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

Decided: July 29, 2011

APPEARANCE:

For the Defendant: Julius J. Sapelalut, Esq.
Chief Public Defender
Office of the Public Defender
P.O. Box PS-174
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HEADNOTES

Criminal Law and Procedure - Motions

Failure to oppose a motion is generally deemed a consent to the motion, but even when there is no opposition, a court still needs good grounds before it can grant the motion. FSM v. Phillip, 17 FSM Intrm. 595, 597 (Pon. 2011).

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 that the suspect has committed or is about to commit a crime. The reasonable suspicion standard requires police officers to identify "specific and articulable facts" justifying the stop, rather than a mere hunch. Reasonable suspicion must exist before the investigatory stop occurs for the stop to be valid. FSM v. Phillip, 17 FSM Intrm. 595, 598 (Pon. 2011).

Search and Seizure - Investigatory Stop

An anonymous tip received regarding the defendant's possible actions to transport contraband to Pingelap, the defendant's appearance at the dock with a backpack, and the defendant's disembarkation from the vessel without the backpack, were sufficient specific and articulable facts that supported the officers' reasonable suspicion that a crime had occurred or was about to occur. FSM v. Phillip, 17 FSM Intrm. 595, 598 (Pon. 2011).

Search and Seizure – Investigatory Stop

A valid investigatory stop requires only reasonable suspicion, based on specific and articulable facts, that the suspect has committed or is about to commit a crime. FSM v. Phillip, 17 FSM Intrm. 595, 598 (Pon. 2011).

Search and Seizure – Investigatory Stop

When the specific facts available to the police officers, namely, the informant's tip; that this tip was corroborated when the defendant, who was known to the officers, arrived at the dock carrying a backpack and boarded the vessel; and that some of the officers witnessed the defendant disembark from the ship without his backpack, were more than sufficient to establish reasonable suspicion, the officers were entitled to perform an investigatory stop of the defendant to determine whether he had or was about to commit a crime. FSM v. Phillip, 17 FSM Intrm. 595, 598-99 (Pon. 2011).

Search and Seizure – Investigatory Stop

The police did not go beyond the scope of an investigatory stop and compel incriminating testimonial evidence because the defendant voluntarily consented to a police request that he assist them in locating a backpack when the officers that approached the defendant were dressed in street clothes, not in uniform; when the police officers were unarmed; when the questioning occurred in a public location; when there was no evidence of any coercion or forceful language being used; and when some of the police officers and the defendant had met each other before and were acquainted with each other. FSM v. Phillip, 17 FSM Intrm. 595, 599 (Pon. 2011).

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

When the officers had reasonable suspicion, based on specific and articulable facts, to perform an investigatory stop of the defendant after he disembarked from the *Voyager* on December 27, 2009, and when the defendant was not compelled to make an explicit or implicit disclosure of incriminating testimonial information since he volunteered to help the officers locate his backpack, he was not at that time, entitled to a privilege against self-incrimination under FSM Const. art. IV, § 7. FSM v. Phillip, 17 FSM Intrm. 595, 599 (Pon. 2011).

Search and Seizure – By Consent

The possibility that Micronesians may be more apt to acquiesce when asked to give their consent by an authority figure may be one of the factors that a court may consider in evaluating the "totality of the circumstances" to determine whether consent was voluntarily given. Such an assessment must be performed on a case-by-case basis, and the court would be overly presumptive to assume that all Micronesians would respond to police questioning in the same manner. FSM v. Phillip, 17 FSM Intrm. 595, 600 (Pon. 2011).

Search and Seizure – By Consent

While the court may be sensitive to the possibility of a Micronesian suspect's simple submission to what is considered the authority or the power of the state to search, a tendency by individuals to accede to the demands of authority figures is not unique to Micronesia. FSM v. Phillip, 17 FSM Intrm. 595, 600 (Pon. 2011).

Search and Seizure – By Consent

A consent search simply does not rise to the level of a custodial interrogation or trial, both situations in which a defendant must be specifically informed of his rights. FSM v. Phillip, 17 FSM Intrm. 595, 600 (Pon. 2011).

Criminal Law and Procedure – Arrest and Custody; Search and Seizure – By Consent

A warning is required when a custodial interrogation takes place and a suspect has been deprived

of his freedom in a significant way. This differs from the situation where there was some evidence of illegal activity prior to the search, but it did not meet the probable cause standard necessary to arrest or search. In this type of situation, a search authorized by valid consent may be the only method by which evidence may be obtained. FSM v. Phillip, 17 FSM Intrm. 595, 600 (Pon. 2011).

