FOR PUBLICATION

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

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS, Plaintiff, v. DAVID TANAKA DIAZ, Defendant.	CRIMINAL CASE NO. 00-0517 **ORDER DENYING DEFENDANT'S MOTION TO DISMISS AND TO QUASH SEARCH WARRANT, AND GRANTING DEFENDANT'S MOTION TO SUPPRESS EVIDENCE**

I. PROCEDURAL BACKGROUND

This matter came before the Court on October 2, 2002, on Defendant's Motion to Dismiss Because of Denial of Right to Speedy Trial and Defendant's Motion To Quash Search Warrant And/Or Suppress Evidence. Assistant Attorney General Grant Sanders appeared on behalf of the Commonwealth of the Northern Mariana Islands [hereinafter Prosecution], and attorneys Edward C. Arriola, Esq. and Victorino DLG. Torres, Esq. appeared on behalf of Defendant, David Tanaka Diaz [hereinafter Defendant]. The Court, having heard the arguments of counsel, having reviewed the record, and being fully informed of the premises, now renders its written decision.

II. FACTS

The Prosecution's Declaration of Probable Cause in Support of an Arrest Warrant and Search Warrant stated that a reliable informant had purchased crystal methamphetamine ("ice") from Defendant with stolen property, specifically with two air condition units, and a Kawasaki bush-cutter. On October 31, 2000, a detective and the informant drove to the Defendant's house and saw that the stolen items were sitting on his garage floor in exactly the same spot where the informant had left them. The detective later confirmed with the

respective owners that the items were stolen. The informant also admitted that he had stolen a tourist's purse at a nightclub and purchased "ice" from Defendant with the money. While at the Defendant's residence, the informant also stated that he had seen a .22 Caliber handgun, a 9MM Caliber handgun, and a .44 Caliber handgun in Defendant's possession.

Based on the informant's statements, and after further investigation, the detective submitted a Declaration of Probable Cause asking the court to issue a search warrant to retrieve the stolen air condition units, the Kawasaki bush-cutter, and the handguns the informant personally saw at the Defendant's house (*e.g.*, a .22 Caliber, 9MM, and .44 Magnum), and "[l]astly, the execution of this search warrant will exten[d] but not limited to places, things, storage rooms and outer house [curtilage] where the defendant could hide air condition units, a 'Kawasaki' bush cutter, and the above mentioned firearms." Decl. of Probable Cause (Nov. 14, 2000) at 3.

Defendant's residence was searched pursuant to the warrant issued on November 14, 2000. The warrant essentially mirrored the language of the declaration, and authorized a search of "defendant's surrounding property [curtilage] and the house during the daytime that will exten[d] but not limited to places, things, storage rooms and outer house [curtilage] where the defendant could hide two air condition units, 'Kawasaki' bush cutter, and the .22 Caliber handgun, 9MM Caliber handgun, and a .44 Caliber Magnum handgun, and other illegal firearms." Search Warrant (Nov. 14, 2000).

Enforcement Officers from the Department of Public Safety ("DPS"), a Tactical Response Emergency Team ("TRET"), CNMI Custom/K-9 Handlers, and CIS Personnel (a total of 24 officers, and 3 dogs) combined to assist in the execution of the Search and Arrest Warrant. In addition to seizing the stolen property, the officers searched for and seized drugs (crystal methamphetamine and marijuana), and various drug weighing, packaging, and using paraphernalia. They also seized other items that could reasonably be connected to drug trafficking. They failed to find the firearms listed in the warrant.

