**FOR PUBLICATION**

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

| | |
|---|---|
| **COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS,**<br><br>Plaintiff,<br><br>v.<br><br>**NESTOR MANABAT,**<br><br>Defendant. | **Criminal Case No. 13-0122**<br><br>**ORDER GRANTING DEFENDANT'S MOTION TO SUPPRESS STATEMENTS** |

## I. INTRODUCTION

THIS MATTER came before the Court on Nestor Manabat's ("Defendant") Motion to Suppress Statements on March 13, 2014 at 1:30 p.m. in Courtroom 202A. The Commonwealth of the Northern Mariana Islands ("the Commonwealth" or "CNMI") was represented by Assistant Attorney General Jacinta M. Kaipat. Defendant was represented by Chief Public Defender Douglas W. Hartig.



## II. DISCUSSION

### A. TIMELINESS

At the outset of this Order, it is relevant to discuss timeliness. The Commonwealth did not raise this as an objection but clarification is needed. On September 11, 2013, the Court issued a Pretrial Order in this matter. It includes the following, "[a]ll dispositive motions shall be filed in a timely fashion to allow the hearing on any such motions to be

calendared on **Thursday, January 30, 2014**, at **1:30 p.m.**" (emphases in original.) Defendant's Motion to Suppress Statements was filed on February 24, 2014, well past the deadline. The Commonwealth did not object to timing so the Motion was heard. When questioned Defendant about the late filing of a dispositive motion, Defendant's counsel stated on the record that a motion to suppress is not dispositive, and later stated that he was not sure what in fact "dispositive motion" means, but that he assumes it means a motion to dismiss the case or a motion that takes care of the case in general. Despite the Commonwealth's failure to object on timeliness grounds, the Court will define "dispositive motion" and address deadlines set in a pretrial order for clarification.

"Dispositive motion" is defined in *Commonwealth v. Villagomez*, Crim. No. 11-0094 (NMI Super. Ct. June 13, 2012) (Order Den. In Part and Granting In Part Def.'s Mot. In Limine at 4).[1] There, this Court found as follows:

> A dispositive motion includes a "motion to suppress." *See United States v. Raddatz*, 447 U.S. 667, 673 (1980); *United States v. Jaramillo*, 891 F.2d 620, 628 (7th Cir. 1989); *United States v. Salahuddin*, 607 F. Supp. 2d 930, 933 (E.D. Wis. 2009). A motion to suppress is defined as a device "used to eliminate from the trial of a criminal case evidence which has been secured illegally, generally in violation" of one's constitutional rights. [BLACK'S LAW DICTIONARY] 1014 (6th ed. 1990). Clearly, Defendant's Motion that seeks to eliminate from trial the use of evidence obtained in violation of Defendant's . . . Fifth Amendment rights is a motion to suppress and, thus, constitutes a dispositive motion.[2]

Thus, a motion to suppress is a dispositive motion.[3] The Court is well within its discretion to treat Defendant's late-filed Motion to Suppress Statements as waived and not hear it;

---

[1] The Court is within its power to enforce its Pretrial Order, so long as the Court does not abuse its discretion, regardless of the Commonwealth's failure to object. *See Sosa v. Airprint Sys.*, 133 F.3d 1417, 1418 (11th Cir. 1998).

[2] At the hearing, Defendant's counsel asserted that a motion to suppress is most likely a motion in limine. This argument was also addressed by this Court in *Villagomez*. This Court explained that a motion in limine limits the use of evidence that is unfairly prejudicial under NMI R. Evid. 403. (Order Den. In Part and Granting In Part Def.'s Mot. In Limine at 4). Motions to suppress operate regardless NMI R. Evid. 403, but instead function to preserved constitutional rights. *Id.* In this case, Defendant is alleging a violation of his Fifth Amendment rights.

