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

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS,	)	**Crim. Case No.00-0223B**
Plaintiff,	)	
v.	)	**ORDER DENYING DEFENDANT'S MOTION TO SUPPRESS**
PING CHEN,	)	
Defendant	)	

I. INTRODUCTION

¶1 This matter came before the Court on April 4, 2001 in Courtroom 217A on Defendant's motion to suppress a videotape depicting activity allegedly relating to the promotion of prostitution. Specifically, Defendant challenges the videotape as illegal surveillance prohibited by the Fourth Amendment and the Commonwealth Constitution. The Government counters that what transpired did not constitute impermissible electronic surveillance. Alternatively, the Government maintains that even if the videotaping does qualify as electronic surveillance, it is usable under doctrines of plain view, open view, or some such equivalent.

II. FACTS

¶2 To record activity relating to the promotion of prostitution, Department of Public Safety ("DPS") Officers placed hidden surveillance cameras in several areas within Garapan. At all times material hereto, the camera at issue was manned by DPS Officers in an unmarked **[p. 2]** vehicle, parked in a lot across from the Cordon Bleu. DPS Officers claim to have witnessed and captured the Defendant on tape, offering women for sex in exchange for money. There is no dispute that the videotaping was undertaken without a warrant and the

consent or knowledge of the Defendant. There is also no dispute that DPS Officers did not record any conversations and that the tape contains visual images only.

¶3 Based upon the observations of DPS Officers and the videotape, the Government filed an information charging the Defendant, Chen Ping, with one count of promoting prostitution in the second degree in violation of 6 CMC § 1344(a).[1] The Government alleges that during the evening hours of the night in question, the Defendant approached an informant working in an undercover capacity for the Department of Public Safety and offered sexual services for money.

¶4 Defendant moves to suppress the videotape on grounds that it constitutes unlawful electronic eavesdropping and surveillance in violation of the Fourth Amendment to the United States Constitution as well as Article I, section 3 and Article I, section 10 of the Commonwealth's Constitution.

III. ISSUE

¶5 Whether the videotape should be suppressed as unlawful electronic surveillance when it was recorded without the knowledge or consent of the Defendant and without a search warrant.

IV. ANALYSIS

¶6 The Fourth Amendment to the United States Constitution and Article 1, section 3 of the Commonwealth Constitution guarantee the "right of the people to be secure in their persons, houses, papers and belongings against unreasonable searches and seizure." U.S. **[p. 3]** CONST. amend. IV, § 3;[2] N.M.I. CONST. Art. I § 3 (1976). In addition to these rights, the Commonwealth Constitution expands upon the protections guaranteed by the Fourth

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[1] In material part, 6 CMC § 1344(a) defines the offense of advancing prostitution when a person, "acting other than as a prostitute or as a customer ...causes or aids a person to commit or engage in prostitution, procures or solicits customers for prostitution purposes, operates or assists in the operation of a house of prostitution or prostitution enterprise, or engages in any other conduct designed to institute, aid, or facilitate an act or enterprise of prostitution."

[2] The Fourth Amendment to the United States Constitution is made applicable in the Commonwealth by § 501(a) of the Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America. *See* COVENANT TO ESTABLISH A COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS IN POLITICAL UNION WITH THE UNITED STATES OF AMERICA (hereinafter, "COVENANT") § 501, 48 U.S.C. § 1601 note, *reprinted in* Commonwealth Code at B-101 et seq. The Fourth Amendment is identical to the first part of N.M.I. Const. art. I, § 3, which provides, in pertinent part: "The right of the people to be secure in their persons, houses, papers and effects against unreasonable search and seizures shall not be violated."

Amendment by expressly prohibiting warrantless wiretapping and comparable techniques of surveillance "that use devices other than the unaided human ear to intercept private conversations or statements." *See* N.M.I. CONST. Art. I § 3(b);[3] ANALYSIS OF THE CONSTITUTION OF THE COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS (Dec. 6, 1976) (hereinafter, "CONSTITUTIONAL ANALYSIS") at 10. Article I, § 10 of the Commonwealth Constitution further provides for a right of individual privacy that "shall not be infringed except upon a showing of compelling interest." *See* N.M.I. Const. Art. I § 10 (1986). Given these protections, Defendant argues that hidden video surveillance always requires a warrant, since videotaping is a form of conduct which, if used by law enforcement to intrude on the reasonable and justifiable privacy interests of an individual, is subject, like any other governmental action, to the limitations of the Fourth Amendment. Because no warrant was obtained, Defendant moves to suppress any activity recorded as a result of the illegal video surveillance.

