FOR PUBLICATION

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

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS, Plaintiff, vs. **XUILING MENG VAUGHN,** (d.o.b.: 04/16/63) Defendant.	**CRIMINAL CASE NO. 06-0222C** **DPS NO: 06-09147** **ORDER DENYING DEFENDANT'S MOTION TO SUPPRESS EVIDENCE SEIZED PURSUANT TO EAVESDROPPING WARRANT**

PROCEDURAL BACKGROUND

THIS MATTER came before the Court on May 23, 2007, at 9:00 a.m., in Courtroom 220A on the Defendant's motion to compel disclosure of information, motion to compel advance production of witness statements, and motion to suppress evidence seized pursuant to an eavesdropping warrant. The Commonwealth was represented by Assistant Attorney General Michael Nisperos. The Defendant appeared with counsel, Chief Public Defender Elisa A. Long and Assistant Public Defender Kelley M. Butcher, and her translator, Mr. Abby Leung.

After receiving the statements and arguments of counsel, the first two motions were deemed moot based on the information provided by the Commonwealth. As to Defendant's motion to suppress, the Court overruled the Defendant's objection to allowing counsel for the Commonwealth from making any legal arguments due to its failure to file a written objection to the motion within the deadline imposed in the Pretrial Order issued in this case. The Court, however, allowed Defendant to respond to the Commonwealth's oral argument at the hearing and to submit a post-argument brief within two days. The Court thereafter took the matter under advisement and notified the parties of its intent to issue a decision no later than one working day

after receiving Defendant's post-argument brief, which was also the day before the matter was set for a bench trial. On the day before trial, Defendant filed an *ex parte* motion to continue the bench trial. Based on the Defendant's justification, this Court granted the motion to continue the bench trial, but set the matter for a status conference on May 30, 2007, to issue its ruling.

At the May 30, 2007 hearing, this Court, having reviewed the memoranda and exhibits, and having heard and considered the arguments of counsel, and being fully informed of the premises, and based on the reasons stated on the record, issued its oral decision from the bench DENYING the Defendant's motion to suppress. The Court now issues its written decision.

FACTS

In this criminal case, Defendant Xiu Ling Vaugh has been charged with one count of receiving stolen property, in violation of 6 CMC § 1606(a). Prior to her arrest, Detective Simon T. Manacop from the Department of Public Safety obtained an electronic eavesdropping or surveillance warrant from the Honorable Juan T. Lizama, Associate Judge of the Superior Court. Ex. A to Def's Mot. to Suppress Evidence. In the detective's Declaration of Probable Cause in the Support of the Issuance of an Eavesdropping Search Warrant ("Affidavit"), he specifically identified the informant as Daniel A. Quitugua, a person recently arrested pursuant to an arrest warrant. Quitugua admitted to being involved in several burglary incidents. He also informed the detective that he sold different stolen items to a Chinese female he only knew as Mama san at the No. 1 Bar in Chalan Kanoa. He later identified Mama san in a photo, which is the Defendant in this case. Quitugua offered to assist law enforcement officials and was willing to meet and converse with Mama san. Based on this Affidavit, Judge Lizama granted the request for a search warrant, and the Department of Public Safety executed the search warrant on September 12, 2006 and September 15, 2006. *Id*.

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ANALYSIS

1. Title III of the Omnibus Crime Control & Safe Streets Act of 1968.

Defendant Vaughn relies on federal law, Title III of the Omnibus Crime Control and Safe Streets Act of 1968 (the "Act"), as the statutory framework for analysis of the legality of electronic surveillance. Mot. at 2, citing to 18 U.S.C. §§2510-2521. Defendant asserts that "the legality of any interception of conversations must be established by compliance with the Act, specifically, the existence of probable cause and the failure or futility of normal investigative techniques." Mot. at 3.

This Court notes that no local authority was cited in support of the Defendant's motion. However, this Court was able to find a prior published Superior Court decision that previously addressed the applicability, or lack thereof, of the Act. In *Commonwealth v. Min Wang a/k/a Linda Wang*, Cr. Case No. 97-187 at 8 (Order Denying Defendant's Motion to Suppress) (T. Bellas) (Jan. 29, 1998), the court found the Act not applicable. It reasoned that 18 U.S.C. § 2511(2)(c) states that:

> It shall **not** be unlawful under this chapter [18 U.S.C. 2510 et seq.] **for a person acting under color of law** to intercept a wire, oral, or electronic communication, **where such person is a party to the communication or one of the parties to the communication has given prior consent to such interception."** (emphasis added in the original).

The *Wang* court then found that "[i]t is commonly held that the strict requirements of 18 U.S.C. 2510 *et seq*. do not apply to the recording of consensual interceptions," and cited to several federal court decisions. *Id.* The trial court in *Wang* concluded that "[b]ecause the instant informant consented to the recording of his conversations with Defendant Wang, the provisions of the Omnibus Act are inapplicable to the instant facts and are thus of no avail to Defendant Wang."

