IN THE SUPREME COURT OF GUAM

PEOPLE OF GUAM,	)	Supreme Court Case No. **CRA96-006**
	)	Superior Court Case No. **CF0420-96**
Plaintiff-Appellant,	)	
	)	
vs.	)	**OPINION**
	)	
FELIX ESPINOSA LUJAN, et al.,	)	
	)	
Defendants-Appellees.	)	
	)	

Filed: December 15, 1998

Cite as: **1998 Guam 28**

Appeal from the Superior Court of Guam

Argued and Submitted on 19 August 1997

Hagåtña, Guam

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BEFORE: PETER C. SIGUENZA, Chief Justice; JANET HEALY WEEKS and EDUARDO A. CALVO, Associate Justices.

SIGUENZA, C.J.:

[1] This appeal presents separate issues regarding both the disqualification of prosecutors and the standards governing dismissal of an indictment. After reviewing the issue of disqualification, the court finds that it lacks jurisdiction to review this submission. However, our lack of jurisdiction as to the first issue does not preclude us from reviewing the dismissal of the indictment. We conclude that the dismissal was in error; accordingly, the court reverses the decision of the trial court and orders the indictment's reinstatement.

BACKGROUND

[2] This matter is an appeal taken by the People following the court's disqualification of the Attorney General's Office as the prosecuting authority and the subsequent dismissal, with prejudice, of the indictment. The indictment alleged acts of bribery, unlawful influence, record tampering, hindering apprehension, official misconduct and conspiracy by employees of the Department of Public Health and Social Services and charges that generally involved the improper certification and/or inspection of establishments under that agency's jurisdiction.

[3] The indictment in this matter was filed 16 July 1996. At some point thereafter, counsel for Defendant Benavente apparently learned the Prosecution Division's Chief Investigator, who had previously been employed at the Department of Public Health, may have been implicated in the pattern of misconduct alleged in the indictment but not charged. As a result, he filed a motion on 20 September 1996 to recuse the Attorney General's Office from prosecuting the matter. He claimed the Chief Investigator's involvement in the offenses, in conjunction with the investigation thereof,

established a conflict of interest that tainted the entire office. Subsequently, the motion to disqualify was heard by the trial judge on 24 September 1996.

[4] At the hearing, the Chief Prosecutor agreed that the Prosecution Division should be disqualified. Philip Tydingco appeared as a Special Assistant Attorney General, appointed personally by the Attorney General of Guam, for the purpose of pursuing this case. However, the trial judge resolved, apparently because the Chief Investigator of the Prosecution Division was directly accountable to the Attorney General himself, in terms of adverse personnel actions, that the Attorney General was too close to this Chief Investigator to have any further involvement in the case whatsoever. The judge therefore disqualified Philip Tydingco and, at the conclusion of the hearing, ordered that the Governor himself would need to appoint a Special Prosecutor to pursue the case. At the same time, he also set a hearing for 30 September 1996 where the special prosecutor was to make an appearance before the court.

[5] At the scheduled hearing six days later, no special prosecutor appeared causing the trial judge to invite motions to dismiss. Motions to dismiss with prejudice were then advanced by the various counsel present, and without any countervailing argument, granted. In deciding the motion, the trial judge did not explain on the record his rationale for granting the motion to dismiss with prejudice.

[6] On 7 October 1996 the Attorney General signed a document designating Attorney John Tarantino as a Special Assistant Attorney General for purposes of this matter, Superior Court Case No. CF 420-96. The notice of appeal was filed on 8 October 1997, by Deputy Attorney General Charles Troutman, and indicates that the People are appealing the trial court's 30 September 1996 order dismissing with prejudice the indictment in Superior Court case No. CF 420-96. The trial judge's decision disqualifying the Attorney General from all involvement in this matter is not mentioned in the notice of appeal. On 11 October 1997 Tarantino and the Attorney General signed

an employment contract formalizing his status as a Special Prosecutor and that agreement was ultimately approved by the Governor on 15 November 1996.

ANALYSIS

I.

[7] The issue of disqualification of the People's counsel is pursued by both sides to this appeal, and from two distinct angles. The People seek our review of the trial court's disqualification of Attorney Philip Tydingco, the Special Prosecutor appointed below by the Attorney General. Appellees urge us to find not only that disqualification was proper but they also seek our determination that Tarantino, who was subsequently employed by the Governor[1], and who acted in the appeal before us, should be deemed to be disqualified as well. Significantly, no motion was made to this court seeking his disqualification. Rather, Appellees raise the issue by way of a footnote in their brief. Our analysis of these two arguments lead us to conclude that we lack jurisdiction to properly address either.

