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Judy Aldan



IN THE
Supreme Court
OF THE
Commonwealth of the Northern Mariana Islands

IN RE COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS,
Petitioner.

Supreme Court No. 2022-SCC-0001-PET

ORDER GRANTING WRIT OF MANDAMUS

Cite as: 2022 MP 5

Decided August 22, 2022

CHIEF JUSTICE ALEXANDRO C. CASTRO
ASSOCIATE JUSTICE JOHN A. MANGLOÑA
ASSOCIATE JUSTICE PERRY B. INOS

Superior Court Criminal Case No. 21-0189-CR
Associate Judge Teresa Kim-Tenorio, Presiding

INOS, J.:

¶ 1 The Commonwealth petitions the Court for a writ of mandamus to order the trial court to accept complaints filed under NMI Rule of Criminal Procedure 5 (“Rule 5 complaints”) that have an electronic signature¹ from the prosecuting attorney.² A Rule 5 complaint demonstrating probable cause under NMI R. CRIM P. Rule 4(a) is required following a warrantless arrest. When a Rule 5 complainant is a police officer, the prosecutor’s signature is not necessary. For the following reasons, the petition for writ of mandamus is GRANTED.

I. FACTS AND PROCEDURAL HISTORY

¶ 2 DPS officers arrested Eric Lee Nekaifes (“Nekaifes”) for assault and battery, strangulation, and possession of ammunition after reports that he assaulted his girlfriend. The arrest was made without a warrant pursuant to 6 CMC § 1467(a)(1). This statute mandates officers to arrest a person, with or without a warrant, if there is probable cause to believe the person has committed a crime involving domestic violence within the previous twelve hours.

¶ 3 After the arrest, a detective wrote a Complaint and Affidavit of Probable Cause (“Complaint”) and sent it to the Office of the Attorney General for review. The Complaint has a signature line for the detective as the affiant and another signature line for the Assistant Attorney General (“AAG”) reviewing the Complaint. After reviewing the Complaint for legal sufficiency, an AAG signed it using an electronic signature, specifically a scanned image of his physical signature. The detective then appeared before a judge and swore to the truthfulness of the Complaint and Affidavit. The judge signed the Complaint, found probable cause for all counts, and set bail. The detective served the Complaint upon the defendant who was already in custody and who acknowledged service. Only then was the Complaint filed through File & ServeXpress.³ This procedure is the general practice of the Attorney General’s Office. That is, the electronic filing happens after the judge signs a Rule 5 complaint, not before.

¶ 4 A different judge presided over the initial appearance, which Rule 5 governs. The judge believed the Complaint was the AAG’s request for an arrest warrant under NMI R. CRIM P. Rule 4(a). The judge interpreted this rule to mean that when a government attorney requests an arrest warrant, the judge is barred

¹ We refer to an “electronic signature” as any non-physical signature, whether or not it complies with the NMI Rules for Electronic Filing and Service.

² Under NMI Supreme Court Rule 21(a)(2)(A), “The petition must be titled ‘In re [name of petitioner].’” The names of the other parties are not included, and the Superior Court is not a respondent. *See In re John Sablan Pangelinan*, 2021 MP 11.

³ The Commonwealth asserts that the arrest warrant was served upon Nekaifes. Pet. 6. The warrant is not on File & ServeXpress, and the return of service only indicates that the Complaint was served.

from exercising discretion to deny the request; thus, it was critical to know that a government’s signature on a request for an arrest warrant was genuine. The judge found the Complaint deficient because the AAG’s signature was in an electronic form and there is no way of knowing whether the AAG actually signed it.⁴ The judge reasoned that, unlike electronically filed court documents, there is no secure credentialing method, other than a physical signature, that can confirm the integrity of each signatory’s identity on a Rule 5 complaint before the document is reviewed by a judge. Finally, the judge found no rule or law that allowed electronic signatures on Rule 5 complaints.

¶ 5 At the hearing, the judge said that the Superior Court judges had met and unanimously agreed that they would not accept electronic signatures on Rule 5 complaints. The judge dismissed the case without prejudice.

¶ 6 The Commonwealth refiled the charges against Nekaifes and rearrested him a day after the dismissal.

¶ 7 The Superior Court filed an answer to the Commonwealth’s petition at our invitation.

