King v. ROP, 6 ROP Intrm. 131 (1997)
EMERSON KING,
Appellant,

v.

REPUBLIC OF PALAU,
Appellee.

CRIMINAL APPEAL NO. 2-95
Criminal Case No. 35-94

Supreme Court, Appellate Division
Republic of Palau

Opinion
Decided: April 3, 1997

Counsel for Appellant: Johnson Toribiong

Counsel for Appellee: Janine Udui (Argued), Kathleen Salii,(on the brief), Office of the Attorney General

BEFORE: ARTHUR NGIRAKLSONG, Chief Justice; JEFFREY L. BEATTIE, Associate Justice; R. BARRIE MICHELSEN, Associate Justice.

MICHELSEN, Justice:

Appellant Emerson King was driving a motor vehicle in Koror at 3:00 a.m. on the morning of November 27, 1993. With him in the car were two companions, one .22 caliber firearm, ammunition for the weapon, and a matchbox containing "ice." [1] He appealed his convictions for possession of a firearm and possession of ammunition. 17 PNCA §§ 3306(a) & (b). We affirm.

Officer Hazime Telei, a national government police officer, stopped the car to investigate the apparent violation of Koror ⊥132 State's curfew law. [2] Having discovered from King and his

[1] "Ice" is a slang term for methamphetamine prepared illicitly as crystals for smoking. *Webster's College Dictionary* Random House, 1995 ed.

[2] Koror Public Law No. K1-25-88 reads: "It shall be unlawful for any person to be in any public area within the State of Koror, including but not limited to walking, standing, assembling, gathering, or driving, on streets, pathways, public park areas, or any other public area, between the hours of 12:30 a.m. and 6:00 a.m. Any person going to or from work, funeral, fishing, or religious services, is excepted from the prohibitions of this section. This section shall also not include any person who is out in any public area as a result of an emergency or other urgency for the prevention of personal injury or property damage, or for anyone who is attempting to secure emergency medical attention."

companions that their activities did not fall within the exceptions to the curfew law, he arrested King. A pat-down of King resulted in the discovery of the ammunition in one of the pockets of his pants. This discovery was the reason the car was searched, and a firearm was found under the front seat on the driver's side. A matchbox on King's person was opened, and the methamphetamine was discovered.

King moved the trial court to suppress the "ice," the ammunition and the firearm. The trial court agreed that the search was partially invalid, suppressing the "ice" because it was neither a weapon nor an instrument, fruit, or evidence of a violation of the curfew law. The Trial Division construed 18 PNC § 301(a) as limiting searches incident to arrest to those categories. Based on the evidence not suppressed, the trial court convicted King of possession of a firearm and possession of the bullets.

Defendant presses the following arguments on appeal:

(1) that the curfew law, and therefore King's arrest, is invalid,

(2) that the trial court erred as a matter of law in determining that the discovery of the evidence regarding the gun and bullets was not a result of an illegal search, and

(3) that the evidence was insufficient to sustain King's conviction on either count.

1. Validity of the Koror State Curfew Law And the Resulting Arrest.

King argues that the curfew is an impermissible regulation of traffic and that Koror State has no authority to enact criminal laws. We first note that the curfew law does not amend or modify any traffic law. It just so happened that King was in a motor ⊥133 vehicle at the time he was violating the curfew. Second, King's argument that Koror has no authority to enact criminal laws is foreclosed by *Koror v. Blanco*, 4 ROP Intrm. 208 (1996), in which it was held that 4 TTC § 51 is "an express delegation of what is commonly termed police power," to Koror State. *Id.* at 210.

King also argues that the curfew is an impermissible restriction on his right to travel pursuant to Article IV, § 9, of the Palau Constitution. That provision reads: "A citizen of Palau may enter and leave Palau and may migrate within Palau." The right is not, as Appellant words it, one of "mobility and movement." The Palau Constitution has incorporated a number of rights also found in the Universal Declaration of Human Rights adopted by the United Nations General Assembly in 1948. [3] The right of migration is one of them. This right, which denies the government the ability to order a citizen to live in a certain place, or arbitrarily deny a citizen the right to leave or enter the country, does not act as an additional restriction of power of the government to investigate and prosecute criminal offenses. The Committee on Civil Liberties

[3] For a listing of rights contained in the Universal Declaration, see *Restatement of the Foreign Relations Law of the United States*, (3rd) American Law Institute Publishers 1987, introductory note at 145; § 701 note 4 at 156.

and Fundamental Rights of the Palau Constitutional Convention expressly stated:

> The Committee takes the position that . . . the rights hereunder are inherently qualified by the police power of the state: e.g. curfew, quarantine, lawful detention, etc.

