For Publication

IN THE SUPREME COURT OF THE VIRGIN ISLANDS

PEOPLE OF THE VIRGIN ISLANDS, Appellant/Plaintiff, v. **JAH'VAR LOOBY,** Appellee/Defendant.	))))))))	**S. Ct. Crim. No. 2016-0043** Re: Super. Ct. Crim. No. 141/2016 (STT)

On Appeal from the Superior Court of the Virgin Islands
Division of St. Thomas & St. John
Superior Court Judge: Hon. Denise M. Francois

Argued: October 11, 2016
Filed: June 14, 2018

BEFORE: **RHYS S. HODGE**, Chief Justice; **MARIA M. CABRET**, Associate Justice; and **IVE ARLINGTON SWAN,** Associate Justice.

APPEARANCES:

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OPINION OF THE COURT

HODGE, Chief Justice.

The People of the Virgin Islands appeal from the Superior Court's August 22, 2016 opinion and order denying a motion to reconsider the Superior Court's July 27, 2016 opinion and order

that granted Jah'var Looby's motion to suppress evidence seized after an officer's pat-down frisk. For the reasons that follow, we reverse.

I. BACKGROUND

The People charged Looby with unlawfully possessing a firearm in violation of title 14, section 2253(a) of the Virgin Islands Code. This charge emanated from the discovery of a firearm on his person after a stop and subsequent frisk by Officers Bruce Taylor and Jamie Serrano of the Virgin Islands Police Department.

On April 16, 2016, Officers Taylor and Serrano were patrolling the Hospital Ground area of St. Thomas in a marked police vehicle to show a police presence during a late evening event celebrating St. Thomas's Carnival.[1] Both officers testified that they knew from their experience and training, that the area was plagued by high crime, which often involved drugs, and firearm use. (J.A. 44; 52-53; 56.) The officers explained that upon stopping and exiting their vehicle, they detected the scent of marijuana emanating from a group of men at both sides of their vehicle. Officer Serrano testified that while exiting the vehicle's passenger side, he observed Looby and another male sharing a marijuana cigarette. (J.A. 41.) As Officer Serrano began to approach, the other male ran away from him, while Looby "hesitated and started to walk away." (J.A. 41.) When Officer Serrano—with his firearm drawn—instructed Looby to stop and to walk back towards him, Looby complied and informed the Officer that he was in possession of a marijuana cigarette. (J.A. 42; 48; 76.) Officer Serrano then told Looby that if that was all he had, he should not have to worry

[1] The Carnival tradition in the Virgin Islands began in 1912. In 1952, it was revived after a lapse of some years and has been continuously celebrated every year since. "Carnival is a month-long event that includes calypso shows, food fair, queen pageants, steel pan shows, parades and more. St. Thomas's annual post-Easter Carnival is an incredible spectacle of spirit and tradition." *V.I. Carnival Comm., Inc. v. Legislature of the V.I.*, 46 V.I. 33, 44 n.8 (V.I. Super. Ct. 2004).

"because if you have under an ounce, it is just a fine." (J.A. 43; 49.) Officer Serrano then called out for Officer Taylor's assistance, having determined that it was unsafe to conduct further investigation of Looby due to the fact that he was then carrying his department-issued rifle. (J.A. 43.) Officer Serrano also claims that after he ordered Looby to stop, he asked him whether he was carrying a firearm and that Looby responded in the affirmative. Looby, however, emphatically denied that any such conversation regarding a firearm ever took place. (J.A. 43; 76-77.)

Before returning to assist Officer Serrano, Officer Taylor had been in pursuit of four men who ran away from the driver's side of the vehicle as he and Officer Serrano approached. (J.A. 55.) After losing sight of the fleeing men, who had been running suspiciously as if they were holding their waistbands, he stopped his pursuit and returned to the police vehicle where Officer Serrano was standing with Looby. (J.A. 56.) Officer Taylor testified that Officer Serrano then informed him that Looby was smoking marijuana. This led Officer Taylor to inquire if Looby had been processed. When Officer Serrano told him "no," Officer Taylor proceeded to perform a pat-down search of Looby, whereupon he discovered a firearm in his waistband. Immediately thereafter, Officer Taylor arrested him. (J.A. 56.) Officer Taylor testified that Officer Serrano never informed him that Looby had admitted that he was carrying a firearm prior to the pat-down search.[2] (J.A. 59.) Officer Taylor also claimed that Looby admitted that he was not licensed to

[2] The Superior Court found Officer Serrano's failure to inform Officer Taylor that Looby said that he was carrying a firearm to be suspicious. It noted that:

> The fact that Serrano did not alert Taylor that [Looby] was carrying a firearm causes the [Superior] Court to question the credibility of Serrano's testimony. The Court finds it improbable that Serrano would not warn a fellow officer of the presence of a firearm in a high crime area.

(J.A. 92 n.28.)

carry a firearm in the Virgin Islands after the firearm was discovered. (J.A. 89.) Looby testified and admitted that he was carrying the firearm. (J.A. 79.)

