Ngirarorou v. ROP, 8 ROP Intrm. 136 (2000)

FELISTO NGIRARAROU,
Appellant,

v.

REPUBLIC OF PALAU,
Appellee.

CRIMINAL APPEAL NO. 98-02
Criminal Case No. 203-97

Supreme Court, Appellate Division
Republic of Palau

Argued: December 3, 1999
Decided: March 10, 2000

Counsel for Appellant: Marvin Hamilton

Counsel for Appellee: Stephen Carrara, Office of the Attorney General

BEFORE: JEFFREY L. BEATTIE, Associate Justice; LARRY W. MILLER, Associate Justice; R. BARRIE MICHELSEN, Associate Justice.

MICHELSEN, Justice:

Appellant was convicted of the crimes of possession of, and trafficking in, methamphetamine. Possession of one gram or less of methamphetamine is punishable by one year's imprisonment and a fine of not more than $3,000. 34 PNC § 3302(d). Trafficking carries a mandatory minimum sentence of 25 years' imprisonment and a fine of not less than $50,000. 34 PNC §3301(b)(5). The Trial Division sentenced Appellant to the mandatory minimum terms of imprisonment and fines. He is currently serving these sentences.

Appellant concedes the correctness of his possession conviction. He appeals the Trial Division's finding that there was sufficient evidence to find him guilty of trafficking. Appellant's characterization of the issue has two components: (1) whether the findings of fact were clearly erroneous, and (2) whether the facts adduced at trial provide sufficient evidence of each element of the crime to find Appellant guilty of trafficking in methamphetamine beyond a reasonable doubt. He also appeals the fine as constitutionally excessive.

Ngirarorou v. ROP, 8 ROP Intrm. 136 (2000)
Challenges to the trafficking conviction

1. Findings of Fact

We first recite certain background facts not challenged in this appeal. Officer Richard Ngiraterang, a member of the Drug Enforcement Division, was on his way to execute a search warrant when he passed a store and observed Appellant talking to another man. Officer Ngiraterang recognized both men as having been under surveillance for the past four to six months as suspected sellers or buyers of methamphetamine. The police had made two previous attempts to purchase methamphetamine from Appellant. The officer radioed the presence of the suspects to Sergeant Ngirameong, who instructed him to continue on with his original assignment. Sgt. Ngirameong and Officer Ramarui drove to the scene in an unmarked car and observed Ngirarorou talking to another man in a car. The record does not reflect whether the man in the car was the one observed by Officer Ngiraterang.

The facts challenged by Appellant are contained in the following passage from the Trial Division's opinion.

⊥137

> Police officers Xavier Ngirameong and Fred Ramarui, who were seated across the street in an unmarked car, observed the defendant get inside the passenger seat of a white sedan and lean toward the driver as if he were talking to him. Officer Ngirameong saw what looked like an "exchange of something" between the defendant and the driver of the white sedan. He later saw defendant receive money from the driver of the car. After the sedan left, defendant stayed around the Gas Station. A second vehicle, a truck, drove up and Officer Ngirameong observed defendant talk to the driver and then get inside the passenger seat of the truck.
>
> Officer Ngirameong, accompanied by Officer Ramarui, arrested the defendant. They advised him of his rights and pat searched him. They felt a "bulky" portion on his belt, but certain that the object was not a weapon, took the defendant to the police station where they stripped searched him. The officers did not search the defendant at the Gas Station parking lot because they did not want to strip search him in public during rush hour.
>
> The search produced $463.00 in U.S. currency, two $50 bills and the rest mostly in 20's. Defendant's counsel explained that his client had just sold his car, hence the cash in his possession. Unfortunately for the defendant, his counsel's "testimony" is not evidence and is without any value. The search also produced nine (9) pieces of sealed plastic containing 0.2793 gram[s] of methamphetamine and 1 glass pipe used for smoking the drug.
>
> Based on the observations of Officers Ngirameong and Ramarui, the $463.00 cash in the wallet of an unemployed defendant, nine (9) pieces of plastic containing methamphetamine and one (1) glass pipe, the court finds that defendant "delivered" methamphetamine to the drivers of the white sedan and the truck in

front of the Gas Station on June 22, 1997.

Before considering the Appellant's specific objections to the Trial Division's fact-finding, we note that when an appellant "argues against the finding of fact which lead to his conviction, the Appellate Division shall not set aside such findings unless it finds that they are clearly erroneous." *ROP v. Chisato*, 2 ROP Intrm. 227, 238 (1991).

