ROP v. Shao Wen Wen, 9 ROP 279 (Tr. Div. 2002)

REPUBLIC OF PALAU,
Plaintiff,

v.

SHAO WEN WEN and
WONG DAN GUO,
Defendants.

CRIMINAL CASE NO. 01-72

Supreme Court, Trial Division
Republic of Palau

Decided: March 19, 2002

[1] **Criminal Law:** Search and Seizure

Criminal Rule 41(e) allows a motion for return of property by any person aggrieved by an unlawful search and seizure.

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

The general rule is that the search of multiple units at a single address must be supported by probable cause to search each unit.

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

While suppression is warranted when the warrant authorizes the search of an entire structure and the officers do not know which unit contains the evidence of illegal conduct, that analysis does not apply when the officer knows there are multiple units and believes there is probable cause to search each unit, or the targets of the investigation have access to the entire structure.

[4] **Constitutional Law:** Search and Seizure; **Criminal Law:** Search and Seizure
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In securing and executing search warrants, police are required to act reasonably, not with factual perfection.

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

In situations where several persons occupy the premises in common, sharing common living quarters but having separate bedrooms, the courts have held that a single warrant describing the entire premises is valid and justified the search of the entire premises.

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

The probable cause inquiry is whether there is probable cause to believe that contraband or evidence is located in a particular place, not whether the owner or occupier of the place is a suspect.

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

Reference to a specific illegal activity can, in appropriate cases, provide substantive guidance for an officer's execution of a search warrant.

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

While an officer has no discretion to seize items not covered by a warrant, a warrant itself is sufficient if it enables the executing officer to ascertain and identify with reasonable certainty those items that the magistrate has authorized him to seize.

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

Evidence seized under 18 PNC § 304 is not limited to contraband or items used in committing a criminal offense, but also permits the seizure of evidence of the crime as such.

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

The question whether evidence may be seized pursuant to a search warrant is distinct from the question whether that evidence will prove a defendant's guilt or even be admissible at trial.

[11] **Constitutional Law:** Expression

Where the government seeks to suppress obscenity, care must be taken to ensure that constitutionally-protected expressive materials are not also suppressed, but where a warrant is not issued on obscenity grounds, there is no need for the careful line-drawing between protected and unprotected materials.

LARRY W. MILLER, Associate Justice:

[1] This matter, which is pending before Justice Salii, is now before this Court on the motions of defendants[1] and a non-party, Jiao Yu Juan,[2] to suppress and return to them property seized pursuant to a search warrant signed by Justice Salii. The motions are best addressed as presenting two principal contentions: (1) that the warrant, which authorized the search of a two-story building, ⊥281 was not supported by probable cause as to each of the apartments and rooms searched; and (2) that the warrant was overbroad and insufficiently particularized with

[1]Since the hearing on the motions, two other defendants have pleaded guilty and are no longer part of the case.

[2]Rule 41(e) allows a motion for return of property by any "person aggrieved by an unlawful search and seizure." For ease of reference, the Court refers to the movants collectively as "defendants".

respect to the items to be searched for. For the reasons stated herein, the motions are denied.

The search warrant was sought following an undercover investigation into alleged prostitution activities at the Style Beauty Center. According to the affidavit of probable cause and as testified to at the hearing,[3] an undercover officer entered the building and was approached by defendant Wong Dan Guo, identified in the affidavit as "Mamasan Rose Wong". Defendant Wong asked the officer if he would like a "special massage" and "made a gesture with the finger of one hand through the circular position of thumb and forefinger on the other hand." Affidavit of Probable Cause in Support of Search Warrant, April 5, 2001, at ¶ 4. The officer was then brought upstairs where he paid $100.00 to defendant Wong and was led into one of the upstairs apartments by defendant Shao Wen Wen, identified in the affidavit as "Irish Jao". The affidavit details that both defendant Shao and the officer undressed, that, at the officer's request, defendant Shao brought out a condom from a drawer, and that she was then arrested.

1. Defendants' first principal contention is that the information provided to the Court, which described the Style Beauty Center, without elaboration, as a "two story concrete building", was insufficient to permit a search of each of the apartments and rooms within the building. As shown by the evidence presented at the hearing, the Style Beauty Center as such – that is, the accoutrements of a beauty parlor – occupied only the ground floor of the building; the second floor consisted of two apartments, one of which was occupied by defendant Wong Dan Guo and her family.[4] In addition, although the open areas and certain of the rooms on the ground floor were used for the (ostensible) business activities of the Style Beauty Center, three of the rooms were used as the living quarters of its employees.

