

SUPERIOR COURT OF THE VIRGIN ISLANDS
DIVISION OF ST.CROIX

PEOPLE OF THE VIRGIN ISLANDS,	)	CASE NO. SX-15-CR-376
	)	CASE NO. SX-15-CR-377
Plaintiff,	)	
	)	
v.	)	
	)	
MALACHI BENJAMIN and OMAR B.	)	
JOSEPH,	)	
	)	
Defendants.	)	
	)	

Cite as: 2020 VI Super 34

Appearances:

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MEMORANDUM OPINION

MOLLOY, Judge.

¶1 **BEFORE THE COURT** are motions filed by the Defendants, Malachi Benjamin ("Benjamin") and Omar B. Joseph ("Joseph"), to suppress evidence allegedly seized in violation of the Fourth

¹ Counsel at the time the motions were argued. The Court takes judicial notice that counsel is no longer employed with the Department. Attorney Chancellor appeared in *Benjamin* when Benjamin was arrested on a bench warrant. But successor counsel has not formally entered an appearance in either case.

Amendment. The People of the Virgin Islands (the “People”) oppose. For the reasons stated below, the Court will deny the motions.

I. FACTUAL BACKGROUND

¶2 On the evening of December 16, 2015, officers of the Virgin Islands Police Department (“VIPD”) were engaged in a crime-reduction initiative in Frederiksted, St. Croix. Between 6:00 p.m. and 8:25 p.m. that night, VIPD Officers Rolando Huertas (“Huertas”), Orlando Benitez Jr. (“Benitez”), and Nyeim France were on patrol in an unmarked police vehicle in the area of Hospital Street. The vehicle’s windows were rolled down. As they approached 39B Hospital Street (“the house”), Huertas smelled a strong odor of marijuana. Huertas has fifteen years of experience and extensive training in identifying illegal drugs. The marijuana odor intensified as the officers drove toward the front of the house. The road is “right in front of the residence.” (Hr’g Tr. 46:14-15 (Sept. 6, 2016).) While still in the vehicle on the public road, Huertas observed a light cloud of smoke rising up from the front of the house. Two people were seated in “a little porch” in front of the house, and one was standing just outside. *Id.* at 11:11-12. The persons on the porch were later identified as Joseph and Benjamin.²

¶3 The porch is relatively small with an irregular “wooden type . . . fence” made of uneven slats with three- to four-inch gaps directly above the curb. (*See* Pls.’ Ex.1; Defs’ Joint Ex. 1.) The officers stopped the vehicle directly in front of the residence. From the vehicle, Huertas could see two large cement blocks on the porch. Items on the porch were also clearly visible from up to fifteen feet away. The officers did not notice any porch lights or streetlamps. But the area was illuminated by the headlights of the unmarked police vehicle.

¶4 While still in the vehicle, Huertas identified himself as a police officer and asked Benjamin and Joseph what they were doing. Benjamin said, “just chilling.” *Id.* at 16:10. Huertas then saw Benjamin make a quick movement with his hand. He shined his flashlight directly at Benjamin and Joseph and saw “what appeared to be a firearm sticking out from a holster inside of th[e] cinder block.” *Id.* at 28:23-25. The gun was later identified as a Silver Taurus .38 Special Revolver with five live rounds in the cylinder. For safety reasons, Huertas called out a police code for “gun” to avoid reaction because shootings had been reported in the area the night before.

¶5 Huertas exited the vehicle and ordered Joseph and Benjamin to put their hands in the air and

² A third individual at the scene was not arrested.

keep them visible. Huertas then walked toward the porch and stopped near a silver scooter leaning against the street-side of the porch entrance. Standing near the entrance to the porch, Huertas ordered Joseph to walk toward him. While Huertas was securing Joseph, Benitez noticed a second firearm, later identified as a Colt 22 LR revolver, which was inside the cinderblock Benjamin had been sitting on. The Colt revolver had five live rounds in the chamber. After alerting officers to the presence of another firearm, Benitez detained Benjamin per police procedure to secure an area to prevent anyone from accessing the weapons.

