

IN THE SUPERIOR COURT
FOR THE
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

COMMONWEALTH OF THE NORTHERN)
MARIANA ISLANDS,)
)
Plaintiff,)
)
v.)
)
MU SHUI XIE,)
)
Defendant.)
_____)

Criminal Case No. 00-0227

ORDER

I. PROCEDURAL BACKGROUND

This matter came before the court on April 4, 2001, in Courtroom 220A at 9:00 a.m. on Defendant's motion to suppress video tape evidence. Gregory J. Koebel, Esq., appeared on behalf of the Defendant, Mu Shui Xie. Assistant Attorney General Marvin J. Williams, Esq., appeared on behalf of the Commonwealth. The court, having heard and considered the arguments of counsel and being fully informed of the premises, now renders its decision.

II. FACTS

On April 10, 2000, Department of Public Safety (DPS) Officers used a video camera located in a van to record an interaction between Defendant and a DPS informant on a public street in Garapan, Saipan. The video camera only recorded the fact that the two individuals engaged in a conversation. [p. 2] No audio recording of the conversation was made because the DPS informant did not wear a microphone and the conversation took place beyond the range of the video camera's audio capabilities.

On April 19, 2000, the Commonwealth filed an Information charging Defendant Mu Shui Xie (Defendant) with one count of Promoting Prostitution in the Second Degree in violation of 6 CMC

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§ 1344(a). Specifically, the Commonwealth alleged that on or about April 10, 2000, Defendant solicited customers for prostitution purposes and engaged in conduct designed to facilitate and aid an act of prostitution by offering sex and/or sexual acts in exchange for money.

On March 14, 2001, Defendant filed a motion to suppress video tape evidence. Defendant asserts that the video tape of the interaction between Defendant and the DPS informant should be suppressed on grounds that the videotaping constituted a search which violated Defendant's constitutional protection from unreasonable search and seizure under Article I, § 3 of the Commonwealth Constitution because DPS Officers failed to obtain a warrant prior to making the aforementioned video tape.

On March 20, 2001, the Commonwealth filed a response to Defendant's motion to suppress asserting that Article I, § 3 of the Commonwealth Constitution does not require that DPS Officers obtain a warrant prior to video taping a conversation taking place on a public street because such conversations are "public or intended to be public." The Commonwealth contends that Defendant cannot claim a "reasonable expectation of privacy" while engaged in such a "public" conversation and that such conversation is beyond the scope of the protections contemplated by Article I, § 3 of the Commonwealth Constitution.

III. ISSUE

Whether the DPS video tape of the conversation between Defendant and the DPS informant should be suppressed on ground that the act of videotaping the interaction constituted a search which violated Defendant's constitutional protection from unreasonable search and seizure under Article I, § 3 of the Commonwealth Constitution because the videotaping was accomplished without first obtaining a warrant. [p. 3]

IV. ANALYSIS

A. Applicability of the Fourth Amendment to the United States Constitution.

The Commonwealth asserts that the Fourth Amendment of the United States Constitution permits a law enforcement agency to make a video tape of a defendant engaging in a conversation

with a confidential informant on a public street because such a defendant cannot claim a “reasonable expectation of privacy” while engaged in such a “public” conversation.

As noted by the court in *Commonwealth v. Hong Fan Li*, “[t]he Commonwealth is correct that the jurisprudence and the evolving common law surrounding the Fourth Amendment of the United States Constitution would permit the videotaping of a defendant engaging in a conversation with a confidential informant on a public street because such a defendant engaged in such a conversation could not claim a “reasonable expectation of privacy.” See *Commonwealth v. Hong Fan Li*, Crim. No. 00-0224 (N.M.I. Super. Ct. Jan. 4, 2001) (Order, at 2). However, the court further noted that “the court must apply the Commonwealth Constitution which extends and enhances the Fourth Amendment’s protections against unreasonable searches and seizures through Article I, § 3(b) and Article I § 10.” *Id.*, at 3.

In *Commonwealth v. Hong Fan Li*, based on facts similar to those presented in this matter, the court found that “the plain language of Article I, § 3(b) of the Commonwealth Constitution requires that a law enforcement agency obtain a warrant prior to using electronic surveillance to obtain evidence of an alleged crime” and that “[t]he use of a video camera to make a . . . video tape appears to fall within the plain meaning of the language ‘electronic eavesdropping’ or ‘other comparable means of surveillance.’” Accordingly, the court granted Defendant’s motion to suppress.

