

NOT FOR PUBLICATION

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

PEOPLE OF THE VIRGIN ISLANDS,

PLAINTIFF,

v.

CHIOKE N. TYSON,
OLSON TYSON, JR.,
AND STAFFORD BROWNE,

DEFENDANTS.

SX-11-CR-355

SX-11-CR-356

SX-11-CR-357

CHARGES:

**BURGLARY FIRST DEGREE/PRINCIPAL (2
CTS)**

14 V.I.C. § 442(1) and 11(a)

ASSAULT THIRD DEGREE/PRINCIPAL

14 V.I.C. § 297(2) and 11(a)

ROBBERY FIRST DEGREE/PRINCIPAL

14 V.I.C. § 1862(2) and 11(a)

**CARRYING OR USING A DANGEROUS
WEAPON DURING THE COMMISSION OF
A CRIME OF VIOLENCE/PRINCIPAL**

14 V.I.C. 2251(a)(2) & 11(a)

**UNAUTHORIZED POSSESSION OF A
FIREARM AND/OR IMITATION THEREOF
DURING THE COMMISSION OF A CRIME
OF VIOLENCE/PRINCIPAL**

14 V.I.C. 2253(a) & 11(a)

MEMORANDUM OPINION

THIS MATTER came before the Court on Defendant Olson Tyson, Jr.'s (hereinafter "Tyson, Jr.") Motion to Suppress, filed on February 21, 2012 and Defendant Stafford Browne's (hereinafter "Browne") Motion to Suppress, filed September 5, 2012. The People of the Virgin Islands (hereinafter "the People") filed their response to Tyson, Jr.'s Motion on February 24, 2012 and filed their response to Browne's Motion on September 14, 2012. On October 26, 2012, Tyson, Jr. filed a notice of joinder in Browne's Motion to Suppress. A Suppression Hearing was held on June 14, 2013 and Defendants' Motions were taken under advisement. Browne filed a

Supplemental Brief in Support of his Motion to Suppress on June 21, 2013. For the reasons set forth, the Court shall grant the defendants' Motions.

BACKGROUND

On the morning of May 23, 2011, Mr. Robert Duprey noticed that there was a light on in the Bath House of one of his cottages. He went to turn off the light, and after doing so turned around and noticed two men running towards him. One of the men grabbed him and threw him to the floor of the Bath House and he was struck in the back of his head with a gun. The individuals went through his pockets and took his wallet and cellular phone. When the men came out of the Bath House, they spotted Mrs. Caroline Duprey, Mr. Duprey's wife, heading towards the Bath House. Mr. Duprey came out on the porch and told his wife to run. The men then grabbed Mrs. Duprey, put a gun to her head and told her to lie down. The men ran off into the bushes while Mrs. Duprey was laying on the ground.

That same morning, Police Chief Christopher Howell was heading towards Discover Grove in response to Central Dispatch's call of the robbery when he noticed a champagne colored Chevy Malibu pass him at a high rate of speed as he was crossing the Mon Bijou Bridge. Chief Howell turned his vehicle around and began to pursue the Malibu. The Malibu continued to drive in a reckless manner through the Mon Bijou area. When the Malibu reached the area near #110 Mon Bijou, two passengers exited the vehicle and began running towards a foot path that exits in the Estate Glynn area. Chief Howell pursued the two passengers on foot and noticed one of the men was holding what appeared to be a handgun. Chief Howell eventually lost contact with the men. Shortly after, Police Sergeant J. Platt located two men in the Estate Glynn area that matched the description given by Chief Howell. Chief Howell positively identified the

men, and eventually located a black handgun on the path where the men ran. The men were then transported to the police station. At the police station, the two men who exited the Malibu and ran off were identified as Olson Tyson, Jr. (Tyson, Jr.) and Stafford Browne (Browne). The driver of the Malibu, who was also eventually apprehended by police, was identified as Chioke N. Tyson.

When asked to describe the men who attacked him, Mr. Duprey described the one who grabbed him as slim in build, about 5'6" tall, wearing all black with a black mask on his face. Mrs. Duprey told police that she saw the men as they were coming towards her from the Bath House, and that they were both dressed in all black and had red spots on their shirts. Mrs. Duprey also said that they both wore black masks and were about 5'10" tall. She described the weapon used as a black handgun with a square handle.

Later that day, at the police station, Mrs. Duprey was shown a photo array consisting of six black t-shirts with designs and was asked to identify the t-shirt worn by the man she saw at her home that morning. She identified shirt number three, the same shirt worn by Tyson, Jr. when he was detained.

