

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

PEOPLE OF THE VIRGIN ISLANDS,

Plaintiff,

v.

ANSEL SMITH,

Defendant.

CRIM NO. SX-14-CR-303

UNAUTHORIZED POSSESSION OF A FIREARM;
UNAUTHORIZED POSSESSION OF AMMUNITION;
FAILURE TO REPORT FIREARMS OBTAINED
OUTSIDE OR BROUGHT INTO THE VIRGIN
ISLANDS;
SIMPLE POSSESSION OF A CONTROLLED
SUBSTANCE

MEMORANDUM OPINION AND ORDER

THIS MATTER is before this Court on Defendant's Motion to Suppress ("Motion") and Memorandum of Points and Authorities in Support of Motion to Suppress ("Memorandum"), filed June 15, 2015; and People's Response to Defendant's Motion to Suppress ("Response"), filed July 16, 2015. The matter came on for hearing on July 27, 2015.¹

For the reasons set forth below, Defendant's Motion will be DENIED.

I. BACKGROUND

On or about August 26, 2014, Officer Jerome Ashe was on patrol traveling south on the Queen Mary Highway when he passed a dark blue Land Rover traveling north, in the vicinity of Quality Electric. Hearing Testimony, J. Ashe; Affidavit, J. Ashe ¶ 2; Motion ¶ 1. Officer Ashe and his partner decided to stop the Land Rover because its windows were so heavily tinted that they could not distinguish the driver. Hearing Testimony, J. Ashe; Affidavit, J. Ashe ¶ 2. As Officer Ashe approached the vehicle, he "immediately smelled a strong odor of what appeared to be marijuana emanating from the interior of the vehicle." Affidavit, J. Ashe ¶ 3A. Officer Ashe asked the driver, Ansel Smith, for his license, registration, and proof of insurance. *Id.* ¶ 3B. As Officer Ashe was reviewing the documents, Defendant began to shake uncontrollably, perspire, and his speech started stuttering. *Id.* ¶ 3C. Officer Ashe asked if Defendant had anything illegal, such as drugs or weapons, on his person or inside the vehicle. *Id.* ¶ 3D. Defendant stated he had marijuana in a brown paper bag on the rear seat. Hearing Testimony, J. Ashe. Officer Ashe asked for permission to retrieve the brown paper and Defendant agreed. *Id.* Officer Ashe found 10 grams of a green leafy substance, the alleged marijuana, and arrested

¹ Defendant was given until August 4, 2015 to file a supplemental brief in support of the Motion and the People was given until August 24, 2015 to file a response. Neither party has filed any supplemental documents.

Defendant. Motion ¶¶ 2-3. The substance field-tested positive for THC, the main component of marijuana. *Id.* ¶ 3E. After being placed under arrest, Defendant was advised of his Miranda rights. *Id.* Subsequent to arrest, Police conducted an inventory inspection of the vehicle by which Officer Ashe “observed in plain view a black handgun with the handle of the handgun facing upwards and the muzzle of the handgun facing downwards, behind the adjustable center console of the back seat.” *Id.* ¶ 3F. Officer Ashe asked Defendant if he had a valid Virgin Islands license to possess a firearm, to which Defendant replied that he did not. *Id.* ¶ 3G. Officer Ashe then measured the tint level and issued traffic citations for excessive tint on the driver’s window, the driver’s rear window, the passenger window, the passenger rear window, and the front windshield, all of which were in violation of the window legal tint limit. *Id.* ¶ 3H. The vehicle was then taken to the Police Department impound lot for safekeeping. *Id.* ¶ 3I. Defendant was processed, booked and bail was set. Unable to post bail, Defendant was remanded to the Bureau of Corrections. *Id.* ¶¶ 3K, 3L. Defendant argues that Officer Ashe did not have probable cause to stop the vehicle; thus, any contraband found or statements made resulting from the stop should be suppressed. Motion, at 2.

II. LEGAL STANDARD FOR A MOTION TO SUPPRESS

The Fourth Amendment protects an individual's right to security in his person, home, papers and effects and specifically against unreasonable searches and seizures. *U.S. CONST. amend. IV*, applicable in the Virgin Islands pursuant to *Revised Organic Act of 1954*, §3 (48 U.S. Code §1561). The burden of proof is on a defendant seeking to suppress evidence under a Fourth Amendment challenge. *See United States v. Acosta*, 965 F.2d 1248, 1256, n. 9 (3d Cir. 1992) (citations omitted). However, once the defendant establishes that the search occurred without a warrant, the burden shifts to the government to show that each act of the warrantless search was reasonable under the Fourth Amendment. *United States v. Johnson*, 63 F.3d 242, 245 (3d Cir. 1995).