¶7 Domestic silent video surveillance is subject to Fourth Amendment prohibitions against unreasonable searches. *See, e.g., United States v. Falls,* 34 F.3d 674, 678-679 (8th Cir.1994); *United States v. Koyomejian,* 970 F.2d 536, 541 (9th Cir.1992); *United States v. Torres,* 751 F.2d 875, 882 (7th Cir.1985). Contrary to the position asserted by the Defendant, however, intrusions upon personal privacy do not invariably implicate the Fourth Amendment. Rather, such intrusions cross the constitutional line only if the **[p. 4]** challenged conduct infringes upon some reasonable expectation of privacy. *See Smith v. Maryland,* 442 U.S. 735, 740, 99 S.Ct. 2577, 2580, 61 L.Ed.2d 220 (1979).[4] To invoke the protections of the Fourth Amendment, therefore, a complainant must satisfy a two-part inquiry: first, the complainant must have an actual expectation of privacy, and second, the complainant is charged with establishing that his expectation is one which society recognizes as reasonable. *See Bond v.*

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[3] Article I, §3(b) provides that "No wiretapping, electronic eavesdropping or other comparable means of surveillance shall be used except pursuant to a warrant."

[4] A search occurs when an expectation of privacy, which society considers reasonable, is infringed. *See United States v. Jacobsen,* 466 U.S. 109, 113, 104 S.Ct. 1652, 1656, 80 L.Ed.2d 85, 94 (1984). Thus, a defendant's Fourth Amendment protections become relevant only after a finding that a defendant's reasonable expectations of privacy have been violated.

United States, 529 U.S. 334, 120 S.Ct. 1462, 1465, 146 L.Ed.2d 365 (2000) (quoting *Smith v. Maryland*, 442 U.S. 735, 740, 99 S.Ct. 2577, 2580, 61 L.Ed.2d 220 (1979); *California v. Ciraolo*, 476 U.S. 207, 211, 106 S.Ct. 1809, 90 L.Ed.2d 210 (1986).

¶8 Defendant maintains that the placement of a manned video camera outside a reputed place of prostitution to photograph illegal activity with the undercover agent violates his reasonable expectation of privacy. Defendant cites no authority, however, to support this novel proposition. Defendant concedes that he was on a public street in Garapan when he engaged the undercover agent in the activities in question. Defendant also does not dispute that DPS could have stationed officers to conduct a 24-hour surveillance of the Cordon Bleu without violating his Fourth Amendment rights. Defendant does not dispute, moreover, that he not only knowingly exposed his allegedly illegal activities to the undercover agent, but that they were also readily observable by any person who visited that area. Under these circumstances, the court is compelled to agree with the Government that the Defendant had no reasonable expectation to be free from hidden video surveillance while he and the undercover agent were engaged in the activities alleged here.

¶9 To determine whether a defendant's privacy expectation is objectionably reasonable, the court considers (1) the nature of the area involved, (2) the precautions taken to insure privacy, and (3) the type and character of the governmental invasion employed. *See, e.g.* **[p. 5]** *United States v. Nerber*, 222 F.3d 197 (9th Cir. 2000) (precise extent of expectation of privacy often depends upon nature of governmental intrusion); *United States v. Domitrovitch*, 852 F.Supp. 1460, 1473 (E.D. Wash. 1994), *aff'd*, 57 F.3d 1078 (9th Cir. 1995) (in determining whether expectation of privacy is reasonable, no single factor, including the location, is dispositive); *Hawaii v. Augafa*, 992 P.2d 723, 734 (Haw. App. 1999) (discussing factors). In this case, the court finds that Defendant's privacy expectation under the Fourth Amendment, to the extent it existed at all, was effectively erased for three reasons: (1) because of where the taping took place, (2) the failure of the Defendant to take any precautions to insure privacy; and (3) the fact that the videotaping recorded only what an officer standing in the same position would have observed with the naked eye.

