Wong v. ROP, 11 ROP 178 (2004)
JIMMY WONG,
Appellant,

v.

REPUBLIC OF PALAU,
Appellee.

CRIMINAL APPEAL NO. 03-004
Criminal Case No. 02-191

Supreme Court, Appellate Division
Republic of Palau

Decided: July 1, 2004[1]
⊥179
⊥180
Counsel for Appellant: Douglas Parkinson

Counsel for Appellee: David H. Matthews

BEFORE: LARRY W. MILLER, Associate Justice; KATHLEEN M. SALII, Associate Justice; J. UDUCH SENIOR, Associate Justice Pro Tem.

Appeal from the Supreme Court, Trial Division, the Honorable R. BARRIE MICHELSEN, Associate Justice, presiding.

SALII, Justice:

This is an appeal from the trial court's Verdict and Judgment and Sentence entered against Jimmy "Shimmy" Wong ("Wong"). Wong was sentenced to life imprisonment for first degree murder. Wong argues that his statements to the police were not made voluntarily and should have been suppressed at trial.[2] Because we find that the trial court did not err in allowing the statements to be admitted at trial without conducting a voluntariness hearing, we affirm.

BACKGROUND

[1]The Court has determined that oral argument would not materially assist in the resolution of this appeal. *See* ROP R. App. Pro. 34(a).

[2]Wong never moved to suppress his second, third, and fourth statements to the police, either before trial or at the time they were introduced at trial. Although the Appellate Division is empowered to reach forfeited errors in criminal cases under ROP R. Crim. P. 52(b), an appellant must first show that there was an "error or defect," that the error was "plain," and that the appellant's "substantial rights" were affected. *See Ueki v. ROP*, 10 ROP 153, 157 (2003). As will be discussed in more detail below, we do not believe that there was an error in the trial court proceedings, much less "plain error" cognizable under Rule 52(b).

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Wong's cellmate at the Koror Jail, Greg Turner "Poda" Germans ("Poda"), was beaten in his jail cell in the early morning of July 21, 2002, and died the next day. When Officer Inocensio Meteolechol, the only guard on duty at the jail that night, was called over to the cell, he observed Poda lying on his bed bleeding from his forehead and his right leg. Officer Meteolechol asked Wong something like, "What have you done to him?" or "What happened to him?" without first advising Wong of his rights. Wong responded that he had hit or hurt Poda. Officer Meteolechol then asked Wong something like, "Why did you hurt Poda?" to which Wong did not ⊥181 respond.

Shift commander Sergeant Ismael Aguon then arrived and escorted Wong over to the BPS Building. Sergeant Aguon observed that Wong was very tense and excited, and he told Wong to "relax, relax." As Sergeant Aguon was walking him to the BPS Building, Wong said to him that "it was the other guy's fault," that the other guy had taken Wong's CD, refused to give it back when asked, and threatened to beat up Wong, which led to a fight. After giving Wong 45 minutes to an hour to calm down at the BPS Building, Sergeant Aguon advised Wong of his rights by reading the BPS constitutional rights form to him. Wong immediately stated that he would not give a statement to the police. Then Wong was taken back to the jail.

Criminal Investigation Division ("CID") detectives took a statement from Wong on July 22, 2002, the day after he had made the statement to Sergeant Aguon. After the BPS Advice of Rights form was read to Wong, Wong agreed to make a statement without consulting counsel. Wong gave a statement that one of the detectives wrote down, and Wong then read the statement and signed it. That statement was generally consistent with the statement that Wong had made to Sergeant Aguon, with some additional details given. CID detectives took another statement from Wong on July 26, 2002, because of inconsistencies between Wong's first written statement and statements of other witnesses and Poda's autopsy report. Wong and one of the prosecutors spoke before the second interview at Wong's request, and they discussed a possible plea agreement. Again the BPS Advice of Rights form was read to Wong, and Wong agreed to give a statement without consulting counsel. That statement differed from the other statements because this time, Wong stated that another inmate, Kazuma Takada, had asked Wong to beat up Poda in exchange for cash and goods, and Wong had agreed. Poda's autopsy revealed deep stab wounds in Poda's lower legs, but Wong's July 22 statement had included nothing about leg injuries. However, Wong's July 26 statement included an assertion that Takada informed Wong that Takada had stabbed Poda in the legs.

