Franz v. ROP, 8 ROP Intrm. 52 (1999)

RODFORD FRANZ,
Appellant,

v.

REPUBLIC OF PALAU,
Appellee.

CRIMINAL APPEAL NO. 98-06
Criminal Case No. 311-96

Supreme Court, Appellate Division
Republic of Palau

Argued: August 16, 1999
Decided: October 21, 1999

Counsel for Appellant: Marvin Hamilton

Counsel for Appellee: Steven Carrara, Assistant Attorney General

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

BEATTIE, Justice:

After a trial on charges of attempted assault and battery with a dangerous weapon and assault and battery, Appellant was convicted of assault and battery with a dangerous weapon and assault and battery and received concurrent sentences on the convictions. Because appellant was not charged with the offense of assault and battery with a dangerous weapon, we reverse that conviction and remand for re-sentencing.

I.

⊥53 On June 30, 1996, Appellant threw a rock and hit Howard Marciano, a security guard at the former Nakamura Campaign Headquarters, cutting him above the left eyebrow. A Criminal Information was filed against him, containing two counts. Count One charged him with "attempted assault and battery with a dangerous weapon" in violation of 17 PNC §§ 104 and 504, and Count Two charged him with "assault and battery" in violation of 17 PNC § 503. Following a one-day trial, Appellant was convicted of two offenses -- assault and battery with a dangerous weapon, and assault and battery. The trial court sentenced Appellant to three years of imprisonment for assault and battery with a dangerous weapon and six months for assault and battery. The sentences were suspended on the condition that Appellant pay a $1,000 fine within two years.

Appellant brings this appeal, alleging four errors on the part of the trial court. First, Appellant contends that, under the Palau statutes, attempted assault and battery with a dangerous weapon is not a criminal offense. Second, he alleges that the conviction for assault and battery with a dangerous weapon must be reversed because the Government's Criminal Information did not charge him with that offense. The Information only charged him with attempted assault and battery with a dangerous weapon. Third, Appellant argues that, should his conviction for assault and battery with a dangerous weapon stand, his conviction for assault and battery must be reversed because it is a lesser included offense and therefore his conviction for both offenses violates the double jeopardy clause of the Constitution. Finally, Appellant argues that the trial court erred in failing to award him credit for three days that he spent in jail prior to trial.

II.

Count One of the Information filed by the Attorney General charged the defendant with:

> ATTEMPTED ASSAULT AND BATTERY WITH A DANGEROUS WEAPON, in that, on or about June 30, 1996 in Dngeronger, the State of Koror, [defendant] did unlawfully attempt to assault, strike, beat or wound Howard Marciano with a dangerous weapon towit [sic], a rock in violation of 17 PNC § 504 and 17 PNC § 104.

Although Count One of the Information charged appellant with attempted assault and battery with a dangerous weapon and alleged that he attempted to strike the victim with a rock, the trial court convicted him, not of attempt, but rather the completed crime, assault and battery with a dangerous weapon. Appellant moved for acquittal, but the trial court denied the motion, stating that a criminal information need not charge an offense in a technical or formal manner as long as it states the essential elements of the offense charged. The appellant claims the trial court erred because it convicted him of an offense not charged in the information and not necessarily included in any offense with which he was charged. The government argues that the conviction should not be reversed because the Information contained only minor deficiencies which did not prejudice the defendant.

A Criminal Information is sufficient if it contains the essential elements of the offense charged and fairly informs the ⊥54 accused of the charges against which he must defend. *Sungino v. ROP*, 6 ROP Intrm. 70, 70-71 (1997). The government contends that, in testing an Information for defects respecting essential elements or factual specificity, courts should not read it in a "hypertechnical" manner. *See United States v. Gironda*, 758 F.2d 1201, 1209 (7th Cir. 1985).

This is not, however, a case in which the defendant contends that the Information is defective. The Information sets forth the essential elements of attempted assault and battery with a dangerous weapon, and appellant does not contend that it lacked sufficient specificity. Appellant's contention is that, having been charged with attempt, he could not be convicted of the uncharged completed crime.[1]

---

[1] Count Two of the Information charged appellant with assault and battery. It is not clear

Attempted assault and battery with a dangerous weapon is a separate offense [2] from assault and battery with a dangerous weapon if each requires proof of a different statutory element. *See Kazuo v. ROP* , 3 ROP Intrm. 343, 347 (1993). The offense of attempt is recognized by 17 PNC § 104, which provides in pertinent part that:

> [E]very person who shall unlawfully attempt to commit any of the crimes named in this title, or in any other title of this Code, which attempt shall fall short of actual commission of the crime itself, shall be guilty of attempt to commit the said crime . . . .

