

disqualification, does not seek to disqualify the judge until after an unfavorable ruling has been made. Berman v. Pohnpei, 17 FSM R. 360, 367 (App. 2011). Just as "litigants 'may not sit idly by during the course of litigation and then seek to present additional defenses in the event of an adverse outcome,'" AHPW, Inc. v. Pohnpei, 18 FSM R. 1, 10 (Pon. 2011) (quoting Arthur v. Pohnpei, 16 FSM R. 581, 599 (Pon. 2009)), litigants may not sit idly by and seek to disqualify a judge only after an adverse final judgment has been rendered.

Accordingly, the Plaintiff's Motion to Disqualify Judge must be, and is hereby, denied.

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FSM SUPREME COURT APPELLATE DIVISION

FOOK CHIANG LEE,)	APPEAL CASE NO. K7-2014
)	(KSC Criminal Case No. 73-2014)
Appellant,)	
)	
vs.)	
)	
STATE OF KOSRAE,)	
)	
Appellee.)	
_____)	

OPINION

Argued: July 31, 2015
Submitted: August 19, 2015
Decided: September 17, 2015

BEFORE:

Hon. Ready E. Johnny, Acting Chief Justice, FSM Supreme Court
Hon. Beauleen Carl-Worswick, Associate Justice, FSM Supreme Court
Hon. Camillo Noket, Specially Assigned Justice, FSM Supreme Court*

*Chief Justice, Chuuk State Supreme Court, Weno, Chuuk

APPEARANCES:

For the Appellant:	Harry Seymour, Esq. Office of the Public Defender P.O. Box 245 Tofol, Kosrae FM 96944
For the Appellee:	Jeffrey S. Tilfas (pro hac vice) Assistant Attorney General Office of the Kosrae Attorney General P.O. Box 870 Tofol, Kosrae FM 96944

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HEADNOTES

Criminal Law and Procedure

Regardless of what it is labeled, a document that contains the plea, the findings (both general and special), and the adjudication, but does not contain the sentence cannot be a judgment of conviction since a judgment of conviction must contain the plea, the findings, and the adjudication and the sentence. Lee v. Kosrae, 20 FSM R. 160, 164 n.1 (App. 2015).

Appellate Review – Standard – Criminal Cases – De Novo

Issues of law are reviewed de novo. Lee v. Kosrae, 20 FSM R. 160, 164 (App. 2015).

Marine Resources

No one may commercially harvest, commercially process, or commercially export sea cucumbers without having a valid permit issued by Kosrae Island Resource Management Authority. Lee v. Kosrae, 20 FSM R. 160, 165 (App. 2015).

Statutes – Construction

Since, in interpreting Kosrae State Code sections, the singular can mean the plural, therefore "permit" can mean permits if the law otherwise requires more than one permit. Lee v. Kosrae, 20 FSM R. 160, 165 (App. 2015).

Statutes – Construction

The court should construe a statute as the legislature intended. Lee v. Kosrae, 20 FSM R. 160, 165 (App. 2015).

Marine Resources

Anyone, regardless of citizenship, is required to obtain the same sea cucumber permit because the permit requirement is part of a regulatory scheme to properly manage an important marine resource and avoid its depletion. Lee v. Kosrae, 20 FSM R. 160, 165 (App. 2015).

Administrative Law – Statutory Construction: Marine Resources

Kosrae Island Resource Management Authority is statutorily required to adopt regulations necessary for the protection and sustainable commercial harvesting, commercial processing, and commercial exportation of sea cucumbers, and to effect this regulatory scheme, the statute vests KIRMA with the authority to issue commercial sea cucumber permits and requires that those making commercial use of sea cucumbers to obtain KIRMA permits. Making persons who have a foreign investment permit also get a KIRMA permit is consistent with this regulatory scheme because if a foreign investment permit holder did not also need to obtain a KIRMA permit, then KIRMA would be unable to effectively manage or regulate the sea cucumber resource since it would not have any contact with or knowledge of the foreign investment permit holder's activities and thus be unable to effectively regulate the resource. Lee v. Kosrae, 20 FSM R. 160, 165 (App. 2015).

