

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

PEOPLE OF THE VIRGIN ISLANDS,	)	
	)	
Plaintiff,	)	CASE NO. ST-2016-CR-0000030
vs.	)	
	)	V.I. Code Ann. tit. 14, § 2253(a)
KADEEM JAMAL HODGE,	)	
(D.O.B.: 07-29-92)	)	
Defendant.	)	
_____	)	

MEMORANDUM OPINION

Before the Court is Defendant Kadeem Jamal Hodge's ("Hodge") Motion to Suppress and supporting Memorandum of Law,¹ which were both filed on April 4, 2016.² Defendant's Motion was never opposed in writing by the People. On May 10, 2016, the Court held a suppression hearing and heard testimony from Officer Akeem Frett, Sergeant Mario Brooks, Officer Denley Williams, and Defendant Hodge. At issue is whether the stop and search of Hodge was legal under the terms of the Fourth Amendment and whether the fruits of the alleged illegal stop and search should be suppressed. The Court finds that while the officers were justified in stopping Hodge's vehicle based on the observed traffic violation (i.e. driving without a seatbelt), the search of Hodge was unjustified. Therefore, the Court will grant Hodge's Motion to Suppress the firearm and ammunition.³

BACKGROUND

On Thursday, January 14, 2016, at approximately 7:45 p.m., Officer Akeem Frett ("Officer Frett") and Sergeant Mario Brooks ("Sergeant Brooks") were patrolling the Contant Knolls neighborhood as part of the Special Operations Bureau's Operation Restore Calm.⁴ Upon approaching an intersection near the entrance to Contant Knolls, the Officers observed a silver Acura TSX, VI License plate number (TEW-086), being operated by a black male, later identified as Hodge. Officer Frett testified that Hodge was speeding. Since Officer Frett and Sergeant Brooks had the patrol car's high beams on, the officers noticed that the driver's seat was reclined and that Hodge was not wearing his seatbelt. Thereafter, the officers turned on the patrol car's strobe lights. By then, Hodge's vehicle was already stopped.

¹ Mem. of Law in Supp. of Kadeem Jamal Hodge's Mot. to Suppress, April 4, 2016.

² The People of the Virgin Islands are represented by Assistant Attorney General Nadja Harrigan. Assistant Attorney General Daniel Huston, who represented the People at the May 10, 2016 suppression hearing, is no longer employed at the Department of Justice, effective August 5, 2016. The Defendant, Kadeem Jamal Hodge, is represented by Attorney Robert A. Leycock.

³ *Horton v. California*, 496 U.S. 128, 136 (1990).

⁴ The purpose of Operation Restore Calm was to patrol high crime areas for robberies and other crimes.

Officer Frett testified that he exited the patrol car and approached Hodge's vehicle while Sergeant Brooks remained in the patrol car and radioed the traffic stop. Officer Frett told Hodge to keep his hands on the steering wheel. He then asked Hodge for his license, registration, and insurance. Hodge appeared "nervous" and he began to move his hands away from the steering wheel towards the console. At that point, Officer Frett drew his firearm and placed it at "low ready."⁵ Officer Frett stated that for Hodge's safety and for Officer Frett's safety, Hodge needed to keep his hands up. Officer Frett then ordered Hodge to exit the vehicle. Hodge opened the car door and exited. The car door remained open. Hodge was ordered onto the ground and was handcuffed. Officer Frett asked Hodge for permission to search the vehicle. Hodge then consented to the search. Officer Frett then called for more officers to search the vehicle.

Hodge gave a vastly different account of the initial encounter with Officer Frett. Hodge testified that he had just dropped a friend off in an area behind Contant Knolls. Since the road was under construction, Hodge was driving slowly. Hodge admitted that he was not wearing his seatbelt. Shortly before Hodge approached the main road, the officers stopped his vehicle. Officer Frett approached the driver's side of Hodge's vehicle with his firearm drawn. Hodge became nervous as a result of the firearm in his face. Hodge was ordered out of the vehicle and was told to get onto the ground. He was then handcuffed. When he got off the ground, he saw the officers searching the vehicle. However, he did not see the officers remove the firearm from the vehicle. Officer Frett also told Hodge not to speak and that he was being detained. Hodge was asked for his license and registration. He told the officers that his license and registration were in the vehicle. Officer Frett stated that he wanted Hodge to "send a message to somebody." Hodge testified that he was never informed of the reason for the detention and that at no time did Hodge give permission for the officers to search his vehicle.