[3] The implied rational from case law is that, in some cases, a motion to suppress has the ability to eliminate all evidence in a case, thereby disposing of the case as impossible to prove without the suppressed evidence.

however, the Court can, in its discretion, hear the late filed Motion if Defendant can show "good cause" for his delay. *See* NMI R. Crim. P. 12(f); *see also United States v. Vanholten*, 2013 U.S. App. LEXIS 20516, 5-7 (11th Cir. 2013); *see also United States v. Trobee*, 551 F.3d 835, 838 (8th Cir. 2009). An example of "good cause" is found in *Villagomez*, stating:

> Failure to timely file a motion to suppress constitutes a waiver, but the court for good cause may grant relief from waiver. NMI R. Crim. P. 12(f). "The decision whether to grant relief from waiver under Rule 12(f) lies in the discretion of the trial court, once good cause for such relief is shown." *Commonwealth v. Yoo*, 2004 MP 5 ¶ 11 (citing *United States v. Tekle*, F.3d 1108, 1113 (9th Cir. 2003)). For example, in *United States v. Hall*, 565 F.2d 917, 919-20 (5th. Cir. 1978),[4] the court found "good cause" under Rule 12(f) to consider an untimely motion to suppress based on the court's desire to avoid penalizing the criminal defendant for the inadvertence of his attorney. (footnote omitted).

(Order Den. In Part and Granting In Part Def.'s Mot. In Limine at 4-5). As in *Villagomez*, the Court will grant relief here. This Court will not penalize Defendant or limit his constitutional right against self-incrimination merely because his attorney is unsure of what constitutes a dispositive motion, especially because the Commonwealth has ample time to "mend" its "case theory" compensating for any possible suppressed evidence.

\\\

\\\

---

Though not all motions to suppress will dispose of a case, all motions to suppress carry the same potential and, thus, are dispositive motions. Motions to suppress can also change a party's theory of the case, strategy, and/or argument, causing substantial prejudice if suppression is granted too close to the trial date. *Cf. Bibb v. Allen*, 149 U.S. 481, 488-89 (1893) (discussing that a motion to suppress testimony from a deposition the day before trial is too late because it does not afford the opposing party an opportunity to correct what was wrong with the deposition). Here, the situation is not as extreme as in *Bibb*, but the same sentiment applies. Had Defendant waited this long to file a motion to suppress "the smoking gun" and the Commonwealth had already established their entire case depending upon the inclusion of "the smoking gun" suppressing it after the Pretrial Order deadline has passed would be highly and unfairly prejudicial. Motions to suppress, like all dispositive motions, are encourage to be filed as soon as practicable.

[4] "Because the Commonwealth Rules of Criminal Procedure are patterned after the Federal Rules of Criminal Procedure, this Court has long held that it is appropriate to consult . . . the [F]ederal [R]ules when interpreting the Commonwealth Rules." *Commonwealth v. Attao*, 2005 MP 8 ¶ 9 n. 7 (citing *Commonwealth v. Jai Hoon Yoo*, 2004 MP 5 ¶ 8 n.1).

## B. AFFIDAVIT

The Court next addresses the issue of whether a motion to suppress requires a supporting affidavit, as decided in *Commonwealth v. Petrus*, Crim. No. 12-0235 (NMI Super. Ct. Aug. 28, 2013) (Order Den. Mot. to Suppress Statement Without Prejudice).[5] In making its ruling there, the court followed the Ninth Circuit which requires a motion to suppress to be accompanied by an affidavit or declaration setting forth admissible facts and affirmations by someone competent to testify. *Id.* This Court addressed the same issue in *Commonwealth v. Sablan*, Crim. No. 13-0157 (NMI Super. Ct. Nov. 14, 2013) (Order Granting Mot. to Suppress). There, this Court extended the rule in *Petrus*, allowing an affidavit of someone competent to testify to simply adopt facts as formally set forth in an attorney's affidavit. *Id.* at 7-9.

Defendant asserts that this rule should be extended even further to allow the mere allegation of facts in his motion to suppress itself to be sufficient, so long as the facts are based on the discovery provided to the defendant by the Commonwealth. Defendant argues that affidavits are not needed, asserting that *Petrus* was decided based on *United States v. Wardlow*, 951 F.2d 1115, 1116 n.1 (9th Cir. 1991), which is inapplicable to the CNMI. *Wardlow* based its ruling on the interpretation of C.D. Cal. R. 9.2,[6] a Local Rule of Practice for the United States District Court for the Central District of California. Defendant argues that Rule 9.2 is inapplicable to the CNMI, and that the CNMI has no rule similar to it. The CNMI, however, does have a rule similar to Rule 9.2. NMI R. Prac. 8, provides, "Submission of Motion[: a] party making a motion may . . . file . . . a separate memorandum of reasons . . . why the motion should be granted. Affidavits *and* other documents setting forth or evidencing facts on which the motion is based *shall* be filed with the motion." NMI R. Prac. 8 (emphases added). Defendant, assumedly, overlooked Rule 8 and therefore did

---

[5] The same attorney represented both Mr. Petrus and Mr. Manabat.