DISCUSSION

Both Defendants Tyson, Jr. and Browne have filed Motions to Suppress. In Tyson, Jr.'s Motion, he argues that the pre-trial identification procedure used against him was impermissibly suggestive. Tyson, Jr. has also joined Browne's Motion to Suppress. In Browne's Motion, he argues that the police lacked probable cause to stop the vehicle he was riding in and also lacked probable cause to arrest him, search him, and seize his items. This Court will first address the

issue of the pre-trial identification procedure raised in Tyson, Jr.'s Motion. The Court will then address the issues raised in Browne's Motion.

I. Tyson, Jr. Motion to Suppress

The issue raised in Tyson, Jr.'s Motion is whether the pre-trial identification procedure used by the police was so impermissibly suggestive that it led to an irreparably mistaken identification, thus violating Tyson, Jr.'s due process rights. In order to determine whether the pre-trial identification procedure violated Tyson, Jr.'s due process rights, this Court must consider: (1) whether the identification procedure was unduly suggestive and (2), if it was unduly suggestive, whether the identification itself was still reliable. *Richards v. People*, 53 V.I. 379, 387 (V.I. 2010). An identification procedure is unduly suggestive if it is "unnecessarily" or "impermissibly" suggestive. *Potter v. People*, 56 V.I. 779, 790 (V.I. 2012). This Court must "assess the degree of suggestiveness presented by the identification procedure actually used in this case, and whether the police had good reason not to use less suggestive procedures" in order to discover whether the procedure was unnecessarily or impermissibly suggestive. *Id.* at 789.

Determining the reliability of the identification requires this Court to look at "the totality of the circumstances to determine whether the identification procedure was so suggestive as to give rise to a substantial likelihood of misidentification." *Id.* In doing this "we consider the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation." *Id.*

Tyson, Jr. argues that the pre-trial identification procedure used against him was both unnecessarily suggestive and unreliable. According to Tyson, Jr., the photo array was unnecessarily suggestive because all of the other shirts pictured were different in color, shape, taste, and style than the one worn by him. Tyson, Jr. asserts that only two of the other shirts contained red images (not spots) and three of the other shirts had shorter sleeves and appeared to be female blouses. Because of the dissimilarity of the other shirts, Tyson, Jr. claims his shirt automatically stood out from the rest in the photo array. Regarding the reliability aspect of the two-part test, Tyson, Jr. argues that Mrs. Duprey nor her husband could accurately describe the men that robbed them and there was no testimony offered as to the degree of attention factor. Tyson, Jr. also asserts that there is a possibility that Mrs. Duprey saw the defendants during her visit to the police station.

The People oppose Tyson, Jr.'s arguments and assert that an article of clothing is not suggestive of any human attribute, and thus is not suggestive at all. The People also argue that the circumstances surrounding the identification indicate that the identification was reliable.

Contrary to the People's assertion, this Court finds that the identification procedure used against Tyson, Jr. was unduly suggestive. Upon review of the photo array it is clear that the shirt worn by Tyson, Jr. stands out. Shirt number three is the most cluttered with designs. Most of the other shirts look like female shirts, and of the ones that do look like they could be male shirts, their shirt design is noticeably distinguishable from Tyson, Jr.'s. Also, none of the other shirts in the photo array contained red spots or anything that looked like red spots, except for maybe shirt six which looks like a female shirt.

With respect to the witness' reliability, Mrs. Duprey was under a lot of distress when she saw the men coming towards her. As she spotted the men coming out of the Bath House with a gun, she also heard her husband calling out for her to run. It is unlikely that Mrs. Duprey was fully paying attention to what her attackers were wearing. In fact, in her statement to police Mrs. Duprey said that both men were wearing black shirts with spots. Tyson, Jr.'s shirt was the only one that vaguely matched that description. Mrs. Duprey also only had a limited opportunity to view her attackers because she was ordered to lie on the ground soon after she spotted them. Although Detective Michael Simmonds testified that Mrs. Duprey was reasonably certain when she identified Tyson, Jr.'s shirt, it appears that her certainty was more a result of the suggestive nature of the photo array and less based on her reliability to identify the shirt. Mrs. Duprey identified Tyson, Jr.'s shirt about six hours after the robbery took place. Under these facts this Court cannot conclude that Mrs. Duprey's identification was reliable and independent of the suggestive nature of the identification procedure.