Standing Committee Report No. 11 (Feb. 20, 1979) at p. 12.

King further argues that the arrest is invalid because it was enforced in this instance by the national government rather than Koror State. We disagree. The delegation of authority to Koror to enact criminal laws did not, expressly or impliedly, withdraw from the national government the right to enforce such laws. In fact the Palau National Code states it is the duty of the Bureau of Public Safety to "enforce all laws, and conduct criminal investigations." 34 PNC § 5003. The delegation of authority to Koror to enact and enforce criminal laws pursuant to 4 TTC 51 does not limit the scope of 34 PNC § 5003.

We therefore uphold the finding of fact, and resulting ⊥134 conclusion of law, with respect to the validity of the arrest.[4] As stated by the Trial Division,

> In this case, the court finds that Sergeant Telei's testimony that defendant and the other occupants appeared 'high,' corroborated by the testimony of one of the passengers, Roxie Ngiraingas, that all three had been smoking ice at a friend's house before entering the car, validated Sergeant Telei's decision to place defendant under arrest.

Trial Division Opinion filed December 9, 1994 at 6.

2. Legality of the Search and Seizure: 18 PNC § 301(a).

The valid arrest of the Appellant entitled the officer to conduct a search incident to that arrest. We now discuss the scope of that search.

Appellant's sole objection to the pat-down that led to the discovery of the bullets was based upon the invalidity of the stop and resulting arrest. However, since the stop and arrest were valid, the pat-down was valid. Therefore, the seizure of the bullets was permissible.

The subsequent seizure of the weapon, which was hidden under the driver's seat, requires further analysis to determine whether it qualifies as a search incident to arrest. We will initially

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[4] Appellant construes the Koror Curfew law to limit an officer's authority to arrest to cases involving the arrestee's own protection, or for the protection of persons or property. However, sections 211(b) and (c) of Title 18, PNC both allow for arrest with respect to any crime committed in the officer's presence. We need not determine whether a Palau state may criminalize conduct on the one hand, and use that authority to limit the scope of 18 PNC § 211 on the other, because even under the restrictive reading of the Koror law the Trial Division decision was correct.

limit our examination to the statute, 18 PNC § 301(a).

The Trial Division looked to 18 PNC § 301(a)[5] to determine the ⊥135 permissible scope of the search, rather than to the Constitution, concluding that the limitations imposed by the statute are at least as stringent as any constitutional limitations.

Section 301(a) became part of the law of the Trust Territory before the United States Supreme Court's opinions in *Terry v. Ohio* 88 S.Ct. 1868 (1968), *Chimel v. California*, 89 S.Ct. 2036 (1969), and *United States v. Robinson* 94 S.Ct. 467 (1973). *See* Source Note, 18 PNCA § 301. *See also* 12 TTC § 101, revisor's note. Therefore, § 301(a) [previously 12 TTC § 101 and previous to that § 460 of the Trust Territory Code] was not an effort to adopt *Terry, Chimel*, or *Robinson* as law here.

However, § 301(a), as well as *Chimel*, focuses on whether the arrestee had any "control" over the area searched. This interest in "control" stems from the seminal case of *Weeks v. United States*, 34 S.Ct. 341 (1914). The *Weeks* Court stated there was a

> right on the part of the government always recognized under English and American law, to search the person of the accused when legally arrested to discover and seize the fruits or evidences of crime. This right has been uniformly maintained in many cases . . . [including] burglar's tools or other proofs of guilt found upon his arrest within the control of the accused.

34 S. Ct. at 344.

The use of the archaic word "evidences" in both *Weeks* and the statute is a strong indication that the intent of the drafter [6] was to adopt *Weeks* by statute as a gloss on the Trust Territory Bill of Rights which, at 1 TTC § 3, adopted the protections of the Fourth Amendment of the United States Constitution for the Trust Territory.

⊥136 United States Supreme Court cases after *Weeks* further explained the scope of a search incident to arrest. In *Carroll v. United States*, 45 S.Ct. 280 (1920), the United States Supreme Court noted:

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[5] 18 PNC § 301 (a) provides that:

> Every person making an arrest may take from the person arrested all offensive weapons which he may have about his person and may also search the person arrested and the premises where the arrest is made, so far as the premises are controlled by the person arrested, for the instruments, fruits, and evidences of the criminal offense for which the arrest is made, and, if found, seize them.

[6] Here we can only refer to "legislative intent" in a loose sense. Because this law predated the Congress of Micronesia, it became law by pronouncement of the High Commissioner. Its readoption as part of the Palau National Code is not to be taken as effecting a change in the meaning of the statute. RPPL No. 2-3, Section 1.

