Kotaro v. ROP, 7 ROP Intrm. 57 (1998)
ZACHEUS KOTARO,
Appellant,

v.

REPUBLIC OF PALAU,
Appellee.

CRIMINAL APPEAL NO. 1-96 [sic]
Criminal Case No. 1-96

Supreme Court, Appellate Division
Republic of Palau

Argued: February 19, 1998
Decided: May 1, 1998

Counsel for Appellant: Yukiwo P. Dengokl, Esq.

Counsel for Appellee: Scott J. Campbell, Esq.

BEFORE: ARTHUR NGIRAKLSONG, Chief Justice; LARRY W. MILLER, Associate Justice; and R. BARRIE MICHELSEN, Associate Justice.

MILLER, Justice:

This case involves a constitutional challenge to specific provisions of the law creating the Office of the Special Prosecutor, 2 PNC §§ 501 et seq. Appellant also raises issues concerning the sufficiency of the evidence at trial and the constitutionality of the sentence imposed upon him. We affirm the trial court's judgment in all respects.

I. BACKGROUND

In June 1995, appellant and his wife were involved in a domestic dispute. On June 14, 1995, Mrs. Kotaro informed an investigator in the Office of the Special ⊥58 Prosecutor that appellant had firearms and ammunition at his residence. Pursuant to a search warrant issued that day, police officers recovered firearms and ammunition from appellant's residence.

The Special Prosecutor charged appellant with seven counts of possession of a firearm; three counts of possession of ammunition; one count of use of a firearm; and one count of misconduct in public office. Appellant unsuccessfully moved to suppress the evidence seized pursuant to the search warrant and to dismiss the case for lack of prosecutorial authority. Following a lengthy trial, appellant was convicted of seven counts of possession of a firearm; one count of possession of ammunition; one count of use of a firearm; and one count of misconduct in public office.

Appellant was sentenced to sixteen years' imprisonment for each of the seven counts of possession of a firearm and the one count of use of a firearm, and five years for possession of ammunition, all of the sentences to run concurrently. Appellant also was sentenced to one year of imprisonment for the misconduct in public office count, that sentence to run consecutively to the others. Appellant timely filed this appeal and now raises seven issues for our consideration.

II. DISCUSSION

A. Constitutionality of Act Creating Office of Special Prosecutor

Appellant's first argument is that the act creating the Office of the Special Prosecutor, 2 PNC §§ 501 et seq., is an unconstitutional infringement on the President's power to enforce the law, and that the Special Prosecutor accordingly lacked the authority to prosecute him.

Section 503(a) of Title 2 sets forth the broad powers of the Special Prosecutor, which include the authority to "investigate and prosecute any and all allegations of violations of . . . laws of the Republic . . ." *Id.* § 503(a)(1). Section 503(b) provides that "[i]n exercising this authority, the Special Prosecutor will have the greatest degree of independence that is consistent with the President's constitutional and statutory authority for all matters falling within the jurisdiction of the Executive Branch." It provides specifically that "[t]he President will not countermand or interfere with the Special Prosecutor's decision[s] or actions," and that "[t]he Special Prosecutor will determine whether and to what extent he will inform or consult with the President about the conduct of his duties and responsibilities." Finally, Section 502 states that the Special Prosecutor "will not be removed from his duties except for cause and without the President's first consulting the President of the Senate and the Speaker of the House of Delegates and ascertaining that their consensus is in accord with his proposed action." Appellant argues that these provisions, separately and as a whole, unconstitutionally infringe upon the President's power, under Article VIII, Section 7(1) of the Palau Constitution, "to enforce the law of the land."

In rejecting this argument, the trial court was persuaded by the majority view of *Morrison v. Olson*, 108 S.Ct. 2597 (1988), and held that the power of the President to remove the Special Prosecutor for cause gave the President "sufficient control over the Special Prosecutor to satisfy the requirements of the Palau Constitution." In *Morrison*, the United States Supreme Court addressed the constitutionality of the Ethics in Government Act of 1978, which provides the framework for the appointment of an independent counsel ⊥59 to investigate certain federal government employees suspected of violating federal law. The Court held that "the Act, taken as a whole, [did not] violate[] the principle of separation of powers by unduly interfering with the role of the Executive Branch," and that a good cause requirement for removal, in particular, did not "interfere impermissibly with [the President's] constitutional obligation to ensure the faithful execution of the laws." *Id.* at 2620.

