FSM SUPREME COURT TRIAL DIVISION

FEDERATED STATES OF MICRONESIA, Plaintiff, vs. ROBERT "AHDET" PHILLIP, Defendant.	)	CRIMINAL CASE NO. 2009-502

ORDER

Dennis K. Yamase
Associate Justice

Hearing: August 10, 2010
Decided: March 18, 2011

APPEARANCES:

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HEADNOTES

Search and Seizure – Investigatory Stop

A law enforcement officer may perform an investigatory stop, also known as a field interrogation, if he has reasonable suspicion, based on specific facts, that the suspect has committed or is about to commit a crime. The officers may perform an investigatory stop when swift action is necessary based upon the law enforcement officer's observations. FSM v. Phillip, 17 FSM Intrm. 413, 419 (Pon. 2011).

Search and Seizure – Investigatory Stop

The question of whether an investigatory stop is a reasonable exception to the prohibition in FSM Const. art. IV, § 5 against unreasonable seizures is whether the facts available to the officers at the moment of the seizure would lead a person of reasonable caution to believe that the action was appropriate. When such situations arise, a warrant is not necessary because there is an element of urgency or speed requiring action while the suspect is present and engaged in suspicious activity. FSM

v. Phillip, 17 FSM Intrm. 413, 419 (Pon. 2011).

Search and Seizure – Investigatory Stop

When officers received a tip that someone was planning to transport marijuana to Pohnpei outer islands in late December, 2009 and the informant provided the description of a vehicle and a vehicle check revealed that the defendant owned it; when, on arrival at the dock, investigating officers observed the defendant board the *Voyager* with a backpack and disembark a short time later without the backpack; when, at first the defendant denied having a backpack, but after being told that he had been seen carrying a backpack on board, he admitted to having a backpack and told officers that he had given the backpack to another person; and when a check of that person revealed that he had never encountered the defendant on the *Voyager*, these specific facts and the rational inferences drawn from them justified the officers' reasonable suspicion that the defendant had deposited a backpack possibly containing contraband on board the *Voyager*. Under these circumstances, with the *Voyager* scheduled to disembark, there was an element of urgency or speed requiring the officers' immediate action. The officers were entitled to perform an investigatory stop of the defendant to determine whether he had or was about to commit a crime because the officers had reasonable suspicion, based on specific facts, that the defendant had committed or was about to commit a crime. FSM v. Phillip, 17 FSM Intrm. 413, 419-20 (Pon. 2011).

Criminal Law and Procedure – Right to Silence; Search and Seizure – Investigatory Stop

When the officers' investigatory stop of the defendant and their questioning him about suspicious circumstances did not constitute an arrest, the officers were not required to advise the defendant of his right to remain silent when they first approached him on the dock. FSM v. Phillip, 17 FSM Intrm. 413, 420 (Pon. 2011).

Search and Seizure

For the purposes of FSM Constitution article IV, § 5, a search is any governmental intrusion into an area where a person has a reasonable expectation of privacy. For actions to constitute a search, there must be: 1) an examination of a premises or a person; 2) in a manner encroaching upon one's reasonable expectation of privacy; 3) with an intention, or at least a hope, to discover contraband or evidence of guilt to be used in the prosecution of a criminal action. FSM v. Phillip, 17 FSM Intrm. 413, 421 (Pon. 2011).

Search and Seizure – Plain View

Despite the fact that the defendant and the backpack was in a public place, it is clear that the defendant had a reasonable expectation of privacy in the backpack's contents. FSM v. Phillip, 17 FSM Intrm. 413, 421 (Pon. 2011).

Search and Seizure – Plain View

There is no protected privacy interest in items exposed to public view. It is not a "search" if police observe what may be seen by any member of the general public. Thus, when a backpack was in a public location, in public view, the police were entitled to locate the backpack on the *Voyager* even without the defendant's consent. FSM v. Phillip, 17 FSM Intrm. 413, 421 n.1 (Pon. 2011).

Search and Seizure – By Consent

The FSM Constitution's prohibition against "unreasonable searches and seizures" generally requires the police to obtain a search warrant by showing probable cause to believe that a search will uncover evidence of contraband or a crime. However, there are certain well delineated exceptions to having a valid warrant prior to commencing a search under FSM Const. art. IV, § 5. One such exception arises when a person authorized to give consent does so prior to the initiation of the search. FSM v. Phillip, 17 FSM Intrm. 413, 421 (Pon. 2011).

Constitutional Law – Interpretation

Although it may look to U.S. constitutional decisions for guidance, the FSM Supreme Court may not simply accept the U.S. court interpretations, but must instead independently consider whether U.S. court rulings are appropriate for application within the FSM. FSM v. Phillip, 17 FSM Intrm. 413, 423 (Pon. 2011).

Constitutional Law – Interpretation; Search and Seizure – Probable Cause

Because the FSM Supreme Court has previously looked to the principles underlying the U.S. Constitution's Fourth Amendment when analyzing the requirements necessary to establish consent sufficient to justify a warrantless search in the FSM, the court may engage in that analysis again. FSM v. Phillip, 17 FSM Intrm. 413, 423 (Pon. 2011).

Search and Seizure – By Consent

FSM Constitution article IV, § 5 requires the police to prove that consent to perform a search was given voluntarily and was not the product of duress or coercion. FSM v. Phillip, 17 FSM Intrm. 413, 423 (Pon. 2011).