Wong and Takada were charged with first degree murder, second degree murder, aggravated assault, and conspiracy to commit first degree murder and/or aggravated assault by Information filed on August 6, 2002. The case against Takada was dismissed without prejudice on October 11, 2002, and the case proceeded solely against Wong. Following a trial held on February 17-21, 2003, the Presiding Judge and Special Judges found Wong guilty of first degree murder and not guilty of conspiracy. Wong was sentenced to life imprisonment on March 24, 2003.

STANDARD OF REVIEW

The trial court's factual findings in a criminal case will not be set aside unless they are clearly erroneous. *Ngirarorou v. ROP,* 8 ROP Intrm. 136, 137 (2000). 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

Wong argues that his first and second statements to the police were made while he was subject to custodial interrogation, and because the police failed to advise him of his *Miranda* rights, those statements were made involuntarily and should have been suppressed. Because Wong was not interrogated by either Officer Meteolechol or Sergeant Aguon, this argument is without ⊥182 merit.

Because custodial interrogation is inherently coercive, a defendant in police custody must be advised of his right to remain silent and right to counsel before interrogation begins. *See* 18 PNC § 218(b);[3] *see also United States v. Owens*, 142 F. Supp. 2d 255, 259 (D. Conn. 2001). Both parties agree that Wong was in custody at the time that his first two statements were made. Therefore, the inquiry turns to whether Wong was interrogated before being advised of his rights. Interrogation includes "either express questioning or its functional equivalent," which is defined as "any words or actions on the part of the police . . . that the police should know are reasonably likely to elicit an incriminating response from the suspect." *Rhode Island v. Innis*, 100 S. Ct. 1682, 1689-90 (1980). A defendant is interrogated for *Miranda* purposes when "the inquiry is conducted by officers who are aware of the potentially incriminating nature of the disclosures sought." *United States v. Morales*, 834 F.2d 35, 38 (2d Cir. 1987). However, the *Miranda* Court distinguished "[g]eneral on-the-scene questioning as to facts surrounding a crime" as beyond the reach of the rule laid down in that case. *See United States v. Conley*, 779 F.2d 970, 972 (4th Cir. 1985) (quoting *Miranda*, 86 S. Ct. at 1629); *United States v. Chase*, 414 F.2d 780, 781 (9th Cir. 1969) (holding that limited, on-the-scene investigative questioning need not be preceded by *Miranda* warnings).

Here, Officer Meteolechol's question, "What have you done to him?" or "What happened to him?" was a question asked to help him ascertain what had occurred and to determine the cause of Poda's injuries, not a question calculated to extract incriminating statements from Wong. In a case similar to the case at hand, where a prison guard asked an inmate named George Scalf "what was going on, what the problem was" immediately after Scalf had stabbed another inmate, the court held that Scalf's response was admissible because the guard's questions were an on-the-scene inquiry to find out what had happened, not an interrogation subject to *Miranda* warnings. *United States v. Scalf*, 725 F.2d 1272, 1276 (10th Cir. 1984). We conclude that Wong's first statement was a voluntary response to on-the-scene investigative questioning and, therefore, the statement was admissible at trial.

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[3]18 PNC § 218 codifies the warning established in *Miranda v. Arizona*, 86 S. Ct. 1602 (1966). *See In re Temol*, 6 ROP Intrm. 326, 327 (1996). Therefore, United States federal court decisions discussing the *Miranda* rule may be considered when construing the Palau statute. *ROP v. Imeong*, 7 ROP Intrm. 257, 259 (Tr. Div. 1998).

Sergeant Aguon's instructions to Wong to "relax, relax" were even less likely to have been designed to persuade Wong to make incriminating admissions. In fact, we do not believe that telling Wong to relax constituted interrogation at all because it was not "express questioning or its functional equivalent." *Innis*, 100 S. Ct. at 1689. Sergeant Aguon's comments were not intended to elicit a response, but instead were intended to calm Wong down. Therefore, we conclude that Wong's second statement was a spontaneous statement that was admissible because it was not made in response to questioning.