[2] The general rule is that "the search of multiple units at a single address must be supported by probable cause to search each unit." 68 Am. Jur. 2d *Searches and Seizures* § 215 (2000). Defendants rely on this rule to challenge two aspects of the search that was carried out: the search of the second upstairs apartment and the search of the separate bedrooms within the beauty shop area.[5] The ⊥282 Court believes, however, that both of these searches fall within exceptions to the general rule and therefore that suppression is not warranted.

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[3]There were certain discrepancies between the affidavit and the testimony given at the hearing about such matters as how many times the undercover officers went inside the building, whether one or both entered the building at the time described in the affidavit, and as to whether the officer first encountered defendant Shao Wen Wen ("Irish Jao") on the first floor or the second floor. These discrepancies were, in the court's view, immaterial, and provide no basis for invalidating the warrant. *See generally Franks v. Delaware*, 98 S. Ct. 2674, 2676 (1978) (suppression warranted only upon a showing that affidavit contains false statements, made knowingly and intentionally or with reckless disregard for the truth, and then only if the remainder of the affidavit is insufficient to establish probable cause).

[4]Although Ms. Wong testified that she sometimes slept in the second apartment when relatives came to stay, none of her belongings were kept there and it was essentially unoccupied – i.e., nobody lived there – at the time of the undercover operation.

[5]The government has not raised the issue of standing, and thus the Court proceeds to analyze these contentions irrespective of the question of who has standing to object to which searches. It would appear, however, that only defendant Wong has standing with respect to the upstairs apartment, and that defendant Shao and non-party Juan only have standing to object to the search of the bedroom, identified in the return of service as Room #5, that they occupied.

[3, 4] As to the upstairs apartment, two exceptions are applicable. As stated in *United States v. Johnson*, 26 F.3d 669 (7th Cir.), *cert. denied*, 115 S. Ct. 344 (1994), while suppression is warranted

> when the warrant authorizes the search of an entire structure and the officers do not know which unit contains the evidence of illegal conduct, that analysis does not apply when (1) the officer knows there are multiple units and believes there is probable cause to search each unit, or (2) the targets of the investigation have access to the entire structure.

Id. at 694. Here, there is little room for dispute that the police had probable cause to search at least the commercial areas of the ground floor and the upstairs apartment in which the arrest was made. But with knowledge that one of the upstairs apartments was being used for illegal activities, it was a reasonable inference – although in the end apparently an incorrect one – that both apartments were so used. Moreover, from all the information available, it was reasonable to believe – and, in fact, true – that defendant Wong, who appeared to be in charge downstairs and had access to at least one of the upstairs apartments, also had access to the second apartment as well. It should be borne in mind, as the *Johnson* court noted, that "we do not require factual perfection by the officers involved; we merely require that they act reasonably." *Id.* As it turned out, although the second apartment turned out to be a family residence, and thus unlikely to be a locale for prostitution, it was the place that defendant Wong put at least some of the money that was paid to her by the officer involved in the undercover operation.

[5] The bedrooms downstairs fall within a separate exception, namely, that "[i]n situations where several persons occupy the premises in common, sharing common living quarters but having separate bedrooms, the courts have held that a single warrant describing the entire premises is valid and justified the search of the entire premises." *Bing v. State*, 342 S.E.2d 762, 764 (Ga. Ct. App. 1986). That exception, which is typically applied as stated above where numerous persons share a single residence, should apply equally if not more strongly here, where the living spaces were located within the single floor of a commercial establishment. Probable cause having been shown as to the business, the Court does not believe that a further showing was required for every room adjoining and indeed located ⊥283 within that business.[6]

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[6] *Bing* quotes a lengthy passage from a leading treatise that seems equally pertinent here:

> "[W]here a significant portion of the premises is used in common and other portions, while ordinarily used by but one person . . . are an integral part of the described premises and *are not secured against access by the other occupants*, then the showing of probable cause extends to the entire premises. For example, if three persons share an apartment using a living room, kitchen, bath and hall in common but holding separate bedrooms *which are not locked*, whichever one of the three is responsible for the described items being in the apartment could have concealed those items anywhere within, including the bedrooms of his cotenant."

