

FSM SUPREME COURT TRIAL DIVISION

FEDERATED STATES OF MICRONESIA,)
)
 Plaintiff,)
)
 vs.)
)
 LESIVOU TEMO BULABALAVU,)
)
 Defendant.)
 _____)

CRIMINAL CASE NO. 2021-507

ORDER FINDING PROBABLE CAUSE

Dennis L. Belcourt
Associate Justice

Hearing: October 4, 2021
Decided: October 13, 2021

APPEARANCES:

For the Plaintiff: Quintina S. Letawerpiy, Esq.
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FSM Department of Justice
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For the Defendant: Marstella E. Jack, Esq.
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HEADNOTES

Search and Seizure – Probable Cause

Probable cause exists when there is evidence and information sufficiently persuasive to warrant a cautious person to believe it is more likely than not that a violation of the law has occurred and that the accused committed that violation. FSM v. Bulabalavu, 23 FSM R. 434, 436 (Pon. 2021).

Evidence – Burden of Proof; Search and Seizure – Probable Cause

Evaluating evidence in a probable cause hearing entails viewing the evidence and reasonable inferences therefrom in the light most favorable to the prosecution. Thus, while the ultimate burden of proof in a criminal case is on the prosecution to show guilt beyond a reasonable doubt, proof of probable cause need only be sufficient that a reasonable person could find that the crime was committed and that the accused is guilty by a preponderance of evidence. FSM v. Bulabalavu, 23 FSM R. 434, 436 (Pon. 2021).

Immigration; Search and Seizure – Probable Cause

Probable cause of what, under 50 F.S.M.C. 114, constitutes “willfully and unlawfully remaining” in the FSM after an entry permit’s expiration can be shown when there evidence of the defendant’s remaining and working in the FSM, while knowing of his permit’s expiration, because there can be inferred an element of voluntariness or purposefulness in his failure to depart, and his testimony that he was advised not to apply for an entry permit until his second contract was finalized is in dispute and not a basis for defeating probable cause. FSM v. Bulabalavu, 23 FSM R. 434, 436-37 (Pon. 2021).

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COURT’S OPINION

DENNIS L. BELCOURT, Associate Justice:

This matter came before the court for a probable cause hearing on October 4, 2021. Assistant Attorney Quintina Letawerpiy, Esq., appeared on behalf of Plaintiff Federated States of Micronesia (“Government”). Ms. Marstella E. Jack, Esq. appeared for Defendant Lesivou (“Lesi”) Temo Bulabalavu. The hearing was held to determine whether probable case existed that the Defendant had committed the crime charged.

Evidence at Hearing

The Court took testimony of the following witnesses: David M. Wolphagen, Chief of Immigration Division, Apiner Hadley, Kurt Erwin, and Eugene Marquez, Division of Immigration, Assistant Attorneys General Robert Nakasone, Jr. and Jesse Mikhel, and Jason Joseph, Investigator, Department of Justice, and Lesi himself. Based on the testimony presented during the hearing, the presentations by counsels, and the written filings, Exs. A-G, the court considers the following relevant facts to be undisputed (except where a dispute is noted) for the purposes of the hearing:

Lesi is a citizen of the Republic of Fiji who began working for the FSM National Government in March, 2018. Initially, he worked as an information technology officer for the FSM Department of Justice (“DOJ”) until September, 2018. From November 2018 until 2021, he worked for the FSM Department of Finance and Administration (“DOFA”). He was paid \$164 per work day and received a \$700 per month housing allowance. Ex. A. His last pay, dated July 2, 2021, was in the amount of \$1,800. Ex. D.

When Lesi worked for the DOJ he was present under a spousal permit. He then moved on to work for the DOFA under an alien worker entry permit. The DOFA paid a \$1000 fee for his status change. On November 27, 2019, Lesi was issued a new entry permit based upon a one-year extension of his contract. Upon request from the DOFA and approval by the President, his contract was further extended until February 26, 2021, and his entry permit was accordingly extended to the same date.

Lesi failed to apply for a renewal of his work permit prior to or on February 26, 2021. As a result, on June 7, 2021, a citation issued by Kurt Erwin and signed by Chief Wolphagen was served on Defendant, for overstay of his entry permit prior to renewal, with a fine of \$100 per day, for a total of \$10,100. The citation notifies the recipient that he has 15 days to file an appeal with the Chief, or to pay Finance the fine.

