

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

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| <b>PEOPLE OF THE VIRGIN ISLANDS,</b> | ) |                                                     |
|                                      | ) | CASE NO. ST-2018-CR-0000110                         |
| Plaintiff,                           | ) |                                                     |
| vs.                                  | ) | V.I. Code Ann. tit. 14, § 1700(a) (1), tit. 16,     |
|                                      | ) | § 91(b)(6) (2 Counts); tit. 14, § 1700(a)(2),       |
| <b>RICHARD A. PENN, JR.,</b>         | ) | tit. 16, § 91(b)(6) (2 Counts); tit. 14, § 1708(2), |
| <b>(D.O.B.: 11-17-67)</b>            | ) | tit. 16, § 91(b)(5) (2 Counts); tit. 14, § 505      |
| Defendant.                           | ) | (2 Counts)                                          |
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**MEMORANDUM OPINION AND ORDER**

**THIS MATTER** is before the Court on Defendant's Motion to Suppress Statement and Memorandum in Support of Motion to Suppress Statement. The People's Opposition to Defendant's Motion to Suppress was filed on September 21, 2018. Defendant's Motion seeks an order suppressing "any and all statements (oral and written) made by the defendant to police officers on April 30, 2018, that the People intend to be used as evidence in this matter." Penn's Motion will be denied because: (1) there was no custodial interrogation when Penn made his verbal unprompted confession and (2) Penn was fully informed of and nevertheless, by his actions, waived his *Miranda* rights when he made and signed the written statement on April 30, 2018.

**I. FINDINGS OF FACT.**

On October 31, 2018, an evidentiary hearing was conducted on Defendant Richard A. Penn, Jr.'s Motion to Suppress.<sup>1</sup> During the hearing, three witnesses testified: Sergeant Charmayne Todman Thomas, Matthew Wade Gusewelle and Defendant Richard A. Penn, Jr. Having heard the testimony of the witnesses and having reviewed the exhibits and the parties written submission, the Court makes the following findings of facts for the purposes of this of addressing the Motion to Suppress.

1. Sergeant Charmayne Todman Thomas has been employed with the Virgin Islands Police Department for 20 years. On April 30, 2018, she was, and still is, the Supervisor in charge of the Domestic Violence Unit.

2. On April 30, 2018, Thomas travelled from St. Thomas to Cruz Bay, St. John for the purpose of investigating a sexual assault. The victim had identified Penn as the suspect.

3. When Thomas arrived in St. John, she went straight to the Leander Jurgen Command

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<sup>1</sup> The Defendant was represented by Attorney Julie S. Todman of the Office of the Territorial Public Defender. The People were represented by Assistant Attorney General Eugene James Connor, Jr.

police station in Cruz Bay to ask for transportation to locate Penn, whom Thomas knew to work on the road leading to Coral Bay, St. John. Officers Vernon Williams and Delberth Phipps agreed to take Thomas in their vehicle to Penn. Williams knew who Penn was. Thereafter, Thomas, Williams and Phipps all travelled in the same police car to look for Penn.

4. Thomas, Williams and Phipps did locate Penn on the road leading to Coral Bay. At the time, Penn was sitting in a pick-up truck with Guswelle, a co-worker, and both were eating lunch.

5. The car carrying Thomas, Williams and Phipps pulled up next to the truck in which Penn and Guswelle were sitting. Williams approached the pick-up truck because he knew Penn. Penn identified himself. After Penn got out of the truck, Thomas asked Penn if he would come to the police station to give a statement as part of her investigation. Penn agreed to go to the police station. At the time, Thomas, Williams and Phipps were armed, but their guns were not drawn. At the time, Williams and Phipps were in uniform. Thomas was not wearing a uniform.

6. Thomas told Penn that he was not under arrest.

7. Penn's vehicle was parked further down the road from where he was eating lunch.

8. Penn was not given the option of driving his own vehicle to meet Thomas at the police station in Cruz Bay.

9. Thomas explained to Penn that, for officer safety, he would have to be handcuffed while riding in the police car. Penn did not object to this. During the ride back to Cruz Bay, Penn sat in the back of the car with Thomas and Williams and Phipps sat up front. During the drive back to Cruz Bay, police talked among themselves.

10. During the ride back to Cruz Bay the police did not ask Penn any questions. When Penn and the police arrived at the police station, Penn got out of the car. His handcuffs were removed and he was escorted to the third floor of the Leander Jurgen Command Station where the Criminal Investigation Bureau room is located.

11. During the time that Penn walked from the car to the third floor Thomas did not ask him any questions. During the time the Penn walked from the car to the third floor, Thomas did not leave Penn's presence.

12. During the time that Penn was escorted from the car to the third floor, he was not questioned by Thomas or any other police officers.

