

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

GOVERNMENT OF THE VIRGIN ISLANDS)

Plaintiff)

vs.)

LARRY ORLANDO HENRY)

Defendant)

CRIMINAL NO. 123/1987

POSSESSION OF AN
UNLICENSED FIREARM

POSSESSION OF STOLEN
PROPERTY

DAVID R. OSBORNE, ESQUIRE
Assistant Attorney General
Department of Law
Toro Building, Golden Rock
Christiansted, St. Croix
Virgin Islands 00820
(Attorney for Plaintiff)

JEFFREY B. C. MOORHEAD, ESQUIRE
Territorial Public Defender
46-47 Company Street
Christiansted, St. Croix, V.I. 00820
(Attorney for Defendant)

FINCH, Judge

MEMORANDUM OPINION AND ORDER
(October 1987)

I. INTRODUCTION

This matter came before the Court on a motion by defendant, Larry Orlando Henry, to suppress certain evidence seized from his person. The issue before this Court is whether Henry's Fourth Amendment rights were violated when he

was arrested and searched. For the reasons mentioned below, this Court finds that Henry's Fourth Amendment rights were violated, and will thus suppress the evidence obtained as a consequence.

II. FACTS

While on duty on December 6, 1986, at approximately 6:05 p.m., Police Officer Carlos A. Rodriguez received an anonymous telephone call. The caller informed him that she observed a black male individual wearing a camouflage army jacket, blue jeans, and a white knitted hat, attempting to sell a firearm on Company Street, Christiansted, St. Croix. Officer Rodriguez, accompanied by another officer, L. Lee, then proceeded to Company Street to search for the described individual. They observed a black male individual dressed as described by the caller. The individual waved to Officer Lee as he was walking by in the street. Officer Rodriguez then walked up to the individual from behind, drew his revolver pointing it upwards, and said, "don't move". He then put his hand on the individual's waist, felt a gun butt, and removed a .38 caliber revolver.

The individual turned out to be defendant, Larry Orlando Henry, whom Officer Lee knew for many years. On one occasion, Officer Lee had removed Henry from a bar because he was

involved in a disturbance. This particular vicinity on Company Street is reputed to be an area in which the following alleged activities are conducted: drug trafficking; prostitution; and the sale of stolen property. Officer Rodriguez, though familiar with Company Street, did not know that it had a reputation for the sale of stolen property. He did not know who Henry was when he encountered him.

III. DISCUSSION

Henry alleges that his Fourth Amendment rights were violated. Specifically, he argues that he was arrested and searched without probable cause. The Fourth Amendment states that:

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.

U.S. Const. amend. IV. Under this amendment, probable cause is generally a necessary prerequisite to a police search or seizure. See Torres v. Com. of Puerto Rico, 99 S. Ct. 2425, 2430 (1979) (stating that, "The government interests to be served in the detection or prevention of crime are subject to traditional standards of probable cause to believe that

incriminating evidence will be found."); United States v. Licavoli, 604 F.2d 613, 620 (9th Cir. 1979); United States v. Rojas, 671 F.2d 159, 165 (5th Cir. 1982); and United States v. Espinosa, 782 F.2d 888, 891 (10th Cir. 1986).

Not all police-citizen encounters, however, implicate the Fourth Amendment thus requiring probable cause. Non-coercive questioning, where no restraint of liberty is involved does not trigger the Fourth Amendment. This type of encounter, intended to elicit voluntary cooperation, is not a seizure. United States v. Mendenhall, 100 S.Ct. 1870, 1877 (1980); and United States v. Black, 675 F.2d 129, 133 (7th Cir. 1982). Another type of police-citizen encounter, established in Terry v. State of Ohio, 88 S. Ct. 1868 (1968), is an investigative stop. Such an encounter is a seizure and thus triggers the Fourth Amendment. However, because it is significantly less intrusive than a traditional arrest, an investigative stop is scrutinized under the reasonableness standard of the Fourth Amendment. Michigan v. Summers, 101 S.Ct. 2587, 2591 (1981). The police need only have an articulable basis for suspecting criminal activity in order to conduct such a stop. Id., at 2592; and Terry, supra, at 1880. In order to determine whether to apply a probable cause or reasonable suspicion standard to the instant case, it is necessary to examine the character of the encounter between Henry and Officer

Rodriguez.

A) Character of Police Encounter

Once a seizure occurs, the Fourth Amendment is triggered.

