the 42-day time period, showing excusable neglect or good cause. FSM App. R. 4(a)(5). No such motion was filed in the trial division. (March 18, 2011 was the last day it could have been filed.)

The February 22, 2011 notice of appeal was therefore untimely. The requirement that a notice of appeal be timely filed is mandatory and jurisdictional. Bualuay v. Rano, 11 FSM Intrm. 139, 145 (App. 2002). Since the Rule 4(a)(1) time limit is jurisdictional, if that time is not extended by the grant of a timely Rule 4(a)(5) motion to extend that time period, we lack jurisdiction to hear the case. Goya v. Ramp, 13 FSM Intrm. 100, 104-05 (App. 2005); Hartman v. Bank of Guam, 10 FSM Intrm. 89, 95 (App. 2001). An untimely filed appeal must be dismissed. Bualuay, 11 FSM Intrm. at 145.

A full panel is not needed to grant the bank's motion since a single article XI, section 3 justice may dismiss an appeal upon failure of a party to comply with the appellate rules' timing requirements, FSM App. R. 27(c), including the time requirement to file the notice of appeal within 42 days after the entry of the order appealed from. Pohnpei v. AHPW, Inc., 13 FSM Intrm. 159, 161 (App. 2005).

We accordingly dismiss this appeal because it was not timely filed.

* * * *

CHUUK STATE SUPREME COURT TRIAL DIVISION

CHUUK STATE,
Plaintiff,
vs.
GEORGE HAUK,
Defendant.

CSSC - CRIMINAL CASE NO. 103-2008

ORDER DISMISSING DEFENDANT'S MOTION TO SUPPRESS AFFIDAVIT SUPPORTING INFORMATION, ORDER DENYING DEFENDANT'S MOTION TO DISMISS PROSECUTION AND ORDER TO SHOW CAUSE

Midasy O. Aisek
Associate Justice

Decided: May 13, 2011

APPEARANCES:

For the Plaintiff: Charleston Bravo
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For the Defendant: Benskin Etse (April 28, June 25, 2009 motions)
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HEADNOTES

Criminal Law and Procedure

The Chuuk State Supreme Court may consider unpublished cases when provided with copies certified by the clerk of court and when such copies are contemporaneously provided to opposing counsel. Chuuk v. Hauk, 17 FSM Intrm. 508, 511 (Chk. S. Ct. Tr. 2011).

Evidence – Hearsay

"Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. Chuuk v. Hauk, 17 FSM Intrm. 508, 512 (Chk. S. Ct. Tr. 2011).

Evidence – Hearsay; Search and Seizure – Probable Cause

If it appears from the complaint, or from affidavit or affidavit filed with the complaint, that there is probable cause to believe that an offense has been committed and that the defendant has committed it, a warrant for the defendant's arrest will issue to any officer authorized by law to execute it. The probable cause finding may be based upon hearsay evidence in whole or in part. Chuuk v. Hauk, 17 FSM Intrm. 508, 512 (Chk. S. Ct. Tr. 2011).

Search and Seizure – Probable Cause

A police officer may, as a general rule, consider any evidence in determining whether reasonable suspicion or probable cause exists. An informer may provide the information. Police should consider the underlying circumstances from which the informer drew his conclusion. Some of the underlying circumstances must show that the informant was reliable. However, evidence to establish reasonable suspicion or probable cause may be entirely based upon hearsay since the general rule is that virtually any evidence may be considered. Chuuk v. Hauk, 17 FSM Intrm. 508, 512 (Chk. S. Ct. Tr. 2011).

Criminal Law and Procedure – Arrest and Custody; Criminal Law and Procedure – Dismissal

An illegal arrest will not entitle a defendant to dismissal of the information. The remedy for an illegal arrest, for failure to provide cause and authority of the arrest, is suppression of any statements made by the defendant. Chuuk v. Hauk, 17 FSM Intrm. 508, 512, 514 (Chk. S. Ct. Tr. 2011).

Evidence – Hearsay; Search and Seizure – Probable Cause

As the levels of hearsay included in the affidavit increase, the guarantees of reliability that justify admission become attenuated. Hearsay that is otherwise admissible may be excluded where it primarily reiterates statements of other, unidentified persons. Chuuk v. Hauk, 17 FSM Intrm. 508, 512 (Chk. S. Ct. Tr. 2011).