Foreign Investment Laws

A foreign investment permit holder is required to, by the terms of his foreign investment permit, to abide by all laws and regulations applicable to the business(es) that his foreign investment permit allows him to engage in. Lee v. Kosrae, 20 FSM R. 160, 165 (App. 2015).

Marine Resources

A foreign investment permit holder must also hold a Kosrae Island Resource Management

Authority permit in order to commercially harvest, process, or export sea cucumbers. Lee v. Kosrae, 20 FSM R. 160, 165 (App. 2015).

Criminal Law and Procedure – Information; Criminal Law and Procedure – Standard of Proof

When an information's language is more specific than the language of the statute under which the offense is charged, the prosecution must establish those specific facts in addition to a violation of the statute. Lee v. Kosrae, 20 FSM R. 160, 165-66 (App. 2015).

Criminal Law and Procedure – Conspiracy

A conspiracy exists when either the agreement or the means contemplated for its achievement are unlawful. Lee v. Kosrae, 20 FSM R. 160, 166 (App. 2015).

Criminal Law and Procedure – Conspiracy

The crime of conspiracy requires proof of specific intent, actual or implied, to violate law. Specific intent requires more than a mere general intent to engage in certain conduct or to do certain acts. The specific intent required for the crime of conspiracy is the intent to advance or further the unlawful object of the conspiracy. Lee v. Kosrae, 20 FSM R. 160, 166 (App. 2015).

Criminal Law and Procedure – Strict Liability Crime

The absence of an intent element – either the defendant has a valid sea cucumber permit or he does not – creates a strict liability or liability without fault offense. The defendant's intent is irrelevant. Lee v. Kosrae, 20 FSM R. 160, 166 (App. 2015).

Criminal Law and Procedure – Conspiracy; Criminal Law and Procedure – Strict Liability Crime

There is no such thing as liability without fault conspiracy. In order to be guilty of conspiring to commit an underlying strict liability offense, the defendant must have the specific intent to violate the underlying law. Lee v. Kosrae, 20 FSM R. 160, 167 (App. 2015).

Criminal Law and Procedure – Conspiracy

When the prosecution did not prove the accused had the specific intent to operate without a Kosrae Island Resource Management Authority permit and did not prove that he agreed with anyone or intended to agree with anyone to run his sea cucumber operation without a KIRMA permit, his conspiracy conviction must be reversed and that charge be dismissed. Lee v. Kosrae, 20 FSM R. 160, 167 (App. 2015).

Criminal Law and Procedure – Defenses – Selective Prosecution

The elements of an equal protection claim of discriminatory or selective prosecution are: 1) other similarly situated persons who generally have not been prosecuted; 2) the defendant was intentionally or purposefully singled out for prosecution; and 3) the prosecution was based on an arbitrary or invidious classification. Lee v. Kosrae, 20 FSM R. 160, 167 (App. 2015).

Criminal Law and Procedure – Defenses – Selective Prosecution

To make out a selective prosecution equal protection claim, an accused must identify any persons similarly situated to him that the government could have prosecuted but has failed to, and he must show that his prosecution is based on an invidious classification of either sex, race, ancestry, national origin, language, or social status. Lee v. Kosrae, 20 FSM R. 160, 167 (App. 2015).

Criminal Law and Procedure – Defenses – Selective Prosecution

A selective-prosecution claim is not a defense on the merits to the criminal charge itself, but an independent assertion that the prosecutor has brought the charge for reasons forbidden by the Constitution. Lee v. Kosrae, 20 FSM R. 160, 167 (App. 2015).

Criminal Law and Procedure – Defenses – Selective Prosecution

A selective prosecution claim fails when the accused and the other persons who have not been prosecuted are not similarly situated, as when the accused, who was in charge of the operation and the moving force behind it, was prosecuted and the lower level personnel were not. Just because they were all involved in the same overall enterprise does not necessarily make them similarly situated. Lee v. Kosrae, 20 FSM R. 160, 167-68 (App. 2015).

Criminal Law and Procedure – Sentencing

Although a consolidated sentence may be proper, it is inadvisable. The better practice is for the trial court to impose sentence on each count individually, indicating whether the sentences are to run concurrently or consecutively because such a sentence facilitates appellate review and obviates the need for a remand for re-sentencing. Lee v. Kosrae, 20 FSM R. 160, 168 (App. 2015).

