

IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS

DIVISION OF ST. CROIX

THE PEOPLE OF THE VIRGIN ISLANDS **Plaintiff**)
)
 Vs.)
)
 JOVAN K FELIX **Defendant**)

CASE NO. SX-13-CR-0000079

ACTION FOR: 14 V.I.C. 2253(A)

**NOTICE OF ENTRY OF
MEMORANDUM
OPINION AND ORDER**

TO: STX/STT MAGISTRATES
STX/STT LAW CLERKS
STX/STT JUDGES
MELISSA ORTIZ, ESQ.
MARTIAL WEBSTER, ESQ.
LAW LIBRARY
IT/ LOG BOOK/ CHIEF DEPUTY CLERK

Please take notice that on August 06, 2014 a(n) MEMORANDUM OPINION
AND ORDER dated August 05, 2014 was entered by the Clerk in the
above-entitled matter.

Dated: August 06, 2014

Estrella H. George
ACTING CLERK OF THE SUPERIOR
COURT



CHERYL CLARKE
COURT CLERK II

**IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. CROIX**

PEOPLE OF THE VIRGIN ISLANDS,

Plaintiff,

v.

JOVAN FELIX,

Defendant.

)
)
) **CASE NO. SX-13-CR-079**
)
) **CHARGES:**
)
) **UNAUTHORIZED POSSESSION OF A**
) **FIREARM; POSSESSION OF**
) **AMMUNITION; FAILURE TO REPORT**
) **FIREARMS OBTAINED OUTSIDE OR**
) **BROUGHT INTO THE VIRGIN**
) **ISLANDS; ALTERATION OF**
) **IDENTIFYING MARKS ON A FIREARM**

ORDER

THIS MATTER comes before the Court on Defendant's Motion to Suppress filed on June 11, 2013. The People of the Virgin Islands filed an opposition on April 2, 2014. The Court held a suppression hearing on April 16, 2014. For the reasons stated in the accompanying Memorandum Opinion dated August 5, 2014, it is hereby

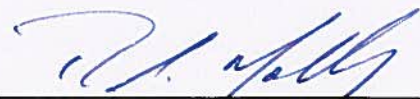
ORDERED that Defendant's Motion to Suppress the Firearm is **DENIED**; it is further

ORDERED that Defendant's Motion to Suppress Defendant's statement that he had a firearm in his possession is **DENIED**; it is further

ORDERED that Defendant's Motion to Suppress Defendant's statement that the firearm is unlicensed is **GRANTED**; it is further

ORDERED that copies of this Order shall be provided to the Office of the Attorney General and Attorney Martial Webster.

Dated: August 5, 2014



ROBERT A. MOLLOY
Judge of the Superior Court

People of the Virgin Islands v. Felix

Civil No. SX-13-CR-079

Order

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ATTEST:

ESTRELLA GEORGE

Acting Clerk of the Court

By: 

Court Clerk Supervisor

Dated: 8/6/14

On February 17, 2013, Officers Robin Richards and Miguel Charriez of the Virgin Islands Police Department responded to a 911 Emergency Call Center (ECC) transmission of a robbery in progress in the back of Sunny Isles Shopping Center near Estate Sion Farm at approximately 8:42 p.m. The victim identified herself and reported to the ECC that she had

been robbed of her handbag at gunpoint by a black male dressed in black clothing. The assailant then fled on foot towards the entrance to Estate Sion Farm. That information was transmitted by police radio to the officers who drove to Estate Sion Farm in a marked police car.

Within approximately four to six minutes of receiving the transmission, the officers entered Estate Sion Farm to search for the suspect. The officers observed a black male individual walking towards the direction of the Estate Sion Farm main entrance. According to the evidence introduced at the suppression hearing, the individual was wearing a black skullcap, black t-shirt, green jacket, blue jeans, and black shoes. (People's Ex. 3). Officer Richards testified that it was night when he first saw the individual, the lighting was poor, the individual's clothing appeared dark, and he was walking at "kind of a fast pace." Officer Richards further testified that there was no one else in the area at that time and the individual was less than a quarter of a mile from the scene of the robbery. The officers stopped the individual, who was later identified as the Defendant, Jovan Felix. The officers were about to pat Felix down when he told the officers that he had a firearm in his right pants pocket. Officer Richards then patted down Felix and discovered a firearm in his right pants pocket. The officers handcuffed Felix and asked if he owned or possessed a firearms license in the Territory of the U.S. Virgin Islands. Felix said no. Thereafter, Felix was arrested for the unauthorized possession of a firearm and officers advised him of his *Miranda* rights. The officers later confirmed with Detective Karen Stout of the firearms division that Felix was not licensed to carry a firearm in the U.S. Virgin Islands.