We reach the same conclusions here. First, although appellant urges that the powers and duties allocated to the Special Prosecutor "are textually committed by the Palau Constitution . . .

to the President . . . without any reservation or qualification whatsoever," Appellant's Reply Brief at 1, we do not understand him to argue - and we reject the notion - that the President alone may exercise them. Although Palau, like the United States, has chosen to vest the executive power in a single chief executive, it is obvious that the President is neither required nor expected to carry out the duties of the Executive Branch by himself. Rather, the Constitution contemplates that he will be assisted by cabinet members, see Article VIII, Section 5, and "other national officers", *see id.*, Section 7(3), appointed by him with the advice and consent of the Senate. The procedure for appointment of the Special Prosecutor and the enforcement authority given him, see 2 PNC §502, are no different from the Minister of Justice, *see id.* §§ 103, 105,[1] in this regard.

Nor do we believe that there is any constitutional infirmity in the independence accorded the Special Prosecutor in carrying out his day-to-day activities. As a practical matter, the Special Prosecutor ultimately has little more discretion than the Attorney General. In the United States, "[t]he Attorney General and United States Attorneys retain broad discretion to enforce the Nation's criminal laws." *U.S. v. Armstrong* , 116 S.Ct. 1480,1486 (1996). The same is true in Palau. Appellant does not suggest, and we have no reason to believe, that the Office of the Attorney General and its staff receive constant guidance from the President in performing their jobs, nor do we believe that such guidance is required by the Constitution. Rather, the President's primary control over the Attorney General is the same as the President's control over the Special Prosecutor: the right of removal.

The question then is whether, as appellant argues, the provision that the Special Prosecutor may only be removed "for good cause" is unconstitutional. Like the U.S. Supreme Court, we believe that "the real question" is whether this limitation is "of such a nature that [it] impede[s] the President's ability to perform his constitutional duty" to enforce the nation's laws. *Morrison*, 108 S.Ct. at 2619. And we agree that the answer to that question is that it does not:

> This is not a case in which the power to remove an executive official has been completely stripped from the President, thus providing no means for the President to ensure the 'faithful execution' of the laws. Rather, because the [Special Prosecutor] may be terminated for 'good cause,' the Executive . . . retains ample authority to assure that [he] is competently performing his . . . ⊥60 statutory responsibilities. . .

Id. at 2619-20. We reject the suggestion that it is a constitutional necessity that the Special Prosecutor be terminable at will.

For all of these reasons, we reject appellant's challenge to the authority of the Special Prosecutor to prosecute him.[2]

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[1] Section 103 provides generally that ministers are to be appointed by the President with the advice and consent of the Senate. Section 105 sets forth the responsibilities of the Minister of Justice, which include "enforcing all laws".

[2] As quoted above, *see* p.3 *supra*, 2 PNC § 502 imposes an additional limitation on the President's power of removal insofar as it requires prior consultation with and agreement of the President of the Senate and the Speaker of the House. Based on *Bowsher v. Synar*, 106 S.Ct.

B. Misconduct In Public Office

Appellant next argues that there was insufficient evidence to support his conviction for misconduct in public office. The statute prohibiting misconduct in public office prohibits a "public official" from engaging in "any illegal acts under the color of office . . ." 17 PNC § 2301. It does not define the terms "public official" or "under color of office."

Appellant, who was a police lieutenant with the Bureau of Public Safety, first argues that he was not a public official. We disagree. In *Dixon v. United States* , 104 S.Ct. 1172 (1984), the United States Supreme Court addressed the term "public official"' in the context of the federal bribery statute, 18 U.S.C. § 201(a). The Court held that, for the purpose of that statute, "the proper inquiry is . . . whether the person occupies a position of public trust with official federal responsibilities." *Id.* at 1180. Adopting this definition, which we believe is a fair and accurate interpretation of the legislative intent in enacting the official misconduct statute, we have no hesitation in concluding that appellant, a national police officer, was a public official.[3]

Appellant next argues that he did not perform any illegal acts "under color of office." In *Willingham v. Morgan* , 89 S.Ct. 1813 (1969), the United States Supreme Court interpreted the term "under color of office" in the context of the federal removal statute, 28 U.S.C. § 1442(a)(1). That Court held that there must be a "causal connection between the charged conduct and asserted official authority" before an action can be considered to have been taken "under color of office." *Id.* at 1815.

As to most of the acts for which appellant was convicted, we agree that the requisite causal connection was not shown. It is not sufficient that some of the weapons and ammunition may have belonged to the police department absent proof that appellant acquired them through some misuse of his official authority. However, as to two of the ⊥61 weapons, discussed in the following section, the evidence shows that appellant initially took possession of them in his capacity as a police officer. We believe that appellant's subsequent unlawful possession of those guns bears a sufficient causal connection to his asserted official authority to uphold appellant's conviction for misconduct in public office.

