

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

PEOPLE OF THE VIRGIN ISLANDS,	)
	) CASE NO. ST-2016-CR-0000406
Plaintiff,	)
vs.	) V.I. Code Ann. tit. 14, §§ 2253(a);
	) 2256(a)
ERNEST D. STEVENS,	)
(D.O.B.: 01-19-79)	)
Defendant.	)
	)

MEMORANDUM OPINION AND ORDER

Before the Court is Defendant's Motion to Suppress and Memorandum in Support Thereof, which was filed on May 11, 2017. The People filed an Opposition to Defendant's Motion to Suppress on June 7, 2017. An evidentiary hearing was held on this matter on June 22, 2017. In his Motion, Defendant Ernest Stevens seeks to suppress a firearm seized by the police on December 29, 2016.¹ Stevens argues that the seizure of his firearm was not based on reasonable suspicion and thus, violates his Constitutional rights.² The People, on the other hand, oppose Stevens' Motion arguing that based on the officer's experience, the high crime neighborhood, and Stevens' furtive movements, the officer had reasonable suspicion sufficient to justify a pat-down for officer's safety.³

Based upon testimony of the arresting officer, the Court was not persuaded that the People met its burden that the search and seizure of Stevens' firearm falls within the bounds of the Fourth Amendment. Accordingly, the Court will grant Stevens' Motion.

I. BACKGROUND

Sargent Denley Williams ("Williams"), who has fifteen (15) years of experience working with the Virgin Islands Police Department ("VIPD"), testified at the suppression hearing on June 22, 2017, that he, along with a team of law enforcement officers from the Special Operations Bureau, and officers from the VIPD were "conducting an initiative, operation Make It Safe Part 2" which is "an initiative to go in high crimes areas, areas with a lot of gun violence, a lot of sales of narcotics, and conduct a saturated patrol, park, walk, and talk with the individual that resides in the area." Williams stated that if criminal activity is afoot, officers would make contact with the individual(s).

On December 29, 2016, Williams and a team in a convoy⁴ conducted the operation in an area known to him as Ras Valley, also referred to as Tutu housing community or Tutu High Rise.

¹ Mot. to Suppress 1.

² Mot. to Suppress 4.

³ Opp'n to Def.'s Motion to Suppress 3.

⁴ Williams explained that a convoy consists of "marked units, with a couple unmarked units, with law enforcement officers [used] to transport [officers] or prisoners."

Driving in a marked vehicle with Officer Kyle Gabriel ("Gabriel") at approximately 8:40 p.m., Williams approached Building 18 where they observed two males sitting in a "dimly lit stairwell" who then got up from the seated position and one proceeded to hide on the left, and another, on the right sides of the building's support columns. Williams testified that he stopped his vehicle and transmitted over police radio to the convoy that there are two males in the stairwell with whom they were going to make contact.

After making the radio transmission, the convoy stopped. Since their unit was directly in front of the stairwell, Williams, dressed in a black top, green pants, and a bullet proof vest with "Police" written across the front and back, and Gabriel, exited the vehicle and proceeded to make contact with the two males. Subsequently, Williams and Gabriel instructed the males to "come out from the dark stairwell and come to our direction."

Williams stated that Stevens, who was slouched and dressed in all black with a black hooded jacket, was making "movements as if he's adjusting something in his waistband." At that point both Williams and Gabriel instructed Stevens to stop making those movements, to show his palms, and walk towards their direction. Stevens continued to "fidget with his waistband area" while still standing in the stairwell. Williams testified that eventually Stevens complied and walked towards the officers' direction. Thereafter, Williams asked Stevens if he had any weapons or any hard objects that could injure him, to which Stevens replied "no" and that he was just arrested for the same reason.

At that point, Williams instructed Stevens that he was going to conduct a "brief pat-down for [Stevens'] safety and [Williams'] due to the area, the amount of homicides and weapons being discharged in that particular area[.]" As Williams patted Stevens down using his palms, he felt a firearm across Stevens' waist area. Williams then held the firearm in Stevens' waistband to the front right section, and asked Stevens if he possessed a license to carry a firearm in the Virgin Islands. Stevens answered "no". Subsequently, Williams removed the firearm from Stevens and read him his Miranda rights, and placed Stevens under arrest.

