FSM SUPREME COURT TRIAL DIVISION

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| FEDERATED STATES OF MICRONESIA,<br><br>Plaintiff,<br><br>vs.<br><br>ANSON JOHN SUZUKI, JESSY (JC) MEFY, and WILSON (W-TWO) WILIANDER,<br><br>Defendants. | ) | CRIMINAL CASE NO. 2009-1503 |

ORDER DISPOSING OF PRETRIAL MOTIONS

Ready E. Johnny
Associate Justice

Hearing: February 3-4, 2010
Decided: February 26, 2010

APPEARANCES:

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HEADNOTES

Criminal Law and Procedure – Arrest and Custody

It is unlawful for the police to keep an arrestee in custody for over 24 hours without bringing him before a judicial officer for a bail hearing unless the location of the nearest court makes such appearance impossible. An arrestee must be either released or charged with a criminal offense within a reasonable time, which under no circumstances shall exceed 24 hours. FSM v. Suzuki, 17 FSM Intrm. 70, 73 (Chk. 2010).

Criminal Law and Procedure – Interrogation and Confession

When an accused has expressed a wish to meet with counsel before further questioning or to have counsel present during questioning, questioning must cease at once, and any attempt by police to ignore or override the accused's wish, or to dissuade him from exercising his right, violates 12 F.S.M.C. 218, and evidence obtained as a result of that violation is not admissible against an accused. FSM v. Suzuki, 17 FSM Intrm. 70, 73-74 (Chk. 2010).

Criminal Law and Procedure – Arrest and Custody

Although evidence and statements lawfully obtained from an accused before he has been detained over 24 hours will be admissible, the accused is entitled to the suppression of any evidence or statements obtained from him after the first 24 hours of his detention. FSM v. Suzuki, 17 FSM Intrm. 70, 74 (Chk. 2010).

Criminal Law and Procedure – Arrest and Custody; Criminal Law and Procedure – Interrogation and Confession

Once an accused has established a relationship between unlawful police activity and the evidence sought to be suppressed, the burden is on the prosecution to show that the evidence is still admissible. FSM v. Suzuki, 17 FSM Intrm. 70, 74 (Chk. 2010).

Criminal Law and Procedure – Interrogation and Confession

When an accused's advice of rights form was signed at 10:03 a.m., on the day after his arrest at about 10:00 a.m., the prosecution has failed to prove that the accused's statement was given within 24 hours of his arrest even though there was some testimony that the accused signed the form not only after he was informed of his rights but also after he subsequently gave a statement since this is neither the usual nor the better method of conducting a police interrogation. FSM v. Suzuki, 17 FSM Intrm. 70, 74 (Chk. 2010).

Criminal Law and Procedure – Arrest and Custody; Criminal Law and Procedure – Interrogation and Confession

Statements and evidence obtained from an accused during the first 24 hours after his arrest are not inadmissible merely because the accused ended up being detained for over 24 hours. FSM v. Suzuki, 17 FSM Intrm. 70, 74 (Chk. 2010).

Evidence – Judicial Notice

A court must, if requested by a party and supplied with the necessary information, take judicial notice of a fact not subject to reasonable dispute in that it is capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned, but when the necessary information has not been supplied, the court cannot take judicial notice. Counsel's oral representation or argument is inadequate if the necessary information has not been supplied to the court. FSM v. Suzuki, 17 FSM Intrm. 70, 74 (Chk. 2010).

the court will permit amendments that only clarify the application of the relevant statutes and that make no further factual allegations and do not charge any different or additional offense. FSM v. Suzuki, 17 FSM Intrm. 70, 76 (Chk. 2010).

Criminal Law and Procedure - Information

An information will not be thrown out because of minor, technical objections which do not prejudice the accused. FSM v. Suzuki, 17 FSM Intrm. 70, 77 (Chk. 2010).

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COURT'S OPINION

READY E. JOHNNY, Associate Justice:

This came before the court on February 3 and 4, 2010, for hearing the following pretrial motions: Defendant Wilson (W-two) Wiliander's Motions for Suppression; to Compel Discovery; for Redaction of Defendant's Name in Co-defendants' Statements; for Dismissal, filed July 29, 2009, and defendant Anson John Suzuki's Motion to Suppress Evidence and Statement, filed July 24, 2009. The prosecution filed an opposition to Wiliander's motions on August 26, 2009, and to Suzuki's motion on August 5, 2009. Defendant Jessy (JC) Mefy did not file any motions but, at the hearing, sought to join the other defendants' motions to the extent they applied to him.

The motions are granted in part and denied in part. The court's reasons follow.