Defendant was charged by Information on November 21, 2000, with one count of Delivery of a Controlled Substance (crystal methamphetamine) in violation of 6 CMC § 2141(a), and with one count of Illegal Possession of a Controlled Substance (crystal methamphetamine), in violation of 6 CMC § 2142(a). Defendant was granted pretrial release on December 20, 2000, to third-party custodian, and a jury trial date was set for September 17, 2001. Eighteen days before the trial, on August 30, 2001, Defendant was arrested

and charged in Criminal Case No. 01-0381. On September 4, 2001, the September 17 trial date was vacated and a new trial date was finally set for July 8, 2002. On April 22, 2002, a jury found the Defendant Guilty in Criminal Case No. 01-0381. Finally, on May 16, 2002, the court approved a stipulation of the parties to continue Defendant's trial in this matter to October 7, 2002, giving Defendant time to prepare for the sentencing hearing in Criminal Case No. 01-0381.

Defendant now files a Motion to Dismiss claiming that his right to a speedy trial has been infringed, and the delay prejudiced Defendant because key witnesses are no longer in the Commonwealth. Defendant also filed a Motion to Quash Search Warrant and/or Suppress Evidence on the grounds that the issuing judge was misled by the officers by their failure to mention that the firearms were seen in the bedroom closet, and by not revealing how they had spotted the air condition units and the Kawasaki bush-cutter. In the alternative, Defendant argues that the drug evidence should be excluded as "fruit of a poisonous tree" since it was not reasonable for them to use narcotics K-9 units to execute a warrant for air-conditioners, guns, and a Kawasaki bush-cutter.

III. ISSUES

A. Whether the court should grant Defendant's Motion to Dismiss Because of Denial of Right to a Speedy Trial when the delay was substantially caused by Defendant's arrest in another case, and there was cooperation between the Prosecution and Defense to facilitate Defendant's preparation for that trial.

B. Whether the court should grant Defendant's Motion to Quash Search Warrant and/or Suppress Evidence on the grounds that the issuing judge was not informed that officers had approached Defendant's residence without a warrant, and/or the officers exceeded the scope of a valid warrant by using K-9 units to search for drugs.

IV. ANALYSIS

A. Motion to Dismiss Because of Denial of Right to Speedy Trial.

The Sixth Amendment to the U.S. Constitution, N.M.I. Const. art. I, § 4(d), and Com. R. Crim. P. 48(b) protect a defendant's right to a speedy trial. The right attaches once an individual is accused, through either formal indictment, information, or arrest. *See*, *e.g.*, *Commonwealth v. Flores*, Crim. No. 92-0197 (N.M.I. Super. Ct. Mar. 22, 1993) (Opinion and Order) (*citing Commonwealth v. Aquino*, Crim. No. 90-0127 (N.M.I. Super. Ct. Apr. 24, 1991) (Order of Dismissal at 3)); *United States v. Marion*, 404 U.S.

307, 319, 92 S. Ct. 455, 463, 30 L. Ed. 2d 468, 478 (1971); *see also* CHARLES A. WRIGHT, 3A FEDERAL PRACTICE AND PROCEDURE: CRIMINAL § 814 (2d ed. 1982). The guarantee to a speedy trial is intended to minimize: deprivation of liberty while a defendant is awaiting trial and is either incarcerated or out on bail; anxiety and disruption of life due to unresolved criminal charges; and, most importantly, impairment of the accused's ability to present an effective defense. *Barker v. Wingo*, 407 U.S. 514, 532, 92 S. Ct. 2182, 2193, 33 L. Ed. 2d 101, 117 (1972); *see also United States v. MacDonald*, 456 U.S. 1, 102 S. Ct. 1497, 71 L. Ed. 2d 696 (1982).

In *Barker*, the Supreme Court enunciated a four-part test to determine whether the right to a speedy trial has been denied. 407 U.S. at 530, 92 S. Ct. at 2192, 33 L. Ed. 2d at 116. The same test is used regardless of whether the speedy trial right is asserted under the Sixth Amendment, the Commonwealth Constitution or Commonwealth Rules of Criminal Procedure 48(b). The test examines the following: (1) the length of the delay; (2) the reason for the delay; (3) the defendant's assertion of the right; and (4) the prejudice to the defendant. *Id.; United States v. Nance*, 666 F.2d 353 (9th Cir. 1982); *United States v. Saunders*, 641 F.2d 659 (9th Cir. 1980). Standing alone, none of these factors is dispositive. Rather, they are interrelated and must be considered together, along with other circumstances relevant to the particular case. *See Barker*, 407 U.S. at 532, 92 S. Ct. at 2193, 33 L. Ed. 2d at 117.

