IN THE
SUPREME COURT OF THE REPUBLIC OF PALAU
APPELLATE DIVISION

KANGICHI UCHAU,
Appellant,
v.
REPUBLIC OF PALAU,
Appellee.

Cite as: 2017 Palau 34
Criminal Appeal No. 17-001
Appeal from Criminal Case No. 16-125

Decided: October 30, 2017

Counsel for Appellant ……..**.....**Johnson Toribiong, Esq.
Counsel for Appellee **.....**Timothy P. Zintak

BEFORE: ARTHUR NGIRAKLSONG, Chief Justice
JOHN K. RECHUCHER, Associate Justice
R. BARRIE MICHELSEN, Associate Justice

Appeal from the Trial Division, the Honorable Kathleen Salii, Associate Justice, presiding.

OPINION

PER CURIAM:

[¶ 1] Defendant Kangichi Uchau was convicted after a bench trial on two counts of criminal violations of the Code of Ethics' "Conflict of Interest" provisions (33 PNC §§ 604(a) and (d)). Pursuant to 33 PNC § 611(a), such violations are misdemeanors subject to a fine of up to $10,000 for each violation, in addition to any other penalties provided by law. The Trial Court sentenced Uchau to one year supervised probation for each count (to run concurrently), a $9,600 fine for Count One, and a $1,200 fine for Count Two. The Court also sentenced Uchau to pay a $1,525 fee to the Office of the Special Prosecutor ("OSP").

[¶ 2] 33 PNC § 604(a) provides that "No employee may take, participate in taking or use his or her government position to attempt to influence any official action where it is reasonably foreseeable that the action could have a material financial effect on that employee, or any financial interest of that employee, that is different from the effect on the public generally." Section 604(d) states "No employee may use or attempt to use the employee's official position to secure or grant privileges, exemptions, advantages, contracts, or treatment, for himself or others, including but not limited to . . . [s]eeking other employment or contracts for services for the employee by the use or attempted use of the employee's office or position."

[¶ 3] Uchau appeals his conviction on four grounds. Firstly, he argues that defense counsel's representation at trial amounted to ineffective assistance of counsel. Secondly, he argues that the government's prosecution of him amounted to malicious prosecution, or, in the alternative, an abuse of process. Thirdly, Uchau argues that the Trial Court violated his constitutional right to examine all witnesses and evidence against him by refusing to order the prosecution to allow defense counsel to examine notes that a witness reviewed before testifying. Fourthly, Uchau argues that the Trial Court erred in finding Uchau guilty because the prosecution failed to establish all elements of the offense beyond a reasonable doubt, including the necessary *mens rea* requirement. Lastly, Uchau argues that, even if the Appellate Division upholds his conviction, the Court should reduce the sentence imposed, which Uchau views as excessive and disproportionate to the seriousness of the offense.

[¶ 4] For the following reasons, we **AFFIRM** the conviction, and **AFFIRM** in part and **REVERSE** in part the sentence.[1]

[1] Although the Appellant has requested oral argument, we determine pursuant to ROP R. App. P. 34(a) that oral argument is unnecessary to resolve this matter.

BACKGROUND

[¶ 5] Evidence is reviewed in the light most favorable to the prosecution. *Etpison v. ROP*, 2017 Palau 32 [¶ 2]; *ROP v. Chisato*, 2 ROP Intrm. 227, 240 (1991). Uchau was Governor of Peleliu State in 2010. In July of that year, Uchau directed the State Treasurer, Ms. Rebecca Ngiruos, to issue a check in his name for $9,600 from the Peleliu State General Account based upon his representation to her that his store, "6 K's Pool & Retail Store", was providing catering services to a state summer camp program. Uchau never produced an invoice or other supporting documentation relating to the costs his store had allegedly incurred.

[¶ 6] In December 2010, Uchau again directed the State Treasurer to issue a check in his name from the Peleliu State General Account, this time in the amount of $1,196.75. This money was meant to reimburse Uchau for catering services provided by his store during a "Bone Collection Handover Ceremony" held by the Peleliu Government in November 2010. This check was signed by Uchau, and was supported by an invoice for catering services from "6 K's Pool & Retail Store."