Several other officers arrived on the scene to provide backup. Officer Denley Williams ("Williams") testified that he arrived approximately ten minutes after the traffic stop. Officer Williams observed approximately six other officers at the scene, and he saw Hodge being interviewed by Officer Richard Velasquez ("Velasquez") and Sergeant Brooks. Officer Williams walked towards Hodge's vehicle with his flashlight in hand. Upon looking into the open door of the vehicle, Officer Williams observed what appeared to be the muzzle of a black firearm under the driver's seat. Officer Williams told Sergeant Brooks about the firearm, later identified as a Glock 36 pistol bearing the serial number DTH128 with one six-round magazine fully loaded. Officer Velasquez asked Hodge if he possessed a firearm license for the United States Virgin Islands and he said, "no." Hodge was advised of his *Miranda* rights and subsequently placed under arrest for possession of an unlicensed firearm pursuant to V.I. CODE ANN. tit. 14, § 2253(a).

There was also conflicting testimony as to whether a traffic citation for driving without a seatbelt was given to Hodge at the scene or at the police station. According to the People, Officer Ecedro Lindquist issued the traffic citation. There was no testimony as to whether Officer

⁵ Low ready requires an officer to point his or her firearm towards the ground at a 45 degree angle.

Lindquist was at the scene of the stop nor was Officer Lindquist mentioned in the Probable Cause Fact Sheet.⁶ A supplemental report created by Sergeant Brooks provides that Officer Lindquist wrote the traffic citation after Hodge exited his vehicle.⁷ However, Hodge testified that he did not receive the traffic citation until he arrived at the police station.

Sometime after the initial traffic stop, Sergeant Brooks' report provides that further investigation revealed that Hodge's vehicle matched the description of a vehicle that was alleged to be driven by person(s) involved in a shooting at the Eclipse nightclub earlier in the week.⁸ The shooting involved Law Enforcement Officers and it was alleged that threats were made against Law Enforcement Officers as a result of the shootings.⁹

MOTION TO SUPPRESS STANDARD

The Fourth Amendment to the United States Constitution prohibits unreasonable searches and seizures.¹⁰ "Generally, for a seizure to be reasonable under the Fourth Amendment, it must be effectuated with a warrant based on probable cause."¹¹ Warrantless searches, however, "are *per se* unreasonable under the Fourth Amendment subject to a few specifically established and well delineated exceptions."¹²

Initially, the accused has the burden of proving that the evidence should be suppressed.¹³ However, once it is proven that the search or seizure was effected without a warrant, the burden shifts to the People to prove by clear and convincing evidence that the governmental activity fell within some recognized exception to the warrant requirement. Along those lines, the People have the burden of proving that each individual act constituting a search or seizure under the Fourth Amendment was reasonable.¹⁴

⁶ See Ex. 1.

⁷ Informational Motion, May 10, 2016.

⁸ *Id.*

⁹ *Id.*

¹⁰ U.S. CONST. amend. IV.

¹¹ *United States v. Robertson*, 305 F.3d 164, 167 (3d Cir. 2002) (citing *Katz v. United States*, 389 U.S. 347, 356-57 (1967)).

¹² *Mincey v. Arizona*, 437 U.S. 385, 390 (1978); *Horton v. California*, 496 U.S. 128, 133 (1990) (opining that the general rule is that warrantless searches are presumptively unreasonable).

¹³ *People v. Archibald*, 50 V.I. 74, 85 (V.I. Super. Ct. 2008); *Government v. Morton*, 15 V.I. 418 (V.I. Super. Ct. 1978); *Rawlings v. Kentucky*, 448 U.S. 98, 104-05 (1980).

¹⁴ *People v. Samuel*, Nos. SX-09-CR-557; SX-09-CR-556, 2010 WL 7756081, at *3 (V.I. Super Ct. Nov. 12, 2010); *United States v. Johnson*, 63 F.3d 242, 245 (3d Cir. 1995).

