Yona v. ROP, 12 ROP 159 (2005)
AUDY YONA,
Appellant,

v.

REPUBLIC OF PALAU,
Appellee.

CRIMINAL APPEAL NO. 04-002
Criminal Case No. 02-185

Supreme Court, Appellate Division
Republic of Palau

Argued: July 13, 1005
Decided: August 1, 2005

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Counsel for Appellant: Siegfried B. Nakamura

Counsel for Appellee: Everett Walton

BEFORE: LARRY W. MILLER, Associate Justice; KATHLEEN M. SALII, Associate Justice; LOURDES F. MATERNE, Associate Justice.

Appeal from the Supreme Court, Trial Division, the Honorable ARTHUR NGIRAKLSONG, Chief Justice, presiding.

PER CURIAM:

Audy Yona appeals his convictions for Bribery and Misconduct in Public Office. Specifically, Yona argues that certain statements made to investigators following his arrest are inadmissible because they were made during the course of plea negotiation. Yona further contends there was insufficient evidence to prove that he had received something for an "official act" or that he did illegal acts "under the color of office," essential elements of the crimes of Bribery and Misconduct in Public Office, respectively. However, for reasons more thoroughly expressed below, we AFFIRM his convictions.

BACKGROUND

Most of the significant facts adduced at trial are undisputed. In early 2002, Special Prosecutor's Investigator Bradley Kumangai ("Kumangai") received a telephone call from Sikyang Omisong ("Omisong") regarding Labor officials accepting bribes. On February 22, 2002, Kumangai and other officers conducted an undercover operation with the assistance of

Omisong in front of Winchell's Donut Shop in Koror. Prior to the operation, Kumangai provided Omisong with $500 in a brown envelope. Officers stationed near the donut shop witnessed Omisong and Yona arrive separately at the parking lot. Yona entered Omisong's vehicle, the two men apparently engaged in conversation, and minutes later, Yona exited carrying a black bag and a brown envelope. After Yona left the area, he was arrested and brought to the Special Prosecutor's Office where officers found the $500 of government funds in his black handbag. Officers also searched Mr. Yona's car and found a "permit, an application, employment certificate, health certificate and business license and other supporting documents." [Transcript at 28]. Kumangai then went to Omisong's residence where Omisong handed over two labor invoices Yona had given him in the car.

At trial, the government presented evidence of other acts of alleged bribery and misconduct by Yona. Jaya Kuppuswammy ("Jaya") testified that she gave Yona money from a foreign recruiter in India, a man she identified only as "Mr. Dennison," on three separate occasions. According to her testimony, on February 14, 2001, one of Dennison's employees, John Victor, flew from India to Palau with worker applications and $500 in cash. On the same day, Victor gave the money to Jaya who then gave it to Yona at a barracks in Airai. On April 11, 2001, another Dennison employee, Jackoon Jamaludin ("Jackoon"), flew in from India with cash and worker applications in an envelope. Jackoon and Jaya then met Yona at the Tree D Motel where Jaya gave him $500. Jackoon testified that when he asked Yona about "our permit," Yona responded, "I'll take care of everything, don't worry." [*Id*. at 124]. Finally, on May 12, 2001, Jaya gave Yona $1,200 at the Tree D Motel. When she gave him the money, Yona said it was for "six ⊥161 papers." [*Id*. at 104].

In addition, the Government offered statements given by Yona to investigators following his arrest, identified as "Government Exhibit 13." On the day he was arrested, Officer Kumangai engaged Yona in discussions about cooperating with the Special Prosecutor's Office. Yona stated that he could "provide information about his supervisors or chiefs of the Labor Office." [Transcript at 141]. Kumangai told Yona that "if he provides information that they could talk to the Special Prosecutor and make some kind of agreement with him." [*Id*. at 141-42]. Yona later provided information that he was driving the Chief of Labor's truck to PMIC to pick up fish, but Kumangai told Yona "it was not the information that we want from him." [*Id*. at 142]. On June 18, 2002, Kumangai called Yona to the office to follow up on the cooperation. After an interview with Kumangai and Investigator Hilario Rechesengel, Yona admitted, among other things, that he received $500 from Jaya, but said that it had been sent by Dennison as a gift.

