

E. *Constitutional and Statutory Propriety of Permanent Injunction*

The Tulenkuns contend that the permanent injunction makes the Land Court Act and the Kosrae Constitution Article VI, section 6 meaningless because under the Land Court Act, the Kosrae State Court's function is to review, as an appellate court using the substantial evidence rule, Land Court decisions. They contend that if, using that rule, the Kosrae State Court affirms a Land Court judgment in their favor while the Kosrae State Court permanent injunction bars them from entering and using upper Yawal it would be inconsistent with the substantial justice standard of Kos. S.C. § 6.402. Since we have vacated the partial summary judgment and the permanent injunction on other grounds we do not reach this issue. Unnecessary constitutional adjudication is to be avoided. Kosrae v. Langu, 9 FSM Intrm. 243, 251 (App. 1999).

V. CONCLUSION

Accordingly, the permanent injunction and the partial summary judgment are vacated. The preliminary injunction remains in effect. This matter is remanded for further proceedings consistent with this opinion.

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FSM SUPREME COURT TRIAL DIVISION

FEDERATED STATES OF MICRONESIA,	)	CRIMINAL CASE NO. 2013-502
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	
THERSTON BENJAMIN a/k/a DOHDOHN	)	
BENJAMIN,	)	
	)	
Defendant.	)	
	)	

ORDER SUPPRESSING EVIDENCE AND DENYING QUASHING INFORMATION

Dennis K. Yamase  
Associate Justice

Decided: March 28, 2014

APPEARANCES:

For the Plaintiff:	Pole Atanraoi-Reim, Esq. Assistant Attorney General FSM Department of Justice P.O. Box PS-105 Palikir, Pohnpei FM 96941
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For the Defendant: Julius J. Sapelalut, Esq.  
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#### HEADNOTES

##### Search and Seizure – Probable Cause

Article IV, § V protects individuals against illegal search and seizures, which can only be done based on probable cause. The standard for determining probable cause is whether there is evidence and information sufficiently persuasive to warrant a cautious person to believe it is more likely than not that a violation of the law has occurred and that the accused committed that violation. The probable cause determination must be made by the deliberate, impartial judgment of a judicial officer. FSM v. Benjamin, 19 FSM R. 342, 346-47 (Pon. 2014).

##### Search and Seizure – Probable Cause

The protection in article IV, § 5 of the FSM Constitution against unreasonable search and seizure is based on a comparable provision in the fourth amendment of the U.S. Constitution. FSM v. Benjamin, 19 FSM R. 342, 347 n.4 (Pon. 2014).

##### Criminal Law and Procedure – Arrest and Custody; Search and Seizure – Probable Cause

When the defendant was found in the area after hours and his answers to the officer's questions were inconsistent, that and the surrounding circumstances rise to the level of reasonable suspicion, but not the higher standard of probable cause, which is needed for a lawful arrest. "Reasonable suspicion" is formed by specific, articulable facts which, together with objective and reasonable inferences, form the basis for suspecting that the particular person detained is engaged in criminal activity. FSM v. Benjamin, 19 FSM R. 342, 347 & n.5 (Pon. 2014).

##### Criminal Law and Procedure – Arrest and Custody

"Arrest" is defined as "placing any person under any form of detention by legal authority." 12 F.S.M.C. 101(3). A person is considered arrested for the purpose of the right to be advised of his constitutional rights when his freedom is substantially restricted or controlled by a police officer who is exercising official authority based upon the officer's suspicion that the person may have been involved in the commission of a crime. FSM v. Benjamin, 19 FSM R. 342, 347 (Pon. 2014).

##### Criminal Law and Procedure – Arrest and Custody

One should be considered "arrested" when one's freedom of movement is substantially restricted or controlled by a police officer exercising official authority based upon the officer's suspicion that the detained person may be, or may have been, involved in commission of a crime. FSM v. Benjamin, 19 FSM R. 342, 347 (Pon. 2014).