¶ 10 The parties do not dispute that a policeman, stationed in the identical location, could have reported what he observed without first obtaining a warrant. And the mere fact that the observation is accomplished by a video camera rather than the naked eye, and recorded on film rather than in an officer's memory, does not convert a constitutionally innocent act into a constitutionally forbidden one. *See Vega-Rodriguez*, 110 F.3d at 181. The interaction occurred on a public street. People who walk on public streets must expect to be observed by those members of the public who also walk along that street. A videotape machine, insofar as it records visual images only, merely makes a permanent record of what any member of the public would see, were he to walk along the street himself. Since DPS could have assigned humans to monitor the location continuously without constitutional insult, it could choose instead to carry out that lawful task by means of a hidden video camera, not equipped with microphones, to record only what the human eye could observe. We therefore hold that to photograph the Defendant on the street did not violate his "reasonable expectation of privacy." Since there was no reasonable expectation of privacy, there was no impermissible search or any Fourth Amendment violation.

¶11 **[p. 6]** *Katz* [5] and its progeny do not dictate any other conclusion. In *Katz*, the Supreme Court suppressed evidence of the defendant's end of telephone conversations overheard by FBI agents who had attached an electronic listening device to the outside of a public phone booth. Ruling that the Fourth Amendment protects people, not places, the Court held that what a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection...." *Katz*, 389 U.S. at 351-52, 88 S.Ct. 507. At the same time, the Court recognized that what a person "seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected...." *Id.* The Court thus found that even though the defendant could have no legitimate expectation that his activities within the booth would not be observed, he did not shed his expectation that his conversations would not be intercepted,. *Id.*

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[5] *Katz v. United States*, 389 U.S. 347, 351-52, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967).

¶12 On the strength of *Katz,* Defendant argues that one can legitimately expect to have "private moments" even in public places, and thus a person can have a reasonable expectation of privacy even when he is on a public street. *See, e.g., United States v. Taketa,* 923 F.2d 665, 676-677 (9th Cir.1991) ("Persons may create temporary zones of privacy within which they may not be videotaped ... even when that zone is a place they do not own or normally control, and in which they might not be able reasonably to challenge a search at some other time or by some other means"); *United States v. Gooch,* 6 F.3d 673, 677 (9th Cir. 1983) (person has a reasonable expectation of privacy in a tent pitched in a public campground). Even assuming that the Defendant did not expect his business transactions with the undercover agent to be captured on videotape, the Defendant's subjective expectation of privacy does not end the inquiry. Under *Katz* and its progeny, the Defendant must still prove that his expectation of privacy is one which society recognizes as reasonable. Defendant has failed to persuade the court that any reasonable expectation of privacy exists here. **[p. 7]**

¶13 "Illegal activities conducted on government land open to the public which may be viewed by any passing visitor or law enforcement officer are not protected by the Fourth Amendment because there can be no reasonable expectation of privacy under such circumstances." *United States v. McGiver,* 186 F.3d 186 F.3d 1119. 1125-1126 (9th Cir. 1999), *cert. denied,* 528 U.S. 1177, 120 S.Ct. 1210, 145 L.Ed.2d 1111 (2000). In *McGiver,* the Ninth Circuit addressed a Fourth Amendment challenge to the use of unmanned, motion-activated cameras, employed by the Forest Service to photograph two defendants harvesting marijuana plants in a remote area of the national forest. As only ten law enforcement officers were available for surveillance, the Special Agent in charge determined that it would not be feasible to station them to conduct a surveillance of the site in order to learn the identity of the persons responsible for growing the plants. Instead, the government installed video and still cameras to photograph persons who approached the area where the plants were growing. The unmanned cameras were motion activated. Among the vehicles photographed at the site was a white Toyota 4Runner truck with unique markings that the government was able to trace

to one defendant. The camera also photographed the other defendant bending over the marijuana plants, and holding a camera near the plants.

