

FOR PUBLICATION

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

UNITED STATES OF AMERICA,)
)
 Plaintiff,) Crim. No. 2004-142
)
 v.)
)
 KEVIN ANTHONY LAVILLE,)
)
 Defendant.)
)
)
)
 _____)

ATTORNEYS:

Alphonso Andrews, Esq.
For the Government

Natalie Nelson Tang How, Esq.
For Defendant Laville

Memorandum Opinion

Gómez, J.

This matter comes before the Court on Defendant Kevin Anthony Laville's ("Laville") motion to suppress out-of-court identifications. Laville also seeks to suppress evidence obtained as a result of his arrest by the Virgin Islands Police Department ("VIPD") and the Department of Homeland Security/Immigration and Customs Enforcement ("ICE"). A hearing on this motion was held on August 16, 2005.

I. FACTS

The following facts pertinent to this motion were adduced at the August 16, 2005, hearing. In the morning hours of August 17, 2004, Officer Aldemar Santos of the VIPD responded to a call from a citizen who informed the VIPD that a boat had run aground on a reef in the harbor in Christiansted, St. Croix. The caller indicated that illegal aliens were exiting the boat.

Upon arriving at the scene, Officer Santos noticed a boat had indeed run aground. Some people were still on the boat, and four individuals were seated on the Christiansted boardwalk. When the four individuals were questioned, they identified themselves as Cubans and indicated that other aliens were in the vicinity. A citizen then joined Officer Santos and stated that other illegal aliens were in the area. Officer Santos apprehended the four self-identified Cubans and, after other officers arrived on the scene, proceeded with the other officers down the boardwalk. Rounding a corner, they saw three men sitting. Upon noticing the officers, the men stood and began walking away quickly. Officer Santos left the other officers and proceeded down a side street while the other officers continued to proceed after the three men.

After hearing the other officers shout "he's running," Officer Santos entered a shopping area where he recognized one of

the three men who had earlier walked away from the officers. On seeing Officer Santos, the man turned and began to run. However, the man stopped after Officer Santos shouted "stop, police." Officer Santos then handcuffed the man, who was later identified as Laville. After being handcuffed, Laville was taken to a VIPD car. On the way to the car, he told Officer Santos that he was from Dominica, and that he was with the crew of the boat that had run aground.

Officer Santos took Laville, along with the others apprehended at the scene, to the police station. Some time later, the VIPD turned these individuals over to agents with the ICE. The boat was turned over to the United States Coast Guard.

The day following the arrest, during a video-recorded interview with ICE officers, the four Cubans reviewed a photo array comprised of photos of all thirty-two individuals on board the vessel and identified Laville and Carter Magloire ("Magloire") as operators of the vessel. ICE also video-recorded an interview with Laville. During the interview, Laville stated that he was from Dominica, and that he had helped drive a sailboat from Dominica to St. Croix.

At an August 26, 2004, preliminary hearing, a magistrate judge found probable cause that an offense was committed and that the defendants, Laville and Magloire, committed it.

Subsequently, during the course of an ICE investigation, two passengers on the vessel reviewed the photo array and identified Laville and Magloire as crew members. Three other passengers also reviewed the photo array and identified Laville as a crew member during a video-recorded interview with ICE officers.

Laville and Magloire were indicted on September 14, 2004, and charged with bringing in and harboring certain aliens.¹ Laville has moved to suppress the boat passengers' statements identifying him as one of the vessel's operators. Laville also contests his arrest by the VIPD and his subsequent arrest by the ICE, and he seeks to suppress "all written and oral statements" he made after either of his arrests.