Search and Seizure – By Consent

FSM Constitution article IV, § 5 protects FSM citizens against unreasonable searches and seizures. There is a legitimate need, under certain circumstances, for FSM law enforcement officers to perform searches based on an individual's voluntary consent since such searches are often the only means available to obtain important and reliable evidence, and may result in considerably less inconvenience for the subject of the search than other means by which to obtain the sought-after evidence. FSM v. Phillip, 17 FSM Intrm. 413, 423 (Pon. 2011).

Search and Seizure – By Consent

A search pursuant to consent often occurs under informal conditions in which the due process considerations inherent in a custodial interrogation or criminal trials do not apply. FSM v. Phillip, 17 FSM Intrm. 413, 423 (Pon. 2011).

Search and Seizure – By Consent

FSM Constitution article IV, § 5 contains no requirement that law enforcement officers inform a consenting individual that he has the right to refuse to give consent. Instead, to ensure that consent not be coerced, by explicit or implicit means, by implied threat or covert force, the court will consider the "totality of the circumstances" to determine whether a criminal defendant's consent was voluntarily given. In doing so, any searches that are the product of law enforcement coercion can be filtered out without undermining the continuing validity of consent searches. FSM v. Phillip, 17 FSM Intrm. 413, 423-24 (Pon. 2011).

Search and Seizure – By Consent

When, of foremost importance, an officer asked the defendant whether they could look inside the backpack, he said, "Yes"; when there was insufficient evidence showing that the officers involved intimidated or harassed the defendant into making his response; when the officers did not brandish weapons, threaten him, or make any intimidating movements; when they were dressed in street clothes, not public safety uniforms, and were not carrying weapons; when the officers were also known to the defendant; and when, while the officers did not advise the defendant that he could refuse consent, that knowledge of the right to refuse consent is not mandatory for a valid consent search to occur, the court will find, based on its examination of the totality of the circumstances, that the defendant voluntarily consented to the search of the backpack. FSM v. Phillip, 17 FSM Intrm. 413, 424 (Pon. 2011).

Search and Seizure – By Consent

In situations where law enforcement have some evidence of illegal activity but lack probable cause to arrest or search, a search authorized by a valid consent may be the only means of obtaining important and reliable evidence. FSM v. Phillip, 17 FSM Intrm. 413, 424 (Pon. 2011).

Search and Seizure – By Consent

When, under the circumstances, it was objectively reasonable for the officers to believe that the scope of the suspect's consent permitted them to remove items from the his backpack and open closed containers because a reasonable person would have believed that to "look inside" a backpack may well necessitate the removal of certain items from the backpack; when the defendant gave his consent to also search the Tupperware container and there was no evidence to suggest that he attempted to limit the scope of the officers' search when they began removing items from the backpack; when the defendant was present when the search was conducted; and when the officers were searching for marijuana, and a reasonable person may be expected to know that marijuana is generally transported in some form of container, the officers' search of the Tupperware container within the defendant's backpack was reasonable because the defendant gave his consent to search the Tupperware container and failed to place any limitation on the scope of the search. FSM v. Phillip, 17 FSM Intrm. 413, 425 (Pon. 2011).

Criminal Law and Procedure – Interrogation and Confession; Search and Seizure – By Consent

When it is determined that the searches were conducted with the defendant's voluntary consent, the defendant's claims of a violation of his right not to incriminate himself pursuant to FSM Const. art. IV, § 7 also fail because a confession's voluntariness is determined by reference to the totality of surrounding circumstances. FSM v. Phillip, 17 FSM Intrm. 413, 425 (Pon. 2011).

Criminal Law and Procedure – Information; Criminal Law and Procedure – Motions

FSM Criminal Rule 12(a) abolishes motions to quash an information. However, since under FSM law any relief possible under the common law motions and pleas abolished by Rule 12(a) may be sought by pretrial motion under FSM Criminal Rule 12(b), the court will consider a defendant's motion to quash the information as a Rule 12(b) motion to dismiss the information. FSM v. Phillip, 17 FSM Intrm. 413, 425 (Pon. 2011).

Criminal Law and Procedure – Motions

When the government has filed no response to a defendant's motion, it will not be permitted to present argument on the motion. FSM v. Phillip, 17 FSM Intrm. 413, 425-26 (Pon. 2011).

Criminal Law and Procedure – Motions

A non-moving party's failure to respond to a motion constitutes a consent to the granting of the motion. However, even if a motion is unopposed, the court still needs good grounds before the motion may be granted. FSM v. Phillip, 17 FSM Intrm. 413, 426 (Pon. 2011).

Criminal Law and Procedure – Information

A criminal information's primary purpose is to inform the defendant of the charges against him so that he may prepare his defense, and to advise the court of the facts alleged so that the court may determine whether those facts, if proven, may support a conviction. An information deficient in these respects may be dismissed without prejudice. FSM v. Phillip, 17 FSM Intrm. 413, 426 (Pon. 2011).

Criminal Law and Procedure – Information

The test for whether a particular information is sufficient is whether it is fair to the defendant to require him to defend on the basis of the charge(s) as stated therein. To determine whether an information is deficient, the information and its supporting affidavit(s) must be read together. FSM v.

Phillip, 17 FSM Intrm. 413, 426 (Pon. 2011).

