ROP v. Decherong, 2 ROP Intrm. 152 (1990)
REPUBLIC OF PALAU
Appellee,

v.

BENITA DECHERONG,
Appellant.

CRIMINAL APPEAL NO. 8-87
Criminal Case No. 130-86

Supreme Court, Appellate Division
Republic of Palau

Opinion
Decided: August 15, 1990

Counsel for Appellant: Johnson Toribiong

Counsel for Appellee: Ernestine K. Rengiil

BEFORE: LOREN A. SUTTON, Associate Justice; ARTHUR NGIRAKLSONG, Associate Justice; ALEX R. MUNSON,[1] Associate Justice.
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MUNSON, Associate Justice:

Procedural History

Appellant Benita Decherong was charged by Information on April 23, 1986, with six counts of embezzlement in violation of Title 17, Palau National Code (PNC) § 1904. On September 28, 1987, appellant entered into a plea agreement, wherein she pleaded guilty to four of the embezzlement counts. The remaining two counts were dismissed. Sentencing was set for a later date.

On October 22, 1987, appellant moved to withdraw her guilty pleas. She subsequently withdrew that motion.

Appellant was sentenced December 14, 1987. A portion of her sentence was one year in jail. Later that day, she filed a "motion to reduce sentence," claiming that she had not been sentenced in accordance with her plea agreement. Apparently, appellant's sentence was stayed pending a hearing the next day. Although it is not clear from the briefs, it appears that appellant then retained her current attorneys, who filed a writ of habeas corpus that same day.

[1] The Honorable Alex R. Munson, Chief Judge, United States District Court for the Northern Mariana Islands, sitting by designation.

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Appellant filed a notice of appeal and motion for stay of execution of sentence pending appeal on December 28, 1987. The Trial Division denied appellant's motion for stay on December 29, 1987. Appellant renewed her motion for stay before the Appellate Division, where it was granted on January 27, 1988, subject to bail and certain conditions. The Appellate Division denied ⊥154 appellant's writ of habeas corpus on March 4, 1988, since appellant had already been freed pending determination of this appeal.

Facts

The relevant facts involve only the sufficiency of appellant's legal representation and the jurisdiction of the trial court. Although there are minor disputes about the facts (which neither party has made an effort to definitively resolve), the general picture which emerges is this:

After being arrested and subsequently released on bail on April 24, 1986, appellant either retained a trial counselor [2] or had one appointed to represent her. The information under which she was charged was originally filed in the Trial Division of the Supreme Court and then transferred to the Court of Common Pleas after a bail hearing.

Trial was originally set for May 28, 1986. Apparently on the day of trial, the government moved for a continuance, which was not opposed. The next trial date set was October 16, 1986. On that date the trial was again continued, this time to November 24, 1986, due to the illness of the government's lead counsel and the inability of any other prosecutor to fill in on such short ⊥155 notice. Appellant did not oppose the continuance.

What happened next is not clear from the briefs, but the trial did not take place in November and was scheduled again, this time for July 16, 1987. On that date appellant moved for a continuance, apparently because she had been injured at the hands of her husband the night before trial. Trial was re-set for August 24, 1987.

On that date the prosecution was again unready to proceed, this time because the prosecutor was trying a case in Peleliu. Appellant moved to dismiss for lack of a speedy trial but the motion was denied. The matter was set for trial September 15, 1987, and then set back (apparently by the trial court on its own motion) to September 28, 1987.

On September 28, 1987, appellant appeared and entered into a plea agreement under which she pleaded guilty to counts I, II, III, and VI of the information. Counts IV and V were dismissed as part of the plea agreement.

On October 22, 1987, appellant, represented by different counsel (an attorney, rather than a trial counselor), moved to withdraw her guilty pleas. She subsequently withdrew that motion.

Appellant was sentenced December 14, 1987. She was sentenced to one year's imprisonment on each of the first three counts and two years' imprisonment on count VI. The sentences ⊥156 were to be served consecutively but they all were suspended, except the one year

[2] "Trial counselor" has replaced the previous designation of "trial assistant."

imprisonment on Count I.

