For Publication

IN THE SUPREME COURT OF THE VIRGIN ISLANDS

MARIO GEVON EMANUEL, Appellant/Defendant, v. **PEOPLE OF THE VIRGIN ISLANDS,** Appellee/Plaintiff.	))))))))	**S. Ct. Crim. No. 2017-0035** Re: Super. Ct. Crim. No. 53/2016 (STT)

On Appeal from the Superior Court of the Virgin Islands
Division of St. Thomas & St. John
Superior Court Judge: Hon. Michael Dunston

Argued: March 13, 2018
Filed: June 13, 2018

BEFORE: **RHYS S. HODGE**, Chief Justice; **MARIA M. CABRET**, Associate Justice; and **IVE ARLINGTON SWAN**, Associate Justice.

APPEARANCES:

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Appellate Public Defender
St. Thomas, U.S.V.I.
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OPINION OF THE COURT

SWAN, Associate Justice

Appellant Mario Emanuel seeks reversal of his convictions on firearms charges based on what he contends was error in the denial by the Superior Court of his motion to suppress an unlicensed firearm with obliterated serial numbers found on his person. He argues that the court

erred when it concluded reasonable suspicion existed for an enforcement officer of the Department of Licensing and Consumer Affairs to detain him, require him to get out of his vehicle, and search his person. He also asserts that the officer violated various local laws because the officer's detention of him lacked both probable cause and a warrant. For the reasons elucidated below, we find no error in the denial of the motion to suppress, and we affirm the judgment of the Superior Court entered upon the convictions for unauthorized possession of a firearm, 14 V.I.C. § 2253(a), and unauthorized possession of a firearm with altered identification marks, 23 V.I.C. § 481(b).

I. FACTS AND PROCEDURAL HISTORY

On January 22, 2016, Officer Darryl Donovan attended a briefing for the Restore Calm Taskforce. Donovan, the Department of Licensing and Consumer Affairs Chief Enforcement Officer, was assigned to the taskforce by the Governor, together with other officers from various local departments, to protect the community from gun violence. During the briefing, taskforce members received a be-on-the-lookout ("BOLO") flyer which contained a photograph of a black male Rastafarian named Chris who was wanted for threatening two officers at a shooting at a nightclub several weeks before. The flyer stated that the suspect was armed and dangerous and possibly operating a 2009 Acura TSX vehicle.

On January 23, 2016 at approximately 4:30 a.m., Officer Donovan and his partner, Officer Nadine Todman-Mike, were patrolling downtown Charlotte Amalie when he entered a nightclub to ask the manager why it was open after the mandated 4 a.m. closing time. Upon entering the establishment, Donovan noticed Emanuel sitting on a stool at the bar. Donovan thought Emanuel acted nervously because he failed to make eye contact with Donovan while twiddling his thumbs. After speaking with the club's manager, who said he had lost track of time and agreed to close the

club immediately, Donovan exited the club. As he departed, Donovan again observed Emanuel and realized Emanuel resembled the BOLO suspect. Upon returning to his vehicle, Donovan informed Officer Todman-Mike of Emanuel's resemblance to the BOLO suspect and proceeded to contact other taskforce members to assist in verifying Emanuel's identification. Donovan and Todman-Mike waited for police assistance, because they were told not to approach the suspect without assistance. After the assisting officers arrived, Donovan and Todman-Mike observed Emanuel exit Blitz and enter his vehicle. Donovan approached Emanuel, identified himself as an officer, asked Emanuel to ensure his hands remained visible, and instructed Emanuel to exit the vehicle. Emanuel complied. Donovan then informed Emanuel that he resembled a person authorities sought. Donovan advised Emanuel he would perform a pat down of his clothing to ensure Emanuel and Donovan's safety. Before conducting the search, Donovan asked Emanuel if he had any weapons or sharp objects. Emanuel replied affirmatively and said he had a gun in his right rear pocket. Donovan discovered the gun in a green sock and asked Emanuel if he had a firearm license. Emanuel responded "no." Donovan then arrested Emanuel for possession of an unlicensed firearm. Emanuel was advised of his rights, transported to the police station, and the gun was simultaneously delivered to a police forensics unit for analysis.