Criminal Law and Procedure – Information; Search and Seizure – Probable Cause

When the three officers' affidavits are sufficient to establish facts which, if proven, may support the defendant's conviction on the charges brought; when the connection between a customs officer and an informant, to the extent that it exists, is not necessary to show probable cause to arrest the defendant; and when the affidavits support the discovery of significant quantities of a leafy substance resembling marijuana in the defendant's backpack, as well as further tests of that substance which revealed that it was marijuana, these affidavits provide probable cause to believe that a crime was committed, and the defendant's motion to dismiss the information will be denied. FSM v. Phillip, 17 FSM Intrm. 413, 426 (Pon. 2011).

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COURT'S OPINION

DENNIS K. YAMASE, Associate Justice:

I. INTRODUCTION

On May 26, 2010, Defendant Robert "Ahdet" Phillip filed several pretrial motions in this matter, including: (1) a motion to suppress the Defendant Phillip's backpack because it was obtained in violation of his right not to incriminate himself; (2) a motion to suppress the contents of the Defendant's backpack because it was obtained in violation of his right to privacy; (3) a motion to suppress the contents of the Tupperware container within the Defendant's backpack; and (4) a motion to quash the information. The Federated States of Micronesia ("the Government") filed its opposition to the Defendant's motions for suppression of evidence on June 8, 2010.

The Court held a hearing on the pretrial motions on August 10, 2010. FSM Assistant Attorney General Pole Atanraoi appeared for the Government. FSM Public Defender Julius "Joey" Sapelalut appeared for the Defendant Phillip. The Defendant appeared as a witness for the defense. FSM Department of Public Safety Officers DeLincoln Norman, Jr. and Jim Obed appeared as witnesses for the Government. The Government was not allowed to argue on the motion to quash the information since it filed no opposition to this motion.

For the reasons that follow, the Court finds that the officers involved performed a valid investigatory stop of the Defendant on December 27, 2009. The Court further finds that the warrantless search of the Defendant's backpack and its contents was reasonable and permissible because the Defendant gave valid consent. Since valid consent is found, the search was not in violation of the Defendant's right not to incriminate himself. Finally, the Court finds that the Government had probable cause to file the criminal information against the Defendant. The Court's findings and reasoning follows.

II. FINDINGS

From the testimony provided at the August 10, 2010 evidentiary hearing on the Defendant's pretrial motions, the Court makes the following findings.

This matter commenced from a criminal investigation undertaken pursuant to an informant's tip received in December of 2009 that someone was planning to transport marijuana to Pohnpei's outer islands in the near future. The informant provided a description of a vehicle and a license plate number.

The investigating officers got the name of the vehicle owner as the Defendant Robert Phillip.

On December 27, 2009, the vessel *Caroline Voyager* ("*Voyager*") was scheduled to depart from Pohnpei to the outer islands. FSM Department of Public Safety Officers DeLincoln Norman, Jr., Officer Jeff Mathias, and Custom Inspector Perry Perman followed up on the tip that there would be an attempt to transport marijuana to Pohnpei's outer islands by ship. They arrived at the dock where the *Voyager* was moored on the afternoon of December 27, 2009. FSM Public Safety Officer Jim Obed was also at the dock to see off his sister who was departing that day on the *Voyager* for Pingelap.

Officer Norman testified that he observed the Defendant arrive at the dock in a sedan and board the *Voyager* wearing a black t-shirt, blue shorts, and a sweater on his shoulder. The Defendant was carrying a backpack. A short time later, the Defendant disembarked from the vessel without the backpack and the sweater. When the Defendant got off the *Voyager* it was about to disembark.

Based on the Defendant's behavior and the anonymous tip received regarding his possible purpose in being at the dock, Officers Norman and Obed approached the Defendant and spoke to him. The officers identified themselves to the Defendant. Officers Obed and Norman then asked the Defendant about the whereabouts of the backpack he had been seen carrying on board the *Voyager*. At first the Defendant denied having a backpack, but Officer Norman explained that he was seen going on board the *Voyager* with a backpack. The Defendant then told the officers that he had given the backpack to another person named Kensy. Officer Obed testified that he later spoke with Kensy and Kensy stated that he had not met the Defendant on the ship.

The officers were dressed in street clothes and were not in uniform. Officer Norman testified that his badge was visible, but that he was unarmed. The Defendant testified that he knew both officers, that he had seen Officer Obed many times before and that he knew Officer Norman well. The officers asked the Defendant to accompany them back onto the *Voyager* so that they could locate the backpack. The Defendant agreed to accompany the officers back onto the *Voyager* to look for the backpack. The Defendant testified that he was afraid to leave the officers, but that he probably could have left at that time. Officer Obed testified that the Defendant was not under arrest at the time and was free to walk away.

The Defendant testified that the officers accompanied him onto the *Voyager* and that Officer Norman held his hand for some period of time on the *Voyager*. He testified that Officer Obed did not hold his hand, but walked behind him. Officers Norman and Obed deny that they held the Defendant's hand at any point during the encounter. The officers contend that they walked behind the Defendant to better enable him to locate his backpack. Officer Obed testified that at one point, the Defendant was situated between the officers, with one officer to his front and one to his rear. However, he stated that this configuration was inadvertent and was not intended to prevent the Defendant from running away.