¶14 When the defendants later challenged the photographs because they were obtained without a warrant in a remote area which, they argued, they could have reasonably regarded as private, the court looked to *Katz* to determine whether the defendants had a constitutionally protected reasonable expectation of privacy. 186 F.3d at 1125. Applying *Katz*'s two-part inquiry, the court ruled that while defendants may have anticipated that cultivating marijuana in a remote area of a national forest would not be observed by law enforcement officers, they failed to demonstrate that they had an objectively reasonable expectation in their cultivation of marijuana in an area open to the public. *Id.*

¶ 15 Identical principles apply in this case. In the case at bar, the Defendant did not conceal anything. Apparently, the Defendant took no precautions to screen his presence or his **[p. 8]** activity from public view. Defendant participated in the transaction in front of a bar on a crowded street. He made no attempt to conceal his identity, and there is no evidence that the Defendant was even concerned that others could observe his actions. Moreover, the openly illegal activities were observed by the informant as well as a fixed camera hidden in a nearby parking lot, placed there to record what any member of the public could have observed on a public street. Given these circumstances, we see no difference between the videotaping and a traditional stake-out where a law enforcement officer conceals himself and waits to make the same observation as the video camera would make. As in *McGiver*, moreover, the Defendant was unable to articulate any expectation of privacy which society would be willing to recognize as legitimate. Once we put aside the Defendant's theory that there is something constitutionally sinister about videotaping, his case crumbles. *See Vega-Rodriguez*, 110 F.3d at 181. If there is constitutional parity between observations made with the naked eye and observations recorded by video cameras that have no greater range, then objects or articles that an individual seeks to preserve as private may be constitutionally protected from such videotaping only if they are not, as here, located in plain view. In other

words, persons cannot reasonably maintain an expectation of privacy in that which they display openly. *Id.*

¶ 16 At the hearing on this matter, however, Defendant argued that hidden video surveillance is one of the most intrusive investigative mechanisms available to law enforcement. Given the sweeping, indiscriminate manner in which video surveillance can intrude upon citizens and the additional protections afforded by the Commonwealth Constitution, Defendant contended that video surveillance should be approved only in limited circumstances, and never without a warrant. Defendant thus appears to contend that under the Fourth Amendment as well as the Commonwealth Constitution, warrantless video recordings *per se* constitute an unreasonable search. Based on *McGiver* and a number of analogous cases, however, the court disagrees. **[p. 9]**

¶17 In *United States v. Knotts,* 460 U.S. 276, 103 S.Ct. 1081, 75 L.Ed.2d 55 (1983), for example, the Court held that "[n]othing in the Fourth Amendment prohibited the police from augmenting the sensory faculties bestowed upon them at birth with such enhancement as science and technology afforded them." *Id.* at 282, 103 S.Ct. 1081. Similarly, in *United States v. Dubrofsky,* 581 F.2d 208 (9th Cir.1978), the Ninth Circuit recognized that "[p]ermissible techniques of surveillance include more than the five senses of officers and their unaided physical abilities. Binoculars, dogs that track and sniff out contraband, searchlights, fluorescent powders, automobiles and airplanes, burglar alarms, radar devices, and bait money contribute to surveillance without violation of the Fourth Amendment in the usual case." *Id.* at 211.[6] More recently, in *United States v. McGiver,* the Ninth Circuit squarely rejected the notion that the visual observation of a site becomes unconstitutional merely because law enforcement chose to use a more cost-effective "mechanical eye" to

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[6] Video surveillance of a common or open area is generally not considered a search. *See Florida v. Riley,* 488 U.S. 445, 449, 109 S.Ct. 693, 696, 102 L.Ed.2d 835 (1989). Thus, courts have recognized that videotaping suspects in public places, such as banks, does not violate the Fourth Amendment, since the police may record what they normally may view with the naked eye. *See, e.g., Sponick v. City of Detroit Police Dept.,* 49 Mich.App. 162, 211 N.W.2d 674, 690 (1973) (tavern a public place where videotaping suspect did not violate fourth amendment); *Oregon v. Wacker,* 317 Or. 419, 856 P.2d 1029 (Or. Aug 19, 1993) (police officers observing defendant, using passive night vision system and video camera, while defendant was in parked automobile did not conduct "search" within meaning of state constitutional provision protecting right against unreasonable search or seizure)..

continue the surveillance. *See* 186 F.3d at 1125, *quoting Knotts*, 460 U.S. at 284, 103 S.Ct. 1081 ("Insofar as respondent's complaint appears to be simply that scientific devices such as the beeper enabled the police to be more effective in detecting crime, it simply has no constitutional foundation. We have never equated police efficiency with unconstitutionality, and we decline to do so now."). There, the court ruled that the use of photographic equipment to gather evidence that could be lawfully observed by a law enforcement officer did not violate the Fourth Amendment. *Id. See also Hawai'i v. Augafa*, 92 Haw. 454, 992 P.2d 723 (1999).

