

FSM SUPREME COURT TRIAL DIVISION

FEDERATED STATES OF MICRONESIA,)	CRIMINAL CASE NO. 2015-501
)	
Plaintiff,)	
)	
vs.)	
)	
FRANCIS ITIMAI,)	
)	
Defendant.)	
<hr/>		

ORDER AGAIN DENYING DISMISSAL

Ready E. Johnny
Associate Justice

Hearing: October 14, 2015
Decided: October 27, 2015

APPEARANCES:

For the Plaintiff: Caroline A. Rugero, Esq.
Assistant Attorney General
FSM Department of Justice
P.O. Box PS-105
Palikir, Pohnpei FM 96941

For the Defendant: Marstella E. Jack, Esq.
P.O. Box 2210
Kolonia, Pohnpei FM 96941

* * * *

HEADNOTES

Civil Procedure – Service; Criminal Law and Procedure – Process

"Process" is a summons or writ issued in order to bring a defendant into court. "Service" usually refers to the formal delivery of some other legal notice, such as a pleading or a motion or other documents. FSM v. Itimai, 20 FSM R. 232, 233 n.1 (Pon. 2015).

Criminal Law and Procedure – Process

In a criminal case, "process" is the arrest warrant or the penal summons that issues to compel a person to answer for a crime. FSM v. Itimai, 20 FSM R. 232, 233 n.1 (Pon. 2015).

Criminal Law and Procedure – Defenses; Criminal Law and Procedure – Dismissal

An accused's joblessness during the time period that the government was tardy in opposing his motion to dismiss, does not constitute prejudice in the legal sense since it did not adversely affect his legal position or his defense. FSM v. Itimai, 20 FSM R. 232, 234 (Pon. 2015).

Criminal Law and Procedure – Information

The test for a particular information's sufficiency is whether it is fair to the defendant to require him to defend on the basis of the charge as stated therein. Liberality is the guide in testing an information's sufficiency in charging all of the offense's essential elements, although this applies to matters of form and not of substance. FSM v. Itimai, 20 FSM R. 232, 234 (Pon. 2015).

Criminal Law and Procedure – Dismissal; Criminal Law and Procedure – Information

The court will take an information's factual allegations as true for jurisdictional purposes and determine whether those factual allegations do allege a crime over which the court can exercise jurisdiction. The government's allegations remain to be proven at trial. FSM v. Itimai, 20 FSM R. 232, 234 (Pon. 2015).

Criminal Law and Procedure – Dismissal; Criminal Law and Procedure – National Crimes

Since the FSM Supreme Court has jurisdiction over crimes committed by a national public official or public servant while that person is engaged in his or her official duties or in violation of a fiduciary duty, it will not dismiss a case where all of the acts and omissions the defendant is accused of committing, he did as a national government official or public servant while he was engaged in his official duty. FSM v. Itimai, 20 FSM R. 232, 235 (Pon. 2015).

* * * *

COURT'S OPINION

READY E. JOHNNY, Associate Justice:

On October 14, 2015, this came before the court to hear the Defendant's Motion for a Reconsideration of the Court Order Denying Dismissal ("Mot."), filed September 21, 2015, and the Government's Opposition to Defendant's Motion for Reconsideration of the Court Order Denying Dismissal, filed September 25, 2015. The motion is denied as explained below.

1.

Defendant Francis Itimai seeks reconsideration the court's August 21, 2015 Order Denying Dismissal. Itimai raises several points. First, he asserts that his counsel made "service of process"¹ [sic] of his motion to dismiss by hand delivery of the motion to the Department of Justice office at Palikir on April 6, 2015, and that therefore the government's May 7, 2015 opposition to that motion was untimely and should have been stricken. Itimai argues that he was prejudiced by the late response because he was without a job or a means of support during that time period. He also contends that the government's proffered reason for its tardiness in responding – Typhoon Maysak and its aftermath – did not constitute excusable neglect and that the court's mention that that typhoon may have been the strongest in the area in the last 100 years was speculative and an indication of bias.

The court must reject these contentions. The court, especially since it is usually resident in

¹ "Process" is a summons or writ issued in order to bring a defendant into court. BLACK'S LAW DICTIONARY 1325 (9th ed. 2009). In a criminal case, "process" is the arrest warrant or penal summons "that issues to compel a person to answer for a crime." *Id.* The court therefore understands Itimai's reference to "service of process" to actually refer to the service of other documents, such as his motion to dismiss, since "service" in that sense refers to "[t]he formal delivery of some other [than process] legal notice, such as a pleading." *Id.* at 1491.

