

NOT PRECEDENTIAL - NOT FOR PUBLICATION

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

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 v.) CRIM. NO. 2004-0096
)
 WILLIAM HODGE, Jr. and AKUMBA)
 HARVEY,)
 Defendants.)
 _____)

APPEARANCES

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MEMORANDUM OPINION

Finch, Chief Judge

This matter comes before the Court on Defendants William Hodge, Jr. ("Hodge") and Akumba Harvey's ("Harvey") (collectively "Defendants") Motion to Suppress Physical Evidence.

Hearing on Defendants' motions was held on July 5, 2005. For the reasons expressed below, this Court will deny Defendants' motion.

I. Evidence

On March 26, 2004, police officers Tehran Parris ("Parris"), Felix Ortiz ("Ortiz") and R. Richardson were conducting a traffic violation check point on Ralph De Chabert road in the vicinity of Building 16. Officer Paris testified that he witnessed a red vehicle approaching the check point traveling at a high rate of speed and that the vehicle had only one head light and no front license plate. Parris also testified that he observed that the driver and passenger were not wearing their seatbelts. Parris subsequently stopped the vehicle.

Hodge, who was driving the vehicle, was asked to produce his driver's license and vehicle registration. Parris testified that Hodge, before producing the requested documents, exited the vehicle leaving the driver's side door open.¹ Officer Parris who was on the passenger side of the vehicle was then advised by Officer Ortiz, via hand signal, that two pieces of crack cocaine could be seen in the vehicle's driver's side pocket. Parris testified that for the officers' safety he then asked the front seat passenger, Dennis Graham, and rear seat passenger, Defendant Harvey, to exit the vehicle. Paris testified that while he was standing at the rear passenger side of the vehicle, he immediately observed the nozzle of a bright chrome handgun sticking out from under the front passenger seat of the vehicle. Parris yelled "gun" to his partners Ortiz and Richardson.

Hodge, Harvey and Graham were then patted down. While patting down Harvey, Parris

¹ Officer Parris' testimony does not make clear whether Hodge exited the vehicle voluntarily or at the direction of the officers. However, as discussed below, whether Hodge was ordered out of the vehicle or exited voluntarily is immaterial to the Court's findings.

observed a small ziplock bag containing a dime bag of a green leafy substance suspected to be marijuana sticking out of his pants pocket. Parris retrieved the ziplock bag from Harvey's right front pants pocket and found it to contain several small dime bags each filled with a green leafy substance.

II. Discussion

A. Legal Standard

The Fourth Amendment to the United States Constitution protects “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.”² Warrantless searches and seizures, subject only to a few specifically established and well-delineated exceptions, are unreasonable. Horton v. California, 496 U.S. 128, 133 & n.4 (1990).

Moreover, where a search is done without a warrant, the burden shifts to the government to show, by a preponderance of the evidence, that the warrantless search was conducted pursuant to one of the exceptions to the warrant requirement. United States v. Herrold, 962 F.2d 1131, 1137 (3d Cir.1992). With these standards in mind, the Court turns to consideration of Defendants' suppression motion.

B. Valid Automobile Stop

Law enforcement officers may stop an automobile when they have a reasonable suspicion to believe that a traffic violation has occurred. Pennsylvania v. Mimms, 434 U.S. 106 (1977). In this case, the evidence provides that Officer Parris stopped the vehicle because he observed it traveling at a high rate of speed with only one head light and no front license plate. Accordingly,

² The Fourth Amendment has been extended to the United States Virgin Islands by Section 3 of the Revised Organic Act of 1954, 48 U.S.C. § 1561, entitled “Bill of Rights.”

the Court finds that the officer's stop of the vehicle was justified because of the observed traffic violations.

Further, under Mimms, an officer may as a matter of course order the driver to exit a lawfully stopped vehicle. Id. Although the testimony in this case does not make clear whether Hodge exited the vehicle voluntarily or was ordered out of the vehicle, the Court's conclusion is the same regardless. Hodge's constitutional rights were not violated.

Additionally, the Mimms rule has been extended to passengers. Maryland v. Wilson, 519 U.S. 408, 410 (1997). Thus, Officer Parris would have acted lawfully even if he had ordered the passengers out of the vehicle prior to the observance of the crack cocaine. In sum, the Court finds that the Defendants' Fourth Amendment rights were not violated by the automobile stop or circumstances of the driver and passengers exit from the vehicle.

C. Plain View Justification

The "plain view" doctrine permits the warrantless seizure of evidence in a law enforcement officer's plain view when (1) the officer seizing the evidence "did not violate the Fourth Amendment in arriving at the place from which the evidence could be plainly viewed," (2) the incriminating nature of the evidence is "immediately apparent," and (3) the officer has "a lawful right of access to the object itself." Horton v. California, 496 U.S. 128, 136-37 (1990).

In this matter, the evidence and supporting case law cited above support the finding that the officers did not violate the Fourth Amendment in arriving at the place from which the evidence could be viewed as they were conducting a routine traffic stop. Second, the testimony provides that the officers observed crack cocaine on the driver's side pocket of the vehicle and the nozzle of a gun protruding out from under the passenger's seat. Thus, the incriminating nature of the evidence was

“immediately apparent.”

With respect to the third prong, the Court finds that the officers, having viewed the contraband in plain sight, had probable cause to then search the vehicle. Thus, the officers subsequent entry into the vehicle to retrieve the cocaine and handgun was permissible. See United States v. McCoy, 824 F.Supp. 467, 476 (D. Del.1993) (citing United States v. Ross, 456 U.S. 798 (1982)).³ Accordingly, the Court finds that the officers had a lawful right of access to the contraband.

D. Terry Pat Down Justification

Under Terry v. Ohio, 392 U.S. 1 (1968), officers may conduct a “pat-down” search for the protection of an officer investigating suspicious behavior of persons he reasonably believes to be armed and dangerous. In this matter, the officers viewed crack cocaine and the nozzle of a handgun prior to conducting the pat-down search of the Defendants. Accordingly, the Court finds that the officers had the necessary reasonable suspicion to conduct the search for their own safety.

Finally, the evidence provides that while conducting the pat-down search of Defendant Harvey, Officer Paris observed a small ziplock bag containing a dime bag of a green leafy substance suspected to be marijuana sticking out of his pants pocket. Thus, under the plain-view doctrine, Parris’ subsequent seizure of the contraband was not in violation of Defendant Harvey’s Fourth Amendment rights.

III. Conclusion

³ See also United States v. Crespo, 868 F.Supp. 79, 84 (M.D. Pa. 1980) distinguishing Horton which involved the seizure of contraband in a home that came about because a search was authorized by a warrant from cases in which the seizure was pursuant to a valid traffic stop.

For the foregoing reasons, the evidence seized in this matter will not be suppressed.

Defendants' motion will therefore be denied

ENTER:

DATED: July 6, 2005

RAYMOND L. FINCH
CHIEF U.S. DISTRICT JUDGE

ATTEST:
Wilfredo F. Morales
CLERK OF THE COURT

By: _____
Deputy Clerk

cc: Honorable George W. Cannon
Denise Hinds-Roach, AUSA
Darwin K. Carr, Esq.
Thurston McKelvin, FPD
Margaret Brown