

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

PEOPLE OF THE VIRGIN ISLANDS,

PLAINTIFF,

v.

KERMIT TORRES,

DEFENDANT.

SX-14-CR-457

CHARGES: 14 V.I.C. § 2253(a) (two counts); 23 V.I.C. § 470(a) (two counts).

ORDER

FOR THE REASONS stated in the accompanying memorandum opinion, it is hereby

ORDERED that Defendant Kermit Torres's Motion to Suppress, filed May 6, 2015, is **GRANTED in part and DENIED in part**. It is further

ORDERED that evidence of the second firearm and of the magazine clip obtained from the Defendant's vehicle on or about December 11, 2014 are **SUPPRESSED** as the result of an illegal search.

DONE and so ORDERED this 13th day of August, 2015.

ATTEST:

Estrella H. George
Acting Clerk of the Court

By: _____

Court Clerk Supervisor

Dated: 8/13/15


HAROLD W.L. WILLOCKS
Administrative Judge of the Superior Court

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MEMORANDUM OPINION

BEFORE THE COURT is Defendant Kermit Torres's motion to suppress evidence seized from his vehicle following a stop by the police. The People of the Virgin Islands responded in opposition to Torres's motion. For the reasons stated below, Torres's motion will be granted in part and denied in part and one firearm and the magazine clip seized from Torres's vehicle suppressed.

FACTUAL AND PROCEDURAL BACKGROUND¹

On Friday, December 12, 2014, just before midnight, Wilfredo Beato was at the Time Square Bar in Christiansted when a fight broke out between three Hispanic males. During the fight one of the men, later identified as Kermit Torres, was cut on his forehead. Beato walked Torres outside the bar after the fight was over and advised him to go home. Torres left, but said he would be back to kill everyone. He then drove off in a black Nissan Infinity but doubled back to remind Beato that he would be back to kill everyone.

Sometime later, Beato left to go home. On the way, a black Chevy Tahoe attempted to overtake him near the Richmond Post Office. Beato continued driving until just past the next intersection, near the Golden Rock Shopping Center, where the Tahoe overtook him and fired several shots into his car, causing him to veer off the road and crash into the fence surrounding the federal courthouse. Beato called 911 and the 911 Emergency Call Center alerted the Virgin Islands Police Department to a report

¹ This background is taken from the testimony and photographs submitted at the June 26, 2015 hearing.

of shots fired in the Estate Richmond area. Officer Jerome Ashe and Officer Rolando Huertas were dispatched to investigate. They came upon a black Toyota RAV 4 vehicle operated by Wilfredo Beato. Beato informed them about what had happened at the Time Square Bar with Torres. He also informed them about a phone call he received while waiting for the police to arrive: the caller told Beato that someone was firing shots around the Time Square Bar.

While Officers Ashe and Huertas were talking with Beato, another Virgin Islands police officer, David Stevens, Sr., was approaching the Time Square area. The Time Square area in Christiansted is bordered by King Street on the north and Company Street on the south with Market Street running from south to north and crossing both King and Company Streets. Officer Stevens had just turned left right off of Company Street and on to Market Street heading north. The black Nissan Infinity was in front of him on Market Street near intersection with King Street. Officer Stevens observed the driver of the Infinity shouting obscenities in Spanish at people outside the Time Square Bar. Because the Infinity was blocking traffic, Officer Stevens turned on his police vehicle's lights and siren. His intent at first was to get Infinity to move. But once the police lights came on and the Infinity turned left onto King Street heading away from downtown Christiansted, Officer Stevens noticed that the car did not have a license plate. He pursued and reported the pursuit over the police radio.

When Officer Ashe heard the report from Officer Stevens, he left the scene of Beato's car and drove toward Christiansted to join Stevens. Officer Stevens followed the Infinity out of Christiansted town, past the former Charles Harwood Memorial Hospital and down a side road leading to the buildings of the former Ralph M. de Chabert housing community. He had his lights and sirens on. Officer Ashe joined up as both cars were turning down to the abandoned de Chabert buildings. The Infinity then made a second turn, onto a road that ends at the entrance to the Virgin Island Water & Power Authority's (WAPA) facility in Richmond. Near the end of the road the Infinity made a U-turn. Officer Stevens also made a U-turn. Because Office Ashe was two car backs, following behind Officers

Stevens and the Infinity, he angled his vehicle to block the Infinity once it turned around. The Infinity tried reversing again but rammed into Officer Stevens's vehicle and came to a stop.

