ROP v. Avenell, 13 ROP 268 (Tr. Div. 2006)

REPUBLIC OF PALAU,
Plaintiff,

v.

CAMERON JAMES AVENELL, MATTHEW YOUNG, RICHARD SUMOR, DAVID TANSEY, and IAN McCOMBE,
Defendants.

CRIMINAL ACTION NO. 06-073

Supreme Court, Trial Division
Republic of Palau

Decided: June 9, 2006
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ARTHUR NGIRAKLSONG, Chief Justice:

Before the Court is Defendant Matthew Young's Motion for Judgment of Acquittal, filed on May 25, 2006. [1] Young contends that the government's charges are multiplicitous, [2] and that the court should dismiss all counts other than the charge based on the Palau Lagoon Monument Act. He also maintains that the charges other than the Palau Lagoon Monument Act should be dismissed based on the rule of lenity. The government argues that by failing to file this motion prior to trial, Young waived the opportunity to raise this issue. Alternatively, the government argues that the charges are proper because the charges have different elements, and therefore, satisfies the applicable test adopted by the Supreme Court. The court agrees with the government, and for the reasons discussed below, the motion is denied.

Defendant Young has been charged with damaging an historical site or cultural property, violation of the Palau Lagoon Monument Act, grand larceny, malicious mischief, conversion of public funds and property, and improper removal from territorial waters. [3] Each of the charges is listed in separate counts of the information. The government contends that he removed a porthole and possibly other items from *The Amatsu*, a shipwreck in Palauan waters.

Objections based on defects in the information must be raised before trial. ROP Crim. P. 12(b)(2). "Failure by a party to raise defenses or objections to or make requests which must be

[1] Defendant Cameron James Avenell initially filed a motion on these grounds. Young joined Avenell's motion. Avenell, however, has since withdrawn the motion, and only Young's motion is remains for consideration.

[2] Multiplicity of charges refers to the improper charging of the same offense in several counts in the information. *See ROP v. Ngiraboi*, 2 ROP Intrm. 257, 271 (1991); *Black's Law Dicitionary* 1041(8th ed. 2004). This should not be confused with duplicity, which is the charging of separate offenses in a single count. *See United States v. Rush*, 807 F. Supp. 1263 (E.D. La. 1992). Although Defendants use the term "duplicative" in several instances, their argument is clearly predicated on multiplicity.

[3] Young had also been charged with possession or removal of government property, but the government has since dismissed that count.

made prior to trial, at the time set by this Rule or by the court, or prior to any extension thereof made by the court, shall constitute a waiver thereof, but the court for cause shown may grant relief from the waiver." *Id.* 12(f).

In *Scott v. ROP*, 10 ROP 92 (2003), ⊥270 the defendant was convicted of four counts of arson. Scott challenged conviction on all four counts based on multiplicity. The Court held that the trial court could have ruled on the objection without a trial on her guilt or innocence. *Id.* at 98; *cf. Grady v. Corbin*, 495 U.S. 508, 241 n.12, 110 S. Ct. 2084 (1990) (stating that under the appropriate test discussed below is not impacted by any evidence or proof offered at trial and "is concerned solely with the statutory elements of the offense charged"). The court concluded that Scott waived her claim under Rule 12 because she did not raise the objection prior to trial. *Scott*, 10 ROP at 98.

In the present case, Young did not file this motion asserting defects in the information until after the government had rested its case-in-chief. In addition, Young has not presented good cause for delaying the issue, and therefore, this court finds that they have waived their right to raise the challenge.

Even if the Court were to rule on the merits of Young's argument, the result would not change. Multiplicitous charges raise constitutional concerns. *See Kansas v. Unruh*, 133 P.2d 35, 45 (Kan. 2006). The Double Jeopardy Clause protects against a second prosecution for the same offense after acquittal, against a second prosecution for the same offense after conviction, and against multiple punishments for the same offense. [4] *Kazuo v.* ROP, 3 ROP Intrm. 343, 346 (1993); *see also North Carolina v. Pearce*, 395 U.S. 711, 717 (1969).

If the double jeopardy issue arises from multiple convictions of different statutes, courts utilize the same elements test derived from *Blockburger v. United States*, 284 U.S. 299 (1932). *See Kansas v. Schoonover*, 133 P.3d 48, 62 (2006). As described in *Blockburger*, the test provides that "where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact that the other does not." *Blockburger*, 284 U.S. at 304. "This test emphasizes the elements of the two crimes." *Brown v. Ohio*, 432 U.S. 161, 166 (1977). "The same-elements test . . . inquires whether each offense contains an element not contained in the other; if not, they are the 'same offence' and double jeopardy bars additional punishment and successive prosecution." *United States v. Dixon*, 509 U.S. 688, 696 (1993).[5]

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[4] To the extent that one might argue that this issue is not ripe because the defendant has not been previously acquitted or convicted on a related charge and he filed his motion prior to the Court's consideration of sentencing, the Court finds it appropriate to discuss the merits because the reason multiplicity may be discussed is that "it creates the *potential* for multiple punishments for a single offense in violation of the Double Jeopardy Clause." *Kansas v. Robbins*, 32 P.3d 171, 182 (Kan. 2001)(emphasis added).

