Noah v. ROP, 11 ROP 227 (2004)
ARCHER NOAH,
Appellant,

v.

REPUBLIC OF PALAU,
Appellee.

CRIMINAL APPEAL NO. 03-003
Criminal Case No. 02-150

Supreme Court, Appellate Division
Republic of Palau

Argued: July 16, 2004
Decided: September 17, 2004
⊥228
Counsel for Appellant: Mariano W. Carlos

Counsel for Appellee: Christopher S. Boeder

BEFORE: ARTHUR NGIRAKLSONG, Chief Justice; LARRY W. MILLER, Associate Justice; R. BARRIE MICHELSEN, Associate Justice.

Appeal from the Supreme Court, Trial Division, the Honorable KATHLEEN M. SALII, Associate Justice, presiding.

MILLER, Justice:

Archer Noah ("Noah") appeals from the trial court's verdict finding him guilty of one count of possession of a firearm in violation of 17 PNC § 3306(a) and one count of possession of ammunition in violation of 17 PNC § 3306(b).[1] The only issue that Noah raises for appeal is whether his conviction was justified under the language of the relevant statutes because he was not the individual who was in possession of the firearm and ammunition at the time it was discovered by the police. Because a defendant can be convicted of possession of a firearm regardless of when he possessed it, as long as the prosecution can prove that he possessed it at some point, we affirm.

BACKGROUND

On June 6, 2002, police officers were looking for a suspect in a burglary investigation when they spotted Curtis Chapman ("Chapman") bending down to place a gun on the ground near a mangrove area. When the officers inspected the gun, they found that it was a loaded .22 caliber revolver. Chapman was arrested and taken to the police station. Later that day, the police

[1]The trial court stayed execution of sentence pending this appeal.

executed a search warrant at Chapman's residence and found ammunition under his mattress and a box near his bed. After Chapman told the police how he had obtained the gun, the police arrested Noah in Ngarchelong and brought him to the Koror jail. Noah was interrogated the next day, and he told the police that he had found a .22 caliber revolver with a rusted trigger in May of 2002. He applied baby oil to the trigger so that the cylinder would turn, and he then showed the gun to Chapman, who expressed an interest in buying the gun. Noah stated that he packaged the gun in a small cardboard box and arranged for it to be delivered to Chapman.

Chapman testified at trial that on June ⊥229 5, 2002, he had a telephone conversation with Noah, during which he agreed to pay $50.00 for the gun. Noah told Chapman that he would have someone named Patricia deliver the gun to Chapman. The next day, Patricia gave Chapman a sealed box containing a gun and ammunition. Noah's brother, Richer Noah, testified that Noah gave him a sealed cardboard box and instructed him to give the box to Patricia. Patricia Frank testified that Richer Noah gave her a sealed cardboard box to take to Koror, and she hand-delivered the package to Chapman. In exchange, Chapman gave Patricia a broken calculator that had money inside and instructed her to give it to Noah.

STANDARD OF REVIEW

The trial court's factual findings in a criminal case will not be set aside unless they are clearly erroneous. *ROP v. Sakuma,* 2 ROP Intrm. 23, 31 (1990). The trial court's conclusions of law are reviewed *de novo* on appeal. *Roman Tmetuchl Family Trust v. Whipps*, 8 ROP Intrm. 317, 318 (2001).

ANALYSIS

Noah argues that the trial court committed reversible error in finding him guilty of possession of a firearm and ammunition under the facts of this case. Although Noah admits that he owned or possessed the gun and ammunition at one point in time, he boxed up these items and had them transported to Koror where Chapman received them, paid for them, and took them into his possession, custody, and control. Noah asserts that he cannot be convicted of possession of a firearm or ammunition because he gave up or abandoned possession of the gun and ammunition when he sent them to Chapman.

The government responds that it does not allege that Noah possessed the gun and ammunition on June 6, 2002, when the police found Chapman holding the gun, but that Noah was charged with, and convicted of, possession of the contraband from the day he found the items until the day he delivered them to Chapman. The government asserts that the duration of the possession does not matter as long as there is sufficient proof of actual or constructive custody or control by the defendant at some point in time. *See People v. Palaschak*, 893 P.2d 717, 721 (Cal. 1995) (holding that direct or circumstantial evidence of past possession was sufficient to sustain a conviction for possession of drugs).

