

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

JOEL DOWDYE

Petitioner,

vs.

GOVERNMENT OF THE VIRGIN ISLANDS,

Respondent.

) Case No. ST-15-MC-93
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HABEAS CORPUS

MEMORANDUM OPINION

On March 24, 2007, a jury found Joel Dowdye (“Dowdye”) guilty of six counts in connection with the March 25, 2006 shooting death of Sherett James and injuring of Daren Stevens. Dowdye filed a Petition for Habeas Corpus Relief on July 15, 2016 and later filed an Amended Petition on November 17, 2017. Dowdye largely challenges the legality of his sentence. The Court granted the Petition and held an evidentiary hearing on June 19, 2018. Dowdye appeared at the hearing *pro se*, via video teleconference from Citrus County Detention Facility in Lecanto, Florida. Assistant Attorney General Dionne G. Sinclair appeared on behalf of the Government. At the conclusion of the hearing the Court took the matter under advisement. For the reasons set forth below, the Court finds Dowdye is entitled to relief and will order that Dowdye be sentenced on Counts VII and VIII and further order that the sentences on VI, VII and VIII be stayed.

BACKGROUND

Following the March 25, 2006 shooting death of Sherett James and injuring of Daren Stevens, Dowdye was charged in an eight-count Information.¹ On March 24, 2007, a jury found him guilty of Counts I, II, V, VI, VII and VIII. The trial court sentenced him on all the convictions, including a sentence for life imprisonment without parole for the first-degree murder conviction. The trial court ordered Dowdye's sentence on Count II (Using a Dangerous Weapon During the Commission of First Degree Murder – as to Sherett James) to run consecutive to his sentence on Count I (First Degree Murder – as to Sherett James); his sentence on Count VI (Using a Dangerous Weapon During the Commission of an Attempted First Degree Murder – as to Daren Stevens) to run consecutive to his sentence on Count V (Attempted First Degree Murder – as to Daren Stevens); his sentences on Counts V and VI to run concurrently with his sentences on Counts I and II; and his sentences on Count VII (First Degree Assault – as to Daren Stevens) and VIII (Using a Dangerous Weapon During the Commission of First Degree Assault – as to Daren Stevens) merged with the sentences on Counts V and VI.

¹ Count I, First Degree Murder in violation of Title 14 V.I.C. §§ 921 and 922(a)(1); Count II, Using a Dangerous Weapon During the Commission of First Degree Murder, in violation of Title 14 V.I.C. § 2251(a)(2)(B); Count III, Second Degree Murder, in violation of title 14 V.I.C. §§ 921 and 922(b); Count IV, Using a Dangerous Weapon During the Commission of Second Degree Murder, in violation of Title 14 V.I.C. § 2251(a)(2)(B); Count V, Attempted First Degree Murder, in violation of Title 14 V.I.C. §§ 921 and 922(a)(1); Count VI, Using a Dangerous Weapon During the Commission of an Attempted First Degree Murder, in violation of Title 14 V.I.C. § 2251(a)(2)(B); Count VII, First Degree Assault, in violation Title 14 V.I.C. § 295(1); and Count VIII, Using a Dangerous Weapon During the Commission of First Degree Assault, in violation of Title 14 V.I.C. § section 2251(a)(2)(B).

Dowdye filed an appeal with the V.I. Supreme Court concerning the *voir dire* procedure employed by the trial court and the trial court's removal of a juror prior to jury deliberations. *See Dowdye v. People of the V.I.*, 55 V.I. 736 (2011). The Supreme Court remanded for the Superior Court to conduct a *Remmer* hearing and make specific findings regarding the trial judge's removal of the juror for alleged misconduct. *Id.* at 775. After the Superior Court conducted the *Remmer* hearing and held that the removal and replacement of the juror was appropriate, Dowdye then appealed again. On appeal the Supreme Court affirmed the Superior Court's ruling. *See Dowdye v. People of the V.I.*, 60 V.I. 806, 817 (2014).²

On July 15, 2016, Dowdye filed the instant Petition for Habeas Corpus Relief. In an August 8, 2017 Order the Court granted the Petition, ordered Respondent Government of the V.I. (the "Government") to file a return, and ordered Dowdye to file his traverse. After the June 19, 2018 evidentiary hearing, the Court took the matter under advisement.

