Republic of Palau
v.
Kennosuke A Suzuky

Criminal Case No. 14-096

Supreme Court, Trial Division
Republic of Palau

Decided: March 3, 2015

Counsel for Republic of Palau ..... John Bradley
Counsel for Defendant ..... Oldiais Ngiraikelau

[1] **Constitutional Law**: Search & Seizure
Criminal Procedure: Warrantless Arrests

One recognized exception to the normal warrant requirement is the "border search exception." Such searches are routinely conducted, without probable cause or warrant, in order to regulate the collection of duties and to prevent the introduction of contraband into this country. Thus, a traveler entering the Republic at Airai International Airport can expect to routinely have his or her luggage inspected to ensure that the contents have been properly declared and that the traveler is not carrying contraband, and customs agents may perform such routine searches without any requirement of reasonable suspicion, probable cause, or warrant.

[2] **Constitutional Law**: Search & Seizure
Criminal Procedure: Warrantless Arrests

Border searches, however, are not all alike. Some searches go beyond routine customs searches and inspections, such as when a customs agent suspects that a traveler is smuggling contraband within his or her body. In the United States such searches must rest upon reasonable suspicion—that is, a border official must have a particularized and objective basis for suspecting the particular person of criminal activity.

[3] **Constitutional Law**: Search & Seizure
Criminal Procedure: Warrantless Arrests

The existence of one potentially sufficient exception to the warrant requirement does not preclude the applicability of another.

[4] **Constitutional Law**: Coerced Confessions
Criminal Procedure: Confessions
Evidence: Admissibility

A reasonable person, despite his innocence, will often confess to a crime he had no involvement with when offered an opportunity to leave without prosecution or further

consequences. That a guilty person would do the same is not relevant to the voluntariness analysis; if a practice can induce an innocent person to provide a false confession, it is the coercive practice, not the result, which is offensive to justice and the Constitution. This distinction, however, rests entirely on the specifics of the promise made: an offer, for example, of a potentially reduced sentence or of other possible law enforcement benefits is fundamentally distinct from an actual dispositive offer of non-prosecution.

[5] **Criminal Procedure**: Exclusionary Rule
Evidence: Admissibility

The Court cannot see how application of the exclusionary rule in this case would be appropriate, given that the actions Defendant claims influenced his statement were not undertaken by representatives of the Republic—that is, neither the Acting Attorney General, nor Director Aguon, nor any other law enforcement officer led him to believe that he specifically would not be charged if he confessed. There is no law-enforcement misconduct to deter, and as such suppression is inappropriate.

Order on Defendant's Motion to Suppress Evidence and Dismiss the Information

The Honorable ARTHUR NGIRAKLSONG, Chief Justice:

Defendant Kennosuke Suzuky, charged with several offenses stemming from his alleged import and/or possession of a number of firearms and ammunition in a shipping container, now brings interlocking motions (1) to suppress physical evidence acquired as the result of a search of his shipping container; (2) to suppress his statements to law enforcement on or about May 13, 2014; and (3) to dismiss the information because of an alleged promise of non-prosecution by the Republic. Supplementary briefing was filed at the order of the Court, and an evidentiary hearing was held on February 17, 2015, with argument continuing on February 23, 2015. For the following reasons, Defendant's motions will be denied.

BACKGROUND

The general facts of this case, both as found by this Court in its December 11, 2014 Order on Pretrial Motions and in the pleadings and hearing held in these motions, are somewhat convoluted. On May 2, 2014, a container of personal goods and effects owned by and being shipped to the Defendant arrived in Palau. Customs officers, shortly thereafter, noted what they believed to be questionable value declarations for the declared contents of the container—vehicles and motorcycles. This triggered a conversation with the Defendant confirming his customs declarations and a routine inspection of the container's contents pursuant to Customs Regulation 4.3.6.1,

"Customs May Examine."[1] Some time thereafter, on or about the morning of May 7, Defendant contacted Customs Officer Poland Masaharu and informed Officer Masaharu that there might be firearms in the container. An inspection was scheduled to occur on May 7, but, upon the discovery of pests in the container the inspection was delayed until May 8 so the container could be fumigated before the contents were examined. Customs informed the Defendant of both scheduled inspections and his right to be present for such inspections; Defendant was present on both occasions and did not object to the search of his container on either date. No warrant to search the container was sought or obtained.