[6] Rule 9.2 has since been replaced by C.D. Cal. R. 12-1.1, but as used in this case, 9.2 stated, "A motion to suppress shall be supported by a declaration on behalf of the defendant, setting forth all facts then known and upon which it is contended the motion should be granted." Rule 12-1.1 is identical to 9.2.

not knowingly misrepresent to the Court that the CNMI has no such rule. Counsels are now on notice of Rule 8 and its requirements.

The court in *Petrus* stated that "Defendant bears the burden of coming forward with at least an offer of proof or some minimal showing that his suppression motion has some factual basis." (Order Den. Mot. to Suppress Statement Without Prejudice at 1-2). The court then went on require an affidavit or declaration supporting a motion to suppress. Defendant asserted that an affidavit is unnecessary when the facts are provided to a defendant by the Commonwealth as discovery. At the hearing on March 13, 2014, the Court allowed Defendant's Motion to be heard, notwithstanding Rule 8.[7] The Court reluctantly accepted, and thus adopted, Defendant's argument extending *Sablan* to allow the mere allegation of facts recited in the motion itself to be sufficient, so long as the facts are based on discovery provided to the defendant by the Commonwealth. This interpretation ensures that Defendant's constitutional rights are preserved and such is the most critical concern of all. Additionally, testimonial evidence from Detective Jonathan SN. Decena ("Decena"), the arresting officer, was offered at the hearing[8] regarding the incident, and it corroborated Defendant's recitation of the facts.

### C. Defendant's Motion to Suppress and *Miranda* Issues

Defendant argues that his Fifth Amendment rights against self-incrimination were violated because he was not informed of his right to remain silent or his right to an attorney, and thus, certain statements made to the police must be suppressed. *See Miranda v. Arizona*, 384 U.S. 436 (1966). In this case, Decena was dispatched to the scene pursuant to a domestic violence 911 call alerting that a man was wielding a machete and threatening his

---

[7] The Court anticipates that the CNMI Supreme Court will eventually provide clear direction on the application of NMI R. Prac. 8, as this issue continues to expend court time. Additionally, inconsistent rulings have caused the application of this rule to vary from case to case and from courtroom to courtroom.

[8] Decena is witness for the Commonwealth. The Court allowed his testimony because Defendant failed to offer any evidence from someone with personal knowledge and the Court wanted to ensure that Defendant's constitutional rights were protected.

family. Upon arrival at the scene, Decena was met by the alleged victim, Nimfa Lumpas Abrillo ("Abrillo"). Decena stated that Abrillo appeared to be very frightened. She directed Decena to Defendant, who was in a neighboring house. When Decena got to the doorstep, he asked Defendant to step outside so that Decena could speak with Defendant's daughter who was inside the house. Defendant complied. Decena next testified that, just like Abrillo, the daughter appeared very scared. Meanwhile, due to the nature of the call, four other officers arrived on the scene to ensure everyone's safety during this dangerous situation, to wit: a machete was alleged to be involved. The four other officers secured a perimeter around Defendant, maintaining a distance of about 10 feet. Upon completing his interview with Defendant's daughter, Decena came outside and asked Defendant "what happened?" Defendant answered, "I got angry about them coming home late." Decena testified that he did not stop Defendant at this point because, as Decena testified, there is nothing wrong with getting angry. Decena then testified that, next, Defendant said, "I pulled [Abrillo's] hair." It was at this point that Decena stopped Defendant and read Defendant his *Miranda* rights.

