ROP v. Singeo, 1 ROP Intrm. 551 (1989)
REPUBLIC OF PALAU,
Appellee,

v.

LEEMAN SINGEO,
Appellant.

CRIMINAL APPEAL NO. 2-87
Criminal Case No. 370-86

Supreme Court, Appellate Division
Republic of Palau

Opinion
Decided: January 3, 1989

Counsel for Appellant: Carlos H. Salii

Counsel for Appellee: Philip D. Isaac

BEFORE: ARTHUR NGIRAKLSONG, Associate Justice; ROBERT HEFNER, Associate Justice; and FREDERICK J. O'BRIEN, Associate Justice.

NGIRAKLSONG, Associate Justice:

BACKGROUND

Appellant contends he found the gun and ammunition in question at Icebox Park. On December 16, 1986, appellant and his companion, Raymond Iechad, drove a black van to the beach ⊥552 under the K-B Bridge opposite Osel's Restaurant. There at about 1:15 a.m., appellant fired approximately four shots into the water.

At about 1:15 a. m. on December 16, 1986, Mrs. Valeria Toribiong, who lives on a slope in Ngerbechedesau, heard two gunshots coming from the direction of the K-B Bridge. She called the police station and reported what she heard. Police officers Napoleon and Oingerang, while on patrol at about that time, received a radio call informing them of a report of gunshots in the area of the K-B Bridge. The officers, who were in front of the Sure-Save Mart, continued to the NECO intersection and proceeded toward the K-B Bridge. On the way, the officers encountered a van coming from the opposite direction at the Topside area near Judge Sutton's residence. The officers did not see any other vehicle besides the van. They stopped the van and immediately radioed for assistance (Tr. pp. 5-9).

Officers Shiro and Ernest had also received the radio report of the gunshots at the Bridge. When the second patrol car arrived on the scene, Officer Shiro got out, walked to the passenger

side of the van, opened the door and immediately seized the gun and ammunition under the passenger seat. There is conflicting testimony as to whether Shiro used a flashlight, whether the gun was in a brown paper bag and whether it was under the seat, or on top of or in a compartment between the seats.

⊥553 The Trial Court, after viewing the inside of the van with counsel and parties and witnesses, found that the passenger seat was about 6 inches off the floor and the gun and ammunition would be in plain view unless they were so far under the seat that the seat itself blocked the view. (Tr. p. 74). The Trial Court further found that when Officer Shiro opened the passenger door of the van, he saw the gun and ammunition "immediately". (Tr. p. 89).

At trial, defendant moved to suppress the gun and ammunition as fruits of an illegal search. The Court found that the stop of the van was a "temporary detention situation" based on a curfew violation and the fact that it was the only vehicle in the area where shots reportedly were fired. The Court found that Shiro opened the door to ascertain the number and identity of all passengers and that the gun was in plain sight under the passenger seat.

Defendant was convicted on all counts and sentenced to pay a $5,000 fine and to a fifteen year jail term for use of the firearm, a $1,000 fine and five year jail term for possession of ammunition, and a $250 fine and three year jail term for the use of ammunition. Defendant is currently out on bail pending appeal.

APPEAL

Appellant appeals from the Trial Court's denial of his motion to suppress and from the sentence which imposes the minimum 15 years imprisonment as prescribed by 17 PNC § 3306 for use of a firearm.

⊥554 ISSUES/ARGUMENT

1. Whether the Trial Court erred in denying defendant's motion to suppress the pistol and ammunition taken from the van.

Appellant argues that none of the police officers acted as if he was in fear of his life. They never asked where he was coming from. The telephone call from Mrs. Toribiong was not enough to establish probable cause to search the van, therefore, the officers were not entitled to rely on that information alone.

There is conflicting testimony as to whether or not the gun was in a paper bag. Even if the gun was not in a bag, Officer Shiro had no reason to enter the van in order to gain the ability to see the gun. Since this was an illegal search not based on probable cause, the gun and ammunition, as fruits of an illegal search, must be suppressed.

Appellee argues that the police officers stopped the appellant for a curfew violation and for investigation of the gunshots. This was only a "temporary detention situation." However,

under *Terry v. Ohio* , 392 U.S. 1, 88 S.Ct. 1868 (1968), officers can make a limited weapons search during an investigatory stop even without probable cause to arrest.

Officer Shiro opened the door of the van because the windows were tinted and it was necessary for him to ascertain the identity and number of passengers. He then saw the gun in plain view under the seat.

⊥555 2. Whether the Kazuo and Yano cases prohibit imposition of the minimum 15 year jail term under the facts of this case.