I. BACKGROUND

The three defendants were arrested on March 26, 2009, at about 10:00 a.m. The state police, who were looking for a vehicle whose occupants were reported to have been involved in an attempted armed robbery earlier that morning, spotted a vehicle fitting the description stopped in the boat pool area on Weno. An officer approached and asked the driver for the vehicle's registration. The officer noticed that there were two rifles in the vehicle. The vehicle's occupants, the three defendants in this case, were then arrested and taken to the nearby police station and booked. All of the defendants were held in police custody for well over 24 hours before being brought before a judicial officer and eventually released.

II. MOTIONS TO SUPPRESS

It is unlawful for the police to keep an arrestee in custody for over 24 hours without bringing him before a judicial officer for a bail hearing "unless the location of the nearest court makes such appearance impossible." 12 F.S.M.C. 218(5). An arrestee must be either released or charged "with a criminal offense within a reasonable time, which under no circumstances shall exceed 24 hours." 12 F.S.M.C. 218(4).

A. *Anson John Suzuki*

Anson John Suzuki seeks to suppress the statement he made while in police custody on the morning of March 27, 2009. Suzuki's motion is granted on two separate and distinct grounds.

First, Suzuki asked for a lawyer to be present. Although the police did get a message to the Public Defenders' Office and counsel from that office arrived at the police station, for some reason counsel were not permitted to meet with Suzuki and Suzuki's interrogation did not stop. When a

defendant has expressed a wish to meet with counsel before further questioning or to have counsel present during questioning, questioning must cease at once, and any attempt by police to ignore or override the defendant's wish, or to dissuade him from exercising his right, violates 12 F.S.M.C. 218. FSM v. Edward, 3 FSM Intrm. 224, 235 (Pon. 1987). Evidence obtained as a result of a violation of 12 F.S.M.C. 218 is not admissible against an accused. 12 F.S.M.C. 220. The continued questioning of Suzuki was therefore impermissible and any resulting statement is thus inadmissible and suppressed.

Second, although evidence and statements lawfully obtained from an accused before he had been illegally detained over 24 hours will be admissible, the accused is entitled to the suppression of any evidence or statements obtained from him after the first 24 hours of his detention. FSM v. Sato, 16 FSM Intrm. 26, 30 (Chk. 2008); FSM v. Menisio, 14 FSM Intrm. 316, 320 (Chk. 2006). Once an accused has established a relationship between unlawful police activity and the evidence sought to be suppressed, the burden is on the prosecution to show that the evidence is still admissible. FSM v. Sippa, 16 FSM Intrm. 247, 249 (Chk. 2009); FSM v. Sam, 15 FSM Intrm. 491, 493 (Chk. 2008) (statement suppressed when made the next day and no evidence whether it was within 24 hours); *see also* FSM v. Inek, 10 FSM Intrm. 263, 265-66 (Chk. 2001). Suzuki's advice of rights form was signed at 10:03 a.m., March 27, 2009. Although there was some testimony that Suzuki signed the form not only after he was informed of his rights but also after he subsequently gave a statement, this is neither the usual nor the better method of conducting a police interrogation. The court therefore concludes that the prosecution has failed to prove that Suzuki's statement was given within 24 hours of his arrest.

Accordingly, Anson John Suzuki's statement is suppressed.

B. *Wilson (W-two) Wiliander*

Wilson (W-two) Wiliander seeks to suppress his oral and written statements made while in custody. Wiliander made these statements about two hours after his arrest. Wiliander contends that they should be suppressed because he was held in custody for over one week and because the statements were not voluntary but were coerced from him. As stated above, statements and evidence obtained from an accused during the first 24 hours after his arrest are not inadmissible merely because the accused ended up being detained for over 24 hours. This ground for suppression is without merit.

To support his claim that the statements were coerced Wiliander asks the court to take judicial notice of the state court testimony of an officer present at his interrogation that he had slapped Wiliander and a state court order finding that Wiliander's statements were not made voluntarily. Wiliander did not supply the court with a certified transcript of the testimony or with a certified copy of the state court order that he asserts ruled that his statements were coerced.

A court must, if requested by a party and supplied with the necessary information, take judicial notice of a fact not subject to reasonable dispute in that it is capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned, but when the necessary information has not been supplied, the court cannot take judicial notice. John v. Chuuk Public Utility Corp., 16 FSM Intrm. 66, 69 (Chk. 2008); Ruben v. Petewon, 13 FSM Intrm. 383, 387 n.1 (Chk. 2005); FSM v. Kansou, 12 FSM Intrm. 637, 641 n.3 (Chk. 2004). Counsel's oral representation or argument is inadequate if the necessary information has not been supplied to the court. Stinnett v. Weno, 6 FSM Intrm. 312, 313 (Chk. 1994). The court therefore cannot take judicial notice of the alleged state court testimony or state court order.