This Court concludes that Title III was intended by Congress to provide substantive law and rules of criminal procedure governing electronic eavesdropping that would apply to the

states and preempt any state law contrary to its provisions. 18 U.S.C.A. § 2516(2); *U.S. v. Hall*, 543 F.2d 1229, 1229-35 (9th Cir. 1976) (*en banc*), *cert. den.*, 429 U.S. 1075 (1977). Effective June 19, 1968, the law applies to states and to "any territory or possession of the United States." 18 U.S.C. § 2510(3). It therefore applied generally to "the several states" and to Guam on January 9, 1978, making it applicable to the CNMI by virtue of sections 102 and 502(a)(2) of the Covenant. Furthermore, there is nothing in Title III that conflicts with any fundamental provision of the Covenant. COVENANT § 105; *Cf., Sablan v. Inos*, 2 N.M.I. 388, 394 (1991).

Title III operates by actually prohibiting all interception of electronic communications, whether by private individuals or by the government, and then providing for many detailed exceptions to this general prohibition. The authority of Congress to regulate electronic communications between and within the states derives from the commerce clause (U.S. Const. Art. I, § 8, cl. 3), so statements regarding the congressional intent "to occupy the field" are not entirely misplaced, even though their application to issues of criminal procedure is awkward and may generate uncertainty. For example, compare *U.S. v. Smith*, 726 F.2d 852, 860 (1st Cir. 1984)("When Congress enacted Title III, it intended to occupy the field of wiretapping.") with *People v. Conklin*, 522 P.2d 1049, 1055 (Cal. 1974)(*Appeal dismissed on basis of no federal question*, 419 U.S. 1064, 95 S.Ct. 652, 42 L.Ed.2d 661 (1974))("we conclude that Congress did not intend to occupy the entire field of electronic surveillance"). Despite the apparent conflict in their respective characterizations of the dormant commerce clause, *Smith* and *Conklin* actually *agreed* in their conclusion that Title III preempts state laws that are more permissive in allowing eavesdropping, but permits state regulation that is more restrictive. (*Smith*, at 861-862; *Conklin*, at 1055).

For the matter presently before the Court, the most important feature of Title III is its exception for communications in which a party to the communication consents to its interception and/or recording found in Section 2511(2)(c) of the Act. This exception has been interpreted to mean that *none* of the provisions of Title III, **including any preemption of state law**, apply to

circumstances in which *one* party to a communication, even a government officer or informant, consents to the monitoring. *U.S. v. Testa*, 548 F.2d 847, 855-856 (9th Cir. 1977); *U.S. v. Proctor*, 526 F.Supp. 1198, 1201-02 (D.Hawaii 1981). The effect of the exception is to leave undisturbed the judicially-developed rules regarding the admissibility eavesdropping evidence, particularly those articulated in *United States v. White*, 401 U.S. 745, 91 S.Ct. 1122, 28 L.Ed.2d 453 (1971). *Testa* at 855. In this case, because the recorded conversations between the Defendant and the informant were made with the consent of the informant, Defendant Vaughn lacks standing to exclude the recordings pursuant to Title III. 18 U.S.C. § 2511(2)(c).

2. Fourth Amendment of the U.S. Constitution.

The recordings also do not infringe upon the defendant's reasonable expectation of privacy under federal Fourth Amendment standards and are not excludible on that basis. *U.S. v. White, supra*, 401 U.S. at 751, 91 S.Ct. at 1126.; In *White*, the United States Supreme Court stated:

> If the conduct and revelations of an agent operating without electronic equipment do not invade the defendant's constitutionally justifiable expectations of privacy, neither does a simultaneous recording of the same conversations made by the agent or by others from transmissions received from the agent to whom the defendant is talking and whose trustworthiness the defendant necessarily risks.

401 U.S. at 751, 91 S.Ct. at 1126. See also, *United States v. Keen*, 508 F.2d 986, 989 (9th Cir. 1974), *cert. denied* 421 U.S. 929, 95 S.Ct. 1655, 44 L.Ed.2d 86 (1975) (Ninth Circuit found that "(w)iretaps obtained with the consent of one party to a conversation do not violate the fourth amendment"). Accordingly, this Court concludes that Defendant's motion to suppress based on a Fourth Amendment of the U.S. Constitution violation claim fails, and therefore must be denied.