The officers approached the Infinity and, with weapons drawn, opened the driver's side door and extracted the driver. The driver was later identified as Kermit Torres. Torres was placed on the ground, with his hands behind his back. Officer Ashe handcuffed him. While kneeling down on the ground outside Torres's car, Ashe saw a firearm under the driver's seat. He also noticed a live ammunition round on the front passenger seat. One of the officers later opened the back passenger door on the driver's side and saw a second firearm sticking out from under the driver's seat. Officer Ashe asked Torres if he had a license for the firearms. Torres said he did not. The police arrested Torres for unauthorized possession of a firearm and transported him to the police station in Frederiksted for booking. While at the police station, Officer Ashe questioned Torres about the fight with Beato and the threats he allegedly communicated to Beato.

Torres appeared before the next morning before the undersigned judge, sitting in Magistrate Division, for an advice of rights hearing on charges of unauthorized possession of a firearm, possession of ammunition, failure to report a firearm, alteration of identifying marks of a weapon, disturbance of the peace by threats, and third-degree assault. The People of the Virgin Islands subsequently brought formal charges by criminal information filed on December 31, 2014. Torres was arraigned before the Magistrate Division that same day and released on bail. The case was subsequently assigned to the undersigned judge for further proceedings.

On May 6, 2015, Torres filed a motion to suppress the evidence obtained from his arrest as having been obtained in violation of his constitutional rights. The People filed a response in opposition on May 7, 2015. The Court held a hearing on June 26, 2015. Virgin Islands Police Officers Jerome Ashe and David Stevens, Sr. testified. Photographs of the scene, including Torres's vehicle, were admitted into evidence. Jury selection and trial are currently scheduled for August 31, 2015.

DISCUSSION

“The Fourth Amendment prohibits unreasonable searches and seizures.”² *Nicholas v. People*, 56 V.I. 718, 738 (2012). In general, “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.* (quoting *Katz v. United States*, 389 U.S. 347, 357 (1967)). Seizures too must be reasonable. “Whenever a police officer accosts an individual and restrains his freedom to walk away, he has seized that person, and the Fourth Amendment requires that the seizure be ‘reasonable.’” *Blyden v. People*, 53 V.I. 637, 647 (2011) (quoting *Brown v. Texas*, 443 U.S. 47, 50 (1979) (alteration omitted)). But “there is no *per se* rule that pointing guns at people, or handcuffing them, constitutes an arrest.” *Id.* at 648 (quoting *Baker v. Monroe Twp.*, 50 F.3d 1186, 1193 (3d Cir. 1995)). Rather, “police officers may take measures ‘reasonably necessary to protect themselves and maintain the status quo’” “during an investigative stop.” *Id.* (quoting *United States v. Hensley*, 469 U.S. 221, 235 (1985)). What measures are reasonable will depend “upon all of the circumstances surrounding the search or seizure and the nature of the search or seizure itself.” *United States v. Montoya de Hernandez*, 473 U.S. 531, 537 (1985).

Here, there is no dispute that the police did not obtain a warrant before stopping Torres or searching his vehicle. Therefore, the prosecution bears the burden of proving that both the stop and the search fall within one or more exceptions to the “warrant requirement.” *Nicholas*, 56 V.I. at 738. One recognized exception to the warrant requirement is a traffic stop. Although the police do not need a warrant “to stop an automobile” and conduct a brief investigation, the police must nonetheless “have probable cause to believe that a traffic violation has occurred” before stopping a vehicle. *People v. Magras*, 54 V.I. 3, 11 (Super. Ct. 2010) (citing *Whren v. United States*, 517 U.S. 806, 810 (1996)). Like any stop by the police, traffic stops must also be reasonable under the circumstances. *Id.* (quoting

² The Fourth Amendment applies in the Virgin Islands pursuant to Section 3 of the Revised Organic Act of 1954. *See* 48 U.S.C. § 1561.

Brendlin v. California, 551 U.S. 249, 255 (2007)).

In his motion, Torres focuses his challenge on the information Beato provided to Officer Ashe. Torres argues that “[t]he information that Officer Ashe possessed at the time of Torres’ arrest was insufficient for the stop and the arrest.” (Def. Mot. to Suppress 3, filed May 6, 2015.) The report of shots fired from a black Infinity in the Time Square area was conveyed to Officer Ashe by Beato who, in turn, had received the information over the phone from someone else. This unknown caller, Torres claims, “could be classified as . . . an anonymous [t]ip[s]ter.” *Id.* Since the tipster is unknown, Torres contends that the Court must consider whether the information the tipster gave was reliable. Citing *United States v. Torres*, 534 F.3d 207, 210 (3d Cir. 2008), Torres argues that none of the multiple factors identified in that case support a finding of reliability in this case. Therefore, the Court should find that the police lacked probable cause to stop him and suppress the evidence seized from his car. However, Torres’s concern is misplaced.