ANALYSIS

A. The Officers Lawfully Initiated the Traffic Stop.

The first issue before the Court is the legality of the traffic stop. The People contend that the officers engaged in a lawful traffic stop and that the firearm was in plain view. Hodge counters that there was an illegal stop, search and seizure, and that there are no valid exceptions to the warrantless search.¹⁵ Further, Hodge contends that there was no “reasonable suspicion” for a detention.¹⁶ Therefore, the gun and other items are the “fruit of the illegality” and are inadmissible.¹⁷

The Fourth Amendment to the U.S. Constitution is made applicable to the Virgin Islands pursuant to Section 3 of the Revised Organic Act of 1954, as amended.¹⁸ The Fourth Amendment provides:

The right of 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.

It is well settled that in Fourth Amendment terms, a traffic stop entails a seizure of the driver “even though the purpose of the stop is limited and the resulting detention brief.”¹⁹ During a typical traffic stop officers are permitted to address “a check of the driver’s license, vehicle registration, and criminal history, and the writing of the citation or warning,” as well as background questions about the destination and purpose of the driver’s trip.²⁰ An officer’s decision to stop an automobile must not be “unreasonable” under the circumstances surrounding the stop.²¹ A vehicle stop is thus subject to the constitutional imperative that it not be unreasonable under the circumstances. Generally, the decision to stop an automobile is reasonable where the police have probable cause to believe that a traffic violation has occurred.²²

In the instant case, Officer Frett and Sergeant Brooks stopped Hodge for committing a traffic violation in their presence, i.e., not wearing a seatbelt, which violates V.I. CODE ANN.

¹⁵ Mem. of Law in Support of Kadeem Jamal Hodge’s Mot. to Suppress, 3, April 4, 2016.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ 48 U.S.C.A. § 1561 (2012).

¹⁹ *Brendlin v. California*, 551 U.S. 249, 255 (2007) (citing *Delaware v. Prouse*, 440 U.S. 648, 653 (1979)); *See also Government of the Virgin Islands v. Ali*, 45 V.I. 164 (V.I. Super. Ct. 2003)).

²⁰ *United States v. Olivera-Mendez*, 484 F.3d 505, 509 (8th Cir. 2007).

²¹ *Whren v. United States*, 517 U.S. 806, 810 (1996).

²² *Id.*

tit 20, § 466.²³ Hodge even admitted during his testimony that he was not wearing his seatbelt at the time he saw the officers. Therefore, the initial stop of Hodge's vehicle was both constitutional and lawful.

B. Officer Frett Lawfully Ordered Hodge to Exit the Vehicle.

Next, the Court must consider whether Officer Frett lawfully ordered Hodge to exit the vehicle. Traffic stops are dangerous encounters that result in assaults and murders of police officers.²⁴ In order to minimize that threat, the U.S. Supreme Court in *Pennsylvania v. Mimms* held that *once a motor vehicle has been lawfully detained for a traffic violation, a police officer may order the driver to get out of the vehicle* without violating the Fourth Amendment's proscription of unreasonable searches and seizures.²⁵ Moreover, a police officer making a traffic stop may also order the passengers to exit the vehicle pending the completion of the stop.²⁶

Here, Officer Frett asserts that he asked Hodge for his license, registration, and insurance. When Hodge appeared nervous and began to move his hands towards the console, Officer Frett ordered him to exit the vehicle. Sergeant Brooks, who has twenty-two (22) years of experience on the police force, testified that during a mere traffic stop based on a seatbelt violation, it's unusual to ask the driver to exit the vehicle. However, in light of *Pennsylvania v. Mimms*, Officer Frett did in fact lawfully order Hodge to exit the vehicle.²⁷

C. The Traffic Stop was Not Lawfully Converted into a Terry Stop.

The Court must also consider whether the traffic stop was lawfully converted into an investigatory *Terry* stop. In *Arizona v. Johnson*, the U.S. Supreme Court held that a police officer may be justified in stopping a vehicle due to a traffic violation without an additional requirement of believing that the occupant is involved in criminal activity.²⁸ An officer's inquiries into matters unrelated to the justification for the traffic stop does not convert the encounter into something other than a lawful seizure, so long as those inquiries do not measurably extend the duration of the stop.²⁹ After a justified and lawful traffic stop, an officer who develops, a reasonable, articulable suspicion of criminal activity may inquire beyond the reason for the traffic stop and may detain the vehicle

²³ 20 V.I.C. § 466 ("No person may operate a motor vehicle unless the operator and any passenger in the front seat of the vehicle are restrained by a lap and shoulder restraint where provided by the vehicle manufacturer which crosses over the hip and pelvis.").