¶ 18 It is true, as Defendant points out, that human observation is far more forgiving than video surveillance. It is also true that random video surveillance portends a significant invasion **[p. 10]** of privacy for redress by the courts.[7] Even so, this court cannot find any principled basis in this case for assigning constitutional significance to the use of a video camera to photograph allegedly illicit transactions between a suspect and an informant on a public thoroughfare that could have been viewed by the naked eye. There has been no allegation in this case that conversations were intercepted, that the video recording was used for any purpose other than law enforcement, that the camera was used in an area traditionally associated with heightened privacy expectations, or that the camera sought to intrude upon something which the Defendant took precautions to hide. Likewise, there is no evidence that the Government was employing highly sophisticated surveillance equipment not generally available to the public. *See Dow Chemical Co. v. United States*, 476 U.S. 227, 238, 106

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[7] *See, e.g., United States v. Koyomejian,* 970 F.2d 536, 551 (9th Cir.1992) (Kozinski, J., concurring) ("...video surveillance can result in extraordinarily serious intrusions into personal privacy.... If such intrusions are ever permissible, they must be justified by an extraordinary showing of need."); *United States v. Cuevas-Sanchez,* 821 F.2d 248, 251 (5th Cir. 1987) ("hidden video surveillance invokes images of the "Orwellian state" and is regarded by society as more egregious than other kinds of intrusions. *See also United States v. Mesa-Rincon,* 911 F.2d 1433, 1442 (10th Cir.1990) ("Because of the invasive nature of video surveillance, the government's showing of necessity must be very high to justify its use"); *United States v. Torres,* 751 F.2d 875, 882 (7th Cir.1984) ("We think it ... unarguable that television surveillance is exceedingly intrusive, especially in combination (as here) with audio surveillance, and inherently indiscriminate, and that it could be grossly abused-to eliminate personal privacy as understood in modern Western nations"). *See also United States v. Nerber,* 222 F.3d 597, 603-604 (9th Cir. 2000) ("Hidden video surveillance is one of the most intrusive investigative mechanisms available to law enforcement. The sweeping, indiscriminate manner in which video surveillance can intrude upon us, regardless of where we are, dictates that its use be approved only in limited circumstances.")

S.Ct. 1819, 1827, 90 L.Ed.2d 226 (1986). Both methods--human observation and video surveillance-- perform the same function. Thus, the court does not see how videotaping *per se* alters the constitutional perspective in any material way.

¶ 19 The court does not rule in this case that CNMI citizens have no legitimate expectation to be free from video surveillance, or that video surveillance is justifiable whenever an informant is present.[8] Nor is this court holding that covert video recordings never **[p. 11]** require a warrant, or that the videotaping of a suspect can never be grossly abused. This is not a case where video surveillance was aimed indiscriminately at public places and captured the lawful activities of many citizens in the hope that it would deter crime or capture what crime might occur.[9] Nor is this a case where the video camera enhanced observations otherwise unavailable to the naked eye, or recorded what a person would be unable to see because the person could not be at the observation point. Despite the pause that the idea of video surveillance gives the court, we rule that in this case, the Defendant had no reasonable expectation under the Fourth Amendment of being free from hidden video surveillance while engaging in openly illegal activity with an undercover informant on a public street.

B.