Alleging that the firearm was discovered as a result of a violation his Fourth Amendment rights under the United States Constitution, Looby moved to suppress as evidence the firearm and statements he allegedly made in connection with the firearm. Following a suppression hearing conducted on July 5, 2016, the Superior Court issued its July 27, 2016 memorandum opinion, in which it concluded that the People had failed to prove that Officer Taylor's pat-down and subsequent seizure of the firearm did not violate Looby's rights under the Fourth Amendment to the United States Constitution. After the Superior Court denied the People's motion to reconsider its suppression order on August 22, 2016, *see People v. Looby*, Super. Ct. Crim. No. 141/2016 (STT), 2016 V.I. LEXIS 114, at *17 (V.I. Super. Ct. Aug. 22, 2016), the People timely filed its notice of appeal with this Court the following day.

II. DISCUSSION

A. Jurisdiction

This Court has appellate jurisdiction over all appeals from the final decisions, judgments, decrees and orders of the Superior Court of the Virgin Islands. 48 U.S.C. § 1613a(d); 4 V.I.C. § 32(a). While this Court does not generally review appeals from a non-final order or judgment from the Superior Court, title 4, section 33(d)(2) of the Virgin Islands Code specifically allows "the People to appeal an order suppressing evidence prior to trial." *People v. Armstrong*, 64 V.I. 528, 533 (V.I. 2016) (citing 4 V.I.C. § 33(2) ("An appeal by the Government of the Virgin Islands shall lie to the Supreme Court from a decision or order of the Superior Court suppressing or excluding evidence.")).

Looby argues that this Court lacks jurisdiction over this matter because the People failed to appeal the Superior Court's July 27, 2016 suppression order, and instead appealed only the Superior Court's August 22, 2016 order denying the People's motion to reconsider. Specifically, he contends that because title 4, section 33(d)(2) provides for an appeal only "from a decision or order of the Superior Court suppressing or excluding evidence," and not from an order denying a motion to reconsider the suppression ruling, this Court is barred from considering this matter.[3]

This Court has noted on multiple occasions that "regardless of any procedural rules, 'the common law confers trial courts with the discretion to revise [an] interlocutory order at any time prior to entry of a final judgment'" and "this inherent authority under the common law extends to criminal cases as well." *Armstrong*, 64 V.I. at 535 (quoting *Island Tile & Marble, LLC v. Bertrand*, 57 V.I. 596, 609 (V.I. 2012)).

Here, although section 33(d)(2) provides for an appeal only "from a decision or order of the Superior Court suppressing or excluding evidence," the People—by filing its motion to reconsider—asked the trial court to exercise its inherent authority to "revise [the] interlocutory order," and to reconsider its decision on Looby's suppression motion. Furthermore, we have repeatedly emphasized that "the substance and function of a Superior Court order controls over the form." *Rivera-Moreno, v. Gov't of the V.I.*, 61 V.I. 279, 312 (V.I. 2014) (quoting *In re Drue*, 57 V.I. 517, 528 (V.I. 2012)). Thus, the fact that the document was titled as a motion to reconsider

[3] At oral arguments, Looby also contended that this Court cannot properly hear this appeal because the People failed to "certif[y] to the Superior Court that the appeal was not taken for the purpose of undue delay" in conformance with title 4, section 33(d)(2). We find this argument meritless, as the People's notice of appeal filed with the trial court stated unequivocally that: "Undersigned counsel certifies that this appeal is not taken for the purposes of delay and the evidence suppressed is substantial proof of facts material to the charges pending against the defendant." (J.A. 1.)

as opposed to a renewed motion to set aside the order of suppression, has no bearing on the Superior Court's decision to revisit its previous order, and determine whether, in light of the People's arguments in the motion to reconsider, the evidence should remain suppressed. We also note that although section 33(d)(5)'s timing requirement is jurisdictional, *First Am. Dev. Grp./Carib, LLC v. WestLB AG*, 55 V.I. 594, 612 (V.I. 2011), the August 23, 2016 notice of appeal was filed timely as to both the July 27, 2016 order granting the motion to suppress, and the August 22, 2016 order denying the motion to reconsider. Taking that into consideration, ruling otherwise could yield an absurd result that could prevent parties from having decisions adequately reviewed by the trial court in appropriate cases, prior to seeking appeal. *See Gov't of the V.I. v. Connor*, 60 V.I. 597, 604 (V.I. 2014).[4] We decline to adopt such a rule.

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[4] Even if this Court were to conclude that the People erred in failing to comply with Rule 4(c) of the Virgin Islands Rule of Appellate Procedure by not specifying in its notice of appeal that it was appealing the July 27, 2016 suppression order, this Court would still be permitted to assert jurisdiction in this case. As explained previously, this Court may exercise jurisdiction over an unspecified order when "'there is a connection between the specified and the unspecified order, the intention to appeal the unspecified order is apparent[,] and the opposing party is not prejudiced and has a full opportunity to brief the issues.'" *Beachside Assocs., LLC v. Fishman*, 53 V.I. 700, 707 n.3 (V.I. 2010) (quoting *Bernhardt v. Bernhardt*, 51 V.I. 341, 346-47 (V.I. 2009)).