II. JURISDICTION AND STANDARD OF REVIEW

¶ 8 We have original jurisdiction to issue writs of mandamus. NMI CONST. art. IV, § 3. The issues in the petition raise questions of law and court rules, which we review de novo. *Commonwealth v. Cabrera*, 4 NMI 240, 250 (1995).

III. DISCUSSION

A. Mootness

¶ 9 Whether the Complaint was valid is now moot because the Commonwealth has reinitiated criminal proceedings against Nekaifes. As a general rule, Commonwealth courts lack jurisdiction to decide moot issues. *Govendo v. Micronesian Garment Mfg.*, 2 NMI 270, 281 (1991); *Sablan v. Tenorio*, 4 NMI 351, 363 (1996). However, we may review moot issues if they are (1) of public importance, (2) likely to recur, and (3) likely to become moot again prior to appellate review. *Id.*; *Norita v. Norita*, 4 NMI 381, 385 (1996).

¶ 10 First, this petition concerns the procedures by which the Commonwealth demonstrates probable cause. This is a matter of public importance because it affects all Commonwealth citizens who are arrested. We have said that “the widespread practices of the Superior Court . . . are a matter of public interest.” *Paulis v. Super. Ct.*, 2004 MP 10 ¶¶ 18–19 (finding the mootness exception applied to a case relevant “to all civil judgment debtors in the Commonwealth”). Additionally, the procedures demonstrating probable cause implicate the core constitutional right of due process. “[C]onstitutional questions satisfy this prong of the exception.” *Castro v. Castro*, 2009 MP 8 ¶ 9. Second, this issue is not isolated to this case because the AAGs and police officers in practice sign Rule 5 complaints—the former using an electronic signature and the latter a physical

⁴ The AAG who reviewed the Complaint was present at the counsel table during the initial appearance.

signature—before they are e-filed. With the Superior Court’s unified stance not to accept electronic signatures on Rule 5 complaints, the issue is likely to recur. Third, the issue is likely to become moot again prior to appellate review, since when the Commonwealth puts a physical signature on a new complaint after the first case gets dismissed, the first case becomes moot and, hence, generally unreviewable. We determine that this case falls under the mootness exception. Therefore, we will review the issue.

B. Writs of Mandamus

¶ 11 Writs of mandamus are “reserved for the most dire of instances when no other relief is available.” *In re Commonwealth*, 2021 MP 6 ¶ 6 (internal citation omitted). When we decide a writ of mandamus, we look to the *Tenorio v. Superior Court* factors:

- (1) the party seeking the writ has no other adequate means, such as a direct appeal, to attain the relief desired;
 - (2) the petitioner will be damaged or prejudiced in a way not correctable on appeal;
 - (3) the lower court’s order is clearly erroneous as a matter of law;
 - (4) the lower court’s order is an oft-repeated error, or manifests a persistent disregard of applicable rules; and
 - (5) the lower court’s order raises new and important problems, or issues of law of first impression.
- 1 NMI 1, 9–10 (1989).

We analyze the *Tenorio* factors in turn.

i. No Other Adequate Means to Attain Relief

¶ 12 An appeal is impossible under our holding in *Commonwealth v. Crisostomo*, 2005 MP 18 ¶ 17.

¶ 13 In *Crisostomo*, we dismissed for lack of jurisdiction the Commonwealth’s appeal of an order dismissing without prejudice several criminal cases for lack of probable cause. We held a finding of no probable cause was not a final judgment. *Crisostomo*, 2005 MP 18 ¶ 17. As in *Crisostomo*, the order dismissing the Complaint without prejudice “does not bar the prosecution from re-filing the charge. Such a determination has no preclusive effect, and therefore is not a final decision.” *Id.* (internal citation omitted) *See also Five Star Cap. Corp. v. Ruby*, 194 P.3d 709, 713 n.27 (Nev. 2008) (“the requirement of a valid final judgment . . . does not include a case that was dismissed without prejudice”). Indeed, the Commonwealth refiled charges and arrested Nekaifes a day after the dismissal. Also relevant is 6 CMC § 8101, which lists the types of decisions in criminal cases that the Commonwealth can appeal. Under the plain language of this statute, the Commonwealth could not appeal even if the dismissal was a final order.

