FOR PUBLICATION

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

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS, Plaintiff, v. **BYRON DELA CRUZ** d.o.b. 2/11/1983 **KURT KING** d.o.b. 8/31/80, Defendants.	CRIMINAL CASE NO. 10-0111T **ORDER DENYING THE GOVERNMENT'S MOTION TO TRANSFER VENUE, GRANTING THE GOVERNMENT'S MOTION TO COMPEL, AND GRANTING THE GOVERNMENT'S MOTION(S) IN LIMINE**

I. INTRODUCTION

THIS MATTER came before the Court on April 26, 2011 at 9:00 a.m. in Courtroom 223A for the Commonwealth's Motion to Transfer Venue, Motion to Compel Discovery, and Motions in Limine. The Government was represented by Assistant Attorney General Russell Lorfing. Defendants Byron Dela Cruz and Kurt B. King (hereinafter "Defendants") appeared with their counsel, Steven Pixley and Vincent Seman[1], respectively.

The Government filed a Motion to Transfer Venue and to Compel Discovery, and further provided notice to the Court of its intent to introduce intrinsic and extrinsic evidence. The Government also filed two Motions in Limine asking this Court to: (1) prohibit Defendants from commenting on the penalty or consequences of a conviction; and (2) prevent Defendants from

[1] Although attorney Vincent Seman served as Defendant King's court appointed counsel at the time of this hearing, subsequently, he withdrew, and Shane A. Intihar, Esq. was appointed as King's counsel on April 29, 2011.

arguing about the admission of audio tapes during the trial.

For the reasons discussed below, the Court denies the Commonwealth's Motion to Transfer Venue, grants the Commonwealth's Motion to Compel, and further finds that Defendants may not comment on the penalty or consequences of a conviction, the Government may introduce the audio tapes, as long as, they are properly authenticated, and the Government may introduce prior bad acts pursuant to NMI R. Evid. 404(b) subject to the Court's 403 balancing test.

II. PROCEDURAL HISTORY

On May 5, 2010, an Information was filed charging Defendant Byron Dela Cruz in Count I with Trafficking of a Controlled Substance in violation of 6 CMC § 2141(a)(1) and in Count II with Illegal Possession of a Controlled Substance in violation of 6 CMC § 2142(a). Defendant King was charged in Count III with Trafficking of a Controlled Substance in violation of 6 CMC § 2141(a)(1), in Count IV with Illegal Possession of a Controlled Substance in violation of 6 CMC § 2142(a), and in Count V with Conspiracy to Commit Trafficking of a Controlled Substance in violation of 6 CMC §303(a). Arrest warrants were signed on April 29, 2010 and Defendants were arrested on that same day. Subsequently, Defendants were arraigned and pled not guilty to the crimes charged.

III. DISCUSSION

A. Motion to Transfer Venue Is DENIED.

It has long been established that "venue shall be laid in the county were the action is instituted." *Bolton v. Martin,* 1 U.S. 296 (1788). This inherent ideology of the judiciary is reflected in our own Commonwealth Code, which dictates that in considering venue for a criminal offense, "all trials of offenses shall be held on the island where the offense was committed." 6 CMC § 108(a). Since the determination of venue rests upon where the crime was committed, it is imperative to ascertain the definition of the crime. *United States v. Passodelis,* 615 F.2d 975, 977 (1980).

In the present case, Defendants are charged with: (1) possession of a controlled substance; and (2) trafficking of a controlled substance. Additionally, Defendant King is charged with conspiracy to traffic a controlled substance. Each of these charges is predicated upon the physicality

of both the person and the substance. Accordingly, since both the presence and the intent of the party in question transpired or manifested on Tinian, it is in keeping with statutory adherence that Tinian serve as the proper venue.

Nevertheless, our criminal code provides as a corollary that: "the Commonwealth may petition the court for a change of location of trial for good cause." 6 CMC § 108(c). Our Supreme Court has interpreted this to mean that although "venue should involve the place where an action occurred," the court "should consider the convenience of the parties as well as the fair administration of justice." *Guerrero v. Tinian Dynasty Hotel & Casino,* 2006 MP 26 ¶ 12 (citing *Van Dusen v. Barrack,* 376 U.S. 612, 622 (1964)).