##### Criminal Law and Procedure – Arrest and Custody

When there was no probable cause to arrest the defendant, placing the defendant into the police car and taking him to the Pohnpei state police station in Kolonia and then questioning him on the way to the national police headquarters in Palikir without reading him his rights, violates his rights to remain silent and to the assistance of counsel. FSM v. Benjamin, 19 FSM R. 342, 347-48 (Pon. 2014).

Criminal Law and Procedure – Arrest and Custody

Having substantially restricted the defendant's freedom when he was placed in the police vehicle and transported first to the Pohnpei police station in Kolonia and then to the national police headquarters in Palikir, the defendant was under arrest and should have been read his rights. By not doing so, any statement made by him on questioning by the police in their vehicle on the way to the national police headquarters in Palikir and before being read his rights will be suppressed. FSM v. Benjamin, 19 FSM R. 342, 348 (Pon. 2014).

Search and Seizure – Exclusionary Rule

The exclusionary rule is well established in the FSM. FSM v. Benjamin, 19 FSM R. 342, 348 (Pon. 2014).

Search and Seizure – Exclusionary Rule

The court will apply the exclusionary rule on a case-by-case basis. The exclusionary rule has been devised as a necessary device to protect right to be free from unreasonable search and seizure. FSM v. Benjamin, 19 FSM R. 342, 348 (Pon. 2014).

Search and Seizure – Exclusionary Rule

Under the exclusionary rule, any evidence obtained through an illegal search and seizure, whether physical or verbal, is a fruit of the illegal search and seizure and is tainted by illegality, and must be excluded. FSM v. Benjamin, 19 FSM R. 342, 348 (Pon. 2014).

Search and Seizure – Exclusionary Rule

When admissions have been obtained in the course of questioning that violated 12 F.S.M.C. 218, statutory policy calls for a presumption that subsequent admissions were obtained as a result of the violation. Statements made by a person being questioned by police without being advised of all his rights violates 12 F.S.M.C. 218. A statement so obtained is rendered inadmissible by 12 F.S.M.C. 220. FSM v. Benjamin, 19 FSM R. 342, 348-49 (Pon. 2014).

Criminal Law and Procedure – Dismissal; Search and Seizure – Exclusionary Rule

When some evidence was obtained by means sufficiently distinguishable to be purged of the primary taint, it will not be suppressed, and therefore the court will not quash the information. FSM v. Benjamin, 19 FSM R. 342, 350 (Pon. 2014).

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COURT'S OPINION

DENNIS K. YAMASE, Associate Justice:

I. BACKGROUND

A criminal Information was filed by the Plaintiff, Federated States of Micronesia (FSM or Government), through the FSM Department of Justice, on August 21, 2013.<sup>1</sup> An Initial Appearance was held on August 26, 2013, where the Defendant, Therston Benjamin a/k/a Dohdohn Benjamin (Benjamin), was represented by the FSM Public Defender's Office. On October 23, 2013, Benjamin

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<sup>1</sup> The Information charges the Defendant with the following: Count I – Trespassing Contrary to 11 F.S.M.C. 605; Count II – Theft Contrary to 11 F.S.M.C. 602(1); Count III - Trespassing Contrary to 11 F.S.M.C. 605; Count IV – Theft Contrary to 11 F.S.M.C. 602(1).

filed a Motion to Suppress his Statements Made Before he was Advised of his Rights. Also on October 23, 2013, Benjamin filed a Motion to Quash the Information for Lack of Probable Cause. On November 6, 2013, the Government entered a reply to Benjamin's motions.

On November 13, 2013, Benjamin filed an Alternate Motion to Suppress All Evidence Against Him. A hearing on all pending pre-trial motions was held on December 11, 2013. FSM Assistant Attorney General (AG) Pole Atanraoi-Reim, Esq., appeared on behalf of the Government, and FSM Public Defender (PD) Julius J. Sapelalut, Esq. represented Benjamin. During the hearing, the court considered the testimony of national police officers Ramsky Andon (Andon) and Kasner Aldens (Aldens). At the close of evidence, the court instructed the parties to brief the issue on the fruit of the poisonous tree doctrine and its possible applications to this matter.

