ROP v. Wolff, 10 ROP 180 (Tr. Div. 2002)
REPUBLIC OF PALAU,
Plaintiff,

v.

MARTIN WOLFF,
Defendant.

CRIMINAL CASE NO. 99-253

Supreme Court, Trial Division
Republic of Palau

Decided: March 13, 2002
⊥181
ARTHUR NGIRAKLSONG, Chief Justice:

Defendant's motion to dismiss this case on the grounds of ineffective assistance of counsel, violation of his right to speedy trial, and lack of probable cause is DENIED. The motion was heard on January 28, 2002.

INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM

Defendant argues that all public defenders who have represented him in this case failed to "investigate witnesses and physical evidence, along with the failure to test or preserve the physical evidence, [which] has resulted in the loss of exculpatory evidence and makes it virtually impossible for defendant to present an effective defense." At the hearing, when the Court asked Defendant to name the public defenders who were incompetent, he replied that it was the Public Defenders Office as an institution that provided him with incompetent legal representation. This has allegedly made it impossible for Defendant to "receive a fair trial." The remedy, according to Defendant, is the dismissal of the charges.

As an initial matter, Defendant's ineffective assistance of counsel claim is premature. It is well-settled that a defendant cannot demonstrate prejudice until there is a judgment entered against him. Ineffective assistance of counsel claims should be raised in habeas proceedings. *See Saunders v. ROP*, 8 ROP Intrm. 90, 91 (1999) (citing *ROP v. Decherong*, 2 ROP Intrm. 152, 168 n.8 (1990)).

In any event, the Court will endeavor to address Defendant's claim. The Palau Constitution affords criminal defendants "the right to counsel." Palau Const. art. IV, § 7. To give effect to this guarantee, "courts have construed it to confer a right to effective counsel and to give rise to a constitutional claim where counsel's performance was deficient and the deficiency prejudiced the defense." *Saunders*, 8 ROP Intrm. at 90-91. Further, Rule 1.1 of the ABA Model Rules of Professional Conduct defines competence of attorneys:[1] "Competent

[1]The ABA Model Rules apply in this jurisdiction by virtue of paragraph (h), Rule 2 of the Disciplinary

representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."

Here, Defendant has failed to show prejudice or to prove that the public defenders who represented him lacked the legal knowledge, skill, thoroughness, and the capacity to prepare his case.

Johnson Toribiong filed an affidavit in support of Defendant's motion to dismiss. Mr. Toribiong concluded in his affidavit that the Public Defender's Office was ineffective as Defendant's counsel. Defendant filed his Reply Memorandum on November 28, 2001, in which he characterized Mr. Toribiong's affidavit "as an expert opinion in the pending Motions to Dismiss." Not only does the Court ⊥182 fail to see how an "expert opinion" is necessary to decide this matter, when the Court asked Defendant how Mr. Toribiong became an "expert" on the speedy trial and effective assistance of counsel doctrines, Defendant provided no justification.

The Court further finds that Defendant failed to cooperate with Mr. Brown, the last public defender to represent him. Defendant did not give Mr. Brown an opportunity to prepare his case. Instead, Defendant took his case to Mr. Toribiong for legal representation.

Mr. Brown filed a motion to withdraw as Defendant's counsel on October 2, 2001. In his supporting papers, Mr. Brown asserted:

> 1. That Defendant (Wolff) has failed to cooperate with counsel in preparing his case for trial.
>
> 2. That Defendant has met with the undersigned counsel only once, that being on August 6, 2001.
>
> 3. That on August 6, 2001, Defendant was asked to provide the names of any witnesses he wished to call on his behalf at trial and the substance of their expected testimony.
>
> 4. Defendant on August 6, 2001 also stated he would provide counsel with his written version of the facts surrounding the charges in his case.
>
> 5. That Defendant has not supplied counsel with either his list of witnesses or his versions of the facts.
>
> 6. That Johnson Toribiong is Martin Wolff's attorney behind the scene in this case.

Paragraphs 7 and 13 of the same certificate of motion recount Mr. Toribiong's role in this case as the "attorney behind the scene." Mr. Toribiong negotiated a plea agreement for

---

Rules.

Defendant and filed a motion to confirm the plea agreement. (*See* Order of October 30, 2001, and Clarification of same day.)