Defendant focuses his factual attack mostly on the "white sedan" incident. [1] The ⊥138 Trial Division recited that both officers "observed the defendant get inside" the white sedan. The transcript indicates that Officer Ramarui testified that Appellant sat inside the vehicle. Officer Ngirameong said he saw him reach inside the sedan. We do not find this difference between the testimony and the findings critical.

The Trial Division also found that Appellant's contacts were with "the driver," although, strictly speaking, there was no evidence that this person was behind the wheel. One officer referred to the person as the owner of the vehicle. The inference that the person was the driver was not unreasonable, but whether the person was the driver or a passenger is ultimately irrelevant, and not grounds for reversal.

The next challenged finding is that Officer Ngirameong saw Appellant receive money from the driver of the car. Appellant asserts that Officer Ngirameong never made that statement, that Officer Ramarui contradicted that statement, and that the first mention of any observation of money was made at trial. Officer Ngirameong's testimony at trial was that:

> I saw [defendant] . . . reach into the car and there was something that uh . . . looked, look like their exchanged . . . I saw [defendant's] uh, enter the other car and uh, he had in--he had his hands uh, reached into the car and when he came out to his car, he had money in his hands.

Officer Ramarui, who testified before Officer Ngirameong, was not questioned about seeing any money. Officer Ngirameong admitted on cross-examination that he had not previously mentioned the money before trial, but then testified on redirect that "[w]hen I stated that he appears to be dealing 'ice' and I thought uh, I--it included those" and defined "dealing in 'ice'" as "[g]iving stuff to a person and exchange for money." We construe the Trial Division's reference to Appellant receiving money from the occupant of the vehicle to be an acceptance of Officer Ngirameong's testimony as related herein. Officer Ramarui's silence on the issue is not a contradiction of Officer Ngirameong's testimony, since the subject was not raised during his testimony. The Trial Division's decision to find Officer Ngirameong's testimony credible is not clearly erroneous.

Appellant further questions whether the officers were able to observe any exchange at all because of the distance. At trial, Appellant did not question the officers on their ability to see

---

[1] We need not resolve Appellant's factual challenge regarding the second vehicle, since we conclude in Section 2 of this opinion that accepting all facts as found by the court, the evidence is insufficient to support a conviction with respect to that vehicle.

because of the distance. The only question relating to ability to observe the transaction was to Officer Ngirameong on whether he could see what occurred in the second vehicle, to which Officer Ngirameong stated that he could not see what was happening there. Having not otherwise raised this issue at trial, Appellant is precluded from raising the matter on appeal.

Finally, Appellant challenges the finding that the white sedan left the gas station. No one testified that the white sedan departed after Defendant's interaction with its ⊥139 occupant. Because the officers made no mention of arresting the occupant or seizing the vehicle at the time of Defendant's arrest, it is a logical inference that the white sedan had departed. However, we need not examine the strength of the court's assumption in depth. The finding that the white sedan left the scene is a neutral inference, rather than one relied upon by the court to determine defendant's culpability. In summary, we find that the Trial Division's findings of fact are not clearly erroneous, and hence not grounds for reversal of the conviction.

2. Challenge to the sufficiency of the evidence

Having determined that the Trial Division's material findings of fact were not clearly erroneous, we now turn to Appellant's argument that the above facts fail to prove the elements of trafficking beyond a reasonable doubt. This argument presents a more difficult question.

> The standard for assessing the sufficiency of evidence to support a conviction requires us to determine whether, 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.

Minor v. ROP, 5 ROP Intrm. 1, 3 (1994) (citing *ROP v. Chisato*, 2 ROP Intrm. 227 (1991) and *ROP v. Sisior*, 4 ROP Intrm. 152 (1994)). When the facts do not support a finding that all elements have been proven beyond a reasonable doubt, the conviction must be reversed. *ROP v. Ngiraingas*, 2 ROP Intrm. 78 (1990).

The government's theory of the case was that Appellant had delivered methamphetamine to the occupants of the two vehicles in question. [2] The delivery of a controlled substance is an element of the offense of trafficking. *Sungino v. ROP*, 6 ROP Intrm. 70, 72 (1997). Hence, in this case, delivery of methamphetamine had to be proved beyond a reasonable doubt. Although failure to recover the controlled substance at issue complicates the government's case, the

---

[2] Presumably because of the small amount of the drug in Appellant's possession at the time of the arrest, the government did not proceed to trial on a theory of possession with intent to deliver. Compare: *United States v. Ojeda*, 23 F.3d 1473 (8th Cir. 1994) (inference of intent to distribute could be made from possession of 7.1 kilograms of 88 to 91% pure methamphetamine); *United States v. Schubel*, 912 F.2d 952 (8th Cir. 1990) (inference of intent to deliver methamphetamine could be drawn from possession of approximately 50 grams of methamphetamine); *United States v. Lopez*, 42 F.3d 463 (8th Cir. 1994) (no inference of intent to deliver could be drawn by possession of 4.1 grams of methamphetamine).