In *Commonwealth v. Santos*, Judge Taylor denied the Government's Motion to Change Venue from Rota to Saipan finding that the Government had not established good cause warranting a change of venue. *Commonwealth v. Santos*, Crim. No. 93-163 (NMI Super. Ct. Sep. 30, 1994)(Decision and Order on Government's Motion [to] Change Venue at 4-8). The Government's petition was premised on the fact that family and community relations would make it difficult for the Government to obtain a fair trial in Rota.

In the present case, the Commonwealth petitions the Court to transfer venue for good cause arguing that nearly all the parties, all evidence, and all witnesses are located in Saipan. (Com.'s Mot. at 3.) In addition, the Commonwealth contends that Defendant King was just tried and acquitted in a criminal case less than six months prior to this case. *id.* Moreover, Defendant King is widely known and extremely involved in the political infrastructure in Tinian and is a relative of a highly respected and powerful family on the island. *id.* Finally, Defendant King's ties to the community make it impossible for the Commonwealth to have a fair trial. *id.* The Commonwealth urges the Court to consider the enumerated factors set out in *Platt v. Minnesota Mining & Mfg. Co.*, 376 U.S. 240 (1964), and conclude that a transfer of venue is warranted.

On April 12, 2011, Defendant Dela Cruz filed an Opposition to the Government's Motion arguing that it should be denied because all the alleged criminal charges were committed on Tinian, Defendant Dela Cruz is a Tinian resident, the Superior Court regularly sits in Tinian, and Judge Marty Taylor already addressed this issue in *Commonwealth v. Santos*. (Def. Cruz's Opp'n at 2.)

On April 12, 2011, Defendant King filed his Opposition to the Government's Motion. Therein, King argues that Tinian is the proper forum to hear the case because Tinian is where the offense was committed, both Defendants are presently located in Tinian pursuant to modified bail orders, the evidence is not too voluminous to transport from Saipan to Tinian, and King may wish to call character witnesses, all of which are located in Tinian. (Def. King's Opp'n at 2-3.) In addition, King claims that the Commonwealth has failed to provide any factual basis that King's relationship with the community of Tinian equates to undue bias. *id.*

After reviewing the above cited cases, as well as, the *Platt* factors, the Court finds that venue is more appropriate in Tinian. The factors weighing in favor of maintaining the trial in Tinian are that: (1) both Defendants are located in Tinian; (2) the alleged crimes occurred in Tinian; (3) the Government has not shown that the contraband seized is too voluminous or burdensome to transfer from Saipan to Tinian; (4) the Tinian Courthouse is widely accessible; and (5) the Court regularly conducts hearings in Tinian. The other factors regarding the location of counsel, expense of the Government in the pursuit of this action, and the location of possible witnesses are not enough to move this Court to transfer venue.

Although the Court acknowledges that Defendant King's ties to the community might appear to make it impossible for the Commonwealth to have a fair trial in Tinian, the Court is reluctant to transfer venue without any supporting facts or declarations to support such a contention. In addition, the fact that Defendant King is widely known and extremely involved in the political infrastructure in Tinian and is a relative of a highly respected family on the island is not enough to establish good cause when moving to transfer venue.

Our Supreme Court has held that "[t]he fact that some of our islands have small populations which may implicate certain community knowledge and family ties cannot lead to a presumption against fairness and what would surely be a resulting loss of participation in the judicial process." *Guerrero v Tinian Dynasty Hotel*, 2006 MP 26 ¶ 13. As such, the Commonwealth's Motion to Transfer Venue is hereby denied.

B. Motion in Limine to Exclude Argument or Objection Re: Penalty is <u>GRANTED</u>.

On February 1, 2011, the Government filed a Motion in Limine[2] to Exclude Argument or Objection Re: Penalty. In essence, the Government sought to disallow Defendants to comment to the jury on any consequences resulting from a conviction. Such a request is in accordance with well-settled case law. *United States v. Frank*, 956 F.2d 872, 879 (9th Cir. 1991). As such, the Government's Motion is granted.

