

¹ The People filed an Opposition on June 19, 2018 and an Amended Notice of Opposition to the Defendant's Motion to Suppress and Memorandum of Support on June 21, 2018 (the "Opposition").

Facts

On September 21, 2017, Officers James A. Dowe, Jr. (“Dowe”) and Kyle Gabriel (“Gabriel”)² were on duty in the area of Tutu Valley, St. Thomas, and patrolling in the same marked police vehicle. At approximately 11:30 a.m., the Officers received word from 911 dispatch of a call reporting a disturbance involving at least one male and a gun in the area of the Tutu Valley basketball court.

Dowe testified that upon arriving at the basketball court and exiting his vehicle, he saw the person now identified as Defendant Justin Gumbs standing approximately eight (8) feet away. Both Dowe and Gabriel testified that there were other individuals present when they arrived at the basketball court: Dowe alleged that there were three to four (3 – 4) males present approximately twenty to twenty-five (20 – 25) feet away; Gabriel stated that the two officers “pulled up in front of a group of males, talking.” Dowe began to approach Gumbs and came within three feet of Gumbs - close enough that he could see Gumbs’s face clearly. As Dowe approached Gumbs, Dowe said “hey”, and Gumbs turned and began running down a nearby steep hill. Gabriel and Velazquez pursued Gumbs on foot, while Dowe went directly to the bottom of the hill via the roadway. Gabriel stated that he stopped at the crest of the hill, when he was fifteen to twenty (15 to 20) yards from Gumbs, and that he observed Gumbs discarding various items as he ran. Gabriel testified that he stopped the

² Dowe and Gabriel were both assigned to the Special Operations Bureau on September 21, 2017 and were still so assigned on the day they testified in this matter.

pursuit for reasons of “officer safety,” as he could not tell what Gumbs was discarding. Velazquez also testified that he stopped the pursuit for safety reasons. Gabriel retraced the route Gumbs had taken as he ran and located a black holster, firearm and a loaded magazine on the hillside. Dowe, Gabriel and Velazquez testified that at no time did they see Gumbs in possession of a firearm. Dowe did not know Gumbs at the time but testified he had come close enough to Gumbs that Dowe was sure he could recognize Gumbs if he saw him again.

Defense witness Kwesi Howard, an assistant U.S. Marshal, testified that on September 21, 2017, he was off duty and in the area of the Tutu basketball court, at the top of the hill, trying to get a cell phone signal following the September 2017 hurricanes. He observed a person he knew to be Mr. B’s nephew, and now identified as Gumbs, staring in his direction. Howard quickly realized Gumbs was staring at the three men standing behind Howard. Howard heard someone known as “Africa”, who was standing behind Howard, tell Gumbs, “I will bus’ my F”.³ Howard turned on the flashing lights on his vehicle and told the three men they must leave the area. Howard reported the matter to his chief, left the area and stopped two officers along the way to report the matter. Howard later gave a statement to Sgt. Rachid. Howard testified that he did not see any weapon on Gumbs.⁴ He also testified he never reported anyone having a backpack, nor did he see anyone with a gun.

³ Howard told the Court that “bus’ my F” means “bust my gun”.

⁴ Howard testified that he had previously thought Defendant’s name was Mactavious, but he later learned his name is actually Gumbs.

Twelve (12) days later, on October 3, 2017, Dowe and Gabriel were again on patrol in the vicinity of the Tutu Valley basketball court. Gabriel testified that the officers knew the person they had seen on September 21 “hung out” in the area of the basketball court and they decided to look for him on that particular day. The Officers located Gumbs, and Dowe identified him as the individual he had approached on September 21, 2017 and who had subsequently fled. The Officers apprehended Gumbs, handcuffed him and took him to Zone A Command. At Zone A Command, Gumbs was read his Miranda rights in the presence of Sergeant Sofia Rachid (“Rachid”). Gumbs signed a Warning as to Rights form, including the waiver section; Rachid witnessed the signing. Plaintiff’s Exhibit M1. Gumbs then made a statement in which he acknowledged that he had been in possession of a firearm on September 21, 2017.