Later that same day, appellant orally moved to reduce sentence, which motion the prosecution joined. [3] Execution of sentence was apparently stayed until the hearing on appellant's motion, which was set for the next day.

On December 15, 1987, appellant hired an attorney, who filed a writ of habeas corpus. She also filed a motion to set aside her guilty pleas and to dismiss the charges for lack of jurisdiction.

The trial judge denied the motions on December 18, 1987. Appellant filed her notice of appeal and a motion for a stay on December 28, 1987. The motion to stay was denied by the trial judge the next day. The motion was renewed before the Appellate Division and granted January 27, 1988. It is not claimed that appellant has spent any time in jail. The motion for writ of habeas corpus was denied March 4, 1988, because appellant had been released pending appeal.

⊥157 Analysis

Appellant posits several grounds for remand to allow her to withdraw her guilty pleas and for further proceedings. However, an initial question is whether she waived certain grounds for appeal by entering unconditional guilty pleas.

Palau Rule of Criminal Procedure 11(a)(2) is nearly identical to the United States federal rule. The Palau rule provides:

> Conditional Pleas . With the approval of the court and the consent of the government, a defendant may enter a conditional plea of guilty or nolo contendere, reserving in writing the right, on appeal from the judgment, to review [sic] of the adverse determination to any specified pretrial motion. If the defendant prevails on appeal, [she] shall be allowed to withdraw [her] plea.

As a general rule, a guilty plea erases claims of constitutional violations arising before the plea:

> [A] guilty plea represents a break in the chain of events which has preceded it in the criminal process. When a criminal defendant has solemnly admitted in open court that [she] is in fact guilty of the offense with which [she] is charged, [she] may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea.

Tollett v. Henderson, 93 S.Ct. 1602, 1608 (1973).

There are exceptions to this general rule. *See, e.g., Blackledge v. Perry* , 94 S.Ct. 2098, 2103 (1974) (meritorious claim ⊥158 of prosecutorial vindictiveness amounting to a due process

[3] The motion is more properly characterized as one for reconsideration of the sentence.

violation); *Menna v. New York* , 96 S.Ct. 241, 242 (1975) (involving a double jeopardy claim). Claims that the applicable statute is unconstitutional or that the charging instrument fails to state an offense are considered "jurisdictional" claims that are not waived by a guilty plea. *See, United States v. Broncheau* , 597 F.2d 1260, 1262 n. 1 (9th Cir.), *cert. denied* , 100 S.Ct. 123 (1979). Further, "[r]ule 11(a)(2) is not limited to any particular pretrial motions. The Advisory Committee on the Federal Rules emphasized that 'the objectives of the rule are served by extending it to . . . "any pretrial motion which, if granted, would be dispositive of the case'.'" *United States v. Scott*, 884 F.2d 1163, 1165 (9th Cir. 1989) (citation omitted).

Here, defendant did not enter into a conditional guilty plea. There is nothing presented to show that she reserved in writing the right to appeal any adverse determinations made against her. Therefore, any claim that does not implicate constitutional safeguards or that is not "jurisdictional" cannot be raised on appeal, since it was implicitly waived by entering guilty pleas.

Because it appears that all of appellant's claims have constitutional or jurisdictional implications, defendant was not harmed by her failure to enter into a conditional plea pursuant to Rule 11(a)(2).

1. Was this case heard in the Court of ⊥159 Common Pleas and, if so, did that court lack jurisdiction?

Appellant asserts that all proceedings against her were actually heard in the Court of Common Pleas, which she argues lacks jurisdiction to hear criminal matters. In support of this argument she cites Article X, Section 5 of the Constitution of the Republic of Palau, which provides, inter alia, that the Supreme Court has jurisdiction over a case in which the national or a state government is a party. The national government is plaintiff in all criminal cases.