Search and Seizure – By Consent

If the court were to impose an explicit proof of knowledge requirement in determining the reasonableness of consent searches, it would seriously limit police officers' ability to use consent searches at all, as it would be very difficult for the prosecution to ever show that a suspect affirmatively knew of his right to refuse consent. Under such a standard, defendants could simply fail to admit that they knew of their right to refuse consent, creating an unrealistically high burden for prosecutors seeking to introduce evidence obtained as a result of a consent search. FSM v. Phillip, 17 FSM Intrm. 595, 600 (Pon. 2011).

Search and Seizure – By Consent

Explicit knowledge of the right to refuse consent is not mandatory for a valid consent search to occur. FSM v. Phillip, 17 FSM Intrm. 595, 601 (Pon. 2011).

Search and Seizure – By Consent

When, based on the totality of the circumstances, the court finds that the defendant voluntarily consented to the search of his backpack, his motion to suppress evidence will be denied. FSM v. Phillip, 17 FSM Intrm. 595, 601 (Pon. 2011).

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COURT'S OPINION

DENNIS K. YAMASE, Associate Justice:

On May 18, 2011, the Defendant Robert "Ahdet" Phillip filed a Motion to Reconsider the Court's Order of March 18, 2011 that denied the Defendant's motions to suppress evidence, quash the information, and to dismiss, finding that police officers performed a valid investigatory stop of the Defendant Phillip, and that the warrantless search of the Defendant's backpack and its contents was permissible because the Defendant gave valid consent. The Plaintiff Federated States of Micronesia (FSM) has filed no response to the Defendant's Motion to Reconsider.

Failure to oppose a motion is generally deemed a consent to the motion, but even when there is no opposition, a court still needs good grounds before it can grant the motion. FSM v. Wainit, 12 FSM Intrm. 360, 362 (Chk. 2004).

In his motion the Defendant argues that the Court should reconsider its denial of its motion to suppress evidence. The Defendant argues that the police officers did not conduct a proper investigatory stop when they questioned the Defendant about the whereabouts of his backpack. The Defendant also contends that he did not validly consent to a police search because he was not informed of his right to refuse consent. The Court considers each issue raised for reconsideration below.

I. WHETHER THE OFFICERS CONDUCTED AN INVESTIGATORY STOP

A. *Defendant's Argument that the Police Officers Did Not Conduct a Proper Investigatory Stop*

In his motion the Defendant argues that the police officers who stopped him at the dock, did not

conduct a proper investigatory stop. The Defendant properly notes that a law enforcement officer may perform an investigatory stop, also known as a field interrogation, if he has reasonable suspicion that the suspect has committed or is about to commit a crime. FSM v. Aliven, 16 FSM Intrm. 520, 527 (Chk. 2009). Pursuant to the United States (U.S.) Supreme Court case of Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968), the reasonable suspicion standard requires police officers to identify "specific and articulable facts" justifying the stop, rather than a mere hunch. *Id.* at 21, 88 S. Ct. at 1880, 20 L. Ed. 2d at 906. Reasonable suspicion must exist before the investigatory stop occurs for the stop to be valid. Aliven, 16 FSM Intrm. at 527.

The Defendant contends that the only specific and articulable facts known to the police officers at the time of the stop were: 1) the anonymous tip the officers received from an informant that someone would attempt to transport marijuana to Pingelap on the *Caroline Voyager*; 2) the corroboration of this tip, which occurred when the Defendant arrived at the dock carrying a backpack and boarded the vessel; and 3) the fact that the officers witnessed the Defendant disembark from the vessel without his backpack.

The Defendant contends that the other evidence cited to in the court's order, including the Defendant's denial of having a backpack, the actual whereabouts of the backpack, and any other information obtained from communications with the Defendant, were gathered after the Defendant had been stopped and cannot form the basis for an investigatory stop. The Defendant argues that the specific and articulable facts available to the police officers before the stop occurred were not sufficient to meet the reasonable suspicion standard necessary for a valid investigatory stop.

The Court agrees with the Defendant Phillip that certain additional evidence, including the Defendant's denial of having a backpack, the whereabouts of the backpack, and any other information the police officers received from the Defendant, was obtained by the police officers after the initial investigatory stop had occurred. However, the Court finds that the facts that existed before the investigatory stop occurred, namely, the anonymous tip received regarding the Defendant's possible actions to transport contraband to Pingelap, the appearance of the Defendant at the dock with the backpack, and the Defendant's disembarkation from the vessel without the backpack, were sufficient specific and articulable facts that supported the officers' reasonable suspicion that a crime had occurred or was about to occur.