The length of delay in this case is 21 months at the filing of this motion. The original jury trial date was scheduled for September 17, 2001. Only a few weeks before the trial date, Defendant was arrested and charged in a case involving similar counts, making it necessary for him to prepare for that trial. *See supra* II. Facts. Obviously, Defendant could not reasonably have been expected to be prepared for the September 17, 2001, trial date in light of the new charges. Defendants stipulated to a continuance of the trial date on May 14, 2002, in order to prepare for sentencing in Criminal Case No. 01-0381. Until the filing of the present motion, Defendant had not asserted his right to a speedy trial, and "failure to assert the right will make it difficult for a defendant to prove that he was denied a speedy trial." *Barker*, 407 U.S. at 532, 92 S. Ct. at 2193, 33 L. Ed. 2d at 118. The purported prejudice to Defendant is negligible, and any that may exist cannot be said to be fairly traceable to the Prosecution alone. The Defendant actually benefitted by not having to defend two cases simultaneously. While at first blush, the fact that almost two years has gone by since the arrest in this case

appears to weigh in favor of a finding that Defendant's right to a speedy trial has been infringed, the evidence shows that Defendant's own actions were a substantial factor causing the delay.

Defendant also cites the Speedy Trial Act of 1974, 18 U.S.C. § 3161, as being applicable to the Commonwealth pursuant to Section 502 of the Covenant. Under the Speedy Trial Act, federal criminal trials must commence within seventy days of the accusation of the defendant. Defendant's contention is incorrect. The Federal Act pertains to federal cases only, and is therefore not controlling here. *See Commonwealth v. Rubidizo*, Crim. No. 93-0132 (N.M.I. Super. Ct. Dec. 1, 1994) (Decision and Order Denying Motion to Dismiss at 5).

Considering all of the relevant factors in this case, it appears that to grant the dismissal would be to reward the Defendant, and punish the Prosecution for their cooperation in the rescheduling of Defendant's other case. It is disingenuous for the Defendant to argue that the delay in this case prejudiced him when he agreed to it in order to prepare a defense in his other trial. The Court, after having examined Defendant's contention that he has been deprived of the right to a speedy trial under the four-factor *Barker* test, and all other circumstances unique to this case, hereby denies Defendant's motion to dismiss.

B. Motion to Quash Warrant and/or Suppress Evidence.

Defendant challenges the warrant, and the evidence seized, on two grounds: (1) the issuing judge was misled because the detective did not inform him that they had driven down Defendant's driveway past private property signs, without a warrant, to see the stolen items in the garage. *See* Def. Ex. B (Motion to Quash and/or Suppress), and (2) even if the warrant were valid, a search with narcotics dogs exceeded the scope of the warrant, thus violating the constitutional "particularity" requirement for a valid search.

The N.M.I. Constitution, Article I, section 3 specifically states:

> [t]he right of the people to be secure in their persons, houses, papers and belongings against unreasonable searches and seizures shall not be violated [and] . . . [n]o 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.

This Article mirrors the Fourth Amendment to the U.S. Constitution, limiting government intrusions into individual privacy. *See* U.S. Const. amend. IV.

a. The warrant was not defective.

The U.S. Supreme Court reversed the Supreme Court of Delaware in *Franks v. Delaware*, 438 U.S. 154, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978), holding that a criminal defendant has a right to challenge the veracity of a sworn statement by police used to obtain a warrant. The Court held that the Fourth Amendment, Fourteenth Amendment, and the derivative exclusionary rule allowed for a petitioner to attack the veracity of the warrant's affidavit after the warrant had been issued and executed. The Court, however, did not require that the affidavit be flawless on its face to be valid.