Officer Obed located the Defendant's backpack on the vessel. He asked the Defendant to identify the backpack, which he did. Officer Obed then asked the Defendant if he could open the backpack. The Defendant replied, "Yes." The Defendant claims that Officer Obed asked his consent to open the backpack only once, the officers contend they asked more than once for permission to search various portions of the backpack and/or its contents. Officer Norman testified that his conversation with the Defendant was in a relaxed tone, that there was no yelling, and that he did not ever threaten or try to scare the Defendant.

The Defendant testified that no officer read him his rights and no one informed him of his right to refuse to consent to the search prior to the search being carried out. The Defendant testified that the backpack contained a Tupperware container and then clothes on top of it. Officer Obed opened

the backpack in the presence of the Defendant and removed the contents, including the Tupperware container. Both Officers Norman and Obed testified that Obed specifically asked the Defendant for permission to open the Tupperware container and that the Defendant nodded his agreement. The Defendant denies that the officers ever asked him whether they could open the Tupperware container before they did so.

After discovering what appeared to be marijuana joints and loose marijuana in plastic bags inside the Tupperware container, the officers requested that the Defendant accompany them to the Pohnpei State police station, where he was placed under arrested. The Defendant was charged with trafficking of a controlled substance pursuant to 11 F.S.M.C. 1141 and possession of a controlled substance pursuant to 11 F.S.M.C. 1142.

On all of the conflicting testimony of the events by the Defendant and the officers that are set forth above, the Court finds the testimony of the officers to be more credible and the version of the events as related by the officers' testimony is adopted by the Court.

III. Was Stop At the Dock An Illegal Seizure

In the Defendant's memorandum of points and authorities in support of his motion to suppress the backpack, he argues that the officers improperly seized him when they stopped him at the dock on the evening of December 27, 2009. Citing United States v. Mendenhall, 446 U.S. 544, 554, 100 S. Ct. 1870, 1877, 64 L. Ed. 2d 497, 509 (1980), the Defendant argues that a seizure occurs when "a reasonable person would have believed that he was not free to leave." *Id.* The Defendant contends that the officers seized him based on nothing more than an informant's tip, which he claims is not sufficient justification for a stop by the officers.

A law enforcement officer may perform an investigatory stop, also known as a field interrogation, if he has reasonable suspicion, based on specific facts, that the suspect has committed or is about to commit a crime. FSM v. Aliven, 16 FSM Intrm. 520, 527 (Chk. 2009). The officers may perform an investigatory stop when swift action is necessary based upon the observations of the law enforcement officer. *See* Terry v. Ohio, 392 U.S. 1, 20, 88 S. Ct. 1868, 1879, 20 L. Ed. 2d 889, 905 (1968).

The question of whether an investigatory stop is a reasonable exception to the prohibition in FSM Const. art. IV, § 5 against unreasonable seizures is whether the facts available to the officers at the moment of the seizure would lead a person of reasonable caution to believe that the action was appropriate. Terry, 392 U.S. at 21-22, 88 S. Ct. at 1880, 20 L. Ed. 2d at 906. When such situations arise, a warrant is not necessary because there is an element of urgency or speed requiring action while the suspect is present and engaged in suspicious activity. *Id.* at 20, 88 S. Ct. at 1879, 20 L. Ed. 2d at 905.

The officers testified that they received a tip that someone was planning to transport marijuana to Pohnpei's outer islands in late December, 2009. The informant provided the description of a vehicle and a check of the vehicle revealed that it was owned by the Defendant. Upon arrival at the dock, investigating officers observed the Defendant board the *Voyager* with a backpack and disembark a short time later without the backpack. At first the Defendant denied having a backpack, but after being told by Officer Norman that he had been seen carrying a backpack on board, he admitted to having a backpack and told officers that he had given the backpack to another person. A check of the person the Defendant claimed to have given the backpack to revealed that he had never encountered the Defendant on the *Voyager*.

This Court finds that these specific facts and the rational inferences drawn from them justified

the officers' reasonable suspicion that the Defendant had deposited a backpack possibly containing contraband on board the *Voyager*. Under these circumstances, with the *Voyager* scheduled to disembark, there was an element of urgency or speed requiring the immediate action of the officers. The officers were entitled to perform an investigatory stop of the Defendant to determine whether he had or was about to commit a crime.

Based on all of these findings, the officers had reasonable suspicion, based on specific facts, that the Defendant had committed or was about to commit a crime. Aliven, 16 FSM Intrm. at 527. Accordingly, the Court finds that the officers performed a valid investigatory stop of the Defendant when they stopped him on the dock on December 27, 2009 and questioned him about the backpack he had left on board the *Voyager*. Further, the officers testified that they asked the Defendant if he would accompany them onto the *Voyager* to search for the backpack and the Defendant agreed and did so.

The Defendant contends that in seizing him, the officers effectively arrested him and should have advised him of his right to remain silent. The Defendant cites to FSM v. Edward, 3 FSM Intrm. 224 (Pon. 1987) to support his proposition that the Defendant was, in effect, under arrest from the moment the officers first approached him.

In Edward, the defendant was picked up by the police in connection with a murder investigation and transported to the police station. *Id.* at 227. The defendant was highly intoxicated when the police detained him, was denied food for more than 40 hours, and was interrogated by police for several hours, until he finally signed a statement in which he confessed to the murder. *Id.* at 228. In its order granting the defendant's motion to suppress, the Edward court noted that a brief detention for questioning about suspicious circumstances does not constitute an arrest. *Id.* at 232 (Pon. 1987) (citing Henry v. United States, 361 U.S. 98, 80 S. Ct. 168, 4 L. Ed. 2d 134 (1959)).