A Supplemental Motion to Suppress Fruit of Poisonous Tree was filed on January 7, 2014 by Benjamin. On January 24, 2014, the Government entered its Opposition to Defendant's Supplemental Motion to Suppress Fruit of the Poisonous Tree. During the hearing on December 11, 2013, the parties agreed that all pre-trial and other pending motions shall be considered together, instead of individually, which the court will do in ruling on the issue of suppression of evidence in this matter.

## II. FACTS

The following facts are undisputed, based on the submissions and as solicited through testimony:

1. On the evening of May 16, 2013 at approximately 10:00 p.m., FSM National Police officers Aldens and Andon were on routine patrol of FSM national government buildings in Kolonia. Upon reaching the FSM Development Bank (FSMDB) structure for inspection, officer Aldens went to the front, as Andon went to the back of the building.<sup>2</sup>
2. While approaching the rear, Andon noticed an individual hiding or attempt to hide in the bushes. Andon shined his flashlight at the person and told him to come out of the bushes. This person would later be identified as Benjamin.
3. As Aldens came to the back of the building, he noticed Andon and Benjamin standing next to the police vehicle. Benjamin had a plastic bag in his possession. When the officers asked Benjamin what he was doing in the area, he responded that he was coming from his aunt's house, and when asked where his aunt lived, he said she lived in the PAMI building located across from the FSM Development Bank building. When asked his aunt's name, Benjamin did not respond.
4. At this point, the officers placed Benjamin in the patrol car, and headed to the Pohnpei State Police station. There was no testimony as to whether or not Benjamin voluntarily went with the officers. Upon arrival at the station, the officers asked the state police officers if there were any reports of a break-in at the FSM Development Bank building. None had been reported. The officers then headed to the National Police headquarters in Palikir with Benjamin. Aldens testified that they took Benjamin to Palikir for further questioning.
5. During the ride to Palikir, after being questioned by the officers, Benjamin confessed to breaking in to the building. Benjamin stated that he had entered the building through a glass window. Aldens testified that it was at this point that Benjamin was read his rights. At approximately

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<sup>2</sup> The FSM Development Bank has since relocated to the Town Plaza building in Kolonia.

11:00 p.m., the officers arrived in Palikir where the officers continued to question Benjamin, and he eventually signed an Advice of Rights form.

6. Benjamin was kept at the Palikir police station overnight, and taken to the Pohnpei State Jail in the morning hours of the next day. While Benjamin was in Palikir, an investigation was carried out by the National Police. An employee of the FSM Development Bank was summoned to the building, and it was found that the following items were missing:
  1. Several milk chocolate bars
  2. Several coffee packets
  3. 1 bottle of lotion
  4. 1 Pohnpeian body lotion
  5. 1 locally made turtle necklace
  6. 5 pieces of cigarettes
  7. 1 packet of chocolate pretzels
  8. 1 packet of non-fat milk
  9. Several pennies and a dime
  10. 2 loaves of bread
7. When Benjamin confessed on the way to Palikir, he stated that he entered the building through a glass window. Finger prints were lifted from the scene where Benjamin said he entered, and the prints matched Benjamin. Employees of the FSMDB later identified the items that were recovered from Benjamin as the items that were missing.
8. Benjamin was released from jail at approximately 3:45 p.m. on May 17, 2013. After his release, Benjamin was taken back to the Palikir station, was further questioned, gave another confession, and was reread his rights. Benjamin signed a form explaining his rights in the Pohnpeian language.