On March 5, 2013, the People filed an Information charging Felix with the following

criminal offenses: (1) unauthorized possession of a firearm in violation of 14 V.I.C. § 2253(a); (2) unauthorized possession of ammunition in violation of 14 V.I.C. § 2256(a); (3) failure to report a firearm in violation of 23 V.I.C. § 470(a); and (4) alteration of identifying marks on a firearm in violation of § 23 V.I.C. § 481(a).

On June 13, 2013, Defendant filed a motion requesting the Court suppress the firearm seized from him as a result of the stop and search as well as statements made during the search. The People filed a response on April 2, 2014. The Court held a suppression hearing on April 16, 2014. Officer Robin Richards was the only individual who testified.

II. LEGAL STANDARD

The Fourth Amendment to the United States Constitution prohibits unreasonable searches and seizures. U.S. CONST. amend. IV. “Generally, for a seizure to be reasonable under the Fourth Amendment, it must be effectuated with a warrant based on probable cause.” *United States v. Robertson*, 305 F.3d 164, 167 (3d Cir. 2002) (citing *Katz v. United States*, 389 U.S. 347, 356-57)). Warrantless searches, however, “are *per se* unreasonable under the Fourth amendment subject to a few specifically established and well delineated exceptions.” *Mincy 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).

“As a general rule, the burden of proof is on the defendant who seeks to suppress evidence.” *United States v. Johnson*, 63 F.3d 242, 245 (3d Cir. 1995). That burden, however, shifts to the government to show that the search or seizure was reasonable once the defendant has established a basis for his motion, i.e. the search or seizure was conducted without a warrant. *Id.* It is undisputed that the police officers conducted a search and seizure

of the Defendant. Accordingly, the People bear the burden of proof to demonstrate that the actions of the police officers were reasonable under the Fourth Amendment.

III. DISCUSSION

Felix contends that the search and seizure was unlawful. Felix maintains that the stop and pat-down search were not supported by reasonable suspicion “that criminal activity [was] afoot.” *Terry v. Ohio*, 392 U.S. 1, 30 (1968). Felix additionally argues that the police officers articulated no reason establishing probable cause to search his person and seize the firearm. In support, Felix cites the Third Circuit Court of Appeal’s holding in *United States v. Ubiles*, 224 F.3d 213 (3d Cir. 2000), providing that it is not unlawful to possess a firearm in the U.S. Virgin Islands—even in public. *Id.* at 217. According to Felix, the police officers had no reason to suspect that he possessed a gun unlawfully, committed a crime, or posed a threat to anyone. Since the People are unable to show that the police had neither reasonable suspicion to stop and conduct a pat down search, nor probable cause to search and seize the firearm, Felix contends that the evidence seized and statements he made as a result of the investigation should be suppressed.

The People contend that the firearm seized should not be suppressed for the following reasons: (1) the law enforcement officers had reasonable suspicion to conduct a stop and pat down of Felix; (2) pursuant to 23 V.I.C. § 488, the police officers possessed the authority to conduct a limited search of Felix, even in the absence of reasonable suspicion; and (3) the police officers possessed probable cause to search Felix and seize the firearm. According to the People, the firearm and Felix’s statements were not derived from an illegal

stop or search and should not be suppressed. The resolution of these issues are discussed below.

A. Officer Richards had Reasonable Suspicion to Stop Felix.

Felix contends that the police officers stopped him without reasonable suspicion that “criminal activity was afoot.” The People contend that the police officers’ reasonable suspicion in this case was based primarily on the information gathered by the officers from the 911 ECC transmission. Thus, the People must demonstrate that the investigative stop of Felix fits under one of the exceptions to the warrant requirement.