On cross-examination, Williams indicated that there weren't any calls for shots fired on December 29, 2016 in Ras Valley but rather, the day before. Additionally, Williams testified that he did not see any criminal activity either at the time he saw the two males seated in the dimly lit stairwell nor when the males were walking towards his direction. He stated that the two males' suspicious activity of getting up upon police appearance and hiding, coupled with Stevens making "furtive movements" with his hands in the waistband area, which is known to conceal weapons, led him to subject Stevens to a pat-down search.

Stevens, on the other hand, presents a different version of events that led to the seizure of the firearm. Stevens claims that he and his cousin, Elroy Cornelius, were talking outside around the building's archway. Thereafter, they saw police arrive and run into the archway with machine guns pointing at Stevens and Cornelius while telling them "don't move". Stevens testified that the police were trying to force them out of the archway. When they came out of the archway, they were told to go up against the rails. The officers then patted him and Cornelius down. Stevens testified that the officer felt his waist, went to the bottom of his jeans, and came back up to his

waist where he felt the firearm. After the firearm was discovered, Stevens remained silent.

II. LEGAL STANDARD

A. The Fourth Amendment: Stop & Frisk

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 1954.⁵ Generally, the Fourth Amendment protects individuals from “governmental intrusion not authorized by a warrant.”⁶ “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’.”⁷ A search or seizure without a warrant is unreasonable absent the applicability of one of a few, well-delineated exceptions.⁸ One such exception is the investigatory stop and frisk.

When an officer has “reasonable and articulable suspicion of criminal activity afoot,” the officer must stop the individual and make reasonable inquiries.⁹ 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.¹⁰

To determine whether an officer acted reasonably in such circumstances, the Court need not focus on “his inchoate and unparticularized suspicion or hunch.”¹¹ Rather, the officer must articulate “specific reasonable inferences which he is entitled to draw from the facts in light of his experience.”¹² Furthermore, reasonable suspicion does not require that the officer personally witness illegal activity, nor rule out the possibility of innocent conduct.¹³

B. Burden of Proof

The Fourth Amendment specifically protects individuals from “unreasonable searches and seizures” effectuated by the government.¹⁴ When seeking to suppress evidence obtained through an allegedly unconstitutional search or seizure, the defendant bears the burden of showing that his

⁵ 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).

⁶ *Simmonds v. People of the Virgin Islands*, 53 V.I. 549, 555-556 (V.I. 2010).

⁷ *Blyden v. People of the V.I.*, 53 V.I. 637, 647, 2010 V.I. Supreme LEXIS 25, *9 (citing *Brown v. Texas*, 443 U.S. 47, 50 (1979)).

⁸ *Browne v. People*, 56 V.I. 207, 217 (V.I. 2012) (quoting *Katz v. United States*, 389 U.S. 347, 357, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967)).

⁹ *People v. Looby*, St. Ct. Crim. No. 2016-0043, No. 2018 WL 3005933, at *4 (V.I. June 14, 2018) (unpublished) (citing *Blyden*, 53 V.I. at 648).

¹⁰ *Terry v. Ohio*, 88 S. Ct. 1868, 1879-80 (1968).

¹¹ *Looby*, 2018 WL 3005933, at *4 (quoting *Terry*, 88 S. Ct. at 1868).

¹² *Id.*

¹³ *Terry*, 88 S. Ct. at 1888; *Illinois v. Wardlow*, 528 U.S. 119, 123, 125 (2000).