prosecution may proceed based upon circumstantial evidence. *United States v. Franklin* , 728 F.2d 994, 998 (8th Cir. 1984); *United States v. Murray* , 753 F.2d 612 (7th Cir. 1985); *United States v. Sanchez,* 722 F.2d 1501 (11th Cir. 1984); *United States v. Quesada* , 512 F.2d 1043 (5th Cir. 1975).

There was one count of trafficking charged in the Information. The Trial ⊥140 Division found the evidence sufficient to find Appellant guilty of delivering methamphetamine to the occupants of *both* vehicles. With respect to the second vehicle, the court found that Defendant entered a vehicle, sat down in the passenger seat, and talked to the driver, then exited. When Defendant was arrested a few minutes later, he was in possession of a small amount of methamphetamine, a pipe for using the drug, and $463. These facts do not support a finding of trafficking beyond a reasonable doubt concerning the second vehicle. We therefore turn to the "white sedan" incident.

Defendant, a suspected seller and user of methamphetamine, appeared to "exchange something" with the occupant and then left the vehicle with money in his hands. Although these observations may have given the officers reasons to conduct an investigatory stop of Appellant, [3] but are not, standing alone, sufficient evidence to sustain a conviction.

The subsequent search of Appellant revealed he was then in possession of: (1) a number of containers for methamphetamine, which in the aggregate totaled .2794 grams; (2) a pipe used for smoking methamphetamine; and (3) $463. At trial, Officer Ngirameong testified that Appellant was no longer driving a taxi.

We will examine each of these component parts of the evidence, and then also consider their cumulative effect.

a. Possession of Containers of Methamphetamine

The Appellant was in possession of nine "plates," at the time of his arrest. At trial Sgt. Ngirameong testified that in Palau there are three sizes of "plates" of "ice" (methamphetamine) that are sold. Appellant's plates were the smallest size, and those in the illicit drug business "always weigh them as 0.1 gram per plate." Because the total amount of ice Defendant had was .2793 grams, most of his plates were empty, or nearly so. The amount in Defendant's possession would be consistent with a user who is down to his last three plates.

b. Possession of Pipe

The Appellant was in possession of a pipe used for smoking ice. This evidence is relevant evidence indicating that Appellant was a user. It is neutral evidence regarding whether he was a seller.

c. Possession of Cash

---

[3] "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." *ROP v. Singeo*, 1 ROP Intrm. 551, 555 (1989) (citing *Terry v. Ohio*, 88 S.Ct. 1868 (1968)). Appellant made a motion to suppress prior to trial, but has not raised the denial of that motion as an issue for appeal.

The evidence was that Appellant was no longer driving a taxi, so there was no obvious explanation for his possession of $463. One fair inference is that he had just completed a sale. Another possibility is that he obtained the cash at an earlier time, and on this date, he wished to be a buyer and the money was for the purpose of making purchases. In the context of the other evidence, it is difficult to rule out either possibility.

⊥141 It is noteworthy why Sergeant Ngirameong seized the money: "we've found some of our money for our controlled [buys] in the possession of . . . those people who are selling drugs and we were taking the chance and hoping that [some] of our money is included in those money."

The fact that the police had twice attempted to buy ice from the Appellant, and during this arrest did not find any of their controlled buy money in the possession of the Appellant, does not strengthen the government's argument.

d. Cumulative Effect of the Evidence

Appellant's suspicious activities at the white sedan, combined with his possession of $463, is circumstantial evidence that he may well have been selling or buying, or trying to sell or buy, methamphetamine. However, the limited supply Appellant had when arrested and the presence of the pipe, the prior police efforts to buy from him, and the absence of police "controlled buy" money on his person, weakens the government's inference that the Appellant in fact sold methamphetamine at that time. We believe it weakens the inference sufficiently so that the government failed to prove trafficking beyond a reasonable doubt. We therefore reverse Appellant's conviction for trafficking in methamphetamine.[4]

Because the Appellant has already served a period of incarceration in excess of the maximum period for his possession conviction, a copy of this opinion shall be served upon the Director of Public Safety who shall accept it as sufficient authority for the release of the Appellant forthwith.

[4] Because we reverse Appellant's conviction for trafficking, the fine for that offense is reversed as well. Appellant did not challenge his fine for possession.