ANALYSIS

Dowdye's first main contention is that his convictions and sentences on Counts II, VI, and VIII, for three separate counts of 14 V.I.C. § 2251(a)(2)(B) (Carrying or Using Dangerous Weapons), violates 14 V.I.C. § 104³ and the Fifth and Fourteenth

² Dowdye's appeal did not challenge his sentence.

³ *Act or Omission Punishable under Different Provisions*: "An act or omission which is made punishable in different ways by different provisions of this Code may be punished under any of such provisions, but in no case may it be punished under more than one. An acquittal or conviction and sentence under any one bars a prosecution for the same act or omission under any other."

Amendments⁴ of the U.S. Constitution. He contends those Counts, “relate to a single act of possessing a dangerous weapon (firearm) by the Petitioner during a single incident”⁵

Dowdye’s other main contention is that his conviction and sentencing on both Counts V (attempted first-degree murder of Daren Stevens) and VII (first-degree assault of Daren Stevens) violated 14 V.I.C. § 104 and double jeopardy under the Fifth and Fourteenth Amendments.

I. A Court May Sentence Pursuant to 14 V.I.C. § 2251, Carrying or Using Dangerous Weapons, in Addition to Sentencing for the Underlying Crime of Violence.

Although Dowdye doesn’t explicitly challenge the legality of the trial court’s sentencing him for both the charges of Carrying or Using a Dangerous Weapon and the related underlying crimes of violence, the Government does argue this point.⁶ Because the Court finds the principles underlying the Government’s argument are instructive here, and acting in an abundance of caution, it will address that argument.

The Double Jeopardy Clause of the Fifth Amendment of the U.S. Constitution states that no person shall, “be subject for the same offence to be twice put in jeopardy of life or limb.” Like the Fifth Amendment, the Revised Organic Act of the Virgin

⁴ Dowdye briefly mentions the due process clause under the Fourteenth Amendment, but otherwise does not discuss a due process violation, and the focus of his argument is on what he alleges are double jeopardy violations of the Fifth and Fourteenth Amendments.

⁵ Am. Petition for Writ of Habeas Corpus 4.

⁶ Return 7-9.

Islands provides that, “no person for the same offense shall be twice put in jeopardy of punishment[.]” 48 U.S.C. § 1561. Additionally, Title 14, section 104 of the Virgin Islands Code provides:

An act or omission which is made punishable in different ways by different provisions of this Code may be punished under any of such provisions, but in no case may it be punished under more than one. An acquittal or conviction and sentence under any one bars a prosecution for the same act or omission under any other.

Hence like the Fifth Amendment, Virgin Islands law, “protects against multiple punishments for the same offense.” *Whalen v. United States*, 445 U.S. 684, 700 (1980) (citation omitted).

However, the U.S. Supreme Court has held that, where “a legislature specifically authorizes cumulative punishment under two statutes, regardless of whether those two statutes proscribe the ‘same’ conduct . . . the trial court or jury may impose cumulative punishment under such statutes in a single trial.” *Mo. v. Hunter*, 459 U.S. 359, 368-69 (1983). In other words, the Fifth Amendment does not, “preclude a court from punishing a defendant for two distinct statutory offenses that contain identical [or similar] elements, provided that the legislature intended to authorize cumulative punishment.” *Ward v. People of the V.I.*, 58 V.I. 277, 286 n. 6 (V.I. 2013).

Section 2251 allows just that. In *Gov't of the V.I. v. Grant* the Third Circuit, acting then as the court of last appeal in criminal cases in the V.I., wrote, “[t]he legislature made clear in the language of the deadly weapon statute [§ 2251,] that it

intended the punishment imposed for that offense to be cumulative to the punishment imposed for the crime of violence itself.” 775 F.2d 508, 513 (citing 14 V.I.C. 2251(a)(2)(B)); *see also Ward*, 58 V.I. at 286 (“Section 2251 . . . expresses a clear and unambiguous intent on the part of the Legislature, whenever an individual is convicted under both section 2251 and a crime of violence, to require punishment for both of those offenses.”). The V.I. Supreme Court has held that even when the elements of the underlying crime of violence (in that case, third degree assault) and the dangerous weapon crime are completely identical, a court may sentence a defendant for those two distinct offenses. *See Ward*, 58 V.I. at 286 n. 6.