342 S.E.2d at 764 (quoting 2 Lafave, Search & Seizure, § 4.5(b) at 81).

[6] The Court is aware of defendants' argument that the police did not have probable cause to believe that all of the women whose rooms were searched were engaged in prostitution. But as the Appellate Division has just reminded this Court, the question is "whether there is probable cause to believe that contraband or evidence is located in a particular place. . . . There is no requirement that the owner or occupier of the place is a suspect." *ROP v. S.S. Enters., Inc.*, 9 ROP 48, 51 (2002). Because, for the reasons set forth above, the Court believes there was probable cause to suspect that evidence would be located in all areas of the Style Beauty Center building, the Court rejects defendants' contentions in that regard.

[7] 2. The second principal argument raised by the motions to suppress is that the search warrant was insufficiently particularized in describing the items to be seized. The Court disagrees. The warrant in this case authorized the seizure of "evidence of prostitution including, but not limited to condoms, pornography, sexual devices and aids, and financial records, receipts, cash as well as articles of personal property tending to establish the identity of persons in control of the premises." Although, as discussed below, defendants argue that some of the items listed were not subject to seizure, their argument as to particularity focuses on the authorization to seize "evidence of prostitution including, but not limited to" the specified items. But while it is clear on the one hand that "authorization to search for 'evidence of *a* crime,' that is to say, any crime, is so broad as to constitute a general warrant" and is therefore impermissible, *United States v. George*, 975 F.2d 72, 76 (2d Cir. 1992) (emphasis in original), it is also well-established that "[r]eference to a specific illegal activity can, in appropriate cases, provide substantive guidance for the officer's exercise of discretion in executing the warrant." *United States v. Spilotro*, 800 F.2d 959, 964 (9th Cir. 1986).[7] Thus, in *Andresen v. Maryland*, 96 S. Ct. 2737, 2748 (1976), the U.S. Supreme Court rejected the argument that a warrant specifically listing items to be seized was ⊥284 rendered overbroad by the inclusion of the phrase, "together with other fruits, instrumentalities and evidence of crime at this [time] unknown." Rather than authorizing "the search for and seizure of any evidence of any crime" as the petitioner had contended, *id.*, the Court found it "clear from the context that the term 'crime' in the warrants refers only to the crime of false pretenses with respect to the sale of Lot 13T." *Id.* at 2748-49. Here, no contextual clues are needed: the warrant is by its terms limited to evidence of the crime of prostitution. In the Court's view, therefore, the warrant satisfied the particularity requirement.

[8] In pressing their argument, defendants cite the fact that the officers who executed the search warrant were accompanied by the Minster of Justice, who sometimes expressed an opinion on what should or should not be seized. They argue that this fact cannot be squared with the proposition that "[a]s to what is to be taken, nothing is left to the discretion of the officer executing the warrant." *Marron v. United States*, 48 S. Ct. 74, 76 (1927). Defendants read too much into this language, however, insofar as they suggest that a warrant must be so specific as to be able to be executed without the exercise of any judgment whatsoever. Rather, *Marron* and its progeny indicate that while the officer has no discretion to seize items not covered by the

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[7]The first case cited in support of this proposition by then-Circuit Judge Kennedy in *Spilotro* was *United States v. Washington* , 797 F.2d 1461, 1472 (9th Cir. 1986), which upheld a warrant for "records, notes, documents indicating [the defendant's] involvement and control of prostitution activity including but not limited to" specified items.

warrant,[8] the warrant itself is sufficient if it "enable[s] the executing officer to ascertain and identify with reasonable certainty those items that the magistrate has authorized him to seize." *George*, 972 F.2d at 75; *see also United States v. Dickerson*, 166 F.3d 667, 693 (4th Cir. 1999) (citing *Marron* for the proposition that the purpose of the particularity requirement is to "ensur[e] that the executing officer is able to distinguish between those items which are to be seized and those that are not"), *rev'd on other grounds*, 120 S. Ct. 2326 (2000).

[9] 3. Defendants' remaining arguments can be dealt with more swiftly. First, the Court rejects defendants' contention that the only evidence properly seized under 18 PNC § 304 was the cash paid by the undercover officer. Without addressing what evidence may be admitted at trial, *see infra*, it is clear that § 304 is not limited to contraband, *see id.* ¶ (1) ("property the possession of which is prohibited by law"), or items "used [in] committing a criminal offense," *see id.* ¶ (6), but also permits the seizure of evidence of the crime as such. *See id.* ¶ (5) ("property necessary to be produced as evidence or otherwise on the trial of anyone accused of a criminal offense"). The "distinction between 'mere evidence' and instrumentalities, fruits of crime, or contraband," was rejected as a matter of constitutional law long ago, *see Warden v. Hayden*, 87 S. Ct. 1642, 1646-51 (1967), and the plain language of § 304 rebuts defendants' contention that it has been enshrined as statutory law. *See also* ROP R. Crim. Pro. 41(b) (authorizing the issuance of a warrant "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; or (3) property designed or intended for use or which is or has been used as the means of committing a criminal offense").