II. DISCUSSION

A. What Constitutes an Arrest

The Fourth Amendment protects citizens "against unreasonable searches and seizures." U.S. Const., amend. IV.² Arrests are considered seizures of persons. *See Dunaway v. New York*, 442

¹ Specifically, the September 14, 2004, indictment charges the following three counts:

Count I: conspiracy to bring in illegal aliens, in violation of 8 U.S.C. § 1324(a)(1)(A)(i) and (v)(1)
Count II: bringing in illegal aliens for financial gain, in violation of 8 U.S.C. § 1324(a)(2)(B)(ii) and 18 U.S.C. § 2
Count III: bringing in illegal aliens, in violation of 8 U.S.C. 1324(a)(1)(A)(I).

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."

U.S. 200, 207 (1979). An arrest occurs "whenever a police officer accosts an individual and restrains his freedom to walk away." *Terry v. Ohio*, 392 U.S. 1, 16 (1968). The Supreme Court has distinguished between seizures where an officer restrains an individual's freedom for an extended period and quick "stop and frisks" that do not result in a significant restraint on freedom. *Id.* Where a stop is not brief, such as where an individual is handcuffed, led to a police car, then taken to a police station, an arrest has been effected. *Dunaway*, 442 U.S. at 212.

Arresting officers must have probable cause to believe that the arrested individual committed a crime before they may legally arrest an individual. *See Kaupp v. Texas*, 538 U.S. 626, 629-30 (2003). Federal officers must have probable cause independent of the local authorities to effect a constitutionally valid seizure of a person already seized by local police officers. *See, e.g., United States v. Sanchez*, 509 F.2d 886, 889 (6th Cir. 1975) (holding that federal agents must obtain separate warrants from state authorities even where state and federal authorities simultaneously search a location pursuant to a state warrant). Absent probable cause, evidence obtained from an arrest cannot be used at trial to prove the defendant's guilt. *See Stone v. Powell*, 428 U.S. 465, 482-89 (1976) (describing development of the exclusionary rule, which proscribes courts from using

evidence obtained from illegal searches and seizures in criminal trials); see also *Mapp v. Ohio*, 367 U.S. 643, 655 (1961) (incorporating exclusionary rule to state proceedings).

Probable cause is determined by viewing the totality of the circumstances to see whether, at the moment of the arrest, "the facts and circumstances within [the police officers'] knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the petitioner had committed or was committing an offense." *Beck v. Ohio*, 379 U.S. 89, 91 (1964); see also *Brinegar v. United States*, 338 U.S. 160, 175-76 (1949) (holding that probable cause exists where the facts and circumstances as they exist at the time of arrest support a finding that a crime has been or is being committed).

Warrantless searches and seizures are considered per se unreasonable unless they fall under one of a few specialized exceptions. See *Horton v. California*, 496 U.S. 128, 133 & n.4 (1990). Where the seizure is done without a warrant, the government has the burden of proving that the seizure falls into one of these exceptions. *United States v. Herrold*, 962 F.2d 1131, 1137 (3d Cir. 1992).

Generally, local police may arrest those suspected of federal offenses without a warrant where local law would permit

the warrantless arrest. See *Miller v. United States*, 357 U.S. 301, 305 (1958) (“[I]n the . . . circumstance of an arrest for violation of federal law by state peace officers, [] the lawfulness of the arrest without warrant is to be determined by reference to state law.”); see also *United States v. Myers*, 308 F.3d 251, 255 (3d Cir. 2002) (“The validity of an arrest is determined by the law of the state where the arrest occurred.”).³ In the Virgin Islands, police officers may effect warrantless arrests in certain circumstances, including when any public offense is committed or attempted in an officer’s presence. 5 V.I.C. § 3562.⁴

³ Laville’s argument that section 1252c of Title 8 of the United States Code limits local authorities to arresting only confirmed aliens suspected of reentering the United States is mistaken. Rather than limiting the ability of local police to make arrests for immigration violations, “[b]oth the plain language and legislative history of § 1252c reflect that Congress intended the provision to *displace* perceived Federal limitations on the authority of state and local officers to arrest criminal illegal aliens.” *United States v. Vasquez-Alvarez*, 176 F.3d 1294, 1300 (10th Cir. 1999) (emphasis added).