However, separate from Defendant's contact with Customs regarding the search of his container, Defendant sought the advice of legal counsel. On or about the morning of May 8,[2] Defendant met with then Chief Public Defender Lalii C. Sakuma to discuss how to resolve possession of his firearms, which he apparently "wanted nothing to do with" and wished to lawfully surrender. While the details of the following conversation(s) are disputed, all parties agree that Ms. Sakuma, on behalf, perhaps in an "unofficial capacity," of the Defendant, contacted then Acting Attorney General Perry Kendall and Bureau of Public Safety Director Ismael Aguon. She inquired as to what a hypothetical client might do if he was in possession of a prohibited firearm and wished to surrender it to the Republic, and was informed that at least some individuals had been allowed to donate such firearms to the Republic or to return them to their place of lawful ownership. Defendant Suzuky was never identified to either Mr. Kendall or Director Aguon, and only Director Aguon appears to have been informed that more than one firearm may have been involved. Neither representative of the Republic was, at that time, informed that the firearm(s) in question were already in Palau, that the Defendant had already informed Officer Masaharu about their presence, or that Customs was already preparing to search the container in question (details that, at that time, Defendant apparently had not disclosed to Ms. Sakuma). No specific plea or charging agreements were negotiated.

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[1] The details of what followed are, in many respects, subject to conflicting testimony. For purposes of these Motions, however, the Court need not make conclusive credibility determinations and resolve all the conflicting evidence. That is because, even taking the evidence presented in the light most favorable to the Defendant, the facts are sufficient to deny both motions. As such, the Court will make only such limited findings as are necessary or clear.

[2] All admitted evidence suggests that this conversation occurred on May 8, subsequent to Defendant's statements to Officer Masaharu and subsequent to the first attempted inspection of his container on May 7. Defendant's in-court argument, that Defendant relied on advice of counsel he received prior to May 8, is not supported by the hearing testimony or the Affidavit of Kennosuke A. Suzuky submitted as part of Defendant's briefing.

Despite the lack of details in these discussions, Ms. Sakuma advised the Defendant that he would be able to surrender his weapons without charges. Ostensibly relying on such advice, Defendant did not object to the search of his container that occurred on May 8 and eventually discovered the firearms in question. The weapons were found within a locked Nissan SUV, in both a black bag and a wooden box that were found within the vehicle. The black bag was not closed; Inspector Roger Andreas testified that the butt of a gun was sticking out of the bag, and could clearly be seen through the windows of the vehicle. The Nissan may have been locked, but Defendant asserts that he provided the key to the vehicle and it was apparently opened and searched without incident.

On and following May 13, Defendant gave a series of statements to investigative agents. Defendant was advised of his right to silence and his right to counsel, and he signed a fully executed *Miranda* waiver. Defendant did not bring an attorney to these meetings, which spanned at least two days and involved Defendant coming and going freely on multiple occasions. Defendant's decision to give a statement apparently was based on the advice of Ms. Sakuma, who, when Defendant asked whether he should give a statement to Customs, recommended that he should and did not advise him to have counsel present. Having waived his right to have counsel present, Defendant's statement admitted ownership and knowledge of the firearms, but asserted that he did not intend for them to be brought to the Republic.

Defendant now (1) seeks to suppress the use of that statement against him as well as the physical evidence collected as a result of the search of his container, and (2) seeks dismissal of all charges based on a promise of non-prosecution that he alleges the Republic made in exchange for his cooperation.