To be precise, the dangerous weapon statute under which Dowdye was sentenced, states that:

Whoever . . . with intent to use the same unlawfully against another, has, possesses, bears, transports, carries, or has under his proximate control . . . [a] dangerous or deadly weapon shall . . . if he . . . has, possesses, bears, transports, carries or has under his proximate control, any such weapon during the commission or attempted commission of a crime of violence . . . shall be [fined and imprisoned], *which penalty shall be in addition to the penalty provided for the commission of, or attempt to commit, the crime of violence.*”

14 V.I.C. § 2251(a)(2)(B) (emphasis added).⁷ Although the language of § 2251(a)(2)(B) seemingly contradicts the language of 14 V.I.C. § 104, the V.I. Supreme Court has held that the, “in enacting 2251, the Legislature intended to establish an exception to the general rule set forth in section 104, and allow individuals to be punished for

⁷ Murder, attempted murder, and assault are defined as crimes of violence. See 23 V.I.C. § 451.

both violating section 2251 and the underlying crime of violence.” *Ward*, 58 V.I. at 287. Thus, a defendant may be charged, convicted, and sentenced under both 14 V.I.C. § 2251 and for the underlying unlawful behavior.

Dowdye’s complaint, however, is not that he was sentenced for Carrying or Using a Dangerous Weapon; rather that he was sentenced for it three times, once each for each corresponding crime of violence (Counts I, V, and VII). Dowdye argues that such a sentence was impermissible, and the Court agrees.

II. Dowdye Will Have Two Counts under 14 V.I.C. § 2251(a)(2)(B) Stayed

Dowdye contends that, “[i]f Counts II, VI, and VIII are based on the same criminal act or constitute one ‘unit of prosecution’, then [his] three convictions [under 14 V.I.C. § 2251(a)(2)(B)] violate double jeopardy by punishing him three times for the same offense.”⁸ Dowdye alleges that, “[n]o evidence was ever introduced that Petitioner possessed more than one dangerous weapon (firearm) with intent to use such dangerous weapons (firearms) against the victims.”⁹ Accordingly, Dowdye argues, “Petitioner possessed only a single firearm therefore he committed only one crime of possession of a dangerous weapon.”¹⁰

The Government in its Return does not directly discuss the issue of multiple sentences under 14 V.I.C. § 2251. Thus, while the Government did argue *during the evidentiary hearing* that, in the case of multiple victims, 14 V.I.C. § 2251 follows the

⁸ Mem. of Law in Supp. of Petition 8.

⁹ *Id.* at 7.

¹⁰ *Id.* at 9.

use of the weapon and not the weapon itself, its Return provided the Court with no legal authority to support that proposition.

The Court found at least one Superior Court case where the court addressed, “whether [] multiple charges leveled against [a] Defendant under section 2251(a)(2)(B) are consonant with the intent of the Legislature as expressed in the language in the state.” *People of the V.I. v. Colon*, 2014 V.I. LEXIS 27, *15. After an exercise in statutory interpretation, the Court concluded they were not. It found that such charges were multiplicitous and impermissible. It premised its decision in part on the fact that, “the multiple counts asserted against each Defendant . . . require proof of exactly the same elements¹¹ and are not at all dependent on which crime of violence is asserted.” *Id.* at *16. This Court agrees.

The Court finds no language in the statute supporting the proposition that the statute follows *use* of a dangerous weapon, as opposed to possession “with intent to use”. Indeed, while this Court nods to the *Colon* court’s detailed analysis of the language of § 2251(a)(2)(B), it is comfortable it needn’t even conduct that level of detailed analysis: there plainly is not language in the § 2251(a)(2)(B) that suggests the statute follows use, rather than one of the other control-related verbs listed in the statute (i.e., “possesses, bears, transports, carries or has under his proximate control”). The statute plainly punishes carrying a dangerous weapon “with intent to

¹¹ Those elements are, “(1) that a defendant possess a dangerous weapon; and (2) with the intent to unlawfully use said weapon against another person.” *Id.* at *16 (citing *Nanton v. People*, 52 V.I. 466, 480-81 (2009)).

use the same unlawfully”; this—as Dowdye points out—is despite the section’s title, “Carrying or Using Dangerous Weapons.” *See People of the V.I. v. Whyte*, 62 V.I. 95, 103 (“[A]ny descriptive headings ... other than section numbers contained therein, immediately preceding the texts of individual sections of the Code do not constitute part of the law.”) (citing 1 V.I.C. § 45) (internal quotations omitted). In this case, Dowdye was in possession of only one dangerous weapon at the time he committed the underlying crimes; he should therefore have been sentenced for only one count under 14 V.I.C. § 2251.