¶ 14 While the Commonwealth can refile the case, that does not address the validity of an electronic signature on Rule 5 complaints. The matter would always evade our review. For instance, if the Commonwealth uses an electronic

signature, the case will be dismissed without prejudice; upon refiling the case with a physical signature, the new case continues but the issue in the dismissed case will evade review. Because there is no other way to attain relief, the first *Tenorio* factor is satisfied.

ii. Damaged or Prejudiced in a Way Not Correctable on Appeal

¶ 15 The Commonwealth argues that if the order stands, it would be damaged whenever the AAG provided an electronic signature on a Rule 5 complaint because it would have to refile the case, rearrest the defendant, and repeat the bail hearing. As explained above, the Commonwealth has no ability to appeal the order and, thus, no way to correct this damage. We find that the second *Tenorio* factor is satisfied.

iii. Clear Error

¶ 16 The third *Tenorio* factor is dispositive, and “a writ is not appropriate if the petitioner has not shown clear error.” *In re Commonwealth*, 2018 MP 8 ¶ 13 (internal quotation marks omitted). The Commonwealth argues the court clearly erred in ruling that the AAG’s electronic signature rendered the Complaint deficient, and asserts that even if the Complaint was deficient, dismissal was an improper remedy.

a. The Complaint Was Valid

¶ 17 *Commonwealth v. Bowie*, 3 NMI 462 (1993) holds that a police officer may request an arrest warrant without involving the prosecuting attorney. Discussing Rules of Criminal Procedure 4 and 9, we said:

The CNMI has no statute or rule prohibiting a police officer from requesting an arrest warrant from a judge, based on probable cause, prior to the filing of a criminal complaint or information. When a judge is satisfied, based on an affidavit, a verified complaint, or a verified information, that a crime has been committed and a particular person committed such a crime, the judge may issue a warrant for the arrest of that person.

Id. at 468.

There is disagreement whether *Bowie* applies here. The Commonwealth asserts that, like in *Bowie*, the request came from the detective, not the AAG. The court believes on the contrary that the AAG requested the arrest warrant because his signature appears on the Complaint, making *Bowie* inapplicable. The court is correct that this case is distinguishable from *Bowie*, albeit for a different reason than it claims.

¶ 18 In *Bowie*, the defendant was arrested pursuant to an arrest warrant that a police officer requested. *Id.* at 465. Here, there was a warrantless arrest followed by the Complaint. Rule 5(a) required a complaint, not an arrest warrant. In relevant part, the rule reads: “If a person arrested without a warrant is brought before a judge, a complaint shall be filed forthwith which shall comply with the requirements of Rule 4(a) *with respect to the showing of probable cause.*” (emphasis added). That is, when the Commonwealth performs a warrantless

arrest, it does not need to obtain an arrest warrant; instead, it must file a written complaint showing a crime has been committed and that the person arrested committed the offense.⁵ Only the showing of probable cause for a warrantless arrest instead of requesting an arrest warrant is necessary because the suspect is already arrested. *United States v. Holiday*, No. 09cr3393 BTM, 2010 U.S. Dist. LEXIS 97483, at *11 (S.D. Cal. Sep. 17, 2010) (noting that a complaint filed after the defendant's arrest was not used to get a warrant for his arrest or to otherwise effect his arrest); *Boomer v. United States*, No. 3:11-CV-00844, 2013 U.S. Dist. LEXIS 203435, at *26 (M.D. Pa. Apr. 18, 2013) ("At the time the criminal complaint was filled out, [the defendant] was already in custody, so an arrest warrant would not have been necessary"); *United States v. Cohen*, No. 2:17-cr-00114-APG-CWH, 2017 U.S. Dist. LEXIS 164583, at *3 (D. Nev. July 3, 2017) ("Judge [] did not sign the arrest warrant, stating it was unnecessary because [the defendant] was already in federal custody").