¶20 This court has held, however, that the Commonwealth Constitution provides greater protection against unreasonable search and seizure than that guaranteed by the Fourth

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[8] The parties have focused their arguments on whether the videotaping in this case infringes upon the rights protected by the Fourth Amendment and the Commonwealth Constitution and have not addressed what, if any, weight should be given by the court to the presence of the informant. To the court, the Undercover agent's presence only strengthens the Government's position. *Cf. Wang v. United States*, 947 F.2d 1400, 1403 (9th Cir.1991) ("the invited informer doctrine makes clear that the Wangs did not have a reasonable expectation of privacy in their voluntary conversations with [the informer] or in the documents which they voluntarily provided to [the informer]"); *United States v. Aguilar*, 883 F.2d 662, 697-98 (9th Cir.1989), *cert. denied*, 498 U.S. 1046, 111 S.Ct. 751, 112 L.Ed.2d 771 (1991) (invited informer cases permit "consensual recording of conversations without warrants" but "informer may not search for evidence not voluntarily revealed by the unsuspecting criminal"). Nevertheless, the court does not intend to imply by its ruling that video surveillance is justifiable whenever an informant is present. For example, the court suspects that under the Fourth Amendment as well as the Commonwealth Constitution, an informant's presence and consent would be insufficient to justify the warrantless installation of a hidden video camera in a suspect's home or the surveillance of his backyard. The court holds only that when a defendant's privacy expectations were already substantially diminished by his choice to conduct allegedly illegal activities on the public thoroughfare, the presence and consent of the informant may itself be sufficient to justify the surveillance under the Fourth Amendment.

[9] *See, e.g.*, Comment, *Scowl Because You're on Candid Camera: Privacy and Video Surveillance*, 31 Val. U.L.Rev. 1079 (1997).

Amendment. *See, e.g., CNMI v. Dado,* Crim. Case No. 98-0261 (Super. Ct. Feb. 23, 2000) (Article I,§ 3 and Article I, § 10 provide greater protection against unreasonable search and seizure than that guaranteed by the Fourth Amendment); *CNMI v. Sablan,* Crim. Case No. 94-35F (Super.Ct. Nov. 1, 1994) (Article I, § 3 provides greater protection against unreasonable search and seizure than that guaranteed by the Fourth Amendment). In light of the additional protections afforded CNMI citizens under Article I, § 10 of the Commonwealth Constitution, the court now determines whether Defendant's **[p. 12]** rights were violated by the Government's failure to obtain a warrant prior to videotaping the transaction with the informant.

¶21 The Commonwealth's Constitution prohibits electronic and "other comparable means of surveillance" without a warrant or without consent. *See* N.M.I. CONST., Article I, § 3(b). Although the focus of Article I, § 3(b) is plainly on the protection of private conversations or statements,[10] even assuming that the definition of electronic surveillance can be construed to encompass photographs or video recordings, the Framers expressly provided that the protections of Article I, § 3(b) would not apply to "interceptions" or "recordings" "that are public or intended to be public." CONSTITUTIONAL ANALYSIS at 10. Thus, the court concludes that the Commonwealth Constitution would not require a warrant to record or intercept objects or activities that, as here, were allowed to be publicly exposed and are plainly visible to the naked eye. *See Washington v. Jones,* 33 Wash.App.275, 653 P.2d 1369, 1370 (1982), *rev. denied,* 99 Wash.2d 1003 (1983) (use of binoculars to view what is otherwise visible violates neither the Fourth Amendment nor its counterpart in the Washington Constitution); *Vermont v. Costin,* 720 A.2d 866 (Vt. 1998) (warrantless video surveillance did not violate constitutional right to privacy where defendant's marijuana

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[10] *See* CONSTITUTIONAL ANALYSIS at 10-11. The ANALYSIS specifically targets wiretapping, electronic eavesdropping, or comparable means of surveillance. *Id.* While the ANALYSIS appears to restrict the term "comparable means of surveillance" to "means" using "devices other than the unaided human ear to intercept private conversations or statements," it also defines "wiretapping" and "electronic eavesdropping in terms of the interception of private conversations or statements. Moreover, in addressing the requirements for a warrant, the ANALYSIS further requires "substantial evidence that the person *whose conversations are about to be intercepted* is committing, has committed or is about to commit a crime and that *communications* concerning that crime will be obtained through the wiretapping or electronic eavesdropping to be authorized by the warrant." (Emphasis added).

plants, observed by the video camera, were located outside the curtilage of his house, in an open field, and where defendant took no steps to exclude the public).