¶6 Joseph and Benjamin were asked about the firearms. Both said they had the guns for protection. *See id.* at 34:9-11 (“Mr. Joseph said that’s for protection. Mr. Benjamin said we need protection.”). Huertas asked them if they had licenses for the firearms. They said no. Huertas then advised them of their rights. After the guns were secured, Joseph and Benjamin were placed in handcuffs and transferred to the police station. A vial later identified as marijuana was discovered in the bushes to the north side of the porch—the same direction of Benjamin’s quick hand movement. At the police station, Officer Karen Stout, Custodian of Firearms Records, confirmed that neither individual was licensed to carry a firearm in the Virgin Islands and, further, that the .38 Special Revolver had been reported stolen. Huertas then arrested Joseph and Benjamin. The People later charged Joseph and Benjamin with unauthorized possession of a firearm in violation of 14 V.I.C. § 2253(a); unauthorized possession of ammunition in violation of 14 V.I.C. § 2256(a); and failure to report firearms obtained or brought into the Virgin Islands in violation of 23 V.I.C. § 470(a). Both Defendants later moved to suppress the firearms.³

II. LEGAL STANARD

¶7 The Fourth Amendment generally protects individuals from ‘governmental intrusion not authorized by a warrant’”⁴ *Simmonds v. People*, 53 V.I. 549, 555-56 (2010) (quoting *United States*

³ Technically, only Benjamin filed a motion with substantive arguments and citations to authority. Joseph filed a one-page motion without little argument or citations to authority, which ordinarily constitutes waiver. *Cf. People v. Ventura*, SX-12-CR-076, 2014 V.I. LEXIS 53, *33-34 n.5 (V.I. Super. Ct. July 25, 2014), *aff’d in part and rev’d in part and remanded*, 64 V.I. 589 (2016). Similarly situated criminal co-defendants are entitled to rely on each other’s arguments, however. *See Rivera v. People*, 64 V.I. 540, 587 (2016) (holding that it would be manifestly unjust to treat “‘identically situated co-defendants . . .’ [differently by] addressing an issue raised by one defendant but waived by another.” (quoting *Boston v. People*, 56 V.I. 634, 644-45 (2012))). Thus, the Court construes Benjamin’s one-page motion as a notice of joinder.

⁴ “The Fourth Amendment to the U.S. Constitution applies to the U.S. Virgin Islands through section 3 of the Revised Organic Act of 1954.” *People v. Berkley*, 70 V.I. 655, 665 n.2 (Super. Ct. 2019) (brackets and citation omitted)

v. *Karo*, 468 U.S. 705, 714-15 (1984)). And “[i]t is beyond debate that individuals have a reasonable expectation of privacy in their homes. *Id.* at 555. Warrantless searches and seizures are “‘*per se* unreasonable absent one of a few well-delineated exceptions.” *People v. Berkley*, 70 V.I. 655, 665 (Super. Ct. 2019) (ellipses and brackets omitted) (quoting *Browne v. People*, 56 V.I. 207, 217 (2012)). One exception is law enforcement’s interest in “‘effectuating a search and seizure [which can] outweigh[] privacy interests.” *Id.* (ellipses and citation omitted). However, once a defendant claims he was searched without a warrant, the prosecution must show that the search was reasonable. *Accord United States v. Johnson*, 63 F.3d 242, 245 (3d Cir. 1995) (“[O]nce the defendant has established a basis for his motion, i.e., the search or seizure was conducted without a warrant, the burden shifts to the government to show that the search or seizure was reasonable.” (citing *United States v. McKneely*, 6 F.3d 1447, 1453 (10th Cir. 1993))).

¶8 Here, the officers seized the firearms without a warrant. Thus, the People have the burden to show that the police officers’ actions “‘were reasonable.” *Berkley*, 70 V.I. at 665 (quoting *People v. Prentice*, 64 V.I. 79, 89 (Super. Ct. 2016)). “‘Reasonableness is an objective inquiry measured by examining the totality of the circumstances surrounding the search and the nature of the search itself.” *People v. Pemberton*, 2019 VI Super 118, ¶ 7 (quoting *Prentice*, 64 V.I. at 89). “If the People fail to satisfy this burden, the Court must suppress the evidence and exclude it from trial under the ‘fruit of the poisonous tree’ doctrine.” *Id.* (quoting *Castillo v. People*, 59 V.I. 240, 255-56 (2013)).