We agree with the government's argument. It is undisputed that Noah found a gun, took possession of it, and delivered the gun and ammunition to Chapman. Even though Noah argues

that he should not be held accountable under the law for possession of the illegal contraband because he abandoned it or gave it up, accepting this argument would lead to an absurd result. A defendant cannot treat illegal contraband as a proverbial "hot potato" and exculpate himself by selling or delivering the illegal goods. Under Noah's argument, only those who were caught at the moment that they possessed illegal contraband could be prosecuted for possession. This is not the situation that exists under the current law.

The statute that prohibits the possession of firearms and ammunition states in relevant part as follows:

> (a) Any person who knowingly shall import, possess, use, manufacture or have in his custody or control, any firearm shall be guilty of a felony . . . .
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> ⊥230
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> (b) Any person who knowingly shall import, possess, use, manufacture or have in his custody or control any ammunition shall be guilty of a felony . . . .

17 PNC §§ 3306(a) and (b). The Palau National Code defines "possess" to mean "to have in one's actual or constructive custody or control." 17 PNC § 3303(i). Relying on this language, Noah asserts that he is not a member of the class of individuals that the Olbiil Era Kelulau ("OEK") intended to punish. Noah contends that the language of the statute indicates that the OEK did not intend to pursue every past possessor of a gun found in someone else's possession or control when it passed the Firearms Control Act. Had the OEK intended to prosecute past possessors, Noah asserts that the legislators could have changed the definition of "possess" to mean "to have or *have had* in one's actual or constructive custody or control." Instead, Noah argues that the OEK limited the language of the statute to pertain only to those who were found to have guns and/or ammunition in their present custody or control.

We disagree. The plain language of the statute does not expressly require present possession of a firearm at the time of the arrest for a person to be charged and convicted. Although the Palau National Code defines all crimes using the present tense, the government is only required to prove that the defendant committed the offense at some point in time. Therefore, even though Noah did not have possession of the illegal contraband at the time it was discovered by the police or at the time he was arrested, evidence of his past possession of the firearm and ammunition was sufficient to support his conviction.

Noah further argues that the legislative intent was to criminalize only present possession of firearms because of the harsh penalty for possession and the need to limit the government's discretion to pick and choose who it should prosecute from the long line of people who may, at one time or another, have come into possession of a gun. *See ROP v. Palau Museum*, 6 ROP Intrm. 277, 278 (1995) ("In the interpretation of statutes, the all-important or controlling factor is the legislative will."). However, Noah has not provided us with any extrinsic evidence of the legislature's intent in enacting the Firearms Control Act, and the language of the statute does not support his interpretation.

We conclude that 17 PNC § 3306 criminalizes any firearm possession, regardless of when

that possession took place. It may be difficult for the government to prove past possession, but where, as here, the suspect admits to possessing the gun at one time and that admission is supported by the evidence, the government should be able to prosecute him for that possession. Noah is correct that the statutory definition of possession requires present control over and access to an item of contraband, but he overlooks the fact that he did have present and exclusive control over and access to the gun at one point in time. Therefore, because past possessors are subject to the same criminal liability as present possessors under the language of the statute, there was sufficient evidence to support Noah's conviction for possession of a firearm and ammunition under the facts of this case.

CONCLUSION

For the foregoing reasons, Noah's conviction is sustained.

⊥231

NGIRAKLSONG, Chief Justice, concurring:

I concur because I believe appellant's interpretation[2] of the firearm statute borders on being frivolous.

The facts are not in dispute. Appellant Archer Noah ("Noah") admitted that he owned or possessed a gun and ammunition at one time. Later, he packed them up and sold them to Curtis Chapman ("Chapman"). The police, in an unrelated investigation, found Chapman in possession of the same gun. Later the police executed a search warrant at Chapman's house and found ammunition under his mattress. Chapman told the police where he got the gun. Noah was arrested the next day.