Appellee responds that the case was originally filed in the Trial Division and ultimately resolved there by a judge of the National Court, temporarily assigned to the Trial Division of the Supreme Court by the Chief Justice pursuant to Article X, § 12[4] of the Constitution and 4 PNC § 201.[5]

The court's order of December 18, 1987, addressed this issue. The trial judge was assigned from the National Court to the Trial Division of the Supreme Court. It was in his capacity as a Trial Division judge that the he accepted appellant's guilty pleas. The trial judge further stated that appellant was mistaken ⊥160 in her belief that the case continued to be heard in the Court of Common Pleas and that her misapprehension resulted from the earlier miscaptioning of the documents, which defect was not cured until much later in the proceedings.

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[4] "The Chief Justice . . . may assign judges from . . . one division of a court to another department or division of that court and he may assign judges for temporary service in another court.. . . * * * "

[5] "The Chief Justice may assign the Presiding Judge of the National Court for temporary service in the Trial Division or Appellate Division of the Supreme Court. * * * "

We accept the trial judge's statement that all proceedings in which he was involved were conducted in the Trial Division. Further, it appears that, pursuant to Section 12, the presiding judge of the National Court can be temporarily assigned only to the Supreme Court. Therefore, the trial judge's characterization of the proceedings is correct in that all proceedings could only be held in the Trial Division. The failure to change the captions on the documents reflects a minor procedural irregularity and does not indicate a substantive violation of appellant's rights.

> 2. If defendant's case was resolved in the Trial Division, did her representation by a trial counselor in that court result in a violation of her rights sufficient to warrant remand to allow her to withdraw her guilty pleas?

Appellant argues that she was entitled to have an attorney (rather than a trial counselor) represent her. Appellant relies on an April 11, 1983, memorandum from the Chief Justice to the Attorney General and the Public Defender. The memorandum states in relevant part:

> It should be stated here according to Supreme Court policy that Trial Counselors may only handle criminal cases where the maximum punishment which may be imposed does ⊥161 not exceed five (5) years.
>
> This necessarily restricts Trial Counselor criminal work to the cases assigned to the Court of Common Pleas.

That memorandum has not been made part of the record on appeal but may be, and is, judicially noticed.

> Article X, Section 14 of the Constitution provides:
>
> The Supreme Court shall promulgate rules governing the administration of the courts, legal and judicial professions, and practice and procedure in civil and criminal matters.

Pursuant to this constitutional mandate, the Chief Justice issued the advisory memorandum of April 11, 1983.

Appellant maintains that she was entitled to representation by an attorney for two reasons. First, because trial counselors are limited in their representation of criminal defendants to cases in the Court of Common Pleas. Second, because the maximum penalty she faced, if convicted on all counts and sentenced to the maximum term of confinement on each count, was thirty years' imprisonment and a fine of $6,000.00.

Because appellant's guilty pleas were ultimately taken in the Trial Division of the Supreme Court, defendant's representation by a trial counselor in that court violates the procedure established in the 1983 memorandum from the Chief Justice. Further, her claims involved a potential sentence well in excess of the case and sentence limitations placed on the criminal practice of trial counselors.

⊥162 Did appellant waive this defect by entering into a plea agreement? We think not. The practice restrictions placed on trial counselors in the Chief Justice' memorandum admit of no exceptions or waivers. That is, there lies implicit in the restrictions the notion that a violation thereof would support an ineffective-assistance-of-counsel argument. Also, her claim cannot be said to have been mooted by the actual sentence she received, which was simply one year's imprisonment. Criminal defendants who have suffered a violation of their rights should not be required to submit to a post-sentencing analysis by an appellate court to determine if the violation was somehow rendered inconsequential by subsequent events.

Because we find that appellant's representation in the Trial Division by a trial counselor violated a policy established by the Chief Justice in the execution of his constitutional duties, we grant her request and REMAND this matter to the Trial Division to allow her to withdraw her guilty pleas and for further proceedings.

⊥163 3. Was appellant denied her right to a speedy trial?

We consider this issue despite our ruling above because, should appellant have prevailed on it, the proceedings against her would have been dismissed in their entirety.