C. Motion in Limine to Review the Tapes Prior to Trial is GRANTED provided Defendants Have the Opportunity to Review those Tapes Prior to Trial.

On February 1, 2011, the Government filed a Motion in Limine requesting a pre-trial ruling of admissibility as to each compact disc/transcript exhibit, to prevent any argument or objections by the defense to the admission of recorded statements during trial pursuant to NMI R. Evid. 901.

On April 12, 2011, Defendant King filed an Opposition to the Government's Motion in Limine arguing that the Commonwealth has failed to disclose any purported recorded statements made by King or any other discovery pursuant to Rule 12 and *Brady*, other than the Commonwealth's bate stamps 001-082 and therefore, the Commonwealth's Motion is not yet ripe.

As a preliminary matter, the Court hereby orders the Commonwealth to provide Defendants with a copy of the tapes/transcripts it intends to use at trial on or before July 15, 2011. Once this is done, the Court will implement the following methodology in admitting said tapes/transcripts.

i. The Tape Recording

Admission of tape recordings at trial rests with the sound discretion of the trial court. *United States v. Bastone*, 526 F.2d 971 (7th Cir. 1975). Audio tape recordings are generally admissible as evidence whether in original or duplicate form. *Smith v. City of Chicago,* 242 F.3d 737, 741 (7th Cir. 2001)(citing *United States v. Carrasco*, 887 F.2d 794, 802 (7th Cir. 1989)). To authenticate a tape in a criminal case the government must prove by clear and convincing evidence that the tape is a true, accurate, and authentic recording of the conversation, at a given time, between the parties involved. *Id.*

---

[2] A motion in limine is a pretrial motion requesting the court to prohibit opposing counsel from referring to or offering evidence on matters so highly prejudicial to the moving party that curative instructions cannot prevent predispositional effect on the jury. *Commonwealth v. Campbell*, 4 NMI 11 (1993).

In *United States v. Slade*, 627 F.2d 293, 301 (D.C. 1980), the court held that the first criterion for admission is that the tapes be authentic, accurate, and trustworthy. The second criterion for admission is that the tapes be audible and comprehensible enough for a jury to consider the contents.

Here, the Government has the burden of showing that the tapes are authentic, accurate and trustworthy. In order to lay the foundation at trial, the Government will have to authenticate the original tape recordings through a witness who has personal knowledge of the voices on the tape.

After doing so, the tapes will be admitted assuming they are audible and comprehensible. In addition, even if after listening to the recordings the Court finds that certain portions of the recordings are inaudible and at times somewhat unclear, the tapes may still be admitted unless "the unintelligible portions are so substantial as to render the recording as a whole untrustworthy." *United States v. Lane*, 512 F.2d 22 (9th Cir. 1975).

Here, the Court will grant the Government's Motion and schedule a second pretrial conference on a date to be determined at the July 12th pretrial conference to go over each tape and transcript once Defendants have had the opportunity to review them. If the tape recordings are audible they will be admitted once they have been properly authenticated at trial.

ii. Written Transcripts

It is within the trial court's discretion to allow the jury to use an accurate transcript "to assist them in listening to a tape.[3]" *United States v. Slade*, 627 F.2d 293, 302 (D.C. 1980). The need for a transcript tends to arise where portions of the tape are relatively inaudible and the identity of the speakers is not automatically clear to a listener. *Id.*

In *United States v. Rochan*, 563 F.2d 1246 (5th Cir. 1977), the court held that transcripts of recorded conversations between defendants and an unindicted co-conspirator were properly admitted because they were consensual tape recordings and the unindicted co-conspirator testified as to their authenticity.

---

[3] In *Slade*, the appellate court held that the trial court did not abuse its discretion by admitting recordings and transcripts since the tapes were sufficiently clear and appropriate instructions were given that the tapes superseded the text of the transcript.

In *United States v. Booker*, 952 F.2d 247, 249-250 (9th Cir. 1991), the court concluded that government-prepared transcripts may be used by the jury to follow tape recordings where certain factors are present: the district judge review the transcript for accuracy, the agent who participated in the taped conversation testifies to the accuracy of the transcript, and the district court gives the jury a limiting instruction.