Assault and battery with a dangerous weapon is a crime under 17 PNC § 504. One element of the offense of attempted assault and battery with a dangerous weapon which is not an element of assault and battery with a dangerous weapon is that the defendant "fall short of actual commission of the crime." 17 PNC §104. [3] One element of the offense of assault and battery with a dangerous weapon which is not an element of attempted assault and battery with a dangerous weapon is that the defendant succeed in striking the victim with the weapon. *Takada v. Supreme Court* , 3 ROP Intrm. 262, 265 (1993). Thus, attempted assault and battery with a dangerous weapon is a separate and distinct offense from assault and battery with a dangerous weapon.

Because appellant was convicted of an offense not charged in the Information -- ⊥55 assault and battery with a dangerous weapon--the conviction cannot stand. "No principle of procedural due process is more clearly established than that notice of the specific charge, and a chance to be heard in a trial of the issues raised by that charge, if desired, are among the constitutional rights of every accused . . . ." *Cole v. Arkansas*, 333 U.S. 196, 201; 68 S. Ct. 514, 517 (1948). Thus, fundamental due process prevents a court from convicting an accused of an offense not charged in the information and not necessarily included in an offense charged.[4]

---

why he was not charged with assault and battery with a dangerous weapon instead of assault and battery.

[2] Because appellant was not convicted of attempted assault and battery with a dangerous weapon, we need not address his argument that such an attempt is not a crime under Palauan law. Without deciding the issue, we assume herein that it is a crime under 17 PNC § 104.

[3] This is in contrast to the United States federal laws, in which attempt is not a separate offense, but rather is addressed separately in the various statutes dealing with the completed offense. *See United States v. York*, 578 F.2d 1036, 1038 & n. 4 (5th Cir. 1978). Under attempt statutes such as 17 PNC § 104, failure to consummate the offense "is as much an element of an attempt . . . as the intent and the performance of an overt act towards its commission." *Lewis v. People*, 235 P.2d 348, 351 (Colo. 1951).

[4] We note also that Rule 31(c) of the Palau Rules of Criminal Procedure provides that "The defendant may be found guilty of an offense necessarily included in the offense charged or of an attempt to commit either the offense charged or an offense necessarily included therein if the attempt is an offense." Although assault and battery is an offense necessarily included in assault and battery with a dangerous weapon, the converse is plainly not the case.

The trial court held that, because Appellant did not dispute at trial the fact that the rock he threw actually hit the victim, he was not prejudiced in his defense, and therefore he could be convicted of the completed crime. However, where a defendant is convicted of an uncharged crime,

> [i]t may never be known with any confidence after a conviction what defenses might have been asserted had defendant been given adequate and advance notice of the possible offenses for which he was criminally vulnerable. Insisting that he be informed in the accusatory pleading of the charges against him, on the other hand, fully satisfies a well established fundamental of due process.

People v. Lohbauer, 627 P.2d 183, 185 (Cal. 1981). Thus, due process prevents a defendant from being convicted of an charged offense which is not charged or necessarily included in a charged offense even if the evidence presented at trial would support the conviction. *State v. Meyers,* 709 P.2d 253 (Or. Ct. App. 1985). Therefore, Appellant's conviction for assault and battery with a dangerous weapon is reversed.

At oral argument, the Republic contended that if this Court reversed Appellant's conviction for assault and battery with a dangerous weapon, the case should be remanded to the trial court for sentencing on the charge of attempted assault and battery with a dangerous weapon, the crime for which he was charged. The trial court, however, found that Appellant had completed the crime of assault and battery with a dangerous weapon and therefore could not be convicted of attempted assault and battery with a dangerous weapon. Because falling short of actual commission of the crime is an element of attempt, 17 PNC § 104, we agree with the trial court.

III.

Due to our reversal of the assault and battery with a dangerous weapon conviction, Appellant's double jeopardy argument need not be addressed. Therefore, we affirm Appellant's conviction for assault and battery. Similarly, Appellant's argument that the trial court erred in failing to give him credit for the time that he spent in jail prior to his trial is moot. Appellant was given a suspended sentence of six months for assault and battery, ⊥56 which is the maximum sentence for that offense. 17 PNC § 501. Appellant has completed this sentence. Therefore, the question whether the trial court was required to give credit to Appellant for time he spent incarcerated prior to trial is moot.

This case, however, must be remanded back to the trial court for a modification of the fine. Appellant's sentence was suspended on the condition that he pay a $1,000 fine within two years. The maximum fine for assault and battery is $100. Therefore, the trial court is instructed to modify its sentence to provide for a fine of not more than $100.

Accordingly, this case is AFFIRMED in part and REVERSED in part. The conviction for assault and battery with a dangerous weapon is VACATED, and the case is REMANDED to the trial court for modification of the amount of the fine imposed.