Chuuk, one of the two states directly affected by Maysak, may take judicial notice of the typhoon's severity and that relief efforts were necessary. Itimai's speculation that the government was reminded to file an opposition by reading a newspaper article, is not germane to the topic. Itimai's joblessness during the time period that the government was tardy in opposing his motion to dismiss, does not constitute prejudice in the legal sense since it did not adversely affect his legal position or his defense. The court has already concluded that the government's filing of its opposition six days late to oppose Itimai's April 21, 2015 supplemental motion and twenty-one days late to oppose his original motion, was, under the circumstances, excusable neglect. The court sees no reason to alter that view.

Even if it did, the result would not change. Although a motion to dismiss stands unopposed and the failure to oppose a motion is generally deemed a consent to the motion, the court still needs good grounds before it can grant the motion. FSM v. Zhang Xiaohui, 14 FSM R. 602, 609, 613 (Pon. 2007). Those good grounds are absent in both Itimai's original motion to dismiss and his motion to reconsider.

II.

Itimai challenges the sufficiency of the Information. The test for a particular information's sufficiency is whether it is fair to the defendant to require him to defend on the basis of the charge as stated therein. FSM v. Ehsa, 20 FSM R. 106, 108-09 (Pon. 2015). Liberality is the guide in testing an information's sufficiency in charging all the essential elements of the offense, although this applies to matters of form and not of substance. *Id.* The crux of Itimai's challenge is that the Information does not allege crimes, and if it does, those are not crimes over which the FSM Supreme Court may exercise jurisdiction.

Itimai contends that the court misconstrued the nature of his travel advance from the Micronesia Shipping Commission ("MSC"). Itimai contends that the Information does not allege that the travel amendment he sought was not approved. Itimai's assertion is contrary to the government's allegation in paragraphs 8 and 27 of the Information.

Itimai further claims that he had to seek a travel amendment because he was caught in an emergency situation in Yap and had to extend his stay. The Information, fairly read, alleges that that is not so, but that Itimai stayed in Yap for other reasons. The government's allegation that Itimai's travel amendment was not approved is part of its basis for charging Counts 1 (conflict of interest, 11 F.S.M.C. 512); 2 (unsworn falsification, 11 F.S.M.C. 524); and 5 (attempted theft, 11 F.S.M.C. 201 and 602) as well as background for the other charges. The government still must prove the Information's allegations at trial, and Itimai may present his defense at that time.

Itimai also argues that he, as the FSM Secretary of Transportation, Communication and Infrastructure ("TC&I"), purchased the world map from MSC for official TC&I use, and that it was improper for the court to conclude otherwise. Itimai misunderstands the nature of the court's ruling. Itimai challenges whether the information alleges crimes over which the court has jurisdiction. The court, taking the factual allegations as true for jurisdictional purposes, determined that those factual allegations do allege a crime over which the court can exercise jurisdiction. The government's allegations remain to be proven at trial.

Itimai also contends that "[t]here was no offense charged alleging the misuse or abuse of the Maritime Operations Revolving Fund." Mot. at 9. A careful reading of the criminal mischief charge (Count 6) easily reveals the falsity of that statement since that count alleges that Itimai caused the government to suffer the loss of \$926 when Itimai caused a \$926 payment to be made out of the Maritime Operations Revolving Fund for an unauthorized purpose. Itimai's defense is that the purpose was authorized. The government's allegation is that that purpose was just a sham to cover the \$926

235
FSM v. Itimai
20 FSM R. 232 (Pon. 2015)

travel advance MSC had made to Itimai. That remains to be proven at trial.

Lastly, Itimai asserts that "the Court order did not make any reference or ruling on the other alleged offenses on whether or not it has jurisdiction to hear them" and asks the court to make a determination on all of them" since they are equally important to his defense preparation. Mot. at 12. The court must reject this assertion.

The court clearly stated that "[a]ll of the acts and omissions Itimai is accused of committing, he did as a national government official or public servant while he was engaged in his official duty." FSM v. Itimai, 20 FSM R. 131, 134 (Pon. 2015). Since the court also clearly stated that it has jurisdiction over crimes "committed by a national public official or public servant while that person is engaged in his or her official duties or in violation of a fiduciary duty," 11 F.S.M.C. 104(7)(b)(viii), the court has already made the determination Itimai seeks.

III.

Having reconsidered and rejected the defendant's arguments that the court lacks jurisdiction, the court again denies Francis Itimai's motion to dismiss the information filed against him. The court will take defendant Francis Itimai's plea on Friday, December 11, 2015, at 10:00 a.m. If a not guilty plea is entered on any count, trial will start at 10:20 a.m., the same day.

* * * *