Negotiating a plea agreement for a client is an important duty of an attorney to his client. A plea agreement may terminate a case entirely. In this case, the only attorney of record for Defendant at the time was Mr. Brown. Mr. Toribiong was not the attorney of record when he negotiated a plea agreement, for which he subsequently filed a motion to confirm without filing a notice of joint appearance or substitution of counsel.

In a subsequent certificate of motion filed on October 30, 2001, Mr. Brown stated:

> 1. That Defendant has failed to cooperate with counsel in preparing his case for trial and will never cooperate with counsel.
>
> 2. That Defendant agreed at the hearing on October 9, 2001 that under no circumstances should the undersigned counsel be allowed to continue to represent the Defendant.

⊥183 3. That the Defendant and the undersigned counsel are now adversaries because the defendant has alleged ineffective assistance of counsel, . . .

> 4. That Defendant has completely destroyed any possible attorney-client relationship.

Defendant brought this ineffective assistance of counsel charge prematurely. Even so, Defendant has not only failed to prove any Public Defender who represented him in this case was incompetent, he has successfully destroyed any possible attorney-client relationship with the Public Defenders Office.

Accordingly, Defendant's motion to dismiss for ineffective assistance of counsel is DENIED.

VIOLATION OF THE RIGHT TO A SPEEDY TRIAL CLAIM

The Court accepts the government's statement of facts in its opposition to Defendant's motion to dismiss for lack of speedy trial. This case was filed on September 16, 1999. The Court issued a penal summons, directing Defendant to appear on September 22, 1999, for his first appearance hearing. On that date, Defendant was released on his own recognizance. He has not spent a day in jail for this case. On January 20, 2000, the trial was set for July 11, 2000, after two status conferences, one on October 22, 1999 and the other on November 26, 1999. On April 11, 2000, Defendant filed a motion to seek medical treatment outside of Palau. In that motion, Gary Soberay, counsel for Defendant at the time, stated that since September 22, 1999, "Mr. Wolff has undergone three surgery procedures at Belau National Hospital. The attending surgeon, Dr. Sung II Yoon, strongly recommended that Mr. Wolff receive off-island treatment for evaluation, management and surgery as soon as possible. Dr. Yoon has opined that if Mr. Wolff

does not receive off-island treatment, his condition could become life-threatening." Dr. Yoon's letter was attached to Defendant's motion. The Court granted Defendant's motion on April 14, 2000. The Court re-set the trial to October 9, 2001. On August 18, 2001, Mr. Toribiong posted a surety bond to allow Defendant to seek a medical evaluation at the Mayo Clinic. The trial date of October 9, 2001, was converted into a hearing on Mr. Brown's motion to withdraw as Defendant's counsel. At the hearing on October 9, 2001, the Court asked the parties to agree on the new trial date. On December 4, 2001, the Court again granted Defendant's motion to travel off-island to seek medical treatment, this time in Hong Kong.

To review a speedy trial violation claim, this jurisdiction has adopted the tests enunciated by the United States Supreme Court in *Barker v. Wingo*, 92 S. Ct. 2182 (1994). *ROP v. Sisior*, 4 ROP Intrm. 152 (1994); *Decherong*, 2 ROP Intrm. at 164.

The test is a balancing of four factors on an *ad hoc* basis. The four factors are: (1) length of delay, (2) the reason for the delay, (3) the defendant's assertion of his right to a speedy trial, and (4) prejudice to the defendant.

It is now thirty (30) months since the information was filed. This *per se* may be presumptively prejudicial. However, the reason for the delay is attributable to Defendant's illness. The presumption of prejudice due to the length of delay disappears ⊥184 when it is shown that Defendant caused the delay. Also, Defendant has never asserted his right to speedy trial. Finally, Defendant has not shown any prejudice to him as a result of the delay. He has not spent a day in jail and has been allowed to travel to the Mayo Clinic in Minnesota and to Hong Kong for medical treatment .

Accordingly, Defendant's motion to dismiss for lack of a speedy trial is DENIED.

LACK OF PROBABLE CAUSE CLAIM

Defendant moved to dismiss the information on the ground that it is not supported by probable cause. The Court finds that probable exists. The affiant stated that a witness told him that she was at her house in Ngchesar and "heard a loud noise coming from the Martin Wolff's home." The witness also said she "smelled something burning, could see smoke and heard Martin Wolff shouting three times." The witness, at a closer distance, saw that Martin Wolff's house was on fire. The affiant also stated that two other witnesses informed him that Defendant had told them that he intended to burn his house. There exists probable cause in support of the information.

Accordingly, Defendant's motion to dismiss is DENIED.