One such exception is an investigatory stop done in accordance with *Terry v. Ohio*, 392 U.S. 1 (1968). Under *Terry*, law enforcement officers may conduct an investigatory stop when justified by a reasonable suspicion that an individual is engaged in criminal activity. *Terry*, 392 U.S. at 21, 28-31. Reasonable suspicion exists when there are “specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant [the] intrusion.” *Id.* at 21. An “officer . . . must be able to articulate something more than an ‘inchoate and unparticularized suspicion or hunch.’” *United States v. Sokolow*, 490 U.S. 1, 7 (1989) (quoting *Terry*, 392 U.S. at 27). The Supreme Court of the United States cautions that the concept of reasonable suspicion is not “readily, or even usefully, reduced to a neat set of legal rules.” *Sokolow*, 490 U.S. at 7. Consequently, “[c]alculating whether an officer has reasonable suspicion to warrant a stop and search is often an imprecise judgment.” *Robertson*, 305 F.3d at 168. Accordingly, “[c]ourts give considerable deference to police officer’s determinations of reasonable suspicion. . .” *United States v. Mosley*, 454 F.3d 249, 252 (3d Cir. 2006). Thus, “[i]n determining whether there was a basis for reasonable

suspicion, a court must consider the totality of the circumstances, in light of the officer's experience." *United States v. Givan*, 320 F.3d 452, 458 (3d Cir. 2003). Evidence obtained as a result of a "Terry stop" that does not meet this exception must be suppressed as "fruit of the poisonous tree." *United States v. Brown*, 448 F.3d 239, 244 (3d Cir. 2006) (citing *Wong Sun v. United States*, 371 U.S. 471, 487-88 (1963)).

With regards to a 911 transmission forming the basis of reasonable suspicion for a Terry stop, the radio dispatcher's knowledge is imputed to the responding officer. *United States v. Torres*, 534 F.3d 207, 210 (3d Cir. 2008). In accessing the reliability of a witness-informant's tip to a 911 dispatcher, the Supreme Court's reasoning in *Adams v. Williams*, 407 U.S. 143 (1972), is instructive. In *Adams*, the Supreme Court addressed whether reasonable suspicion to justify a Terry "stop and frisk" was restricted to the arresting officer's personal observation. The Court concluded that information provided to officers from non-law enforcement individuals could also be sufficient to justify a "stop and frisk" search under Terry. Where the informant's tip is reliable, it can itself be the basis for reasonable suspicion. The Court explained:

Informants' tips, like all other clues and evidence coming to a policeman on the scene, may vary greatly in their value and reliability. One simple rule will not cover every situation. Some tips, completely lacking in indicia of reliability, would either warrant no police response or require further investigation before a forcible stop of a suspect would be authorized. *But in some situations—for example, when the victim of a street crime seeks immediate police aid and gives a description of his assailant, or when a credible informant warns of a specific impending crime—the subtleties of the hearsay rule should not thwart an appropriate police response.*

Id. at 147. (emphasis added).

Similar to the reasoning in *Adams*, the Third Circuit Court of Appeals in *United States v. Johnson*, 592 F.3d 442, 450 (3d Cir. 2010), found that a 911 call containing reliable information provided reasonable suspicion for officers to conduct a vehicle stop. In *Johnson*, an innocent bystander called 911 to report an ongoing altercation that involved gunfire and armed individuals fleeing the scene in a taxicab. *Id.* at 449. In determining whether officers had reasonable suspicion to conduct a traffic stop based on the informant's tip, the Third Circuit concluded that the informant possessed enhanced credibility because she freely identified herself, gave detailed information based on her eyewitness observations, and her credibility was bolstered by the officers' independent corroboration of the information provided by the tip. *Id.* at 449-50.