¶22 Article, I, section 10, moreover, establishes a fundamental constitutional right to individual privacy. A party must have a legitimate expectation of privacy which society is willing to recognize as reasonable, however, in order for the right of privacy to attach. *See In re Estate of Hillblom*, Civil Nos. 95-0626 (N.M.I. Super.Ct. Oct. 2, 1995) (Order **[p. 13]** Regarding Sealing of Claims). In determining the reasonableness of a person's expectation of privacy, the court considers factors similar to those giving rise to a claim under the Fourth Amendment: (1) the means by which the video surveillance was accomplished, including the location of the equipment and the method utilized to place it there, (2) the degree of intrusion inherent in the nature of video surveillance,(3) the location of the area involved, and (4) the precautions taken to insure privacy. *See Hawaii v. Augafa*, 992 P.2d 723, 734 (Haw. App. 1999) (discussing factors). Once a privacy interest has been implicated, the Commonwealth must show that there is a "public purpose" which advances the health, safety, or welfare of the community justifying the intrusion. *See Commonwealth v. Aldan*, Appeal No. 96-034 (N.M.I. Sup.Ct. Dec. 4, 1997), Slip Op. at 7 (Villagomez, J. dissenting).[11] To prevail, the Government must then establish that the intrusion is compelling, that is, as a practical matter, the public purpose could not have been accomplished in a less intrusive manner. *Id.*

¶23 The court need not balance the respective interests, however, because in this case, Defendant has failed to demonstrate the existence of a protectable privacy interest. In a case decided under the search and seizure as well as the privacy protections of its state constitution,[12] the Hawaii court of appeals ruled that the defendant had no objectively reasonable expectation of privacy to deal drugs on a busy public street. *Hawaii v. Augafa*, 992 P.2d at 734. In

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[11] Law enforcement qualifies as such a purpose. *Aldan*, Slip Op. at 7, citing CONSTITUTIONAL ANALYSIS at 27.

[12] Article I, section 7 of Hawaii's Constitution tracks the Fourth Amendment. Article I, section 6 further provides of a right of privacy virtually identical to that guaranteed by Article I, § 10 of the Constitution of the CNMI. It provides, in material part: "[t]he right of the people to privacy is recognized and shall not be infringed without the showing of a compelling state interest." Since the Defendant in *Augafa* challenged the use of the surveillance camera as an unconstitutional search, the court decided that Article I, § 7 was the operative constitutional provision governing the case, notwithstanding the privacy guarantees also implicated.

support of its conclusion, the court looked first to the location of the activity to find that the defendant could not assert a reasonable expectation of privacy with respect to any object or activity which was open and visible to the public in a heavily trafficked area where, as here, the presence of members of the public could reasonably be **[p. 14]** anticipated. *Id.*[13] Second, the court found that the defendant failed to take precautions to screen his presence from public view or otherwise conceal his actions. *Id.* Finally, the court found that while television surveillance is exceedingly intrusive and could be grossly abused, the videotaping was of a public street with unlimited access, and, as here, recorded only what an officer standing in the same position would have observed. *Id.* at 735-736. In that there were no challenges to the "super-human" capabilities of the video camera, and because an officer could have viewed exactly what was viewed through the lens of the video camera and recorded on the videotape, the court ruled that the surveillance did not qualify as an unconstitutional intrusion. *Id.* at 737.

¶ 24 For the same reasons, the court concludes that under the Commonwealth Constitution, the Defendant has no legitimate expectation of privacy which society is willing to recognize. First, while not in plain view, the camera was placed across the street at a non-intrusive vantage point. Although it is true that the Defendant could not necessarily see the camera inside the automobile, he knew, or should have known, that anyone on that side of the street could have seen him engage in the activities in question. Second, "where the purpose of an optically-aided view is to permit clandestine police surveillance of that which could be seen from a more obvious vantage point without the optical aid, there is no unconstitutional intrusion." *See Hawai'i v. Ward*, 62 Haw. 509, 615-516, 617 P.2d 568, 572 (1980). Third, as noted above, the Defendant took no actions to insure or protect his privacy, and the interaction with the undercover agent took place on a heavily trafficked street. While there may be circumstances under which video camera surveillance, even in a public place may