III. DISCUSSION

¶9 The Defendants raise two arguments for suppressing the firearms.⁵ First, they argue that the officers lacked sufficiently-particularized, objective evidence of criminal activity. Second, they argue that, because of the heightened expectation of privacy surrounding the home, the seizure violated the Fourth Amendment. The People counter officers trained in identifying marijuana, who observe objective evidence of marijuana use in an area known for criminal activity, supplies reasonable suspicion for a brief investigatory stop. The People also argue, in the alternative, that reasonable suspicion is not required when citizens use contraband in plain view. Each is addressed in turn.

⁵ During the suppression hearing, Benjamin questioned the legality of Virgin Islands law which requires that firearms be licensed. The Court declines to address this argument because Benjamin did not raise it in his initial motion and failed to develop his argument with citations to legal authority. “[I]t is not the duty of any court of law to develop a litigant’s argument, especially if that party is represented by counsel.” *Ventura*, 2014 V.I. LEXIS 53 at *32 n.5 (citing *United States v. Zannio*, 895 F.2d 1, 17 (1st Cir. 1990)).

A. Reasonable Suspicion to Justify an Investigatory Stop

¶10 Because the firearms were seized without a warrant, “the People must show that the investigative stop and all subsequent events fit under an exception to the warrant requirement.” *Id.* at ¶ 9. An “‘investigative stop’” is one of the recognized exceptions to the warrant requirement. *Id.* (citing *Terry v. Ohio*, 392 U.S. 1 (1968) (remaining citation omitted)). “Brief investigative stops are . . . valid when based on particularized objective facts, ‘in light of the officer’s experience,’ an officer has a reasonable suspicion that ‘criminal activity is afoot.’” *Id.* at ¶ 10 (quoting *Blyden v. People*, 53 V.I. 637, 648 (2010)). For the stop to be justified, “the officer must ‘articulate something more than an inchoate or unparticularized suspicion or hunch.’” *Id.* (quoting *People v. Cannergeiter*, 65 V.I. 114, 122 (Super Ct. 2016)). “A ‘*Terry*’ stop . . . usually entails a vehicular stop, but [can also] encompass[] any attempt by a law enforcement officer to literally stop an individual to question the person.” *People v. Blake*, 65 V.I. 13, 16 (Super. Ct. 2012). Thus, a *Terry* stop usually occurs in a public place or roadway. “But if an officer restrains an individual’s liberty, ‘by means of physical force or show of authority,’ Fourth Amendment protections attach.” *Pemberton*, 2019 VI Super 118 at ¶ 18 n.3 (quoting *Terry*, 392 U.S. at 19 n.16).

¶11 “The concept of reasonable suspicion has not been ‘reduced to a neat set of legal rules.’” *Id.* at ¶ 19 (quoting *Cannergeiter*, 65 V.I. at 131). And determining whether suspicion is reasonable “‘is often . . . imprecise . . .’” *Id.* (citation omitted). But considerable deference is given to the officer’s determination, and reasonable suspicion “‘is a less demanding test than probable cause.’” *Id.* (citation omitted). The officer still must articulate particularized objective facts, however, that in his experience support his belief “‘that criminal activity is afoot.’” *Id.* at ¶ 55 (citation omitted). And “[w]hen reviewing for reasonable suspicion, courts consider facts of individual significance in the totality of the circumstances, in light of the officer’s experience and specialized training.” *Id.* at ¶ 20 (footnote omitted) (quoting *People v. Murrell*, 56 V.I. 796, 807 n.8 (2012)). Relevant factors include: “(1) presence in high crime area; (2) ‘nervous, evasive or furtive behavior’; and (3) behavior that conforms to an officers’ specialized knowledge of criminal activity.” *Id.* (brackets and citation omitted).

