

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

PEOPLE OF THE VIRGIN ISLANDS,	)	
	)	CASE NO. ST-18-CR-254
Plaintiff,	)	
-vs-	)	14 V.I.C. § 2253(a)
	)	14 V.I.C. § 2256(a)
OJHANI INECIA,	)	
(D.O.B. 09/15/1998)	)	
Defendant.	)	
PEOPLE OF THE VIRGIN ISLANDS,	)	
	)	CASE NO. ST-18-CR-255
Plaintiff,	)	
-vs-	)	14 V.I.C. § 2253(a)
	)	14 V.I.C. § 2256(a)
JARIUS G. PENN,	)	
(D.O.B. 09/21/1999)	)	
Defendant.	)	
PEOPLE OF THE VIRGIN ISLANDS,	)	
	)	CASE NO. ST-18-CR-256
Plaintiff,	)	
-vs-	)	14 V.I.C. § 2253(a)
	)	14 V.I.C. § 2256(a)
ARKIM C. CLERSAINT,	)	
(D.O.B. 07/15/1999)	)	
Defendant.	)	

Cite as: 2019 VI Super 93U

MEMORANDUM OPINION AND ORDER

¶1 **THIS MATTER** is before the Court on Defendant Arkim Clersaint's Motion to Suppress, filed on February 8, 2019. Defendant Jarius Gerard Penn's Joinder in Co-Defendant Akeem (sic) Clersaint's Motion to Suppress was filed on March 4, 2019. Defendant Ojhani Inecia's Joinder in Co-Defendant Arkim Clersaint's Motion to Suppress was filed on March 7, 2019. Clersaint's Motion and the subsequent Joinders will be referred to collectively as the "Motion."

¶2 The Motion seeks to suppress the arrest of the Defendants and their identification by law enforcement officers on the grounds that their warrantless stop, seizure, search and subsequent arrests were in violation of Virgin Islands law, the Revised Organic Act of the Virgin Islands and the Fourth Amendment to the United States Constitution because the stop and search of the Defendants were not supported by reasonable suspicion. The Defendants further argue that because there was no reasonable suspicion to support their stop, seizure and pat-down frisk, the evidence later seized in the search that lead to their arrests should therefore be suppressed. The Defendants

also argue that their arrests for constructive possession of a firearm were made in violation of V.I. Code tit. 23, §488.

¶3 At issue is whether the police had reasonable suspicion to stop the Defendants. Because the police did not articulate any unusual suspicious or criminal conduct on the part of the Defendants which led them to reasonably conclude that the Defendants may be engaged in criminal activity and that the Defendants may be armed and presently dangerous, the Motions to Suppress will be granted.

I. BACKGROUND

¶4 An evidentiary hearing was held on the Motion on June 11, 2019. Virgin Islands police officers Jermaine Carty and Marilyn Hendricks-Laware testified. Based upon the testimony and exhibits admitted into evidence, the Court makes the following findings.

¶5 On Monday, October 22, 2018, at approximately 1840 hours, a minor identified as C.D. came to the Leander Jurgen Command Police Station in Cruz Bay, St. John (the “Station”), and reported to Police Officer Jermaine Carty (“Carty”) that earlier the same evening, at about 1828 hours, C.D. was robbed at gun point by another minor identified as K.R. C.D. told the police that he was walking on King Street in the area of a business known as Connections, when K.R. threw a small empty bottle of rum at him. C.D. continued to walk down King Street in the presence of K.R. In the vicinity of the Lime Inn restaurant on King Street, Cruz Bay, K.R. pulled out a black and chrome handgun from his backpack, cocked it (pulled the slide back to chamber a round), and told C.D. to give him his phone. When C.D. protested, K.R. pointed the gun to C.D.’s head and told C.D. again: “give me your phone.” According to C.D., K.R. grabbed the phone from C.D.’s hand and walked away.