[8] We have consistently held that this court's appellate jurisdiction is limited to those matters which the legislature permits us to review. *See People v. Quenga*, 1997 Guam 6 (holding that a juvenile was not entitled to an interlocutory appeal of the denial of a "reverse certification" hearing because the Guam legislature had indicated an intent that juvenile certification rulings could be appealed only after a judgment of conviction); *In re: Request of the Twenty-Fourth Guam Legislature For Declaratory Judgment as to the Implementation of the Initiative Order of Dismissal Reducing Members of the Twenty-Fifth Guam Legislature*, 1997 Guam 15 (dismissing declaratory

[1]As noted above, the Attorney General entered into a contract with Special Prosecutor Tarantino, but the formalization of that agreement included the Governor's requisite signature.

judgment action initiated by the Guam legislature after the legislature passed a resolution requesting withdrawal and amended statute to remove this court's jurisdiction over action where such a resolution has been entered); *Merchant v. Nanyo Realty*, 1997 Guam 16 (holding that the legislature had intended that, generally, our jurisdiction must be predicated upon a final judgment in the court below, and dismissing the appeal for lack of such).

[9] Despite statutory provisions expressing a broad grant of jurisdiction, *see* 7 GCA §§ 3107 and 3108 (1994), where other statutory provisions contain specific limitations on the ability of a party to pursue appellate relief, we must respect those restrictions. In this instance, the disqualification of a prosecutor by the trial judge is a determination from which direct appeal is simply not available. Regardless of our broad jurisdiction, we will not consider an issue which a party is statutorily not permitted to advance.

[10] 8 GCA § 130.20 (1993) lists in detail those matters which the People can appeal in a criminal proceeding. It addresses both pre-trial orders and those following judgment. It permits appeals from orders granting suppression motions; *see* 8 GCA § 130.20(a)(6); and from orders made after judgment affecting the substantial rights of the government. *See* 8 GCA § 130.20(a)(3). It does not specifically provide for the appeal of a decision disqualifying the prosecutor assigned to the case. Nor is there a more general allowance which could be read to encompass this issue.

[11] The Ninth Circuit Court of Appeals has previously concluded that this section establishes the absolute limits of those matters which the People can pursue on direct appeal. *Guam v. Ulloa*, 903 F.2d 1283, 1285-1286 (9th Cir. 1990); *see also Guam v. Estrebor*, 848 F.2d 1014 (9th Cir. 1988). The determination in *Ulloa* was based on a line of Supreme Court opinions holding that the authority of the People to appeal rulings in a criminal case cannot exceed express statutory authorization. 903 F.2d at 1286. We accept this conclusion and hold that, because neither 8 GCA § 130.20 nor any

other provision of Guam's statutes permits such issue to be appealed, it is disallowed.

[12] This determination is reinforced by a substantial body of case authority indicating appeals of attorney disqualifications are generally not available and that review of such orders must be pursued through a collateral attack. Disqualification determinations do not generally meet finality requirements and the Supreme Court has held, as a rule, these are not appealable. *See, e.g.*, *Richardson-Merrell v. Koller*, 472 U.S. 424, 105 S.Ct. 2757 (1985). Although *Richardson-Merrell* is a civil case, and an analysis involving a criminal defendant's right to counsel of his choice would be quite different, the discussion surrounding the ability to appeal reaches the question of the People's legal representative, and is applicable in this instance. 472 U.S. at 432; 105 S.Ct. at 2762.

[13] As a final comment on this issue, we note that Appellant failed to identify the issue of the disqualification of the People's counsel in the Notice of Appeal which initiated the matter before us. That Notice indicates that this is an appeal from the entry of a dismissal order. It does not speak to the issue of the disqualification in any manner. In a prior case, we gave notice that the court could insist on strict compliance with Rule 3(c) of the Guam Rules of Appellate Procedure in its requirement that the matters appealed from be expressly designated in the Notice. *Ward v. Reyes*, 1998 Guam 1, ¶ 7(permitting an appeal from the denial of a Motion for Reconsideration to be treated as an appeal of the underlying judgment based on the specific facts of the case). As a general rule, the Notice of Appeal is treated as defining the parameters of an appellate court's subject matter jurisdiction. *See, e.g., Culinary & Serv. Employees Union Local 555 v. Hawaii Employee Benefit Admin.*, 688 F.2d 1228, 1232 (9th Cir.1982) (stating "[w]here no notice of appeal from a post-judgment order awarding attorneys' fees is filed, the court of appeals lacks jurisdiction to review the order.").

[14] Based upon the foregoing, we conclude that we lack jurisdiction to consider the issue of

attorney disqualification.

II.

