IN THE HIGH COURT
OF THE
REPUBLIC OF THE MARSHALL ISLANDS

REPUBLIC OF THE MARSHALL ISLANDS v. JILI BETWELL, JENNET JENNET, and TILIJ JENNET, Defendants.	CRIMINAL CASE NO. 2013-005 MEMORANDUM OF DECISION AND ORDER DENYING MOTION TO SUPPRESS DEFENDANT BETWELL'S STATEMENT

TO : Assistant Attorney-General Jack Jorbon, prosecutor
Assistant Attorney-General Jonathan Kawakami, prosecutor
Talafou Manase, mlsc, counsel for defendant Betwell
Chief Public Defender Russell Kun, counsel for the defendants Jennet Jennet and Tilij Jennet

I. INTRODUCTION

Defendant Jili Betwell, with two others, was charged in the Republic's March 18, 2013 Criminal Information with Burglary and Criminal Conspiracy. After his initial appearance on April 1, 2013, a First Criminal Information was filed on April 2, 2013. At the preliminary hearing on April 5, 2013, the court found good cause to proceed on both counts. Defendant Betwell filed a motion to suppress custodial statements, confessions made by him on May 17, 2013. A hearing was held on July 17, 2013. The court denies the motion finding that Betwell was not illegally under arrest at the time he made the statements; was not denied his right to be informed of his constitutional rights; was not entrapped; and was not coerced into making the statement involuntarily.

II. FACTS

For the purposes of this motion, the Court relies upon evidence presented at hearing on July 17, 2013 as well as testimony presented at the preliminary hearing on April 5, 2013. The

defendant prepared a transcript of the preliminary hearing which Republic provisionally accepted. There has been no further objection from the Republic and the court will accept the transcript as accurate and order it filed as part of the record for this motion.

On January 10, 2013 detectives Duston Trakwon and Souvenir Heine, from the RMI National Police, went to defendant's residence to question him regarding a burglary at Payless Supermarket which occurred two nights previously. They were not in uniform and drove an unmarked Criminal Investigation Division (CID) car. Upon arriving, they went to the front door where Tarkwon knocked on the door. An old man answered the door and Tarkwon asked if Betwell was there. The old man either called or went to get Betwell. Defendant came to the door and Tarkwon asked Betwell to come with them so they could work with him at the police station. While neither detective identified himself as a police officer, they believed Betwell was aware they were with the police because of his previous police contacts with them, including incarceration at the Majuro jail, which is under the same roof as the police station. Betwell was not handcuffed, the officers neither had nor displayed any weapons. There were no threats or intimidating comments made by the officers. Betwell did not say anything but accompanied them to the car and they then drove to the police station. There was no conversation in the car and no questions were asked of defendant on the way to the police station.

At the police station, Tarkwon, Heine and the defendant got out of the car and entered the police station. With no conversation, they proceeded to the CID office, Betwell following the two officers. They entered the CID room and Betwell was requested to sit on the couch in the office. In front of the couch was one of three tables in the office. Also in the office were two other officers, Captain Vincent Tani and Sgt. Carney Terry. Both seated, Tani was "in his office" while Carney was working on a computer at one of the tables. Neither of them questioned the

defendant nor interacted with him. Tarkwon stood in front of the table at which Terry was seated, working on the computer. Heine was standing next to the door. Before any questions were asked of the defendant, the defendant began telling what happened and made an allegedly incriminating statement. Tarkwon told defendant to stop and to wait while Tarkwon left the room to attend to other business. Heine followed shortly thereafter, with the other two officers apparently remaining in the CID office with Betwell. Takwon and Heine returned 20 to 30 minutes later, at which point they discovered that the defendant had left. They looked for him in and around the station, but could not find him.

III. DISCUSSION.

Defendant has moved to suppress the statement made at the police station on January 10, 2013 on a variety of grounds. First, he claims that the statement was the product of an illegal arrest; second, that it was the product of police entrapment; third, that he was not informed of his constitutional rights; and finally, that the statement was not voluntarily made.

A. There was no illegal arrest.

Defendant argues he was compelled to accompany the police officers to the police station on January 10, 2013 and that such detention constituted an arrest. Under the RMI Constitution, any arrest or seizure must be pursuant to a warrant unless there is not adequate time to obtain one. In the absence of such, the seizure is unreasonable, and evidence obtained through an unreasonable seizure cannot be used to support a criminal conviction.[1] A similar contention was raised in *Kaupp v. U.S.* In that case, the Court applied "the Fourth Amendment rule that a confession 'obtained by exploitation of an illegal arrest' may not be used against a criminal

[1]RMI Constitution, Article II, Section 3.

defendant."[2] The Court stated the test for a seizure of a person:

> A seizure of the person within the meaning of the Fourth and Fourteenth Amendments occurs when, "taking into account all of the circumstances surrounding the encounter, the police conduct would 'have communicated to a reasonable person that he was not at liberty to ignore the police presence and go about his business.'" (cites omitted.)[3]