II. Browne Motion to Suppress

Browne raises several issues in his Motion to Suppress, including: (1) whether the police violated his Fourth Amendment rights by stopping the vehicle he was riding in; (2) whether the police had probable cause to arrest him without a warrant; and (3) the constitutionality of the police officers' warrantless search of his person and seizure of his property. Tyson, Jr. has joined Browne's Motion, thus raising the same issues.

The burden of proof is on the defendant who moves to suppress evidence. *People v. Samuel*, No. SX-09-CR-557, 2010 WL 7746081 *3 (V.I. Super. 2010). Tyson, Jr. and Browne have sustained their burden by establishing that they were detained and searched without a

warrant. *Id.* The People must now prove “that each individual act constituting a search or seizure under the Fourth Amendment was reasonable.” *Id.*

A. Constitutionality of the Traffic Stop

As an initial matter, Browne and Tyson, Jr. challenge the constitutionality of the traffic stop initiated on the vehicle they were riding in. When a police officer makes a traffic stop, the driver of the car and the passengers in the car are seized within the meaning of the Fourth Amendment, thus the passengers also have standing to challenge the constitutionality of the stop. *See Brendlin v. California*, 551 U.S. 249 (2007). Browne and Tyson, Jr., however, were not in the vehicle when it was eventually stopped by the police.

“A seizure must exist before evidence may be considered fruit of that seizure.” *U.S. v. Hodge*, 42 V.I. 437, 440 (D.V.I. 2000) (rev’d on other grounds). A seizure under the Fourth Amendment does not take place until an individual has been physically apprehended by the police or submits to a showing of police authority. *Id.* In this case, Tyson, Jr. and Browne were no longer passengers in the vehicle when it was physically apprehended by the police. Tyson, Jr. and Browne exited the vehicle while it was still being pursued. Because they were not in the vehicle when it was apprehended, they do not have standing to challenge the traffic stop.

B. Legality of Browne and Tyson, Jr.’s Warrantless Arrest

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.” 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.” *Phipps v. People*, S. Ct. Crim. No. 2008–0032, 2011 WL 1239863 *9 (V.I. Feb. 14, 2011). Section 3562 is in conformity with the Fourth Amendment’s protection against unreasonable searches and seizures. *Id.*

Searches and seizures conducted without a warrant are presumptively unreasonable. *People v. Samuel*, Nos. SX–09–CR–557, SX–09–CR–556, 2010 WL 7746081 *3 (V.I. Super. Nov. 12, 2010). A warrantless search and/or seizure must be accompanied by probable cause to meet the reasonableness standard of the Fourth Amendment. *People v. Archibald*, 50 V.I. 74, 84 (V.I. Super. 2008). Under certain circumstances, this same rule applies to warrantless searches and/or seizures accompanied by reasonable suspicion. *See People v. Matthew*, 55 V.I. 380, 388 (V.I. Super. 2011).

Reasonable suspicion, a less stringent standard than probable cause, is all that is required for officers to make a brief, investigatory stop of an individual they suspect is involved in criminal activity. *Illinois v. Wardlow*, 528 U.S. 119, 123 (2000) (citing *Terry v. Ohio*, 392 U.S. 1, 30 (1968)). Although reasonable suspicion requires less than a preponderance of the evidence, “[t]he officer must be able to articulate more than an ‘inchoate and unparticularized suspicion or ‘hunch’” of criminal activity.” *Id.* at 123-24. “[N]ervous, evasive behavior [i.e., fleeing from the police] is a pertinent factor in determining reasonable suspicion.” *Id.* at 124.

Browne and Tyson, Jr. assert that their warrantless arrest was unlawful under Title 5, Section 3562 of the Virgin Islands Code because the police lacked probable cause to arrest. According to the Defendants, at the time of their arrest the officers had neither observed Browne and Tyson, Jr. commit a crime nor had they found anything in Tyson, Jr. and Browne’s

possession that would have provided probable cause for arrest. All the officers knew at the time of arrest was that Browne and Tyson, Jr. had been occupants in the vehicle that was being pursued by police, and that they had fled the vehicle while it was being pursued. The People, on the other hand, argue that Browne and Tyson, Jr. were arrested because they fled the vehicle being pursued by police, an imitation black handgun was found along the path Tyson, Jr. and Browne fled, and they matched the description given by the victims.

