

IN THE TERRITORIAL COURT OF THE VIRGIN ISLANDS

DIVISION OF ST. CROIX

GOVERNMENT OF THE VIRGIN ISLANDS)

Plaintiff)

vs.)

LUIS RODRIGUEZ)

Defendant)

CRIMINAL NO. 240/85

POSSESSION OF UNLICENSED
FIREARMS

MEMORANDUM OPINION AND ORDER

I. INTRODUCTION

This matter came before this Court on defendant's motion to suppress evidence seized at the time of his arrest. Defendant was arrested on July 15, 1985 at the El Montecarlo Bar without an arrest warrant for an alleged sale of a firearm. This sale is alleged to have occurred on February 15, 1985. At the time of the arrest, the officers seized a .32 caliber gun, which was allegedly found in plain view on the bed of the room where the defendant was arrested. According to the defendant, the warrantless arrest constitutes a violation of his Fourth Amendment rights under the United States Constitution. The Government opposes defendant's motion to suppress on the basis that the officers had probable cause to arrest the defendant and that therefore, the gun was seized incident to a lawful arrest. For the reasons herein stated, the motion to suppress will be denied.

II. FACTS

On July 15, 1985, four Narcotic Strike Force agents set out to arrest the defendant for an alleged illegal firearm sale which occurred on February 15, 1985. The agents went to defendant Rodriguez's home but did not find him there. Failing to find the defendant at home, Agent Rivera suggested that they look for Rodriguez at the El Montecarlo Bar. When the agents arrived at the bar, Agent Rivera went inside to ascertain whether Rodriguez was in the premises. Rivera was informed by the owner of the bar that Rodriguez was in one of the rooms. Rivera signalled the other agents to enter the bar. The agents went to the room indicated by the bar owner and knocked on the door. Rodriguez opened the door slightly and upon recognizing the agents, attempted to close the door, at which time the agents forced their way into the room. The agents arrested Rodriguez and seized a .32 caliber gun allegedly found on the bed in plain view.

The illegal firearm sale for which the defendant was arrested allegedly occurred on February 15, 1985 at the same bar where he was subsequently arrested. According to the Narcotic Strike Force, the gun was sold by Rodriguez to undercover Agent Rivera, identified by the code name "Shadow". Rivera is the same agent who, on the day of the arrest,

suggested that Rodriguez may be found at the bar, since based on his undercover work, he knew the defendant to frequent the bar. The undercover identity of "Shadow" surfaced sometime after February 15, 1985 and before July 15, 1985. The testimony indicates that the Strike Force had sufficient time to obtain an arrest warrant but failed to do so. When questioned as to the reason for failing to obtain the arrest warrant, the agent testified that it was a mere "oversight" of the Narcotic Strike Force.

III. DISCUSSION

In the Virgin Islands a warrantless arrest is valid when probable cause exists to believe that a felony has been committed. 5 V.I.C. §3562. Whether probable cause exists depends on whether the facts and circumstances before the arresting officers were sufficient to "warrant a prudent man in believing that the defendant had committed or was committing the offense with which he was charged." V.I. v. Rodriguez, 7 V.I. 360 (D.C.V.I. 1969), aff'd. 423 F.2d 9 (3d Cir. 1970). It is obvious that in the case before this Court the arresting officers had probable cause to arrest the defendant on February 15, 1985. According to agent Rivera, one of the arresting officers, Rodriguez sold the firearm to

him personally on February 15, 1985. The issue before this Court is whether probable cause existed at the time of the arrest on July 15, 1985, five months after the alleged illegal sale.

Defendant claims that a five month delay from the date of the alleged incident to the date of arrest is unreasonable and that absent exigent circumstances, an arrest warrant was required. According to the defendant, the arrest was illegal since a warrant was not obtained. Therefore, defendant asserts that the search of the room was also illegal and all evidence obtained from such search must be suppressed. The Government, on the other hand, argues that probable cause still existed at the time of arrest, that an arrest warrant was not required and that a five month delay was not unreasonable under the circumstances of this case.