> When a man is legally arrested for an offense, whatever is found upon his person, or in his control which it is unlawful for him to have and which may be used to prove the offense may be seized and held as evidence in the prosecution.

Id. at 287.

In *Angello v. United States*, 46 S.Ct. 4, 5 (1925), the court noted:

> The right without a search warrant contemporaneously to search persons lawfully arrested while committing crime and to search the place where the arrest is made in order to find and seize things connected with the crime as its fruits or as the means by which it was committed, as well as weapons and other things to effect an escape from custody, is not to be doubted. [Citing *Weeks* and *Carroll*.]

In *Marron v. United States* , 48 S.Ct. 74 (1927) a search of the inside of a closet was justified as a search incident to arrest.

> The closet in which liquor and ledger were found was used as a part of the saloon . . . . And, while [the ledger] was not on Birdsall's person at the time of the arrest, it was in his immediate possession and control.

Id. at 77.

In *Harris v. United States*, 67 S.Ct. 1098 (1947), an arrest was made for crimes relating to forged checks. The opening of a sealed envelope found inside a desk drawer was justified as "incident to arrest." In the envelope they found altered draft cards. The conviction for possession of the draft cards was affirmed.

In *United States v. Rabinowitz* , 70 S.Ct. 430 (1950), the state of the law was summarized by Justice Minton:

> The right 'to search the place where the arrest was made in order to find and seize things connected with the ⊥137 crime as its fruits or as the means by which it was committed' seems to have stemmed not only from the acknowledged authority to search the person, but also from the longstanding practice of searching for other proofs of guilt within the control of the accused found upon arrest. [Citing *Weeks*.] It became accepted that the premises where the arrest was made, which premises were under the control of the person arrested and where the crime was being committed, were subject to search without a search warrant. Such a search was not 'unreasonable.' [*Citing Angello*, *Carroll* and *Rabinowitz*]

Id. at 433.

The *Rabinowitz* court therefore upheld the search of a desk, safe, and file cabinet as incident to arrest. It is significant that even though several of the cases discuss seizing evidence

of *the* crime, evidence was not suppressed even if it was not connected to the crime for which the defendant was arrested. Consequently, it can be said that there may be a search incident to arrest for evidence relating to the crime for which the defendant was arrested, but that discovery of evidence of additional crimes uncovered during the search need not be suppressed.

In summary, the law now codified at 18 PNC § 301(a), so closely following the elements deemed important in *Weeks*, *Carroll*, *Angello*, and *Rabinowitz*, was an obvious effort to adopt American law with respect to searches incident to arrest as it existed at the time of the adoption of § 460 of the Trust Territory Code. [7] So the search of the vehicle incident to this arrest cannot be said to be violative of 18 PNC § 301(a), because it would have been upheld under *Weeks*, and other pre-*Chimel* case law.[8]

Because of the historical background described above, the Trial Division's assumption that the statute is at least as stringent as any limitation in the Palau Constitution may not be correct. Consequently an examination of the limitations imposed by Article IV § 4 is appropriate.

⊥138

4. Discussion of Article IV Section 4.

Article IV § 4 of the Palau Constitution states that "every person has the right to be secure in his person, house, papers and effects against entry, search, and seizure." In *Republic of Palau v. Gibbons*, 1 ROP Intrm. 547A (App. 1988), this Court rejected the syllogism that (1) the United States Constitution allows "reasonable" searches without a warrant; (2) Article IV Section 4 of the Palau Constitution makes no mention of reasonableness; (3) therefore the Palau Constitution does not allow "reasonable" searches without a warrant. *Id.* at 547Q. The *Gibbons* case involved the arrest of the defendant and an impoundment of his car to await the issuance of a search warrant. The *Gibbons* court stated that in obtaining a search warrant "the police went to greater lengths than were necessary to assure that defendant's rights were not trampled on." *Id.* at 547P.

At this point, when Officer Blailes ordered defendant to proceed to the police station and defendant could not have reasonably believed he was free to go, the passenger compartment of the defendant's automobile, including the glove box could have been searched as a 'contemporaneous incident of that arrest.' [Citing *New York v. Belton* , 101 S.Ct. 2860, 2864 (1981)]. *Id.* at 547O.

We believe that principle applies here. This holding is in recognition of the fact that

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[7] Consistent with the above American case law the Trust Territory High Court Trial Division upheld the seizure of a ship log when arresting the vessel's captain in *Trust Territory v. Kaneshma*, 4 TTR 340 (1969), expressly basing the holding on the provisions of this statute.

[8] *Chimel* limited the search incident to arrest not to the premises controlled by the arrestee, but to the area of "immediate" control, *i.e.*, that area from which a weapon or evidence could be obtained at the time of the arrest. *Harris* and *Rabinowitz* were overruled. *Chimel* at 2042-2043.

