Gotina v. ROP, 8 ROP Intrm. 65 (1999)
WILLIAM GOTINA, et al.,
Appellants,

v.

REPUBLIC OF PALAU,
Appellee.

CRIMINAL APPEAL NO. 99-02
Criminal Case No. 100-99

Supreme Court, Appellate Division
Republic of Palau

Decided: November 9, 1999

Counsel for Appellants: 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.

PER CURIAM:

By Order dated October 28, 1999, this Court vacated appellants' sentences of imprisonment, but reserved judgment on appellants' contentions that the fines imposed upon them for unlawful fishing in violation of 27 PNC § 181 are excessive. We now proceed to address those contentions.[1]

Appellants assert that the fines of $10,000 on each of two counts for two of the appellants and $25,000 on each of two counts for the other two appellants violate the Excessive Fines Clause of Palau's Constitution, *see* Art. IV, Sec. 10, (". . . excessive fines are prohibited"), because appellants are indigent and unable to pay any substantial fine.

This Court has not previously construed Palau's Excessive Fines Clause. [2] However, the

[1] In its October 28 Order, this Court afforded appellants an opportunity to file a reply brief on the issue of excessive fines, despite their prior waiver of their right of reply. *See* October 28 Order at 2 n.1. In a Motion filed November 3, 1999, appellants again explicitly waived their right to file a reply brief. *See* Renewed Motion at ¶ 9. The Court finds this issue appropriate for disposition without oral argument because oral argument would not materially assist the Court in resolving this appeal. *See In re Estate of Kotaro Kubarii*, 7 ROP Intrm. 27, 27 n.1 (1998).

[2] In the only reported case involving the Excessive Fines Clause, the Court, in construing a forfeiture statute, noted that a broad construction "would raise substantial issues" as to a "possible violation" of the Excessive Fines Clause, but did not definitively interpret or apply the

prohibition against excessive fines has long been part of the law of Palau, *see* 1 TTC § 6 ("[e]xcessive bail shall not be required, nor excessive fines imposed"), and is derived from the comparable clause in the United States Constitution. *See* U.S. Const. amend. VIII ("[e]xcessive bail shall not be required, nor excessive fines imposed"). It is therefore appropriate to consider United States case law in construing this provision. *Akiwo v. Supreme Court of the Republic of Palau, Trial Division*, 1 ROP Intrm. 96, 99 (1984).

The United States Supreme Court has had few opportunities to consider excessive fines issues. *See United States v. Bajakajian* , ⊥66 118 S.Ct. 2028, 2033 (1998) ("[t]his Court has had little occasion to interpret, and has never actually applied, the Excessive Fines Clause"). However, it recently considered an excessive fines challenge and held that, "the touchstone of the constitutional inquiry under the Excessive Fines Clause is the principle of proportionality: The amount of the forfeiture must bear some relationship to the gravity of the offense that it is designed to punish." *Id*. at 2036. In setting forth this test, the Court held that a fine is unconstitutionally excessive if it "is grossly disproportional to the gravity of the offense," but made no mention of the defendant's ability to pay.

In this case, appellants argue only that the fines are excessive in light of their inability to pay, and do not contend that the fines, which are within statutorily prescribed limits, *see* 27 PNC § 182(b) (authorizing fines of up to $50,000 for unlawful fishing), are disproportional to the gravity of the unlawful fishing offenses. Although ability to pay was not an issue in *Bajakajian*, where the fine consisted of the forfeiture of currency that had already been seized, *see id.* at 2039 n.15, we nonetheless find it significant that the Court articulated a legal standard that controls the constitutional excessiveness inquiry, and that turns on the gravity of the offense rather than on ability to pay.

This approach is consistent with the many cases that have declined to scrutinize inability to pay as an element of the constitutional excessiveness inquiry, and have held that indigence becomes relevant only as a defense to any attempt on the part of the government to enforce payment of the fine. As one court explained, "[n]either the Constitution, nor applicable sentencing statutes and guidelines . . . categorically prohibit a court from ever imposing a fine after the defendant has proven his inability to pay . . . . [C]ourts consider a defendant's ability to pay only after the government unsuccessfully has attempted to collect the fine." *United States v. Altamirano*, 11 F.3d 52, 53 (11th Cir. 1993) (citations omitted).