Accordingly, the court found that the defendant was not under arrest when he was brought to the police station, nor during the brief questioning performed by the police immediately upon the defendant's arrival at the police station. Edward, 3 FSM Intrm. at 232. However, the court determined that at some point after these events had transpired and the defendant was sent to a room to await further instruction, he became an arrested person and should have been advised of his rights. *Id.*

The facts in Edward are distinguishable from those in this case. In this case, officers dressed in plain clothes questioned the Defendant in a public location about suspicious circumstances. The officers asked the Defendant questions about the backpack he was seen carrying on board the *Voyager*. The officers then asked the Defendant if he would accompany them onto the *Voyager* to help them locate the backpack and he agreed to do so.

The Court finds that the officers' investigatory stop of the Defendant and their questioning him about suspicious circumstances did not constitute an arrest, and as a result, the officers were not required to advise the Defendant of his right to remain silent when they first approached him on the dock. The Defendant then voluntarily boarded the *Voyager* with the officers to help them locate the backpack.

IV. Was Search of Backpack and its Contents Improper

The Defendant argues that he did not give valid consent for the search of the backpack and its contents, that the search and seizure of the backpack was in violation of his right not to incriminate himself, and that any evidence obtained from that search and seizure should be suppressed. The Defendant contends that he had a reasonable expectation of privacy in the backpack and its contents,

and that the officers violated his right to privacy by performing a warrantless search of the backpack and its contents without obtaining the Defendant's valid voluntary consent to do so.

For the purposes of FSM Const. art. IV, § 5, a search is any governmental intrusion into an area where a person has a reasonable expectation of privacy. In re FSM National Police Case No. NP 10-04-03, 12 FSM Intrm. 248, 250 (Pon. 2003). For actions to constitute a search, there must be: (1) an examination of a premises or a person; (2) in a manner encroaching upon one's reasonable expectation of privacy; (3) with an intention, or at least a hope, to discover contraband or evidence of guilt to be used in the prosecution of a criminal action. FSM v. Mark, 1 FSM Intrm. 284, 298 (Pon. 1983).

Here, the officers searched the Defendant's backpack and its contents. Despite the fact that the Defendant and the backpack was in a public place, it is clear that the Defendant had a reasonable expectation of privacy in the backpack. *See, for example*, FSM v. Tipen, 1 FSM Intrm. 79, 85 (Pon. 1982) (constitutional protection against unreasonable searches extends to contents of closed containers within one's possession and to those items one carries on one's person a citizen is entitled to protection of the privacy which he seeks to maintain even in a public place). Finally, the officers acted upon an informant's tip that the Defendant intended to transport contraband on the vessel. The officers undertook the search with the intention to discover contraband (e.g., illicit drugs) that they believed the Defendant might be attempting to transport to Pohnpei's outer islands.[1]

The Court agrees with the Defendant that a warrantless search of his backpack took place on the afternoon of December 27, 2009 and that he had a reasonable expectation of privacy in that backpack. The question is whether this search was unreasonable, i.e., whether it was in contravention of the FSM Constitution's prohibition against "unreasonable searches and seizures." FSM Const. art. IV, § 5. Generally, this prohibition requires the police to obtain a search warrant by showing probable cause to believe that a search will uncover evidence of contraband or a crime. *Id.* However, there are certain well delineated exceptions to having a valid warrant prior to commencing a search under FSM Const. art. IV, § 5. One such exception arises when a person authorized to give consent does so prior to the initiation of the search. *See* FSM v. George, 1 FSM Intrm. 449 (Kos. 1984).

Here, the Government contends that the Defendant consented to the search of his backpack. In support, the Government provides the testimony of Officers Obed and Norman, who conducted the search. Both officers testified that Officer Obed asked the Defendant if they could look inside of his backpack and that the Defendant responded, "Yes." The Defendant also states, in his motions to suppress evidence, that he responded, "Yes," when asked if the officers could look inside his backpack.

The Defendant contends, however, that this is not enough to provide an exception to the warrant requirement of FSM Const. art. IV, § 5. The Defendant argues that in addition to asking him for consent to search the backpack, the officers were required to inform the Defendant of his right to refuse consent. In support, the Defendant cites to Kosrae v. Alanso, 3 FSM Intrm. 39 (Kos. S. Ct. Tr. 1985). In that Kosrae State Court trial division case, the question before the Kosrae court was whether

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[1] Defendant argues in his memorandum of points and authorities in support of his motion to suppress the contents of the backpack that "it cannot be said that the defendant voluntarily led the officers to the location of his backpack." Memo. at 5. The Court notes that there is no protected privacy interest in items exposed to public view. It is not a "search" if police observe what may be seen by any member of the general public. *See* Illinois v. Andreas, 463 U.S. 765, 771, 103 S. Ct. 3319, 3324, 77 L. Ed. 2d 1003, 1010 (1983) (if the inspection by police does not intrude upon a legitimate expectation of privacy, there is no "search" subject to the Warrant Clause). Because the backpack was in a public location, in public view, the police were entitled to locate the backpack on the *Voyager* even without the Defendant's consent.