Gumbs was arrested and charged with Unauthorized Possession of a Firearm and Unauthorized Possession of Ammunition. Gumbs argues that the out-of-court identifications made by Dowe and Gabriel on September 21, 2017 and October 3, 2017 were unnecessarily suggestive and unreliable and should be suppressed, along with any subsequent in court identifications.

Legal Standard

The Fourth Amendment to the United States Constitution, applicable to the United States Virgin Islands through section 3 of the Revised Organic Act of 1954,⁵ guarantees:

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

“The Fourth Amendment protects individuals from ‘unreasonable searches and seizures,’ and ‘searches without a warrant are presumptively unreasonable.’” *United States v. Smith*, 2013 U.S. Dist. LEXIS 121721, *8 (quoting *United States v. Mathurin*, 51 V.I. 1196 (3d Cir. 2009)). However, “the Supreme Court has held that ‘police can stop and briefly detain a person for investigative purposes if the officer has a reasonable suspicion supported by articulable facts that criminal activity ‘may be afoot,’ even if the officer lacks probable cause.” *Mathurin*, 51 V.I. at 1203 (quoting *United States v. Sokolow*, 490 U.S. 1, 7 (1989); *Terry v. Ohio*, 392 U.S. 1, 30 (1968)). “To have reasonable suspicion, an officer must have specific and articulable facts under the totality of the circumstances that the person stopped is or was involved in criminal activity.” *Emanuel v. People of the Virgin Islands*, 2018 V.I. Supreme LEXIS 10, *9-10 (citing *United States v. Jacobsen*, 391 F.3d 904, 906 (8th Cir. 2004)). “This

⁵ See 48 U.S.C. § 1561.

is a lesser standard than probable cause but requires more than an officer's mere hunch." *Id.* (citing *United States v. Monsivais*, 848 F.3d 353, 357 (5th Cir. 2017)). In evaluating what constitutes 'reasonable suspicion' sufficient to justify a *Terry* stop, "the totality of the circumstances -- the whole picture -- must be taken into account." *United States v. Cortez*, 449 U.S. 411, 417 (1981).

The Fourteenth Amendment to the United States Constitution reads, in applicable part: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law."

Analysis

Gumbs contends that the out-of-court identifications by Dowe and Gabriel were unnecessarily suggestive, unreliable, violate the Due Process Clause of the Fourteenth Amendment and must be suppressed. The People counter that the instant matter does not involve identification based on an unnecessarily suggestive procedure and assert that the officers had the requisite reasonable suspicion to stop Gumbs under the Fourth Amendment. There are two out-of-court identifications in dispute: first, the identification of Gumbs at the Tutu Valley basketball court following the 911 call on September 21, 2017; and second, the identification of Gumbs at the same basketball court twelve (12) days later, on October 3, 2017, which ended in his arrest.

I. The Officers Did Not Have Reasonable Suspicion Sufficient to Initially Identify Gumbs as the Suspect.

Gumbs contends that Dowe did not have the requisite reasonable, articulable suspicion to identify him as the suspect of the 911 call on September 21, 2017.

Per their testimony, Dowe, Gabriel and Velazquez were on patrol in the Tutu Valley area when they were dispatched to investigate a tip about a man with a gun. According to Dowe, the tipster had provided a detailed description of the clothes the suspect was wearing, as well as the general location where he could be found. Dowe testified that when he arrived at the Tutu Valley basketball court and exited his vehicle, of the four to five (4 – 5) individuals present only Gumbs matched the physical description given by the 911 dispatch. Therein, however, lies a serious discrepancy: Dowe is the only witness who heard the purported detailed physical description of the suspect. Dowe testified that dispatch described the suspect as a male wearing a “baseball cap, black t-shirt, a backpack, shorts and possibly flip flops.” On the other hand, Gabriel testified that he heard nothing about a clothing description, instead the dispatcher simply mentioned a disturbance involving a “firearm and a male with a backpack.” He stated that he did not recall hearing anything further on the call. Officer Richard Velazquez (“Velazquez”) likewise testified that all he could recall of the 911 dispatch call was that there had been a report of a disturbance involving a male with a firearm in the area of the Tutu Valley basketball court.

The only description of the suspect in the transcript of the 911 call history record is a cursory mention of “wearing a green hat”. Otherwise the call log simply reflects a report of a “disturbance with weapons involved” in the area of “Estate Tutu Valley,” and “Mr. B nephew is the suspect.” Defendant’s Exhibit M2.