DISCUSSION

I. The Search of Defendant's Container

[1] This Court's "analysis begins, as it should in every case addressing the reasonableness of a warrantless search, with the basic rule that 'searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under [the Constitution]—subject only to a few specifically established and well-delineated exceptions.'" *Arizona v. Gant*, 556 U.S. 332, 339 (2009) (quoting *Katz v. United States*, 389 U.S. 347, 357 (1967)); *see also ROP v. Gibbons*, 1 ROP Intrm. 547A, 547Q–R (1988) (holding that certain exceptions to the warrant requirement exist under the Palau Constitution as they do under the United States Constitution). One such recognized exception is the "border search exception,"[3] which this Court has noted is

[3] The Court uses the common term "border search exception" despite it being something of a misnomer given that the Constitution applies the same standards to both searches and seizures.

"a universal norm . . . so unremarkable that it never generated a reported decision in the Trust Territory Reports."[4] *ROP v. Techur*, 6 ROP Intrm. 340, 343 (Tr. Div. 1997). Such searches are routinely conducted, "without probable cause or warrant, in order to regulate the collection of duties and to prevent the introduction of contraband into this country." *Id.* (quoting *United States v. Montoya de Hernandez*, 473 U.S. 531, 537 (1985)).

[2] Border searches, however, are not all alike. A traveler entering the Republic at Airai International Airport can expect to routinely have his or her luggage inspected to ensure that the contents have been properly declared and that the traveler is not carrying contraband, and customs agents may perform such routine searches without "any requirement of reasonable suspicion, probable cause, or warrant." *Montoya de Hernandez*, 473 U.S. at 538. Some searches, however, go beyond routine customs searches and inspections, such as when a customs agent suspects that a traveler is smuggling contraband within his or her body. *See id*. at 540–41 (finding that holding a passenger for an involuntary x-ray or monitored bowel movements went beyond the scope of a routine search). While the Appellate Division has not addressed this issue under the Palau Constitution, in the United States such searches must rest upon reasonable suspicion—that is, a border official "must have a 'particularized and objective basis for suspecting the particular person'" of criminal activity. *Id* at 541 (quoting *United States v. Cortez*, 449 U.S. 411, 417 (1981)).

Defendant contends that the search of his container was not routine, and consequently required a warrant absent a separate exception to the warrant requirement.[5] The Court disagrees, and finds that the search of Defendant's container was a routine search. Officer Masaharu testified that the initial concern with Defendant's container was raised by the daily review of the required documents (a bill of lading, a packing list, and an invoice) attached to incoming containers. He further testified that the standard practice is to call Customs if the forms indicate possible undervaluation of the contents, as he believed they did here. If there is a more routine practice of customs and border inspectors than the review of required documents for the enforcement of

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[4] For a detailed survey and analysis of United States border search law and how it applies to the realities of modern technology, *see United States v. Ali Saboonchi*, 990 F. Supp. 2d 536 (D. Md. 2014) (holding that reasonable suspicion was required to perform a warrantless forensic search of electronic devices entering the country).

[5] Substantial, undisputed, and credible evidence suggests that the Defendant consented to and affirmatively assisted in the search of his container, and consent is a recognized exception to the warrant requirement. While not explicitly conceding he consented, Defendant argues that any consent was invalid because it was coerced by a promise of non-prosecution. Because the Court finds that no such promise was made, *see infra* Part II, Defendant's consent constitutes an alternative basis upon which to deny suppression were the border search exception insufficient.

border laws, this Court is not aware of it. Inspector Andreas described the "validation process"—the process of emptying a container and itemizing its contents to ensure that they match the declarations on the customs forms—which Defendant's container was subjected to. To the extent that anything about this search was unusual and officers may have specifically been looking for firearms, this was not caused by the actions of law enforcement; any such concern was triggered by the volitional act of Defendant contacting Officer Masaharu and informing him that there might be weapons in the container. Given that inspection and "validation" of the contents of a container is "part of the process," the Court finds that the search of Defendant's container was routine and did not exceed the reasonable scope of a warrantless border search. As such, neither reasonable, particularized suspicion nor probable cause was required.