In *United States v. Terry-Crespo*, 356 F.3d 1170 (9th Cir. 2004), the Ninth Circuit Court of Appeals similarly applied the reasoning in *Adams* to support an officer's *Terry* stop of a suspect based on an emergency 911 call in which the caller claimed to have been threatened with a handgun minutes earlier. The Ninth Circuit held that the call relayed first-hand information from a victim, concerned a contemporaneous emergency event, and the tip was entitled to greater reliability because the call was not anonymous. *Id.* at 1174-77. Therefore, the court found there was reasonable suspicion to stop the Defendant. *Id.*

In this matter, the victim reported to the 911 ECC that she had just been robbed. She also identified herself to the 911 dispatcher and then reported that a black male dressed in black clothing grabbed a black handbag from her at gunpoint before fleeing on foot towards the Estate Sion Farm entrance. That information was immediately transmitted to the officers over the radio. Officer Richards testified that when the officers arrived to the scene, they saw

a black male in dark clothing, walking at a “fast pace” near the entrance to Estate Sion Farm. The officers arrived just minutes after receiving the radio transmission and no one else was walking in the vicinity at that time. The officers then stopped the individual. Based on Officer Richards’ testimony that Felix was a black male, wearing dark clothing, walking at a “fast pace,” near the location of the robbery, and Felix was the only individual in the area, the Court finds that the officers possessed reasonable suspicion to conduct a *Terry* stop of Felix. See *United States v. Harple*, 202 F.3d 194, 196-97 (3d Cir. 1999) (holding that when other factors, such as the suspect’s geographic proximity to the crime scene, are present, the fact that a suspect matches a witness description may give rise to reasonable suspicion). Thus, the officers’ investigatory stop of Felix was lawful under the Fourth Amendment.¹

B. Officer Richards had Reasonable Suspicion to Frisk Felix.

Felix argues that the officers did not have reasonable suspicion to conduct a pat-down search of his person, or “frisk” him. Felix cites to the ruling in *United States v. Ubiles*, 224 F.3d 213 (3d Cir. 2000), that mere possession of a firearm alone does not give rise to reasonable suspicion that criminal activity has occurred. Therefore, Felix contends that he should not

¹During closing arguments at the suppression hearing, Defendant argued, in a cursory fashion, that the officers did not have reasonable suspicion because the stop was pretextual. Defendant pointed to Officer Richards’ testimony wherein he stated that he would have stopped “any black individual,” and that Felix was the first person he observed. The Court notes that where a stop is made on a pretextual basis, it may still be held valid where there is objectively justifiable behavior under the Fourth Amendment. *Whren v. U.S.*, 517 U.S. 806, 812-13 (1996) (allegedly pretextual stop valid because probable cause objectively existed and subjective motivations of police are irrelevant). It is well settled that the Constitution prohibits selective enforcement of the law based on considerations such as race. *Id.* at 813. Notwithstanding the fact that Officer Richards stated he would have stopped “any black individual,” the Court finds that Officer Richards articulated an objectively justifiable basis, establishing reasonable suspicion, to conduct a lawful investigatory stop of Felix pursuant to the Fourth Amendment. See *U.S. v. Toney*, 124 Fed. Appx. 713, 715 (3d Cir. 2005) (opining that an alleged pretextual stop was valid where officers had articulable, reasonable suspicion to stop defendant).

have been searched because officers had no indication that he possessed a gun unlawfully, committed a crime, or posed a threat to anyone.

Although the People assert that the officers had reasonable suspicion to conduct a *Terry* frisk, they primarily contend that 23 V.I.C. § 488 permits U.S. Virgin Islands police officers to approach and conduct a limited search of a person who they reasonably believe is carrying an unlicensed firearm and poses a danger to the officer or others. The People argue that *Ubiles* was wrongly decided because the Third Circuit did not take into account 23 V.I.C. § 488. The People submit that the language of section 488(b) creates a presumption that the mere carrying of a firearm is illegal. Therefore, the People argue that the pat-down search of Defendant was lawful. The Court will address the parties' arguments in turn.