In a comparable U.S. Supreme Court case it was found that the probable cause standard for arrest was met when a reliable informant gave police officers a description of a suspected drug dealer and informed them that the suspect would be at a specific train station on a given date and time. Draper v. United States, 358 U.S. 307, 309, 79 S. Ct. 329, 331, 3 L. Ed. 2d 327, 329-30 (1958). When the police officers arrived at the train station, they visually identified an individual who exactly matched the informant's description and arrested him. *Id.* at 309-10, 79 S. Ct. at 331, 3 L. Ed. 2d at 330. The U.S. Supreme Court held that information from an informant whose information has been shown to be reliable may be used to establish probable cause when the information provided is an exact match to the description of the person sought. *Id.* at 313, 79 S. Ct. at 333, 3 L. Ed. 2d at 332. The Court held that "with every other bit of [the informant's] information being thus personally verified, [the police officer] had "reasonable grounds" to believe that the remaining unverified bit of [the informant's] information–that [the defendant] would have the heroin with him–was likewise true." *Id.*

A valid investigatory stop requires only reasonable suspicion, based on specific and articulable facts, that the suspect has committed or is about to commit a crime. Aliven, 16 FSM Intrm. at 527. Given that the reasonable suspicion standard is a lower standard than the probable cause standard considered in Draper, the Court finds that the specific facts available to the police officers, namely, the informant's tip; that this tip was corroborated when the Defendant, who was known to the officers,

arrived at the dock carrying a backpack and boarded the vessel; and that some of the officers witnessed the Defendant disembark from the ship without his backpack, were more than sufficient to establish reasonable suspicion. Accordingly, the officers were entitled to perform an investigatory stop of the Defendant to determine whether he had or was about to commit a crime.

B. *Defendant's Argument that He Had a Right to Be Notified of his Constitutional Right Against Self-Incrimination During Questioning*

The Defendant further contends that the police officers went beyond the scope of an investigatory stop when they questioned him about the whereabouts of his backpack. He claims that the officers' questioning entitled him to various constitutional protections, including being informed of his right to remain silent during a police interrogation. FSM Const. art. IV, § 7; *see also* Miranda v. Arizona, 384 U.S. 436, 479, 86 S. Ct. 1602, 1630, 16 L. Ed. 2d 694, 726 (1966).

The Defendant cites to the U.S. Supreme Court case of Doe v. United States, 487 U.S. 201, 108 S. Ct. 2341, 101 L. Ed. 2d 184 (1988), in support of his argument that the officers' request that he accompany them onto the *Voyager* to search for the backpack constitutes a testimonial communication entitling him to a warning regarding his right against self-incrimination. In that case, the Court held that the 5th Amendment to the U.S. Constitution (similar to FSM Const. art. IV, § 7), ensures that individuals may resist compelled explicit or implicit disclosures of incriminating testimonial information. Doe, 487 U.S. at 212, 108 S. Ct. at 2348, 101 L. Ed. 2d at 198. The U.S. Supreme Court found that for an individual's action to be considered "testimonial," the act must itself, explicitly or implicitly, relate a factual assertion or disclose information. *Id.* at 209-10, 108 S. Ct. at 2347, 101 L. Ed. 2d at 196-97.

The holding in Doe applies to incriminating testimonial information that has been compelled, e.g., that the suspect has not voluntarily provided. *Id.* at 212, 108 S. Ct. at 2348, 101 L. Ed. 2d at 198. In this case, the Court found that the Defendant voluntarily consented to their request that he assist them in locating the backpack. This determination was based on the evidence presented at the August 10, 2010, hearing, which showed that when the officers approached the Defendant, they were dressed in street clothes, not in uniform; the police officers were unarmed; the questioning occurred in a public location; there was no evidence of any coercion or forceful language being used; and some of the police officers and the Defendant had met each other before and were acquainted with each other.

The evidence fully supports the Court's finding that the Defendant was not compelled or coerced, but instead voluntarily boarded the *Voyager* with the officers to help them locate the backpack he had originally been seen carrying onboard. It should also be pointed out that the evidence indicated that it was one of the officers who located the backpack and not the Defendant.

Upon reconsideration, the Court finds that the officers had reasonable suspicion, based on specific and articulable facts, to perform an investigatory stop of the Defendant after he disembarked from the *Voyager* on December 27, 2009. The Court further finds that the Defendant was not compelled to make an explicit or implicit disclosure of incriminating testimonial information when he volunteered to help the officers locate his backpack, and was not at that time, entitled to a privilege against self-incrimination under FSM Const. art. IV, § 7.