²⁴ *United States v. Moorefield*, 111 F.3d 10, 13 (3d Cir. 1997) (citing *See, e.g., Wilson*, 137 L. Ed. 2d 41, 1997 WL 65726, at *4; *Michigan v. Long*, 463 U.S. 1032, 1047, 103 S. Ct. 3469, 3480, 77 L. Ed. 2d 1201 (1983); *United States v. Robinson*, 414 U.S. 218, 234 n.5, 94 S. Ct. 467, 476 n.5, 38 L. Ed. 2d 427 (1973); *Adams v. Williams*, 407 U.S. 143, 148 n.3, 92 S. Ct. 1921, 1924 n.3, 32 L. Ed. 2d 612 (1972).

²⁵ *Pennsylvania v. Mimms*, 434 U.S. 106, 111 (1997).

²⁶ *Maryland v. Wilson*, 519 U.S. 408, 415, 117 S. Ct. 882, 886, 137 L. Ed. 2d 41 (1997).

²⁷ *Pennsylvania*, 434 U.S. at 111.

²⁸ 555 U.S. 323, 327 (2009).

²⁹ *Id.*

and its occupants for further investigation.³⁰ While reasonable suspicion must be more than an inchoate hunch, the Fourth Amendment requires that the police articulate some minimal objective justification for an investigatory stop.³¹

It is undisputed that Officer Frett chose to extend the duration of the traffic stop. The question presented is whether Officer Frett had reasonable suspicion to do so. Specifically, Officer Frett's reasonable suspicion rests on two factors: 1) Hodge's nervousness and 2) Hodge's movements. Taken together, both factors do not give rise to reasonable suspicion.

With respect to Hodge's nervousness, in *Illinois v. Wardlow*, the U.S. Supreme Court noted that "nervous, evasive behavior is a pertinent factor in determining reasonable suspicion."³² However, nervousness alone is insufficient to establish reasonable suspicion of criminal activity. While the police may certainly incorporate the witnessed nervousness in assessing a situation, Officer Frett would need to tie Hodge's nervousness to additional factors. It is not unusual for a motorist to exhibit nervousness when confronted by a police officer.³³

With respect to Hodge's movements, Officer Frett stated that Hodge began to move his hands away from the steering wheel towards the console. Furtive movements can certainly be considered suspicious activity. For example, in *People v. Magras*,³⁴ the officers noted furtive movements taking place inside the vehicle *as well as* the inordinate amount of time it took the driver to bring the requested documents to the officers. Additionally, the officers detected the nervousness of the driver and the surprising disclosure that he did not know the names of the occupants in the vehicle. The Court held that the officers had reasonable suspicion to convert the traffic stop to a full investigatory *Terry* stop.

Detective Allen testified that his suspicion heightened after processing: (1) the smell of marijuana emanating from the vehicle; (2) Charles's initial failure to place the vehicle in park; and (3) Charles placing his hands on his waist area. Based on nineteen (19) years of experience in law enforcement, Detective Allen concluded that Charles may be armed. Since Detective Allen was able to articulate an objective reasonable basis for suspecting that Charles was involved in some type of criminal activity, his decision to lean into, extend and/or convert the traffic stop to a full *Terry* stop was justified.

Unlike *Magras* and *Charles*, Officer Frett was not able to provide the Court with an objective and reasonable basis for suspecting that Hodge was involved in some type of criminal activity or armed and dangerous. Mere nervousness and slight hand movements after a purported request for the driver to obtain his license and registration do not provide sufficient grounds to

³⁰ *United States v. Givan*, 320 F. 3d 452, 458 (2003).

³¹ *Id.*

³² 528 U.S. 119, 124, 145 L. Ed. 2d 570, 120 S. Ct. 673 (2000).