Yona objected to the admission of the June 18, 2002 statement, arguing it was inadmissible because it was either an offer to compromise under ROP Rule of Evidence 408, or a statement relating to plea discussions or a plea agreement under ROP Rule of Evidence 410. After hearing arguments from the parties, the trial court disagreed, finding that "government Exhibit 13 is not an offer to compromise, is not a statement about plea agreement and defendant was either unable to uncover illegal activities on the part of anyone in his office or was not sincere with his offer to cooperate with the government." [Decision and Order, at 2]. Accordingly, the court denied Yona's objection and admitted Government Exhibit 13.

At the conclusion of the evidence, the trial court found Yona guilty of three counts of Bribery in violation of 17 PNC § 701 and three counts of Misconduct in Public Office in violation of 17 PNC § 2301. On April 9, 2004, Yona was sentenced to two years for each Bribery count and three years for each count of Misconduct in Public Office to run concurrently, all of the sentences to be suspended except the first year.

STANDARD OF REVIEW

This court reviews the sufficiency of the evidence only to determine "whether, viewing the evidence in the light most favorable to the prosecution, and giving due deference to the trial court's opportunity to hear the witnesses and observe their demeanor, any reasonable trier of fact could have found the essential elements of the crime were established beyond a reasonable doubt." *Minor v. ROP*, 5 ROP Intrm. 1, 3 (1994). Under this standard, even if the Appellate Division would have decided the case differently if it were sitting as the trier of fact, the conviction must be upheld. *Id.*

DISCUSSION

I. ROP Rule of Evidence 410

On appeal, Yona reasserts his objection to the admission of the June 18, 2002 statement, but this time relying solely on ROP Rule of Evidence 410. At the time of trial, Rule 410 provided in pertinent part:

> Except as otherwise provided in this rule, evidence of a plea of guilty, later withdrawn, or a plea of nolo contendere, or of an offer to plead guilty or nolo ⊥162 contendere to the crime charged or any other crime, or of statements made in connection with, and relevant to, any of the forgoing pleas or offers, is not admissible in any civil or criminal proceeding against the person who made the plea or offer.

ROP R. Evid. 410.[1] Courts have "consistently emphasized the importance of guilty pleas and the safeguards surrounding the entire process of plea negotiations, plea agreement, and plea taking." *United States v. Robertson*, 582 F.2d 1356, 1365 (5th Cir. 1978). For plea bargaining to work effectively and fairly, "a defendant must be free to negotiate without fear that his statements will later be used against him." *United States v. Herman*, 544 F.2d 791, 796 (5th Cir. 1977). However, not every discussion between an accused and agents for the government is a plea negotiation. "Suppressing evidence of such negotiations serves the policy of insuring a free dialogue only when the accused and the government actually engage in plea negotiations: 'discussions in advance of the time for pleading with a view to an agreement whereby the defendant will enter a plea in the hope of receiving certain charge or sentence concessions.'" *Robertson*, 582 F.2d at 1365 (quoting ABA Standards, Introduction at 3). With these principles in mind, courts, in construing the parallel federal rule, apply a two-tier analysis in determining whether a discussion should be characterized as a plea negotiation. The first tier is "whether the

[1]ROP Rule of Evidence 410 was amended on January 5, 2005.

accused exhibited an actual subjective expectation to negotiate a plea at the time of the discussion." *Id*. The second is "whether the accused's expectation was reasonable given the totality of the objective circumstances." *Id*.