There is no constitutional right to be arrested. Hoffa v. United States, 385 U.S. 293 (1966). An arrest need not be made as soon as probable cause exist and the government will be granted leeway in decisions as to the timing of arrests. U.S. v. Davis, 646 F.2d 1298 (8th Cir. 1981), cert. denied Robert v. U.S., 419 U.S. 854 (1974); and U.S. v. McManaman, 606 F.2d 919 (10th Cir. 1979), appeal after remand 653 F.2d 458 (1981). Courts have recognized that some prearrest delay is inevitable and therefore legally permissible due to the

requirement of effective police work. The Supreme Court has stated:

The police are not required to guess at their peril the precise moment at which they have probable cause to arrest a suspect, risking a violation of the Fourth Amendment if they act too soon and a violation of the Sixth Amendment if they wait too long. Law enforcement officers are under no constitutional duty to call a halt to a criminal investigation the moment they have the minimum evidence to establish probable cause, a quantum of evidence which may fall far short of the amount necessary to support a criminal conviction.

Hoffa v. U.S., 385 U.S. at 310. The issue of delay arrests arises mainly in cases involving the use of undercover agents. The courts have recognized that the need to maintain the secrecy of the identity of the undercover agent is sufficient justification for delaying the arrest of a defendant after probable cause has been established or an arrest warrant issued. U.S. v. Jones, 524 F.2d 834 (D.C. Cir. 1975); U.S. v. Cravero, 545 F.2d 406 (5th Cir. 1976), cert. denied Miller v. U.S., 429 1100 (1976). However, while some delay is legally permissible, courts must consider the adverse effects, if any, of the delay on the defendant. Any unreasonable, unnecessary or intentional prearrest delay may result in prejudice to the accused, warranting dismissal of the charges against him. U.S. v. Jones, 524 F.2d 834; Chapman v. U.S., 376 F.2d 705 (2d Cir. 1967), cert. denied 389 U.S. 881 (1967);

and U.S. v. Mays, 549 F.2d 670 (9th Cir. 1977). There generally are two types of prejudice attributable to pretrial arrest:

1. defendant's ability to present a defense impaired due to his own or his witnesses' lack of memory; unavailability of witnesses; or inability to establish an alibi; and

2. possibility of misidentification of the defendant where the only evidence against him is the uncorroborated testimony of an undercover agent who had only a single brief encounter with said defendant.

The burden is on the defendant to establish that the delay was prejudicial or part of a deliberate, intentional and oppressive design for delay. U.S. v. Jones, 524 F.2d 834; Chapman v. U.S., 376 F.2d 705; and U.S. v. Mays, 549 F.2d 670.

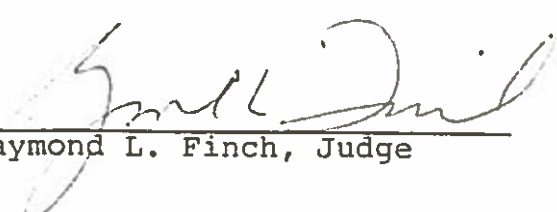
In adopting the above principles and applying them to the facts of this case, this Court must conclude that the defendant failed to claim and establish any prejudice resulting from the five month delay. The testimony indicates that Agent Rivera was working undercover at the time of the alleged illegal sale. It is uncontroverted that he was involved in a continuing investigation of the sale of narcotics and other illegal items, including firearms. Rivera's identity subsequently surfaced, although the

testimony did not indicate the precise time when it did. The testimony did not show how much time lapsed between the surfacing of Rivera's identity and the arrest of the defendant. Although it is incumbent upon the Government to act diligently to arrest the accused as soon as possible after the undercover agent surfaces, the burden is on the defendant to prove that the delay was intentionally designed to frustrate his defense or that the delay has prejudiced said defense. This burden has not been met by the defendant. No testimony was offered claiming or showing prejudice. Therefore, this Court must find that the arrest of the defendant on July 15, 1985 was valid.

Accordingly, defendant's motion to suppress the gun seized pursuant to the arrest is hereby denied.

DATED:

Nov. 6th, 1985


Raymond L. Finch, Judge