.3d 1064 (10th Cir. 1995) as support for his position.

Defendant's reliance on *Lambert* is misplaced. The facts of *Lambert* are comparable, but distinguishable from the case *sub judice* and the distinction further supports the finding that the encounter between Defendant and officers was consensual. In *Lambert*, a Los Angeles DEA agent observed Lambert purchase a one-way ticket from Los Angeles to Wichita, Kansas. The agent noticed that Lambert paid for the ticket in cash just forty (40) minutes before his flight departed. The L.A. DEA agent then called DEA agents in Wichita and alerted them to Lambert's arrival. Three DEA agents observed Lambert as he arrived at the baggage claim area in Wichita and observed that he seemed nervous, retrieved his luggage, and left the airport quickly. The agents then approached Lambert as he walked to his car. The agents identified themselves, and asked to speak to defendant. The agents inquired as to whether defendant had just flown in and asked to see his airline ticket. They returned the ticket after they examined it,

³ . The officers did not use any physical force or make any show of authority until after the canine sniff indicated the presence of a controlled substance. The record indicates that when Defendant began to back up as his bags were being searched, he was instructed not to run. This show of authority occurred, however, after the canine sniff was conducted and after Defendant consented to the search.

then requested to see defendant's driver's license. The agents then retained the driver's license for about twenty-five (25) minutes as they questioned Lambert. While retaining the driver's license, the agents inquired about Lambert's business and asked if they could search his suitcase. Lambert refused. The agents, nevertheless, seized Lambert's suitcase and returned the driver's license. Lambert left the airport, at which time, his suitcase was subjected to two dog sniffs and search pursuant to search warrant, which revealed the presence of illegal drugs.

Lambert filed a motion to suppress the evidence seized pursuant to the search. The motion was denied by the trial court and Lambert entered conditional pleas of guilty. The Fourth Circuit reversed and found that Lambert was seized, without reasonable suspicion, when DEA agents retained his driver's license.

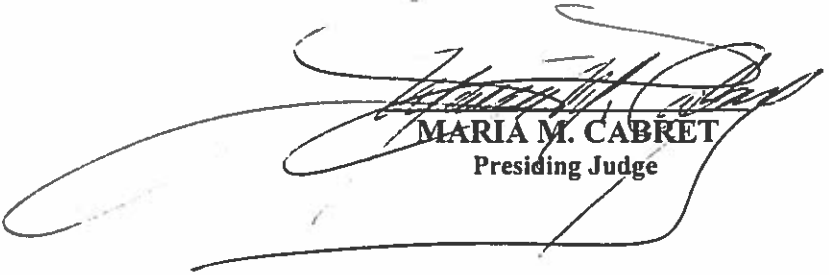
The Fourth Circuit determined that "[t]here is no doubt that at its inception the encounter between the agents and Mr. Lambert was permissible and in no way implicated the Fourth Amendment." 46 F.3d at 1068. The Fourth Circuit held that the consensual encounter became an investigative detention when the agents retained Lambert's driver's license. The Fourth Circuit never indicated that the encounter was nonconsensual because the agents in Wichita were alerted to defendant by the agent in L.A.⁴ Likewise here, this Court does not find of any significance the fact that Diaz alerted Howell to Defendant's behavior.

⁴ Other factually similar cases support the Government's position that the fact that Diaz alerted Howell and Valerino to Defendant does not make an otherwise consensual encounter a seizure. For instance, in *U.S. v. Thame*, 846 F.2d 200 (3d Cir. 1988), defendant traveled by train from Ft. Lauderdale to Philadelphia. Defendant had aroused the suspicions of Amtrak investigators in Ft. Lauderdale when he made the reservation on the day of travel, paid for the ticket in cash, did not give a telephone number, asked whether he could keep his luggage with him, and reserved a sleeping accommodation for the trip to Philadelphia, but not for the return. The investigators then called ahead to DEA agents in Philadelphia, who stopped and questioned defendant at the train terminal in Philadelphia. In finding that the initial encounter with defendant was consensual, the Third Circuit did not address the fact that the Philadelphia agents were alerted to defendant by the Amtrak investigators in Florida. Similarly, in *U.S. v. Rivera*, No. 98-280, 1998 WL 633686 (E.D.Pa. August 13, 1998), defendant traveled from San Juan to Philadelphia. In San Juan, a DEA agent approached defendant and engaged him in a consensual encounter. The agent in San Juan then

Unlike *Lambert*, there was no investigative detention in this case and therefore, the evidence should not be suppressed. In *Lambert*, the encounter became an investigative detention before a canine sniff or search was ever conducted because the agents retained Lambert's driver's license. Additionally, Lambert refused to consent to the canine sniff or search. The officers in the present case, however, did not retain anything belonging to Defendant, and he was free to leave until the canine sniff alerted the officers to the presence of a controlled substance. Moreover, Defendant in this case clearly consented to the canine sniff. The consensual nature of the encounter in this case and the fact that Defendant consented to the canine sniff and search makes the facts in this case distinguishable from the facts in *Lambert*.

CONCLUSION

The encounter between Defendant and the officers at the Seaborne airport terminal was consensual. Because such encounters do not implicate the Fourth Amendment, the evidence seized pursuant to the search and the subsequent statements made by Defendant are not "fruits of the poisonous tree."



MARIA M. CABRET
Presiding Judge

contacted the Philadelphia office of the DEA to alert them that defendant met a drug courier profile. In Philadelphia, defendant was observed and stopped by another DEA agent. In finding the second stop consensual, the court did not discuss the fact that the DEA agent in San Juan alerted the DEA agent in Philadelphia to the defendant.