> This does not mean "truthful" in the sense that every fact recited in the warrant affidavit is necessarily correct, for probable cause may be founded upon hearsay and upon information received from informants, as well as upon information within the affiant's own knowledge that sometimes must be garnered hastily. But surely it is to be "truthful" in the sense that the information put forth is believed or appropriately accepted buy affiant as true.

Franks, 438 U.S. at 165, 98 S. Ct. at 2681, 57 L. Ed.2d at 678 (*citing Nathanson v. United States*, 290 U.S. 41, 47, 545 S. Ct. 11, 13, 78 L. Ed. 159, 161 (1933); *Giordenello v. United States*, 357 U.S. 480, 485-86, 78 S. Ct. 1245, 1250, 2 L. Ed. 2d 1503, 1509 (1958); *Aguilar v. Texas*, 378 U.S. 108, 114-15, 84 S. Ct. 1509, 1514, 12 L. Ed. 2d 723, 729 (1964)).

Defendant claims that the warrant was obtained only after an illegal search conducted by the detective by driving past the private property signs posted along the road leading to the Defendant's house. He argues that a search warrant should have issued before proceeding down Defendant's driveway, and that this information was kept from the issuing judge when the detective applied for the search warrant.

In the detective's Declaration of Probable Cause, it specifically states that "Affiant along with the informant *drove to the defendant's house* . . . [and] [i]nformant pointed out that the air condition units [were] exactly [in] the same place where he had left [them]." *See* Decl. of Probable Cause in Supp. of the Issuance of an Arrest Warrant and a Search Warrant at 2 (emphasis added). The affiant's failure to affirmatively acknowledge passing the signs along the road to Defendant's residence in his declaration cannot in itself invalidate the probable cause the search warrant was issued upon. There is no evidence that the detective intentionally falsified any information on the affidavit to secure the warrant. He may not have seen the signs, or he may have read them to be cautionary rather than prohibitory.

The first two signs along the road leading to Defendant's residence read "Private Road, Drive Slow" and "Private Property, P/S Slow Down," thus demonstrating concern about speed rather than manifesting a general prohibition against trespass altogether. Also, the last sign purported to be on Defendant's property is

a sign that reads "KEEP OUT, Restricted Area; Violators will be prosecuted." Although the warning on this sign may be intended to put potential trespassers on notice that their presence is restricted, it is far from clear what boundary is delineated by it. The boundary so specified may be the wooded area directly behind the sign, or directly in front of the approach to the house. The submission of the photographed signs only invites speculation by the Court, and in the absence of more convincing evidence will not defeat a valid warrant issued by an impartial magistrate finding probable cause based on affiant's declaration. In other words, without an affirmative showing that the officer acted in bad faith, or with reckless disregard for the truth in his presentation to the issuing judge, this Court will not disturb an otherwise valid warrant. The Court, based on the foregoing reasons, hereby denies Defendant's Motion to Quash the Warrant.

b. The search exceeded the scope of the warrant.

The Fourth Amendment requires that a warrant "particular[ly] describ[e] the place to be searched, and the person or things to be seized." *See* U.S. Const. amend. IV. Warrants which permit "general, exploratory rummaging in a person's belongings" are prohibited. *See United States v. McClintock*, 748 F.2d 1278, 1282 (9th Cir. 1984) (*quoting Andresen v. Maryland*, 427 U.S. 463, 480, 96 S. Ct. 2737, 2748, 49 L. Ed. 2d 627, 642 (1976). General warrants, of course, are prohibited by the Fourth Amendment. "[T]he problem [posed by the general warrant] is not that of intrusion *per se*, but of a general, exploratory rummaging in a person's belongings. . . . [The Fourth Amendment addresses the problem] by requiring a 'particular description' of the things to be seized." *Coolidge v. New Hampshire*, 403 U.S. 443, 467, 91 S. Ct. 2022, 2038-39, 29 L. Ed. 2d 564, 583 (1971). This requirement "makes general searches . . . impossible and prevents the seizure of one thing under a warrant describing another. As to what is to be taken, nothing is left to the discretion of the officer executing the warrant." *Stanford v. Texas*, 379 U.S. 476, 485, 85 S. Ct. 506, 512, 13 L. Ed. 2d 431, 437 (1965) (*quoting Marron v. United States*, 275 U.S. 192, 196, 48 S. Ct. 74, 76, 72 L. Ed. 231, 237 (1927)).