¹⁴ U.S. CONST. AMEND. IV.

or her Fourth Amendment rights were violated.¹⁵ However, once the defendant shows that the evidence was obtained without a warrant, the government then bears the burden of showing that the act of the warrantless search or seizure was reasonable under the Fourth Amendment.¹⁶

C. Credibility of Witnesses

The Court must make credibility determinations when presented with conflicting witness testimonies.¹⁷ “[A]t a hearing on a motion to suppress, the credibility of the witnesses and the weight to be given the evidence, together with the inferences, deductions and conclusions to be drawn from the evidence, are all matters to be determined by the trial judge.”¹⁸ In determining credibility, the Court considers the following factors: “the witness’ demeanor and manner on the stand, his ability to accurately recollect the matters at hand, the manner in which he may be affected by the outcome, the extent to which his testimony is either supported or contradicted by other evidence and testimony in the case, and whether it withstands the ‘common sense test’.”¹⁹ Furthermore, a law enforcement officer’s testimony is not considered more or less credible.²⁰

III. ANALYSIS

Stevens has met his burden by establishing that his firearm was seized without a warrant, and thus, the burden shifts to the government to prove by a preponderance of the evidence that Stevens’ search and seizure was reasonable.²¹ To determine if Stevens’ rights were violated, the Court’s analysis depends on which version of events the Court credits. Considering the conflicting testimony, the Court must first assess the credibility of the witnesses.

A. The Court finds that Sergeant Williams’ testimony is not credible.

The Court does not credit Williams’ testimony concerning his observations that allegedly led him to search Stevens and seize his firearm. First, based on the Court’s observation of Williams’ demeanor, his testimony appeared to be by rote and almost mechanical.²² Williams’ testimony did not appear to be coached, but rather a collection of legal buzz words designed to support an investigatory stop and frisk.

Second, Williams appeared to have trouble remembering the events. In explaining their

¹⁵ See *United States v. Acosta*, 965 F.2d 1248, 1256, n.9 (3d Cir. 1992).

¹⁶ See *United States v. Johnson*, 63 F.3d 242, 245 (3d Cir. 1995); *People of the V.I. v. Lloyd*, Super. Ct. Crim. No. SX-09-CR-480, 2015 V.I. LEXIS 122, at *6 (Super. Ct. Sept. 29, 2015) (unpublished).

¹⁷ *United States v. Christian*, Crim. No. 2017-0017, 2018 WL 891401, at *4 (D.V.I. Feb. 14, 2018) (unpublished) (citing *United States v. Richardson*, 501 F. Supp. 2d 724, 734 (W.D. Pa. 2007)).

¹⁸ *Id.*

¹⁹ *Id.* (citing *United States v. Davis*, 2014 WL 1394304, at *3 (W.D. Pa. Apr. 9, 2014)).

²⁰ *Id.* at *4 (quoting *United States v. Graham*, 2014 WL 3396495, at *4 (D.N.J. July 9, 2014)).

²¹ *United States v. Murphy*, 402 F. Supp. 2d 561, 565 (W.D. Pa. 2005).

²² *United States v. Lumpkin*, 192 F.3d 280, 289 (2d Cir.1999 (“[A] witness’s demeanor on the stand, including his or her confidence, impacts the assessment of credibility.”); *Colby v. Klune*, 178 F.2d 872, 873 (2d Cir.1950) (“demeanor . . . is recognized as an important clue to witness’ credibility”).

actions, officers need to provide the Court with “specific and sufficient justification for their beliefs and activities . . . to persuade the Court that they were acting within the confines of the Constitution.”²³ In recalling the events, Williams continuously made “conclusory recitations of key ‘buzz words’.”²⁴ Williams stated that he observed Stevens making “furtive movements” around his waist area, which was “suspicious activity” that caused him to conduct a “brief pat-down for [Stevens’] safety and [Williams’] due to the area.” Williams could not remember the date or time of the events leading up to the arrest.

Third, Williams’ interest in the outcome is clearly outweighed by Stevens’. The Court recognizes that defendants in criminal cases have a greater stake in the outcome, however, “it would be manifestly unfair and highly improper for that overtly or subliminally to be the determinative factor in judging a defendant’s testimony.”²⁵ Therefore, the Court reaches its credibility based on the totality of these factors and not just the consideration that Stevens has a greater interest in the outcome of the instant Motion.²⁶

Fourth, Gabriel’s testimony contradicted both his own and that of Williams during the course of the suppression hearing.²⁷ The inability to recollect details accurately negatively impacts a witness’ credibility.²⁸ Called as a rebuttal witness by the People, Gabriel stated that he recalled that he had a Glock pistol on his person that was not pointed at the males, but rather, in a “low ready” position, which means that the Glock was in a 45-degree angle towards the ground. However, when asked by the Court if he had a machine gun, Gabriel stated that he did not recall whether he carried a machine gun or a Glock. Gabriel also testified that he had tunnel vision while focusing attention on Cornelius while Williams handled Stevens.