Applying these factors, we note first that there is an obvious connection between the July 27, 2016 and August 22, 2016 orders, as the latter order sought reconsideration and reversal of the former unspecified suppression order. *Id.*; *Bernhardt*, 51 V.I. at 347. Second, it is clear that the People intended to appeal the substantive ruling of the July 27, 2016 suppression order because its amended notice of appeal stated specifically that: "[t]he issue to be presented on appeal is whether . . . the trial court abused its discretion when it granted the Defendant's Motion to Suppress in an Order dated July 26, 2016." (J.A. 1); *Beachside Assocs., LLC*, 53 V.I. at 707 n.3 ("[I]t is apparent that Beachside intended to appeal the underlying order because its notice of appeal states that one issue for appeal is the correctness of the trial court's good cause determination, which was the subject of the underlying order."). Lastly, there is no indication that Looby has suffered any prejudice "as his brief . . . addresses the merits of any issues relating to the underlying order." *Beachside Assocs., LLC*, 53 V.I. at 707 n.3; *see Matute v. Procoast Navigation, Ltd.*, 928 F.2d 627, 630 (3d Cir. 1991) ("[I]n the absence of a showing of prejudice by [appellee], it appears that [appellant's] mistake in failing to state specifically that he was appealing from the underlying dismissal should be viewed as harmless error."), *overruled on other grounds by Neely v. Club Med Mgmt. Servs.*, 63 F.3d 166, 177-78 (3d Cir. 1995). Thus, even under this alternate analysis, the

Accordingly, because the Superior Court properly exercised its authority to reconsider and reaffirm its July 27, 2016 order by accepting briefs and issuing its August 22, 2016 order, the People's August 23, 2016 filing of its notice of appeal was timely and comports with Virgin Islands Rule of Appellate Procedure 5(b)(2). (J.A. 1) (the notice of appeal provided that "the People . . . pursuant to 4 V.I.C. §33(d)(2), appeal . . . from the Memorandum Opinion of the V.I. Superior Court denying the People's Motion to Reconsider the Superior Court's July 27, 2016 Order granting the Defendant's Motion to Suppress entered in the case on 22nd day of August, 2016")).

B. Standard of Review

Ordinarily this Court accepts the trial court's factual findings unless they are clearly erroneous, and reviews its legal conclusions *de novo*. *Armstrong*, 64 V.I. at 533. We review the Superior Court's decision to consider the merits of a renewed suppression motion for an abuse of discretion. *Id.* at 535 (collecting cases). Finally, when an issue requires interpreting the United States Constitution, we exercise *de novo* review. *Browne v. People*, 56 V.I. 207, 217 (V.I. 2012).

C. Fourth Amendment: Stop, Frisk, and Seizure

The People contend that the Superior Court erred when it held that Officer Taylor's pat-

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People's failure to state in its notice of appeal that it was specifically appealing the July 27, 2016 order is harmless error that does not divest this Court of jurisdiction.

Nevertheless, given this Court's directive that every notice of appeal "shall designate the judgment, order or part thereof appealed from and the reason(s) or issue(s) to be presented on appeal," we emphasize the importance—for the purpose of preventing dismissal by this Court—that parties be careful to note with specificity every order that is being appealed from; doing so is without question in the best interest of the parties to avoid dismissal of the appeal. V.I. R. APP. P. 4(a). As explained above, in the particular posture of this case, where there is only one order containing the substantive ruling (the July 27, 2016 order), and only one order denying the motion to reconsider that substantive ruling (the August 22, 2016 order), it is clear from the People's notice of appeal what the scope of its appeal encompasses (and therefore, which orders are affected), thus enabling the Court's jurisdiction. In a case presenting more orders, or where the notice of appeal language is not as specific, a different result might well obtain.

down and subsequent seizure of the firearm failed to comport with the Fourth Amendment to the United States Constitution. More succinctly, the People argue that a review of the totality of the circumstances supports a finding of reasonable suspicion, because marijuana remains contraband in this Territory, *see* 19 V.I.C. § 595, and possession of it is punishable as either a crime or civil infraction, respectively under title 19, sections 607(a) or 607a of the Virgin Islands Code. We agree.

The trial court, in its July 27, 2016 ruling on the suppression motion, determined that Officers Serrano and Taylor lawfully stopped Looby for possession of marijuana. (J.A. 91.) The court found that the officers' detection of the scent of burning marijuana, the observation of Looby holding a marijuana cigarette, and Looby's admission that he possessed an unlit marijuana cigarette, provided reasonable suspicion of simple possession of marijuana. (J.A. 91) (citing 19 V.I.C. § 607). It concluded that because "[s]imple possession of marijuana is unlawful. . . . the police officers had reasonable suspicion that Defendant was engaged in criminal activity and lawfully stopped him." (J.A. 91.) The People do not contest this finding, but instead argue that the trial court erred in concluding that the officers could not constitutionally have conducted a frisk of Looby's person thereafter. Specifically, the People assert that Officer Taylor lawfully frisked Looby due to several factors that, when aggregated, justified the frisk, including: (1) the smell and observance of a small amount of marijuana;[5] (2) Officer Taylor's pursuit of the other individuals and their conduct; and (3) the area being known for high crime. Alternatively, the People contend,

[5] In 2014, the Virgin Islands Legislature overrode a gubernatorial veto to amend title 19, chapter 29 of the Virgin Islands Code by enacting Act No. 7700 to decriminalize simple possession of one ounce or less of marijuana; a person in possession of one ounce or less of marijuana "commits a civil infraction that is a civil offense" punishable by imposition of a fine. Act of Dec. 19, 2014, Bill No. 30-0018, 2014 V.I. Sess. Laws 191, § 2(a).

that even if this Court were to determine that Officer Taylor did not possess reasonable suspicion to justify the frisk on his own, and if we were to find that Officer Serrano did not inform Officer Taylor of the presence of a firearm, Officer Taylor's search would nevertheless be justified if we were to employ the collective knowledge doctrine to find reasonable suspicion.