Law enforcement officers may exceed the limits of the warrant when they have implied justification reasonably necessary to further the warrant's purpose. *See Michigan v. Summers*, 452 U.S. 692, 704-705, 101 S. Ct. 2587, 2595, 69 L. Ed. 2d 340, 350 (1981).

The "plain view" doctrine is an exception to the general rule that a seizure of personal property must be authorized by a warrant. As Justice Stewart explained in *Coolidge*, a warrantless seizure is acceptable when

an officer is lawfully in a location and *inadvertently* sees evidence of a crime because of "the inconvenience of procuring a warrant" to seize this newly discovered piece of evidence. 403 U.S. at 470, 91 S. Ct. at 2040, 29 L. Ed. 2d at 585. "[W]here the discovery is anticipated, where the police know in advance the location of the evidence and intend to seize it," the argument that procuring a warrant would be "inconvenient" loses much, if not all, of its force. *Id.*

There is no reason why the police officers could not have obtained a warrant, particularly listing drugs as one of the items to be searched for, before entering Defendant's premises. The rationale behind allowing the seizure of inadvertently discovered evidence does not excuse officers from the "particularity requirement" for a warrant to seize, when the officers know the location of evidence, have probable cause to seize it, intend to seize it, and yet do not bother obtaining a warrant particularly describing that evidence. To do so, would violate "the express constitutional requirement of 'Warrants . . . particularly describing . . . the things to be seized,'" and would "fly in the face of the basic rule that no amount of probable cause can justify a warrantless seizure." *See Id.* at 471, 91 S. Ct. at 2041, 29 L. Ed. 2d at 586.

In this case, the officers had more than "implied justification" to believe that drugs would be found. The informant had told them that he had exchanged the stolen items listed in the warrant for "ice." They secured a valid warrant particularly describing Defendant's residence and curtilage as the place to be searched. They also particularly described the air condition units, bush cutter, and the handguns as the items to be seized. If they had "inadvertently" discovered drugs while searching for the items listed in the warrant, that seizure may have passed constitutional muster. When the police failed to list drugs as one of the items being searched for, and then incorporated the use of dogs trained only for locating narcotics, they exceeded the scope of the warrant. At the hearing, the customs officer in charge of the narcotics K-9 team testified that this was the only search using the dogs he had ever been involved in where drugs were not listed on the warrant.

It is well established that all evidence obtained as the result of an unlawful search must be suppressed as "fruit of a poisonous tree." *See Wong Sun v. United States*, 371 U.S. 471, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963). The Court finds that failure to particularly describe drugs in the warrant, and then to employ narcotics K-9s in the search of Defendant's home, violated Defendant's Fourth Amendment right to be free of unreasonable governmental intrusion.

V. CONCLUSION

For the above reasons, the Court hereby DENIES Defendant's Motion to Dismiss, and Defendant's Motion to Quash the Search Warrant. The Court GRANTS Defendant's Motion to Suppress Evidence of the narcotics, marijuana, and all other paraphernalia associated with the use, manufacture, or sale of illegal drugs seized on November 14, 2000.

SO ORDERED this 10th day of October, *nunc pro tunc* to October 2, 2002.

/s/ Juan T. Lizama
JUAN T. LIZAMA, Associate Judge