

**IN THE
SUPREME COURT OF THE REPUBLIC OF PALAU
APPELLATE DIVISION**

<p>VILMA YOSHIWO, <i>Appellant,</i> v. REPUBLIC OF PALAU, <i>Appellee.</i></p>
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Cite as: 2023 Palau 12
Criminal Appeal No. 22-007
Appeal from Criminal Case No. 21-067

Decided: April 17, 2023

Counsel for Appellant	Johnson Toribiong
Counsel for Appellee	April D. Cripps

BEFORE: OLDIAIS NGIRAIKELAU, Chief Justice, presiding
JOHN K. RECHUCHER, Associate Justice
DANIEL R. FOLEY, Associate Justice

Appeal from the Trial Division, the Honorable Kathleen M. Salii, Presiding Justice.

OPINION

NGIRAIKELAU, Chief Justice:

[¶ 1] This appeal asks us whether a defendant’s constitutional protection against double jeopardy bars a new trial after the Appellate Division set aside a conviction because of some error in the proceedings leading to conviction.

[¶ 2] Because our prior reversal was based solely on a procedural trial error, double jeopardy did not attach. Thus, we **AFFIRM**.

BACKGROUND

[¶ 3] On November 12, 2021 Appellant Vilma Yoshiwo was convicted by the Trial Division with Misconduct in Public Office, 17 PNC § 3918 ("Count

1"), Violation of the Code of Ethics, 33 PNC § 603 ("Count 2"), and Theft of Government Property in the First Degree, 17 PNC § 2615 ("Count 3"). Crucially, during trial, the trial judge did not allow Yoshiwo to confer with her attorney during a brief recess between her direct and cross examination.

[¶ 4] Last year, Yoshiwo appealed the trial court's judgment and argued first that the Trial Division committed clear error in finding Appellant guilty on insufficient evidence; and second that the trial court violated Appellant's constitutional right to counsel by preventing her from conferring with her attorney. On July 13, 2022, the Appellate Division found that Yoshiwo's constitutional right to counsel was in fact violated. *Yoshiwo v. Republic of Palau*, 22 Palau 15 ¶ 37. The Appellate Division vacated the convictions and remanded the case to the Trial Division for a new trial.

[¶ 5] The case was reassigned to a new trial judge, and Yoshiwo moved to dismiss based on double jeopardy. The Trial Division denied the motion, explaining that jeopardy did not attach because the Appellate Division vacated the convictions as if no trial had occurred. Yoshiwo appeals the Trial Division's decision.

STANDARD OF REVIEW

[¶ 6] Constitutional interpretation is a matter of law. *Otobed v. Palau Election Commission*, 20 ROP 4, 7 (2012). A lower court's conclusions of law are reviewed de novo. *See Wong v. Obichang*, 16 ROP 209, 211-12 (2009).

DISCUSSION

[¶ 7] Article IV, section 6, of the Constitution of the Republic of Palau provides "[n]o person shall be placed in double jeopardy for the same offense." This provision prohibits: (1) a second prosecution for the same offense; and (2) multiple punishments for the same offense at a single trial. *Remengesau v. Republic of Palau*, 18 ROP 113, 122-23 (2011). Because Palau's double jeopardy clause is similar to the double jeopardy clause in the United States Constitution, courts in Palau look to United States case law as an aid in interpreting the scope of double jeopardy protection. *See id.*; *see also Gideon v. Republic of Palau*, 20 ROP 153 (2013).

[¶ 8] The Double Jeopardy Clause manifests a constitutional policy of finality in criminal proceedings for the benefit of the defendant. *Akiwo v. Supreme Court*, 1 ROP Intrm. 96, 99 (1984) (citing *United States v. Jorn*, 400 U.S. 470 (1971) (plurality opinion)). If a defendant is acquitted, or if he is convicted and the conviction is upheld on appeal, he may not be retried for the same offense. *Id.* (citing *United States v. Ball*, 163 U.S. 662 (1896)). The intention is to “protect an individual from being subjected to the hazards of trial and possible conviction more than once from an alleged offense.” *Republic of Palau v. Tmetuchl*, 1 ROP Intrm. 443, 465 (1988) (quoting *Burks v. United States*, 437 U.S. 1, 11 (1978)).