III. DISCUSSION

Warrantless searches are *per se* unreasonable, unless they fall under an exception to the rule requiring that searches be conducted pursuant to warrant. *See Katz v. United States*, 389 U.S. 347, 357 (1967). Investigatory stops, such as a traffic stop, are lawful when justified by a reasonable suspicion that an individual is engaged in criminal activity. Criminal activity in this context, includes a general traffic violation. *See Md. v. Wilson*, 519 U.S. 408, 410 (1997); *Pa. v. Mimms*, 434 U.S. 106, 111

(1977); *People of the V.I. v. Charles*, 2014 V.I. LEXIS 7, at *7 (V.I. Super. Ct. Feb. 26, 2014);² *United States v. Polanco*, 48 V.I. 744, 750 (D.V.I. 2007); *Ornelas v. United States*, 517 U.S. 690, 693 (1996); *United States v. Hensley*, 469 U.S. 221, 226-227 (1985)). The reasonable suspicion standard is met when an officer can point to specific and articulable facts, which when taken together with rational inferences from the facts, reasonably warrant the intrusion.³ Courts must look to the totality of the circumstances of each case to determine whether officers have a particularized, objective basis for suspecting that criminal activity is afoot. *Polanco*, 48 V.I. at 750 (citing *United States v. Arvizu*, 534 U.S. 266, 273-274 (2002)); see also *U.S. v. Cortez*, 449 U.S. 411, 417 (1981).

Here, Defendant argues that based upon the wording of 20 V.I.C. § 800(b)(1),⁴ Officer Ashe's traffic stop must have been pretextual because an assessment that a vehicle has heavily tinted windows is not specific, not articulable, and not factual, and therefore cannot form the basis for reasonable suspicion. Memorandum, at 2. Therefore, Defendant asserts that Officer Ashe used the traffic stop to determine whether a traffic violation existed. *Id.* Defendant seeks to suppress all evidence obtained as

² *Charles* explains lawful stops by stating:

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

Charles, 2014 V.I. LEXIS, at *7-8 (citing *Arizona v. Johnson*, 555 U.S. 323, 327 (2009)).

³ The primary bases for reasonable suspicion are the officer's personal observations, as explained in *Polanco*:

Law enforcement officers may use their own training and experience to make inferences ... and deductions about the cumulative information available to them that might well elude an untrained person. The standard of reasonable suspicion may not be satisfied by an officer's hunch alone. The likelihood of criminal activity required for reasonable suspicion is lower than that required for probable cause.

...

Finally, police officers may use their own training and experience as well as the observations of other officers in concluding whether reasonable suspicion or probable cause exists.

Polanco, 48 V.I. at 750 (citing *United States v. Arvizu*, 534 U.S. at 277; *United States v. Hensley*, 469 U.S. at 232).

⁴ Title 20 V.I.C. § 800(b)(1) prohibits the use of tint on vehicle windows "... where the light transmittance is reduced to less than 35%, when measured by a device designed specifically for that purpose and approved by the Director or Police Commissioner and operated by an employee of the Bureau of Motor Vehicles or Virgin Islands Police Department trained in the use of the device." Memorandum, at 2.

a result of the alleged unlawful stop, arrest, and search and seizure of his vehicle as violations of his Fourth Amendment rights. *Id.*⁵

The People argues that the traffic stop was constitutional as it was supported by reasonable suspicion. Response, at 2. To support the contention that reasonable suspicion existed, the People highlights that any technical violation of a traffic code legitimizes a stop, even if the stop is merely pretext for an investigation of some other crime. *Id.* (citing *U.S. v. Delfin-Colina*, 464 F.3d 392, 397 (3d Cir. 2006)). Officer Ashe conducted the stop based on his belief that the vehicle had an illegally tinted window, in violation of 20 V.I.C. § 800(b)(1); therefore, he had valid reasonable suspicion to conduct the stop. *Id.* The People cites *United States v. Gooch*, 915 F.Supp. 2d 690 (3d Cir. 2012), in which the officer did not specifically know that the window tint was in violation of the law; nevertheless, the court found that the officer had reasonable suspicion to conduct the traffic stop. *Gooch*, 915 F.Supp. 2d at 705.⁶ The Third Circuit has also held that:

... the window tint provided reasonable suspicion justifying the stop. The reasonable suspicion analysis does not deal with hard certainties, but with probabilities. Additionally, the specific facts supporting an officer's reasonable suspicion must be seen and weighed not in terms of library analysis by scholars, but as understood by those versed in the field of law enforcement.