### III. SUPPRESSION OF STATEMENTS AND EVIDENCE

#### A. *Probable Cause*

Benjamin contends that once the police at the Pohnpei State police station stated that there were no reports of break-ins, Aldens and Andon no longer had probable cause to further keep Benjamin, and he should have been released that time. Based on this lack of probable cause, Benjamin claims that any evidence obtained by the Government after they left the Pohnpei State police station, including his initial confession and all evidence thereafter, should be disqualified under the exclusionary rule premised on the Fruit of the Poisonous Tree Doctrine. Wong Sun v. United States, 371 U.S. 471, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963).<sup>3</sup>

The court first looks to the FSM Const. art. IV, § V, which protects individuals against illegal

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<sup>3</sup> In Wong Sun, the U.S. Supreme Court held "We need not hold that all evidence is 'fruit of the poisonous tree' simply because it would not have come to light but for the illegal actions of the police. Rather, the more apt question in such a case is 'whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.'" *Id.* at 487-88, 83 S. Ct. at 417, 9 L. Ed. 2d at 455.

search and seizures, which can only be done based on probable cause.<sup>4</sup> The standard for determining probable cause is whether there is evidence and information sufficiently persuasive to warrant a cautious person to believe it is more likely than not that a violation of the law has occurred and that the accused committed that violation. The probable cause determination must be made by the deliberate, impartial judgment of a judicial officer. FSM v. Wainit, 12 FSM Intrm. 105, 108 (Chk. 2003); FSM v. Zhong Yuan Yu No. 621, 6 FSM Intrm. 584, 588-89 (Pon. 1994).

Here, although Benjamin was found in the area after hours and his answers to the officer's questions were inconsistent, the court finds that the surrounding circumstances would rise to the level of reasonable suspicion, and not the higher standard of probable cause, which is needed for a lawful arrest.<sup>5</sup> Further evidence of the lack of probable cause was the fact that the officers needed to take Benjamin to the Pohnpei state police station, and later to the National Police headquarters in Palikir, to seek further information and to conduct further questioning.

"Arrest" is defined as "placing any person under any form of detention by legal authority." 12 F.S.M.C. 101(1). A person is considered arrested for the purpose of the right to be advised of his constitutional rights, when his freedom is substantially restricted or controlled by a police officer who is exercising official authority based upon the officer's suspicion that the person may have been involved in the commission of a crime. Kosrae v. Phillip, 13 FSM Intrm. 449, 451-52 (Kos. S. Ct. Tr. 2005).

The court looks to the standards used in FSM v. Edward, 3 FSM Intrm. 224, 240 (Pon. 1987), to determine when a defendant's movement is substantially restricted. "One should be considered 'arrested' when one's freedom of movement is substantially restricted or controlled by a police officer exercising official authority based upon the officer's suspicion that the detained person may be, or may have been, involved in commission of a crime." *Id.* at 232.

In FSM v. Louis, 15 FSM Intrm. 348, 352 (Pon. 2007), the court made it clear that the test in determining arrest used in FSM v. Edward, 3 FSM Intrm. 224 (Pon. 1987), comports with the statutory definition of arrest used in Chapter 2 of 12 F.S.M.C. – Rights of Person Arrested. "One should be considered 'arrested' within the meaning of 12 F.S.M.C. 218 when one's freedom of movement is substantially restricted or controlled by a police officer exercising official authority based upon the officer's suspicion that the detained person may be, or may have been, involved in commission of a crime."

In the present case, although the court finds that there was no probable cause to arrest Benjamin at the FSMDB building when the officers placed him in the car to take him to the Pohnpei state police station his freedom was substantially restricted and at that point the court determines that he was under arrest. The Kosrae State Court determined a similar issue in Kosrae v. Erwin, 11 FSM Intrm. 192 (Kos. S. Ct. Tr. 2002). In Erwin, the Kosrae court held that where a person's freedom was substantially restricted by a police officer when he was placed into a police car and where that person

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<sup>4</sup> Protection in article IV, §5 of FSM Constitution against unreasonable search and seizure is based upon comparable provision in fourth amendment of U.S. Constitution. FSM v. Rodriguez, 3 FSM Intrm. 385, 386 (Pon. 1988).

