

FSM SUPREME COURT APPELLATE DIVISION

STATE OF KOSRAE,) APPEAL CASE NO. K1-2009
)
Appellant,)
)
vs.)
)
SIZUMU K. GEORGE,)
)
Appellee.)
_____)

OPINION

Argued: December 18, 2009
Decided: December 18, 2009
Opinion Entered: January 12, 2010

BEFORE:

Hon. Martin G. Yinug, Associate Justice, FSM Supreme Court
Hon. Dennis K. Yamase, Associate Justice, FSM Supreme Court
Hon. Ready E. Johnny, Associate Justice, FSM Supreme Court

APPEARANCES:

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HEADNOTES

Appellate Review – Decisions Reviewable

An appellate court is obligated to examine the basis of its appellate jurisdiction, *sua sponte*, if necessary. Kosrae v. George, 17 FSM Intrm. 5, 7 (App. 2010).

Appellate Review – Decisions Reviewable; Appellate Review – Standard of Review – Criminal Cases

Under the Kosrae Code, government appeals from the Kosrae State Court in a criminal proceeding are limited to only when the Kosrae State Court has held a law or regulation invalid, and the appellate court may then reverse determination of invalidity of a law or regulation. No other Kosrae statute specifically authorizes a prosecution appeal. Kosrae v. George, 17 FSM Intrm. 5, 7 (App.

2010).

Appellate Review – Decisions Reviewable

Generally, absent specific statutory authorization, the prosecution lacks the right to appeal an adverse ruling in a criminal case. Kosrae v. George, 17 FSM Intrm. 5, 7 (App. 2010).

Appellate Review – Decisions Reviewable; Appellate Review – Standard of Review – Criminal Cases

Since the Kosrae Code only provides for an appeal in a criminal proceeding by the government only when the Kosrae State Court has held a law or regulation invalid, it does not authorize prosecution appeals from an adverse legal ruling construing a statute, such as when the Kosrae State Court did not hold the applicable statute of limitations invalid (it remains in effect) but interpreted it in a manner that the prosecution disagreed with and which terminated the prosecution. Kosrae v. George, 17 FSM Intrm. 5, 7 (App. 2010).

Criminal Law and Procedure – Double Jeopardy

A pretrial dismissal of a criminal prosecution would not raise double jeopardy concerns if the appellate court were to order the case reinstated because the accused had not once been put in jeopardy. Jeopardy does not attach in a criminal trial until the first witness is sworn in to testify. Kosrae v. George, 17 FSM Intrm. 5, 7 n.1 (App. 2010).

Appellate Review – Decisions Reviewable; Appellate Review – Standard of Review – Criminal Cases

Although many jurisdictions authorize prosecution appeals when a trial court's interlocutory pretrial order effectively terminates the prosecution, either because vital evidence is suppressed or because the court dismisses the case based solely on a pretrial legal ruling, the Kosrae Code does not authorize such appeals. Kosrae v. George, 17 FSM Intrm. 5, 7 (App. 2010).

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COURT'S OPINION

MARTIN G. YINUG, Associate Justice:

When this came before us for oral argument we asked the parties to limit their initial arguments to the threshold issue of whether we have jurisdiction to hear this appeal. After a recess, during which we carefully considered the parties' arguments and their briefs, we ruled from the bench that we lacked jurisdiction over this appeal because it did not fall within the Kosrae statute authorizing prosecution appeals in criminal cases. We accordingly dismissed this appeal. This opinion memorializes our dismissal order and explains our reasoning.

I. BACKGROUND

On February 5, 2008, the State of Kosrae filed a two-count criminal information charging that, in a Land Commission case, Sisumu K. George had, on February 18, 1999 and on April 15, 1999, materially altered documents with the intent to defraud others by forging their signatures. On November 10, 2008, George moved to dismiss the information against him on the ground that the statute of limitations barred his prosecution.