[¶ 9] Yoshiwo asks us to interpret our Constitution strictly and without exceptions to protect her right against double jeopardy. She argues that the plain text of our Constitution is not qualified by any exception.

[¶ 10] Nonetheless, the protection against double jeopardy must balance the competing interest of the defendant and society's interest in the fair and prompt administration of justice. “It would be a high price indeed for society to pay were every accused granted immunity from punishment because of any defect sufficient to constitute severable error in the proceedings leading to conviction.” *United States v. Tateo*, 377 U.S. 463, 466 (1964).

[¶ 11] As such, where a defendant’s conviction is set aside because of some error in the proceedings leading to conviction, he may be retried without violating his protection against double jeopardy. *See Lockhart v. Nelson*, 488 U.S. 33, 38 (1988); *see also Burks v. United States*, 437 U.S. 1, 15 (1978).

[¶ 12] It also follows that the Double Jeopardy Clause precludes a second trial once the reviewing court has reached the merits of the case, for instance, by finding the evidence legally insufficient. *Tmetuchl*, 1 ROP Intrm. at 465; *see also Burks*, 437 U.S. at 18 (“[R]eversal for trial error, as distinguished from evidentiary insufficiency, does not constitute a decision to the effect that the government has failed to prove its case.”). Put another way, double jeopardy attaches where an appellate court’s reversal resolves the *merits* of the case, rather than merely setting aside a conviction tainted by a procedural trial error.

[¶ 13] When we set aside Yoshiwo’s convictions, vacated her sentence, and remanded the case to the Trial Division for a new trial, we did not consider the

merits of Yoshiwo’s case. The reversal was based solely on a procedural trial error, the failure to let Yoshiwo consult with her counsel during recess. Through our remand, we awarded Yoshiwo the opportunity for a fair trial on the merits, in full respect of her constitutional rights. The Trial Division did not err by denying the motion to dismiss.

[¶ 14] Yoshiwo further argues that double jeopardy attaches because the trial court violated her *constitutional* right to counsel, which does not amount to a mere procedural error, and that a constitutional violation requires a dismissal by the Appellate Division. Appellant provides no authority to support this contention, and we have repeatedly ruled that “[u]nsupported legal arguments need not be considered by the Court on appeal. *See Gibbons v. Seventh Koror State Legislature*, 13 ROP 156, 164 (2006). Nonetheless, we have to disagree.

[¶ 15] Our Constitution safeguards procedural rights and substantive rights equally, and a constitutional protection may very well be procedural in nature. This is undoubtedly the case for the right to counsel. *See e.g., Dalton v. Heirs of Borja*, 5 ROP Intrm. 95, 101 (1995) (“criminal procedural protections such as the right to counsel and proof beyond a reasonable doubt are both necessary and appropriate to protect the due process rights of parties and prevent the arbitrary exercise of judicial power”); *Republic of Palau v. Decherong*, 2 ROP Intrm. 170, 171 (1990) (finding that the fundamental right to assistance of counsel is to ensure that the accused will not lose benefit of a procedural protection because of the ignorance of the law.). Furthermore, we have previously remanded cases in which the Trial Division violated the constitutional rights of the defendants. A case in point is *Pamintuan v. Republic of Palau*, 16 ROP 32 (2008), where the defendants were not provided with interpreters. We explicitly reversed and remanded the defendants’ convictions on both constitutional and statutory grounds. As a result, Yoshiwo’s argument finds no support in this jurisdiction.

CONCLUSION

[¶ 16] We **AFFIRM** the Trial Division’s order.