According to the Probable Cause Fact Sheet, Mrs. Duprey reported to Central Dispatch at 9:26 a.m. about the robbery at her home. Her only description of the assailants at that time was that they were two men with a gun. The police encounter with Tyson, Jr. and Browne took place shortly after Mrs. Duprey's report to Central Dispatch. The police did not interview Mrs. Duprey, the victim who described the shirt worn by Tyson, Jr., until 10:45 a.m. This means that at the time Chief Howell and the other police units encountered the vehicle and the passengers that were inside, the only information they had was that Mr. and Mrs. Duprey had been attacked in their home by two men with a gun. They had no information regarding a vehicle being used, nor did they have a description of the assailants. All the officers knew at the time was that there was a vehicle speeding away from the crime scene and that the vehicle would not submit to their authority. Although these circumstances were enough to give the officers reasonable suspicion to believe that criminal activity was afoot, the circumstances did not rise to the more stringent standard of probable cause.

While Chief Howell was pursuing Tyson, Jr. and Browne on foot, he noticed that one of them, later identified as Tyson, Jr., was holding a handgun. The gun was found *after* the two men were apprehended. At this time, there was still no probable cause to arrest the two men.

There are no facts indicating that the police had received further information regarding the robbery. There are also no facts indicating that the police had learned anything from their *Terry* stop of the two men that gave them sufficient probable cause to believe that Tyson, Jr. and Browne were in possession of a firearm in violation of Title 23, Section 454 of the Virgin Islands Code. In *Samuel*, 2010 WL 7746081, police officers found a firearm in the defendant's possession while they were conducting a traffic stop. In that case, this Court stated that

although the Officers had statutory authority pursuant to 23 V.I.C. § 488 to investigate the defendants lawful possession of the weapons that had been discovered through lawful police activity, there is absolutely no evidence on the record that the Officers sought to initiate the inquiry prior to Samuel's arrest . . . there is no additional evidence on the record that the Officers were apprised of any facts that lead them to the reasonable belief that defendants did not possess the firearms lawfully upon discovery of the weapons at the time of the traffic stop. The record reflects merely that it was determined at the Station upon checking with the Firearms Division that neither Doward nor Samuel had a license to possess a firearm. The record also fails to present any testimony from the Officers based upon their enforcement experience supporting that they had—prior to arresting Samuel—an articulable basis to reasonably believe that Defendants possessed the firearm unlawfully.

Id. at *7. The same is true in the case at bar. Without evidence on the record supporting the officers' finding of probable cause to arrest, this Court cannot hold that the arrest of Tyson, Jr. and Browne made prior to the interview of Mrs. Duprey was lawful.

C. Constitutionality of the Search and Seizure

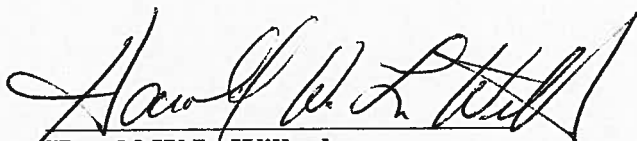
Following their arrest, Tyson, Jr. and Browne were transported to the police station, along with the third defendant in this case, Chioke Tyson. The People acknowledge that once the defendants were arrested, the items in their possession were placed in evidence. Browne and Tyson, Jr. argue that because these items were taken without their consent and without a warrant, they were illegally seized.

This Court has already found that the police illegally arrested Browne and Tyson, Jr., thus it must also follow that the search incident to their arrest was illegal. The search incident to arrest doctrine allows police to search an individual once he has been detained. *See Blyden v. People*, 53 V.I. 637, 652 (V.I. 2010). The doctrine does not apply in a case, such as this one, where individuals have been illegally arrested. *Id.* at 651-52. Thus, the items belonging to Tyson, Jr. and Browne that were taken and placed into evidence must be suppressed as fruits of an illegal arrest.

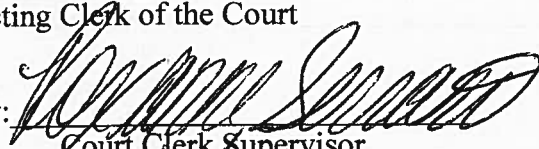
CONCLUSION

A review of the circumstances surrounding the identification of Tyson, Jr. indicate that the identification procedure was so impermissibly suggestive that it led to an irreparably mistaken identification. The photo array used by police was unduly suggestive and the victim's identification of Tyson, Jr. was unreliable. In addition, both Tyson, Jr. and Browne were arrested in violation of the Fourth Amendment. The police detained both men without probable cause or a warrant. As a result, the fruits of their illegal arrest must be suppressed. The Court will issue an Order consistent with this Opinion.

Dated: 6-30-15


Harold W.L. Willocks
Administrative Judge of the Superior Court

ATTEST:
Estrella George
Acting Clerk of the Court

By: 
Court Clerk Supervisor

Dated: 7/1/15