On November 11, 2016, a suppression hearing was conducted to determine the admissibility of the evidence obtained from Emanuel during the January 23, 2016 stop. At the hearing, the People argued that the motion should be denied because Donovan's reasonable suspicion that Emanuel was the BOLO suspect, provided sufficient grounds for the stop and search. Although less than probable cause, the People asserted that an officer could briefly detain a person as long as the officer had reasonable and articulable facts under the totality of the circumstances that a crime had occurred or was about to occur. The People noted Emanuel was

not under arrest when Donovan approached him, and Donovan's search of Emanuel was reasonable to ensure the officer's safety because the BOLO suspect was reportedly armed and dangerous.

Emanuel argued that Donovan and the other taskforce members illegally seized him in violation of his Fourth Amendment rights when they approached him in his car and demanded he show them his hands and exit the vehicle. Emanuel contended that a person is seized under the Fourth Amendment when the person believes he is not free to leave police custody or terminate police questioning. Emanuel said his lack of eye contact and the twiddling of his thumbs was insufficient to provide a basis for reasonable suspicion. He further argued that Donovan's uncertainty about his identity did not suffice to show reasonable suspicion. Lastly, Emanuel asserted that Donovan had no knowledge that he had committed a crime. Thus, Emanuel contended that the gun retrieved by Donovan should be suppressed because there was no legal basis for Donovan's seizure or search of him.

The Superior Court observed that the Fourth Amendment of the United States Constitution protects people against unreasonable searches and seizures. It noted that searches and seizures without probable cause or a warrant are generally unconstitutional unless one of the few narrowly recognized exceptions applies. It concluded there was reasonable suspicion to justify Emanuel's stop and search because of the physical similarities between Emanuel and the photograph of the suspect on the BOLO flyer. The court opined that Donovan did not need specific facts that Emanuel was guilty of a crime or a suspect; rather, Donovan's belief that Emanuel was a person wanted for questioning was a sufficient reason to detain him. Lastly, the court stated it would have been unreasonable for Donovan to approach and question Emanuel without taking the necessary

precautions to ensure Donovan's safety. Accordingly, the court denied Emanuel's motion to suppress the gun seized in the incident.

On January 9, 2017, the one-day jury trial commenced upon a two count information which charged Emanuel with unauthorized possession of a firearm, 14 V.I.C. § 2253(a), and unauthorized possession of a firearm with altered identification marks, 23 V.I.C. § 481(b). Donovan testified for the People. He stated he received the BOLO flyer at the taskforce meeting, and subsequently encountered Emanuel in the nightclub. He thought Emanuel acted nervously and resembled the individual depicted in the BOLO when Donovan observed him upon entering the club and further observed Emanuel when Donovan departed the nightclub. Upon returning to his patrol car, Donovan informed his partner concerning Emanuel's striking resemblance to the BOLO suspect and contacted other taskforce members to verify his identification. Donovan said they waited for assistance and returned to the nightclub once police assistance arrived. At that juncture, Donovan said he observed Emanuel exit the club and enter his car. He approached Emanuel and identified himself as an officer. He asked Emanuel to keep his hands visible and exit the vehicle. Donovan informed Emanuel that he resembled a person authorities sought and would administer a pat down to ensure everyone's safety. Prior to the pat down, Donovan asked Emanuel if he had any weapons on him, and Emanuel said he had a gun in his back pants pocket. Donovan retrieved the gun and asked Emanuel if he had a license for it. Emanuel said "no," and Donovan arrested him. Importantly, the gun had an obliterated serial number.

On cross-examination, Donovan admitted that the encounter at the nightclub was the first time he saw Emanuel. He said Emanuel resembled the BOLO suspect, a person police authorities sought, but Emanuel was subsequently determined not to be same person depicted in the BOLO photograph. Donovan confirmed that Emanuel did not make any threats directed at him and

complied with all Donovan's requests. Donovan acknowledged that the suspect identified in the BOLO was supposedly operating an Acura TSX vehicle, but, at the time of the encounter, Emanuel operated a minivan. Lastly, Donovan testified that he did not observe Emanuel commit a crime, and he had no information that Emanuel had committed a crime.