Even if Wong's first two statements to the police were involuntarily made and should have been suppressed, Wong's third statement, which was consistent with his first two statements, was admissible. Wong ⊥183 contends that there are substantial issues as to whether his third and fourth statements to the police were made voluntarily and that it was error to admit those statements into evidence without first having made a determination as to whether they were voluntary. We disagree. Wong was fully advised of his *Miranda* rights in the Advice of Rights form before gave his third, written statement to the police, but he voluntarily chose to give the statement anyway, without requesting the assistance of counsel. *Miranda* warnings are intended to protect the suspect's privilege against self-incrimination, and once the warnings are given, the suspect may "knowingly and intelligently" waive such rights and answer questions. *Owens*, 142 F. Supp. 2d at 259 (quoting *Miranda*, 86 S. Ct. at 1630). Wong argues that the voluntariness of his third, written statement was compromised because he did not know that his two prior confessions were not admissible. In effect, Wong asserts that "the cat was out of the bag" because Wong had already made damaging admissions, leading him to repeat and elaborate on his earlier statements even after the warnings were given. *See Imeong,* 7 ROP Intrm. at 260. However, the Trial Division has held that a defendant can give a fully knowing and voluntary waiver of his rights even though he did not know that his prior confessions could not be used against him. *See id*. In other words, "[a] suspect who has once responded to unwarned yet uncoercive questioning is not thereby disabled from waiving his rights and confessing after he has been given the requisite *Miranda* warnings." *Oregon v. Elstad*, 105 S. Ct. 1285, 1298 (1985). Here, where Wong's first two statements were not obtained by the use of deliberately coercive or improper tactics, the only remaining question is whether Wong made a knowing and intelligent choice to waive his *Miranda* rights before making a subsequent statement. *Imeong*, 7 ROP Intrm. at 260 (quoting *Elstad*, 105 S. Ct. at 1295).

Ascertaining whether a statement was voluntarily made ultimately requires the court to examine the totality of the circumstances to determine whether the will of the suspect was overborne by government coercion. *See Alston v. Redman*, 34 F.3d 1237, 1253 (3d Cir. 1994). In other cases, the passage of time between an unwarned statement and a waiver of a suspect's *Miranda* rights and the fact that the statements were given to different officers were factors considered by courts in finding a voluntary waiver. *See Medeiros v. Shimoda*, 889 F.2d 819, 824-25 (9th Cir. 1989); *State v. Rowe*, 720 P.2d 765, 767 (Or. Ct. App. 1986). Moreover, where a suspect asserts only the right to silence, and not the right to counsel, it appears that the police may renew contact on their own initiative after a period of time, give new *Miranda* warnings, and obtain a valid waiver of rights. *See Edwards v. Arizona*, 101 S. Ct. 1880, 1885 (1981); *Michigan v. Mosley*, 96 S. Ct. 321, 326-27 (1975). Here, where there is no evidence in the record that Wong ever requested the assistance of counsel, he had a history of prior dealings with the

criminal justice system, several hours had lapsed since he had made his first two statements to the police, and the questioning was conducted by different officers, we believe that Wong waived his rights knowingly and voluntarily and that his third statement was admissible.

Finally, Wong argues that his fourth statement to the police was not made voluntarily. He contends that the offer of a possible plea agreement coerced him to make a fourth statement to explain the inconsistencies between his prior statements and evidence revealed by the investigation. The test for the voluntariness of a confession is "whether the confession was extracted by any sort of threats or violence, or obtained by ⊥184 any direct or implied promises, however slight, or by the exertion of any improper influence." *Hutto v. Ross*, 97 S. Ct. 202, 203 (1976) (quotation omitted). "That a law enforcement officer promises something to a person suspected of a crime in exchange for the person's speaking about the crime does not automatically render inadmissible any statement obtained as a result of that promise." *Alston v. Redman*, 34 F.3d 1237, 1253 (3d Cir. 1994) (quotation omitted). Here, there is no evidence that a particular plea agreement was promised to Wong in exchange for his statement or that threats or violence were used to extract a fourth statement from Wong. Further, we do not believe that the discussion of a possible plea agreement or mere encouragement by law enforcement officials to explain inconsistencies revealed by the investigation were sufficient to overbear the will of the suspect. *See id.* (concluding that suspect's waiver of rights was not coerced by limited nature of investigators' promise to make plea recommendation to prosecutor if suspect cooperated fully in interrogation). Therefore, this argument is also without merit.

CONCLUSION

For the foregoing reasons, we affirm the judgment of the Trial Division.