The Fourth Amendment protects persons from "unreasonable searches and seizures."[6] U.S. CONST. amend IV. Generally, to conduct a valid Fourth Amendment search, a judge or magistrate must issue a warrant upon a finding of probable cause that describes, with particularity, both the place to be searched and the persons or things to be seized. *Nicholas v. People*, 56 V.I. 718, 738 (V.I. 2012); *Katz v. United States*, 389 U.S. 347, 357 (1967). In fact, "searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions." *Id.* (footnotes omitted); *Browne v. People*, 56 V.I. 207, 217 (V.I. 2012); *Horton v. California*, 496 U.S. 128, 133 n.4 (1990).[7]

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[6] This Court has previously acknowledged that:

> The Fourth Amendment of the United States Constitution applies to the Virgin Islands. *See* Revised Organic Act of 1954, § 3, 48 U.S.C. § 1561, *reprinted in* V.I. Code Ann., Historical Documents, Organic Acts, and U.S. Constitution at 87-88 (1995) (preceding V.I. Code Ann. tit. 1) ("The following provisions of and amendments to the Constitution of the United States are hereby extended to the Virgin Islands … and shall have the same force and effect there as in the United States … the first to ninth amendments inclusive . . . .").

Armstrong, 64 V.I. at 530 n.1.

[7] To successfully claim a violation of the protections afforded under the Fourth Amendment, a person must also satisfy a legitimate expectation of privacy test, by establishing: first, that the person had an actual or subjective expectation of privacy in the place or item searched; and second, that the subjective expectation was one that an ordinary person would deem reasonable under the circumstances. *Katz*, 389 U.S. at 361 (Harlan, J. concurring). However, because no argument in this appeal contends a lack of legitimate expectation of privacy, we see no need to conduct such analysis.

Although an officer is generally permitted to search a person or place only upon a finding of probable cause, the United States Supreme Court has determined that "'in appropriate circumstances the Fourth Amendment allows a properly limited 'search' or 'seizure' on facts that do not constitute probable cause to arrest or to search for contraband or evidence of crime.'" *Blyden v. People*, 53 V.I. 637, 647-48 (V.I. 2010) (quoting *United States v. Brignoni-Ponce*, 422 U.S. 873, 882 (1975)). In *Terry v. Ohio*, 392 U.S. 1 (1968), the United States Supreme Court determined that when an officer notices suspicious conduct by a person whose behavior leads the officer to reasonably conclude in light of his experience that criminal activity may be afoot, the officer may stop the individual to identify himself and make reasonable inquiries. *Blyden*, 53 V.I. at 648 (quoting *Terry*, 392 U.S. at 30) (establishing the reasonable suspicion requirement to support a stop and frisk)). Importantly, when assessing "whether the officer acted reasonably in such circumstances," we focus not on "his inchoate and unparticularized suspicion or 'hunch,'" but instead upon "specific reasonable inferences which he is entitled to draw from the facts in light of his experience." *Terry*, 392 U.S. at 27.

The People argue that the officers conducted a lawful *Terry* stop and frisk of Looby because possession of marijuana is punishable as a civil infraction under title 19, section 607a(b)(2) for carrying less than one ounce of marijuana; thus, it contends that the frisk was automatically justified for officer safety. But, "[a] lawful frisk does not always flow from a justified stop." *Thomas v. Dillard*, 818 F.3d 864, 876 (9th Cir. 2016) (citation and internal quotation marks omitted); *accord United States v. Foster*, 824 F.3d 84, 89 (4th Cir. 2016); *United States v. Cardona-Vicente*, 817 F.3d 823, 827 (1st Cir. 2016); *United States v. Garcia*, 459 F.3d 1059, 1063–64 (10th Cir. 2006). Rather, "[i]n the case of the self-protective search for weapons, [an officer] must [also] be able to point to particular facts from which he reasonably inferred that the

individual was armed and dangerous." *Sibron v. New York*, 392 U.S. 40, 64 (1968); *United States v. Hughes*, 517 F.3d 1013, 1016 (8th Cir. 2008) ("There must be articulable and specific facts as to dangerousness."). Thus, the validity of a *Terry* frisk, like an initial *Terry* stop, is considered independently under the totality of the circumstances. *See United States v. Robinson*, 615 F.3d 804, 807-08 (7th Cir. 2010) ("Whether an officer has a reasonable suspicion to support a *Terry* frisk is a fact-specific inquiry that looks at the totality of the circumstances[.]") (citation and internal quotation marks omitted); *accord Hughes*, 517 F.3d at 1016; *United States v. McKoy*, 428 F.3d 38, 39 (1st Cir. 2005). Accordingly, we first assess whether the officers conducted a valid *Terry* "stop" by looking to facts that indicate that the officers reasonably believed that criminal activity was afoot prior to the stop, as found by the trial court. *Terry*, 392 U.S. at 30.

