

NOT FOR PUBLICATION

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

PEOPLE OF THE VIRGIN ISLANDS,

PLAINTIFF,

v.

CURTIS PHIPPS,

DEFENDANTS.

SX-15-CR-330

CHARGES:

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**POSSESSION OR SALE OF
AMMUNITION**

**UNAUTHORIZED POSSESSION OF
A FIREARM**

FAILURE TO REPORT FIREARMS

MEMORANDUM OPINION

THIS MATTER came before the Court on Defendant Curtis Phipps's Motion to Suppress, filed on February 4, 2016. The People of the Virgin Islands (hereinafter "the People") filed their response to Phipps's Motion on February 26, 2016. For the reasons set forth below, the Court shall grant the Defendant's Motion.

BACKGROUND

On or about October 28, 2015 at 1:58 pm, VI police officers received a report of two suspicious looking male individuals looking into the yards of homes in the Concordia West area near the Queen Luis Home. Police Sergeant Gumbs responded to the report and proceeded to the area where he saw two male individuals pushing a wheelbarrow filled containing gardening tools. Gumbs requested identification from the two males and inquired what they were doing in the area. Defendant explained that they were in the process of creating a neighborhood gardening area. Sergeant Gumbs allowed the males to leave however Gumbs alleges that he observed an imprint

of a firearm in the backpack of the Defendant. Gumbs felt the exterior of the backpack and determined it to be a firearm. Sergeant Gumbs then searched the backpack and found the gun. Defendant was taken into Custody and transported to Wilbur H. Frances Command. Defendant did not provide a firearm license and upon checking with the Firearms Bureau, it was determined Defendant did not have a permit to possess a firearm.

DISCUSSION

In his Motion, he argues that the police lacked probable cause to arrest him, to search him, and to seize his firearm. This Court will address each of the issues raised in Defendant's Motion.

Defendant raises several issues, including whether the police had probable cause to arrest him without a warrant; and the constitutionality of the police officers' warrantless search of his person and seizure of his property.

The burden of proof is on the defendant who moves to suppress evidence. *People of the V.I. v. Samuel*, SX-09-CR-556, 2010 V.I. LEXIS 80 (Super. Ct. Nov. 12, 2010) (unpublished). Defendant has sustained his burden by establishing that he was detained and searched without a warrant. The People must now prove "that each individual act constituting a search or seizure under the Fourth Amendment was reasonable." *Id.*

A. Legality of the Warrantless Arrest

Defendant argues that he was placed under arrest and transported to the police station without probable cause to initiate an arrest. The People argue that Defendant was detained until they could discover that the firearm was unlicensed. The Court finds that based on the reasonable person standard, when looking into the totality of the circumstances, that the arrest was effectuated upon transportation of the defendant to the Police Administration and Operation Building. "The

question is whether the circumstances amount to a show of official authority such that a reasonable person would have believed that he was not free to leave.” *United States v. Mendenhall*, 446 U.S. 544 (1986). *Hayes v. Florida* explains that “the line is crossed when the police, without probable cause or a warrant, forcibly remove a person from his home or other place in which he is entitled to be and transport him to the police station, where he is detained, although briefly, for investigative purposes.” 470 U.S. 811 (1985). Here, Defendant was removed from the Concordia West area, a public area, and brought to the police station. A reasonable person would not believe that he was free to leave if after an Officer has told you are free to leave, grabs an object of his person, searches it and transports you to a police station. This court finds that these facts do amount to a “show of official authority”.

“We adhere to the view that such seizures, at least where not under judicial supervision, are sufficiently like arrests to invoke the traditional rule that arrests may constitutionally be made only on probable cause.” *Id.* Based on the facts discussed above, this seizure is sufficiently enough like an arrest to invoke the traditional arrest rule and require probable cause.

Under Title 5, Section 3562(3) of the Virgin Islands Code, a police officer may make a warrantless arrest of an individual “when a felony has in fact been committed and he has reasonable cause for believing the person to have committed it.” Reasonable cause or probable cause “exists when at the moment of arrest police have knowledge of facts and circumstances grounded in reasonably trustworthy information sufficient to warrant a belief by a prudent person that an offense has been or is being committed by the person to be arrested.” *Phipps v. People*, 54 V.I. 543, 559 (2011) (Swan, J., concurring).

Searches and seizures conducted without a warrant are presumptively unreasonable. *Samuel*, 2010 V.I. LEXIS 80 at *3. A warrantless search and/or seizure must be accompanied by probable cause to meet the reasonableness standard of the Fourth Amendment. *People v. Archibald*, 50 V.I. 74, 84 (V.I. Super. Ct. 2008). Under certain circumstances, this same rule applies to warrantless searches and/or seizures accompanied by reasonable suspicion. *See People v. Matthew*, 55 V.I. 380, 388 (V.I. Super. Ct. 2011).