Thus, "a fine may constitutionally be imposed upon an indigent defendant, who may assert his continuing indigence as a defense if the government subsequently seeks to collect the fine." *United States v. Wong*, 40 F.3d 1347, 1383 (2d Cir. 1994); *accord United States v. Torres* , 901 F.2d 205, 247 (2d Cir. 1990) (holding that a defendant "may assert a constitutional objection [to a fine] on the ground of his indigency only if the government seeks to enforce the court's order . . . at a time when the defendant [is] unable, through no fault of his own, to comply") (citations and internal quotations omitted); *Gilbert v. State* , 669 P.2d 699, 703 (Nev. 1983) (finding "[n]o constitutional impediment . . . to imposing a . . . fine on an indigent defendant" provided state does not imprison defendant for non-payment without a hearing to determine his

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Excessive Fines Clause. *Republic of Palau v. M/V Aesarea*, 1 ROP Intrm. 429, 434 (1988).

capacity to pay); *see also* 21 Am. Jur. 2d § 615 ("any fine within the limits of a statute is in the discretion of the trial judge and may not be the subject of review on constitutional grounds").[3]

⊥67 A number of state and federal cases have, as appellants emphasize, required some finding as to the defendant's ability or inability to pay the imposed fine, and have remanded for further proceedings where the trial court had failed to make sufficient findings on the issue. These cases, however, have done so in reviewing the trial court's exercise of its statutory or common law sentencing authority, and not on constitutional grounds under the Excessive Fines Clause. *See, e.g., United States v. Anderson* , 39 F.3d 331, 358-59 (D.C. Cir. 1994), *vacated in part on other grounds*, 59 F.3d 1323 (D.C. Cir. 1995); *United States v. Stevens,* 985 F.2d 1175, 1188 (2d Cir. 1993); *United States v. Quan-Guerra* , 929 F.2d 1425, 1427 (9 th Cir. 1991); *United States v. Rowland*, 906 F.2d at 621, 623-24 (11 th Cir. 1990); *People v. Malone* , 923 P.2d 163, 166 (Colo. Ct. App. 1995). Accordingly, such cases lend no support to the Excessive Fines challenge which is the sole issue appellants raise in this appeal.

Appellants emphasize, and the Government does not dispute, that since the filing of this appeal the Government has obtained an order prohibiting appellants from leaving Palau unless they post a bond to secure payment of the fines. By doing so, the Government has arguably taken the type of coercive measures to enforce payment that would require further proceedings to determine appellants' ability to pay. [4] Appellants, however, have not appealed from that order, but rather have merely cited it as a basis for seeking expedited review of their original excessive fines challenge. We accordingly limit our analysis to the excessive fines issue raised in the instant appeal, and do not address the distinct issues that might arise from enforcement of such an order in the absence of a determination that appellants are capable of paying the sums at issue. Because appellants' arguments regarding their inability to pay the fines fail to raise a cognizable challenge under the Excessive Fines Clause, we reject appellants' excessive fines challenge and AFFIRM the trial court's judgment to that extent.

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[3] We find further support for this proposition in cases interpreting the Cruel and Unusual Punishment Clause of the U.S. Constitution, which, like its Palauan counterpart, is found in the same constitutional provision as the Excessive Fines Clause, *see* art. IV, sec. 10, and thus offers some interpretive guidance. *See, e.g., Walker v. People*, 248 P.2d 287, 302 (Colo. 1952) (holding that constitutional prohibition against cruel and unusual punishment "refer[s] to the statute and not to the sentence . . . . If the statute is not in violation of the Constitution, then any punishment assessed by a court . . . within the limits fixed thereby cannot be adjudged excessive").

[4] *See, e.g., Bearden v. Georgia*, 103 S. Ct. 2064, 2071-74 (1983) (holding that revocation of probation for failure to pay fine was unconstitutional absent finding of willful refusal or absence of good faith effort to pay fine, and remanding for determination as to reasons for non-payment); *United States v. Voda*, 994 F.2d 149, 154 n.13 (5th Cir. 1993) (holding that, although Constitution does not preclude imposing fine on indigent defendant, it does restrict penalties that may be imposed for inability to pay); *United States v. Vasquez*, 874 F.2d 1515, 1518 (11th Cir. 1989) (holding that Constitution would not permit detention of defendant pending payment of fine absent finding that defendant had present ability to pay).