After reviewing the record in this case, we hold that Yona did not exhibit a subjective expectation to negotiate a plea. He never inquired about anything in exchange for pleading guilty, nor was pleading guilty even discussed. More importantly, assuming for the moment that Yona exhibited an expectation, we hold that such expectation would have been unreasonable under the circumstances. Kumangai never implied he had authority to negotiate a plea. He simply told Yona that if he provided useful information, "we can talk to the Special Prosecutor," *i.e*., the person with authority to negotiate a plea, "to . . . make some kind of agreement." The discussion was, at most, a "cooperation negotiation"; a type of negotiation not rendered inadmissible by Rule 410. *See United States v. White*, 617 F.2d 1131 (5th Cir. 1980) ("it is apparent the parties were, at the most, involved in 'cooperation negotiations.' Confessions made pursuant to such discussions are not inadmissible as plea bargains."). *See also United States v. Leon Guerrero*, 847 F.2d 1363 (9th Cir. 1988) (inculpatory statements made by defendant to FBI agents beginning when defendant agreed to cooperate with FBI investigation into bribery of government officials in exchange for United States attorney's promise that he would consider such cooperation in handling any future cases were not made in the course of plea discussions and were thus admissible in prosecution of defendant for bribery); *United States v. Posey*, 611 F.2d 1389, 1390 (5th Cir. 1980) (where defendant told agents that he would like to "cut a deal," to "make some kind of negotiated settlement" with the district court, and agent told defendant that the only thing that could be promised was that the ⊥163 agent would bring defendant's cooperation to the attention of the prosecutor and the court, defendant did not have a reasonable expectation that they were negotiating a plea bargain); *United States v. Gentry*, 525 F. Supp. 17, 19 (M.D. Tenn. 1980) ("What occurred in this case was that [the ATF agent] told the defendant that his cooperation would me made known to the United States Attorney and the Court. The facts in this case clearly do not constitute plea negotiations."). Accordingly, we find the trial court did not err in admitting Yona's statement given to investigators on June 18, 2002.

II. Insufficient Evidence

Yona also argues there was insufficient evidence to support a conviction for the crimes charged. In particular, he contends there was no evidence to show that he did something "for an official act," as required to be found guilty of Bribery (17 PNC § 701),[2] or that he committed illegal acts "under the color of office," as required to be found guilty of Misconduct in Public Office (17 PNC § 2301).[3] In regards to the February 22, 2002 incident, Yona contends there is no basis to infer that Omisong paid the money for the invoices, that he himself received the money for the invoices, or that any labor permits were to be or were actually issued. As for February 14, 2001, Yona points out that he and Jaya never discussed the purpose of the $500.

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[2]Under 17 PNC § 701, Bribery is defined as "unlawfully and voluntarily giv[ing] or receiv[ing] anything of value in wrongful and corrupt payment for an official act done or not done, or to be done or not to be done . . ."

[3]Under 17 PNC § 2301, Misconduct in Public Office is "do[ing] any illegal acts under the color of office, or wilfully neglect[ing] to perform the duties of his office as provided by law."

Indeed, the only evidence is his admission that it was a gift from Dennison. Finally, although Yona stated on May 14, 2001 that the $1,200 was "for papers," the evidence did not tell what kind of papers they were talking about.

We find the evidence was sufficient to support Yona's convictions for Bribery and Misconduct in Public Office. Courts have recognized that in cases like this, "[d]irect evidence concerning the precise details of a corrupt agreement is seldom available and reliance must often be placed on inferences concerning the details." *People v. Terry*, 282 P.2d 19, 22 (Cal. 1955). In this case, Yona received cash from Omisong, a local employer, and Dennison, a foreign recruiter, on four separate occasions. All the transactions occurred in what can only be described as surreptitious locations -- a parked car in front of Winchell's Donut Shop, a barracks in Airai, and an apartment behind the Tree D Motel. Furthermore, as testified to by Sonia Isamu ("Sonia"), a clerk for the Division of Labor, Yona's responsibilities did not include handling invoices, but rather consisted mainly of handling worker complaints and inspecting barracks to make sure they can handle the amount of workers listed on the application. Lastly, although the April 11, 2001 incident was not charged in the Information, it is nevertheless noteworthy that Yona, in response to a question about worker permits, responded, "I'll take care of everything, don't worry." Given this incriminating evidence, we find that it was reasonable for the trial court to infer, beyond a reasonable doubt, that Yona illegally accepted money in return for processing applications, or at least in return for assurances that the applications would be processed. *See, e.g., People v. Graves*, 29 P.2d 807, 813 (Cal. App. 1934) ("it is, of course, true that there is no direct testimony of ⊥164 the alleged fact that Appellant corruptly agreed to vote and did corruptly vote . . . but there are circumstances present in this case . . . that baffle any other explanation. . . ."). These acts certainly constitute "official acts" or acts "under the color of office" by an employee of the Division of Labor.

CONCLUSION

For the foregoing reasons, Audy Yona's convictions for Bribery and Misconduct in Public Office are AFFIRMED.