This Court recently examined a *Miranda* violation and discussed and the Fifth Amendment's legal standard, stating:

> Criminal defendants have a privilege against self-incrimination. NMI Const. art. I § 5; U.S. Const. amend. V. In order to protect this privilege, suspects must be informed of their constitutional rights before custodial interrogation[s] may begin. . . . *Commonwealth v. Mettao*, 2008 MP 7 at [¶] 17 (2008), citing *Miranda v. Arizona,* 384 U.S. 436, 445 (1966). Suspects are deemed to be in "custody" when "they are formally arrested or otherwise deprived of their freedom of action in any significant way." *Mettao*, 2008 MP at [¶] 17. . . . "Interrogation" [includes] not only as express questioning but also . . . statements made by police officers intended to elicit incriminating responses from a suspect. *Id.*

(Order Granting Mot. to Suppress at 8).

**1. Custody**

In determining whether a person is deprived of their freedom of action in any significant way the CNMI Supreme Court adopted an objective test asking would "a

reasonable person in the defendant's position . . . believe that he . . . was in police custody of the degree associated with a formal arrest." *Commonwealth v. Ramangmau*, 4 NMI 227, 235 (1995).[9] Under this view, the key to determining custody "is whether the atmosphere was 'police dominated.'" *Id.* Based on the reports of the frantic alleged victims indicating that Defendant threatened them with a machete and the amount of officers at the scene, who secured a 10 foot perimeter around Defendant, a reasonable person in Defendant's position would not feel free leave the area, thus, depriving him of his freedom of action in a significant way. These facts also establish that the atmosphere was sufficiently "police dominated." Additionally, Decena asked Defendant to step outside while he spoke to Defendant's daughter. Such a directive from a uniformed officer could cause a reasonable person to feel as though they are not free to leave. Thus, Defendant was in custody under *Miranda.*

**2. Interrogation**

An "interrogation under *Miranda*, refers to . . . express questioning . . . [including] any words or action on the part of the police . . . that the police should know are reasonably likely to elicit an incriminating response from the suspect." *Mettao*, 2008 NMI 7 at ¶ 17; *Commonwealth v. Yan*, 4 NMI 334, 338 (1996); *Rhode Island v. Innis*, 446 U.S. 289, 300-01 (1980).

Defendant argued that because: (1) Decena responded to a 911 call placed by Abrillo; (2) Decena had taken statements from the alleged victims; and (3) because all fingers were pointing to Defendant, Decena already considered Defendant to be a suspect of a crime. At the hearing, Decena testified that prior to questioning Defendant he believed that he had probable cause to arrest Defendant. When Decena asked Defendant "what

[9] *Ramangmau* is very similar this case. The defendant there was told to stand by while the police secured the scene of a vehicular collision and tended to the victim. The defendant was then asked questions prior to his arrest. The court determined that the defendant was not in custody until he was formally arrested. Here, police were called to a scene of reported domestic violence; they spoke to witnesses and secured a 10 foot perimeter around Defendant scene around Defendant. Thus, the present scene is "police dominated" more so than the scene in *Ramangmau.*

happened?" he reasonably should have known that his question was likely to elicit an incriminating response. Thus, this was an interrogation under *Miranda*. Decena stated that when Defendant answered, "I got angry about them coming home late," he did not stop Defendant because getting angry is not crime. However, the focus is not on Defendant's response, but instead on what "the police should know [is] reasonably likely to elicit an incriminating response." *Id.* As Defendant argued, Decena responded to a 911 call and interviewed alleged victims, all of whom alleging Defendant committed a crime, therefore, Decena should have known that asking Defendant "what happened?" was likely to elicit an incriminating response. Thus, prior to asking "what happened," Decena should have informed Defendant of his rights.

## III. CONCLUSION

Defendant was not informed of his *Miranda* Rights before being asked a question by an officer which the officer should have known would illicit an incriminating response. The officer questioned Defendant while other officers surrounded him in a 10 foot perimeter, creating sufficiently police dominated atmosphere. A reasonable person in this situation would not have felt free to leave. Thus, Defendant's Motion to Suppress Statements is granted. The Court hereby suppresses the following statements: (1) Defendant's statement, "I was angry about them coming home late"; and (2) "I pulled her hair."

**IT IS SO ORDERED** this 21st day of March, 2014.

**ROBERTO C. NARAJA, Presiding Judge**