Lesi claims that the renewal of his permit was being negotiated between the DOFA and the DOJ as approval of his application was contingent upon two prospective contracts. Lesi explained that his earlier applications for entry permits have been handled by the DOFA. On March 4, 2021, Assistant Attorney General Nakasone approved a contract for Defendant from March 1, 2021 to February 28, 2022 to work as a Digital Information Officer for the Department of Finance for, among other things, the FSM COVID-19 Economic Stimulus Relief Project. On March 8, 2021, Defendant signed the above contract. He testified to taking the contract to the Division of Immigration soon thereafter to follow-up on his entry permit. He was

told that as he had a second contract that was being processed, intended to supplement the first contract from a different funding source, he should wait for that to be completed. He did not know the identity of the person who so advised him, and none of the Division witnesses could recall him coming into the office on this occasion. The second contract was transmitted for review on April 21, 2021, and was still under legal review as of June 18, 2021. Chief Wolphagen testified that Defendant should have applied for an entry permit based solely on the first contract, the one which had been approved.

Defendant testified he applied for a new entry permit on July 8, 2021. He did not receive a new entry permit. He was interviewed and then arrested on September 20, 2021, and brought before this Court that afternoon for his Rule 5 hearing, where as noted in this Court's Order for Pretrial Release, he was read his rights and ordered released on certain conditions without pleading but after waiving the reading of the information.

The Charge

The information contains exactly one count, that, since February 26, 2021, Lesi, a citizen of the Republic of Fiji residing in the State of Pohnpei has remained in the Federated States of Micronesia willfully and unlawfully after expiration of his entry authorization. It cites to both 50 F.S.M.C. 103(6) (which describes alien worker permits) and 50 F.S.M.C. 114(1) with describes the violation and sets forth the potential penalty for a violation –imprisonment for not more than two years, a fine of not more than \$10,000, or both.

Probable Cause Standard Met

“Probable cause exists when there is evidence and information sufficiently persuasive to warrant a cautious person to believe it is more likely than not that a violation of the law has occurred and that the accused committed that violation.” FSM v. Wainit, 10 FSM R. 618, 621 (Chk. 2002). Evaluating evidence in a probable cause hearing, similar to the determination of a motion for acquittal pursuant to FSM Criminal Rule 29, entails “viewing the evidence and reasonable inferences therefrom in the light most favorable to the prosecution.” Andohn v. FSM, 1 FSM Intrm. 433, 438 (App. 1984); People v. Taylor, 655 P.2d 382, 384 (Colo. 1982).

Thus, while the ultimate burden of proof in a criminal case is on the prosecution to show guilt beyond a reasonable doubt, Alaphanso v. FSM, 1 FSM Intrm. 487 (App. 1983), proof of probable cause need only be sufficient that a reasonable person could find that the crime was committed and that the accused is guilty by a preponderance of evidence.

In this matter, the focal issue is whether Lesi willfully and unlawfully remained in the FSM after the expiration of his entry permit. The undisputed evidence at hearing was that Lesi remained in the FSM several months beyond expiration of his entry permit. There is a dispute as to what was said (or not said) to him that may have contributed to his stay until his September arrest. On top of his prior years of entry permits, his testimony that he sought a new entry permit a week *after* his previous entry permit had expired is early evidence from which it may be inferred that he was aware of the expiration of his prior permit and need for renewal thereof. Solely at issue is whether his remaining in the FSM beyond the permit expiration was willful and unlawful.

What constitutes “willfully and unlawfully remaining” under 50 F.S.M.C. 112 (since renumbered as 50 F.S.M.C. 114) was addressed in FSM v. Jorg, 1 FSM Intrm. 378 (1983). The defendant in that matter, an Austrian, was stranded in the FSM, lacking funds to pay for an airline ticket to his home country, until Austria offered him a short term loan. Although he expressed concern that Austria might imprison him if he did not repay the loan, his remaining in the FSM after refusing to accept the loan was found by this Court to be willful and unlawful and therefore criminally liable. *Id.* at 385-88.

In the instant case, there was no evidence at hearing that Lesi was impecuniously or otherwise

rendered unable to leave the FSM. The evidence supports an inference that he was getting paid enough before (as well as after) expiration of his entry permit to enable him to travel to Fiji. He was aware of his entry permit expiration, but did not leave. From his remaining and working in the FSM, knowing of the expiration of his permit, there can be inferred an “element of voluntariness or purposefulness in [his] failure to depart.” *Id.* at 384. His testimony that he was advised not to apply for an entry permit until his second contract was finalized is in dispute and not a basis for defeating probable cause. Even if it is to be believed that he was so advised, at that time it appears he had already overstayed his entry permit. This Court finds that the above-stated standard for probable cause for the one count of willfully and unlawfully remaining in the FSM after expiration of his entry permit has been met.

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