³³ *Whren*, 517 U.S. at 817 (noting that traditional traffic stops have the potential to cause significant anxiety and "that anxiety is likely to be even more pronounced when the stop is conducted by plainclothes officers in unmarked cars").

³⁴ *People of the Virgin Islands v. Magras*, 54 V.I. 3 (V.I. Super. Ct. 2010).

extend and/or convert the traffic stop to a full *Terry* stop. Furthermore, Officer Frett asked Hodge to produce his license, registration, and insurance. This request would require Hodge to remove his hands from the steering wheel towards the console or glove compartment of the vehicle. Therefore, the Court finds that the traffic stop was unlawfully converted to a *Terry* stop.

D. The Pat Down Search of Hodge was Not Conducted in Accordance with the Fourth Amendment.

The question presented is whether the pat-down search of Hodge was conducted in accordance with the Fourth Amendment. To justify a pat-down of the driver or a passenger during a traffic stop, . . . the police must harbor reasonable suspicion that the person subjected to the frisk is armed and dangerous. In *People v. Phillips*, this Court stated that a “protective search for weapons (commonly referred to as a “frisk” and/or “pat down”) is a limited search done only for detection of a dangerous weapon in the interest of officer security.”³⁵

While the stop of Hodge was justified by the observed traffic violation (i.e., driving without a seatbelt), the justification for the stop did not provide justification for the frisk or pat down. Officer Frett testified that when he approached the vehicle, he asked Hodge for his license, registration, and insurance. He testified that Hodge appeared “nervous” and began to make hand movements towards the console. At that point, Officer Frett pulled out his firearm and place it in a low ready position. He then told Hodge to keep his hands up for safety reasons. Officer Frett then ordered Hodge to exit the vehicle, ordered him onto the ground, and handcuffed Hodge. Officer Frett described Hodge as cooperative and stated that Hodge even gave the officers consent to search his vehicle. Officer Williams’ testimony corroborated that Hodge exited the vehicle and got onto the ground. However, neither officer proffered facts that gave rise to a reasonable suspicion that Hodge was armed and dangerous. Thus, there was no reason to subject Hodge to a pat-down and frisk.

Although the officers did not actually seize any evidence from Hodge’s person, the Court finds that the pat-down and frisk of Hodge was conducted without reasonable suspicion and, thus, resulted in a violation of Hodge’s constitutional rights.

E. The Firearm Seized from Hodge’s Vehicle Will Be Suppressed.

The People argue that the firearm is admissible because it was in plain view. Hodge counters that the evidence obtained as a result of the officers’ search of the vehicle –the firearm and ammunition- must be suppressed because the warrantless search of the vehicle was constitutionally impermissible and Hodge did not consent to the vehicle being searched.³⁶

³⁵ 52 V.I. 130 (V.I. Super. Ct. 2009).

³⁶ Mem. of Law in Support of Kadeem Jamal Hodge’s Mot. to Suppress, 3, April 4, 2016.

Under the plain view doctrine, it is reasonable for law enforcement to seize evidence in plain view without a warrant provided: 1) the officer is lawfully in the place from which the evidence is in plain view and has lawful right of access to the object itself; and 2) the incriminating character of the evidence is immediately apparent.³⁷ “The plain-view doctrine is grounded on the proposition that once police are lawfully in a position to observe an item firsthand, its owner's privacy interest in that item is lost.”³⁸ Absent probable cause, however, the officer cannot manipulate or disturb the object in order to discover its incriminating character.³⁹

Here, the Court finds that Officer Williams was not lawfully in the position from which to view the evidence and, thus, the first element of the plain-view doctrine has not been met.⁴⁰ Officer Frett was overzealous in unlawfully converting the traffic stop to a *Terry* stop, ordering Hodge to exit the vehicle, and engaging in an unlawful pat and frisk of Hodge. Therefore, Officer Williams could not have lawfully arrived in the place to view the firearm. As such, the Court will suppress the firearm and ammunition.