The jury returned a guilty verdict on both charges. On March 6, 2017, Emanuel was sentenced and a timely appealed ensued on March 16, 2017.

II. JURISDICTION

"The Supreme Court [has] jurisdiction over all appeals arising from final judgments, final decrees or final orders of the Superior Court." 4 V.I.C. § 32(a). In a criminal case, a judgment embodying the adjudication of guilt and the sentence imposed based on that adjudication constitutes a final judgment. *Williams v. People*, 58 V.I. 341, 345 (V.I. 2013) (collecting cases). Accordingly, the Superior Court's March 14, 2017 judgment is a final judgment over which we have jurisdiction.

III. STANDARD OF REVIEW

In reviewing the trial court's decision on a motion to suppress, we review its factual findings for clear error and exercise plenary review over its legal determinations. *Thomas v. People*, 63 V.I. 595, 602-03 (V.I. 2015) (citing *Simmonds v. People*, 53 V.I. 549, 555 (V.I. 2010)). The trial court's evidentiary rulings are reviewed for abuse of discretion. *Id*. at 614.

Under the Fourth Amendment of the United States Constitution, people are protected against unreasonable searches and seizures of their persons, houses, papers, and effects.[1]

[1] The Fourth Amendment of the United States Constitution applies to the Virgin Islands through section 3 of the Revised Organic Act of 1954. 48 U.S.C. § 1561.

Generally, unreasonable searches and seizures arise when the government intrudes into one of the constitutionally protected areas absent probable cause or a warrant. *Thomas*, 63 V.I. at 618; *Simmonds*, 53 V.I. at 574 (Swan, J., dissenting) (citing *Horton v. California*, 496 U.S. 128, 133 (1990)). However, there are delineated exceptions to the probable cause requirement. *People v. Heath*, 63 V.I. 80, 86 (V.I. Super. 2015) (citing *Mincey v. Arizona*, 437 U.S. 385, 390 (1978)). These exceptions are justified because they limit the personal intrusion to detainees and involve substantial law enforcement interests. *Michigan v. Summers*, 452 U.S. 692, 699 (1981). One exception is the long-established doctrine that reasonable suspicion allows an officer to briefly detain a person to determine if a crime has been committed or is about to be committed. *See Gumbs v. People*, 64 V.I. 491, 508 (V.I. 2016) (citing *Terry v. Ohio*, 392 U.S. 1, 30 (1968)). To have reasonable suspicion, an officer must have specific and articulable facts under the totality of the circumstances that the person stopped is or was involved in criminal activity. *United States v. Jacobsen*, 391 F.3d 904, 906 (8th Cir. 2004). This is a lesser standard than probable cause but requires more than an officer's mere hunch. *United States v. Monsivais*, 848 F.3d 353, 357 (5th Cir. 2017). To find that reasonable suspicion existed to justify a stop, a court must examine the "totality of the circumstances" in the situation at hand, in light of the individual officers' own training and experience, and should uphold the stop only if it finds that "the detaining officer ha[d] a 'particularized and objective basis' for suspecting legal wrongdoing." *United States v. Arvizu*, 534 U.S. 266, 273 (2002) (quoting *United States v. Cortez*, 449 U.S. 411, 417-18 (1981)).

In evaluating reasonable suspicion, a court may consider various factors such as the officer's awareness of a suspect's nervous and evasive behavior, the crime rate of the area, and flight from police. *United States v. Whitfield*, 634 F.3d 741, 744 (3rd Cir. 2010) (citing *Illinois v. Wardlow*, 528 U.S. 119, 123 (2000)). "It is not necessary that the suspect actually have done or is

doing anything illegal; reasonable suspicion may be based on acts capable of innocent explanation." *Id*. "Reasonable suspicion must be based on commonsense judgments and inferences about human behavior." *Id*.