Moreover, Gabriel testified that after the two males got up and hid behind the columns, he could see one of the males in the hidden position “fixing his waistline as if to adjust something.” However, Williams stated that it was after being instructed by himself and Gabriel to come out of hiding and walk towards the officers, that he witnessed one of the males adjusting something in his waistband. Gabriel, on direct examination, stated that when they got out of the car, one of the males were fidgeting with his pants, at which point, he told one of the males to come out of the hallway. However, Gabriel contradicted himself on rebuttal cross-examination and stated that when police see individuals get up, adjust his waistline, and *then* hide from police, that is not normal behavior.

This Court finds that Williams’ testimony does not satisfy the “common sense test”.

²³ *People of Virgin Islands v. Archibald*, 50 V.I. 74, 99 (V.I. Super. Ct. 2008).

²⁴ See *id.* (officers need to justify that their actions fall within the confines of the Constitution rather than using statements such as “officers’ safety”, “quick and furtive movements”, or “illegal activity”).

²⁵ *Christian*, 2018 WL 891401, at *5 (quoting *Murphy*, 402 F. Supp. at 571).

²⁶ *Id.* (“All of the circumstances must be considered, and credibility determination arrived at based on reason and logic.”).

²⁷ *United States v. Jackson*, 560 F. Supp. 2d 331, 336 (D. Del. 2008) (officers’ testimonies during the suppression Hr’g not credible due to several inconsistencies).

²⁸ Compare *Murphy*, 402 F.Supp.2d at 572 (officer’s inability to recollect details of a stop rendered him less than credible) with *Christian*, 2018 WL 891401, at *5 (officer’s ability to recall the matter in detail demonstrated a clear and consistent recollection of events).

Williams testified that the Make It Safe Part 2 operation in the high crime areas includes conducting saturated patrol, park, and walk and talk with the individuals in the area. He states that when “we see any kind of criminal activity afoot”, the officers make contact with the individuals. But Williams testified he did not see any criminal activity afoot at the time he saw the two males, when the two males hid behind the columns, or at the time the two males were walking towards him and Gabriel. Yet, he still decided to make contact with the two individuals. Officers conducting an operation to patrol neighborhoods with high levels of crime and drugs cannot just subject individuals in those areas to a stop and frisk.²⁹

Williams testified that after he placed Stevens under arrested, Stevens repeated that he was just arrested for the same thing. Stevens, however, claimed that he was arrested for possession of a firearm fifteen (15) years ago.

In addition, Gabriel’s conflicting testimony does not support Williams’ testimony nor aids the common sense evaluation of the record. Initially, Gabriel testified that he did not recall which marked unit he was in nor did he recall the officer that was with him in the unit. Yet, Gabriel testified that “we got out of the car” and mentioned Williams throughout his testimony. At no point, did Gabriel mention how Williams appeared on the scene or at what point did he come to realize that it was Williams, who was the other officer searching Stevens.

Furthermore, Gabriel testified that there were other officers who got out of the vehicle. He could not recall whether the other officers were carrying machine guns or long rifles but testified that they usually carry such firearms. On the other hand, Williams did not mention the appearance of other officers on the scene, but rather, that he transmitted to the convoy that he and Gabriel would make contact with the two males since his unit was directly in front of the building, and that it was he and Gabriel who got out of the vehicle and approached Stevens and the other male.