Appellant argues that the *Kazuo v. ROP* ; *Yano v. ROP* , 1 ROP Intrm. 154 (App. Div. 1984) cases hold that the fifteen year mandatory jail term for possession of a firearm is cruel and unusual punishment as being disproportionate with the underlying crime. Appellant argues that since he was only test firing in a deserted area at 1:15 a.m., this essentially constitutes nothing more than "possession".

Appellee argues that the holding of the *Kazuo/Yano* cases applies only to possession of a firearm. In this case, appellant clearly "used" the pistol, so the *Kazuo/Yano* cases do not apply. Secondly, Appellee argues that the holding of the *Kazuo/Yano* cases is erroneous in that it assumed that the Trusteeship Agreement which would apply the 8th amendment of the U.S. Constitution to the Trust Territory was self executing. The case of *Trust Territory v. Lopez* , 7 TTR 449, 453 (App. Div. 1976), held that it was not self-executing. The Agreement has not been made a part of Palau law and, therefore, *Kazuo/Yano* should be overruled.

STANDARD OF REVIEW

14 PNC § 604 (b) provides that:

> The findings of fact of the high court or the Supreme Court in cases tried by it shall not be set aside by the Appellate Division of that court unless clearly erroneous, but in all other cases the appellate or reviewing court may review the facts as well as the law.

⊥556 Conclusions of law are, on the other hand, reviewed de novo. *Official Creditor's Committee of Fox Markets, Inc. v. Ely* , 337 F.2d 461 (9th Cir. 1964); cert. denied, 380 U.S. 978; and *Kelson v. Springfield* , 767 F.2d 651, 653 (1985) (1985); *San Francisco Police Officers' Association v. San Francisco*, 812 F.2d 1125 (9th Cir. 1987).

ANALYSIS

1. Appellant's motion to suppress the Trial Court's findings which underlie its denial of Appellant's motion to suppress are set forth at pages 89 to 97 of the transcript. The Court found that the stop of the van involved a "temporary detention situation". The officers had a reasonable suspicion that the occupants of the van were involved with the gunshots reported near the K-B Bridge. It was a reasonable suspicion because it was past the hour of curfew, the van was the

only vehicle encountered by the police coming from the direction of the K-B Bridge, and the van was encountered close to the time the gunshots were reported. The officers had every reason to believe that the occupants of the van were armed. It would have been reasonable for Officer Shiro to have approached the van with his gun drawn (Tr. 92). Under the circumstances, the Trial Court found that the opening of the van door by Officer Shiro to ascertain the identity and number of occupants was not an unreasonable intrusion.

We agree. The question of whether an item in plain view of the police may be seized turns on the legality of the ⊥557 intrusion which enables them to perceive and physically seize the item in question. *Texas v. Brown* , 460 U.S. 730, 738, 103 S.Ct. 1535, 1541 (1983). As defined by the U.S. Supreme Court in that case, the "plain view" exception to the Fourth Amendment's ban on warrantless searches requires: (a) there must be probable cause to believe that the item is contraband or incriminating evidence, 460 U.S. at 741-744, 103 S.Ct. at 1542-1544; (b) the initial police intrusion must be lawful, 460 U.S. at 744, 103 S.Ct. at 1544; and (c) the discovery of the contraband or incriminating evidence must have been inadvertent, 460 U.S. at 744-5, 103 S.Ct. at 1544.

The similarities between *Texas v. Brown, supra* , and the case at bar are noteworthy. In *Brown*, the defendant was stopped at night for a routine license check which could have led to his arrest for operating a motor vehicle without an operator's license. The officer used a flashlight to look into the vehicle and bent his body to get a better look inside the vehicle. The officer observed drugs in plain view and arrested the defendant. In the case at bar, the police stopped the vehicle because of a curfew violation (which could have led to Appellant's arrest) and because of a report about gunshots in the area. The officer used a flashlight to look into the vehicle and also bent his body to get a better look into the vehicle. The officer discovered a gun in plain view in the vehicle.

Does the case at bar meet the *Brown* criteria for a "plain view" seizure? We so find. First, since mere possession ⊥558 of any firearm is a felony in the Republic of Palau, 17 PNC § 3306(a), the officer had more than probable cause to believe that the weapon he observed inside the vehicle was contraband and incriminating evidence. Second, the intrusion by the police was lawful, since they had probable cause to believe that Defendant had committed a curfew violation and because they had a reasonable suspicion that the vehicle's occupants may have been involved in a felony, use of a firearm: 17 PNC § 3306(a). Third, the discovery of the firearm in question was clearly inadvertent; the facts of the case do not allow for any foreknowledge by Officer Shiro that a firearm would be found in the vehicle.