The Court described the facts of the interaction between the police and defendant:

> A 17–year–old boy was awakened in his bedroom at three in the morning by at least three police officers, one of whom stated " 'we need to go and talk.' " He was taken out in handcuffs, without shoes, dressed only in his underwear in January, placed in a patrol car, driven to the scene of a crime and then to the sheriff's offices, where he was taken into an interrogation room and questioned. . . " Okay " in response to [Detective] Pinkins's statement is no showing of consent under the circumstances. Pinkins offered Kaupp no choice, and a group of police officers rousing an adolescent out of bed in the middle of the night with the words " 'we need to go and talk' " presents no option but "to go." There is no reason to think Kaupp's answer was anything more than "a mere submission to a claim of lawful authority."[4]

Under the facts of the case, the Court found there was an arrest and that, in the absence of probable cause, it was illegal. The Court also determined that the administration of Miranda warnings was insufficient to break the causal connection between the illegal arrest and the confession. The defendant's conviction was overturned and remanded for further proceedings consistent with the decision. The Court noted that in the absence of additional facts, the confession would have to be suppressed.

However, in *U.S. v. Mendenhall,* the Court determined there was no seizure of the defendant under the following circumstances:

> The events took place in the public concourse. The agents wore no uniforms and

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[2]*Kaupp v. Texas*, 538 U.S. 626, 123 S. Ct. 1843, 1844, 155 L. Ed. 2d 814 (2003)

[3]538 U.S. 626, 629

[4]538 U.S. 626, 631.

> displayed no weapons. They did not summon the respondent to their presence, but instead approached her and identified themselves as federal agents. They requested, but did not demand to see the respondent's identification and ticket. Such conduct without more, did not amount to an intrusion upon any constitutionally protected interest. The respondent was not seized simply by reason of the fact that the agents approached her, asked her if she would show them her ticket and identification, and posed to her a few questions. Nor was it enough to establish a seizure that the person asking the questions was a law enforcement official.[5]

The Court further determined there was no subsequent seizure when the defendant went with the agents to the airport DEA office. The Court stated: "The question whether the respondent's consent to accompany the agents was in fact voluntary or was the product of duress or coercion, express or implied, is to be determined by the totality of all the circumstances."[6] Those circumstances were characterized as follows:

> The Government's evidence showed that the respondent was not told that she had to go to the office, but was simply asked if she would accompany the officers. There were neither threats nor any show of force. The respondent had been questioned only briefly, and her ticket and identification were returned to her before she was asked to accompany the officers.[7]

In the present case, the circumstances surrounding the interaction between the defendant and police suggest a situation more like *Mendenhall* than *Kaupp*.

There were no threats or show of force. Like *Mendenhall*, and unlike *Kaupp*, the officers were not in uniform and displayed no weapons. Like *Mendenhall*, and unlike *Kuapp*, defendant was not handcuffed. Like *Mendenhall* and unlike *Kaupp*, defendant was asked to accompany the officers, rather than being forcibly taken into custody. The officers were polite and did not raise

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[5]*United States v. Mendenhall*, 446 U.S. 544, 555, 100 S. Ct. 1870, 1877, 64 L. Ed. 2d 497 (1980)

[6]446 U.S. 544, 557.

[7]446 U.S. 544, 557-58

their voices. There were only two officers dealing with Betwell in a non-threatening, non-intimidating manner.

While the police did not specifically say Betwell had the right to say no or not accompany them, that is not determinative.[8] In this case, the totality of the circumstances shows the defendant's consent to accompany the police officers to the police station was not " the product of duress or coercion, express or implied."[9] There was no arrest of Betwell and his challenge to the admissibility of his statement to police on this basis must fail.

B. Entrapment does not apply to this case.

Entrapment is an affirmative defense to a crime, based upon a showing that the person was induced by a law enforcement agent to commit an offense that the person would not otherwise have committed. The police actions at issue here occurred *after* the alleged offense was committed. Entrapment has no application to the admissibility of a confession.

C. There was no Constitutional violation in failing to inform the defendant of his rights.

Under the RMI Constitution, no "confession extracted from someone who has not been informed of his rights to silence and legal assistance and of the fact that what he says may be used against him, be used to support a criminal conviction." This provision basically memorializes in the RMI Constitution the so called "Miranda rights" found to be constitutionally required in the United States. In the U.S., there is no requirement to "Mirandize" a defendant in the absence of "interrogation":

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[8]"Our conclusion that no seizure occurred is not affected by the fact that the respondent was not expressly told by the agents that she was free to decline to cooperate with their inquiry, for the voluntariness of her responses does not depend upon her having been so informed." 446 U.S. 544, 555.

[9]446 U.S. 544, 557.