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COURT'S OPINION

READY E. JOHNNY, Acting Chief Justice:

This appeal is from the Kosrae State Court defendant Fook Chiang Lee's conviction on two counts of unauthorized procuring of aquatic life and one count of conspiracy to engage in the commercial harvesting, processing, and export of sea cucumbers without a permit. Because Lee had not been served the State of Kosrae's brief, we, at Lee's request, reset oral argument from July 29, 2015, to July 31, 2015, and further permitted Lee to file a reply brief afterward. Lee filed a reply brief on August 19, 2015, at which point the appeal was submitted to us for our decision.

We affirm the unauthorized procuring of aquatic life convictions but reverse the conspiracy conviction and order that charge dismissed. We also reject Fook Chiang Lee's selective prosecution claim. Our reasons follow.

I. BACKGROUND

On May 21, 2014, the State of Kosrae filed an information charging that Fook Chiang Lee had in April and the early part of May 2014: (1) committed the offense of Unauthorized Procuring of Aquatic Life by engaging in the commercial harvesting, commercial processing, or commercial exportation of sea cucumbers without a permit in violation of Kosrae State Code § 13.523(5); (2) committed the offense of Unauthorized Procuring of Aquatic Life by processing more than five sea cucumbers without a permit in violation of Kosrae State Code § 13.523(6); (3) committed the offense of conspiracy when he agreed with local fishermen with the intent to engage in the commercial harvesting, processing, and exportation of sea cucumbers without a permit in violation of Kosrae State Code § 13.203; (4) committed the offense of conspiracy when he agreed with Jack Chen to engage in commercial harvesting, processing, and exportation of sea cucumbers; and (5) committed the offense of Unauthorized Foreign Business by buying sea cucumbers for commercial purposes from local fishermen without a Kosrae or FSM foreign investment permit.

Lee moved to dismiss the information because Lee, under the name of L&H Company, held a foreign investment permit (#KM005-2012) allowing him to engage "in the business in farming, harvesting, processing and exporting sea cucumbers"; in other business such as scrap metal, wholesale and retail groceries, sea transport, taxi services, and venture capital; and in "farming, harvesting, processing and exporting marine live products." Kosrae opposed on the ground that, in its view, the permit required by the statute was one issued by the Kosrae Island Resource Management Authority

("KIRMA"). Lee also moved to dismiss on the ground of selective prosecution. The trial court denied Lee's motion on July 3, 2014.

Trial was held October 30-31, 2014. Count IV was dismissed because of the prosecution's statement during trial that it did not have sufficient evidence to prove that count. Count V was dismissed because it alleged that Lee engaged in business without a foreign investment permit when Lee did have one. On December 4, 2014, the Kosrae State Court pronounced in open court that it found Lee guilty of counts I-III and imposed a sentence of six months' imprisonment, suspended on the condition that Lee complete six months' probation plus pay a \$500 fine and a \$100 probation fee.

On oral motion, the sentence was stayed pending appeal. A written Sentencing Order was entered on December 17, 2014, and a written "Judgment of Conviction"¹ was entered on December 22, 2014. Lee then filed a notice of appeal.

II. ISSUES PRESENTED

Fook Chiang Lee contends that the Kosrae State Court erred as a matter of law in finding that he 1) processed sea cucumbers without a permit in violation of Kosrae State Code § 13.523(5); 2) processed more than five sea cucumbers without a permit in violation of Kosrae State Code § 13.523(6); and 3) committed the offense of conspiracy when he agreed with local fishermen to engage in the commercial processing of sea cucumbers without a permit in violation of Kosrae State Code § 13.203. Lee also contends that the Kosrae State Court abused its discretion when it refused to dismiss the prosecution based on his selective prosecution claim.

III. ANALYSIS

The first three issues are issues of law. We review issues of law de novo. Engich v. FSM, 15 FSM R. 546, 552 (App. 2008); Wainit v. FSM, 15 FSM R. 43, 48 (App. 2007).