Looby contends that by decriminalizing possession of less than one ounce of marijuana, the Legislature manifested its intent for officers to no longer be permitted to conduct warrantless searches or pat-downs without evidence that the person possesses *more* than an ounce of marijuana. When interpreting a statute, this Court's first consideration is the words the Legislature drafted; and, if the Legislature's intent is clear, we need not look further. *First Am. Dev. Grp./Carib*, 55 V.I. at 602 (citations and internal quotation marks omitted). But, even though a literal interpretation is preferred, "'the intention prevails over the letter'" of the language appearing in the statute; thus, we will not interpret it literally "'if such a reading is contrary to its objective.'" *Id.* (quoting *Gilbert v. People*, 52 V.I. 350, 356 (V.I. 2009)). To determine legislative intent, we consider "the context surrounding" the statute. *Ottley v. Estate of Bell*, 61 V.I. 480, 493 (V.I. 2014).

In enacting Act No. 7700, the Legislature provided clear policy objectives and reasons for its enactment including: the national trend toward decriminalization of the social sharing of minor amounts of marijuana; reduced court costs in prosecuting marijuana possession; increased revenue

for the Territory provided by the fines; changing views in society on the drug; "free[ing] up criminal justice resources to deal with more serious crimes, which are particularly salient given extremely high murder rates in the Virgin Islands;" studies indicating that alcohol may be more harmful than marijuana; "harsher penalties are not associated with lower use rates" of marijuana; and the potential health benefits of marijuana. Act No. 7700, Bill No. 30-0018, 2014 V.I. Sess. Laws 191, § 2(a). Significantly, however, the Legislature also noted that "decriminalization does not 'legalize' activity, which would be accomplished by removing all or most legal detriments from a previously illegal act." *Id.* While possession of one ounce or less of marijuana is decriminalized, marijuana remains a Schedule I controlled substance under title 19, section 595 of the Virgin Islands Code. As a result, it is clear that the Legislature had no intent to "legalize" marijuana possession, and such possession is still unlawful. *See* 19 V.I.C. §§ 607(a), 607a.

Following from this, we note that when enacting the decriminalization statute, the Legislature is presumed to know the existing state of the law, *see Cascen v. People*, 60 V.I. 392, 404 (V.I. 2014), and was aware that officers are permitted to make warrantless seizures of items that are "'evidence of a crime, *contraband*, or *otherwise subject to seizure*.'" *Gumbs*, 64 V.I. at 508 (quoting *Thomas*, 63 V.I. at 606 n. 4); *Florida v. Harris*, 568 U.S. 237, 243 (2013) ("A police officer has probable cause to conduct a search when the facts available to him would warrant a person of reasonable caution in the belief that contraband or evidence of a crime is present."); *Texas v. Brown*, 460 U.S. 730, 741 (1983). Section 607a(b)(1) provides that "[a]ny person who possesses one ounce or less of marijuana . . . is subject to forfeiture of the contraband"; section 607a(b)(2) provides that "[a]ny person who openly and publicly displays, consumes, or uses one ounce or less or marijuana . . . is subject to forfeiture of the contraband"; and additionally, section 607(a)(b)(3) provides that "[a]ny person under the age of eighteen at the time of the offense, who

possesses one ounce or less of marijuana . . . is subject to forfeiture of the contraband." It is evident that the Legislature's intent in enacting Act No. 7700 was only to reduce criminal liability for possessing small quantities of the substance, while at the same time, keeping marijuana as a controlled substance subject to seizure by law enforcement, regardless of amount. *Accord Robinson v. State*, 152 A.3d 661, 663 (Md. 2017).[8]

Further, although a person in possession of an ounce or less of marijuana may now avoid criminal penalization, the presence or absence of criminal penalization does not disturb our constitutional frisk and seizure inquiry. This is because reasonable suspicion—the predicate for a valid stop and frisk—does not depend on whether the People proved beyond a reasonable doubt that a defendant is "guilty"; instead, reasonable suspicion is a matter of constitutional and evidentiary concern turning on whether an officer reasonably concludes that evidence of contraband or of a crime may be present. *Gumbs*, 64 V.I. at 508. Notwithstanding enactment of Act 7700, the scent of marijuana (which remains contraband subject to seizure in this Territory)

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[8] First-time possession of small amounts of marijuana remains decriminalized, but not legalized, in the following fourteen jurisdictions: Connecticut, Delaware, Illinois, Maryland, Minnesota, Mississippi, Missouri, Nebraska, Nevada, New York, North Carolina, Ohio, Rhode Island, and Vermont. *See* CONN. GEN. STAT. § 21a–279a(a)(1); DEL. CODE ANN. tit. 16 § 4764(c); 720 ILL. COMP. STAT. 550/4(a); MD. CODE ANN., Crim. Law (2002, 2012 Repl. Vol., 2016 Supp.) § 5–601(c)(2)(ii); MINN. STAT. § 152.027 Subd. 4(a); MISS. CODE ANN. § 41–29–139(c)(2)(A)(1); MO. REV. STAT. § 579.015; NEB. REV. STAT. § 28–416(13)(a); NEV. REV. STAT. § 453.336(4)(a); N.Y. PENAL LAW § 221.05; N.C. GEN. STAT. § 90–95(d)(4); OHIO REV. CODE ANN. § 2925.11(C)(3)(a); 1956 R.I. GEN. LAWS § 21–28–4.01(c)(2)(iii); VT. STAT. ANN. tit. 18 § 4230a(a)(1).