3. Article I, section 3 of the NMI Constitution.

Although Defendant failed to specifically raise the NMI Constitution as grounds to suppress the recordings evidence, this Court notes that Article I, section 3(b) specifically provides that "[n]o wiretapping, electronic eavesdropping or other comparable means of

surveillance shall be used except pursuant to a warrant." Therefore, under local law, the same criteria used for the issuance of any search warrant is required for the eavesdropping warrant. In this case, a detective obtained an electronic eavesdropping or surveillance warrant from a Superior Court judge who found probable cause to issue the warrant. Defendant challenges the sufficiency of the Affidavit of the detective who obtained the warrant, and relies on the U.S. Supreme Court decision of *Illinois v. Gates*, 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983), and the Fifth Circuit decision of *United States v. Jackson*, 818 F.2d 345, 358 (5th Cir. 1987). In *Gates*, the U.S. Supreme Court abandoned the rigid "two-pronged test" under *Aguilar* and *Spinelli* for determining whether an informant's tip established probable cause for the issuance of warrant, and adopted a "totality of the circumstances" approach that traditionally has informed probable cause determinations. *Gates* at 238; 103 S.Ct. at 2332. In reaching this conclusion, the Supreme Court noted that:

> the veracity of persons supplying anonymous tips is by hypothesis largely unknown, and unknowable. As a result, anonymous tips seldom could survive a rigorous application of either of the *Spinelli* prongs. Yet such tips, particularly when supplemented by independent police investigation, frequently contribute to the solution of otherwise "perfect crimes." ***While a conscientious assessment of the basis for crediting such tips is required by the Fourth Amendment, a standard that leaves virtually no place for anonymous citizen informants is not***.

Id. at 237-238. (emphasis added).

The *Gates* standard applies to a wiretap application. *United States v. Zambrana,* 841 F.2d 1320, 1332 (7th Cir.1988) (applying *Gates* test). Under *Gates,* the task of the issuing [judge] is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the "veracity" and "basis of knowledge" of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place. ***And the duty of a reviewing court is simply to ensure that the [judge] had a "substantial basis for … conclud[ing]' that probable cause existed.*** *Gates,* 462 U.S. at 238-239, 103 S.Ct. at 2332; *Zambrana,* 841 F.2d at 1332 (emphasis added).

In this case, unlike in *Gates* (information received from an anonymous letter), or in *Zambrana* (confidential informants used), the government informant was clearly identified to the reviewing judge by name, background, and the circumstance when the information was received by the detective. The affidavit submitted by Detective Manacop states that he is a member of the Thief Apprehension Select Coalition (TASC), who investigate any all criminal violations with special attention to burglary, theft and robbery. In the detective's affidavit, the informant was identified by name and shown as someone who was just recently arrested pursuant to an arrest warrant and who, after being advised of his constitutional rights and waiving them, confessed to being involved in several burglary incidents. The arrestee turned informant offered to assist law enforcement officials. He was willing to meet and converse with this person who he had prior dealings of selling different stolen items. He gave detailed descriptions of some items he sold to the Defendant, where to find the Defendant, and how the Defendant handled the transactions. ***He specifically noted that most of the stolen property would not be kept long within the same building and would be transported or sold to another person***. The informant obviously had first-hand knowledge of the details of the Defendant's handling of stolen properties. He later identified this person through a photo. The eavesdropping search warrant issued by the Court identified the informant and the person in the photo, i.e. the Defendant. Because the stolen property would not be kept long within the Defendant's premises, a search warrant first would not necessarily corroborate Quitugua's statements. There simply was no reasonable means of verifying if the stolen items Quitugua listed had been received by the Defendant except for an electronic recording of the Defendant's own admissions.

Based on these facts, and under the totality of the circumstances test, this Court concludes that Judge Lizama had a substantial basis for concluding that probable cause existed that a conversation between the informant and the Defendant would produce evidence that a crime had been committed, or that a crime will be committed, and so the eavesdropping warrant is valid.

In Defendant's motion, she relies on *United States v. Jackson*, 818 F.2d 345, 358 (5th Cir. 1987) for the proposition that an affidavit must show an informant's veracity and reliability in one of three ways. Mot at. 4. First, *Jackson* is distinguishable in that it pertains to the issuance of an arrest warrant, not an eavesdropping warrant. Second, the *Jackson* decision also acknowledges that an informant's basis of knowledge can also be established by a particularly detailed tip. *Jackson* at 349, citing *Gates* at 2330. In *Jackson*, the source of the particularly detailed description of the stolen property appeared to be from the police inventory, not from the informant Dunbar. *Id*. at 349-350. Furthermore, to show Jackson's involvement in the burglary, the informant merely alleged that Jackson exercised control over the property, and that Jackson "knew" of the burglary. In this case, the allegation is that Quitugua sold the stolen items to the Defendant at the No. 1 Bar, and then she transported them elsewhere or sold them to others quickly. Quitugua also stated that at least twice in the month of July (2006), he sold two desktop computers that were stolen from the PSS Office in Lower Base. During that transaction, Defendant asked Quitugua to store these items in her bedroom located just behind the No. 1 Bar. These detailed facts, unlike the *Jackson* case, support the probable cause finding that Defendant Vaughn knew the items were stolen. Accordingly, the issuance of the eavesdropping search warrant in this case was appropriate.

CONCLUSION

For the foregoing reasons, Defendant Vaughn's motion to suppress evidence seized pursuant to the eavesdropping warrant is DENIED.

SO ORDERED this 11th day of June, 2007.

/S/_____
RAMONA V. MANGLOÑA, Associate Judge