Once a suspect has been stopped based upon reasonable suspicion, an officer may perform a cursory inspection of the detainee's outer clothing if the officer has knowledge that the detainee is both armed and dangerous, based on the premise that the officer's safety is in jeopardy. *Terry*, 392 U.S. at 27; *United States v. Robinson*, 846 F.3d 694, 698 (4th Cir. 2017) (citing *Arizona v. Johnson*, 555 U.S. 323, 326-27 (2009)). In this case, the uncontradicted evidence at the suppression hearing was that—before the pat-down search was even begun—Emanuel informed Officer Donovan that he had a gun in his back pocket. Thus, retrieving that weapon from Emanuel's person was fully justified under well-established Fourth Amendment jurisprudence.

IV. DISCUSSION

Emanuel argues that the Superior Court erred in denying his motion to suppress because Donovan lacked reasonable suspicion to conduct the stop and search. Emanuel also asserts that Donovan violated various local laws because Donovan's detention of Emanuel lacked both probable cause and a warrant.

A. Criminal Nature of Threats to Officers

First, it is prudent to address Emanuel's contention that threats made to officers do not constitute a crime in the Virgin Islands. As he noted in his appellate brief, some states have enacted threat-to-officer laws and laws against terrorist threats (Appellant's Br. 25). Moreover, there are various federal statutes that criminalize threats to United States employees. Namely, 18 U.S.C. §

111 punishes offenders for assaulting, resisting, or impeding certain federal employees.[2] Although these statutes are not controlling in the Virgin Islands, they are indicative of how other jurisdictions and the federal government protect civil servants. Additionally, the Virgin Islands penalizes assault. *See* 14 V.I.C. § 291.[3] While the record fails to state exactly what transpired during the shooting at the nightclub, it does state that the BOLO suspect made threats to officers while they were all at the establishment. Presumably, the threats could have been combined with overt gestures. Also, given his proximity to the officers, the BOLO suspect had the ability to assault and/or batter them. Thus, it is foreseeable that he could have assaulted them and, at minimum, committed an attempted assault which would have certainly warranted the need for authorities to locate him. *See Fahie v. People*, 59 V.I. 505, 518 (V.I. 2013) (noting that the People charged the defendant with attempted assault in the first degree).

B. Collective Knowledge of Officers

It is noteworthy that Donovan received information at the Restore Calm Taskforce briefing concerning the BOLO suspect's ongoing threats to do harm to two police officers who were allegedly involved in the fatal shooting of his friend at the nightclub. Importantly, in *United States v. Braden*, Crim. No. 11-CR-20192 ML/P, 2012 WL 3552854, at *6 (W.D. Tenn. July 6, 2012) (unpublished), the court stated that officers can rely on information received during a briefing with superiors or other law enforcement officers to make a *Terry* stop. In *Braden*, an officer stopped a suspect who was wanted by the Drug Enforcement Administration ("DEA") for drug trafficking.

[2] "Whoever (1) forcibly assaults, resists, opposes, impedes, intimidates, or interferes with any person designated in § 1114 of this title while engaged in the or on account of the performance of official duties. . . shall where the acts in violation of this section constitute only simple assault be fined under this title or imprisoned not more than one year, or both, and where such acts involve physical contact with the victim of that assault or the intent to commit another felony, be fined under this title or imprisoned not more than 8 years, or both." 18 U.S.C. § 111(a).

[3] "Whoever (1) attempts to commit a battery; or (2) makes a threatening gesture showing in itself an immediate intention coupled with an ability to commit a battery-commits as assault." 14 V.I.C. § 291.