United States v. Hall, 270 Fed. Appx. 123, 126 (3d Cir. 2008) (internal quotations omitted).

The facts in the instant case support a finding that the window tint on the Land Rover provided sufficient legal justification for the stop and was not mere pretext.⁷ The actions that took place as a

⁵ The Third Circuit has provided guidance for the Virgin Islands, specifically, in *United States v. Lewis*, 672 F.3d 232 (3d Cir. 2012), in which the District Court of the Virgin Islands had concluded that "excessive tints provided a legal justification for the traffic stop, regardless of whether [the officer] was motivated by the desire to investigate the tip about the firearms." 672 F.3d. at 237. The Third Circuit stated that generally, "pretextual traffic stops supported by reasonable suspicion do not run afoul of the Fourth Amendment ... a pretextual traffic stop requires the officer to have observed a traffic violation prior to initiating the traffic stop ... the corollary of this fundamental principle is that *ex post facto* justifications are impermissible." *Id.*

⁶ *Gooch* relied on *United States v. Hall*, 270 Fed. Appx. 123 (3d Cir. 2008), wherein the Third Circuit stated:

Hall argues that the tint on his windows did not provide the necessary reasonable suspicion because the officers had no way of knowing at the time of the stop whether the tint was part of the original equipment or was applied after the vehicle was manufactured. He further argues that his loud music did not justify the stop because the Pittsburgh anti-noise ordinance is unconstitutionally vague. Finally, Hall argues that his attempt to elude the officers did not provide reasonable suspicion because all of the officers in the unmarked car were wearing plainclothes rather than uniforms. He points to 75 Pa. Stat. Ann. § 3733(c)(1), which provides that a defense to a charge of eluding police is that the police vehicle is "unmarked, [and] not occupied by a police officer who was in uniform and displaying a badge or other sign of authority."

Hall, 270 Fed. Appx. at 126.

⁷ *Lewis* provides an appropriate contrast to the instant case, in which, based on the Third Circuit's review of the testimony, the Third Circuit found that "the only logical conclusion is that the tints were a contrived, after-the-fact explanation for the traffic stop. As such, the tints cannot justify the stop of Lewis's vehicle." *Lewis*, 672 F.3d at 238.

result of the initial traffic stop were also constitutional. Officer Ashe testified that (1) he noticed a Land Rover driving with such heavily tinted windows⁸ (2) that he could not distinguish the driver through the heavy window tint; (3) causing him and his partner, Officer Ashley Benton, to make the joint decision to make a U-turn to follow the tinted car, (4) following which the officers conducted the traffic stop.⁹ (5) When Defendant rolled down the window, the strong odor of marijuana emanated from the vehicle. (6) When asked if he had narcotics or firearms in the vehicle, Defendant admitted he had marijuana in a brown bag on the rear seat. (7) Officer Ashe asked for permission to retrieve the marijuana from the bag; Defendant agreed and Officer Ashe retrieved a green leafy substance from the bag;¹⁰ (8) the green leafy substance tested positive for THC.¹¹ (9) Officer Ashe then arrested Defendant and conducted a vehicle inspection, incident to lawful arrest,¹² which revealed a 9mm hand gun in the center console in the rear of the vehicle, for which Defendant did not have a license.¹³

The Court finds that Officer Ashe conducted a valid traffic stop after he first observed what he reasonably suspected to be a traffic violation. Consistent with prior Virgin Islands and Third Circuit non-binding precedent, the Court finds that Officer Ashe was not required to know with certainty that the tinted windows were in violation of the law before making the stop. Rather, Officer Ashe was merely required to reasonably suspect the windows were in violation of the law.¹⁴ Officer Ashe testified that he was unable to distinguish the driver of the vehicle because of the heavy window tinting

⁸ Officer Ashe testified that he cannot determine the percentage of light passing through the window by “eyeballing it;” however, he can make an estimation based on his training and experience as to whether the tint is in compliance with the law, and he made the stop based on his estimation that the tint was not in compliance with the law. Hearing testimony, J.Ashe.