A. *Whether a KIRMA Permit Was Required*

Lee does not contest the factual allegations that L&H Company was engaged in commercial harvesting, commercial processing, and commercial exportation of sea cucumbers; that the business processed more than five sea cucumbers; and that he made agreements with local fishermen with the intent to engage in the commercial harvesting, processing, and exportation of sea cucumbers. Lee contends that he is not guilty of these charges since he did have a permit – foreign investment permit #KM005-2012 issued to him through L&H Company – because that permit allowed him to engage in the business of farming, harvesting, processing, and exporting sea cucumbers. Lee claims that since § 13.523(5) and § 13.523(6) make it an offense to commit the acts therein "without a permit" and since the word "a" means one, only one permit was needed, and he had one – foreign investment permit #KM005-2012.

¹ This was not actually a judgment of conviction since it did not contain the sentence. Regardless of what it is labeled, a document that contains the plea, the findings (both general and special), and the adjudication, but does not contain the sentence cannot be a judgment of conviction since a judgment of conviction must contain the plea, the findings, and the adjudication and the sentence. Neth v. Kosrae, 14 FSM R. 228, 231 (App. 2006). The December 17, 2014 Sentencing Order more nearly satisfies Kosrae Criminal Procedure Rule 32(b)(1)'s requirement that "[a] judgment of conviction shall set forth the plea, the findings, and the adjudication and sentence. . . ."

Kosrae asserts that the permit that Lee was charged with not having is a permit issued by KIRMA under Kosrae State Code § 19.359(1), and that a foreign investment permit does not satisfy that requirement. Section 19.359(1) provides that "[n]o person may commercially harvest, commercially process, or commercially export sea cucumbers without having a valid permit issued by KIRMA." Kosrae further notes that under the general principles for interpreting the Kosrae Code that were enacted as part of the Code itself, "[u]nless another meaning or use clearly appears in the Code . . . [t]he singular includes the plural, and conversely" Kos. S.C. § 1.101(2)(a).

Kosrae is correct that in interpreting Kosrae State Code sections that the singular can mean the plural and that therefore "permit" can mean permits if the law otherwise requires more than one permit. But, more importantly, we construe a statute as the legislature intended. FSM Social Sec. Admin. v. Kingtex (FSM) Inc., 8 FSM R. 129, 131 (App. 1997). The Kosrae Legislature's intent when enacting the statute was that anyone, regardless of citizenship, would be required to obtain the same permit because the permit requirement is part of a regulatory scheme to properly manage an important marine resource and avoid its depletion.

KIRMA is statutorily required to "adopt necessary regulations to provide for the protection and sustainable commercial harvesting, commercial processing, and commercial exportation of sea cucumbers" Kos. S.C. § 19.359(3). KIRMA did just that and adopted regulations which were admitted at trial as Plaintiff's Exhibit 16 (consisting of 13 pages). To effect this regulatory scheme, the statute vested KIRMA with the authority to issue commercial sea cucumber permits and required that those making commercial use of sea cucumbers to obtain KIRMA permits. Making persons who have a foreign investment permit also get a KIRMA permit is consistent with the regulatory scheme for managing Kosrae's sea cucumber resource. If a foreign investment permit holder did not also need to obtain a KIRMA permit, then KIRMA would not be able to effectively manage or regulate the sea cucumber resource since it would not have any contact with or knowledge of the foreign investment permit holder's activities and thus be unable to effectively regulate the resource.

Furthermore, a foreign investment permit holder is required to, by the terms of his foreign investment permit, to abide by all laws and regulations applicable to the business(es) that his foreign investment permit allows him to engage in.

Accordingly, we affirm the trial court holding that a foreign investment permit holder must also hold a KIRMA permit in order to engage in the commercial harvesting, processing, or export of sea cucumbers, and we affirm Lee's conviction for violating Kos. S.C. § 13.523(5) [Count I].

B. Other Grounds for Count II – Processing Versus Possessing

Lee also challenges his conviction on Count II because the information charged him with "processing more than five sea cucumbers without a permit" in violation of Kosrae State Code § 13.523(6), while that statute prohibits the possession of more than five sea cucumbers without a permit, not the processing of more than five sea cucumbers. Kosrae does not really address the wording discrepancy but asserts that it proved that Lee possessed and processed more than five sea cucumbers without a KIRMA permit.