The trial court agreed, and, by a December 31, 2008 written order, dismissed the information. The prosecution then appealed. On appeal, the prosecution asserted that the Kosrae State Court had misinterpreted the applicable criminal statute of limitations, Kos. S.C. § 13.106(3), and had thus invalidated it, and that, if it had been correctly interpreted, the case would have proceeded to trial.

Kosrae v. George
17 FSM Intrm. 5 (App. 2010)

II. APPELLATE JURISDICTION

George questioned our jurisdiction and Kosrae acknowledged that it was a threshold issue. We are obligated to examine the basis of our appellate jurisdiction, *sua sponte*, if necessary. Alonso v. Pridgen, 15 FSM Intrm. 597, 598 n.1 (App. 2008).

In dismissing Kosrae v. Langu, 16 FSM Intrm. 83, 87-88, *reh'g denied*, 16 FSM Intrm. 172 (App. 2008), we relied on Kosrae Code § 6.404(5) and held that government appeals from the Kosrae State Court in a criminal proceeding are limited to only when the Kosrae State Court has held a law or regulation invalid. We further noted that another Kosrae statute provided that in prosecution appeals, an appellate court "may reverse determination of invalidity of a law or regulation." Kos. S.C. § 6.403(3). No other Kosrae statute specifically authorizes a prosecution appeal. Generally, "[a]bsent specific statutory authorization, the prosecution lacks the right to appeal an adverse ruling in a criminal case." 7 WAYNE R. LAFAVE, JEROLD ISRAEL, NANCY KING & ORIN S. KERR, CRIMINAL PROCEDURE § 27.3(b), at 34 (3d ed. 2007).

The prosecution contended that the trial court's adverse ruling effectively invalidated the statute by, in its view, misinterpreting it. The Kosrae State Court, however, did not hold the applicable statute of limitations, Kos. S.C. § 13.106(3)(a), invalid. It remains in effect. The Kosrae State Court interpreted it in a manner that the prosecution disagreed with and which terminated the prosecution.¹ The Kosrae statute does not authorize prosecution appeals from an adverse legal ruling construing a statute. It provides for an appeal "in a criminal proceeding, by the Government only when the [Kosrae State] Court has held a law or regulation invalid." Kos. S.C. § 6.404(5). This was thus not an appeal authorized by the Kosrae statute.

Many jurisdictions authorize prosecution appeals when a trial court's interlocutory pretrial order effectively terminates the prosecution, either because vital evidence is suppressed or because, as was here, the court dismisses the case based solely on a pretrial legal ruling. See 7 LAFAVE ET AL., *supra*, § 27.3(c), at 37-41. The Kosrae Code does not authorize such appeals.² The Kosrae Legislature may wish to consider whether to allow future prosecution appeals from final terminating pretrial orders.

III. CONCLUSION

Accordingly, we dismissed this appeal.

* * * *

¹This pretrial dismissal would not raise double jeopardy concerns because George had not once been put in jeopardy since jeopardy does not attach in a criminal trial until the first witness is sworn in to testify, see FSM v. Cheng Chia-W (I), 7 FSM Intrm. 124, 128 (Pon. 1995). So if we had jurisdiction over this appeal and had then concluded that the prosecution's interpretation was correct, the information could have been reinstated and George tried on the charges.

²In FSM v. Edward, 3 FSM Intrm. 224, 240 (Pon. 1987), the trial court suppressed the accused's statement because it was made involuntarily in violation of FSM Constitution article IV, sections 3 and 7. The prosecution sought appellate review of the pretrial suppression order through a petition for a writ of certiorari. The FSM appellate court held that, under FSM national law, it had the jurisdiction to issue such a writ to review the suppression order, *in re Edward*, 3 FSM Intrm. 285, 288-89 (App. 1987) (single justice order), but it denied the petition since the prosecution had failed to, or had been unable to, specify the trial court's alleged error(s), *id.* at 289-90. We take no position on whether, under Kosrae state law, appellate review of the dismissal order might have been available through a timely petition for a writ of certiorari or for a writ of mandamus or prohibition.