Ultimately, this decision is a difficult one. The Court spent a great deal of time weighing the law and the facts of this case largely because of the conflicting testimony from Officer Frett and Hodge. If the Court were to believe the testimony of Officer Frett, then it's possible that a search of the vehicle occurred prior to Officer Williams arriving on the scene. Officer Frett specifically testified that he received permission from Hodge to search the vehicle and he called other officers to search the vehicle. Hodge even testified that he saw the officers searching his vehicle. Yet, the People expect the Court to believe that Officer Williams, who arrived approximately 10 minutes later, was the first person to discover the firearm in plain view underneath the driver's seat. Such a conclusion is illogical. While the Court commends the Virgin Islands Police Department's efforts to reduce crime by patrolling high-crime neighborhoods through Operation Restore Calm, officers cannot abandon the requirements articulated in the Fourth Amendment to the U.S. Constitution.

CONCLUSION

While the officers were justified in stopping Hodge's vehicle based on the observed traffic violation (i.e. driving without a seatbelt), the search of Hodge's vehicle was unjustified. Therefore, the Court will grant Hodge's Motion to Suppress the firearm and ammunition.⁴¹

³⁷ *People of the Virgin Islands v. Santana*, __ V.I. __, 2014 V.I. LEXIS 40, at *5 (V.I. Super. Ct. July 8, 2014) (citing *Horton v. California*, 496 U.S. 128, 136-37).

³⁸ *Illinois v. Andreas*, 463 U.S. 765, 771, 103 S. Ct. 3319, 77 L. Ed. 2d 1003 (1983).

³⁹ *Arizona v. Hicks*, 480 U.S. 321, 326-29, 107 S. Ct. 1149, 94 L. Ed. 2d 347.

⁴⁰ Cf. *People of the Virgin Islands v. Prentice*, __ V.I. __, 2016 V.I. LEXIS 16, at *37 (V.I. Super. Ct. Feb. 23, 2016) (The Court found that the first condition of the plain-view doctrine was met because the muzzle of the gun was visible on the backseat of the car, a place that Officer Wyrzykowski could lawfully search pursuant to the *Terry* stop.)

⁴¹ *Horton v. California*, 496 U.S. 128, 136 (1990).

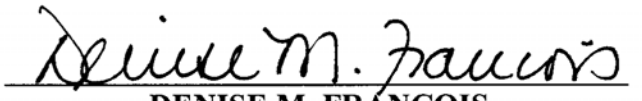
Accordingly, it is hereby

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

ORDERED that the People are **PROHIBITED** from introducing at trial any evidence of the firearm seized on the evening of January 14, 2016, or Defendant's statements made in connection with the firearm; and it is further

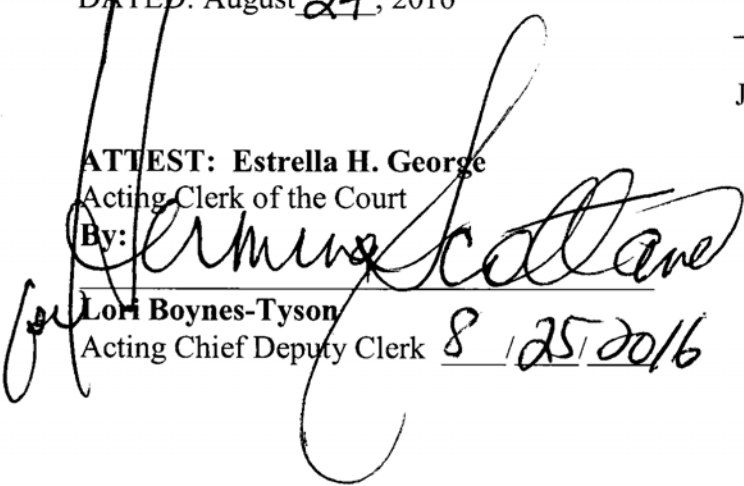
ORDERED that a copy of this Memorandum Opinion shall be directed to Criminal Division Chief at the Department of Justice, Quincy McRae, and Attorney Robert A. Leycock.

DATED: August 24, 2016


DENISE M. FRANCOIS
Judge of the Superior Court of the Virgin Islands

ATTEST: Estrella H. George
Acting Clerk of the Court

By:


Lori Boynes-Tyson
Acting Chief Deputy Clerk

8 / 25 / 2016