13. When Penn, Thomas, Williams and Phipps arrived at the Criminal Investigation

Bureau room, Thomas began arranging chairs for that there would be enough chairs for every to sit on. While Thomas was preparing a seat for Penn he blurted out—unprompted and without questioning—that he knew what the case was about. Penn said that he did not rape the victim, M.S., that it was consensual and that he had sex with the victim when she was twelve years old and he was forty. Thomas testified that “everything came out at once.”

14. Thomas told Penn to stop speaking. She read Penn his *Miranda* rights and she gave him the V.I.P.D. Warning As To Rights which very clearly explains the *Miranda* rights. Penn read the Warning As To Rights form. Thomas also read the Warning As To Rights form to Penn and he signed it. Penn also wrote in the date and time. Penn refused to sign the bottom portion of the form that specifically waived his rights in writing.

15. Thomas then told Penn that she was going to document what he told her and he agreed. Thomas wrote down everything that Penn said in a question and answer format.<sup>2</sup>

16. Thomas read everything on the statement back to Penn and he sign both sheets.

17. The second page of the statement signed by Penn states: “I hereby declare that the foregoing statement, which I have dictated and read, is freely and voluntarily given and is true and correct to the best of my knowledge.”<sup>3</sup>

18. After Penn signed both pages of the statement he was placed under arrest.

19. Penn did not request an attorney at any time.

## **II. *MIRANDA* WARNINGS MUST BE GIVEN WHEN A SUSPECT IS IN CUSTODY AND SUBJECT TO GOVERNMENTAL INTERROGATION.**

Once a motion to suppress a statement of the accused is made on the basis of a violation of *Miranda v. Arizona*<sup>4</sup> and the accused alleges facts demonstrating that the accused was in custody and subject to interrogation, the burden shifts to the People to prove by a preponderance of the evidence that the police complied with *Miranda* and that the statement was voluntary.<sup>5</sup>

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<sup>2</sup> People’s Ex. 4.

<sup>3</sup> People’s Ex. 4.

<sup>4</sup> 384 U.S. 436, 475 (1979).

<sup>5</sup> *People v. Azzam*, No. ST-16-CR-232, 2017 WL 5514375, at \*1 (V.I. Super. Nov. 14, 2017) (citing *Colorado v. Connelly*, 479 U.S. 157 (1986)).

In order to demonstrate that a statement is unlawfully obtained, the defendant must have provided testimonial information during a custodial interrogation<sup>6</sup> and the defendant's waiver of his *Miranda* rights must not have been knowing, voluntary, and intelligent.<sup>7</sup> In this context, the accused is in custody if he is deprived of freedom in any significant way such that a reasonable person in the accused's position would not feel free to leave under the totality of the circumstances.<sup>8</sup> Whether an arrestee is in custody is an objective test depending on the "the objective circumstances of the interrogation, not on the subjective views harbored by either the interrogating officers or the person being questioned."<sup>9</sup> An interrogation occurs when the Defendant responds to express questioning or its functional equivalent—words or actions reasonably likely to elicit an incriminating response.<sup>10</sup>

**A. Penn was Not in Custody When He Confessed.**

The Court believes Thomas, and not Penn, that the handcuffs were removed from Penn when he got out of the police car. The Court further finds that Thomas told Penn at his job site that he was not under arrest and that they wanted to get a statement from Penn at the police station.

The police did not question Penn during the drive to the police station in Cruz Bay. Even after they arrived at the Criminal Investigation Bureau, the police did not question Penn as they arranged the chairs. A suspect is not in custody simply because questioning takes place at a police station.<sup>11</sup> The Court finds that Penn was not in custody at the time he made his statement.

**B. The Verbal Statement Made by Penn to the Police on April 30, 2018 Was Voluntary.**

Thomas testified that Penn voluntarily began speaking, without questioning. "To determine whether a confession is voluntary, a court considers the totality of the circumstances and looks at

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<sup>6</sup> *Id.* at \*2 (citing *R.I. v. Innis*, 446 U.S. 291, 300–01 (1980)).

<sup>7</sup> *Id.* at \*2 (citing *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)).

<sup>8</sup> *Id.* at \*2 (citing *Yarborough v. Alvarado*, 541 U.S. 652, 663–65 (2004)).

<sup>9</sup> *Custodial Interrogations*, 42 GEO. L.J. ANN. REV. CRIM. PROC. 193, 196 n.547 (2013) (collecting cases).

<sup>10</sup> *R.I. v. Innis*, 446 U.S. 291, 300–01 (1980).