a landowner had given proper consent to have his property searched. After examining FSM Supreme Court and United States (U.S.) Supreme Court cases pertaining to the question of consent, the court held that "consent," in the context of a warrantless search, required knowing and voluntary relinquishment of a known right. Alanso, 3 FSM Intrm. at 44. The court further held that:

> In order to protect the right to be free from unreasonable searches, this Court requires clear proof, not merely that consent was given, but that a right was knowingly and voluntarily waived. *It is fundamental that a citizen be aware of the right he is giving up in order for consent to be found.*

Id. (emphasis added). After examining the evidence presented, the Kosrae trial court determined that because no evidence had been presented showing that the landowner had been informed of his right to refuse consent, such consent was inadequate to permit a warrantless search absent probable cause. *Id.*

Although the Kosrae trial court adopted the requirement that the consenting person be informed of his right to refuse consent, this holding in Alanso has never been directly considered by the FSM Supreme Court. The key FSM Supreme Court case regarding consent is FSM v. George, 1 FSM Intrm. 449 (Kos. 1984). In George, the FSM Supreme Court considered what showing of consent was required to permit a warrantless search of a private residence. In that case, the court found that the defendant had failed to respond to the police when they asked him whether he consented to their entry into his house. *Id.* at 463.

In George, the trial court looked to principles developed under the Fourth Amendment of the U.S. Constitution for guidance in determining what must be shown to establish consent sufficient to justify a warrantless search. *Id.* at 455-56 (citing FSM v. Tipen, 1 FSM Intrm. 79, 85 (Pon. 1982)). The George court noted that although it may look to U.S. constitutional decisions for guidance, the FSM Supreme Court may not simply accept the U.S. court interpretations, but instead must independently consider whether the rulings of U.S. courts are appropriate for application within the FSM. *Id.* at 457 (citing Alaphonso v. FSM, 1 FSM Intrm. 209 (App. 1983)).

The trial court in George ultimately determined that the U.S. Fourth Amendment guidelines are applicable in the FSM because both FSM and U.S. citizens have similar interests in the protections afforded by their respective constitutions against unreasonable searches and seizures. *Id.* at 457-58.

Applying Fourth Amendment principles, the George court found that a defendant's failure to oppose police entry does not constitute permission to enter. *Id.* at 458-59. Instead, the consent must be voluntary rather than passive submission to the power of the state. *Id.* at 459. The court stated, "A demand, even if courteously expressed, is different from a request, and a citizen's compliance with a police officer's demand, backed, as such a demand would be, by apparent force of law, is perhaps subtly, but nonetheless significantly, different from voluntary consent to a request." *Id.* at 458. The court, finding that the defendant merely submitted to the search of his house and did not actively consent, granted the defendant's motion to suppress the items seized in the course of the improper search. *Id.* at 463.

Although this case provided the basic principles upon which a consent search must be based, the George court did not directly consider the specific contention raised in this Defendant's motion to suppress, namely, whether the officers must inform the consenting person that he has the right to refuse consent. The court did, however, provide some guidance for future law enforcement action and stated in a subsection of its opinion entitled "Guidance" that the police: "could have sought Paliksru George's consent to enter, advising him of his right to deny them entry, or otherwise assuring that the

consent was voluntary. Officers entering a house by consent for purposes of a search must keep in mind the eventual likelihood that they will need to establish that the consent was voluntary." *Id.* at 463.

Because the FSM Supreme Court has previously looked to the principles underlying the Fourth Amendment of the U.S. Constitution when analyzing the requirements necessary to establish consent sufficient to justify a warrantless search in the FSM, *see* FSM v. Tipen, 1 FSM Intrm. 79, 85 (Pon. 1982); George, 1 FSM Intrm. at 455-56, this Court will engage in that analysis again.

FSM Constitution article IV, § 5, like the Fourth Amendment to the U.S. Constitution, requires the police to prove that consent to perform a search was given voluntarily and was not the product of duress or coercion. In the landmark U.S. Supreme Court case pertaining to the constitutionality of consent searches, Schneckloth v. Bustamonte, 412 U.S. 218, 93 S. Ct. 2041, 36 L. Ed. 2d 854 (1973), the U.S. Supreme Court held that "the question of whether consent to a search was in fact 'voluntary' or was the product of duress or coercion, express or implied, is a question of fact to be determined from the totality of the circumstances." *Id.* at 227, 93 S. Ct. at 2047-48, 36 L. Ed. 2d at 862-63. This test requires a court to examine all of the relevant circumstances surrounding the situation in which the consent was obtained. *Id.*

The Schneckloth court specifically considered whether the police must inform the person to be searched of his right to refuse the request. It ruled that no requirement exists under the Fourth Amendment to inform an individual that he has the right to refuse to give consent. *Id.* at 248-49, 93 S. Ct. at 2059, 36 L. Ed. 2d at 875. Instead, the knowledge of the right to refuse to grant consent is simply one factor that the court may consider when determining the question of voluntariness. *Id.*

The U.S. Supreme Court rejected the requirement that the police advise an individual of his right to refuse consent on the basis that meeting the detailed requirements of an effective warning would be "thoroughly impractical." *Id.* at 231, 93 S. Ct. at 2050, 36 L. Ed. 2d at 865. The U.S. Supreme Court noted that consent searches normally occur in informal, spur-of-the-moment situations, such as on the side of the road or in a person's home or office. *Id.* at 232, 93 S. Ct. at 2050, 36 L. Ed. 2d at 865. The Court found that such situations are much different than a custodial interrogation or a trial in which a defendant must be specifically informed of his rights. *Id.*