The trial court may condition the use of tape recording at trial on the advance preparation of an accurate transcript. *United States v. Gerry*, 515 F.2d 130 (2d Cir. 1975). When a transcript is to be used to supplement the tape recordings, the parties should first seek to arrive at a stipulated transcript. If the parties cannot agree, each side should produce its own transcript or its own version of disputed portions of the tape.

Here, the Government seeks to admit tapes/transcripts pursuant to NMI R. Evid. 901. The Court will allow the use of a transcript, as long as, defense counsel is provided with an opportunity to prepare his own transcript if he so chooses.

The jury will be allowed to use the transcript to aid them in listening to the tapes; however, the transcript will not be admitted into evidence. In addition, the jurors will be instructed that their hearing of the tape supersedes the text of the transcript.

D. The Government May Introduce Evidence of Extraneous Offenses Pursuant to NMI R. Evid. 404(b) if it Provides a Proper Purpose for its Intended Use Or Is Intrinsic to the Crime Charged.

On February 1, 2011, the Government filed a Notice of Intent to Introduce Extraneous Offenses Pursuant to NMI R. Evid. 404(b) as to Defendant King. More specifically, the Government sought to introduce in its case-in-chief the following:

(1) Prior illegal use of crystal methamphetamine

(2) Prior illegal use of marijuana

(3) Vehicular homicide of Gerald Mundo Aldan

(4) Assault and Battery

NMI R. Evid. 404(b) provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such

> as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it tends to introduce at trial.

In order to introduce 404(b) evidence, the Commonwealth must first provide reasonable notice to Defendant of its intent to introduce such evidence. The Commonwealth Rules of Evidence patterned after the Federal Rules of Evidence provide that when using 404(b) evidence, the party introducing such evidence must "provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial." *Commonwealth v. Dizon*, Crim No. 03-0005 (NMI Super. Ct. Jul. 14, 2003)(Order Granting Request for Specific Notice of Intent to Introduce Other Act Evidence at 2).

Here, notice was given on February 1, 2011, which was well in advance of trial. Therefore, the Government may introduce such evidence if it is relevant and probative of a material issue other than character. *Huddleston v. United States*, 485 U.S. 681 (1988).

Rule 404(b) evidence "may be admitted if: (1) the evidence tends to prove a material point; (2) the other act is not too remote in time; (3) the evidence is sufficient to support a finding that defendant committed the other act; and (4) (in certain cases) the act is similar to the offense charged." *United States v. Chea*, 231 F.3d 531, 534 (9th Cir. 2000); see also *United States v. Howell*, 231 F.3d 615, 628 (9th Cir. 2000).

Here, Defendant King is charged with trafficking of a controlled substance, illegal possession of a controlled substance, and conspiracy to commit trafficking of a controlled substance. The Government is seeking to introduce Defendant's prior illegal use of crystal methamphetamine, prior illegal use of marijuana, the vehicular homicide of Gerald Mundo Aldan, and Defendant's prior assault and battery.

If the evidence is being offered to show that the Defendant either possessed or sold drugs in the past, and therefore, most likely possessed or sold drugs on this occasion then this will be improper character evidence and will be inadmissible since it will be showing that Defendant acted in conformity therewith. However, if the evidence is being offered for another purpose allowed

under 404(b) and not for its propensity, then it will be admitted as "other purpose" evidence, subject to the 403 balancing test.

NMI R. Evid. 404(b) reads in pertinent part: "[e]vidence of other crimes, wrongs, or acts . . . may however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."[4]

Here, the Government states in its brief that it intends to introduce 404(b) material, but does not provide a basis for its use. Instead, the Government makes a blanket assertion that it intends to introduce Defendant's prior bad acts pursuant to Rule 404(b). While the Court believes that such prior bad acts may fall within the parameters of Rule 404(b), the Government must first state the purpose for its intended use of each of the four pieces of evidence so as not to be mistaken for improper character evidence. Thereafter, the Court will balance the probative value versus the potential for unfair prejudice.