A V.I. Supreme Court case from 2013 both buttresses this Court’s conclusion and instructs the Court on how Dowdye’s sentence should be corrected. In *Tyson v. People of the V.I.*, the Supreme Court addressed a markedly similar set of facts (albeit relating to charges under 14 V.I.C. § 2253, a markedly similar statute¹²) and found:

In this case, Tyson was sentenced for two counts of unauthorized use of a firearm during a crime of violence — one count pertaining to the murder of Joseph, the other count pertaining to the murder of L.P.C. Notwithstanding the fact that we have determined there was

¹² Although *Tyson* related to the statute punishing carrying unlawfully possessed firearms as opposed to other dangerous weapons, that statute is otherwise nearly identical to § 2251. *See* 14 V.I.C. § 2253, “Carrying of firearms; openly or concealed; evidence of intent to commit crime of violence; definitions”, “Whoever, unless otherwise authorized by law, *has, possesses, bears, transports or carries either, actually or constructively*, openly or concealed any firearm, as defined in Title 23, section 451(d) of this code, loaded or unloaded, may be arrested without a warrant, and shall be sentenced to imprisonment of not less than ten years and shall be fined not less than \$10,000 nor more than \$15,000 or both the fine and imprisonment, except that if such person shall have been convicted of a felony in any state, territory, or federal court of the United States, *or if such firearm or an imitation thereof was had, possessed, borne, transported or carried by or under the proximate control of such person during the commission or attempted commission of a crime of violence*, as defined in subsection (d) hereof, then such person shall be fined \$25,000 and imprisoned not less than fifteen (15) years nor more than twenty (20) years. *The foregoing applicable penalties provided for violation of this section shall be in addition to the penalty provided for the commission of, or attempt to commit, the felony or crime of violence.* (emphasis added)

insufficient evidence to sustain Tyson's conviction for felony murder — which would eliminate the sentencing enhancement on that weapons count, *see Ambrose v. People*, 56 V.I. 99, 105 (V.I. 2012) (citing *Pearson v. State*, 64 So.3d 569, 577 (Miss. Ct. App. 2011)) — the crime of possession under the facts of this case was a single act. The record contains no evidence that Tyson used multiple firearms, and instead indicates that he possessed the same firearm throughout the duration of the shooting incident. Although there were arguably two victims of Tyson's crime of possession, considering possession itself is the crime prohibited by section 2253(a) — independent of any crime of violence — we do not find that each count of possession was committed against at least one different victim, so as to warrant separate sentences. *See People v. Masters*, 195 Cal. App. 3d 1124, 241 Cal. Rptr. 511, 512 (1987) (applying California sentencing provision after which section 104 of title 14 of the Virgin Islands Code was modeled).

59 V.I. 391, 428. In concluding that Tyson should not have been sentenced for two counts of unauthorized use of a firearm, the Supreme Court remanded to the Superior Court with instructions to sentence Tyson for only one firearm conviction, and to stay execution of his sentence for the remaining conviction. *Id.* at 429. This Court will follow suit and stay the sentences on Counts VI and VIII.

III. The Court Will Pronounce a Sentence on Count VII, First Degree Assault of Daren Stevens, and Then Stay That Sentence

Dowdye next argues that his conviction and sentencing on both Counts V (attempted first degree murder of Daren Stevens) and VII (first degree assault of Daren Stevens) violated 14 V.I.C. § 104 and the double jeopardy protections of the Fifth and Fourteenth Amendments. He argues that the trial judge's merging of those Counts did not cure the defect, "because a merger only subsumes the sentence but

will not ultimately eviscerate the conviction of the merged offense, upon the completion of the sentenced offense(s).”¹³