Eight other jurisdictions have legalized possession of small amounts of marijuana in some form: Alaska, California, Colorado, the District of Colombia, Maine, Massachusetts, Oregon and Washington. *See* ALASKA STAT. ANN. § 17.38.020(1); CAL. HEALTH & SAFETY CODE § 11357, *et. seq.*; COLO. CONST. ART. 18, § 16(3)(a); D.C. CODE § 48–904.01(a)(1)(A); MASS. GEN. LAWS ANN. 94G, § 7; ME. REV. STAT. tit.7 § 2452; OR. REV. STAT. ANN. § 475.864; WASH. REV. CODE ANN. § 69.50.4013(3)(a).

Possession of any amount of marijuana remains a crime under federal law. *See* 21 U.S.C. § 844.

alone may be sufficient to establish reasonable suspicion or even "probable cause" to conduct further investigation into possible criminal acts or evidence of contraband.[9] *United States v. Ramos*, 443 F.3d 304, 308 (3d Cir. 2006) ("It is well settled that the smell of marijuana alone, if articulable and particularized, may establish not merely reasonable suspicion but probable cause."); *United States v. Humphries*, 372 F.3d 653, 658 (4th Cir. 2004) ("[T]he odor of marijuana alone can provide probable cause to believe that marijuana is present in a particular place."); *United States v. White*, 593 F.3d 1199, 1203 (11th Cir. 2010) ("[T]he smell of marijuana alone may provide a basis for reasonable suspicion."); *United States v. Elkins*, 300 F.3d 638, 660 (6th Cir. 2002); *United States v. Kerr*, 876 F.2d 1440, 1445 (9th Cir. 1989) (noting that "the presence of the odor of contraband may itself be sufficient to establish probable cause") (citations omitted); *United States v. Russell*, 670 F.2d 323, 325 (D.C. Cir. 1982) (stating, "'[p]lain view,' we think it safe to say, encompasses 'plain touch,' and probably 'plain smell' as well"). Therefore, we agree with the Superior Court that because possession of marijuana remains unlawful in this Territory, officers may establish reasonable suspicion to conduct a *Terry* stop if the officer relied upon his or her experience and training to detect the presence of that contraband.

But as noted earlier, the presence of reasonable suspicion to warrant a *Terry* stop does not automatically render the subsequent frisk lawful. *Thomas*, 818 F.3d at 876. In its subsequent analysis concerning justification for the frisk, the Superior Court compartmentalized the additional factors (concerning the suspicious behavior of the men surrounding Looby and the area being

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[9] We recognize that the Superior Court of the Virgin Islands addressed a similar issue concerning the automobile exception to the warrant requirement in *People v. Cannergeiter*, 65 V.I. 114, 124 (V.I. Super. Ct. 2016), and that *Cannergeiter* remains an active case that this Court may or may not have to consider on appeal in the future and on which we take no position.

known for high crime, frequent gun shots and drug use) to conclude that the officers did not possess reasonable suspicion of Looby being a danger to justify them to warrant conducting the frisk. (J.A. 91-93.) The Superior Court, however, failed to consider one undisputed fact: that Looby told Officer Serrano, after the stop but before the frisk, that he possessed a marijuana cigarette. (J.A. 42; 48; 76.)

Although the Legislature labels possession of one ounce or less of marijuana as a "civil infraction" or a "civil offense" for which an officer should merely issue a citation, we note that the Legislature's limitation on the power to arrest in relation to one ounce or less of marijuana does not alter this Court's Fourth Amendment inquiry on probable cause to search. *See Virginia v. Moore*, 553 U.S. 164, 173, 176 (2008) (recognizing "when States go above the Fourth Amendment minimum, the Constitution's protections concerning search and seizure remain the same[]" and "while States are free to regulate arrests however they desire, state restrictions do not alter the Fourth Amendment's protections."); *accord United States v. Bernacet*, 724 F.3d 269, 277–78 (2d Cir. 2013) (holding even though parole violations were not "offenses" or "crimes" under New York law, the violations nonetheless gave police the authority to arrest a violator and perform a constitutional search incident to arrest). The touchstone of a Fourth Amendment analysis concerning a search or seizure is reasonableness—namely, whether a police officer acted reasonably. *See Wyoming v. Houghton*, 526 U.S. 295, 300 (1999) (noting a court employs the traditional Fourth Amendment inquiry "by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests.") (citing *Vernonia School Dist. 47J v. Acton*, 515 U.S. 646, 652-53 (1995)). Hence, even where a state or territory's Legislature has restricted the