> [c]ustodial arrests are often dangerous; the police must act decisively and cannot be expected to make punctilious judgments regarding what is within and what is just beyond the arrestee's grasp.

United States v. Lyons, 706 F.2d 321, 330 (D.C. Cir. 1983). "It is an especially difficult judgment because people under stress such as an arrestee may not be wholly rational and may attempt actions that have little chance of success." *Criminal Constitutional Law* , Rudstein *et al* . ¶ 2.06[4] p. 2-209, 210 (Rel. 5-11/95 Pub. 098).

Vehicular stops are particularly fraught with danger, and the danger is heightened when the driver has companions in the vehicle. It also is noted that this is the third case before the Appellate Division when a motor vehicle stop involved firearms, the *Gibbons* case being the first one. A second case was *ROP v. Singeo* , 1 ROP ⊥139 Intrm. 551 (App. Div. 1989). [9] The instant case adds another dangerous component. According to the trial testimony, the occupants had been using a powerful drug [10] illicitly. We believe the correct rule for the safety of the residents of Palau is that when a police officer has made a lawful custodial arrest of an occupant of a motor vehicle, the officer may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile. *New York v. Belton* , 101 S.Ct. 2860 (1981). The Trial Division's decision to deny the motion to suppress the ammunition and the firearm is affirmed.

Accordingly, we find that the gun and ammunition were properly introduced as evidence at trial.

5. The Evidence Was Sufficient To Support the Convictions

Appellant challenges the sufficiency of the evidence with respect to both charges for which he was convicted. First, he suggests there was insufficient evidence that the "bullets" were ammunition, arguing that no ballistics tests were performed.

This Court has adopted, with some modifications, the Federal Rules of Evidence for the United States District Courts. Consequently, we look to United States cases construing those rules as an aid to interpret the evidence rules of this Court. In evaluating evidentiary rulings, we note that "[t]he admission or exclusion of evidence is a matter particularly suited to the broad discretion of the trial judge." *In re Merritt Logan, Inc.*, 901 F.2d 349, 359 (3d Cir. 1990).

Rule 901 provides in pertinent part that:

> The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.

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[9] For yet another case at the Trial Division see *ROP v. Ueki*, Crim. Case No. 114-90 (Tr. Div. 1990).

[10] Methamphetamine is a central nervous system stimulant. *Webster's College Dictionary*, Random House, 1995 ed.

> (b) Illustrations. By way of illustration only, and not by way of limitation, the following are examples of ⊥140 authentication or identification conforming with the requirements of this rule:
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> 1. *Testimony of witness with knowledge* . Testimony that a matter is what it is claimed to be.
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> * * *
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> 4. *Distinctive characteristics and the like* . Appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances.

The "bullets" were produced at trial and marked as exhibits. One witness was an officer with ten years of experience who testified that the items had the look and heft of real bullets. The caliber of the exhibits matched the caliber of the firearm, and fit the firearm taken from the vehicle. The officer's testimony was that in his opinion the exhibits were actual bullets and hence ammunition. This evidence is admissible pursuant to Rule 901.

The objection of Appellant with respect to the firearm is twofold. First, he asserts there was an alleged break in the chain of custody, and second, he argues that the fact that the firearm was found under the front seat on the driver's side is an insufficient showing of possession by the Appellant.

With respect to the chain of custody, Rule 901 "merely requires some evidence which is sufficient to support a finding that the evidence in question is what its proponent claims it to be." *United States v. Jimener Lopez* , 873 F.2d 769 (5th Cir. 1989). Unlike fungible and otherwise indistinguishable items, a specific firearm may be identified, even if there is a "break" in the chain of custody. The "break" does not affect admissibility, but may affect the weight of the evidence the fact-finder chooses to give the item.

Appellant finally argues that even if the evidence is admissible, it is insufficient to prove possession of the firearm, arguing that the firearm was merely under King's seat in the vehicle.

> We review challenges to the sufficiency of evidence by considering when viewing the evidence in the light most favorable to the prosecution and giving due deference to the trial judge's opportunity to hear the witnesses and observe their demeanor, any reasonable trier of fact could have found that the essential elements of the crime were established beyond a reasonable doubt. *Liep v. ROP*, ⊥141 5 ROP Intrm. 5, 9 (1994).

In this case, the Appellant was free to argue that it was coincidence that he was driving the vehicle that happened to have a firearm under the driver's seat. He could additionally argue that it was also coincidence that he happened to have bullets on his person that matched the

caliber of the firearm. But the Trial Division was equally entitled to believe that such a possibility did not rise to the level of a reasonable doubt. We therefore affirm the convictions in this case.