<sup>11</sup> *Custodial Interrogations*, 45 Geo. L.J. Ann. Rev. Crim. Proc. 220, 250 (2016) (citing *Beheler*, 463 U.S. at 1125 (no custody because defendant, not parolee or arrestee, voluntarily accompanied police to station, talked to police for 30 minutes, and was permitted to leave); and *Or. v. Mathiason*, 429 U.S. 492, 493, 495 (1977) (per curiam) (no custody because parolee voluntarily submitted to questioning at police station despite being questioned by officer in room with closed door)).

conduct of officers and characteristics of the accused.<sup>12</sup> Nothing in Penn's testimony during the suppression hearing indicate that his statement was elicited through questioning, threats or coercion.

The Court places no credence on Penn's testimony that he did not make an unprompted statement, but that he was merely repeating what Thomas told him. The Court finds that as Thomas was arranging chairs so that Penn would have a place to sit down, Penn, without questioning, blurted out a confession. No questions had been asked of Penn.

The same conclusion was reached by the Supreme Court of the Virgin Islands in *Castillo v. People*<sup>13</sup> when the defendant spontaneously said "I killed the little girl" while a U.S. Marshal was searching the defendant for weapons. Determining that there was no custodial interrogation, when Castillo "uttered his admission to the murder" the Supreme Court held there was no implication of the *Miranda* warnings."<sup>14</sup>

In the instant case, there was no interrogation underway when Penn confessed. Therefore, there was no custodial interrogation.

**C. Penn Waived his *Miranda* Rights by Voluntarily Agreeing to Reduce What He Said Verbally into a Written Statement.**

After Thomas told Penn to stop talking, he was advised of his constitutional rights and acknowledged same in writing.<sup>15</sup> Even though Penn refused to sign the Waiver located on the lower half of the Warning As To Rights form, he waived his rights by this actions when he agreed to let Thomas reduce his statement to writing. An express waiver of rights is not required.<sup>16</sup>

During the suppression hearing, Penn tried to argue that the written statement was invalid because it indicates a time of 2:20 p.m. at the top of page 1 and the Warning as to Rights signed by Penn has a time of 2:30 p.m. This time different does not invalidate the voluntariness of the statement or that Penn waived his *Miranda* rights, because Thomas testified clearly as to the

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<sup>12</sup> *Castillo v. People*, 59 V.I. 240, 265 (V.I. 2013) (citations omitted).

<sup>13</sup> 59 V.I. 240, 265 (V.I. 2013).

<sup>14</sup> *Id.* at 267.

<sup>15</sup> People's Ex. 3.

<sup>16</sup> *Custodial Interrogations*, 42 Geo. L.J. Ann. Rev. Crim. Proc. 193, 205 (2013) (citing *N.C. v. Butler*, 441 U.S. 369, 373, 375-76 (1979) (explicit waiver not necessary to show defendant waived right to remain silent because defendant volunteered incriminating statements); and *U.S. v. Mejia*, 600 F.3d 12, 17-18 (1st Cir. 2010) (valid waiver properly inferred because defendant, after being given proper *Miranda* warnings, began responding to questions willingly and offered to be informant).

sequence of events. First, Penn voluntarily confessed without being questioned. Second, Thomas told Penn to stop and then read him his *Miranda* rights. Third, Penn read the Warning As To Rights form and signed it stating that he understood what his rights are. Whatever time Penn wrote on the Warning as to Rights Form does not change the sequence of events.

Penn testified that he felt confused, embarrassed and restrained when he was handcuffed. Penn claims that the handcuffs were on him the entire time, even as he walked up the stairs to the third floor. Even if the Court were to find this testimony credible and that Penn was in custody when he made his verbal and written statements, the Court finds that his verbal statements were voluntary and that his written statement was made with full knowledge of his constitutional rights.

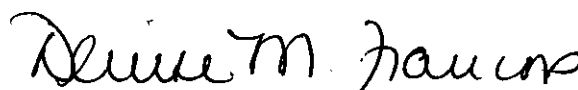
From the time of Thomas' first interaction with Penn, until he was placed under arrest, Thomas conducted her investigation properly, following best police practices and did not violate Penn's Fifth Amendment privilege against self-incrimination or his rights under *Miranda v. Arizona*.

Accordingly, it is hereby

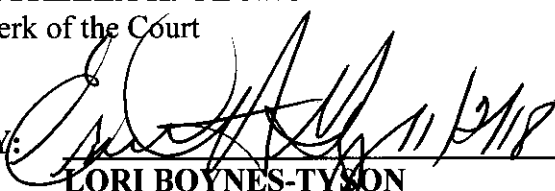
**ORDERED** that Defendant Richard A. Penn, Jr.'s Motion to Suppress Statement, filed on September 6, 2018, is **DENIED**; and it is further

**ORDERED** that a copy of this Order shall be directed to counsel of record.

DATED: 11/2/2018

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

**ATTEST:**  
**ESTRELLA H. GEORGE**  
Clerk of the Court

BY:  11/2/18  
**LORI BOYNES-TYSON**  
Chief Deputy Clerk