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[10] In a similar vein, it bears some emphasis that the question whether evidence may be seized pursuant to a search warrant is distinct from the question whether that evidence will prove defendants' guilt or even be deemed admissible at trial. By definition, the possession by defendants of non-contraband items – money, condoms, even sexually explicit videos, *see infra* – is not illegal. Thus, their admissibility and, if admitted, their weight as evidence, will depend on whether the trial court, either as judge or as finder of fact, determines that they are probative as circumstantial evidence that acts of prostitution have taken place at the Style Beauty Center. Thus, for example, defendants are perfectly entitled to demonstrate that they came to Palau "with their own cash money" and that there is therefore no basis for an inference that the amounts of money seized show that they were engaged in illegal activities. *See* Motion for Return of Property, and Motion to Suppress Evidence, November 14, 2001, at 6. But those are matters to be presented and argued at trial; they are not a basis for suppression, much less for invalidating the search warrant retroactively. For present purposes, it is sufficient to conclude that the police had "cause to believe" that the items seized "[would] aid in [the] apprehension or conviction" of persons involved in the crime of prostitution for which the warrant was sought. *See Warden*, 87 S. Ct. at 1650.[9]

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[8]Although the particularity requirement was discussed by the Supreme Court in *Marron*, it did not hold that the warrant was insufficiently particularized, but simply that "the seizure of the ledger and bills . . . was not authorized by the warrant." *Id.* The whole discussion was arguably dicta in any event, since the Court went on to hold that these items "were lawfully seized as an incident of the arrest." *Id.* at 77.

[9]The Court reaches this conclusion, albeit somewhat hesitantly, even as to the numerous pairs of earrings seized from defendant Wong's bedroom, whose marginal evidentiary value would seem to be slight at

[11] Finally, the Court sees no infirmity in the authorization to search for and the eventual seizure of "pornography". If Palau had an obscenity law, and if the warrant were issued in furtherance of that law, then there would be a significant constitutional issue to be addressed. *See Lo-Ji Sales, Inc. v. New York*, 99 S. Ct. 2319, 2324 (1979) (invalidating a warrant that "left it entirely to the discretion of the officials conducting the search to decide what items were likely obscene and to accomplish their seizure"). Where the government seeks to suppress "obscenity", care must be taken to ensure that constitutionally-protected expressive materials are not also suppressed. But Palau has no obscenity law, the warrant was not issued on that basis, and there was no need for the careful drawing of a line between protected and unprotected materials. Rather, the warrant was issued and the seizures were made on the common-sense notion that the presence of sexually explicit materials in what was ostensibly a beauty salon might be probative of whether the premises were instead being used for prostitution activities. That the materials seized were otherwise ⊥286 constitutionally protected, as the Court must assume they are, does not affect their probativeness as evidence on that issue, and therefore does not call into question the legality of their seizure. *See State v. Claiborne*, 818 P.2d 285, 289 (Idaho 1991) ("When a book is judged to be evidence of a crime, it is seizeable with a valid warrant . . . just as any other piece of evidence of a crime would be.").

The motions to suppress are accordingly denied, and this case is returned to Justice Salii for all further proceedings.

So Ordered.

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best. The officer who seized the earrings explained that when Ms. Wong did not respond to his question whether all of the earrings belonged to her, he surmised that they might be used by the women (as "accessories" to the crime, perhaps?) whose prostitution activities she is accused of advancing. While that is not wholly implausible, it seems of scant weight: if the trial judge believes the undercover officer's testimony concerning Ms. Wong's alleged direct advancement of prostitution on the night of April 5, 2001, the marginal value of the earrings in satisfying the government's burden would seem to be minimal. On the other hand, if that testimony is disbelieved, the earrings would hardly go far in proving guilt beyond a reasonable doubt. While these observations do not lead the Court to declare that the seizure of the earrings was illegal, the Court would suggest that the government – prosecutors and police – consider whether the thoroughness of the search in this case was perhaps disproportionate to the ultimate evidentiary value of what was seized.