An officer may use a flashlight to aid his inspection of the interior of a vehicle without violating the Fourth Amendment. *Texas v. Brown, supra* , 460 U.S. at 740-1, 103 S.Ct. at 1542. Cf. *United States v. Lee* , 274 U.S. 559, 563, 47 S.Ct. 746, 748 (1927); *United States v. Garlid* , 630 F.2d 633, 634 (8th Cir. 1980); and *United States v. Rickus*, 737 F.2d 360, 366 (3rd Cir. 1984) fn. 3.

An officer may bend his body to get a better look inside a vehicle without violating the Fourth Amendment, since

> The general public could peer into the interior of [the] automobile from any number of angles; there is no reason [the officer] should be precluded from observing as an officer what would be entirely visible to him as a private citizen. There is no reasonable expectation of privacy (citations omitted) shielding that portion of the interior of an automobile which may be viewed from the outside by either inquisitive passersby or by diligent police officers. *Texas v. Brown supra* , 460 U.S. at 471, 103 S.Ct. at 1542.

⊥559 In cases where a search or seizure has as its immediate object a search for a weapon, the "weighty interest in police officers' safety" justifies warrantless searches based only on a reasonable suspicion of criminal activity. *New York v. Class*, 106 S. Ct. 960, 967-68 (1986).

It is well-settled that an investigatory stop short of an arrest is valid if based upon a reasonable suspicion that criminal activity is afoot. *Terry v. Ohio*, 392 U.S. 1, 30, 88 S.Ct. 1868, 1884 (1968); *United States v. Brignoni-Ponce* , 422 U.S. 873, 884, 95 S.Ct. 2574, 2581 (1975); *Brown v. Texas* , 433 U.S. 47, 52, 99 S.Ct. 2637, 2641 (1979). Reasonable suspicion must be based upon "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." *Terry, supra*, 392 U.S. at 21, 88 S.Ct. at 1880. See also, *Brignoni-Ponce, supra*, 422 U.S. at 885, 95 S.Ct. at 2582; and *Michigan v. Summers* , 452 U.S. 692, 697, 101 S.Ct. 2587, 2592 (1981). In determining whether a stop is justified the court must view the circumstances surrounding the stop in their entirety, giving due weight to the experience of the officers. See, *United States v. Cortez* , 449 U.S. 404, 419, 101 S.Ct. at 695 (1981). Finally, such an investigative stop must be "reasonably related in scope to the justification for its initiation." *Terry, supra* , 422 U.S. at 882, 95 S.Ct. at 2580. The legal requirements for an investigatory stop are all present here.

The Trial Court's denial of Appellant's motion to suppress is affirmed.

⊥560 2. Whether the holding in *Kazuo* and *Yano* is erroneous and therefore should be overruled.

The *Kazuo/Yano* cases hold that the 15 year mandatory jail term for possession of a firearm is cruel and unusual punishment as disproportionate to the crime. Appellant argues that the "use of a gun under the facts of this case amounted in effect to possession as defined in the *Yano* and *Kazuo* cases . . ." Appellant makes no argument that *Kazuo/Yano* should be expanded to include use.

In *Kazuo/Yano* the petitioners filed petitions for prohibition contending that Article XIII, Section 13(2) of the Palau Constitution establishing a mandatory minimum imprisonment for the importation, possession, use or manufacture of firearms was cruel and unusual punishment.

The actions against *Kazuo* and *Yano* were for possession only. *Id.* at 156, n.4. In concluding that the mandatory sentencing provision of 15 years for possession of a firearm was "significantly disproportionate" to the crime, the Court emphasized the limited nature of its

holding, noting that the "decision effects only the proscribed punishment for possession." *Id.* at 175.

Here, appellant clearly used the pistol and, therefore, *Kazuo/Yano* simply does not apply. *Kazuo/Yano* is therefore clearly and factually distinguishable from this case. Accordingly, we affirm the Trial Court's sentence imposing 15 years imprisonment for use of a pistol.

Finally, we are urged by the appellee to overrule the ⊥561 *Kazuo/Yano* holding. Having distinguished *Kazuo/Yano* from the case at bar, it is not necessary and perhaps not even appropriate for us to reconsider *Kazuo/Yano* holding de novo. We decline to do so. We will, however, reconsider the *Kazuo/Yano* holding if presented with an appropriate case.

CONCLUSION

We affirm the Trial Court's denial of appellant's motion to suppress the gun and the ammunition. We also affirm the Trial Court's sentence that imposes a 15-year jail term for the use of firearm. Further, we decline to reconsider the holding of *Kazuo/Yano* because it is not necessary and appropriate to do so in this case.