Id. The deputy lacked independent knowledge of the suspect's crimes and was not provided any details of the crimes by the DEA, but was asked to stop the suspect's vehicle if it was encountered. Although the deputy ultimately had several independent reasons to legally stop the suspect, the court reasoned the DEA's request was sufficient reasonable suspicion to detain the suspect. Citing *United States v. Hensley*, 469 U.S. 221, 232-33 (1985), the district court held that an officer can rely on communications from other law enforcement personnel to make a *Terry* stop as long as the agent providing the information had reasonable suspicion for the stop. *Braden*, 2012 WL 3552852, at *6-8. Similarly, in *United States v. Barnes*, 910 F.2d 1342 (6th Cir. 1990), reasonable suspicion was found where a federal law enforcement officer briefed two Memphis police officers on the suspect, who was thought to be in the area. The officers were advised that the suspect was a convicted felon and armed at all times. Using this information, the officers stopped the suspect. The United States Court of Appeals for the Sixth Circuit held that the federal agent had reasonable suspicion to stop the suspect and the officers' detention of him was justified, although they lacked independent reason to suspect him of any wrongdoing. *Id*. at 1344. *See also*, *e.g.*, *United States v. Adams*, Crim. No. 09-20224, 2010 WL 3504072, at *8 (E.D. Mich. Mar. 10, 2010) (unpublished) ("[I]n determining whether actions are proper, courts must evaluate the collective information of all officers involved, including cooperating federal and local officers."); *United States v. Jacobsen*, 391 F.3d 904, 906 (8th Cir. 2004) ("[A] police officer can rely on a wanted flyer when making a *Terry* stop, even if the flyer omits specific articulable facts supporting reasonable suspicion. Evidence uncovered during the stop is admissible and admissibility does not require that those acting on the flyer know the specific facts prompting the flyer, if some degree of communication exists between officers.") (citing *Hensley*, 469 U.S. at 232); *United States v. Williams*, 627 F.3d 247, 253 (7th Cir. 2010) ("[T]he collective knowledge doctrine permits an officer to stop, search,

or arrest a suspect at the direction of another officer or police agency, even if the officer himself does not have firsthand knowledge of the facts that amount to the necessary level of suspicion to permit the given action." (citing *Hensley*, 469 U.S. at 232-33)).

In *United States v. Antuna*, 186 F.Supp.2d 138 (D. Conn. 2002), the district court found that an officer lacked reasonable suspicion to stop an individual where the officer asserted that he believed that the individual resembled a suspect in a wanted poster. However, the officer was unable to state whether the suspect in the wanted poster was sought for a felony or another offense; he could not identify which wanted poster triggered his memory; he could not recall whether the wanted poster that triggered his memory was discussed during the briefing before the shift in which he encountered the individual, or which board at the police station displayed the wanted poster that triggered his memory. Additionally, the officer did not have any posters in his car on the day he encountered the individual and could not testify as to what physical attributes made him believe that this individual was the suspect in the poster. The court reasoned that there may be situations in which an officer could not produce the poster that triggered his memory, but could justify his actions if he could "testify what physical attributes about the defendant caught his attention, e.g., specific feature or mark on [the suspect's] face, or a physical description that related to the wanted poster, or could identify where he saw the wanted poster that formed his reasonable suspicion." *Id*. at 143-44.

This case is distinguishable from *Antuna* and consistent with those that hold an officer can rely on information received from other law enforcement agencies. Donovan acted on the information received at the Taskforce briefing which was provided by the Virgin Islands Police Department ("V.I.P.D."). (Appellee's Br. 18). Although he lacked independent knowledge of the BOLO suspect's crimes, he was informed that the suspect had threatened two officers and was

presumed armed and dangerous. Additionally, Donovan received a BOLO that provided a photograph of the suspect and stated that he was armed and dangerous. Donovan received the BOLO at the start of his shift on January 22, 2016 and encountered Emanuel in the early morning of January 23, 2016. Lastly, Donovan twice observed Emanuel—once as he entered the nightclub and again as he exited the nightclub. Donovan testified that Emanuel resembled the BOLO suspect, even though Emanuel failed to make eye contact with Donovan. (J.A. 100-01). Although Emanuel contends that the BOLO was extremely deficient because it listed no crime for which the suspect was sought, Donovan was informed at the briefing of the threats the suspect allegedly made and directed towards two law enforcement officers. Therefore, because Donovan relied on the information from the briefing which was provided by V.I.P.D. and believed Emanuel resembled the BOLO suspect, Donovan had reasonable suspicion to stop Emanuel.