In the present matter, as in *Commonwealth v. Hong Fan Li*, the court must interpret Article I, § 3(b) of the Commonwealth Constitution which extends and enhances the Fourth Amendment to the United States Constitution’s protections against unreasonable searches and seizures. See *Commonwealth v. Sablan, supra*, at 9 (“the characteristics of the islands of Rota, Saipan and Tinian compel this court to interpret the Commonwealth search and seizure provision as providing greater constitutional protection than the U.S. Constitution”). Analysis of the Fourth Amendment to the United States Constitution, although instructive and valuable for providing guidance in search and seizure analysis, does not bind this court’s interpretation of the Commonwealth Constitution. See *Sirilan v. Castro*, 1 CR [p. 4] 1082, 1111 (Dist. Ct. 1984) (“When the circumstances of a case are such that the provisions of the U.S. Constitution as they have been interpreted by the United States Supreme Court do not reflect the values of the people of the Commonwealth, we will not hesitate to

look to the Commonwealth's Constitution for the protections and guarantees placed therein by and for the people") *see also Commonwealth v. Sablan*, Crim. No. 94-0035 (N.M.I. Super. Ct. Nov. 1, 1994) (Decision and Order on Defendant's Motion to Suppress Evidence, at 9) (prior reliance on federal precedent and federal constitutional provisions does not preclude taking a more expansive view of state constitutions).

B. Whether Conversation between Defendant and DPS Informant was "Public" or "Intended to be Public."

Pursuant to Article I § 3 of the Commonwealth Constitution:

The right of the people to be secure in their persons, houses, papers and belongings against unreasonable searches and seizures shall not be violated.

(a) No warrants shall issue except upon probable cause supported by oath or affirmation and particularly describing the place to be searched and the persons or things to be seized.

(b) No wiretapping, electronic eavesdropping or other comparable means of surveillance shall be used except pursuant to a warrant.

(c) A person adversely affected by an illegal search or seizure has a cause of action against the government within limits provided by law.

N.M.I. Const. art. I, § 3.

In the present matter, DPS Officers used a video camera located in a van to record an interaction between Defendant and a DPS informant on a public street in Garapan, Saipan. The video camera only recorded the fact that the two individuals engaged in a conversation. No audio recording of the conversation was made because the DPS informant did not wear a microphone and the conversation took place beyond the range of the video camera's audio capabilities.

The Commonwealth asserts that Article I, § 3(b) is not intended to prevent recording of conversations that are "public or intended to be public" and that the conversation between Defendant and the DPS informant was "public" or "intended to be public" because it took place on a public

street. [p. 5] Defendant, however, asserts that the conversation was a private conversation taking place on a public street.

The “Analysis of the Constitution of the Commonwealth of the Northern Mariana Islands” states:

This section [Art. I, § 3] does not cover interception or recording of conversations or statements that are public or intended to be public.

Northern Marianas Constitutional Convention, Analysis of the Constitution of the Commonwealth of the Northern Mariana Islands, at 9 (Dec. 6, 1976) (emphasis added). As stated in *Commonwealth v. Hong Fan Li*, “although the conversation took place on a public street, it was a ‘private’ conversation between two people.” *Commonwealth v. Hong Fan Li*, Crim. No. 00-0224 (N.M.I. Super. Ct. Jan. 4, 2001) (Order, at 4). “‘Private’ is defined as being ‘intended for or restricted to the use of a particular person, group, or class.’” *Id.*, citing Merriam-Webster’s Collegiate Dictionary (2000 Edition). In the present matter, as in *Commonwealth v. Hong Fan Li*, the court finds that the conversation between Defendant and the DPS informant in the present matter was also a “private” conversation, despite the fact that it took place on a public street. As such, the court finds that the conversation between Defendant and the DPS informant was not “public” or “intended to be public” within the meaning of Article I, § 3 of the Commonwealth Constitution.

C. Failure to Obtain Warrant Prior to Videotaping Interaction between Defendant and DPS Informant.

As stated in *Commonwealth v. Hong Fan Li*, the court finds that videotaping the interaction between Defendant and the DPS Informant constituted “electronic eavesdropping or other comparable means of surveillance” as contemplated by Article I, § 3(b) of the Commonwealth Constitution. As such, the DPS video tape was made in contravention of Article I § 3(b) of the Commonwealth Constitution because no warrant was obtained. Accordingly, Defendant’s motion to suppress the videotape made on April 10, 2000, is **GRANTED**.

V. CONCLUSION

For the foregoing reasons, the court reiterates that the plain language of Article I, § 3(b) of the Commonwealth Constitution requires that a law enforcement agency obtain a warrant prior to using [p. 6] electronic surveillance to obtain evidence of an alleged crime. In the present matter, as in *Commonwealth v. Hong Fan Li*, DPS Officers failed to obtain a warrant prior to videotaping the alleged illegal activities of Defendant. As such, the court finds that the Department of Public Safety videotape was made in contravention of Article I § 3(b) of the Commonwealth Constitution. Accordingly, Defendant's motion to suppress the videotape made on April 10, 2000, is **GRANTED**.

So ORDERED this 16 day of April, 2001,

/s/
JUAN T. LIZAMA, Associate Judge