We could look at this discrepancy in either of two ways. We could consider "processing" to be a typographical error that was typed in when "possessing" was meant. Or we could consider, that by using the word "processing," Kosrae was alleging additional facts it had to prove in order to obtain a conviction on this count; that is, Kosrae had to prove that Lee not only possessed more than five sea cucumbers but also that he processed those five plus sea cucumbers. But the better view is that Kosrae was alleging additional facts that it had to prove. When an information's language is more

specific than the language of the statute under which the offense is charged, the prosecution must establish those specific facts in addition to a violation of the statute. FSM v. Boaz (I), 1 FSM R. 22, 24 (Pon. 1981).

In this case, the prosecution did that. It proved that Lee had processed more than five sea cucumbers. And since, in order to process sea cucumbers, someone would necessarily have to possess those sea cucumbers in order to process them, Lee was not prejudiced² by the additional factual allegation. The trial court, in its "Judgment" found that "there is incontrovertible evidence that [Lee] processed over five sea cucumbers without the necessary Kosrae Island Resource Management Authority (KIRMA) permit" J. of Conviction at 1 (Dec. 22, 2014). Accordingly we affirm Lee's conviction for violating Kos. S.C. § 13.523(6) [Count II].

C. Conspiracy

Lee contends that there was no conspiracy because the essence of a conspiracy is an agreement and there was no agreement to harvest, process, or export sea cucumbers without a permit – that is, while there was an agreement to harvest, process, and export sea cucumbers, there was no agreement to do that without a permit because Lee thought he had a permit. Lee argues that his conspiracy conviction must be reversed because the requisite intent (*mens rea*) was not proven for conspiracy, a specific intent crime. Lee contends that the trial court found that he did not have the specific intent to violate Subsections 13.523(5) and (6) when he formed the agreement because it stated that "Defendant may have genuinely operated his business under the belief his Foreign Investment Permit was sufficient to legally operate his sea cucumber harvesting business." J. of Conviction at 1 (Dec. 22, 2014). The trial court added that "[w]hile there may be some mitigating factors with regard to Defendants' goodwill and honest mistake in this matter, the elements for conviction are nonetheless satisfied." J. of Conviction at 2 (Dec. 22, 2014).

A conspiracy exists when either the agreement or the means contemplated for its achievement are unlawful. FSM v. Fritz, 14 FSM R. 548, 555 (Chk. 2007). From Lee's point of view, neither the agreement nor the means for achieving it were unlawful because he thought he had the necessary permit to harvest, process, and export sea cucumbers. Lee is correct. The "crime of conspiracy requires proof of specific intent, actual or implied, to violate . . . law." United States v. Seaman, 259 F.3d 434, 441 (6th Cir. 2001). "Specific intent requires more than a mere general intent to engage in certain conduct or to do certain acts." United States v. Haldeman, 559 F.2d 31, 113 (D.C. Cir. 1976). "[T]he specific intent required for the crime of conspiracy is the intent to advance or further the unlawful object of the conspiracy." *Id.* at 112.

Subsections 13.523(5) and (6), the statutory provisions Lee was convicted of conspiring to violate, create strict liability or liability without fault offenses because of the absence of an intent element – either the defendant has a valid permit or he does not, the defendant's intent is irrelevant. See Sander v. FSM, 9 FSM R. 442, 447 (App. 2000) (absence of an intent element evinces a legislative intent to dispense with the *mens rea* element and make the proscribed conduct a strict liability crime). The trial court acknowledged this when it referred to Lee as having made an "honest mistake" but nonetheless convicted him.

² If, instead, the word "processing" were considered merely a typographical error and "possessing" was what was actually meant (as might have been discovered by reading the cited statute), Lee still would not have been unduly prejudiced since the charge was sufficiently definite for Lee to prepare his defense. See FSM v. Nifon, 14 FSM R. 309, 315 n.1 (Chk. 2006).

"Although the question has seldom been confronted in the cases, it seems clear there is no such thing as liability without fault conspiracy." 2 WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., *SUBSTANTIVE CRIMINAL LAW* § 6.4(e)(4), at 82 (1986). In other words, in order to be guilty of conspiring to commit an underlying strict liability offense, the defendant must have the specific intent to violate the underlying law.