C. Reasonable Suspicion Based on the BOLO Bulletin

On appeal, Emanuel argues that Donovan's seizure of him was unconstitutional because it was not completely based on the BOLO or any reasonable suspicion supported by the BOLO or other information. (Appellant's Br. 13). The court in *United States v. Lawes*, 292 F.3d 123, 127 (2d Cir. 2002), opined that dissimilarities between the suspect and defendant did not undermine the finding of reasonable suspicion. The suspect in *Lawes* was a 5'9", 160 pound, twenty-year old black male while defendant in that case was a 6'1", 200 pound, thirty-four year old black male. Moreover, the suspect had a scar on his arm but the defendant had a scar on his face under his eye. Regardless, the Second Circuit held that the trial court did not err because there were similarities between the two men when the mugshots that officers carried with them on the night they arrested the defendant were compared to a photograph of the defendant, justifying a finding of reasonable suspicion. *See also United States v. Jackson*, 652 F.2d 244, 248 (2nd Cir. 1981) (finding reasonable

suspicion existed when an officer stopped the defendant who resembled the suspect in race, age, hairstyle, and coat color although further observation revealed the defendant's coat was different in color than the suspect's coat because the officer reasonably believed defendant fit the description of the suspect.); *United States v. Barnes*, 910 F.2d 1342, 1344-45 (6th Cir. 1990) (reasonable suspicion based on resemblance to mugshot and the defendant's presence in an area the suspect was known to frequent); *United States v. Hudson*, 405 F.3d 425, 433-34 (6th Cir. 2005) ("Of course, had the officers positively or, at least, reasonably identified [the defendant] as a passenger before approaching the car . . . for example, by reference to a photograph of Hudson or a composite drawing, they would have had reasonable suspicion to seize the car and its occupants."); *United States v. Taylor*, Crim. No. 01 CR 0576(LTS), 2002 WL 193573, at *3 (S.D.N.Y. February 7, 2002) (unpublished) (Officers had photo of a suspect while they were on patrol and stopped the defendant based on his resemblance to the photo. Although the defendant was not the suspect, officers recovered a firearm that violated federal laws. "The central factual assertion supporting reasonable suspicion [is] that the officers had concluded [the defendant's] appearance matched that of the shooting suspect. Based on the resemblance, they had reasonable suspicion to believe that [he] was the shooting suspect for whom they were looking."); *c.f. United States v. Springs* 17 F.3d 192, 194 (7th Cir. 1994) (noting that recognition of suspect based on surveillance photos alone may be sufficient to establish probable cause).

Here, Donovan encountered Emanuel inside a nightclub at approximately 4 a.m. Although Donovan saw him under what were presumably poor lighting conditions, Donovan twice observed Emanuel: "As I was entering . . . I noticed Mr. Emanuel sitting on a stool to the right and I glanced at him and he looked like the individual we were looking for in the BOLO." (J.A. 80). As he left the establishment, Donovan again observed Emanuel, but more intensely: "[A]s I exited the club,

I looked at him even more closer to see if he was the individual we were looking for in the BOLO and he resembled him very much." (J.A. 81). Therefore, Donovan did not just have a fleeting glance of Emanuel like the officer in *Antuna*. Rather, he closely examined Emanuel's features on both entering and exiting the nightclub in order to reasonably conclude that Emanuel was the man that authorities sought. Moreover, during the suppression hearing, even the court noted the similarities between Emanuel and the BOLO suspect depicted in the flyer. (J.A. 126). Thus, as in *Lawes*, the distinctions between Emanuel and the BOLO suspect do not eviscerate the reasonableness of Donovan's reasonable suspicion that Emanuel was the individual described in the BOLO.

Although Emanuel suggests that Donovan did not follow the BOLO because it stated that the subject in that case operated an Acura vehicle whereas at the time of the stop Emanuel operated a minivan, this argument is specious. It is unreasonable to believe that a suspect or person of interest could not change vehicles and operate different vehicles at different times. Donovan also testified that he was not informed that the Acura was registered to the BOLO suspect. (J.A. 101). Accordingly, Donovan certainly could have thought that the BOLO suspect operated another model vehicle which would not have been detrimental to or diminish a finding of reasonable suspicion under the standard of the totality of the circumstances.