[15] We next address the issue of the indictment's dismissal and hold that dismissal of the indictment cannot be justified for several reasons. First, the record contains no evidence in support of the claims raised by Appellees' trial counsels. When the record contains no evidence supporting a court's decision, an abuse of discretion occurs. *People v. Tuncap*, 1998 Guam 13, ¶ 13. Without such, we are unable to determine if relevant factors were actually considered by the trial court. *Id.* at 12.

[16] The hearing record essentially focused on three allegations: 1) the Chief Prosecutor rushed the matter to the grand jury so that he could have an important case indicted immediately before a legislative oversight hearing; 2) the Chief Prosecutor held a press conference after the indictment was returned; and 3) the suspected Chief Investigator had been involved in the investigation of the Defendants. All of these claims, offered in support of the various grounds of dismissal, were presented to the court as offers of proof and not as evidence.

[17] Likewise, we are also unable to determine what factors the court considered and found relevant in dismissing the case. In matters of discretion, the trial court must make findings that enable a reviewing court to determine if relevant factors were properly weighed. *See Tuncap* at ¶ 12. Clearly, the trial court accepted some or all of the factual assertions offered in support of dismissal. However, there is no statement as to what theory or facts persuaded the judge to dismiss. Moreover, the state of the record does not permit us to surmise such basis. As the record now stands, we find the factual claims to be unsubstantiated and, accordingly, the trial court's dismissal with prejudice cannot stand.

[18] We also find that legal authority addressing a trial court's use of supervisory authority to dismiss a case does not support the action taken under the circumstances now before us. While we agree with Appellees' submissions describing the general nature of such authority, the parameters surrounding actual exercise suggests the use of such authority is limited, and in this particular matter, inappropriate.

> The exercise of supervisory authority is appropriate under three circumstances: 1) where a remedy for a violation of a recognized statutory, procedural, or constitutional right is required; 2) where judicial integrity must be preserved by ensuring that a conviction rests on appropriate considerations validly before a jury; and 3) where the court seeks to deter future illegal government conduct.

United States v. Jennings, 960 F.2d 1488, 1491 (9th Cir. 1992)(citations omitted). For prosecutorial misconduct to support the supervisory exercise of dismissal as a sanction, the misconduct must be both flagrant and prejudicial. *See United States v. Jacobs*, 855 F.2d 652, 655-56 (9th Cir. 1988) (holding that trial judge abused his discretion in dismissing indictment based upon perceived government misconduct in failing to comply with a discovery order).

[19] The evidentiary record, such as it is, is unclear as to both what misconduct occurred and what prejudice was incurred by the Defendants. Appellees argue the trial court properly exercised its discretionary and inherent supervisory authority to remedy wrongs based on abuse of position[2], a conflict of interest and prejudice to the defendant[3]. Appellees' Brief at 23.

[20] Even if the court assumed the factual claims supporting these grounds to be true, they do not

[2]Apparently relating to the issue of abuse of position, the record of the 30 September 1996 hearing reflects that Benavente's counsel asserted that he had spoken to unnamed investigators in the prosecution office and, if called to the stand, they would testify that the Chief Prosecutor was told that the cases could not be properly prepared for the grand jury in the short time within which the Chief Prosecutor wished to proceed. It was further represented that the Chief Prosecutor wanted an indictment on the day that he presented evidence because he had a legislative oversight hearing the following day. Excerpt of Record at 112-114. Nothing in the record indicates that representatives from the prosecution were present to testify nor were defendants required to call witnesses to support these claims.

[3]The Appellees also argue that the trial court dismissed based on want of prosecution. For reasons set forth in the opinion, we discuss this issue separately.

support dismissal of the indictment with prejudice. Absent substantial defects in the indictment, there is no basis for relief even if the twenty-six page document reflected both an incomplete investigation and hasty presentation to the grand jury. If there were defects, the appropriate relief would normally have been dismissal without prejudice. *See, e.g.*,8 GCA §65.55 (1993) (allowing court, where it grants a dismissal based upon defects in the institution of the prosecution or the pleadings, to hold the defendant in custody for some period of time *pending refiling*)(emphasis added).

[21] As to the press conference, this is the one assertion where there is a clear indication of prejudice being claimed. It was represented that Appellee Benavente's name was "splattered" across the media as a consequence of the press conference. This conduct embarrassed him to the point where his family had to do grocery shopping for him and caused him to take medication to sleep. Excerpt of Record at 111-112. Another adverse consequence, asserted by Benavente, was the reassignment of his duties at the Department of Health which resulted in him being tasked with changing light bulbs.

[22] The problem with these claims is that they are natural consequences of an indictment being filed in open court. There is no basis presented for finding that "but for" the press conference these incidents would not have happened. Additionally, there is also the question of whether a prosecutor holding a press conference thereby engages in flagrant misconduct. While it may very well be imprudent to take such action, given the record, we do not find this conduct improper.