> We conclude that the Miranda safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent. That is to say, the term "interrogation" under Miranda refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect.[10]

This court believes the terminology in the RMI Constitution related to a confession "extracted" incorporates the concept of "interrogation" as used in the U.S. In the absence of "interrogation," that is, questioning or words or actions on the part of the police that they should know are reasonably likely to elicit an incriminating response from the suspect, the RMI requirement to inform a person of his rights do not come into play. In the present case, the record indicates there was no questioning of the defendant. There were no words or actions on the part of the police calculated to elicit an incriminating response from the suspect. There was no failure to advise the defendant of his constitutional rights and his challenge to the admissibility of his statement to police on this basis must fail.

D. Defendant's statement was not made involuntarily.

The court has determined that the defendant was not arrested. However, defendant asserts his statement made to police was not voluntary. Although in the U.S. challenges on this basis are often made under the due process clause of the U.S. Constitution[11], Article II, Section 4(8) of the RMI Constitution states in part: "No person shall be subjected to coercive interrogation, nor may any involuntary confession or involuntary guilty plea, . . . be used to support a criminal conviction."

In determining whether a confession is "voluntary," the U.S. Supreme Court has declared:

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[10]*Rhode Island v. Innis*, 446 U.S. 291, 300-01, 100 S. Ct. 1682, 1689-90, 64 L. Ed. 2d 297 (1980).

[11]For example, *Brown v. Mississippi*, 297 U.S. 534, 540 (1961).

"We hold that coercive police activity is a necessary predicate to the finding that a confession is not 'voluntary' within the meaning of the Due Process Clause of the Fourteenth Amendment."[12] The Court reviewed cases where such coercion had been found:

> E.g., *Mincey v. Arizona*, 437 U.S. 385, 98 S.Ct. 2408, 57 L.Ed.2d 290 (1978) (defendant subjected to 4-hour interrogation while incapacitated and sedated in intensive-care unit); *Greenwald v. Wisconsin*, 390 U.S. 519, 88 S.Ct. 1152, 20 L.Ed.2d 77 (1968) (defendant, on medication, interrogated for over 18 hours without food or sleep); *Beecher v. Alabama*, 389 U.S. 35, 88 S.Ct. 189, 19 L.Ed.2d 35 (1967) (police officers held gun to the head of wounded confessant to extract confession); *Davis v. North Carolina*, 384 U.S. 737, 86 S.Ct. 1761, 16 L.Ed.2d 895 (1966) (16 days of incommunicado interrogation in closed cell without windows, limited food, and coercive tactics); *Reck v. Pate*, 367 U.S. 433, 81 S.Ct. 1541, 6 L.Ed.2d 948 (1961) (defendant held for four days with inadequate food and medical attention until confession obtained); *Culombe v. Connecticut*, 367 U.S. 568, 81 S.Ct. 1860, 6 L.Ed.2d 1037 (1961) (defendant held for five days of repeated questioning during which police employed coercive tactics); *Payne v. Arkansas*, 356 U.S. 560, 78 S.Ct. 844, 2 L.Ed.2d 975 (1958) (defendant held incommunicado for three days with little food; confession obtained when officers informed defendant that Chief of Police was preparing to admit lynch mob into jail); *Ashcraft v. Tennessee*, 322 U.S. 143, 64 S.Ct. 921, 88 L.Ed. 1192 (1944) (defendant questioned by relays of officers for 36 hours without an opportunity for sleep).[13]

Defendant asserts he was coerced in that he was in custody, was alone in the interrogation room with no friends or an attorney surrounded by officers in uniform. None these actions approaches the police misconduct exhibited in cases above where involuntariness was found by the Court. The police stopped his oral statement. Although asked to stay while the officers attended to other business, defendant was allowed to leave the police station without being stopped or hindered. Defendant was not coerced and defendant's statement to the police was not involuntary. His challenge to the admissibility of his statement on this basis must fail.

IV. CONCLUSION.

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[12]*Colorado v. Connelly,* 479 U.S. 157, 167 (1986).

[13]*Ibid.*, at p. 164.

Defendant's challenge to the admissibility of his statement to the police on January 10, 2102 made at the police station must fail. He was not under arrest at the time he made the statement as he had voluntarily accompanied the police to the station. He was not "entrapped" into making the statement. He was not deprived of the constitutional safeguard to be given notice of his rights before making a statement because he was never questioned or interrogated. He was not coerced into making an involuntary statement. As a result, his motion to suppress his statement must be denied.

ORDER

Based upon the forgoing, it is hereby ORDERED as follows:

1. The "Transcripts of Police Officer Duston Tarkwon testimony" submitted by defendant Betwell for the purposes of the hearing on defendant's motion to suppress is **ADMITTED** into evidence;

2. Defendant Betwell's motion to suppress is **DENIED.**

Date: July 22, 2013.

James H. Plasman
Associate Justice, High Court