¶6 C.D. also said that four of K.R.’s friends watched C.D. get robbed at gunpoint. When C.D. reported this incident to him, Carty knew who the four friends were because they all hang out as a group near an abandoned building located between King Street and Hill Street. This area between two buildings is known as “the Cut” because pedestrians can walk from Hill Street through the Cut to reach King Street without walking the length of Hill Street, and vice versa.

¶7 After C.D. made his report, Carty and Officer Lewis (“Lewis”) left the station and drove up Centerline Road looking for K.R. Significantly, the police were not looking for K.R.’s friends. When Carty and Lewis did not see him, they travelled to the Cut where they know K.R. hangs out. Lewis and Carty saw several males at the Cut but they could not see who they were. Because the matter they were investigating involved a firearm, the two police officers returned to the Station to strategize on how to locate K.R.

¶8 After Carty and Lewis returned to the station, two other minors brought C.D.’s phone to the station. One of the minors reported that they were given the phone by an unnamed person saying: “here’s your phone”. One or both of the minors told the police that the person or persons who gave them the phone were “down in the Cut”.

¶9 The police then left in three vehicles: Laware drove Lewis in one vehicle up Hill Street and Carty and Officer Mills drove in another vehicle with the goal to arrive at the King Street side of the Cut as the other officers approached from above the Cut on Hill Street. Sergeant Clarke followed in another vehicle behind Laware and Lewis. As the police were driving up Hill Street, Lewis told Laware “[K.R.] just took off.” Lewis and Laware got out of their vehicle and walked down hill to where a group of individuals were sitting on a “platform.” Clarke told the individuals to go down the stairs that lead onto King Street. As Laware arrived, the individuals were walking down the stairs onto King Street.

¶10 Thinking that K.R. may have given the gun to one of his friends, the police told the individuals to place their hands on the wall and all were patted down or “frisked” for officer safety. Prior to this point in time, no one had told Laware who K.R.’s friends were or their names or how many friends were present at the alleged armed robbery.

¶11 Carty and Mills were delayed in their arrival at the Cut due to communication problems. While Carty and Mills were stopped, they saw K.R. exit a mini mart. Carty approached K.R., told him to place his hands on the wall and arrested K.R. While he was arresting K.R., Carty could see the other Defendants with their hands up against a wall as part of the pat-down frisk.

¶12 Carty testified that he arrested Clersaint for being within five feet of the backpack that no one claimed. Later, Carty testified that the Defendants were 1-2 feet away from the backpack. However, this testimony as well as of much of Carty’s testimony was based upon what other officers told him.

¶13 Laware testified that all of the police who were present at the time of the stop and search, were wearing bullet-proof vests and all were in uniform. Lewis had a shotgun. Laware testified that all of the individuals who were stopped and frisked complied with everything they were told. While the individuals were standing, Laware went back up the stairs and found a backpack on another set of stairs attached to the abandoned building located next to the Cut. Clarke asked the individuals who had been stopped and frisked if the backpack belonged to any of them and they all said no. Lewis asked the individuals twice if the backpack belonged to any of them and again they all said no. Once no one claimed ownership of the backpack, Laware opened it and found a gun along with other items.

¶14 Laware did not see where the individuals were seated. She did not know where each was seated in relation to where she later found the backpack.

¶15 After the firearm was found in the backpack, the minor, A.C. (the brother of Arkim Clersaint), Arkim Clersaint, Jarius Penn and Ojhani Inecia were arrested for constructive possession of a firearm. The minor, A.C. (the brother of Arkim Clersaint), was placed in protective custody. K.R. was also arrested and charged with armed robbery and placed in protective custody.