⁴ Section 3562 of Title 5 of the Virgin Islands Code provides in full: A peace officer may make an arrest in obedience to a warrant delivered to him, or may, without a warrant, arrest a person --

- (1) for a public offense committed or attempted in his presence;
- (2) when a person has committed a felony, although not in his presence;
- (3) when a felony has in fact been committed and he has reasonable cause for believing the person to have committed it;
- (4) on a charge made, upon a reasonable cause, of the commission of a felony by the party; or
- (5) at night, when there is reasonable cause to believe that he has committed a felony.

III. ANALYSIS

A. Laville's Arrest by the Virgin Islands Police

Laville claims that the VIPD lacked authority to arrest him without a warrant because they did not have a reasonable, articulable suspicion that he had committed or was committing a felony when they arrested him. Remarkably, the government responds that Laville "was not 'arrested' by local police . . . [but] detained by them on probable cause that he entered into the U.S. illegally" before being "turned over to immigration officers." (Govt.'s Opp'n to Addendum to Mot. to Suppress, 2.)⁵

The record shows that, at the time the VIPD arrested Laville, the VIPD possessed information that a boat had run aground and that Laville, arguably, was one of several illegal aliens that had come ashore. At best, these facts would provide probable cause to believe Laville had illegally entered the United States in violation of the federal illegal entry statute – section 1325 of Title 8 of the United States Code. However, illegal entry is a misdemeanor that is completed upon entry into

⁵ This claim is a distinction without a difference. In *Dunaway*, the Supreme Court noted that "[t]here can be little doubt that [a defendant is] seized in the Fourth Amendment sense when [he is] taken involuntarily to the police station." 442 U.S. at 207. When police officers remove someone from a house and take him to a waiting police car, and then to the police station, that individual has been seized. *Id.* at 212. As in *Dunaway*, the VIPD here restrained Laville in handcuffs and led him first to a police car, and then took him to the police station in St. Croix against his will. These actions constitute an arrest.

the United States. *United States v. Cores*, 356 U.S. 405, 408 n.8 (1958) (noting that 8 U.S.C. § 1325 is not a continuous offense); see also *United States v. DiSantillo*, 615 F.2d 128, 136-37 (3d Cir. 1980) (same). Because the illegal entry did not occur in the presence of the VIPD, the VIPD had no authority to make the warrantless arrest of Laville. See *Gov't of the V.I. v. Duvergee*, 456 F.3d 1271 (3d Cir. 1972); see also *United States v. Bowley*, No: 05-3460, 2006 U.S. App. LEXIS 1860, at * 5 (3d Cir. Jan. 26, 2006) (reversing the district court on other grounds, while recognizing, without comment, the trial judge's holding that the VIPD lacks the authority to make warrantless arrests for federal immigration misdemeanors not committed in their presence). Thus, the statements Laville made to the VIPD subsequent to his arrest concerning his place of birth and his status as a crew member will be suppressed.

B. Laville's Arrest by the ICE

Laville also argues that the ICE lacked probable cause to effect a warrantless seizure of him following his arrest by the VIPD. The government argues that the arrest was legal because the Magistrate found probable cause at the August 26, 2004, preliminary hearing.⁶

⁶ This argument is without merit. The purpose of a preliminary hearing "is to determine whether probable cause exists to hold the defendant for trial." *Edwards v. Arizona*, 451 U.S. 477, 480 n.7 (1981). This hearing does

ICE agents have the authority to make warrantless arrests of aliens suspected of committing a federal crime. 8 U.S.C. § 1357. Such arrests must be based on probable cause. *See United States v. Brignoni Ponce*, 422 U.S. 873, 882 n.7 (1975); *Murillo v. Musegades*, 809 F. Supp. 487, 500 (W.D.Tex. 1992).