Applying these principles to the instant case, this Court finds the reasoning in Schneckloth to be persuasive. FSM Constitution article IV, § 5 protects FSM citizens against unreasonable searches and seizures. There is a legitimate need, under certain circumstances, for law enforcement officers in the FSM to perform searches based on an individual's voluntary consent. Schneckloth, 412 U.S. at 227, 93 S. Ct. at 2048, 36 L. Ed. 2d at 863. Such searches are often the only means available to obtain important and reliable evidence, and may result in considerably less inconvenience for the subject of the search than other means by which to obtain the sought-after evidence. *Id.* at 228, 93 S. Ct. at 2048, 36 L. Ed. 2d at 863.

In this case, the search yielded evidence that served as the basis for charges to be brought against the Defendant, and provided some assurance that others, wholly innocent, were not charged. This Court agrees that a search pursuant to consent often occurs under informal conditions in which the due process considerations inherent in a custodial interrogation or criminal trials do not apply.

Accordingly, this Court determines that FSM Constitution article IV, § 5 contains no requirement that law enforcement officers inform a consenting individual that he has the right to refuse to give consent. Instead, to ensure that "consent not be coerced, by explicit or implicit means, by implied threat or covert force," this Court shall consider the "totality of the circumstances" to determine

whether a criminal defendant's consent was voluntarily given. Schneckloth, 412 U.S. at 227, 93 S. Ct. at 2048, 36 L. Ed. 2d at 863. In doing so, any searches that are the product of law enforcement coercion can be filtered out without undermining the continuing validity of consent searches.

Based on its examination of the totality of the circumstances in this case, this Court finds that the Defendant voluntarily consented to the search of the backpack. Of foremost importance, when the Defendant was asked by Officer Obed whether they could look inside the backpack, he said, "Yes." There was insufficient evidence showing that the officers involved intimidated or harassed the Defendant into making his response. The officers did not brandish weapons, threaten him, or make any intimidating movements. They were dressed in street clothes, not public safety uniforms, and were not carrying weapons. The officers were also known to the Defendant. While the officers did not advise the Defendant that he could refuse consent, this Court determines that knowledge of the right to refuse consent is not mandatory for a valid consent search to occur.

In situations where law enforcement have some evidence of illegal activity, but lack probable cause to arrest or search, a search authorized by a valid consent may be the only means of obtaining important and reliable evidence. The difficulty with the proof of knowledge requirement set forth in Alanso is that in practice it would create serious doubts whether consent searches could continue to be conducted. It would only be in very rare cases when it could be proved from the record that a person in fact affirmatively knew of his right to refuse to consent. The object of the inquiry and the nature of a person's subjective knowledge or understanding highlights the difficulty of the government's burden under the ruling of Alanso. Any defendant who was the subject of a search solely authorized by his consent might attempt to prevent the introduction of evidence obtained from that search simply by failing to testify that he in fact knew he could refuse consent. The extreme difficulty of meeting this burden provides compelling reason why it should not be required.

The Defendant argues that, while he may have given the officers permission to "look inside" his backpack, he did not authorize them to remove the contents of his backpack or to examine the Tupperware container at the bottom of his backpack. In a similar U.S. Supreme Court case, Florida v. Jimeno, 500 U.S. 248, 111 S. Ct. 1801, 114 L. Ed. 2d 297 (1991), the U.S. Supreme Court held that when an individual gives valid consent to a vehicle search, the police need not separately request permission to search each closed container found inside the vehicle.

In Jimeno, the police had reason to believe that the defendant was carrying narcotics in his vehicle. *Id.* at 249, 111 S. Ct. at 1803, 114 L. Ed. 2d at 302. The police asked to search the vehicle and the defendant consented. *Id.* at 249-50, 111 S. Ct. at 1803, 114 L. Ed. 2d at 302. Upon performing the search, the police found cocaine inside a folded paper bag on the car's floorboard. *Id.* at 250, 111 S. Ct. at 1803, 114 L. Ed. 2d at 302. The defendant argued that, while he had given the police permission to search his vehicle, he had not given permission to search inside the folded paper bag. *Id.*

The U.S. Supreme Court held that a criminal suspect's Fourth Amendment right to be free from unreasonable searches is not violated when, after he gives police permission to search his car, they open a closed container found within the car that might reasonably hold the object of the search. *Id.* at 251, 111 S. Ct. at 1804, 114 L. Ed. 2d at 303. The court held that under the circumstances, it was objectively reasonable for the police to believe that the scope of the suspect's consent permitted them to open the particular container, since the defendant did not place any explicit limitation on the scope of the search. *Id.* The court determined that the defendant was aware that the police were searching for narcotics, and a reasonable person may be expected to know that narcotics are generally carried in some form of container. *Id.*

In Jimeno, the item to be searched was the defendant's vehicle, but this Court finds that the same general principles apply to the consent search of Defendant's backpack. Under the circumstances, it was objectively reasonable for the officers to believe that the scope of the suspect's consent permitted them to remove items from the Defendant's backpack and open closed containers. A reasonable person would have believed that to "look inside" a backpack may well necessitate the removal of certain items from the backpack.