Search and Seizure – Probable Cause

When the court makes its determination as to whether probable cause was proven, it must regard the evidence from the vantage point of law enforcement officers acting on the scene but must make its own independent determination as to whether, considering all the facts at hand, a prudent and cautious law enforcement officer, guided by reasonable training and experience, would consider it more

likely than not that a violation has occurred. Chuuk v. Hauk, 17 FSM Intrm. 508, 512-13 (Chk. S. Ct. Tr. 2011).

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

When the affidavit identifies its author as a Chuuk State Public Safety Department police detective and indicates that the detective was assigned to investigate the offenses alleged in the information; when the affidavit does not identify informants but describes facts uncovered during the course of the investigation; and when the defendant admits that the affiant formed his conclusions based upon the alleged victim's representations, the affiant's failure to name sources of information does not render the affidavit defective, in part because the defendant admits that the affiant gathered information directly from the victim. The affidavit does not suffer from multiple layers of hearsay because the affiant identifies himself and attests to personally investigating the criminal violations alleged. Chuuk v. Hauk, 17 FSM Intrm. 508, 513 (Chk. S. Ct. Tr. 2011).

Search and Seizure – Probable Cause

It is difficult to imagine how the vast majority of criminal prosecutions might proceed without using hearsay: it is the exception rather than the norm that court testimony underpins probable cause determinations. Any statements made to the affiant by the alleged victim are by definition hearsay and hearsay may, in whole or in part, form the basis of probable cause determinations, as may virtually any kind of evidence. Chuuk v. Hauk, 17 FSM Intrm. 508, 513 (Chk. S. Ct. Tr. 2011).

Search and Seizure – Probable Cause

Generally speaking, a prudent and thorough investigation likely would involve questioning the defendant before a probable cause determination is made, but the court is not in the business of investigating criminal allegations; law enforcement officials are and whether and to what extent the officer determined that such questioning was unnecessary and whether the omission somehow weakens the State's case is a factual issue to be determined at trial. Nothing in FSM or Chuuk state law provides that every investigating officer in every criminal case must question all or any criminal suspects before making a probable cause determination. Chuuk v. Hauk, 17 FSM Intrm. 508, 513-14 (Chk. S. Ct. Tr. 2011).

Search and Seizure – Probable Cause

Although there are civil remedies for the wrongs alleged, the possible existence of civil remedies in no way negates the fact that the legislature has criminalized the behavior alleged. The court's task in a probable cause determination is to determine whether the criminal allegations have merit, not to contemplate the propriety of the legal venue. Chuuk v. Hauk, 17 FSM Intrm. 508, 514 (Chk. S. Ct. Tr. 2011).

Search and Seizure – Probable Cause

When the court finds nothing to indicate that information obtained from the alleged victim is unreliable; when it does not seem reasonable or realistic to expect an alleged victim to remain neutral and unbiased regarding his claims about being victimized; and when the defendant admits that there was a financial arrangement of some sort between himself and the complainant and that the agreement itself is part of the nexus of facts leading up to this prosecution, the defendant has failed to demonstrate that from the investigating officer's perspective, information obtained during the course of the investigation is insufficient to justify a probable cause finding. Chuuk v. Hauk, 17 FSM Intrm. 508, 514 (Chk. S. Ct. Tr. 2011).

Criminal Law and Procedure – Right to Confront Witnesses

Since the accused has a constitutional right to confront and cross examine his accusers at trial, if the complainant has been untruthful or misleading, it remains to be ferreted out through the

adversarial process. Chuuk v. Hauk, 17 FSM Intrm. 508, 514 (Chk. S. Ct. Tr. 2011).

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

The time to raise issues regarding probable cause is immediately after arrest, preferably at the initial appearance, arraignment, or, upon motion, at a probable cause hearing. It is not approximately one month before trial is scheduled to begin. Chuuk v. Hauk, 17 FSM Intrm. 508, 514 (Chk. S. Ct. Tr. 2011).