II. Issue Two – Whether Defendant Phillip Validly Consented to a Police Search Because He Was Not Informed of His Right to Refuse Consent

The Defendant further asks the Court to reconsider its decision that informing a suspect of his right to refuse consent, while one factor for the Court to consider when determining whether a consent

search was voluntary, is not required for a consent search to be valid. The Defendant argues that it is inappropriate to apply the U.S. Supreme Court's holding in Schneckloth v. Bustamonte, 412 U.S. 218, 93 S. Ct. 2041, 36 L. Ed. 2d 854 (1973) in the FSM because Micronesian customs and traditions differ markedly from those in the United States. The Defendant cites to the judicial guidance clause in FSM Const. art. XI, § 11, which states that "[c]ourt decisions shall be consistent with this Constitution, Micronesian customs and traditions, and the social and geographical configuration of Micronesia. In rendering a decision, a court shall consult and apply sources of the Federated States of Micronesia."

The Defendant contends that Micronesians should be afforded the additional protection of being explicitly informed of their right to refuse consent because of their non-confrontational nature and tendency, based on social customs, to defer to those in a position of authority. He argues that Micronesians should not be penalized for practicing their customs and traditions, and some protection should be granted to ensure that they are aware of their right to put tradition and custom aside in the face of a police request to perform a consent search. The Defendant compares the additional warning to a suspect of his right to refuse consent with the requirements set forth in Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), and claims that a clear cut warning would be the most effective way to protect a suspect's rights pursuant to FSM Const. art. IV, § 5.

In its March 18, 2011 order, this Court determined that the question of whether consent to a search was voluntarily given is a question of fact to be determined from the totality of the circumstances. [FSM v. Phillip, 17 FSM Intrm. 413, 423-24 (Pon. 2011).] The possibility that Micronesians may be more apt to acquiesce when asked to give their consent by an authority figure may be one of the factors that a court may consider in evaluating the "totality of the circumstances" to determine whether consent was voluntarily given. However, such an assessment must be performed on a case-by-case basis, and this Court would be overly presumptive to assume that all Micronesians would respond to police questioning in the same manner.

While the Court may be sensitive to the possibility of a Micronesian suspect's "simple submission to what is considered the authority or the power of the state to search," McCORMICK ON EVIDENCE, § 175 (1972), a tendency by individuals to accede to the demands of authority figures is not unique to Micronesia and, is, in fact, the basis for the U.S. Supreme Court's requirement that voluntary consent to a search be shown for the search to be reasonable. *Id.*

Contrary to the Defendant's position, this Court found in its March 18, 2011, order that a consent search simply does not rise to the level of a custodial interrogation or trial, both situations in which a defendant must be specifically informed of his rights, as held in Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). The Miranda warning is required when a custodial interrogation takes place and a suspect has been deprived of his freedom in a significant way. This situation differs from the situation here, where there was some evidence of illegal activity prior to the search, but it did not meet the probable cause standard necessary to arrest or search. In this type of situation, a search authorized by valid consent may be the only method by which evidence may be obtained. If the Court were to impose an explicit proof of knowledge requirement in determining the reasonableness of consent searches, it would seriously limit police officers' ability to use consent searches at all, as it would be very difficult for the prosecution to ever show that a suspect affirmatively knew of his right to refuse consent. Under such a standard, defendants could simply fail to admit that they knew of their right to refuse consent, creating an unrealistically high burden for prosecutors seeking to introduce evidence obtained as a result of a consent search.

In this case, the Defendant Phillip was acquainted with some of the police officers, the officers were not wearing uniforms, the officers were unarmed, and the officers did not threaten the Defendant or make any intimidating movements. Further, and most importantly, the officers involved specifically

asked the Defendant if they could look inside of his backpack and the Defendant responded, "Yes." The Defendant did not testify that his behavior in agreeing to the officers' request was based on any type of customary norm or tradition.

The Defendant has presented no new evidence or case law to challenge the Court's determination that his consent to the search of his backpack was knowingly and voluntarily given. Accordingly, this Court, upon reconsideration of its March 18, 2011 order, finds that explicit knowledge of the right to refuse consent is not mandatory for a valid consent search to occur. Based on the totality of the circumstances, the Court finds that the Defendant Phillip's voluntarily consented to the search of his backpack.

The Defendant Phillip's motion to reconsider is HEREBY DENIED.

Trial in this matter is currently set to begin on Tuesday, August 2, 2011, at 9:30 a.m. at the FSM Supreme Court in Palikir, Pohnpei. The parties shall meet at the courthouse in Palikir on Monday, August 1, 2011, to label exhibits, stipulate to the authenticity and/or admissibility of evidence where possible, and to discuss any final pretrial matters, so that trial may begin at 9:30 a.m. on Tuesday, August 2, 2011.

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