There was evidence that the Defendant gave his consent to also search the Tupperware container. Officer Norman testified that he asked the Defendant if he could open the Tupperware container and the Defendant nodded his agreement. There was no evidence to suggest that the Defendant attempted to limit the scope of the officers' search when they began removing items from the backpack. The Defendant was present when the search was conducted. Further, the officers were searching for marijuana, and a reasonable person may be expected to know that marijuana is generally transported in some form of container. Because the Defendant gave his consent to search the Tupperware container and failed to place any limitation on the scope of the search, the Court finds that the officers' search of the Tupperware container within Defendant's backpack was reasonable.

Since it is determined that the searches were conducted with the voluntary consent of the Defendant, the Defendant's claims of a violation of his right not to incriminate himself pursuant to FSM Const. art. IV, § 7 also fail. In the case of FSM v. Jonathan, 2 FSM Intrm. 189 (Kos. 1986), the court held that the voluntariness of a confession would be determined "by reference to the totality of surrounding circumstances." *Id.* at 197. The Jonathan trial court also cited to the Schneckloth case and the same test as set forth above was applied. Thus the analysis under this constitutional claim would have the same results.

Instructively, the court in Jonathan stated that:

> courts have recognized that questioning of witnesses and suspects is a necessary tool for the effective enforcement of criminal laws. "Without such investigation, those who were innocent might be falsely accused, those who were guilty might wholly escape prosecution, and many crimes would go unsolved. In short, the security of all would be diminished." Schneckloth v. Bustamonte, 412 U.S. 218, 225, 93 S. Ct. 2041, 2046, 36 L. Ed. 2d 854, 861 (1973).

The Defendant's motion to suppress his backpack because it was obtained in violation of his right not to incriminate himself; the Defendant's motion to suppress the contents of his backpack because they were obtained in violation of his right to privacy; and the Defendant's motion to suppress the contents of the Tupperware container within his backpack are HEREBY DENIED.

V. SHOULD THE INFORMATION BE QUASHED

In addition to the evidentiary motions to suppress, the Defendant filed a motion to quash the information on May 26, 2010. FSM Criminal Rule 12(a) abolishes motions to quash an information. *Id.* However, under FSM law, any relief possible under the common law motions and pleas abolished by Rule 12(a) may be sought by pretrial motion under FSM Criminal Rule 12(b). FSM v. Sato, 16 FSM Intrm. 26, 28 (Chk. 2008). Therefore, the Court will consider Defendant's motion to quash the information as a FSM Crim. R. 12(b) motion to dismiss the information. *Id.*

The Government failed to file any response to the Defendant's motion to quash the information. At the August 10, 2010 hearing, the Government requested permission to present argument in opposition to the Defendant's motion. When the Government has filed no response to a defendant's

motion, it will not be permitted to present argument on the motion. FSM v. Kansou, 15 FSM [illegible] 373, 378 (Chk. 2007). Accordingly, the Court denied the Government's request to present argument at the August 10, 2010 hearing on the Defendant's pretrial motion to quash the information.

Failure of a non-moving party to respond to a motion constitutes a consent to the granting of the motion. FSM v. Wainit, 12 FSM Intrm. 201, 203 (Chk. 2003). However, even if a motion is unopposed, the Court still needs good grounds before the motion may be granted. *Id.*

The Defendant argues that the information must be dismissed because the Government lacks probable cause to proceed. He contends that the criminal information, which states at paragraph 4 that Custom Inspector Perry received a call from Jackson Smith informing him that the Defendant was expected to transport marijuana to Pohnpei's outer islands on the *Voyager*, is inaccurate. The Defendant argues that Perry's affidavit, attached to the criminal information, fails to mention his receipt of a telephone call from Smith and therefore no probable cause exists to support the criminal information.

The primary purpose of a criminal information is to inform the defendant of the charges against him so that he may prepare his defense, and to advise the court of the facts alleged so that the court may determine whether those facts, if proven, may support a conviction. FSM v. Sato, 16 FSM Intrm. 26, 29 (Chk. 2008). An information deficient in these respects may be dismissed without prejudice. *Id.* The test for whether a particular information is sufficient is whether it is fair to the defendant to require him to defend on the basis of the charge(s) as stated therein. *Id.*

To determine whether an information is deficient, the information and its supporting affidavit(s) must be read together. Sato, 16 FSM Intrm. at 29 (citations omitted). Here, the affidavits provided by Officers Norman, Obed, and Perman are sufficient to establish facts which, if proven, may support a conviction of the Defendant on the charges brought. The connection between Perry and Jackson Smith, to the extent that it exists, is not necessary to show probable cause to arrest the Defendant. Instead, the affidavits support the discovery of significant quantities of a leafy substance resembling marijuana in the Defendant's backpack, as well as further tests of that substance which revealed that it was marijuana. The Court finds that these affidavits provide probable cause to believe that a crime was committed, as required by FSM v. Mudong, 1 FSM Intrm. 135, 140 (Pon. 1982).

Accordingly, Defendant's motion to quash the information and to dismiss are HEREBY DENIED.

VI. TRIAL

The parties in this matter shall confer and agree to three alternative trial dates after April 11, 2011, and the Defendant shall submit these agreed upon trial dates to the Court by March 31, 2011. For the selection of the recommended trial dates, the parties are informed that the Court will be unavailable for trial from April 25 to 29, from May 6 to 25, and from June 6 to 10, 2011.

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