II. MOTION TO SUPPRESS STANDARD

¶16 The Fourth Amendment to the U.S. Constitution guarantees security in persons, papers, and effects against unreasonable searches and seizures.¹ The Fourth Amendment of the U.S. Constitution applies to the U.S. Virgin Islands pursuant to section 3 of the Revised Organic Act of 1954.²

¶17 In general, for a seizure to be reasonable under the Fourth Amendment, it must be effectuated with a warrant based on probable cause.³ Warrantless searches, however, “are *per se* unreasonable under the Fourth Amendment subject to a few specifically established and well delineated exceptions.”⁴ Evidence obtained as the result of an unreasonable search or seizure can be suppressed.⁵

¶18 In *Terry v. Ohio*, the United States Supreme Court held that a police officer may conduct a brief, investigatory stop and conduct a quick pat-down search for weapons without a warrant and on less than probable cause if the officer has a reasonable and articulable suspicion of criminal activity.⁶ Such a search is limited by the exigencies of the situation. In order to be valid under *Terry*, a pat-down search must be based on a reasonable belief that a person is armed and presently dangerous.⁷ “The officer need not be absolutely certain that the individual is armed; the issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger.”⁸ “The purpose of this limited search is not to discover evidence of crime, but to allow the officer to pursue his investigation without fear of violence . . .”⁹

¶19 Therefore, the following two conditions must be met for stop and frisk to qualify as a constitutional *Terry* search: 1) the police officer must have had reasonable suspicion that the person stopped committed a criminal offense and 2) to proceed from a stop to a frisk, the police officer must have had a reasonable suspicion that the person stopped was armed and dangerous. A

¹ U.S. Const. amend. IV. The complete Revised Organic Act of 1954 is found at 48 U.S.C. §§ 1541-1645 (1995), reprinted in V.I. Code Ann., Historical Documents, Organic Acts, and U.S. Constitution at 73-177 (1995) (preceding V.I. Code Ann. tit. 1).

² *Simmonds v. People of the Virgin Islands*, 53 V.I. 549, 555-556 (V.I. 2010).

³ *United States v. Robertson*, 305 F.3d 164, 167 (3d Cir. 2002) (citing *Katz v. United States*, 389 U.S. 347, 356-57 (1967)).

⁴ *Mincey v. Arizona*, 437 U.S. 385, 390 (1978); *Horton v. California*, 496 U.S. 128, 133 (1990) (opining that the general rule is that warrantless searches are presumptively unreasonable).

⁵ *Wong Sun v. United States*, 371 U.S. 471, 485-86 (1963) (“the exclusionary rule has traditionally barred from trial physical, tangible materials obtained either during or as a direct result of an unlawful invasion”).

⁶ 392 U.S. 1, 21 (1968).

⁷ *Ybarra v. Illinois*, 444 U.S. 85, 92-93 (1979).

⁸ *Terry v. Ohio*, 392 U.S. 1 at 27 (1968).

⁹ *Adams v. Williams*, 407 U.S. 143, 146 (1972).

court must consider the totality of circumstances when deciding whether such reasonable suspicion existed.¹⁰

¶20 Ordinarily, a criminal defendant bears the burden of proof when arguing that evidence should be suppressed.¹¹ However, if a search or seizure was conducted without a warrant, the burden shifts to the People to demonstrate the search fell within some recognized exception to the warrant requirement.¹²

¶21 In the instant case, the Defendants have sustained their burden by establishing that they were detained and searched without a warrant. The lack of a warrant shifts the burden to the People to prove “that each individual act constituting a search or seizure under the Fourth Amendment was reasonable.”¹³ The burden is on the People to demonstrate by clear and convincing evidence that the governmental activity fell within some recognized exception to the warrant requirement.¹⁴

¶22 “Whenever a police officer accosts an individual and restrains his freedom to walk away, he has seized that person, and the Fourth Amendment requires that the seizure be ‘reasonable’.”¹⁵ The Fourth Amendment’s protection extends to all seizures, including brief investigatory stops.¹⁶ “Reasonableness is an objective inquiry measured by examining the totality of the circumstances surrounding the search or seizure and the nature of the search or seizure itself.”¹⁷ A search or seizure without a warrant is unreasonable absent the applicability of one of a few, well-delineated exceptions.¹⁸ One such exception is the investigatory stop and frisk.

¶23 When an officer has “reasonable and articulable suspicion of criminal activity afoot,” the officer may stop the individual and make reasonable inquiries.¹⁹ In *Terry v. Ohio*, the United States Supreme Court stated its holding as follows:

We merely hold today that where a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed

¹⁰ See *United States v. Cortez*, 449 U.S. 411, 417 (1981).