¶12 Here, the Defendants correctly argue that the detection of smell alone cannot create reasonable suspicion. As this Court has held, “‘a broadly diffuse and undistinguished marijuana odor

will not automatically provide the necessary particularity to establish reasonable suspicion.” *Cannergeiter*, 65 V.I. at 135 (quoting *United States v. Ramos*, 443 F.3d 304, 309, 47 V.I. 755, 760 (3rd Cir. 2006)). But public use of marijuana continues to be illegal in the Virgin Islands and marijuana use may still supply reasonable suspicion to conduct an investigatory stop. *Cf. People v. Looby*, 68 V.I. 683, 698-99 (2018) (“[A]lthough 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 . . . constitutional frisk and seizure inquiry . . . 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.”). Moreover, individual factors, which may be innocent by themselves if taken alone, when “taken together may warrant further investigation.” *Pemberton*, 2019 VI Super 118 at ¶ 20 (brackets and citation omitted). And here, three individuals were in an area where public and private space overlapped. The defendants were within the curtilage inches from the public roadway, adjacent to a public sidewalk, and in public view. The officers initially observed them from their vehicle in a public road while in plain view.

¶13 The Defendants contend that, once the officers did not find anyone smoking marijuana, the officers should have moved on. But the Defendants’ arguments proceed from a fundamental misunderstanding of *Terry* stops. The justification for an investigative stop is not that a crime has occurred but that “a person has committed *or is about to commit a crime*.” *Id.* at ¶ 49 (emphasis added) (citation omitted)). Here, Huertas had experience in identifying marijuana. The officers drove by the house and observed a cloud of smoke above three individuals. It was nighttime. Shots had been fired in the area the night before. As the officers approached, one of the individuals made a furtive gesture, tossing something away. Once the officers approached, the firearms were observed. They asked the Defendants if the Defendants had a license to possess the firearms and did not receive an answer. Although the Defendants contend that the guns cannot supply reasonable suspicion because the officers did not know if the guns were licensed, the totality of the circumstances supports reasonable suspicion to perform an investigative stop and seize the firearms and detain them until the officers could determine whether the Defendants possessed the

firearms illegally.⁶ Under these circumstances, the Court cannot conclude that the officers acted unreasonably.

B. Evidence was in Plain View

¶14 The People further argue that the seizure was reasonable because the firearm was in plain view, a recognized exception to the warrant requirement. *See Gumbs v. People*, 64 V.I. 491, 508 (2016) (“[W]arrantless searches are constitutionally invalid—subject to well-established exceptions to the warrant requirement. Two such exceptions are the ‘Terry’ stop and the ‘plain view’ doctrines.” (citation omitted)).

Under this doctrine, the warrantless seizure of incriminating evidence is permissible when three conditions are met: (1) the officer did not violate the Fourth Amendment in arriving at the place from which the evidence could be plainly viewed; (2) the item’s incriminating character must be immediately apparent; and (3) the officer must have a lawful right of access to the object itself.

Heath, 63 V.I. at 93 (citing *Horton v. California*, 496 U.S. 128, 136-137 (1990)). “The plain-view doctrine is grounded on the proposition that once police are lawfully in a position to observe an item firsthand, its owner’s privacy interest in that item is lost.” Absent probable cause, however, the officer cannot manipulate or disturb the object in order to discover its incriminating character.” *People v. Santana*, 63 V.I. 25, 31 (Super. Ct. 2014) (quoting *Illinois v. Andreas*, 463 U.S. 765, 771 (1983)).

¶15 The Defendants counter that, because of heightened expectations of privacy for homes, including the curtilage of the home, the plain view exception does not apply and their right to privacy was violated.⁷ The curtilage of one’s home does generally enjoy the same protections as the home. But police activity “that does not compromise any legitimate interest in privacy is not a search subject to the Fourth Amendment.” *United States v. Murray*, 53 V.I. 831, 850 (D.V.I. 2010) (citing *Illinois v. Caballes*, 543 U.S. 405, 408 (2005)). “[T]he Fourth Amendment protects people, not places.