1. *The Facts in Ubiles are Distinguishable from the Facts of this Case.*

In *Ubiles*, a concerned citizen informed a law enforcement officer that a man standing on the sidewalk at a crowded event possessed a firearm. *Ubiles*, 224 F.3d at 215. The citizen did not indicate to the officer that the defendant possessed the gun unlawfully, that he was committing or about to commit a crime, or that he posed a threat to the officers or anyone in the crowd. *Id.* at 214. When the officer approached the defendant, he neither observed any unusual or suspicious behavior, nor was he able to tell whether the defendant was carrying a weapon. *Id.* at 215. Nevertheless, the officer conducted a pat-down search and found a machete and loaded gun in defendant's possession. *Id.* The District Court denied the defendant's motion to suppress the firearm and the defendant was found guilty of possessing an unregistered firearm at trial. *Id.* at 216. In reversing the District Court's decision and finding that the *Terry* stop of the defendant was not justified, the Third Circuit Court of

Appeals held that there is no reasonable suspicion to stop a suspect in the absence of evidence that the defendant illegally possessed a firearm or was otherwise engaging in criminal activity. *Ubiles*, 224 F.3d at 217-18. Thus, the firearm should have been suppressed as the fruit of an unlawful seizure. *Id.* at 220.

The present case is distinguishable from *Ubiles* because in that case, the police had no reason to suspect that criminal activity was afoot when they stopped the defendant. The sole justification for the police stop was an anonymous tip regarding a man at a crowded street festival who possessed a firearm. *Id.* at 214. However, the officers here had reasonable suspicion to stop Felix based on several factors including Felix matching the description given to the 911 ECC transmission, his proximity to the crime scene, and the speed at which he was walking.

In order to be valid under *Terry*, a pat-down search must be based on a reasonable belief or suspicion that the person is armed and presently dangerous. *Ybarra v. Illinois*, 444 U.S. 85, 93 (1979). Here, the victim reported to the 911 ECC that she was robbed at gunpoint. Consequently, the officers had a reasonable belief to conclude that the suspect would still likely be armed and dangerous. *United States v. Roane*, 356 Fed. Appx. 564, 566 (3d Cir. 2009) (finding officer's protective frisk was reasonable where a suspect matched the description given by a robbery victim and the very nature of the crime suggests that a weapon was involved); *See also United States v. Ayala*, 169 Fed. Appx. 717, 719-20 (3d Cir. 2006) (holding informant's tip that a Hispanic man, wearing an orange shirt and dark jeans, had threatened to shoot him moments earlier and only three blocks from the officers' location, provided reasonable suspicion to stop suspect at nearby corner who matched the

description and conduct a protective frisk). After Felix was stopped and Officer Richards was about to conduct a pat-down search, Felix immediately notified the officers he had a firearm in his front right pocket. Based on Felix's proximity to the scene of the robbery, his matching description to the 911 ECC transmission, the officers' knowledge that the victim was robbed at gunpoint, and Felix's admission that he had a firearm in his possession, the Court finds that the officers had a reasonable suspicion that Felix was armed and dangerous. Therefore, the officers conducted a lawful pat-down of Felix.

2. Title 23, Section 488 is not Applicable to this Case.

The People contend that *Ubiles* was wrongly decided because it failed to consider 23 V.I.C. § 488, which allows an officer to stop, question, and, if necessary, search a person if the officer has a reasonable belief that the person is in illegal possession of a firearm. Subsections (a) and (b) of the statute read as follows:

(a) Any law enforcement officer who, in the light of his observations, information and experience, has a reasonable belief that (i) a person may be wearing, carrying, or transporting a firearm in violation of section 454² of this title, (ii) by virtue of his possession of a firearm, such person is or may be presently dangerous to the officer or to others, (iii) it is impracticable, 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 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 in violation of section 454 of this title; and*

² Title 23, Section 454 identifies the categories of individuals who may lawfully possess firearms.

(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. The police officer in acting under this section shall do so with due regard to all circumstances of the occasion, including but not limited to the age, appearance, physical condition, manner and sex of the person approached.

(b) In the event that the officer discovers the person to be wearing, carrying, or transporting a firearm, he may demand that the person produce evidence that he is entitled to so wear, carry, or transport the firearm pursuant to section 454 of this title. If the person is unable to produce such evidence, the officer may then seize the firearm and arrest the person.