¹¹ *Government v. Morton*, 15 V.I. 418, 423 (Terr. Ct. 1978); see also *People v. Archibald*, 50 V.I. 74, 85 (V.I. Super. Ct. 2008) (citing *Government v. Morton*); *People v. Benjamin*, 2009 V.I. LEXIS 25, at *28 (V.I. Super. Ct. 2009); *People v. Thomas*, 2014 V.I. LEXIS 28, at *4 (V.I. Super. Ct. 2014).

¹² *Morton*, 15 V.I. at 423.

¹³ *People v. Pryce*, Super. Ct. Crim. No. SX-15-CR-069, 2015 WL 13579326, at *1 (V.I. Super. July 27, 2015) (unpublished).

¹⁴ *People of Virgin Islands v. Archibald*, 50 V.I. 74, 85 (V.I. Super Ct. 2008) (citations omitted).

¹⁵ *Blyden v. People of the V.I.*, 53 V.I. 637, 647, (V.I. 2010) (citing *Brown v. Texas*, 443 U.S. 47, 50 (1979)).

¹⁶ *People v. Heath*, 63 V.I. 80, 88 (V.I. Super. Ct. 2015) (citing to *United States v. Johnson*, 620 F.3d 685, 690 (6th Cir. 2010)).

¹⁷ *People v. Prentice*, 64 V.I. 79, 89 (V.I. Super. Feb. 23, 2016) (citing *United States v. Montoya de Hernandez*, 473 U.S. 531, 537 (1985); *Ohio v. Robinette*, 519 U.S. 33, 39 (1996)).

¹⁸ *Browne v. People*, 56 V.I. 207, 217 (V.I. 2012) (quoting *Katz v. United States*, 389 U.S. 347, 357 (1967)).

¹⁹ *Blyden*, 53 V.I. at 648 (quoting *Terry*, 392 U.S. at 27, 30).

and presently dangerous, where in the course of investigating this behavior he identifies himself as a policeman and makes reasonable inquiries, and where nothing in the initial stages of the encounter serves to dispel his reasonable fear for his own or others' safety, he is entitled for the protection of himself and others in the area to conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons which might be used to assault him.²⁰

¶24 To determine whether an officer acted reasonably in such circumstances, the Court need not focus on "his inchoate and unparticularized suspicion or hunch."²¹ Rather, the officer must articulate "specific reasonable inferences which he is entitled to draw from the facts in light of his experience."²²

III. ANALYSIS

¶25 The Court finds that in the instant case, the Defendants were "seized" and not free to walk away because there were uniformed police officers approaching them from behind on Hill Street and there were uniformed police officers in front of them on King Street. Officer Lewis had a shotgun. All police were wearing bullet-proof vests. The Defendants were seated when the police arrived. The Defendants did not run. The Defendants did not "take off" in the manner that K.R. did as the police approached. The Defendants remained seated until the police told them to get up and walk down the stairs. Laware testified that the Defendants complied with everything they were told. There was nothing to indicate that the Defendants were free to leave anytime they wished or that they had an option to disregard the police orders. Because the Court finds that the Defendants were "seized" and their freedom was restrained, then the seizure must be reasonable.²³

¶26 While the Defendants were essentially under arrested and detained, the police searched the area. The police thought that K.R. *may* have given the gun to one of his friends. However, more than an inchoate and unparticularized suspicion or hunch is required as a basis for a search.

¶27 Based upon testimony, it is clear that the police were searching for the firearm used by K.R. in the alleged robbery of C.D. C.D. also reported that K.R. took the firearm out of a backpack. While C.D. reported that K.R.'s friends were present when the alleged robbery occurred, the police were looking for K.R. C.D. reported that one person robbed him: K.R. None of the Defendants participated in the robbery. Moreover, given that K.R. "took off" when the police arrived, it appears that he left his "friends" holding the proverbial bag.