Noah argues that he cannot be convicted of possession of a firearm and ammunition because he parted with the gun and ammunition when he sold them to Chapman. Chapman, the last person to have them, was the person caught by the police. From this, Noah argues that there is nothing in the statute, which is written in the present tense, that subjects him to the firearms and ammunition prohibition. And had the Olbiil Era Kelulau ("OEK") intended to apply the prohibition against firearms and ammunition to Noah or any person who abandons the possession of a firearm or ammunition before getting caught, the OEK could have enacted an

[2]Statutory construction presents a question of law. *ROP v. Etpison* , 5 ROP Intrm. 313, 317 (Tr. Div. 1995). Questions of law are reviewed *de novo*. *Elbelau v. Semdiu,* 5 ROP Intrm. 19, 21 (1994).

express statutory prohibition.[3] Thus, Noah argues, the silence[4] of the OEK on this set of facts gives him the green light to possess a firearm and ammunition as long as he can unload them on to someone else in a "timely" manner.

> The statute that prohibits the possession of firearms and ammunition states as follows:
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> (a) *Any person* who knowingly shall import, possess, use, manufacture or have in his custody or control, any firearm shall be guilty of a felony and upon conviction thereof shall be fined not more than $5,000.00, receive no compensation for the ⊥232 firearm(s), and be imprisoned for not less than 15 years.
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> (b) *Any person* who knowingly shall import, possess, use, manufacture or have in his custody or control any ammunition shall be guilty of a felony and upon conviction thereof shall be fined not more than $1,000.00, receive no compensation for such ammunition, or be imprisoned not more than 5 years or all of these.

17 PNC §§ 3306(a) and (b) (emphasis added). The statute also provides specific exemptions to the prohibition:

> (a) A law enforcement officer may possess a firearm while acting in an official capacity only with express written permission of the President or the state chief executive in the case of a state law enforcement officer within the state jurisdiction upon approval of the same by the President. Such written permission shall express the purpose and time of authorized possession; but, in no case, shall any law enforcement officer possess a firearm while on off-duty hours. The President and each state chief executive shall submit a quarterly report to the presiding officers of the Olbiil Era Kelulau disclosing the names of all law enforcement officers who were given such permission and the circumstances under which they were given.
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> (b) Members of the Armed Forces lawfully in the Republic may possess firearms

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[3]Noah offers basically just one canon of statutory interpretation in support of his argument. One does not employ only one rule of statutory construction in discerning the intent of the statute because for every canon, there is almost always a contrary one. For example, here, one could say that had the OEK intended to exempt Noah, it could have provided for a statutory exemption along with the other exemptions provided in the law.

More importantly, if a statute is ambiguous, courts and anyone else who seeks to interpret the statute "must . . . exhaust the 'traditional tools of statutory construction' to determine" the intent of the statute. *Natural Res. Defense Council, Inc. v. Browner* , 57 F.3d 1122, 1125 (D.C. Cir. 1995) (citations omitted). This makes a lot of sense, for how else would one reach the most reasonable reading of an ambiguous statute unless he considers all applicable rules of statutory construction?

[4]The United States Supreme Court has warned against reading something into a legislative silence. "It is at best treacherous to find in (legislative) silence alone the adoption of a controlling rule of law." *Girouard v. United States,* 66 S. Ct. 826, 830 (1946).

and ammunition only in those areas certified by the President.

(c) Any law enforcement officer or Armed Forces personnel in violation of these provisions shall be subject to the provisions of section 3306 of this chapter.

(d) Nothing in this chapter shall apply in any way to United States military, law enforcement or any other authorized personnel lawfully within the Republic during the term of the United Nations Trusteeship Agreement, or during the term of any other Agreement which may lawfully exist between the United States and the Republic providing for the presence in the Republic of United States military, law enforcement of other authorized personnel.

17 PNC § 3307.

Besides these specific exemptions, the statute initially provided for amnesty.

Every person who shall voluntarily surrender any firearm or ammunition . . . prior to January 1, 1982 shall not be subject to the provisions of section 3306 of ⊥233 this chapter, [the prohibition on firearms and ammunition].

17 PNC § 3309 (emphasis added).

The first rule of statutory construction is that you look at the statute on its face. If the statute is clear, the duty to interpret does not even begin. *Yano v. Kadoi,* 3 ROP Intrm. 174, 182 (1992) ("[W]here the language is plain and admits of no more than one meaning, the duty of interpretation does not arise."); *see also The Senate v. Nakamura*, 7 ROP Intrm. 212, 217 (1999); *Remeliik v. The Senate,* 1 ROP Intrm. 1, 5 (Tr. Div. 1981); *Airai State Gov't v. Ngkekiil Clan*, Civil Action No. 03-207, slip op. at 3-4 (Tr. Div. August 3, 2004).