power to arrest by statute, the traditional standards for reasonableness would still govern a court's Fourth Amendment analysis. *See Moore*, 553 U.S. at 171. Thus, analogous to *Moore*—where the Supreme Court of the United States found that the history of the Fourth Amendment never prohibited arrests in violation of a statute and that under traditional reasonableness inquiry "when an officer has probable cause to believe a person committed even a minor crime [or, where constitutionally reasonable, an infraction, not labeled as a "crime"]. . ., the balancing of private and public interests is not in doubt"—we hold that when an officer has probable cause to conduct a search under traditional constitutional analysis, he or she may do so notwithstanding any prohibitions placed on his or her power to arrest by the Legislature. *Moore*, 553 U.S. at 171 (holding a state's limit on the power to arrest by statute is immaterial to the Fourth Amendment inquiry); *accord Bernacet*, 724 F.3d at 277–78 (noting because the defendant's claim was "of a constitutional dimension," it could not be "measured with a state law ruler"); *see also U.S. v. Wilson*, 699 F.3d 235, 238 (2d Cir. 2012) ("We hold that the violation of the ICE policy requiring prior authorization did not affect the constitutionality of the stop under the Fourth Amendment and that the stop and subsequent search comported with the Fourth Amendment because they were justified by probable cause."). We caution that this does not mean that officers may conduct a search for any subjective reason; the constitutional analysis remains an objective one. *See City of Los Angeles v. Mendez*, 581 U.S. ___, ___, 137 S. Ct. 1539, 1547 (2017); *accord*, *Florida v. Jardines*, 569 U.S. 1, 10 (2013). Having established that the decriminalization of one ounce or less of marijuana under 19 V.I.C. § 607 has no bearing on our decision, we resume our Fourth

Amendment analysis.[10] It is well-established that the existence of probable cause provides justification for a frisk, for it represents a higher standard than reasonable suspicion. *Blyden*, 53 V.I. at 647-48 (quoting *Brignoni-Ponce*, 422 U.S. at 882); *see also United States v. Grayer*, 232 Fed. App'x 446, 451 (6th Cir. 2007) ("Because reasonable suspicion requires a lesser quantum of proof than probable cause . . . the officers, ipso facto, had sufficient reasonable suspicion to seize [the defendant].") (citing *Griffin v. Wisconsin*, 483 U.S. 868, 878 n. 4 (1987)). "A police officer has probable cause to conduct a search when the facts available to him would warrant a person of reasonable caution in the belief that contraband or evidence of a crime is present." *Harris*, 568 U.S. at 243 (internal quotation marks and alterations omitted); *see also United States v. Donahue*, 764 F.3d 293, 302 (3d Cir. 2014) ("The courts in making Fourth Amendment analyses long have rejected any distinction between 'evidence of a crime' and 'contraband.'") (citing *Warden, Md. Penitentiary v. Hayden*, 387 U.S. 294, 301 (1967)). Importantly, "[s]ubjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis," *Whren v. United States*, 517 U.S. 806, 813 (1996), and thus "an arresting officer's state of mind . . . is irrelevant to the existence of probable cause," *Devenpeck v. Alford*, 543 U.S. 146, 153 (2004). In other words, "the fact that the

[10] In reaching this decision, we emphasize that we do not depart from our prior precedents that the Virgin Islands Legislature may enact laws that grant greater protections than the United States Constitution, *see, e.g.*, *Estick v. People*, 62 V.I. 604, 620 (V.I. 2015) (recognizing that 14 V.I.C. § 104 provides greater protections than the Double Jeopardy Clause of the U.S. Constitution), or decline to make unlawful acts that are crimes under federal law, *see, e.g.*, *People v. John*, 52 V.I. 247, 258 (V.I. 2009) (holding that search warrant was invalid, in part, because possession of child pornography was not a crime under Virgin Islands law). On the contrary, our holding that the Legislature's decision to decriminalize one ounce or less of marijuana has no bearing on our decision is precisely because the Legislature elected not to legalize marijuana under Virgin Islands law and to have marijuana, regardless of amount, be subject to forfeiture as contraband.

officer does not have the state of mind which is hypothecated by the reasons which provide the legal justification for the officer's action does not invalidate the action taken as long as the circumstances, viewed objectively, justify that action." *Scott v. United States*, 436 U.S. 128, 138 (1978).

Because "[a]dmissions of crime carry their own indicia of credibility sufficient at least to support a finding of probable cause to search," *State v. Mena*, 399 So. 2d 149, 152 (La. 1981), under traditional Fourth Amendment analysis Looby's unsolicited admission to Officer Serrano, after the stop but before the frisk, that he possessed a marijuana cigarette provided Officer Serrano with probable cause to believe that Looby possessed contraband subject to seizure, especially considering that the officers, in fact, smelled marijuana coming from Looby's person. *See United States v. Pope*, 686 F.3d 1078, 1084 (9th Cir. 2012) (search of defendant's person for additional marijuana justified when defendant admitted to officer that he possessed marijuana); *United States v. Tillman*, No. CR. 06-31-KKC, 2006 WL 3780557, at *8 (E.D. Ky. Dec. 20, 2006) (unpublished) (holding that officer's observation of baggy on defendant's person containing suspected cocaine "established probable cause to search defendant's person for evidence of additional contraband."); *Nixon v. United States*, 870 A.2d 100, 105 (D.C. 2005) (search of defendant's person for contraband was legally justified since probable cause existed after defendant admitted to the officer that he had "one little bag"); *State v. Lee*, 475 So.2d 1116, 1118 (La. Ct. App. 1985) (frisk of defendant justified because officer obtained probable cause to believe defendant possessed contraband when defendant made "spontaneous, unsolicited admission" that he had "some stuff"); *see also Russell*, 670 F.2d at 325 (recognizing the "plain smell" concept).