Defendant, in the alternative, asserts that the border search doctrine did not apply to the discovery and seizure of the firearms, because the firearms were found in the back seat of an automobile.[6] As such, Defendant argues the "automobile exception," which applies when an officer has probable cause to believe that a vehicle contains evidence of criminal activity, is the applicable exception to the warrant requirement. *See Gant*, 556 U.S. at 347. But this fundamentally misinterprets how exceptions to the warrant requirement work—they are not mutually exclusive, and the border search doctrine cannot be so easily thwarted merely by driving across the border instead of shipping a container. *See, e.g., United States v. Rivas*, 157 F.3d 364, 366–67 (5th Cir. 1998) (analyzing the search of the interior structure of a vehicle under the border search doctrine when the vehicle was crossing the international border); *United States v. Carreon*, 872 F.2d 1436, 1440–41 (10th Cir. 1989) (same).

[3] Consider, for example, a hypothetical situation where an officer has reason to believe a vehicle crossing the international border is equipped with a bomb that is set to explode shortly thereafter when the vehicle reaches a crowded destination. No fewer than three overlapping exceptions allow for warrantless search of this vehicle, each with their own required quantum of proof: the border search exception, the automobile exception, and the exigent circumstances exception. One does not yield to the other; the law only requires that, where a warrantless search is performed, it must fall within *one* of the specifically delineated exceptions. *Gant*, 556 U.S. at 338. The existence of one potentially sufficient exception to the warrant requirement does not preclude the applicability of another, and as such Defendant's motion to suppress physical evidence is denied.

II. Defendant's Statements On or About May 13

Defendant contends that his May 13 statement constituted a coerced confession, and therefore is inadmissible under the Constitution. *See* Palau Const. art IV, § 7

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[6] The Court also notes Inspector Andreas's undisputed and credible testimony that the butt of a gun was plainly visible to him through the window of the closed vehicle.

("Coerced or forced confessions shall not be admitted into evidence."). The general test regarding whether a statement was coerced is one of voluntariness, which, considering the totality of the circumstances, inquires into whether the suspect's will was overborne by government coercion. *Wong v. ROP*, 11 ROP 178, 183 (2004). Factors that can overbear a suspect's will may include "any sort of threats or violence, . . . any direct or implied promises, however slight, or [] the exertion of any improper influence. *Id*. at 183–84 (quoting *Hutto v. Ross*, 97 S. Ct. 202, 203 (1976)).

[4] This Court has previously ruled that "[a] promise of non-prosecution is sufficient to overbear the will of a suspect." *ROP v. Mesubed*, 20 ROP 219, 230 (Tr. Div. 2013) (citing *United States v. Menesses*, 962 F.2d 420, 428 (5th. Cir 1992) (["A] confession made induced by an assurance that there will be no prosecution is not voluntary."). The reason for such a specific rule, despite the general rule that voluntariness is tested under the totality of the circumstances, is one of simple reality: no one, guilty or innocent, enjoys being subject to interrogation, and most people will take almost any opportunity to end an interrogation. It is the same reason courts do not allow into evidence confessions that are extracted by torture; a reasonable person, despite his innocence, will often confess to a crime he had no involvement with when offered an opportunity to leave without prosecution or further consequences. That a guilty person would do the same is not relevant to the voluntariness analysis; if a practice can induce an innocent person to provide a false confession, it is the coercive practice, not the result, which is offensive to justice and the Constitution. This distinction, however, rests entirely on the specifics of the promise made: an offer, for example, of a potentially reduced sentence or of other possible law enforcement benefits is fundamentally distinct from an actual dispositive offer of non-prosecution. *See United States v. Long*, 852 F. 2d 975, 978 (7th Cir. 1988) ("[L]eading the defendant to believe that he or she will receive lenient treatment when this is quite unlikely is improper, whereas, making a promise to bring the defendant's cooperation to the attention of the prosecutor or to seek leniency [from the court], without more, typically is not.").