A person has been "seized" within the meaning of the Fourth Amendment only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave. Examples of circumstances that might indicate a seizure, even where the person did not attempt to leave, would be the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled.

Mendenhall, supra, at 1877. It cannot be seriously contended that the encounter between Henry and Officer Rodriguez did not constitute a seizure. The real issue is, whether the mode of the seizure amounted to an arrest or merely an investigative stop. The Government urges that the contact between Henry and Rodriguez should be classified as an investigative or Terry stop. This Court disagrees.

Terry recognized an exception to the general rule that seizures must be based on probable cause. The Court there concluded that a brief, on the spot stop and frisk for weapons did not fit within the traditional concept of an arrest. Dunaway v. New York, 99 S.Ct. 2248, 2254 (1979). It established a "narrowly drawn authority to permit a reasonable

search for weapons for the protection of the police officer, where he has reason to believe that he is dealing with an armed and dangerous individual, regardless of whether he has probable cause to arrest the individual for a crime." Id., at 2255. The exception created by Terry and its progeny is only a limited one. The "investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop." Florida v. Royer, 103 S.Ct. 1319, 1325 (1983). The method employed should be the least intrusive means available. Thus the police may not seek to verify their suspicions via means which approach the conditions of an arrest. Id., at 1325.

Nothing in the actions of Officer Rodriguez leads this Court to believe that he conducted an investigative stop of Henry. His actions were not in the nature of an investigation. Unlike Terry, Adams v. Williams, 92 S.Ct. 192 (1972), and United States v. Brignoni-Ponce, 95 S.Ct. 2574 (1975), Officer Rodriguez asked nothing of Henry to verify or dispel his suspicion. Instead, he drew his gun, said "don't move", and proceeded to search Henry. This certainly was not the least intrusive means by which Rodriguez could have verified or dispelled his suspicion under the circumstances. He could have: 1) merely observed Henry, 2) identified himself

as an officer, 3) requested identification, or 4) questioned him concerning his suspicion. Either of these methods might have resulted in some act or statement by Henry which verified or dispelled Rodriguez' suspicion. In light of the facts known to him at the time he encountered Henry, Officer Rodriguez' intrusion on Henry's personal security was so significant that it constituted an arrest. Furthermore, the facts of this case does not indicate that Henry was dangerous or that Officer Rodriguez was in need of protection. Thus, although this Court does not reach the issue, it is not so clear that Rodriguez had reasonable grounds to even stop and frisk Henry.

B) Applicable Standard

Having determined that Henry was arrested, this Court will apply the probable cause standard to ascertain the validity of the arrest. Probable cause exists "when, at the time of the arrest, the facts and circumstances within the officer's knowledge are sufficient to warrant a prudent man in believing that the suspect had committed or was committing an offense." United States v. Glasser, 758 F.2d 1197, 1205 (3rd Cir. 1984), cert. denied 105 S.Ct. 2025. The Supreme Court has adopted a "totality of circumstances" approach to make a probable cause determination. See Illinois v. Gates, 103

S.Ct. 2317, 2332 (1983). This approach considers all factors including the "informant's reliability and basis of knowledge." Id. at 2328.

In the instant case, the prime basis for the arrest was an informant's tip. Nothing indicates that the informant was reliable. Indeed, Officer Rodriguez did not even know who the informant was. Upon arriving on the scene, the only aspect of the tip that was verified was Henry's clothing. Nothing worn by Henry could lead one to reasonably believe that he committed or was about to commit a crime. This is so despite the fact that Henry was in a high crime area. The encounter occurred around 6:05 p.m. Officer Rodriguez noticed nothing unusual about Henry which verified his suspicion. He did not even know who Henry was. The short end to this tale is that Henry's arrest was based upon a statement by some unknown person that he committed a crime. Considering the totality of the circumstances, this Court finds that there was no probable cause to arrest Henry.

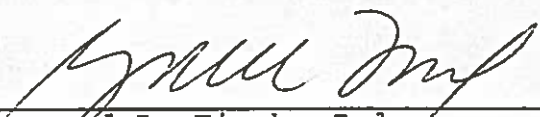
III. CONCLUSION

Based upon the foregoing, this Court concludes that the evidence discovered on Henry's person was seized in violation of his Fourth Amendment rights for want of probable cause. Accordingly, the evidence will be suppressed. Weeks v. United

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States, 34 S.Ct. 341 (1914); and Segura v. United States, 104
S.Ct. 3380 (1984).

DATED: October 8 1987


Raymond L. Finch, Judge