We recognize that, shortly after Looby admitted to possessing a marijuana cigarette, Officer Serrano told him that he should not have to worry "because if you have under an ounce, it is just a fine," (J.A. 43; 49), and justified the subsequent frisk of his person on officer safety grounds. However, we reiterate that the test for probable cause is an objective one, and that an officer's state of mind or subjective intent is irrelevant. *Whren*, 517 U.S. at 813; *Scott*, 436 U.S. at 138. That Officer Serrano decided not to charge Looby with the civil offense of possessing one ounce or less of marijuana does not negate the fact that Looby's admission that he possessed a marijuana cigarette provided him with probable cause to conduct a search of his person. *See People v. Rodriguez*, 945 P.2d 1351, 1359-60 (Colo. 1997) (holding that officer's decision not to issue a citation for weaving did not strip him of his authority to seize the defendant when probable cause existed for the weaving offense); *Farmer v. State*, 275 S.E.2d 774, 776 (Ga. Ct. App. 1980) (holding that officer's search of defendant's person for marijuana justified by objective existence of probable cause that defendant committed simple assault); *State v. Overby*, 590 N.W.2d 703, 706 (N.D. 1999) (holding that search of defendant's person was justified, even though officer claimed search was a "frisk for weapons" out of concern for officer safety, because probable cause existed that defendant possessed marijuana, even though search occurred prior to arrest); *accord Arrington v. Kinsey*, 512 Fed. Appx. 956, 959 (11th Cir. 2013) ("'[S]ubjective reliance on an offense for which no probable cause exists' does not make an arrest out of order where there is probable cause to arrest for a different offense.") (quoting *Lee v. Ferraro*, 284 F.3d 1188, 1196 (11th Cir. 2002)).

Consequently, after Looby admitted to possessing a marijuana cigarette, the officers possessed probable cause to believe that Looby possessed contraband. This provided the officers with the legal justification to both detain Looby and search his person to determine how much

contraband he possessed.[11] *See Pope*, 686 F.3d at 1084. That the officers nevertheless exercised their discretion not to issue a citation to Looby for his possession of marijuana does not render the search of his person unlawful. *Commonwealth. v. Skea*, 470 N.E.2d 385, 392-93 (Mass. 1984). Accordingly, because the officers possessed probable cause to justify a search of Looby's person under the Fourth Amendment, and because the firearm was discovered as a result of Officer Taylor's lawful search, we conclude that the Superior Court erred in excluding the firearm.[12]

III. CONCLUSION

Because under all of the circumstances, both Officer Serrano and Officer Taylor individually possessed probable cause to stop and search Looby, we conclude that Officer Taylor's search of his person was lawful under the Fourth Amendment. Following from that, the evidence clearly established that it was immediately apparent from that lawful action that the officer had discovered a firearm, thus Officer Taylor acted within his constitutional authority to seize the

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[11] In fact, were we to hold otherwise, any individual who admits to possessing less than an ounce of marijuana would effectively be immunized from further search, a result that the Legislature could not have intended given its decision for marijuana to remain a Schedule I controlled substance, the possession of which is unlawful. 19 V.I.C. §§ 595, 607(a), 607a.

[12] We recognize that on appeal, and below in the Superior Court, that much of the argument and reasoning was centered around whether the horizontal or vertical collective knowledge doctrine represents the soundest rule for the Virgin Islands, and in turn whether Officer Taylor's knowledge should have been imputed together with Officer Serrano's to establish probable cause. We also recognize that there currently exists a split in the Superior Court regarding application of the collective knowledge doctrine in this jurisdiction. *Compare People v. Looby*, 65 V.I. 84, 93-95 (V.I. Super. Ct. 2016) (declining to adopt the horizontal collective knowledge doctrine), *with People v. Crooke*, Super. Ct. Crim. No. F273/2009, __ V.I. __, 2012 V.I. LEXIS 60, at *15 (V.I. Super. Ct. Nov. 14, 2012) (adopting the horizontal collective knowledge doctrine to establish probable cause). However, we find it unnecessary at this time to address this issue given that marijuana remains contraband subject to forfeiture in this territory, and because the officers possessed probable cause to search Looby.

firearm without a warrant. Accordingly, the Superior Court erred in denying the People's motion to reconsider its ruling granting Looby's motion to suppress, and thus reverse its July 27, 2016 opinion and order. This action is remanded to the Superior Court for further proceedings in accordance with this opinion.

Dated this 14th day of June, 2018.

BY THE COURT:

/s/ Rhys S. Hodge
RHYS S. HODGE
Chief Justice

ATTEST:

VERONICA J. HANDY, ESQ.
Clerk of the Court