The duty to interpret a statute begins when the statute is first determined to be ambiguous. "Statutory language is ambiguous if reasonable minds could differ as to its meaning; if a statute can support two reasonable interpretations, a court must find the language of the statute to be ambiguous." 73 Am. Jur. 2d *Statutes* § 114 (2001). "Ambiguity exists when a statute is capable of being understood by reasonably well-informed persons in two or more different senses." 2A Norman J. Singer, *Statutes and Statutory Construction* § 45.02 at 11-12 (6th ed. 2000) [hereinafter Singer].

To begin with, Noah has not shown that the statute is ambiguous as to whether the prohibition against the possession of firearms and ammunition applies to him. The statute clearly prohibits the possession of firearms and ammunition in this country, with well-defined exceptions limited to qualified "law enforcement officers," "members of the Armed Forces," and other "authorized personnel."[5] Even then, not every law enforcement officer or every member of

[5]"In ascertaining the plain meaning of the statute, the court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole." *K Mart Corp. v. Cartier, Inc.,* 108 S. Ct. 1811, 1818 (1988) (citations omitted).

the Armed Forces is exempt. He or she must be approved or certified by the President of this country before he or she can be allowed to possess or use firearms and ammunition. And to make sure that available guns and bullets will only be in the hands of those authorized by law, the statute provided for an amnesty with a cut off date of January 1, 1982.

On the face of the statute, "any person" or "every person" after January 1, 1982, other than those specifically exempt under § 3307, is subject to the prohibition of firearms and ammunition under section §§ 3306 (a) and (b). Nothing in the statute, be it by words, phrases or design of the statute, implies that "other exceptions" are left for the court to identify and apply.[6] The enumeration of exceptions in the statute is exclusive. On the face of the statute, the prohibition of firearms and ammunition applies to Noah.
⊥234

Assuming the statute is ambiguous, I believe the appropriate canon to apply here is that which states that an exception not included with the statutory exceptions is excluded.[7] *See* Singer, § 47.23 at 317. It is appropriate because it relates to and complements the primary intent of the statute which is to prohibit firearms and ammunition. Singer, § 47.25 at 327; *see also ROP v. Palau Museum*, 6 ROP Intrm. 277, 278 (Tr. Div. 1995). Noah's attempt to carve out an exception to the prohibition other than those enumerated in the statute runs counter to the primary intent of the statute. No rule of statutory construction is ever justified when it defeats the very intent of the statute. Singer, § 47.25 at 332.

Noah further argues that since the firearm statute is written in the present tense, only the "last in time" defendant is subject to the firearm statute. If we apply this novel "last in time rule" of statutory construction to other similarly written crimes, we would end up with equally unreasonable results. For example, the crime of assault and battery with a dangerous weapon is written in the present tense. *See* 17 PNC § 504. Suppose two defendants, taking turns, strike the victim with the same baseball bat; is it only the defendant who delivered the last blow who could be convicted of the crime and not the one before?

When a canon used to interpret a statute produces unreasonable results, such canon should be avoided. Singer, § 45.12 at 81. Not only is this "last in time" theory unheard of, its application would also produce unreasonable results.

In conclusion, Noah's failure to read the plain meaning of the firearm statute and his attempt to interpret the intent of the OEK contrary to the plain meaning of the statute fall woefully short of being at least plausible. A legal argument that is not even plausible just may be frivolous. I affirm.

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[6]"If a law is plain and within the legislative power, it declares itself and nothing is left for interpretation. It is as binding upon the court as upon every citizen. To allow a court, in such a case, to say that the law must mean something different from the common import of its language, because the court may think that its penalties are unwise or harsh would make the judicial superior to the legislative branch of the government, and practically invest it with the lawmaking power. The remedy for a harsh law is not in interpretation but in amendment or repeal." Singer, § 46.03 at 139 (citations omitted).

[7]"This rule is based on logic and common sense. It expresses the concept that when people say one thing they do not mean something else." Singer, § 47.25 at 327.