D. Reasonable Suspicion Based on Observations of Suspect's Apparent Nervousness

Emanuel asserts that twiddling thumbs and evading eye contact is insufficient to satisfy reasonable suspicion. Yet, as stated in *Whitfeld*, reasonable suspicion may be based on facts that can be innocently explained. 634 F.3d at 744 (citing *Wardlow*, 528 U.S. at 123). Donovan, a twenty-year police veteran, was a taskforce officer whose mission was to eradicate pervasive gun violence in St. Thomas. If he entered an establishment at approximately 4 a.m. and observed an

individual, the sole patron, who failed to make eye contact with him and appeared nervous, it is not illogical that he thought that person's behavior suspicious. Moreover, Donovan believed Emanuel resembled the BOLO suspect. He testified his basis for stopping Emanuel was Emanuel's resemblance to that suspect. (J.A. 368). Although the identification was subsequently determined to be incorrect, a reasonable mistake of fact does not negate reasonable suspicion. As noted in *United States v. Harmon*, 724 F.3d 451, 456 (10th Cir. 2014), "[a]n officer's reasonable mistake of fact may support the finding of reasonable suspicion . . . ." *United States v. Fleetwood*, 235 Fed. Appx. 892, 895-96 (3rd Cir. 2007) ("A reasonable mistake of fact does not violate the Fourth Amendment.") (quoting *United States v. Chanthasouxat*, 342 F.3d 1271, 1276 (11th Cir. 2003)). Therefore, Donovan's observations, combined with the BOLO and the information received at the taskforce briefing, provided more than a sufficient basis for finding that the officer had a reasonable suspicion under a totality of the circumstances.

E. Evidence of Recent or Ongoing Crime

Emanuel contends that past crimes cannot be the basis for reasonable suspicion. In *Hensley*, the court noted that a *Terry* stop could be used to investigate a crime that has occurred or one that is ongoing. 469 U.S. at 232-33. Here, the person sought in the BOLO was suspected of threatening two police officers in connection with a shooting at a nightclub in which his friend was allegedly killed by police. Presumably, police officers would not issue a BOLO for a suspect who threatened them with mere physical bodily contact. The BOLO explicitly states that the subject sought was armed and dangerous. Therefore, the threat to police probably involved a firearm and, since the threat was not executed when it was made, it could present an ongoing or continuous matter and not a past crime as Emanuel alleges. Significantly, there is no evidence that the threat by the BOLO suspect was ever recanted or disavowed subsequent to the shooting incident that led to the issuance

of the BOLO. In light of this context, Donovan had reasonable suspicion to stop Emanuel because the BOLO suspect, at any time, could have executed the threat against any officer.

F. Pat-down Frisk for Weapons

To reiterate, once a suspect has been stopped based upon reasonable suspicion, an officer may perform a cursory inspection of the detainee's outer clothing if the officer has reasonable suspicion that the detainee is both armed and dangerous, based on the premise the officer's safety is in jeopardy. *Terry*, 392 U.S. at 27; *Robinson*, 846 F.3d at 698-701 (citing *Johnson*, 555 U.S. at 326-27)). "When an officer is justified in believing that the individual whose suspicious behavior he is investigating at close range is presently armed and dangerous to the officer and others . . . it would . . . be clearly unreasonable to deny the officer to take the necessary measures to determine whether the person is in fact carrying a weapon and neutralize the threat of physical harm." *Gumbs*, 64 V.I. at 508.

Here, Donovan received a BOLO that stated the suspect who was sought was potentially armed and dangerous. Also, he was told not to approach the BOLO suspect because he was presumed armed. (J.A. 82). More importantly, before the pat-down search began, Emanuel told Donovan that he had a gun in his right back pants pocket. (J.A. 84). Thus, there was legitimate cause for Donovan to believe Emanuel was presently armed and dangerous and to take the necessary precautions to ensure everyone's safety by performing a pat-down of him.

G. No Violation of Local Statutes

Emanuel argues that Donovan violated 5 V.I.C. §§ 3561,[4]-3562[5] and 23 V.I.C. § 488[6] when he stopped him. As mentioned above, the BOLO, the information obtained at the taskforce briefing, and Donovan's observations provided reasonable suspicion for the stop and Donovan's knowledge that the BOLO suspect was potentially armed authorized the frisk. When Emanuel informed Donovan that he possessed an unlicensed firearm, Donovan had probable cause to arrest him. Thus, Emanuel's contention that Donovan violated local law when he stopped him is meritless.