Specifically, Gabriel’s failure to recollect which type of firearm he had during the stop and frisk and other consistencies diminish his testimony. While it is true that officers conduct countless searches during their careers, it is difficult to believe an officer with approximately ten (10) years of experience cannot recall whether he was carrying a Glock or a machine gun during a planned initiative that had already been conducted for two weeks prior to the night in question.³⁰

Thus, taken in its totality, the circumstances here as described at the suppression hearing by Williams are incompatible with a common sense evaluation of the whole record. Accordingly, the Court finds that Williams was not credible.³¹

²⁹ *Government of the Virgin Islands v. Rodriguez*, 23 V.I. 386, 390 (Terr. Ct. 1988) (“If any person walking in a high crime area, with a bulge in his shirt, can be stopped and frisked by police, the Fourth Amendment is utterly meaningless.”).

³⁰ *Davis*, 2014 WL 1394304, at *3 (An experienced detective, who has executed approximately 100 search warrants, testimony failed the common sense test after failing to include a defendant’s incriminating statement in a search warrant).

³¹ See *United States v. Boyce*, Crim. No. 2014-00029, 2015 WL 856943 at *8 (D.V.I. 2015) (“ ‘At a suppression Hr’g ... the Court determines the credibility of witnesses and may accept or reject any or all of a witness’ testimony’ ”) (quoting *Davis*, 2014 WL 1394304, at *3).

B. The Court finds that the Government failed to meet its burden to prove that the firearm seizure was within the confines of the Fourth Amendment.

Having determined that Williams' testimony is not credible, the Court must lastly consider whether the firearm should be suppressed. In deciding whether evidence should be suppressed, the evidence must be seized in violation of the defendant's Fourth Amendment rights.³² Williams' testimony not only was unpersuasive and appeared preconceived, but it also conflicted at several points with his fellow officer. It is unclear why the People called Gabriel as a rebuttal witness because Gabriel could not recall which vehicle he was in or who was in the vehicle with him. Further, Gabriel could not recall whether he carried a Glock or a machine gun. "While all of the foregoing inconsistencies may appear trivial in isolation, as a whole they do influence a determination of credibility."³³ On the other hand, Cornelius corroborated Stevens' testimony, and also Gabriel's testimony that officers usually carry machine guns made Stevens' version of events more probable.³⁴

Under these circumstances, the Court finds that the People have failed to prove by a preponderance of the evidence that there was reasonable suspicion to warrant an investigatory stop when Williams searched and seized the firearm from Stevens on December 29, 2016. Accordingly, the Court finds that the stop & frisk violated the Fourth Amendment and that the firearm seized must be suppressed.

IV. CONCLUSION

The Court finds that seizure of the firearm from Stevens was conducted in violation of the Fourth Amendment. Therefore, the Court will grant the Defendant's Motion to Suppress. Accordingly, the evidence obtained as a consequence of this improper seizure and subsequent improper search will be suppressed.

Accordingly, it is hereby

ORDERED that Defendant's Motion to Suppress and Memorandum in Support Thereof, filed on May 11, 2017, is **GRANTED**; and it is further

³² *Murphy*, 402 F.Supp.2d at 572 (W.D. Pa. 2005) (holding evidence seized pursuant to an unlawful stop must be suppressed pursuant to the exclusionary rule).

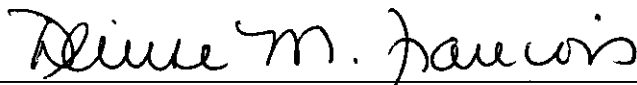
³³ *Id.* (comparing defendant's testimony that four windows were open with officer's testimony that the driver side window was down and troopers' testimony that all windows were closed.)

³⁴ Suppression Hr'g Tr. 39, 54-55. *Id.* (Government found not credible when "weighing the testimony of [an] Officer . . . whose inability to recollect the details of the stop render him less than credible; the testimony of defendant, an interested but nevertheless credible witness whose testimony was corroborated by [witness]; and the testimony of Officer . . . whose otherwise credible testimony was diminished by contradictions and inconsistencies with the testimony of numerous other witnesses.").

ORDERED that the People are **PROHIBITED** from introducing at trial any evidence of the firearm seized December 29, 2016, or Defendant's statements made in connection with said firearm; and it is further

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

DATED: July 24, 2018


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 7/25/18