23 V.I.C. § 488(a)-(b). (emphasis and footnote added).

While the People assert that subsection (b) of the statute creates a presumption that the mere carrying of a firearm is illegal, the Court need not consider this argument because the People have failed to demonstrate that the officers complied with the procedural requirements of section 488. There is no indication from the testimony presented that Officer Richards had knowledge that Felix was in illegal possession of a firearm in violation of 23 V.I.C. § 454 at any time prior to stopping and searching him. Therefore, the People have failed to demonstrate that the officers have complied with the first criteria of section 488(a).

The officers' failure, however, to comply with section 488(a) does not render the search invalid. Section 488(c) specifically provides that "[n]othing in this section shall be construed to limit the right of any police officer to make any other type of search, seizure, and arrest which may be permitted by law." Based on the matching witness description of Felix, Felix's proximity to the crime scene, the speed at which Felix was walking, and the voluntary admission by Felix that he had a firearm in his right front pocket, the Court finds that Officer Richards possessed a reasonable, articulable suspicion that Felix was armed and

dangerous. Thus, the Court finds 23 V.I.C. § 488 inapplicable to this case and Officer Richards' pat-down of Felix constituted a valid *Terry* frisk.

C. Officers had Probable Cause to Arrest Felix and Seize the Firearm.

Felix contends that the firearm should not have been seized because it is the product of an illegal stop and pat-down search. Felix further maintains that the officers lacked probable cause to search him and seize the firearm. The People argue that the officers had probable cause to search, seize the firearm, and arrest Felix. As previously noted, the Court finds that the officers conducted a lawful stop and pat-down search of Felix. Therefore, the issue before the Court is whether the officers possessed probable cause to search Felix and seize the firearm.

Probable cause to arrest exists when the facts and circumstances within the arresting officer's knowledge are sufficient in themselves to warrant a reasonable person to believe that an offense has been or is being committed by the person to be arrested. *United States v. Cruz*, 910 F.2d 1072, 1076 (3d Cir. 1990) (citing *Dunaway v. New York*, 442 U.S. 200, 208, (1979)). Officers may search and seize objects on an arrestee's person if made contemporaneous to a lawful arrest. *Chimel v. California*, 395 U.S. 752, 763 (1969) (opining that "it is entirely reasonable for the arresting officer to search for and seize any evidence on the arrestee's person in order to prevent its concealment or destruction."); *See also United States v. Robinson*, 414 U.S. 218, 235 (1973) ("A custodial arrest of a suspect based on probable cause is a reasonable intrusion under the Fourth Amendment; that intrusion being lawful, a search incident to the arrest requires no additional justification.").

Here, Felix was handcuffed after the officers patted him down and confirmed he possessed a firearm. Felix contends that he was under arrest when officers placed handcuffs on him, while the People assert that Felix was handcuffed for the safety of the officers and not under arrest until Felix confirmed he was in possession of the firearm unlawfully. In order to determine whether an arrest occurred when Felix was handcuffed, the Court finds it necessary to examine the standard espoused in *Baker v. Monroe Township*, 50 F.3d 1186 (3d. Cir 1995). In that case, the Third Circuit Court of Appeals stated that “[t]here is no *per se* rule that pointing guns at people, or handcuffing them constitutes arrest . . . But the use of guns and handcuffs must be justified by the circumstances . . . we must look at the intrusiveness of all aspects of the incident in the aggregate.” *Id.* at 1193.

Applying the standard in *Baker*, the Third Circuit Court of Appeals in *Virgin Islands v. Blyden*, 437 Fed.Appx. 127 (3d. Cir 2011), held that when officers drew their guns and handcuffed the defendant, it did not amount to an arrest under the Fourth Amendment. *Id.* at 128-29. In *Blyden*, officers received a radio message regarding a shooting suspect’s description and the direction from which he was traveling, only minutes after the shooting. *Id.* at 128. The officers stopped the defendant on the basis of his matching description within five minutes of receiving the radio message. *Id.* Pursuant to the reasoning in *Baker*, the Third Circuit found that the officers were acting appropriately to protect themselves when they stopped the defendant with guns drawn and immediately handcuffed him as they reasonably believed he was fleeing the shooting and likely armed. *Id.* at 129.