¶ 19 Both the judge at the initial appearance and the Commonwealth treated the Complaint as a request for an arrest warrant. The judge said "the integrity of the CNMI Office of the Attorney General's signature is paramount to whether the government may be granted a warrant for arrest through a Rule 5 Complaint." *Commonwealth v. Nekaifes*, Crim. No. 21-0189 (NMI Super. Ct. Dec. 3, 2021) (Order Dismissing Without Prejudice at 3). The petition calls it a "Complaint and Affidavit of Probable Cause in Support of the Issuance of an Arrest Warrant." Pet. 6. However, the record does not support the shared notion that the Commonwealth asked for an arrest warrant. For example, the Complaint is titled "Complaint and Affidavit of Probable Cause"—the title does not mention an arrest warrant. In the Complaint, there is a single reference to "the requested warrant" which appears in a section of boilerplate language.⁶ But the Complaint is wholly absent of any language actually requesting an arrest warrant. Moreover, the first judge—the one who signed the Rule 5 complaint and set bail—did not go beyond finding probable cause. The record does not show that an arrest warrant was issued, and the detective declared in the return of service that Nekaifes was served with the Complaint, not a warrant. But even if the Commonwealth intended to ask for an arrest warrant, the first judge did find

⁵ The law under which Nekaifes was arrested also reinforces this point. 6 CMC § 1467(a) says "Except as provided in (b) or (c) of this section, a law enforcement officer, with or without a warrant, shall arrest a person if the officer has probable cause to believe the person has, either in or outside the presence of the officer, within the previous 12 hours" committed domestic violence. This law mandates warrantless arrests when there is probable cause. It would be particularly counterintuitive for an officer acting under this law to get an arrest warrant *after* arresting a suspect.

⁶ The Complaint says "It is intended to show merely that there is sufficient probable cause for the requested warrant and does not set forth all of my knowledge about this matter."

probable cause, meeting the requirements of Rule 4(a) as incorporated by Rule 5(a).

¶ 20 Law enforcement officers can file Rule 5 complaints under the Federal Rules of Criminal Procedure. *United States v. Fernandez-Guzman*, 577 F.2d 1093, 1097 (7th Cir. 1978) (explaining that Rule 5 requires “officers to swear out a complaint showing probable cause before a judicial officer ‘without unnecessary delay’ after a warrantless arrest”). For example, in *United States v. Simon*, after arresting the defendant, a narcotics agent “signed a probable cause arrest complaint the next morning.” 409 F.2d 474, 475 (7th Cir. 1969). Rule 5 complaints have also been filed by FBI agents, police officers, and ATF agents. *Hayes v. United States*, 419 F.2d 1364, 1366 (10th Cir. 1969); *United States v. Robinson*, No. 10-CR-20088, 2012 U.S. Dist. LEXIS 81251, at *2 (C.D. Ill. June 12, 2012); *United States v. Casillas*, 792 F.3d 929, 930 (8th Cir. 2015).

¶ 21 Rule 5(a) says nothing about requiring the prosecutor’s signature. By contrast, Rule 4(c)(1) specifies that “[t]he warrant shall be signed by a judge.” The inclusion of this requirement for the warrant, contrasted with the absence of any similar language in Rule 5(a), suggests that Rule 5 complaints do not require the prosecutor’s signature.

¶ 22 Here, like in *Simon*, a law enforcement officer filed a complaint to establish probable cause following the defendant’s arrest. 409 F.2d at 475. This satisfied Rule 5, and the Complaint was not otherwise deficient. We held in *Bowie* that the prosecutor’s signature is not required when a police officer requests an arrest warrant. 3 NMI at 468. Consistent with that decision, we now hold that the prosecutor’s signature is not necessary when a police officer files a Rule 5 complaint. As the AAG’s signature was not required, the requirements for electronic signatures provided by the NMI Rules for Electronic Filing and Service are irrelevant here.⁷

¶ 23 In this case, a detective was both the Rule 5 complainant and affiant, and the Complaint was a single document consisting of both a complaint and supporting affidavit. In a different scenario, a prosecutor could be the Rule 5 complainant who signs the complaint using an electronic signature and a police officer could support the complaint in a separate affidavit. In both instances, Rule 5(a)’s purpose is to uphold the constitutional requirement for a judicial finding of probable cause “supported by oath or affirmation.” U.S. CONST. amend. IV; see also *Fernandez-Guzman*, 577 F.2d at 1097. Therefore, when a police officer appears before a judge to verify the veracity of an affidavit supporting a Rule 5 complaint, it should not matter whether the prosecutor signed it electronically or physically. If there is reason to believe that the prosecutor’s electronic signature is not genuine, the court could decline to find probable cause. However, a bare