⁶ Defendants argued that the seizure began when Huertas asked what they were doing. However, a “seizure does not occur simply because a police officer approaches an individual and asks a few questions.” *United States v. Murray*, 53 V.I. 831, 852 (D.V.I. 2010) (quoting *United States v. Crandell*, 554 F.3d 79, 84 (3d Cir. 2009)).

⁷ The People argued at the hearing that neither Defendant proved they had standing under the Fourth Amendment to make their privacy argument. It is true that neither Defendant established that they resided at 34B Hospital Street. However, the Defendants do not have the burden on a motion to suppress a warrantless search or seizure. Moreover, the police report states that Joseph lived at the house. Thus Benjamin, who lives elsewhere, clearly was his guest.

What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection." *Katz v. United States*, 389 U.S. 347, 351 (1967). Thus, not all private property is shielded from the Fourth Amendment. Take, for example, the front door of a person's home. "Officers are allowed to knock on a residence's door or otherwise approach the residence seeking to speak to the inhabitants just as any private citizen may." *Berkley*, 70 V.I. at 666 (brackets omitted) (quoting *Simmonds*, 53 V.I. at 558). And if the front door of one's home can be approached by officers without a warrant, officers can also approach the porch, which precedes the door, without a warrant. Therefore, the Defendants' privacy argument is rejected.

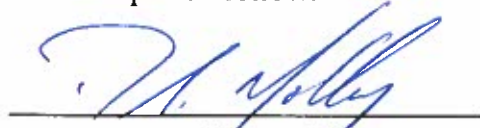
¶16 But more importantly, the officers had a right to be in the public road. Approaching the porch did not violate the Fourth Amendment. And upon approaching, they shined a flashlight and observed a firearm. While the officers could shine the flashlight for their own safety, the use of the flashlight did not transform into a search. *Cf. Marshall v. United States*, 422 F.2d 185, 189 (5th Cir. 1970) ("When the circumstances of a particular case are such that the police officer's observation would not have constituted a search had it occurred in daylight, then the fact that the officer used a flashlight to pierce the nighttime darkness does not transform his observation into a search. Regardless of the time of day or night, the plain view rule must be upheld where the viewer is rightfully positioned, seeing through eyes that are neither accusatory nor criminally investigatory. The plain view rule does not go into hibernation at sunset."). Huertas saw the firearm through the cinder block with the aid of the flashlight. It was in plain view and the officers could have seized the firearms for safety purposes. *Cf. Thomas v. People*, 63 V.I. 595, 609 n.5 (2015). Not as evidence of a crime, however, *cf. Gumbs*, 64 V.I. at 509, because possession of a firearm, in and of itself, is not a crime. Possession of an unlicensed firearm is a crime. But once the officers asked the Defendants if the firearms were licensed and learned that they were not, the officers could seize them at that point. Thus, the plain view exception to the Fourth Amendment is also applicable here. *See id.*; accord *Thomas*, 63 V.I. at 609 n.5.

IV. CONCLUSION

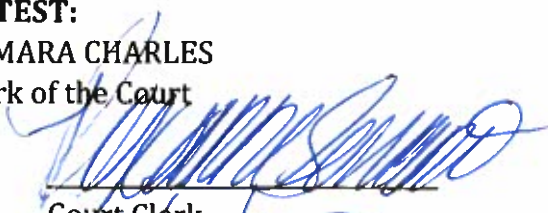
¶17 For the reasons set forth above, the Court finds that, under the totality of the circumstances, the officers had reasonable suspicion to perform an investigative stop. Moreover, the firearms were not concealed within the porch or the home. Instead, both officers saw them in plain view. and there

is no expectation of privacy for items that can be seen by the public in plain view. Accordingly, the motions to suppress will be denied. Orders consistent with this Opinion follow.

Date: March 10, 2020


ROBERT A. MOLLOY
Judge of the Superior Court

ATTEST:
TAMARA CHARLES
Clerk of the Court

By: 

Court Clerk

Dated: 