Nothing from Dowe’s description is included in the transcript of the 911 call history record. Moreover, Ms. Carolyn Wattley, VITEMA 911 Manager, testified that while it was possible for a call operator to receive information such as Dowe claims to have heard and not record that information in the 911 call log, such a lapse would be a rare occurrence.

“Some tips, completely lacking in indicia of reliability, would either warrant no police response or require further investigation before a forcible stop of a suspect would be authorized.” *People of the V.I. v. Felix*, 2014 V.I. LEXIS 59, *9 (Super. Ct. Aug. 5, 2014) (citing *Adams v. Williams*, 407 U.S. 143, 147 (1972)). “[D]etaining officers must have a particularized and objective basis for suspecting the particular person stopped of criminal activity.” *United States v. Cortez*, 449 U.S. 411, 417-418 (1981). “This demand for specificity in the information upon which police action is predicated is the central teaching of this Court’s Fourth Amendment jurisprudence.” *Terry*, at 21, n. 18. None of the officers testified as to seeing Gumbs with a weapon, and certainly not Howard who observed a brief exchange in the same area, involving Gumbs just minutes earlier. Gabriel testified that he did not hear any reference to “Mr. B.[s] nephew” in the dispatch. Neither Velazquez nor Dowe made any mention

of hearing any reference to “Mr. B[s] nephew” in the dispatch, nor even a “green hat”. Both Dowe and Gabriel testified that they did not know Gumbs prior to September 21, 2017. On cross-examination, Dowe stated that he knew Mr. B and had “been told” that Gumbs had a relationship with Mr. B.

No witness at the suppression hearing gave testimony regarding the source, identity or reliability of the tipster who called 911. Curiously, no one said the caller was anonymous. Therefore, the Court can draw no firm conclusion on whether the caller was known to police.⁶ However, Howard testified that he never mentioned “backpack” or that he had seen anyone with a gun. According to Howard, Mr. B’s nephew was the subject of the threat, not the person that made the threat.⁷

After much consideration, weighing the testimony of all three officers, Howard and Wattley, the Court does not find Dowe’s testimony credible as to the specific description of the suspect, as it is completely inconsistent with the 911 call log and what Gabriel and Velasquez heard from the 911 Dispatch. Further, there was nothing in the 911 dispatch call that would have suggested to the officers that Gumbs was involved in any criminal activity. While Dowe may have had a reasonable suspicion of criminal activity based on the 911 call, he did not have the specific and

⁶ The “complainant” in the 911 call was “Unit 53T Det. B. Farrell”. Def. Ex. M2. Howard’s report to police officers along the way was the likely source of the 911 call from Det. B. Farrell. However, no witness linked Howard’s oral report to the police officers to the call to 911.

⁷ The Court recognizes the 911 caller may have given a slightly different description of events.

articulable facts required to justify identifying Gumbs as the subject of the 911 call over the other males present at the Tutu Valley basketball court.

Therefore, the initial out-of-court identification of Gumbs is invalid and will be suppressed.

II. The Second Identification and Apprehension of Defendant was Likewise Unjustified.

Dowe testified that when he exited his vehicle on September 21, 2017, he was able to get a good enough look at Gumbs's face that he would be able to identify him if he saw him again. As Gabriel testified, he and Dowe knew Gumbs "hung out" in the area of the Tutu Valley basketball court and the two officers were actively looking for Gumbs on October 3, 2017, based on Dowe's prior encounter with Gumbs. However, as established above, Dowe's testimony regarding Gumbs's appearance is not credible and thus the initial identification of Gumbs as the subject of the 911 call was invalid. As the initial identification was invalid, it cannot be used as the basis for a subsequent identification.