Criminal Law and Procedure – Dismissal; Torts – Malicious Prosecution

When an accused's motion to dismiss alleges, in the complete absence of supporting facts or reference to any legal standard under which such facts might be analyzed, that there is probable cause to believe the State has intentionally and maliciously instituted criminal actions against him, the court will not take such an allegation lightly as it implicates the integrity of the Chuuk State Attorney General's office and will order the defendant to show cause for making the allegation. Chuuk v. Hauk, 17 FSM Intrm. 508, 514 (Chk. S. Ct. Tr. 2011).

* * * *

COURT'S OPINION

MIDASY O. AISEK, Associate Justice:

The State filed a criminal information supported by an affidavit of probable cause alleging one count of grand larceny, one count of cheating, and one count of theft by failure to make required disposition of funds received in the matter captioned above on September 17, 2008. A warrant for defendant's arrest was issued by the Court on the same day. On April 28, 2009, defendant filed a motion to suppress the affidavit and dismiss the case. The Court record contains two copies of the motion, one with a certificate of service indicating receipt on April 28, 2009, another indicating both service and receipt on June 25, 2009. Defendant subsequently filed a motion to grant the April 28th motion on June 25, 2009. The State filed a motion for enlargement of time to oppose defendant's motion, along with its opposition, on July 8, 2009. Defendant's third attorney of record filed a motion to enlarge time to file a second motion to dismiss, and the second motion to dismiss, on June 29, 2009. The Court decides these motions without oral argument.

Defendant's original motion cites FSM Rule of Evidence 803(8)(B) to support the contention that matters observed by law enforcement personnel pursuant to their duty to report in criminal cases are not exceptions to the hearsay rule. Counsel are cautioned against citing rules that are not the Chuuk State Supreme Court's even when there is an equivalent rule in another jurisdiction. The motion also referred to CSSC-CR No. 143-2001. Presumably, this case was later published as Chuuk v. Chosa, 16 FSM Intrm. 95 (Chk. S. Ct. Tr. 2008). The Court may consider unpublished cases when provided with copies certified by the Clerk of Court and when such copies are contemporaneously provided to opposing counsel. Defendant failed to provide both the Court and opposing counsel with copies of CSSC-CR No. 143-2001. That defect is remedied by the publication of Chosa.

The argument in defendant's original motion relies on FSM Evid. R. 803(8)(B) and the then unpublished case to assert that 1) hearsay not subject to exception was used to support the affidavit, 2) one or more information sources underlying the affidavit were not identified, and 3) the affidavit contains multiple levels of hearsay. His second motion to dismiss further contends that in part because police did not question him prior to obtaining an arrest warrant, and relied solely on the statements of the alleged victim, there exists no probable cause to believe that the crimes alleged have been committed. He also argues that since there was an agreement in place between himself and the alleged

victim, the dispute over the legality of his acquisition of a sum of money purportedly owed pursuant to that agreement, an issue which also underlies the criminal charges, is best resolved in a civil court. It is unclear whether the arguments about multiple levels of hearsay are abandoned or implicitly continued in defendant's second motion. In the second motion defendant also claims, without marshaling any facts or law in support, that there is probable cause to believe that the State intentionally and maliciously instituted this criminal action against him.

The State argues that pursuant to Rule 4(b), Chuuk Rules of Criminal Procedure, a finding of probable cause may be based on hearsay. It points out that the affidavit was signed by the police officer who undertook the investigation and that the officer's personal knowledge cannot be construed as hearsay. The State also contends that defendant has not specified how the affidavit suffers from multiple levels of hearsay.

PROBABLE CAUSE AND HEARSAY

"Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. Chk. Evid. R. 801(c). If it appears from the complaint, or from affidavit or affidavit filed with the complaint, that there is probable cause to believe that an offense has been committed and that the defendant has committed it, a warrant for the arrest of the defendant shall issue to any officer authorized by law to execute it. Chk. Crim. R. 4(a). The finding of probable cause may be based upon hearsay evidence in whole or in part. Chk. Crim. R. 4(b); FSM v. Wainit, 10 FSM Intrm. 618, 621 (Chk. 2002). A police officer may, as a general rule, consider any evidence in determining whether reasonable suspicion or probable cause exists. The information may be provided by an informer. Police should consider the underlying circumstances from which the informer drew his conclusion. Some of the underlying circumstances must show that the informant was reliable. However, evidence to establish reasonable suspicion or probable cause may be entirely based upon hearsay. The general rule is that virtually any evidence may be considered. Kosrae v. Tosie, 12 FSM Intrm. 296, 299 (Kos. S. Ct. Tr. 2004).