⁹ The officers approached the vehicle without the tint meter in hand.

¹⁰ Seizures of property that is obtained by consent are valid because the Fourth Amendment does not protect items that are voluntarily surrendered. *See Cal. v. Hodari D.*, 499 U.S. 621, 629 (1991).

¹¹ “When officers have probable cause to believe that a person has committed a crime in their presence, the Fourth Amendment permits them to make an arrest, and to search the suspect in order to safeguard evidence and ensure their own safety.” *Virginia v. Moore*, 553 U.S. 164, 178 (2008).

¹² Here, the arrest was lawful because the Defendant’s green leafy substance suspected to be marijuana tested positive for THC, the active chemical ingredient in marijuana, giving Officer Ashe probable cause to believe the crime of possession of a controlled substance had been committed in his presence.

¹³ A search incident to lawful custodial arrest “is not only an exception to the warrant requirement of the [4th] Amendment, but is also a ‘reasonable’ search under that Amendment.” *See U.S. v. Robinson*, 414 U.S. 218, 235 (1973). Similarly, the Third Circuit found that a search incident to arrest was valid because the police had probable cause to arrest a defendant for drug trafficking. *U.S. v. Lampkin*, 464 F.2d 1093, 1098 (3d Cir. 1972).

¹⁴ People’s Exhibit 1, a photograph of the front of the subject vehicle in the condition in which it was stopped, was presented at the hearing, and gives credence to the testimony of Officer Ashe that, based upon his experience and training, he could reasonably suspect that the windows were excessively tinted in violation of the law of the Virgin Islands. The fact that the windows when later tested were found to be in violation of the law supports Officer Ashe’s testimony and lends credibility to his reasonable suspicion for making the traffic stop.

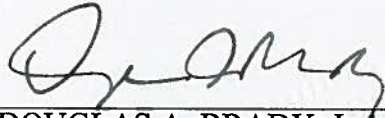
and, based upon his training and expertise, he believed that the tint was in violation of the law. As such, the Officer had reasonable suspicion to conduct the initial traffic stop. Defendant's allegation that Officer Ashe conducted the stop as mere pretext for determining whether a traffic violation existed is not borne out by the facts in the record. Rather, Officer Ashe reasonably suspected that the Land Rover's tinted windows constituted a traffic violation and, therefore, the stop was constitutional.

As noted, although, Officer Ashe had probable cause to search the vehicle because of the strong marijuana odor emanating from the vehicle,¹⁵ he did not need probable cause to conduct the search because Defendant consented to the officer's search for the marijuana. Once the substance tested positive for THC, the active chemical component of marijuana, Officer Ashe had probable cause to arrest Defendant for unlawful possession of a controlled substance. The lawful arrest then allowed Officer Ashe to conduct a full inventory search of the vehicle, during which he found the unlicensed gun. Because all of the events that occurred on August 26, 2014 were constitutionally permissible, the evidence obtained is admissible.

Based on the foregoing, it is hereby

ORDERED that Defendant's Motion to Suppress in this matter is DENIED.

DATED: September 29, 2015.


DOUGLAS A. BRADY, Judge

ATTEST: Estrella H. George
Acting Clerk of the Court

By: 
Court Clerk Supervisor 9/30/15

CERTIFIED TO BE A TRUE COPY
This 2nd day of October 2015

Estrella George
Acting CLERK OF THE COURT

Court Clerk II

¹⁵ "Probable cause exists where facts and circumstances within the arresting officer's knowledge are sufficient in themselves to warrant a reasonable person to believe that an offense has been ... committed by the person to be arrested." *United States v. Cruz*, 910 F.2d 1072, 1076 (3d Cir. 1990).

[P]olice may search a vehicle without a warrant if they have probable cause to do so. The rationale behind this automobile exception to the warrant requirement is that "the 'ready mobility' of automobiles permits their search based only on probable cause."... [A] policeman's on-the-scene assessment of probable cause provides legal justification for arresting a person suspected of crime, and for a brief period of detention to take the administrative steps incident to arrest.

Polanco, 48 V.I. at 749, 751 (citing *Ornelas*, 517 U.S. at 693; quoting *United States v. Burton*, 288 F.3d 91, 100-01 (3d Cir. 2002); and *Gerstein v. Pugh*, 420 U.S. 103, 113-14 (1975)).