Moreover, on October 3, 2017, Dowe and Gabriel had no "reasonable, articulable suspicion that criminal activity [was] afoot" *Illinois v. Wardlow*, 528 U.S. 119, 123 (2000) (citing *Terry*, at 30). There was no 911 call prior to Gumbs's arrest. Gabriel testified that he did not recall seeing Gumbs "doing anything suspicious" on that day. Dowe testified that Gumbs did not run or resist when he saw the officers

and that when Gumbs was given a pat-down search after his arrest, no weapons were found. “Under Title 5, Section 3562(3) of the Virgin Islands Code, a police officer may make a warrantless arrest of an individual ‘when a felony has in fact been committed and he has reasonable cause for believing the person to have committed it.’” *People of the V.I. v. Tyson*, 2015 V.I. LEXIS 77, *10 (Super. Ct. July 27, 2015) (not for publication). “Reasonable cause or probable cause ‘exists when at the moment of arrest police have knowledge of facts and circumstances grounded in reasonably trustworthy information sufficient to warrant a belief by a prudent person that an offense has been or is being committed by the person to be arrested.’” *Id.* (quoting *Phipps v. People of the V.I.*, 54 V.I. 543, 559, 2011 V.I. Supreme LEXIS 1. Dowe and Gabriel had no reasonable cause to stop Gumbs on October 3, 2017, nor did they have a warrant for his arrest. Thus, the only reason Dowe and Gabriel had for stopping Gumbs on October 3, 2017 was the discovery of the handgun and ammunition allegedly dropped by Gumbs on the hillside on September 21⁸, combined with Dowe’s invalid initial identification. Thus, the identification of Gumbs and his arrest on October 3 were invalid and will be suppressed.

⁸ The Court notes that Defendant did not raise the issue of the firearm or the ammunition found on the hill on September 21, 2017 in his Motion to Suppress. As the only issues raised for suppression were the two (2) out-of-court identifications (as well as any subsequent in-court identifications) and the statement given by Gumbs on October 3, 2017, those are the only issues that will be addressed in the instant Memorandum Opinion.

III. Defendant's Statement Obtained Incident to Arrest

Under the 'fruit of the poisonous tree' doctrine, "all evidence derived, either directly or indirectly, from an unlawful invasion into one's realm of constitutional sanctity, must be excluded as proof against the victim." *People of the V.I. v. Castillo*, 49 V.I. 195, 222-223(V.I. 2008) (citing *Wong Sun*, 371 U.S. at 484-488). "The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the court, but that it shall not be used at all." *Nardone*, 308 U.S. at 340-341 (quoting *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 392 (1920); *Gouled v. United States*, 255 U.S. 298, 307 (1921)).

Dowe did not have the requisite reasonable, articulable suspicion to apprehend Gumbs on October 3, 2017. As Dowe's identification and subsequent arrest of Gumbs were not justified, the resulting confession is also invalid as fruit of the poisonous tree and will be suppressed.

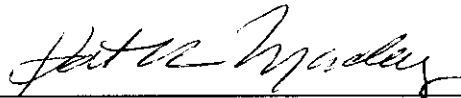
Conclusion

On September 21, 2017, Officer Dowe did not have the requisite reasonable suspicion to identify Defendant Gumbs as the subject of the anonymous 911 call when he arrived at the Tutu Valley basketball court. As Officer Dowe's original identification of Gumbs was invalid, the subsequent identification of Gumbs on October 3, 2017 was also invalid. As the identifications were invalid, Dowe's warrantless arrest of Gumbs on October 3, 2017 was unjustified and Gumbs's confession is suppressed as fruit of the poisonous tree. Therefore, Defendant's Motion

to Suppress will be granted. The identifications and the written statement will be suppressed.

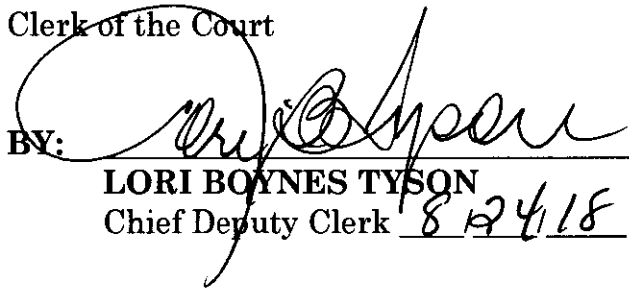
An Order consistent with this Memorandum Opinion will be entered.

DATED: August 24, 2018



Kathleen Mackay
Judge of the Superior Court
of the Virgin Islands

ATTEST:
ESTRELLA H. GEORGE
Clerk of the Court

BY: 

LORI BOYNES TYSON
Chief Deputy Clerk

8/24/18