Even assuming that there was an illegal arrest, a defendant is still not entitled to dismissal of the information. The remedy for an illegal arrest, for failure to provide cause and authority of the arrest, is suppression of any statements made by the defendant. Kosrae v. Anton, 12 FSM Intrm. 217, 219-20 (Kos. S. Ct. Tr. 2003). When the affiant's belief that probable cause existed was based solely on affiant's review of a police report, which presumably was prepared by an officer who investigated the crime scene; when the affiant does not state whether the affiant spoke with the reporting officer, or even identify the reporting officer; when there is no explanation of how the information contained in the police report was obtained; when there is no evidence that the affiant or the unknown reporting officer interviewed witnesses or investigated the incident and there is no way to determine the extent to which the report itself was based on hearsay or any assurance that it was based on the investigating officer's reasonable belief rather than on pure speculation, then the "affidavit of probable cause" is deficient because the affidavit suffers from multiple layers of hearsay, and multiple levels of hearsay become less reliable as the number of levels of hearsay increase and because the affidavit fails to adequately identify the information's source or sources and may be based on unattributed hearsay statements of one or more declarants. As the number of included hearsay statements increases, the guarantees of reliability that justify admission become attenuated. Hearsay that is otherwise admissible may be excluded where it primarily reiterates statements of other, unidentified persons. Chuuk v. Chosa, 16 FSM Intrm. 95, 98-99 (Chk. S. Ct. Tr. 2008).

When the court makes its determination as to whether probable cause was proven, it must regard the evidence from the vantage point of law enforcement officers acting on the scene but must make its own independent determination as to whether, considering all the facts at hand, a prudent and

cautious law enforcement officer, guided by reasonable training and experience, would consider it more likely than not that a violation has occurred. Ishizawa v. Pohnpei, 2 FSM Intrm. 67, 77 (Pon. 1985).

Defendant misconstrues the rule of Chosa when he claims that multiple layers of hearsay render the affidavit in this case unreliable. In Chosa, the prosecutor prepared an affidavit of probable cause after reviewing an unattributed police report. It was not possible to determine from the report whether its author had actually undertaken the investigation. Chosa, 16 FSM Intrm. at 113. The prosecutor did not state whether he spoke with the reporting officer, nor did he identify the reporting officer. There was no explanation of how the information contained in the police report was obtained. There was no evidence that the prosecutor or the unknown reporting officer interviewed witnesses or investigated the incident. There was no way to determine the extent to which the report itself was based on hearsay or any assurance that it was based on the reasonable belief of the investigating officer rather than on pure speculation. *Id.* at 115.

Primarily on these facts, coupled with the prosecutor's affidavit based upon nothing more, the Court in Chosa found that the affidavit was defective in several ways, including suffering from multiple levels of hearsay, and suppressed it along with dismissing the criminal action. *Id.* at 115. But the affidavit in the case before the Court identifies its author as a police detective of the Chuuk State Public Safety department. Affidavit at 1:3. It also indicates that the detective was assigned to investigate the offenses alleged in the information. Affidavit at 1:5; Information at 1-2. The affidavit does not identify informants but describes facts uncovered during the course of the investigation. Affidavit at 1:6, 2:7. Defendant admits that the affiant formed his conclusions based upon representations of the alleged victim. Motion at 3:10, 13 (June 29, 2010)

Failure of the affiant to name sources of information does not render the affidavit defective in this case in part because defendant admits that the affiant gathered information directly from the victim. The affidavit does not suffer from multiple layers of hearsay because the affiant identifies himself and attests to personally investigating the criminal violations alleged. It is difficult to imagine how the vast majority of criminal prosecutions might proceed without using hearsay: it is the exception rather than the norm that court testimony underpins probable cause determinations. Any statements made to the affiant by the alleged victim are by definition hearsay and hearsay may, in whole or in part, form the basis of probable cause determinations, as may virtually any kind of evidence. The Court finds no merit in defendant's contention that the affidavit of probable cause suffers from multiple layers of hearsay.