NMI R. Evid. 403 states that if the intended evidence's prejudice substantially outweighs its probative value it may not be admitted. *Commonwealth v. Brel*, 4 NMI 200, 203 (1999). Rule 403's balancing test weighs in favor of admitting evidence when the prior act does "not involve conduct any more sensational or disturbing than the crimes with which [the defendant] was charged." *United States v. Byers*, Slip. Op. 2009 WL 301951 (Feb. 06 2009)(citing *United States v. Boyd*, 53 F.3d 631,637 (4th Cir. 1995).

Additionally, since permitting the introduction of "other crimes" evidence poses the danger that the jury will view it as a reflection on the party's character and reach a verdict because it concludes that the party is a bad person deserving of punishment, if admitted - the Court will make sure that: (1) such evidence is admitted only for a non-character purpose; (2) such evidence is

---

[4] In *United States v. Jones*, 982 F.2d 380, 382 (9th Cir. 1992), the court held that in light of the similarity in the modus operandi between appellant's previous involvement in importation of marijuana and the present charges, the testimony was relevant as tending to show that appellant had the requisite knowledge and intent to commit the crimes with which he was charged.

In *United States v. Ramirez-Jiminez*, 967 F.2d 1321, 1325-1326 (9th Cir.1992), appellant's knowledge was a material issue in the case, consequently, the government was permitted to prove defendant's knowledge through proof of his prior bad acts.

relevant; (3) such evidence is weighed pursuant to Rule 403; and (4) certain limiting instructions are given. These procedures, along with the Defendant's opportunity to cross-examine the witness will ensure that all proper procedures are taken for introducing the Defendant's prior bad acts. However, Rule 404(b) does not apply to all forms of uncharged misconduct.

Evidence of crimes that are "inextricably intertwined" with, or intrinsic to, the charged offense is not considered to be other crimes, or extrinsic, evidence. *United States v. Soliman*, 813 F.2d 277, 279 (9th Cir. 1987). Prior acts may be admitted if the evidence "constitutes a part of the transaction that serves as the basis for the criminal charge." *United States v. DeGeorge*, 380 F.3d 1203, 1220 (9th Cir. 2004). Prior act evidence may also be admitted "when it [is] necessary to do so in order to permit the prosecutor to offer a coherent and comprehensible story regarding the commission of the crime." *Id.* at 1012-13. In other words, such evidence may be admitted to show background facts or circumstances surrounding the charged crime without addressing Rule 404(b).

Subject to the 403 balancing test, Defendant's prior use of illegal drugs may be admitted as intrinsic evidence to prove, among other things, knowledge and plan in connection with the conspiracy charge. However, the vehicular homicide charge and the assault and battery charge are not intrinsic to the crimes charged. Therefore, if the Government intends to introduce those acts, it must first meet the requirements of NMI. R. Civ. P. 404(b) as outlined above.

Lastly, the Government will need to make an offer of proof as to the purpose of the evidence prior to it being brought in. This can be done at trial outside the presence of the jury and shall not be referred to during openings or voir dire.

E. The Government's Motion to Compel Discovery is GRANTED.

On February 1, 2011, the Commonwealth filed a Motion to Compel Discovery to which it believed it was entitled to wit: all documents and tangible objects as well as reports and examinations in the Defendant's care, custody, and control that the Defendant reasonably anticipates using at trial. In support thereof, the Commonwealth claims that it sought reciprocal discovery on August 11, 2010, October 1, 2010, October 5, 2010, and November 3, 2010, however, as of February 1, 2011, the Commonwealth had not received any discovery from either Defendant.

The Commonwealth is correct in that NMI R. Crim. P. 16(b) provides for disclosure of evidence by the Defendant. Subsection (e)(2) of said rule regulates discovery and provides:

> **Failure to Comply With a Request**. If, at any time during the course of the proceedings, it is brought to the attention of the court that a party has failed to comply with this rule, the court may order such party to permit the discovery or inspection, grant a continuance or prohibit the party from introducing evidence not disclosed, or it may enter such other as it deems just under the circumstances. The court may specify the time, place, and manner of making the discovery and inspection and may prescribe such terms and conditions as are just.

The Court hereby orders Defendants to disclose any reciprocal discovery in their possession by July 15, 2011.

IT IS SO ORDERED this 8 day of July 2011.

David A. Wiseman, Associate Judge