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[13] The court stated: "Defendant cannot transform the 'public street' into a 'private sphere' by arguing that a right of expected privacy is invoked by his 'unilateral action' of engaging in a drug deal." 992 P.2d at 734.

constitute an unconstitutional intrusion violative of Article I, section 10, there are no facts giving rise to such a violation here. **[p. 15]**

¶25 On the one hand, the court acknowledges that the right of individual privacy guaranteed by the Commonwealth is extremely broad,[14] and that the right protects "an individual's right to physical solitude free from intrusions such as ... constant and manifest surveillance, and any other intrusions that a reasonable person would find offensive and objectionable." CONSTITUTIONAL ANALYSIS at 29. Likewise, the court recognizes that video surveillance qualifies as one of the most intrusive forms of searches performed by the government, regardless of the type of premises searched. *See, e.g.,* cases cited at note 9, *supra.* Yet, the court does not find the videotape at issue to constitute the "constant and manifest surveillance" contemplated by the Framers. As an initial matter, the surveillance was neither "constant" nor "manifest": the camera was operated intermittently, from a fixed location. Second, there is nothing heavy-handed, grossly abusive, or inherently offensive about video surveillance. Video surveillance as a method of investigation does not in itself violate a reasonable expectation of privacy, since the police are free to record what they can see on the open thoroughfares with their own eyes.[15] We therefore conclude, in this case, that no Article I, § 10 protections are triggered.

¶26 In reaching this conclusion, we stress once again that the court is not addressing the appropriateness of using electronic technology or video surveillance of a protected area. *See, e.g., Hawaii v. Bonnell,* 75 Haw. 124, 856 P.2d 1265, 1276 (1993) (because **[p. 16]**

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[14] According to the CONSTITUTIONAL ANALYSIS, the right of privacy encompasses a freedom of association as well as thoughts, ideas, and beliefs, and protects them from regulation or attempted coercion by the government or other persons. CONSTITUTIONAL ANALYSIS at 28. The right also

> protects an individual's right to physical solitude free from intrusions such as eavesdropping on telephone calls, on conversations, harassing telephone calls, constant and manifest surveillance, and any other intrusions that a reasonable person would find offensive and objectionable. It prevents public disclosure of private facts relating to an individual. It protects and individual... from having his name picture, or identity appropriated by other persons for their own use.

Id. at 28-29.

[15] *See Taketa,* 923 F.2d at 677; *Sacramento County Deputy Sheriff's Assoc. v. County of Sacramento,* 51 Cal.App.4th 1468, 1484 (1996).

employee break room was a protected area, the covert video surveillance of employees violated the search and seizure as well as the right to privacy protections guaranteed by the state constitution). The court has not been called upon in this case, moreover, to attempt to define the circumstances that should trigger Article I, §10 regulation of video surveillance, nor do we minimize the dangers threatened by the widespread and unchecked use of video surveillance.

¶27 The court is aware that other divisions of this court, on identical facts, have ruled that the police acted unlawfully because they engaged in covert video surveillance without a warrant. Given the importance of the interests at stake, we believe that the matter should be resolved by our Supreme Court. We respectfully decline, however, to adopt an approach that would require prior judicial authorization for all video surveillance.[16] It is not the province of this court to decide what investigatory methods should be employed by law enforcement officials: that determination is one which should be left to the executive branch officials charged with this responsibility.

CONCLUSION

¶28 Based upon the foregoing, the motion to suppress is DENIED.

So ORDERED this 20 day of April, 2001.

/s/
TIMOTHY H. BELLAS, Associate Judge

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[16] Recognizing that the judicial response to electronic video surveillance has not been consistent, the American Bar Association's Criminal Justice Section has been working on a standard that would comprehensively address when such surveillance is appropriate and establish procedural safeguards. The draft standard, which often suggests regulation beyond constitutional minimums, proposes for the video surveillance involved here only that a supervisory law enforcement official determine that the surveillance will not view a private activity or condition and is reasonably likely to achieve a legitimate law enforcement objective. *See* C. Slobogin, *Technologically-Assisted Physical Surveillance: The American Bar Association's Tentative Draft Standards,* 10 Harv. J.L. & Tech. 383, 458-59 (1997) (Draft Standard 2-6.3(c)).