Defendant contends that the Republic, in explaining a firearm surrender process that has previously resulted in non-prosecution, extended to him such an offer of non-prosecution. This Court disagrees. Plea bargaining, while involving matters of constitutional import, is often analyzed under general principles contract law. *See Cantero v. State of Ponape*, 8 TTR 331, 333 (1983); *see also Blackledge v. Allison*, 97 S.Ct 1621, 1629-30, n. 6 (1977) (noting that factors that may serve to invalidate a contract, such as misunderstanding, duress, or misrepresentation may also invalidate a guilty plea). Even accepting as true the most favorable testimony about the conversations between the Republic and Ms. Sakuma, the purported statements by Republic simply do not constitute an offer of non-prosecution. *See* Restatement (Second) of Contracts § 24 ("An offer is the manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it.").

There is no evidence that the Republic, through its authorized representative the Acting Attorney General, or through law enforcement Director Aguon, ever offered not to prosecute *this* Defendant. The conversations between counsel,[7] which Ms. Sakuma testified she "understood" to constitute an agreement not to prosecute, involved a general procedure and limited, unclear, hypothetical facts (which eventually turned out to be inaccurate). Even being generous to the Defendant, these conversation are at best understood as preliminary negotiations in which the Republic demonstrated a willingness to bargain and outlined common circumstances under which it had previously agreed to bargain, but did not manifest an actual offer. *See id.* § 26 cmt. a. (distinguishing preliminary negotiations from offers, particularly where the potentially accepting party has reason to know based on circumstances and previous business practice of the parties that no offer is yet intended). Ms. Sakuma conceded that Mr. Kendall made only one actual offer—to talk to Director Aguon—and that no express promises of non-prosecution were made to the Defendant.

Further, Ms. Sakuma conceded that she did not inform Mr. Kendall—because the Defendant had not informed her—that Defendant possessed more than one firearm, that the weapons had already arrived in Palau, that the Defendant had already disclosed to Customs that he had failed to declare the weapons, and that the container had already been opened by Customs. As such, even if there *was* an offer, it was clearly made under a mistaken understanding of the facts, which generally makes the resulting contract voidable by the adversely affected party. *See id.* § 152 (When a Mistake of Both Parties Makes a Contract Voidable); § 153 (When a Mistake of One Party Makes a Contract Voidable). That the facts were unknown to Ms. Sakuma as well as Mr. Kendall does not change the fact that, even if Mr. Kendall had made an offer on behalf of the Republic that was accepted by the Defendant, the result would have been a voidable contract induced by fundamental misrepresentations that the Defendant, through Ms. Sakuma, made. *See* Am. Jur. 2d *Contracts* § 214 (Fraud and Misrepresentation).

[5] Defendant raises one more argument regarding his confession, which the Court will address only briefly: the idea that his confession was "coerced" by the apparently mistaken advice of the public defender. A number of legal issues preclude the Court's full review of this theory at this time, notably the fact that the motion in question is one to suppress. The exclusionary rule, as it has often been stated, is not a catchall—it is a rule designed to prevent law enforcement from overreaching in its efforts to convict suspects. *See Herring v. United States*, 555 U.S. 135, 141 ("[T]he exclusionary rule is not an individual right and applies only where it results in appreciable

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[7] It is not clear that Ms. Sakuma, who testified that she did "not officially" represent Defendant during these conversations, was even acting as his attorney at this time. The Court need not, and does not, decide this issue, as it would not affect the outcome of these motions.

deterrence."). The Court cannot see how application of the exclusionary rule in this case would be appropriate, given that the actions Defendant claims influenced his statement were not undertaken by representatives of the Republic—that is, neither the Acting Attorney General, nor Director Aguon, nor any other law enforcement officer led him to believe that *he* specifically would not be charged if he confessed. There is no law-enforcement misconduct to deter, and as such suppression is inappropriate. *See id.*[8]

III. Defendant's Motion to Dismiss for Estoppel

Finally, Defendant argues that the Republic, having promised that Defendant would not be charged for these offenses, must be estopped from proceeding with these charges. Effectively, Defendant is arguing that he was offered immunity from prosecution in exchange for his cooperation investigating this case and that, having cooperated as requested, the Republic should be bound by this immunity offer.