Dowdye is correct. Although he was sentenced for attempted first degree murder and first-degree assault, which are different crimes, “[the] crimes are based on a single act. Thus, they constitute a single offense under section 104, and the trial court exceeded its authority by imposing multiple punishments for the same offense.” *Williams v. People of the Virgin Islands*, 56 V.I. 821, 832 (2012) (finding second-degree murder, first-degree assault, and third-degree assault to be a single offense).¹⁴ This is true even where the sentences are ordered to be served concurrently and no greater sentence results. *Id.* at 832-33 (citing *Ball v. United States*, 470 U.S. 856, 864 (1985)). This finding is premised on the fact that, “an additional conviction, whose concomitant sentence is served concurrently, does not evaporate simply because of the concurrence of the sentence. The separate conviction, apart from the concurrent sentence, has potential adverse collateral consequences that may not be ignored.” *Id.* at 833 (citing *Ball*, 470 U.S. at 864-65).

Dowdye’s dual-sentencing for both the attempted first-degree murder and first-degree assault of Daren Stevens constitutes impermissible punishment under 14 V.I.C. § 104 and the Double Jeopardy Clause. *Williams*, 56 V.I. at 833. The V.I. Supreme Court has held that the correct procedure in these circumstances is for the

¹³ Mem. 14.

¹⁴ “The plain language of section 104 indicates that despite the fact that an individual can be charged and found guilty of violating multiple provisions of the Virgin Islands Code arising from a single act or omission, that individual can ultimately only be punished for one offense.” *Williams*, 56 V.I. at 832.

Superior Court, “to announce a sentence for all offenses and to subsequently stay execution of the sentences in which section 104 is implicated.” *Williams v. People of the V.I.*, 58 V.I. 341, 353 n. 10 (clarifying the holding of the earlier *Williams* decision on the appropriate way to remedy such sentences). Dowdye argues this is the appropriate remedy¹⁵, and while the Government wrote in its Return that, “[t]he Court properly merged the convictions as to Stevens, without imposing separate sentences,” at the evidentiary hearing the Government agreed that it would be “better course” for the Court to impose and stay a sentence.¹⁶ The Court agrees it is required to do so. The Court will schedule a hearing to pronounce a sentence on Counts VII and VIII. Those sentences will then be stayed.

CONCLUSION

Dowdye has shown he is entitled to habeas relief in regard to his multiple sentences for Carrying or Using Dangerous Weapons, 14 V.I.C. § 5521(a)(2)(B), and in regard to his sentencing for both Counts V (attempted first degree murder of Daren Stevens) and VII (first degree assault of Daren Stevens). In both instances, the multiple sentences were in error and the appropriate relief is to correct those sentences.

¹⁵ Mem. 14.

¹⁶ More precisely, the Government agreed the Court should impose and then stay a sentence for Counts VII (first-degree assault) and VIII (using a dangerous weapon during the commission of first-degree assault). However, the Court addressed the 14 V.I.C. § 2251 sentences earlier in this decision.

Contemporaneous herewith, the Court is entering an order scheduling a hearing for September 11, 2018 to sentence Dowdye on Counts VII and VIII. Thereafter, the Court will formally stay the sentences of Count VI, VII and VIII.¹⁷

DATED: August 13, 2018

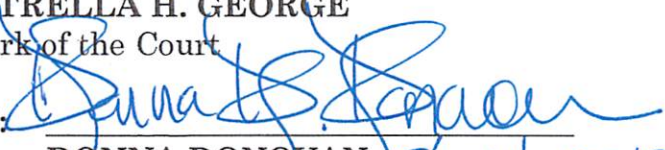


Kathleen Mackay
Judge of the Superior Court
of the Virgin Islands

ATTEST:

ESTRELLA H. GEORGE
Clerk of the Court

BY:



DONNA DONOVAN

Court Clerk Supervisor 18 / 14 / 2018

¹⁷ See V.I. H.C.R. Rule 2(h):

If the Superior Court grants habeas corpus relief on the merits, in whole or in part, it may order discharge of the petitioner or award a different form of remedy as the justice of the case may require. Consistent with Section 3 of the Revised Organic Act, the court shall provide a successful habeas corpus petitioner with redress in the form of a remedy that cures the constitutional or statutory violation, even if that specific remedy is not set forth in a statute.

V.I. H.C.R. Rule 1(d)(8):

An "order granting habeas corpus relief" or an "order denying habeas corpus relief" is the court's final order - issued after review of the petition on the merits - awarding or denying the ultimate relief sought by the petitioner.