[5] The U.S. Supreme Court has ruled that analysis regarding multiple punishments (as opposed to whether crimes are separate) should focus on whether the legislature intended to punish the same offense under two different statutes. *See Whalen v. United States*, 445 U.S. 684, 691-92 (1980). "Even if the crimes are the same under *Blockburger*, if it is evident that a state legislature intended to authorize cumulative punishments, a court's inquiry is at an end." *Ohio v. Johnson*, 467 U.S. 501, 499 n.8 (1984);

⊥271 Hundreds of cases apply the same elements test to various criminal statutes, but the court will only discuss three to illustrate the application of facts to the test. In *Schoonover*, the defendant argued, *inter alia*, that the charges of manufacture of methamphetamine and possession of methamphetamine are multiplicitous because the act of manufacturing necessarily implies eventual possession. *Schoonover*, 133 P.3d at 80. The Kansas Supreme Court disagreed and identified the differing elements. "Manufacturing methamphetamine requires proof of manufacturing or the ability to manufacture, while possession of methamphetamine does not. Possession of methamphetamine requires proof of possession, while manufacturing does not." *Id.* at 81 (internal citations omitted).

In *United States v. Johnson*, the defendant was convicted of intentional destruction of government property and intentional destruction of trees on public property. *United States v. Johnson*, 162 Fed. Appx. 526, 528 (2006). The defendant appealed the sentence, arguing that the cumulative sentencing violated the Double Jeopardy Clause, but the trial court disagreed. In affirming the lower court, the Court of Appeals for the Sixth Circuit analyzed the statutes under the same elements test, [6] and it determined the two statutes had different elements. *Id.* at 529-530. The charge for destruction of governmental property required proof that (1) the defendant willfully injured or attempted to injure (2) property of the United States (3) worth at least $1000. The charge for destruction of trees required proof that (1) the defendant wantonly injured or destroyed trees and (2) that the injury occurred on United States land reserved for public use. Accordingly, the sentences did not violate the Double Jeopardy Clause. *Id.* at 530.

In *Kazuo v. ROP*, 3 ROP Intrm. 343 (1993), the defendant was charged with aggravated assault and use of a firearm. The court reasoned that conviction under both statutes did not violate the Double Jeopardy Clause because unlawful assault is an element of aggravated assault but not of use of a firearm and the use of a firearm is not an element of aggravated assault. *Id.* at 347.

In the present case, Defendant Young has been charged with damaging an historical site or cultural property, violating the Palau Lagoon Monument Act, grand larceny, malicious mischief, and conversion of public funds and property. Each of these charges requires proof of separate elements, and therefore, they are not in violation of the Double Jeopardy Clause based on multiplicity.

For example, in order to convict someone for violating the Palau Lagoon Monument Act, the government must prove that the individual (1) removes, appropriates, damages, or destroys (2) ships, other vessels, or aircraft (or parts thereof), which formerly belonged to the armed

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see also Missouri v. Hunter, 459 U.S. 359, 366 (1983) ("With respect to multiple punishments imposed in a single trial, the Double Jeopardy Clause does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended."). As a result, the restrictions of prosecution under the Double Jeopardy Clause are greater when determining whether crimes are separate as compared to whether multiple punishments are constitutionally permitted.

[6] The court recognized the U.S. Supreme Court's rulings on legislative intent controlling in these cases as discussed in footnote 5, *supra*, but it found no clear indication of contrary legislative intent. It, therefore, analyzed the statutes under the same-elements test.

forces or commercial fleet of any nation and which are at the bottom of the Palau Lagoon. 19 PNC § 306. Grand larceny, however, requires proof that ⊥272 an individual (1) steal, take and carry away (2) personal property of another (3) that is worth more than $50 (4) with the intent to permanently convert it to his own use. 17 PNC § 1902. There are stark differences between the elements of the two statutes. The former requires removing or damaging a specific class of things. The latter includes a monetary value element that is not present. *See Johnson*, 162 Fed. Appx. at 528 (distinguishing two statutes, in part, based on a value element present in one statute but not in another). In other words, it is possible to violate the Palau Lagoon Monument Act without committing grand larceny, and it is possible to commit grand larceny without violating the Palau Lagoon Monument Act. *See Kazuo*, 3 ROP Intrm. at 347.

The Court need not discuss all fifteen different combinations of statutes and how each of the six statutes provides different elements from the other statutes. It is sufficient to say that the Court has reviewed each combination and finds that it would be possible to commit each offense without necessarily committing another one of the charged offenses.

Young also makes the argument that certain charges should be dismissed based on the rule of lenity. This principle provides that when a criminal statute's scope is ambiguous, deference should be given in favor of the defendant. *See Scott*, 10 ROP at 97 n.5; 73 Am. Jur. 2d *Statutes* § 197 (2001) (citing *Moskal v. United States* , 498 U.S. 103 (1990)). The criminal statutes at issue in the present case are not ambiguous, and therefore, the rule of lenity is inapplicable to this case.

For the reasons above, Defendant Young's Motion for Judgment of Acquittal is DENIED.