<sup>5</sup> "Reasonable suspicion is formed by specific, articulable facts which, together with objective and reasonable inferences, form the basis for suspecting that the particular person detained is engaged in criminal activity." United States v. Lopez-Soto, 205 F.3d 1101, 1105 (9th Cir. 2000); United States v. Garcia-Camacho, 53 F.3d 244, 246 (9th Cir. 1995).

was under the police officer's suspicion that he was involved in the crimes committed earlier that evening, he was considered arrested for the purpose of the right to be advised of his constitutional rights to remain silent and to have legal counsel. And when the police officers failed to advise him of his constitutional rights at the time he was placed in the police car and considered arrested, all his statements made to the police after his arrest and placement into the police car and before he was advised of his constitutional rights, are inadmissible against him. *Id.* at 193-94.

In this case, there was little to no evidence produced during the hearing to show that Benjamin voluntarily entered the police vehicle or that the officers told Benjamin that he may choose not to go with them. Because the court finds that there was no probable cause to arrest Benjamin, placing him into the police car and taking him to the Pohnpei state police station in Kolonia and then on to the national police headquarters in Palikir without reading him his rights violated Benjamin's rights to remain silent and to the assistance of counsel. Importantly, at the time Benjamin was questioned and confessed, there was still no crime even identified.

This case is unlike the case of FSM v. Edward, 18 FSM Intrm. 444 (Pon. 2012), because in Edward there was sufficient evidence that showed that Edward voluntarily got into the police vehicle. He was not restrained or coerced in any way from going with the police officers for further questioning at the national police headquarters in Palikir. In the present case, there was little to no evidence of the circumstances surrounding Benjamin's going with the police officers, first to the Pohnpei police station and then to the national police headquarters in Palikir for further questioning.

The police officers could have questioned Benjamin at the location where they initially found him and contacted their headquarters in Palikir by radio to inquire with the state police as to any reported break-ins on that evening. This would have allowed Benjamin to remain in the vicinity of the FSMDB building and his freedom to move about would not have been substantially restricted. This course of action would be more in line with the right of the police to question a suspect under the reasonable suspicion standard.

Having substantially restricted Benjamin's freedom when he was placed in the police vehicle and transported first to the Pohnpei police station in Kolonia and then to the national police headquarters in Palikir, the court determines that the Defendant Benjamin was under arrest and should have been read his rights. By not doing so, any statement made by Benjamin prior to his being read his rights and upon questioning by the police in their vehicle on the way to the national police headquarters in Palikir is hereby suppressed.

#### B. *Exclusionary Rule*

The exclusionary rule is so well established in the U.S. and the FSM that little needs to be said to amplify its reasoning or application. Kosrae v. Alanso, 3 FSM Intrm. 39, 44 (Kos. S. Ct. Tr. 1985) (citing FSM v. Tipen, 1 FSM Intrm. 79 (Pon. 1982)); Weeks v. United States, 232 U.S. 383, 34 S. Ct. 341, 57 L. Ed. 652 (1914). This court will apply the exclusionary rule on a case-by-case basis. The exclusionary rule has been devised as a necessary device to protect right to be free from unreasonable search and seizure. Alanso, 3 FSM Intrm. at 44. Under the exclusionary rule, any evidence obtained through an illegal search and seizure, whether physical or verbal, is a fruit of the illegal search and seizure, is tainted by illegality, and must be excluded. *Id.*

Where admissions have been obtained in the course of questioning concluded in violation of 12 F.S.M.C. 218, statutory policy calls for a presumption that subsequent admissions were obtained as

a result of the violation.<sup>6</sup> FSM v. Edward, 3 FSM Intrm. 224, 231 (Pon. 1987). Statements made by a person being questioned by police without being advised of all his rights violates 12 F.S.M.C. 218. A statement so obtained is rendered inadmissible by 12 F.S.M.C. 220.<sup>7</sup> FSM v. Menisio, 14 FSM Intrm. 316, 319 (Chk. 2006); FSM v. George, 6 FSM Intrm. 626, 629 (Kos. 1994).