The only evidence and testimony properly before this court and from which the court may draw inferences and find facts supports the conclusion that Wiliander's statement was voluntarily made on March 26, 2009, not long after his arrest and well within the 24-hour timeframe. The preponderance

of the evidence thus weighing in the prosecution's favor, Wiliander's motion to suppress his statement is denied.

## III. Motion to Redact

Wiliander also moved to redact his name from any statement of any other defendant offered in evidence at trial so that any defendant's statement admitted into evidence would not contain any inculpatory statements concerning any codefendant. The other defendants orally joined this motion.

The motion is granted. The use of a non-testifying defendant's statement as evidence against a codefendant would violate the codefendant's "right of confrontation"[1] since the declarant would not be a trial witness subject to the codefendant's cross-examination. Hartman v. FSM, 6 FSM Intrm. 293, 301 (App. 1993). This difficulty can be eliminated if the parties redact any codefendant statements before trial. *Id.* at 301-02 & n.12; Hartman v. FSM, 5 FSM Intrm. 224, 230 (App. 1991) ("many problems can be eliminated by a redaction of parts of the inculpatory statements referring to codefendants who are jointly tried"); FSM v. Aliven, 16 FSM Intrm. 520, 530 (Chk. 2009) (if codefendants are tried together, a defendant's admissible out-of-court statement ought to be redacted to eliminate references to other codefendants); FSM v. Sam, 14 FSM Intrm. 328, 335 (Chk. 2006) (after redaction accomplished by the parties, no prejudice will occur if the statements then give no reference to any codefendant and the court does not view the statement until after redaction).

Accordingly, the motion to redact is granted. Any defendant statement that the prosecution may wish to introduce at trial shall be designated as such at least ten days before trial along with the proposed redactions. The parties shall then consult so as to produce before trial an agreed redacted copy which shall be the version that the prosecution may try to introduce at trial.

## IV. Motion to Compel

Wiliander asks the court to compel the prosecution to produce documents showing the date and times: 1) that Wiliander was arrested, 2) that the police tried to question Wiliander, and 3) that he was released. The prosecution contends that it has produced the documents requested with the possible exception of Wiliander's release date, which should be readily ascertainable from court records. During the hearing, Wiliander did not specify any documents that he might still be missing.

The motion is denied because it appears to be moot. Furthermore, Wiliander could have sought any documents he still did not have through a subpoena duces tecum for any Public Safety records he still wanted. The court also notes that the prosecution is under a continuing duty to produce documents requested if any come to light, FSM Crim. R. 16(c); FSM v. Walter, 13 FSM Intrm. 264, 268 (Chk. 2005) (parties' continuing duty to disclose evidence or material previously requested or ordered), and is also under a continuing constitutional duty to disclose all exculpatory material that it has or may later obtain, FSM Crim. R. 16(a)(1)(F); Walter, 13 FSM Intrm. at 269; FSM v. Cheng Chia-W (I), 7 FSM Intrm. 124, 128 n.4 (Pon. 1995).

## V. Motion to Dismiss

Wiliander also asks the court to dismiss, on several grounds, Counts VII, VIII, and IX, which charge conspiracy to illegally posses a firearm, to illegally possess ammunition, and to use firearms in

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[1] "The defendant in a criminal case has a right . . . to be confronted with the witnesses against him . . . ." FSM Const. art. IV, § 6.

the commission of a crime. Wiliander's codefendants orally joined this motion.

Wiliander first contends that these counts are defective. He asserts that, since the essence of any conspiracy offense is the agreement, the information fails to set forth the essential facts constituting the offenses because there are no factual allegations that the defendants agreed to commit the offenses. This contention is without merit. Each of the three counts alleges that the defendants "did unlawfully conspire to . . ." do some act. This is an allegation that there was an agreement since the word "conspire" means "to join in secret agreement to do an unlawful or wrongful act or to use such means to accomplish a lawful end." WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 281 (1986). By alleging that the defendants "conspired to" do something, the information alleges that the defendants joined in an agreement.

Wiliander also asserts that the three conspiracy counts are "multiplicitous" and that, based on 11 F.S.M.C. 203(2), any two of the counts must be dismissed. Subsection 203(2) provides that "[i]f a person conspires to commit a number of offenses, he or she is guilty of only one conspiracy if the multiple offenses are the object of the same agreement or continuous conspiratorial relationship." The prosecution concedes that the defendants cannot be convicted of all three counts, but contends that this motion is premature. The prosecution is correct. It may seek to charge and prosecute all three alleged conspiracies, and, if it proves more than one of the conspiracy counts, a guilty finding will be entered on only one of the counts.