At the suppression hearing, the VIPD testified that it transferred Laville, as well as the other aliens arrested that day, to the custody of the government. This transfer constituted a new arrest of Laville by the federal government. *See, e.g., California v. Hodari D.*, 499 U.S. 621, 624-28 (1991). The government must therefore show that probable cause existed at the time of the warrantless arrest or that exigent circumstances required the warrantless arrest. *See Payton v. New York*, 445 U.S. 573, 590 (1980); *see also Sharrar v. Felsing*, 128 F.3d 810, 819-20 (3d Cir. 1997).

In determining probable cause, this Court examines only the evidence presented to it. *See Gov't of the V.I. v. Jarvis*, 653 F.2d 762, 764 (3d Cir. 1981) (upholding district court's finding of probable cause based on a review of "evidence adduced at the suppression hearing"); *see also Gov't of the V.I. v. M.G.*, D.C. Crim. App. No. 2004-83, 2005 U.S. Dist. LEXIS 8476, at * 13 (D.V.I. App. Div. April 26, 2005) (holding that a "full

not conclude whether probable cause existed at the time of the arrest.

investigation" into probable cause includes an assessment of all the evidence presented at a suppression hearing).

Here, the government did not present any evidence of what, if anything, ICE learned from the VIPD about Laville that would suggest he had committed a crime. It presented no affidavits, testimony, or evidence of any kind establishing it had probable cause to arrest Laville after his detention with the VIPD. Under those circumstances, it would be improper for the Court to presume the information in the possession of the VIPD was shared with the United States. Indeed, while the record must be viewed in a light most favorable to the government, the Court will not "supply the testimony that the government failed to elicit during the suppression hearing. . . . [and will] refrain from drawing inferences that are either not supported by the record, or contrary to it, in an effort to uphold an arrest." *Myers*, 308 F.3d at 255. Evidence adduced at the suppression hearing only indicates that the VIPD "turned over" Laville to the ICE. The government has failed to meet its burden, as the information elicited at the hearing is insufficient to sustain a finding that probable cause to arrest Laville existed at the time of his detention by the ICE. Because the ICE did not have probable cause to arrest Laville, the video-recorded statement Laville

made to the government subsequent to ICE arresting him will be suppressed.

Laville also seeks to suppress other evidence that he claims the government seized after his arrest. The government asserts no evidence was seized from the defendant. Laville has not shown what, if any, evidence was seized from his person following his arrest that might be subject to suppression. Thus, to the extent he seeks to suppress additional evidence, his motion must be denied.

C. Identification through Photo Arrays

Laville also challenges the government's use of photo arrays to obtain positive identifications of him from alleged eyewitnesses.⁷ These arrays, Laville argues, were unconstitutional because his counsel was not present at the time the identifications were made. Laville also asserts that because the photo arrays contained images of persons whose sex and skin tones differed from Laville's, the photo arrays were "unnecessarily suggestive" and impermissible. The government argues that the photos are not suggestive because they are of the thirty-two people on the vessel.

⁷ Laville's motion to suppress includes a request to suppress in-court identifications. He has not directed this Court to, nor does the record show, any identifications that took place in a court.

Laville is simply mistaken in arguing he had a right to counsel at the photo arrays. "A defendant has no right to have counsel present at a photo array." *Gov't of V.I. v. Benjamin*, 736 F. Supp. 1337, 1348 (D.V.I. 1990) (citing *United States v. Ash*, 413 U.S. 300 (1973)). Laville was not denied his constitutional rights by not having counsel present at the witnesses' photo array identifications of him.

