ROP v. S.S. Enters., Inc., 9 ROP 48 (2002)

REPUBLIC OF PALAU,
Appellant,

v.

S.S. ENTERPRISES, INC.,
Appellee.

CIVIL APPEAL NO. 01-19
Civil Action No. 00-125

Supreme Court, Appellate Division
Republic of Palau

Decided: January 10, 2002[1]

[1] **Appeal and Error:** Government's Appeal Right in Civil Cases

In civil cases, the government has the same right of appeal as private citizens.

[2] **Appeal and Error:** Standard of Review; **Civil Procedure:** Summary Judgment

A grant of summary judgment is reviewed *de novo*, with all evidence and inferences viewed in the light most favorable to the nonmoving party, to determine whether the Trial Division correctly found that there was no genuine issue of material fact and that the nonmoving party was entitled to judgment as a matter of law.

[3] **Appeal and Error:** Standard of Review

⊥49 Review of a Trial Division decision on summary judgment is plenary, and thus it includes both a review of the determination that there is no genuine issue of material fact, and whether the substantive law was correctly applied.

[4] **Constitutional Law:** Search and Seizure; **Criminal Law:** Search and Seizure

Probable cause to support the issuance of a search warrant is determined by asking whether evidence was before the issuing judge showing in some trustworthy fashion the likelihood that an offense had been committed and there is sound reason to believe that a particular search will turn up evidence of it.

[5] **Constitutional Law:** Search and Seizure; **Criminal Law:** Search and Seizure

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[1]The parties have both agreed to waive oral argument pursuant to ROP R. App. Pro. 34(a). Because oral argument would not materially assist the Court in resolving this appeal, we are considering the appeal on the briefs.

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, but there is no requirement that the owner or occupier of the place be a suspect.

[6] **Appeal and Error:** Preserving Issues

Arguments made for the first time on appeal are considered waived, but it is appropriate to relax this stricture in exceptional circumstances.

Counsel for Appellant: Steven Daugherty

Counsel for Appellee: Mark Doran

BEFORE: ARTHUR NGIRAKLSONG, Chief Justice; R. BARRIE MICHELSEN, Associate Justice; DANIEL N. CADRA, Associate Justice Pro Tem.

MICHELSEN, Justice:

[1] In this civil proceeding brought by the government to enforce monetary penalties for alleged violations of the Marine Protection Act, the Appellee successfully moved to suppress the evidence obtained during the execution of a search warrant. The primary objection to the issuance of the warrant was that it failed to demonstrate probable cause to believe that the Appellee or its agents had committed a crime. The trial court granted the motion to suppress and entered summary judgment in favor of Appellee. The government appealed.[2] We hold that although a search warrant application must be supported by probable cause to believe evidence of a crime or contraband is to be found at a specified premises, it need not also demonstrate probable cause to believe that the owner or occupier of the property is involved in the crime. We therefore reverse the order granting the motion to suppress and the summary judgment and remand the matter for further proceedings consistent with this opinion.

BACKGROUND

Except for four species not involved in this case, the Palau National Code states: "No birds shall be taken, intentionally killed or harmed, nor their eggs taken . . . ." 24 PNC § 1401. Primary responsibility for enforcement of this law, as well as all of Palau's conservation laws, falls upon the officers of the Division of Marine Conservation and Entomology ("the Division"). After receiving reports that S.S. Enterprises, Inc., d/b/a the Penthouse ⊥50 Restaurant was serving *belochel* (an indigenous pigeon) to its customers, the Division conducted an investigation and ultimately applied for, and obtained, a search warrant for the Penthouse Restaurant. In the affidavit in support of issuance of the application Officer Kammen Chin, Chief Conservationist for the Division, related that:

1. In September 1997 Officer Rengchol ordered and was served belochel at

[2] "In civil cases, the government shall have the same right of appeal as private citizens." 14 PNC § 603(b).

the Penthouse Restaurant.

2. On or about May 8, 1998, Officer Chin observed two customers being served belochel at the Penthouse Restaurant.

3. On May 20, 1998, Marine Law Enforcement officer Oiterang observed approximately ten customers being served belochel at the Penthouse Restaurant.

4. On May 28, 1998, a Penthouse Restaurant employee stated to Conservation officer Ngirngetiang that the Penthouse Restaurant had 8 belochel in its freezer.

5. On June 4, 1998 a Penthouse Restaurant employee stated to Conservation Officer Ngirngetiang that the Penthouse restaurant would sell him frozen belochel, but not a prepared one.

Based upon this information a search warrant was issued for the Restaurant and during its execution the Division seized 3 *belochel*. Also discovered and seized during the search were 20 undersized rock lobsters, 8 of which were berried females, and 11 undersized mangrove and coconut crabs. Fishing for, buying, or selling undersized and/or berried female lobsters are acts prohibited by 27 PNC § 1204(e), and similar prohibitions concerning undersized coconut and mangrove crabs are found at 27 PNC § 1204(i) and (j). Protected marine life taken in violation of those provisions are also subject to forfeiture. 27 PNC § 1208(b)(3).

In June 2000, the Republic filed this action for civil violations concerning the undersized crabs and lobsters, but not the *belochel*. Counsel for the Restaurant filed a motion for summary judgment and to suppress the evidence obtained during the search, arguing that there was no "probable cause [to believe] that an offense has been, or is being committed, at the Penthouse Restaurant premises at the time of the application for a warrant."