Article IV, Section 7 of the Constitution of the Republic of Palau provides in part that "[a] person accused of a criminal offense . . . shall enjoy the right . . . to a speedy, public and impartial trial." This constitutional guarantee is not further defined or delineated by statute, other than the considerations implicit in 17 PNC § 107, which section requires that all crimes except murder in the first or second degree must be prosecuted within three years after such crime is committed.[6]

Here, the prosecution against appellant was started well within the three year statute of limitations and that finding alone normally is dispositive. However, on rare occasions there are speedy trial considerations even for prosecutions begun within the limitations period. Palau has previously recognized the importance of the constitutional guarantee to a speedy trial. *See, e.g., Trust Territory v. Waayan* , 7 T.T.R. 560, 563-566 (1977), and we take this opportunity to revisit this area.

⊥164 The constitutional right to a speedy trial has been recognized as "an important safeguard to prevent undue and oppressive incarceration prior to trial, to minimize anxiety and concern accompanying public accusation and to limit the possibilities that long delay will impair the ability of an accused to defend himself." *United States v. Ewell*, 86 S.Ct. 773 (1966). "The right of a speedy trial is necessarily relative. It is consistent with delays and depends upon circumstances. It secures rights to a defendant. It does not preclude the rights of public justice." *Id., quoting, Beavers v. Haubert* , 25 S.Ct. 573, 576 (1905). "Whether delay in completing a prosecution . . . amounts to an unconstitutional deprivation of rights depends upon the circumstances." *Id., quoting, Pollard v. United States* , 77 S.Ct. 481, 486 (1957). The foregoing

[6] This limitation period can be extended only where the defendant flees from justice, absents himself or herself from the Republic, or hides so that service cannot be effected.

observations are reiterated in *Barker v. Wingo* , 92 S.Ct. 2182, 2186-2195 (1972). There, after recognizing the difficulty in fashioning an objective test to determine speedy trial violations, the Supreme Court adopted a balancing test with four interrelated components: Length of delay, the reason(s) for the delay, the defendant's assertion of the right to a speedy trial, and prejudice to the defendant. *Id.*, at 2192. This approach was adopted in *Trust Territory v. Waayan, supra*.

Here, the trial was delayed twice at the request of the government (once due to the illness of the lead prosecutor), then ⊥165 once upon appellant's motion (due to her injury in a domestic dispute), then again on the government's motion (when the prosecutor was in Peleliu trying another case), and a final time, apparently on motion of the trial court. Appellant's counsel acquiesced to the first two requests by the government but moved to dismiss on speedy trial grounds[7] when the government requested a third continuance. The time span between appellant's arrest and her entry of the four guilty pleas was approximately seventeen months.

As shown by the case law, speedy trial claims are resolved on a case-by-case basis. Here, appellant was free on bail during all relevant time periods. She makes no allegations of prejudice based on the delays, and provides no case law or facts to support her assertion that her trial counsel "should have moved to dismiss the case for lack of speedy trial when Appellee was not ready for the second time to prosecute the case."

The dynamics of every criminal trial are unique. Given the record before it, it would be impossible for this Court to deduce defense counsel's strategy and reasons for not opposing the delays. He could quite reasonably have decided that the delays worked in appellant's favor and lessened the likelihood that she would ever face trial. *See, e.g., Barker v. Wingo* , at 2187. ("As ⊥166 the time between the . . . crime and trial lengthens, witnesses may become unavailable or their memories may fade. If the witness supports the prosecution, its case will be weakened, sometimes seriously so. * * * [D]eprivation of the right to speedy trial does not per se prejudice the accused's ability to defend himself.") Indeed, given the fact that she entered guilty pleas on the day of trial, defense counsel's investigation may have led him to conclude that an extended passage of time offered the only hope appellant had to escape conviction.

In sum, the length of delay was not excessive and the reasons for the delay are not unusual or implausible. Most important, though, is that appellant has not articulated any prejudice caused her by the delay. Failing that, the speedy trial claim is not well-taken.