As to the photo arrays the government used to obtain identifications of Laville as one of the boat's operators, due process requires that identification procedures not be "unnecessarily suggestive" as determined by examining the totality of the circumstances surrounding the identification procedures. *Stovall v. Denno*, 388 U.S. 293, 302 (1967); see also *Manson v. Brathwaite*, 432 U.S. 98, 105-06 (1977) (noting that unnecessarily suggestive identification procedures create a likelihood of misidentification and violate due process). Defendants have the initial burden of proving an identification procedure is impermissibly suggestive. See *Neil v. Biggers*, 409 U.S. 188, 198-99 (1972). Unnecessary suggestiveness alone, however, will not invalidate a witness identification if the identification otherwise possesses sufficient aspects of reliability. See *Manson*, 432 U.S. at 114; see also *Neil*, 409 U.S. at 198-99.

The validity of photo arrays, such as those used here, is analyzed using seven factors:

(1) the manner in which the pretrial identification was conducted; (2) the witness' prior opportunity to observe the alleged criminal act; (3) the existence of any discrepancies between the defendant's actual description and any description given by the witness before the photographic identification; (4) any previous identification by the witness of some other person; (5) any previous identification of the defendant himself; (6) failure to identify the defendant on a prior occasion; and (7) the lapse of time between the alleged act and the out-of-court identification.

United States v. Higgins, 458 F.2d 461, 465 (3d Cir. 1972).

In reviewing the totality of the circumstances, the Court finds that the identifications were reliable. First, the government used the same method to obtain at least nine independent witness identifications of Laville. There is no evidence that the witnesses' identifications were coerced or otherwise improperly obtained.

Second, the identifying witnesses had ample prior opportunity to observe the alleged criminal act. All the witnesses who identified Laville had been passengers on the vessel with him, during which time they could have observed him.

Third, there is no evidence of any discrepancies between the defendant's actual description and that given by the witnesses. The fourth, fifth, and sixth factors are not relevant here,

because there were no previous identifications of Laville, nor did any of the witnesses fail to identify Laville on previous occasions.

Finally, all of the witnesses identified the defendant within a month of the defendant's alleged acts. Their memories of the events giving rise to Laville's indictment, as well as to their identification of him, were therefore still relatively fresh when the identifications were obtained. Even if there were differences in the skin tone of people pictured in a photo array, such differences are not enough to establish undue suggestiveness. *See, e.g., United States v. Lawrence*, 349 F.3d 109, 115 (3d Cir. 2003) (finding district court did not abuse its discretion in holding that photo array in which defendant did not stand out was not unduly suggestive); *United States v. Wilson*, 787 F.2d 375, 385 (8th Cir. 1986) (upholding use of photo array where defendant had a slightly different skin tone than the others pictured).

In view of the totality of the circumstances, the government's use of the photo array to identify Laville was not unduly suggestive. Therefore, the identifications made using the photo arrays will not be suppressed.

IV. CONCLUSION

Accordingly, Laville's motion to suppress his oral statements to the VIPD, and his motion to suppress his video-recorded statement to the ICE, will be granted.

In all other respects Laville's motion to suppress will be denied.

An appropriate order accompanies this memorandum.

ENTERED this 2nd day of February, 2006.

FOR THE COURT:

_____/s/_____
Curtis V. Gómez
District Judge

ATTEST:
WILFREDO MORALES
Clerk of the Court

By: _____
Deputy Clerk

Copies to:
Judge Cannon
Alphonso Andrews, AUSA
Natalie Nelson Tang How, Esq.
Olga Schneider
Carol C. Jackson
Lydia Trotman
Claudette Donovan
Theresa Thomas
Margaret Brown
Joseph Bartels

ORDERED that Laville's motion to suppress his oral statements to the Virgin Islands Police Department is GRANTED; it is further

ORDERED that Laville's motion to suppress his video-recorded statements made to the Department of Homeland Security/Immigration and Customs Enforcement is GRANTED.

In all other respects Laville's motion to suppress is DENIED.

ENTERED this 2nd day of February, 2006.

FOR THE COURT:

_____/s/_____
Curtis V. Gómez
District Judge

ATTEST:
WILFREDO MORALES
Clerk of the Court

By: _____
Deputy Clerk

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