Similar to the facts in *Blyden*, the officers here stopped Felix after receiving a 911 ECC transmission regarding a robbery suspect. The officers stopped Felix based on his matching

description, proximity to the scene of the robbery, and the officers' personal observations. The officers then patted down Felix, confirmed that he possessed a firearm, and handcuffed him. The Court finds that the officers acted appropriately for their own safety, as they had reason to believe that Felix was fleeing the robbery and likely armed. *See U.S. v. Hensley*, 469 U.S. 221, 235 (1985) (stating [p]olice officers are "authorized to take such steps as [are] reasonably necessary to protect their personal safety and to maintain the status quo during the course of the stop."). Thus, Felix was not under arrest when the officers handcuffed him. The officers then asked Felix whether he was in lawful possession of the firearm. Felix said no. Upon Felix's admission of unlawful possession of the firearm, the Court finds that the officers possessed probable cause to arrest Felix and incidentally search his pants pocket to seize the firearm.

D. Statements Made by Felix

In addition to moving to suppress the firearm, Felix also moves to suppress his statements to the officers on the grounds that they are the fruit of an illegal stop and search and in violation of his Fifth Amendment rights. As noted above, the Court has determined that the stop of Felix and seizure of the firearm were not illegal. Therefore, the issue before the Court is whether Felix's Fifth Amendment rights were violated.

The Fifth Amendment of the U.S. Constitution provides in relevant part that "[n]o person . . . shall be compelled in any criminal case to be a witness against [himself]." U.S. CONST. amend. V.³ The landmark Supreme Court case, *Miranda v. Arizona*, 384 U.S. 436

³The Fifth Amendment is made applicable to the Virgin Islands by the Revised Organic Act of 1954, as amended, § 3, 48 U.S.C. §§ 1541-1645 (1994), reprinted in V.I. CODE ANN., Historical Documents, Organic Acts, and U.S. Constitution at 73-177 (1995 & Supp. 1997) (preceding V.I. CODE ANN. tit. 1).

(1966), established procedural safeguards for the manner in which an accused person is questioned while in custody. *Miranda* warnings require that a suspect be informed of his right against self-incrimination before being subject to any questioning. *Id.* at 444. Law enforcement officials must administer *Miranda* warnings where a person is subject to a custodial interrogation. *Id.* Custodial Interrogation refers to "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *Id.*

For purposes of *Miranda*, a person is interrogated where any question or statement or action by the police is likely to elicit an incriminating response. *Rhode Island v. Innis*, 446 U.S. 291, 301 (1980). In determining whether a suspect is in custody at the time of interrogation, the Supreme Court has instructed:

Two discrete inquiries are essential to the determination of whether a suspect was in custody at the time of an interrogation: first, what were the circumstances surrounding the interrogation, and second, given those circumstances, would a reasonable person have felt he or she was not at liberty to terminate interrogation and leave. Once the scene is set and the players' lines and actions are reconstructed, the court must apply an objective test to resolve the ultimate inquiry: was there a formal arrest or restraint on freedom of movement of the degree associated with formal arrest.

Thompson v. Keohane, 516 U.S. 99, 112 (1995) (internal quotation marks and footnote omitted). Relevant factors regarding the circumstances of the interrogation include the location of the questioning, its duration, statements made during the interview, the presence or absence of physical restraints during the questioning, and the release of the interviewee at the end of the questioning. *Howes v. Fields*, 132 S.Ct. 1181, 1189 (2012).

1. Felix's Statement that he had a Firearm in his Possession was Made Voluntarily.

The Court now turns to the issue of whether Felix was subjected to custodial interrogation when he notified the officers that there was a firearm in his pants pocket. As noted above, *Miranda* warnings are required only where a suspect is taken in custody and subjected to interrogation. *Rhode Island v. Innis*, 446 U.S. at 300. However, "[a]ny statement given freely and voluntarily without any compelling influences is, of course, admissible in evidence." *Id.* at 299-300 (quoting *Miranda*, 384 U.S. at 478). Here, the officers initially stopped Felix based on a reasonable suspicion that he robbed an individual. Officer Richards was about to pat down Felix when Felix immediately notified Officer Richards that he had a firearm in his right pants pocket. Felix was not physically restrained at the time, was not questioned, and there does not appear to have been any action by police likely to elicit an incriminating response. Therefore, the Court finds that Felix's initial statement was made voluntarily and its admissibility is not barred by the Fifth Amendment.