Wiliander further contends that the court lacks jurisdiction over Count IX since that count alleges a conspiracy to use firearms in aid of the commission of a robbery and robbery is not a national crime. The court, in FSM v. Sam, 14 FSM Intrm. 328, 333-34 (Chk. 2006), has already rejected that argument. It held that 11 F.S.M.C. 1023(7), which prohibits firearms use in connection with or in aid of the commission of "any crime against the laws of the Federated States of Micronesia," does not restrict liability for firearms use to only those crimes defined in the FSM Code because the term "any crime against the laws of the Federated States of Micronesia," when read in context must refer to any or all criminal laws in the Federated States of Micronesia, national, state, or local, since, if it were otherwise, it would not be possible for the statute to have its obviously intended purpose and effect – to discourage the use of, and to punish the use of, firearms during the commission of other crimes. Sam, 14 FSM Intrm. at 333-34. The use of a firearm to commit a Chuuk state law crime, such as robbery, is a national offense even though the robbery itself is not a national offense. Wiliander's motion to dismiss Count IX on the ground that it does not allege a conspiracy to commit a national offense is accordingly denied.

During oral argument, Wiliander raised further grounds to dismiss Counts VII, VIII, and IX. He asserts that Counts VII and VIII must be dismissed because they both charge violation of "Section 203 of 11 FSMC Section 1002" and there is no section 203 in 11 F.S.M.C. 1002. He also asserts that Count IX must be dismissed because it charges an offense punishable by "CSL No. 6-66 Section 201 of Section 503, in violation of Section 203 of 11 FSMC, Chapter 10, Section 1023(7)" and there is no "Section 201 of Section 503" in the Chuuk Criminal Code. In response, the prosecution asserted that these were merely typographical errors and moved orally to amend the information to correct those errors.

The court hereby denies Wiliander's oral motion to dismiss and grants the prosecution's oral motion to amend the information since "[t]he court may permit an information to be amended at any time before finding if no additional or different offense is charged and if substantial rights of the defendant are not prejudiced." FSM Crim. R. 7(e). The defendants will not be prejudiced by the amendments sought since the amendments only clarify the application of the relevant statutes. No further factual allegations are made. Nor will the amendment charge any different or additional offense.

Even without the amendments, the three conspiracy counts would not be dismissed because an information will not be thrown out, because of minor, technical objections which do not prejudice the accused. Laion v. FSM, 1 FSM Intrm. 503, 518 (App. 1984). Wiliander's objections are minor and technical.

Counts VII and VIII charge conspiracies to illegally possess firearms and to illegally possess ammunition. Section 203 of Title 11 makes conspiracy a criminal offense and section 1002 prohibits, among other things, the illegal possession of firearms and ammunition. Section 203 is the statutory provision that Counts VII and VIII charge the defendants violated by conspiring and section 1002 is the statutory provision that the factual allegations in those counts allege the defendants were conspiring to violate. Counts VII and VIII are therefore amended to read "in violation of Section 203 of 11 F.S.M.C. by conspiring to violate 11 F.S.M.C. 1002."

Count IX alleges that the defendants conspired to use firearms in connection with or in aid of an attempted robbery, burglary, threat and assault with a dangerous weapon. Again, 11 F.S.M.C. 203 is the FSM conspiracy statute, 11 F.S.M.C. 1023(7) is the FSM statute prohibiting the use or attempted use of a firearm "in connection with or in aid of the commission of any crime against the laws of the Federated States of Micronesia," and Chuuk State Law ("CSL") No. 6-66 is the Chuuk Criminal Code and section 503 defines and prohibits robbery and section 201 defines and prohibits attempts to commit a crime. Count IX is therefore amended to read "in violation of Section 203 of 11 F.S.M.C. by conspiring to violate 11 F.S.M.C. 1023(7) by committing a crime punishable under CSL No. 6-66, §§ 201 and 503."

Accordingly, Wiliander's motions, written and oral, to dismiss Counts VII, VIII, and IX are denied.

## V. Conclusion

The custodial statement given by Anson John Suzuki is suppressed. Wilson (W-two) Wiliander's custodial statement is not suppressed. The prosecution shall, at least ten days before trial, designate any defendant statement that has not been suppressed and that it wishes to introduce at trial along with its proposed redactions of references to codefendants. The parties shall then consult so as to produce before trial an agreed redacted copy which will be the version that the prosecution may try to introduce at trial. Wiliander's motions to compel and to dismiss Counts VII, VIII, and IX are denied. The prosecution's motion to make technical amendments to those counts is granted.

The court will hear the defendants' pleas on May 24, 2010, at 9:30 a.m., and, if any not guilty pleas are entered, trial will start at 1:30 p.m., May 24, 2010.

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