Defendant raises this argument under two theories, both of which are easily disposed of. First, as noted above, Defendant contests that the Republic, through the representations of Mr. Kendall and Director Aguon, offered not to charge this Defendant. As the Court found above, *see supra* Part II, this simply is not the case. Even if such an offer had been made, it would have been made in reliance on incomplete and affirmatively misrepresented facts that the Defendant knew were incomplete and misrepresented; the Republic would not have been bound or estopped by such an offer.

Defendant's second theory, while more creative, is similarly unavailling. Defendant notes, correctly, that the Public Defender is a government employee under the supervision of the Minister of State. As such, Defendant posits, the Public Defender is an executive officer with the authority—or at least, the apparent authority—to bind the Republic by her promises and thus estopp the Republic from charging the Defendant because she informed the Defendant that he would not be charged. This theory, while inventive, asks the Court to over look key facts.

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[8] Arguments and inquiries by Defendant's current counsel appeared to question the reasoning, and perhaps the quality of the reasoning, behind Ms. Sakuma's advice. To the extent that they suggest concerns with the effectiveness of her assistance, such issues are not appropriate for consideration during a suppression hearing. That said, given that the right to counsel in Palau applies to the "accused," and Defendant had not been accused, charged, or even seriously investigated in relation to firearms offenses, it is unclear from where Defendant would have derived a right to counsel at the time of the conversations in question, and the right to effective counsel is part-and-parcel of the right to counsel. *See* Palau Const. Art IV, § 7; *Saunders v. ROP*, 8 ROP Intrm. 90, 91 (1999).

Defendant contends that, at the time he received the advice in question, Ms. Sakuma represented him. If that is the case, it is difficult to fathom how she could also have spoken for the executive, his adversary, within any imaginable understanding of the nature of the attorney-client relationship. Second, as Defendant notes, the Public Defender's Office exists under the authority of the Ministry of State—*not* the Ministry of Justice, which oversees law enforcement and prosecution. The Public Defender's Office and the Attorney General are separated at the highest level of Government permitted under the Constitution, given that all executive offices and agencies must report to the Office of the President. *See* Palau Const. art. VIII, § 1. The Constitution requires that those accused be granted counsel, and the Public Defender exists substantially to fulfill that requirement. To find that the Public Defender is in some way in privity with the Republic—sufficient that a promise from the Public Defender, and not the Attorney General, could bind the Republic—would dismantle the entire legal system established by the people through the Constitution and laws of Palau. This Court sees no factual, legal, or constitutional justification or authority to do so.

Finally, and most glaringly, even if the Public Defender had such authority to extend a binding offer on behalf of the Republic, it suffers the same fatal defect as any offer Mr. Kendall might have offered: Defendant had failed to provide Ms. Sakuma with the pertinent facts and, it appears, for some time affirmatively misled her about the gravity of his situation. No lawyer, of any level of skill or experience, can provide valuable assistance to a client when that client obscures and misrepresents the truth about the situation. A defendant who is not truthful with his lawyer cannot equitably blame that lawyer when a lack of honesty or candor leads to an unpalatable legal outcome. That fault rests squarely on the fault of an untruthful defendant.

Defendant's motion to dismiss is denied.

CONCLUSION

For the foregoing reasons, Defendant's Motion to Suppress Statements, Motion to Suppress Evidence, and Motion to Dismiss the Information are denied.