Officer Ashe stated in his January 24, 2015 affidavit, which was attached to the charging document, that Beato told him that shots were fired from a black Nissan Infinity in the Time Square area. He further stated that Beato learned that information from a phone call from another individual. However, it was Officer Stevens who first followed the black Nissan Infinity and he did not follow the vehicle based on a “tip” from Beato. Instead, Officer Stevens followed the Infinity because it did not have a license plate and refused to pull over after he flashed his police vehicle’s lights. Thus, Torres’s concern about the reliability of any information Beato received over the phone is of no moment here. What’s more, Officer Ashe did not testify that he learned about shots fired outside the Time Square bar from Beato who in turn received it by phone. Rather, his testimony was that Beato told him about the bar fight Torres got into, about Torres’s threats to come back and kill everyone, and also what kind of car Torres was driving. Once Officer Ashe heard a report over the police radio (presumably by Officer Stevens) about the same kind of car blocking traffic near Time Square, Officer Ashe left the

scene of Beato's car and proceeded toward Christiansted town where he met up with Torres being pursued by Officer Stevens. Any tip Beato received is not relevant to Torres's subsequent arrest.

Additionally, Torres's argument regarding the reasonableness of the stop of his vehicle also lacks merit. Officer Stevens testified that when he activated the lights for his police car he noticed that the Infinity did not have a license plate. Operating a vehicle upon the public highways without a license plate is a violation of the law. *See* 20 V.I.C. § 331 ("no motor vehicle . . . shall be operated upon the public highways of the Virgin Islands unless . . . it is equipped with license plates"). As the People note in their opposition, this gave the police "abundant reasonable suspicion to stop the suspect vehicle." (People's Resp. to Def.'s Mot. to Suppress 4, filed May 7, 2015.) *See Whren*, 517 U.S. at 812-814. Therefore, Torres's broader challenge to the overall constitutionality of the stop of his vehicle is also unfounded. But even though the basis for stopping Torres may have been constitutional, and even though Torres's motion challenged only the reliability of the anonymous tipster, the Court cannot overlook the broader concerns he brought out at the hearing concerning how the police seized evidence from his vehicle. The testimony shows that the officers' actions were not fully compliant with the law.

From inside Torres's vehicle the police seized two firearms and ammunition (a live round on the front passenger seat and a magazine clip under the driver's seat). Torres moves to suppress all items. The People counter that the seizure of these items was justified because the police had received reports of shots fired from a car that resembled the car Torres was driving. The People also claim that because Torres was driving a vehicle without a license plate and because he fled when the police pursued him – this all combined to "gave the officer additional probable cause to detain him to investigate." *Id.* And once "[t]he police officers observed the firearms from a legal vantage point in plain view on the floorboard of the defendant's car," it gave them the authority to arrest him for unauthorized possession of a firearm. *Id.* at 5. But the testimony of the officers does not entirely support these claims.

Officer Ashe testified that after he and the other officers approached Torres's car and extracted him from the driver's side, they then placed him face down on the ground with his hands behind his back. Officer Ashe proceeded to handcuff Torres, kneeling on the ground alongside the car. The door to the driver's side of the car was open at that point. Officer Ashe testified that while he was on the ground he observed a firearm underneath the driver's seat. The firearm depicted in People's exhibits 6 through 8 was seen, according to Officer Ashe, in plain view (albeit from the vantage point of someone kneeling down alongside a car). Officer Ashe also testified that the ammunition was seen in plain view on the front passenger seat.

Under the plain view exception, law enforcement officers can seize items in plain view without a warrant if the officers are lawfully in the place where the items are plainly viewable and can further access the items lawfully. *See Horton v. California*, 496 U.S. 128, 136-37 (1990). In other words, if an officer has the authority to be in a specific place he can then seize an item that he sees in plain view but only if the incriminating nature of the item is "immediately apparent" and only if it is discovered "inadvertently." *Texas v. Brown*, 460 U.S. 730, 743 (1983). Here, Officer Ashe was on a public road, having joined fellow officers in pursuing a vehicle that had refused to pull over. And because Torres had refused to pull over but instead fled, and further rammed Officer Stevens's vehicle while trying to drive away, the officers were justified in handcuffing Torres both to detain him and to protect themselves. Thus, Officer Ashe was lawfully in the place where the first firearm and the ammunition was discovered. While the incriminating nature of the firearm was not apparent immediately—since "it is not a crime to possess a firearm in the Virgin Islands," *United States v. Ubiles*, 224 F.3d 213, 214 (3d Cir. 2000)—it became apparent once Officer Ashe asked Torres if he had a license for the firearm and Torres told him no. Possession of an unlicensed firearm is a crime in the Virgin Islands. *See* 14 V.I.C. § 2253(a). Therefore, the seizure of the first firearm was lawful.