¶28 There was no testimony that the Defendants acted suspiciously. The Defendants were not found where the robbery took place. In short, while the police efficiently and quickly located and arrested K.R., the Defendants were also stopped, seized and searched without the police providing

²⁰ *Terry v. Ohio*, 392 U.S. 1, 30 (1968).

²¹ *People v. Looby*, 68 V.I. 683, 695 (quoting *Terry*, 292 U.S. at 27).

²² *Id.*

²³ *Brown v. Texas*, 443 U.S. 47, 50 (1979).

a reasonable and articulable suspicion of criminal activity with respect to the Defendants.

¶29 The Court is mindful that “the alleged Fourth Amendment violations must be carefully scrutinized in order to protect individual rights from unwarranted search and seizures”²⁴ and that this consideration must be balanced against the governmental interest of effective crime prevention and detection.²⁵

¶30 There was no testimony or evidence that the police observed any unusual conduct on the part of the Defendants which would have led the police to believe, objectively, and in light of their experience, that the Defendants were engaged in any suspicious or criminal activity, and that they may have been armed and dangerous. The People failed to establish by clear and convincing evidence that the police in this case had reasonable suspicion to stop, detain and search the Defendants while they were looking for K.R.

¶31 The Defendants also argue that the police violated 23 V.I.C. § 488 by failing to first ask the Defendants whether they were authorized to possession a firearm. However, given the results of the Court’s Fourth Amendment analysis, the Defendant’s Section 488 argument need not be addressed.

¶32 Based upon the foregoing, the Defendants’ Motion will be granted and all evidence, including the firearm and ammunition garnered as a consequence of the unconstitutional stop, seizure and arrest of the Defendants will be suppressed.

Accordingly, it is hereby

ORDERED that Defendant Arkim Clersaint’s Motion to Suppress is **GRANTED**; and it is further

ORDERED that Defendant Ojhani Inecia’s Motion to Suppress is **GRANTED**; and it is further

ORDERED that Defendant Jarius Gerard Penn’s Motion to Suppress is **GRANTED**; and it is further

ORDERED that that the People are **PROHIBITED** from introducing at trial in the above-captioned matters any evidence of the firearm and ammunition seized on October 22, 2018, following the stop and arrest of the Defendants; and it is further

²⁴ *People of Virgin Islands v. Archibald*, 50 V.I. 74, 102 (V.I. Super. Ct. 2008).

²⁵ *Terry*, 392 U.S. at 22.

ORDERED that a copy of this Memorandum Opinion and Order shall be directed to counsel of record.

DATED: 7/2/2019

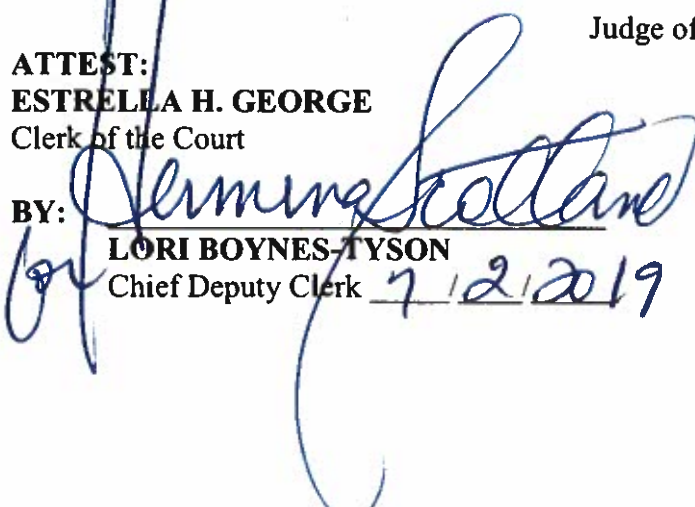


DENISE M. FRANCOIS

Judge of the Superior Court of the Virgin Islands

ATTEST:
ESTRELLA H. GEORGE
Clerk of the Court

BY:


LORI BOYNES-TYSON

Chief Deputy Clerk 7/2/2019