The rule of Chosa is exceptional and driven by the intersection of a many anomalous facts. This Court does not interpret that case to stand for the proposition that hearsay may not be used to make probable cause determinations; to do so would be to ignore well established jurisprudence on the subject. And, as the State points out, defendant does nothing to support his claim that the affidavit contains multiple levels of hearsay. It remains unclear to the Court just what portion of the affidavit lends itself to that interpretation. Such a finding, at a bare minimum, would be required to trigger the kind of analysis undertaken in Chosa. Instead defendant proceeds as if citation of an unpublished case, coupled with an unsubstantiated claim about multiple levels of hearsay, amounts to a legal argument for suppression of the affidavit and dismissal of the action.

The Investigation and Civil Remedies

Defendant's second motion argues that since he was not questioned before the investigating officer determined that there was probable cause, the officer's determination is biased to the extent that it should be dismissed. A detailed report of the officer's investigation is not before the Court, nor should it be at this point in the proceedings. The Court agrees that generally speaking, a prudent and thorough investigation likely would have involved questioning of the defendant before a probable cause

determination was made. But the Court is not in the business of investigating criminal allegations; law enforcement officials are. Whether and to what extent the officer determined that such questioning was unnecessary, and whether the omission somehow weakens the State's case is a factual issue to be determined at trial. That defendant has an explanation, which at least partially appears to consist of a claim that there was an agreement involving money between him and the alleged victim must also be tested at trial.

Nothing in FSM or Chuuk State law provides that every investigating officer in every criminal case must question all or any criminal suspects before making a probable cause determination. Even if the officer had obtained defendant's explanation before drawing his conclusions, the legal issues surrounding defendant's actions allege criminal behavior, not whether a sum of money was owed to him by the complainant. This is to say that nothing about defendant's purported financial agreement with the alleged victim would have necessarily caused the investigating officer to form a different probable cause determination. Defendant may be correct in saying that there are civil remedies for the wrongs alleged. But the possible existence of civil remedies in no way negates the fact that the behavior alleged has been criminalized by our legislature. The Court's task is to determine whether the allegations have merit, not to contemplate the propriety of the legal venue.

The Court finds nothing to indicate that information obtained from the alleged victim is unreliable. It does not seem reasonable or realistic to expect an alleged victim to remain neutral and unbiased regarding his claims about being victimized however. Defendant's admission that there was a financial arrangement of some sort between himself and the complainant, and that the agreement itself is part of the nexus of facts leading up to this prosecution, at a bare minimum indicates to the Court that there are at least two competing versions of events. Defendant has a constitutional right to confront and cross examine his accusers at trial. If the complainant has been untruthful or misleading, it remains to be ferreted out through the adversarial process.

Defendant has failed to demonstrate that from the investigating officer's perspective, information obtained during the course of the investigation is insufficient to justify a finding of probable cause. The Court also reminds defendant that the time to raise issues regarding probable cause is immediately after arrest, preferably at the initial appearance, arraignment, or, upon motion, at a probable cause hearing. It is not approximately one month before trial is scheduled to begin. The Court further reminds defendant that generally, and notwithstanding facts of the kind in Chosa, the remedy for failure to provide cause and authority of the arrest is suppression of any statements made by the defendant, not dismissal of the case. Anton, 12 FSM Intrm. at 219-20.

MALICIOUS PROSECUTION

Defendant's second motion to dismiss alleges, in the complete absence of supporting facts or reference to any legal standard under which such facts might be analyzed, that there is probable cause to believe the State has "intentionally and maliciously instituted criminal actions against the defendant." The Court does not take such an allegation lightly as it implicates the integrity of the Chuuk State Attorney General's office. Defendant is hereby Ordered to show cause for making the allegation. Defendant's motions to suppress the affidavit of probable cause are dismissed and his motions to dismiss this criminal action are denied.

IT IS SO ORDERED.

* * * *