Reasonable suspicion, a less stringent standard than probable cause, is all that is required for officers to make a brief, investigatory stop of an individual they suspect is involved in criminal activity. *Illinois v. Wardlow*, 528 U.S. 119, 123 (2000) (citing *Terry v. Ohio*, 392 U.S. 1, 30 (1968)). Although reasonable suspicion requires less than a preponderance of the evidence, “[t]he officer must be able to articulate more than an ‘inchoate and unparticularized suspicion or ‘hunch’” of criminal activity.” *Id.* at 123-24. “[N]ervous, evasive behavior [i.e., fleeing from the police] is a pertinent factor in determining reasonable suspicion.” *Id.* at 124. “What is reasonable depends upon all of the circumstances surrounding the search or seizure and the nature of the search or seizure itself.” *United States v. Ubiles*, 224 F.3d 213, 216 (2000)

Defendant asserts that his search and seizure was unlawful because police lacked reasonable suspicion to believe that a crime was being committed. According to the Defendant, at the time of his arrest Sergeant Gumbs had neither observed Defendant commit a crime and upon inquiry of why Defendant was in the area, Sergeant Gumbs told him he was free to go, thus he could not have suspected criminal activity. Sergeant Gumbs only saw Defendants walking with a wheelbarrow which was not sufficient to incite probable cause for arrest or a reasonable suspicion. Defendant argues that the police should have inquired whether the firearm was licensed or not.

The People, on the other hand, argue that officers detained him and brought him to the police station to determine whether he had a license. According to the Probable Cause Fact Sheet, Sergeant Gumbs viewed an imprint of a handgun as Defendant was walking away. At that time, Sergeant Gumbs grabbed the bag, felt the outside of the backpack and then opened the bag for search. Defendant was detained and then taken to the Police Administration and Operation Building. In *Ubiles*, the Third Circuit specifically noted that it is not necessarily a crime to possess a firearm in the Virgin Islands. *Id.* at 217. According to *Ubiles*, “it is not a crime to possess a firearm in the Virgin Islands,--even when standing in a crowd.” *Id.* at 214. It is unlawful however, to possess an unlicensed firearm therefore officers should inquire whether the person is licensed prior to arrest.

In *Ubiles*, officers had no knowledge of whether *Ubiles* was licensed to carry a firearm prior to the stopping, the searching, and seizure. The court held that the police conduct was in violation of *Ubiles*’ Fourth Amendment right to be free of unreasonable searches and seizures. *Id.* at 218. This Court finds that this case is similar to *Ubiles*. There were not enough facts to give the officers reasonable suspicion to believe that criminal activity was afoot, nor did the officers prior to Defendant’s arrest, make any inquiry to determine whether the firearm was illegally possessed. In order for this arrest to have been valid, officers should have attempted to determine, prior to the arrest, whether Defendant was licensed to carry a firearm.

Sergeant Gumbs saw an imprint of a handgun in the backpack of a man walking with a wheelbarrow full of gardening tools who just had told him that he was working on creating a neighborhood garden area. Additionally, the statement of the intent of the men to create a garden area would reasonably justify why two men walking with a wheelbarrow of gardening tools may

have been looking at residential yards, the initial reason Sergeant Gumbs was called. In *Samuel*, 2010 WL 7746081, police officers found a firearm in the defendant's possession while they were conducting a traffic stop. In that case, this Court stated that

although the Officers had statutory authority pursuant to 23 V.I.C. § 488 to investigate the defendants lawful possession of the weapons that had been discovered through lawful police activity, there is absolutely no evidence on the record that the Officers sought to initiate the inquiry prior to Samuel's arrest . . . there is no additional evidence on the record that the Officers were apprised of any facts that lead them to the reasonable belief that defendants did not possess the firearms lawfully upon discovery of the weapons at the time of the traffic stop. The record reflects merely that it was determined at the Station upon checking with the Firearms Division that neither Doward nor Samuel had a license to possess a firearm. The record also fails to present any testimony from the Officers based upon their enforcement experience supporting that they had—prior to arresting Samuel—an articulable basis to reasonably believe that Defendants possessed the firearm unlawfully.

Id. at *7. The same is true in the case at bar. Without evidence that supports the officers' finding of probable cause to arrest, this Court cannot hold that the arrest of Defendant, made prior to determining whether he had a license for the firearm, was lawful.

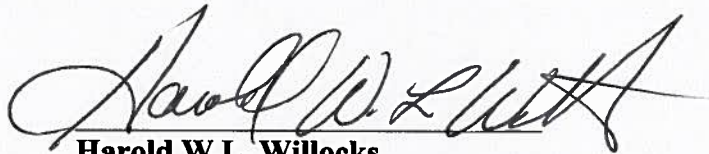
B. Constitutionality of the Search and Seizure

This Court has already found that the police arrest was unlawful thus it must also follow that the search incident to their arrest was illegal. The search incident to arrest doctrine allows police to search an individual once he has been detained. *See Blyden v. People*, 53 V.I. 637, 652 (V.I. 2010). The doctrine does not apply in a case, such as this one, where individuals have been illegally arrested. *Id.* at 651-52. Thus, the firearm belonging to Defendant that was taken and placed into evidence must be suppressed as a fruit of an illegal arrest.

CONCLUSION

Defendant was arrested in violation of the Fourth Amendment. The police detained Defendant without probable cause or a warrant. As a result, the fruit of the illegal arrest must be suppressed. The Court will issue an Order consistent with this Opinion.

Dated: 3-22-16


Harold W.L. Willocks
Administrative Judge of the Superior Court

ATTEST:
Estrella George
Acting Clerk of the Court

By: 
Court Clerk Supervisor

Dated: 3/23/16