2. Felix's Statement that the Firearm is Unlicensed was a Product of Custodial Interrogation.

The next issue is whether Felix was subjected to custodial interrogation when asked by Officer Richards if he had a license to possess a firearm in the U.S. Virgin Islands. Felix maintains that he was under arrest when the officers placed handcuffs on him. However, the People maintain that Felix was not arrested until he confirmed he did not have a license for the firearm. Felix was then advised of his *Miranda* rights.

A defendant under arrest is clearly in custody. *Orozco v. Texas*, 394 U.S. 324, 329 (1969) ("Once an arrest occurs, the application of *Miranda* is automatic."). Although

handcuffing a suspect may not constitute an arrest, it may still create a level of coercion equivalent to formal custody for *Miranda* purposes. *New York v. Quarles*, 467 U.S. 649, 655 (1984) (stating that a suspect who was surrounded by at least four police officers and handcuffed when questioned was in police custody at time of questioning for *Miranda* purposes, even though he was not yet arrested). As previously discussed, Felix was not formally placed under arrest until immediately after his statement to the officers. Therefore, the Court must consider the circumstances surrounding the interrogation to determine whether Felix was in custody at the time of questioning.

The facts show that at the time of questioning, Felix was handcuffed, alone with two police officers at night, and there was no one else in the area. It appears unlikely that a reasonable person in Felix's position would have felt free to terminate the interrogation and leave. The questioning was an interrogation because Officer Richards's inquiry was an invitation to "relate a factual assertion or disclose information," specifically, an admission that Felix was in violation of 14 V.I.C. § 2253(a). *Doe v. United States*, 487 U.S. 201, 210 (1988). Therefore, Felix was entitled to the protection of the Fifth Amendment, including the right to refuse to answer. *Id.* at 210-11. Thus, the Court finds that Felix was in custody at the time he was questioned by the officers regarding whether he had a license for the firearm. Given the fact that the Felix was not given the required *Miranda* warnings prior to interrogation, his response must therefore be suppressed. *Miranda v. Arizona*, 348 U.S. at 476.⁴

⁴ The Court notes that suppression of Felix's statement does not necessitate the suppression of the firearm derived from Felix's un-Mirandized statement. *United States v. Patane*, 542 U.S. 630, 639 (2004) (holding that when a suspect is not given his *Miranda* warnings, his statements are not allowed to be admitted, but physical

IV. CONCLUSION

After a review of the record and the totality of the circumstances surrounding this matter, the Court finds that the People have proven the existence of a recognized exception to the warrant requirement. At the April 16, 2014 suppression hearing, Officer Richards provided specific, articulable facts leading to a reasonable suspicion that Felix was involved in criminal activity at the time he was stopped by the officers. When officers lawfully conducted a pat-down of Felix, they confirmed the presence of a firearm to which Felix told them was unlicensed. That information gave the officers probable cause to arrest Felix and seize the firearm. The Court additionally finds that Felix's statement that he had a firearm in his possession was made voluntarily. However, Felix's statement to police regarding whether his firearm was licensed was the product of custodial interrogation without *Miranda* warnings. Accordingly, the Defendant's motion to suppress the firearm seized will be denied, and suppression of Felix's statement that he did not have a license to possess the firearm will be granted. An appropriate Order follows.

DATED: August 5, 2014



ROBERT A. MOLLOY
Judge of the Superior Court

evidence that is found as a result of the statements may be admitted); *See also United States v. Moore*, 466 F.2d 547, 548 (3d Cir. 1972) (stating "[i]t has been well established that the Fifth Amendment protection against self-incrimination applies wholly to testimonial evidence as distinguished from physical evidence").

ATTEST:

ESTRELLA GEORGE
Acting Clerk of the Court

By: 

Court Clerk Supervisor

Dated: 8/6/14