In this case, that would mean that Lee would have had to have known that he needed to have a KIRMA permit for his sea cucumber business and that he knew he did not have a valid permit but agreed to go ahead with his commercial sea cucumber activities anyway. Kosrae did not prove, and the trial court did not find, that Lee knew he did not have a necessary permit or that he knew that he needed a KIRMA permit. Kosrae did not have to prove either of those to obtain convictions for violations of Subsections 13.523(5) and (6), strict liability offenses. However, Kosrae had to prove specific intent to operate without a KIRMA permit in order to obtain a conviction for conspiracy to violate either §§13.523(5) or 13.523(6). It did not. As mentioned above, Lee did not agree with anyone or intend to agree with anyone to run his sea cucumber operation without a permit. We must thus reverse Lee's conspiracy conviction and order that that charge be dismissed.

D. Selective Prosecution Claim

Lee contends that the trial court abused its discretion by not dismissing the case against him because it was a selective and discriminatory prosecution.

The elements of an equal protection claim of discriminatory or selective prosecution are: 1) other similarly situated persons who generally have not been prosecuted; 2) the defendant was intentionally or purposefully singled out for prosecution; and 3) the prosecution was based on an arbitrary or invidious classification. *FSM v. Wainit*, 11 FSM R. 1, 7 (Chk. 2002). To make out a selective prosecution equal protection claim, an accused must identify any persons similarly situated to him that the government could have prosecuted, but has failed to, and he must show that his prosecution is based on an invidious classification of either sex, race, ancestry, national origin, language, or social status. *Fritz*, 14 FSM R. at 552. A selective-prosecution claim is not a defense on the merits to the criminal charge itself, but an independent assertion that the prosecutor has brought the charge for reasons forbidden by the Constitution. *Id.*

Lee, a citizen of Taiwan (Republic of China), asserts that the prosecution was based on the invidious classification of alienage – that is, that he was the only person involved in the sea cucumber operation that was criminally prosecuted because he was the only foreigner. Thus, the prosecution against him, and him alone, was based on the invidious classification of national origin, ancestry, or race. Lee points to others, all Kosraeans, who he asserts were similarly situated but who were not criminally prosecuted. These others – local fishermen, all Kosraeans – harvested the sea cucumbers. Lee's partner in L&H Company, Higgin Weilbacher, is also Kosraean. None of these persons were criminally prosecuted for their part in the sea cucumber business. They were issued letters of reprimand or warning, or cease and desist orders, or civil penalties, but not criminally prosecuted.

Kosrae responds that from its investigation Higgin Weilbacher was not involved in the sea cucumber operation. Kosrae contends that if it were not for Fook Chiang Lee having instructed the local fishermen and having made payments to them for harvesting sea cucumbers, then the local fishermen would not have collected the sea cucumbers. Kosrae refers to Lee as "the ring leader."

The selective prosecution claim fails because Lee and the local fishermen are not similarly situated. Lee was in charge of the sea cucumber operation and the moving force behind it. It makes sense that someone higher up in an organization would be dealt with more severely than the lower level

personnel. Just because they were all involved in the same overall enterprise does not necessarily make them similarly situated.

Since no one else was similarly situated, Lee could not, as a matter of law, make out a selective prosecution claim. The trial court did not abuse its discretion.

E. *Remand*

Since Lee was given a consolidated sentence for the three counts, we must vacate that sentence and remand the matter for re-sentencing on the two counts for which the convictions remain valid. Although a consolidated sentence may be proper, it is inadvisable. Ned v. Kosrae, 20 FSM R. 147, 155 (App. 2015). "[T]he better practice is for the trial . . . court to impose sentence on each count individually," indicating whether the sentences are to run concurrently or consecutively because such a sentence facilitates appellate review and obviates the need for a remand for re-sentencing. Yinmed v. Yap, 8 FSM Intrm. 95, 103 (Yap S. Ct. App. 1997).

IV. CONCLUSION

Accordingly, we affirm the convictions for Counts I and II, (Unauthorized procurement of aquatic life in violation of Kos. S.C. § 13.523(5) and Kos. S.C. § 13.523(6), respectively). We reverse the conspiracy conviction because Kosrae failed to prove the intent necessary to conspire to violate a strict liability offense. Furthermore, we conclude that Fook Chiang Lee cannot succeed on his selective prosecution claim. We therefore vacate the consolidated sentence and remand the matter for re-sentencing on the two convictions that remain and order that the conspiracy count be dismissed.

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