Therefore, because the court finds that Benjamin was under arrest when he was placed in the police vehicle outside of the FSMDB building, all statements and physical evidence obtained after Benjamin's arrest at the FSMDB compound is considered tainted evidence and based on the Fruit of the Poisonous Tree Doctrine, and is hereby suppressed. The suppressed evidence includes both statements made to the police officers and the fingerprints lifted off the window of the FSMDB office.

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<sup>6</sup> 12 F.S.M.C. 218 states "In any case of arrest, or arrest for examination, as provided in subsection (4) of section 211 of this chapter, it shall be unlawful to:

(1) deny to counsel, whether such counsel is retained by the arrested person or a member of his family or is a Public Defender not yet appointed by the Court, the right to see the arrested person once, at any time, for a reasonable period of time at the place of detention, and thereafter at reasonable intervals and for reasonable periods of time; or

(3) refuse or fail to make a reasonable effort to send a message by telephone, cable, wireless, messenger, or other expeditious means to any person mentioned in subsection (2) of this section, provided the arrested person so requests and such message can be sent without expense to the Government or the arrested person prepays any expense there may be to the Government; or

(6) further, it shall be unlawful for those having custody of one arrested, before questioning him about his participation in any crime, to fail to inform him of his rights and their obligations under subsections (1) through (5) of this section.

(7) In addition, any person arrested shall be advised as follows:

(a) that the individual has a right to remain silent;

(b) that the police will, if the individual so requests, endeavor to call counsel to the place of detention and allow the individual to confer with counsel there before he is questioned further, and allow him to have counsel present while he is questioned by the police if he so desires; and

(c) that the services of the Public Defender, when in the vicinity or of his local representative, are available for these purposes without charge.

<sup>7</sup> 12 F.S.M.C. 220 states

No violation of the provisions of this title shall in and of itself entitle an accused to an acquittal, but no evidence obtained as a result of such violation shall be admissible against the accused; provided, that any person detained in custody in violation of any provision of this title may, upon motion by any person in his behalf, and after such notice as the court may order, be released from custody by the court named in the warrant, or before which he has been held to answer. The release shall be upon such terms as the court may deem law and justice require. The relief authorized by this section shall be in addition to, and shall not bar, all forms of relief to which the arrested person may be entitled by law.



C. *Quashing the Information for Lack of Probable Cause*

While most of the known evidence is suppressed including the statements made by Benjamin, some physical evidence is not suppressed since this evidence would have been obtained without the information provided by the statements of Benjamin. This would include the list of items that were missing from the employees of the FSMDB. These would have been revealed after the employees reported to work and noticed that the items were missing. This evidence would have been obtained by means sufficiently distinguishable to be purged of the primary taint. Since this evidence and others which may be presented later are not suppressed, the court will not quash the information and this part of the Defendant's motion is HEREBY DENIED.

V. CONCLUSION

All evidence obtained from the Defendant after his unlawful arrest in the police vehicle going to the Pohnpei police station is HEREBY SUPPRESSED. Upon application of the fruit of the poisonous tree doctrine, the suppressed evidence shall include the statements made by Defendant Benjamin while in the police vehicle on the way to the national police headquarters in Palikir and any other statements made to the police after the initial confession, as well as the fingerprint evidence taken from a window at the FSMDB office. The evidence of missing items are not suppressed and the motion to quash the information is HEREBY DENIED.

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FSM SUPREME COURT TRIAL DIVISION

KARLYNN JOHNNY,	)	CIVIL ACTION NO. 2013-002
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	
OCCIDENTAL LIFE INSURANCE and NET	)	
CARE LIFE AND HEALTH,	)	
	)	
Defendants.	)	
	)	

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Dennis K. Yamase  
Associate Justice

Trial: October 15-16, 2013  
Decided: March 28, 2014

APPEARANCES:

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