C. Possession of Two Handguns

3181 (1986), the trial court held that this restriction was an unconstitutional encroachment on the President's executive powers. For two reasons, we do not believe that this issue is ripe for decision at this time. First, appellant has made no suggestion that the President had ever attempted to remove the Special Prosecutor who prosecuted this case, nor that the OEK prevented or impeded such removal. Second, 2 PNC § 506 states that "[i]f any provision of this chapter . . . is held invalid, the invalidity does not affect other provisions . . . and to this end the provisions of this chapter are severable." Therefore, even were this aspect of the law ultimately to be found unconstitutional, the remainder of the law would remain in effect.

[3] We note that, although not relevant to the acts charged in this case, the OEK recently has amended 17 PNC § 2301 specifically to cover police and other law enforcement officers.

Appellant argues that the trial court erred in convicting him of possession of two .38 caliber handguns, which had been issued to him by the police department. The essence of appellant's argument is that he believed that he was authorized by Director Brell to carry a weapon on a 24-hour basis. Testifying as a witness for the prosecution, Director Brell denied that he had given appellant permission to carry a weapon 24 hours a day since appellant left the drug task force in 1990.

The trial court was faced with conflicting testimony and chose to believe Director Brell. We cannot say that the trial court, which had the opportunity to observe the witness, clearly erred with respect to this issue. *See Ngiramos v. Dilubech Clan*, 6 ROP Intrm. 264, 266 (1997) (where there are two permissible views of evidence, factfinder's choice cannot be clearly erroneous).[4]

D. Possession of Weapons and Ammunition and Firing Weapon

Appellant next argues that the trial court erred in convicting him of possession of five other weapons and ammunition and with firing one of the weapons. We review the trial court's findings under the clearly erroneous standard. 14 PNC § 604(b); *ROP v. Singeo*, 1 ROP Intrm. 551, 555 (1989) (findings of fact in criminal case not set aside unless clearly erroneous).

The police recovered the weapons from appellant's home. Both appellant's wife and his domestic helper testified that they had seen appellant store firearms and ammunition in the house; that the weapons seized by the police looked like the weapons they had seen in the house; and that they witnessed appellant fire a rifle. The evidence presented at trial is sufficient to support these convictions.

E. Legality of Search Warrant

Appellant also argues that the trial court erred by failing to suppress the evidence obtained pursuant to the search warrant. The information supplied by appellant's wife, who had been inside appellant's home within the past week, was that appellant kept weapons and ammunition in the house.

In deciding whether to issue a search warrant, a judge is called upon to evaluate whether there is probable cause to believe that contraband or evidence is located in a particular place. The question on our review of the issuance of a search warrant is whether the issuing judge had a substantial basis for finding the existence of probable cause. *ROP v. Gibbons*, 1 ROP Intrm. 547A, 547J (1988).

The information provided to the ⊥62 issuing judge was sufficient to provide a substantial basis for a finding of probable cause. The fact that appellant's wife had moved from the house

[4] In light of this conclusion, we need not consider whether authorization to carry a weapon 24 hours a day, even if it had been given, would have been effective. It is nevertheless worth noting that 17 PNC § 3307(a) requires that "express written permission" be given, that such permission state "the purpose and time of authorized possession", but that, "in no case, shall any law enforcement officer possess a firearm while on off-duty hours."

several days earlier does not detract from such a finding. As the affidavit in support of the search warrant observed, and as common sense would suggest, guns and ammunition in the quantity described were unlikely to have been disposed of within that time period and were therefore "still likely to be found in the location to be searched." The trial court, therefore, did not err by refusing to suppress the evidence seized pursuant to the search warrant.

F. Possession of Multiple Firearms

Appellant's sixth argument is that he committed only one violation of 17 PNC § 3306 because all of the firearms were found in his possession on the same day and at the same time.

Appellant's argument would have greater force if the applicable statute applied to the possession of "any firearm or firearms" or otherwise suggested that a single violation was to result from possession of multiple weapons. Section 3306(a) states that "[a]ny person who knowingly shall . . . possess . . . any firearm shall be guilty of a felony . . . ." We find, therefore, that under the plain language of the statute, each weapon gives rise to a separate violation.

G. Cruel and Inhumane Punishment

Finally, appellant argues that a 16 year sentence for possession of a firearm is "torture, cruel, inhumane or degrading treatment or punishment" and, therefore, is prohibited by Article IV, Section 10 of the Palau Constitution.

In *ROP v. Ngiraboi* , 2 ROP Intrm. 257, 268 (1991), this Court held that "the mandatory 15 year minimum sentence for Possession of a Firearm . . . does not conflict with the prohibition against cruel and inhumane treatment." We do not believe that there is a constitutionally significant difference between the sentence imposed in *Ngiraboi* and that meted out to defendant; we therefore hold that a 16 year sentence for possession of a firearm does not violate the Palau Constitution.

III. CONCLUSION

For the reasons set forth above, we affirm the judgment of the trial court.