But the seizure of the second firearm and the magazine clip was not. Officer Ashe testified that he saw the firearm depicted in People's exhibit 9 (which was admitted only to show the location) after seeing the firearm depicted in People's exhibits 6 through 8. He further testified that another officer—he did not recall who—had opened the back passenger door behind the driver's side. There, shoved up underneath the seat they discovered a second firearm and a magazine clip. Officer Ashe testified that he observed the second firearm and magazine clip in plain view. But he also testified that he could not recall which officer was the first to see the second firearm and repeatedly confirmed on cross-examination that he and the other officers had “searched” Torres's vehicle.

Both the exhibit the People presented and Officer Ashe's own testimony show that the second firearm and the magazine clip were not seen in plain view. Neither officer testified to any exigent circumstances that would have authorized searching the vehicle for their protection. In fact, Officer Ashe testified that Torres was already in handcuffs at the time and that there was no risk to him or other officers. There simply was no reason for any officer to open the back door to Torres's vehicle and search further, particularly since the police could have impounded and towed Torres's vehicle. *Accord Allen v. People*, 59 V.I. 631, 636-37 (2013). Once impounded, the second firearm and the magazine clip would most likely have been discovered during an inventory search. *See People v. Santana*, SX-12-CR-085, 2014 V.I. LEXIS 40, *15 (V.I. Super. Ct. July 8, 2014) (observing that “the Virgin Islands Police Department has an inventory search procedure that it follows when cars are towed to a police impoundment lot” whose “purpose . . . is accountability”). Unlike in *Santana*, however, where the People at least argued that suppression was not warranted as the evidence would have been discovered inevitably during an inventory search, *see id.* at *13, here the People never raised the “inevitable discovery” exception. And the burden is on them when a search is conducted without a warrant. They failed to carry that burden here concerning the second firearm and the magazine clip.

When courts conclude that the police have obtained evidence “as a result of an unconstitutional search, the exclusionary rule requires that the fruits of that search be excluded from evidence at trial.” *Castillo v. People*, 59 V.I. 240, 255-56 (2012) (quoting *Simmonds v. People*, 53 V.I. 549, 561 (2010)). But “[e]vidence will not be excluded as ‘fruit’ unless the illegality is at least the “but for” cause of the discovery of the evidence. Suppression is not justified unless the challenged evidence is in some sense the product of illegal governmental activity.” *Brown v. People*, 56 V.I. 207, 221 (2012) (quoting parenthetically *Segura v. United States*, 468 U.S. 796, 815 (1984)). Here, the illegal search is the “but for” cause for discovering the second firearm and the magazine clip. Ergo, the second firearm and the magazine clip must be suppressed as the fruit of illegal searches.

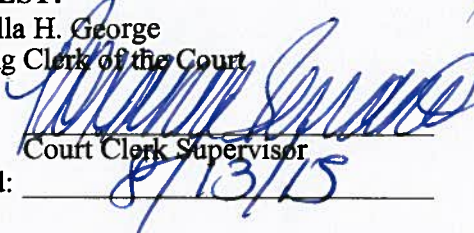
CONCLUSION

For the reasons stated above, the Court rejects Torres’s challenge to the constitutionality of the stop. The People had a legitimate basis for stopping the vehicle. He was driving a car without a license plate, which is a violation of Virgin Islands law. The People also showed that the police were authorized to detain Torres temporarily following the stop and subsequently discovered one firearm in plain view. But the People failed to show that the second firearm or the magazine clip were seen in plain view or that some other exception to the warrantless search requirement applies. Accordingly, both must be suppressed. An appropriate order follows.

ATTEST:

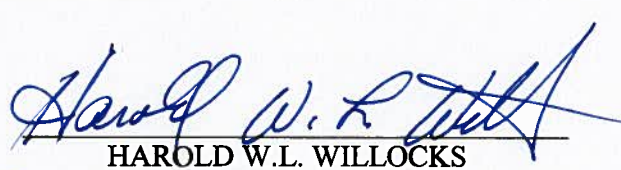
Estrella H. George
Acting Clerk of the Court

By:


Court Clerk Supervisor

Dated:

8/13/15


HAROLD W.L. WILLOCKS
Administrative Judge of the Superior Court