[23] As to the Chief Investigator's role, it is not clear from the record what his investigative involvement was supposed to have been and what prejudice resulted to the Appellees. While the record reflects a great deal of speculation and innuendo, hard evidence was not presented that would support any claim of prejudice to the Appellees. Again, if there was a basis for finding that the

charging process had actually been compromised by the investigator's participation, before his complicity was known to the Chief Prosecutor, dismissal without prejudice, pursuant to statute, would have provided protection for the Defendants.

[24] The final basis for the dismissal asserted by the Appellees was based on want of prosecution. We address this issue separately for two reasons. First, the issue is supported by substantiated facts.[4] Second, Appellees' brief, although inviting us to affirm the trial court's decision based on a number of grounds, relies primarily upon case authority associated with dismissals based on want of prosecution. The issue can be addressed on the merits and, thus, deserves specific attention.

[25] A dismissal on the basis of want-of-prosecution is to be employed with caution and only after the prosecution is forewarned that the court is contemplating doing so if no action is taken on the case. *United States v. Simmons*, 536 F.2d 827, 836 (9th Cir. 1976). *See, e.g., United States v. Towill*, 548 F.2d 1363, 1368-69 (9th Cir. 1977) (justifying dismissal on the basis that the trial judge had, after denying the prosecutor's repeated motions for continuances, warned of dismissal if the prosecution did not go forward on the scheduled trial date).

[26] In this case, the government was not told that the matter would be dismissed if the case did not proceed on the scheduled date, nor is there any indication that the motion to dismiss was even noticed. Although Appellees claim the "case" was forwarded to the governor with notice of the further proceedings in the matter and that "the purpose of the further proceedings was to address numerous motions filed by defense counsel, including various motions to dismiss," Appellees Brief

[4]The factual basis of the dismissal is based, in objective evidentiary terms, on the fact that on 24 September 1996 the Governor was advised that he would need to appoint a special prosecutor and that, six days later, he had not appointed an attorney to appear at the hearing. This factual history appears to be the only substantiated set of circumstances set forth in the record. As to the want-of-prosecution claim, it appears to be a fact that on 24 September 1996 the trial judge transmitted his disqualification order in this matter to the Governor's legal counsel. Excerpt of Record at 28 (24 September 1996 order) and 107 (trial judge noting for record during the 30 September 1996 hearing that Mary Louise Wheeler had been served on 24 September at 5:15 PM). It is also clear that no special prosecutor appeared six (6) days later at the further proceeding.

at 7; none of the documents[5] transmitted to the Governor make reference to a motion to dismiss. Even more significant, the motions to dismiss entertained by the court at the 30 September 1996 hearing were not based on written filings. Excerpt of Record at 106-125. Instead, the trial court opened the floor and invited oral motions by stating: "I'll accept a motion from any of the defense counsel". Excerpt of Record 107, ll:18-19. Consequently, the trial court's dismissal without prior notice or warning was inappropriate. Had the trial court in this matter included in the order that he would dismiss the case if no special prosecutor appeared at the subsequent proceeding, a much stronger basis to proceed upon would be present. Likewise, had the Governor's counsel been advised of the motions to dismiss, there might be more justification in considering them at the hearing.

[27] Finally, we note the time interval in question does not lend itself to an inference that dismissal is appropriate. *See United States v. Barboza*, 612 F.2d 999, 1001 (5th Cir. 1980) (holding that a delay of 87 days between arraignment and trial was not long enough to be considered presumptively prejudicial for purposes of a Rule 48 dismissal motion). In this case, the trial judge apparently believed that the Governor would be able to make the appointment in one day. *See* Excerpt of Record at 102, ll:5-16. The period of inactivity in question here was six (6) days starting from the date of the order until dismissal on 30 September 1996 while the total elapsed time from indictment to dismissal was 76 days.

[28] In sum, not only were there no findings made supporting dismissal, such findings could not have been properly made as the record is devoid of evidence necessary to support them. In addition, even assuming the allegations to be true, they fall short of that required by law. Finally, this entire

[5]The documents transmitted to the Governor included the following: the September 26, 1996 Order, the indictment, and the verified complaint. Excerpt of Record at 107.

matter occurred without notice being given to the Governor, or his legal counsel, that motions to dismiss were being entertained. The dismissal is deficient in both fact and law.

CONCLUSION

[29] For the reasons noted above, this matter is **REVERSED** and **REMANDED** with instructions that the indictment be reinstated.

JANET HEALY WEEKS
Associate Justice

EDUARDO A. CALVO
Associate Justice

PETER C. SIGUENZA
Chief Justice