The Trial Division agreed and therefore suppressed the evidence from the search, which included evidence of the undersized lobsters and crabs, and entered judgment for Defendant.

DISCUSSION

[2, 3] A grant of summary judgment is reviewed *de novo* , with all evidence and inferences viewed in the light most favorable to the nonmoving party, to determine whether the Trial Division correctly found that there was no genuine issue of material fact and that the moving party was entitled to judgment as a matter of law. *Dalton v. Borja* , 8 ROP Intrm. 302, 303, (2001); *Ngerketiit Lineage v. Tmetuchl* , 8 ROP Intrm. 122, 123 (2000). ⊥51 Review of a Trial Division decision on summary judgment is plenary. *Akiwo v. ROP* , 6 ROP Interm. 105, 106 (1997). It includes both a review of the determination that there is no genuine issue of material fact, and whether the substantive law was correctly applied. *Anderson v. Liberty Lobby, Inc.*, 106 S. Ct. 2505, 2510 (1986).

We turn directly to the flaw in the Appellee's prevailing argument before the Trial Division. It contains an unstated assumption that an application for a search warrant has two separate probable cause hurdles to meet: first, a showing that the evidence or contraband sought is at a particular location, and second, probable cause to believe that the owner or the occupier of the premises is guilty of the crime under investigation. This is incorrect.

[4, 5] The Palau Constitution provides that "[e]very person has a right to be secure in his person, house, papers and effects against entry, search, and seizure." Palau Const. art. IV, § 4. It specifically requires that a warrant "for search and seizure may not issue except from a justice or judge on probable cause supported by an affidavit particularly describing the place, persons, or things to be searched, arrested, or seized." Palau Const. art. IV, § 6. The expression, "probable cause" is a term of art borrowed from United States jurisprudence and its definition is well-settled, although not always easy to apply. In this context, the inquiry can be stated simply: whether evidence was before the issuing judge showing "in some trustworthy fashion the likelihood that an offense has been committed and there is sound reason to believe that a particular search will turn up evidence of it." *ROP v. Gibbons*, 1 ROP Intrm. 547A, 547J (1988) (citing *United States v. Aguirre* , 839 F.2d 854, 857-58 (1st Cir. 1988)). "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." *Kotaro v. ROP* , 7 ROP Intrm. 57, 61 (1998). There is no requirement that the owner or occupier of the place is a suspect. *Zurcher v. Stanford Daily* , 98 S. Ct. 1970, 1973 (1978) (probable cause requirement allows searches where "fruits, instrumentalities, or evidence of crime is located, whether or not the owner or possessor of the premises to be searched is himself reasonably suspected of complicity in the crime being investigated").

The Palau Rules of Criminal Procedure are consistent with this caselaw. Rule 41(b) provides in part that a warrant "may be issued under this rule to search for and seize any (1) property that constitutes evidence of the commission of a criminal offense; or (2) contraband, the fruits of a crime, or things otherwise criminally possessed." In other words, the culpability of the occupier of the premises is not an issue when the court issues a search warrant. Accordingly, since there was probable cause to believe that *belochel* would be found at the Restaurant, the warrant was validly issued and the items properly seized.

Counsel for the Restaurant argues that the affidavit is also deficient for failure to affirmatively show that the birds were taken in violation of law. We disagree. Reliance on experience of officers and inferences they make from their experience is commonplace and entirely reasonable in this context. *Gibbons*, 1 ROP Intrm. at 547K. The issuance of the warrant here concerned alleged violations of 24 PNC § 1401, which, as noted earlier, states that: "no birds shall be taken, intentionally killed or harmed, nor their eggs taken . . . ." To "take" is defined as "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to ⊥52 engage in any such activity." 24 PNCA § 1004(j). A fair inference is that the Restaurant was not keeping diseased birds or roadkill in the food freezer. If the birds were fit for consumption, then they had to be "taken" illegally, and thus, the birds were evidence of a crime. Furthermore, if during that search the officers discovered marine life subject to forfeiture pursuant to 27 PNC § 1208(b)(3) they were authorized to seize it. Hence, none of the evidence

should have been suppressed.

Much of what we have discussed here was not argued in the Trial Division, which brings us to the last point of Appellee; that the government's appellate issues are raised for the first time on appeal. This is a fair objection. In the Trial Division, the government concedes it did not argue the well-settled rule that "probable cause to search does not require that there be probable cause to believe the owner or possessor of the property to be searched committed a crime."[3] Rather, it unsuccessfully attempted to show that the warrant application in fact made such a showing. The government now asks that we take cognizance of the issue as "plain error."

[6] While "[t]his court has made clear that arguments made for the first time on appeal are considered waived, . . . [i]n exceptional circumstances it is appropriate to relax this stricture." *Ngerketiit Lineage v. Ngerukebid Clan* , 7 ROP Intrm. 38, 43 (1998) (internal citations omitted). We believe this appeal is such a case. Here, we review the grant of summary judgment, a ruling we consider *de novo*. No additional fact-finding is needed, and the issue is limited to one of law. Having considered the government's arguments, and Appellee's response to them, we are constrained to conclude that the Trial Division was "not presented with and did not consider the governing theory of law." *Aquon v. Calvo*, 829 F.2d 845, 848 (9th Cir. 1987). Hence, the order granting the motion to suppress is vacated, the summary judgment is reversed, and this matter is remanded for further proceedings consistent with this opinion.

[3]David S. Rudstein, et al., Criminal Constitutional Law, Vol. 1, ¶ 2.04[3] (2001).