H. Threats Not Protected Speech Under the First Amendment

Following oral arguments, Emanuel filed an April 3, 2018 supplemental brief in which he argues that, although the government may regulate true threats, without the ability of the Court to review the contents of the threat, this Court must conclude that the threat is protected speech under

[4] "A peace officer is . . . an enforcement officer of the Department of Licensing and Consumer Affairs . . . A warrant to arrest shall be directed to and executed by such officers." 5 V.I.C. § 3561.

[5] "A peace officer may make an arrest in obedience with a warrant delivered to him, or may, without a warrant, arrest a person- (1) for a public offense committed or attempted in his presence; (2) when a person has committed a felony, although not in his presence; (3) when a felony has in fact been committed and he has reasonable cause for believing the person to have committed it; (4) on a charge made, upon reasonable cause, of the commission of a felony by the party; or (5) at night, when there is a reasonable cause to believe he has committed a felony." 5 V.I.C. § 3562.

[6] "Any law enforcement officer who . . . has a reasonable belief that (i) a person may be wearing, carrying, or transporting a firearm in violation of section 452 of this title, (ii) by virtue of his possession of a firearm, such person is or may be presently dangerous to the officer or others, (iii) it is impractical, under the circumstances, to obtain a search warrant; and (iv) it is necessary for the officer's protection or the protection of others to take swift measures to discover whether such a person is, in fact, wearing, carrying, or transporting a firearm, such officer may: (1) approach the person and identify himself as a law enforcement officer; (2) request the person's name and address, and, if the person is in a vehicle, his license to operate the vehicle, and the vehicle's registration; and (3) ask such questions and request such explanations as may be reasonably calculated to determine whether the person is, in fact, unlawfully wearing, carrying, or transporting a firearm . . . ; and (4) if the person does not give an explanation which dispels the reasonable belief which he had, he may conduct a search of the person, limited to a patting or frisking of the person's clothing in search of a firearm . . . ." 23 V.I.C. § 488.

the First Amendment. Therefore, he argues the threat cannot constitute criminal activity that justifies a *Terry* stop. However, this argument is specious. The First Amendment free speech clause is implicated when speech is regulated. *See Watts v. United States*, 394 U.S. 705, 707 (1969) ("[A] statute . . . which makes criminal a form of pure speech, must be interpreted with the commands of the First Amendment clearly in mind."). Yet, in this case, there is no charge or suggestion that the threatening statement itself constituted a crime, and nothing in our decision on the Fourth Amendment question presented in this case requires this Court to make such a conclusion. Instead, the statement is only relevant here insofar as it constitutes an articulable fact supporting the police officer's reasonable suspicion that criminal activity—future harm to the threatened officers—was likely to occur, which in turn, justified the *Terry* stop leading to Emanuel's arrest. Thus, in the context of this case, we need not determine whether the threatening statement itself falls under the protection of the First Amendment, because the suspected criminal activity for which Emanuel was stopped was not merely the past act of making a threatening statement, but rather the future act of executing the threat and committing violence against an officer. Unquestionably, violence against police officers—whether in the form of assault, battery, or some other crime—is not treated as protected speech under the First Amendment. *See NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 916 (1982) ("The First Amendment does not protect violence."). Accordingly, the First Amendment is not implicated by the *Terry* stop Donovan executed.

V. CONCLUSION

This case pivoted on the credibility of the witnesses. However, we note the trial judge decided the motion to suppress in the People's favor principally based on his belief of Donovan's factual recitation over Emanuel's. Emanuel testified at trial only; therefore, the trial court received

no testimony from him when deciding the motion to suppress. We conclude that the trial judge accurately ascertained the situation as it was on the day of the incident and, for the reasons elucidated above, its denial of the motion to suppress was not error. Therefore, we affirm the defendant's convictions on both firearm offenses.

Dated this 13th day of June 2018

BY THE COURT:

/s/ Ive Arlington Swan
IVE ARLINGTON SWAN
Associate Justice

ATTEST:
VERONICA J. HANDY, ESQ.
Clerk of the Court