⁷ The current NMI Rules for Electronic Filing Service became effective on December 11, 2021, shortly after the events of this case. NMI R. ELEC. FILING Rule 8 lays out the accepted formats for electronic signatures. In the version effective in this case, the requirements for electronic signatures are found in Rule 6.5.

assertion that electronic signatures are inherently untrustworthy without more is insufficient to find a complaint deficient.

b. Dismissal Was Not the Proper Remedy

¶ 24 The court has conceded in its answer that dismissal is not the proper remedy when a signature on a Rule 5 complaint is deficient. It acknowledges that Rule of Criminal Procedure 5(a) says “When a person, arrested with or without a warrant or given a summons, appears initially before the judge, that judge shall proceed in accordance with the applicable subdivision of this rule.” The court states that the rule “means that the judge must continue with the initial appearance so long as the defendant appears before the judge and is: (1) arrested with a warrant, (2) arrested without a warrant, or (3) given a summons.” Answer at 9. The court also acknowledges that dismissal is an “extraordinary” and so disfavored remedy. *Id.* (quoting *Commonwealth v. Campbell*, 4 NMI 11, 18 (1993)).

¶ 25 Commonwealth law also provides guidance on the remedies for a defective Rule 5 complaint. 6 CMC § 6106 specifies that:

The proceedings before a court or an official authorized to issue a warrant of arrest may not be invalidated, nor any finding, order, or sentence set aside or any error or omission, technical or otherwise, occurring in those proceedings, unless in the opinion of the reviewing authority or the court hearing the case on appeal or otherwise it appears that the error or omission has prejudiced the accused.

6 CMC § 6107 states in relevant part:

No violation of [the statutes governing criminal procedure] shall in and of itself entitle an accused to an acquittal, but *no evidence obtained as a result of any violation may be admitted* against the accused; provided, that any person detained in custody in violation of any provision of this division may, upon motion by any person in his or her behalf, and after such notice as the court may order, be released from custody by the court named in the warrant, or before which the person has been held to answer.
(emphasis added).

¶ 26 Here, the alleged error in the complaint was the AAG’s electronic signature. Pursuant to 6 CMC § 6106, an error cannot invalidate the complaint unless the court finds that it prejudices the defendant. Absent such a finding, 6 CMC § 6106 requires the court to proceed with the initial appearance. Furthermore, under 6 CMC § 6107, the remedy for a defective or faulty complaint is the inadmissibility of the evidence obtained or the release of the defendant from custody. Finally, the AAG who reviewed the Complaint was present at the counsel table at the initial appearance and could have addressed the judge’s concerns about the authenticity of the electronic signature.

¶ 27 We find that the court clearly erred in holding that the Complaint was deficient and then dismissing the case. The third *Tenorio* factor is satisfied.

iv. Oft-Repeated Error

¶ 28 The Commonwealth argues that the refusal to accept an electronic signature on a Rule 5 complaint is an oft-repeated error. It notes the rejection of another Rule 5 complaint for using an electronic signature on November 21, 2021, just two days before it rejected the complaint in this case. *Commonwealth v. Nekaifes*, Crim. No. 21–0189 (NMI Super. Ct. Dec. 3, 2021) (Order Dismissing Without Prejudice at 3 n.3). Moreover, the court said that all Superior Court judges would reject electronic signatures on Rule 5 complaints unless this Court determined otherwise. Because the rejection of Rule 5 complaints with an electronic signature from the AAG was erroneous and because this mistake has repeatedly occurred, we find that the fourth *Tenorio* factor is satisfied.

v. Case of First Impression or Important Problem

¶ 29 Before this opinion, we had not ruled on the issue of whether the prosecutor’s signature is required on a Rule 5 complaint, making this a case of first impression. We find that the fifth *Tenorio* factor is satisfied.

IV. CONCLUSION

¶ 30 Because all five of the *Tenorio* factors are satisfied, the petition for writ of mandamus is GRANTED. A Rule 5 complaint filed by a police officer does not require the prosecutor’s signature and is not deficient if the prosecutor provides an electronic signature indicating they have reviewed for legal sufficiency.

SO ORDERED this 22nd day of August, 2022.

/s/

ALEXANDRO C. CASTRO
Chief Justice

/s/

JOHN A. MANGLOÑA
Associate Justice

/s/

PERRY B. INOS
Associate Justice

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