4. Was appellant fully apprised of the consequences of her guilty plea?

Rule 11 of the Palau Rules of Criminal Procedure governs the acceptance of pleas. In its ruling of December 18, 1987, the trial court addressed at length the issue of appellant's understanding of the plea agreement. There is nothing before this Court to indicate that the trial court failed to comport with the requirements of Rule 11, or that defendant did not fully understand the consequences of her guilty plea, or that a specific promise of no imprisonment had been made to her by the ⊥167 prosecution. Any claim that appellant was promised that she

[7] Parties would do well to note the differences between motions based on a simple failure to prosecute, a statute of limitations, or on a constitutional speedy trial provision.

would serve no jail time finds no support in the record before the Court.

5. Was appellant denied the effective assistance of legal counsel?

This issue is somewhat mooted by our discussion and remand, above. However, because of the importance of the issue we offer the following.

Generally, claims of ineffective assistance of counsel are brought before a court on collateral attack, using a motion for writ of habeas corpus, and not on a direct appeal. *See, e.g., United States v. Wagner*, 834 F.2d 1474, 1482 (9th Cir. 1987); *United States v. Johnson*, 820 F.2d 1065, 1073-1074 (9th Cir. 1987). "This is so because usually such a claim cannot be advanced without the development of facts outside the record." *United States v. Birges*, 723 F.2d 666, 670 (9th Cir.), *cert. denied*, 104 S.Ct. 1926 (1984). "Challenge by way of habeas proceeding is preferable because it permits the defendant to develop a record as to what counsel did, why it was done, and what, if any, prejudice resulted." *United States v. Pope*, 841 F.2d 954, 958 (9th Cir. 1988). "However, if defendant's legal representation was so inadequate as obviously to deny him his . . . right to counsel, the trial court's failure to take notice sua sponte of the problem 'might constitute plain error which may be ⊥168 considered on direct appeal.'" *United States v. Kazni*, 576 F.2d 238, 242 (9th Cir. 1978) *quoting, United States v. Porter*, 431 F.2d 7, 11 (9th Cir.), *cert. denied*, 91 S.Ct. 360 (1970).

Article IV, § 7[8] of the Palau Constitution specifically recognizes writs of habeas corpus. For the reasons given above, the panel directs that, as a matter of policy, future claims of ineffective assistance of counsel be brought via a writ, unless the claimed conduct of counsel [9] is so egregious as to amount to "plain error."

Here, appellant's argument that she was denied effective assistance of counsel involves her claims that she was entitled to be represented by an attorney and that her counsel did not ⊥169
effectively assert her right to a speedy trial. These issues have been addressed above.

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[8] "The writ of habeas corpus is hereby recognized and may not be suspended. * * * "

[9] For an extended discussion of effective assistance of counsel in the context of a death penalty case, see *Strickland v. Washington*, 104 S.Ct. 2052 (1984). *Strickland* held that a guilty plea cannot be attacked unless counsel was not a "reasonably competent attorney." Defendant must show that counsel's representation fell below an objective standard of reasonableness. *Id.*, at 2064. However, even if the test is satisfied, any error must be prejudicial to warrant setting aside a guilty plea. *Id.*, at 2066-2067. In *Hill v. Lockhart*, 106 S.Ct. 366 (1985), the question of effective assistance of counsel again arose after a plea of guilty had been entered. Defendant had been given incorrect information about his eligibility for parole. There, the Supreme Court held that for a guilty plea entered on advice of counsel to be deemed involuntary, the defendant must show, in addition to conduct below an objective standard of reasonableness, that there was a reasonable probability that, but for counsel's unprofessional errors, the defendant would not have pleaded guilty and would have insisted on going to trial. Both *Strickland* and *Hill* were habeas corpus proceedings.

Conclusion

For the reasons given above, this matter is REMANDED to the Trial Division. Appellant shall be allowed to withdraw her guilty pleas as part of any additional proceedings.