[¶ 7] These two checks came to the attention of the Office of the Public Auditor during an audit of Peleliu State in 2014. The Office of the Public Auditor gave this information to the Attorney General, who turned this matter over to the OSP. After conducting its own investigation, the OSP charged Uchau with two counts of criminal violations of the Code of Ethics, namely 33 PNC §§ 604(a) and (d).

[¶ 8] For the most part, Uchau did not dispute the evidence presented by the Special Prosecutor at trial. Instead, Uchau argued that any violations of the Code of Ethics were *de minimis* (an argument he does not press here), and stressed that there was no evidence that Uchau, acting through his business, had defrauded, cheated, overbilled, or otherwise failed to render adequate catering services to Peleliu State in relation to the summer camp or the bone collection ceremony.

[¶ 9] After trial, the Court found Uchau guilty on two counts (one for each of the checks in question) of criminal violations of the Code of Ethics, and imposed the aforementioned sentence. This appeal followed.

STANDARD OF REVIEW

[¶ 10] A lower court's conclusions of law are reviewed *de novo*. *ROP v. Terekiu Clan*, 21 ROP 21, 23 (2014). Findings of fact are reviewed for clear error. *Imeong v. Yobech*, 17 ROP 210, 215 (2010). Under the clear error standard, the trial court will be reversed only if no reasonable trier of fact could have reached the same conclusion based on the evidence in the record. *Id*.

DISCUSSION

[¶ 11] Uchau raises four arguments for why his conviction should be overturned, and provides additional objections regarding his sentence.

I. Ineffective Assistance of Counsel

[¶ 12] Uchau submits that he received ineffective assistance of counsel because his public defender allegedly never informed him of his right to testify on his own behalf, nor advised him about the strategic implications of testifying versus not testifying at trial. Uchau argues that this failure was especially egregious in his case because the critical issue for the prosecution to prove was the necessary intent on Uchau's part, as the underlying conduct of issuing checks in his name was largely undisputed. For this reason, Uchau claims that his testimony "was so crucial to any viable defense that counsel was plainly deficient for failing to call him as a witness."

[¶ 13] *Saunders v. ROP*, 8 ROP Intrm. 90 (1999), established the guidelines for bringing ineffective-assistance-of-counsel claims. "Because many ineffective-assistance- of -counsel claims rely on facts outside the trial record, it's often difficult to review such claims on direct appeal, as an appellate court lacks a mechanism for developing a factual record regarding

counsel's decisions and actions." *Id*. at 91. Therefore, such claims may be raised on direct appeal "*only when the record is sufficiently developed to permit meaningful appellate review of the claims*." *Id*. at 92 (emphasis added).

[¶ 14] In *Saunders*, the appellant claimed that because *mens rea* was the critical issue at trial, his own testimony was so essential to any viable defense that counsel was plainly deficient for failing to call him as a witness. *Id*. at 92-93. The Court disagreed, explaining that an ineffective-assistance-of-counsel claim cannot arise solely from the fact that the defendant did not testify at trial. Instead, such a determination requires an analysis of whether defense counsel competently fulfilled his duty "to advise defendant of his right to testify or not to testify, the strategic implications of each choice, and that it is ultimately for the defendant himself to decide." *Id*. (quoting from *United States v. Teague*, 953 F.2d 1525, 1533 (11th Cir. 1992)). Because there was no extrinsic evidence regarding defense counsel's communications with the defendant or the content of defendant's possible testimony, the record was not "sufficiently developed to permit meaningful review of [the appellant's] claim." *Id*. Therefore, the appellant's claim was not cognizable on direct appeal.

[¶ 15] Uchau's argument is identical to the one that failed in *Saunders.* He presents no evidence to support his ineffective-assistance-of-counsel claim, other than pointing to the fact that he did not testify on his own behalf at trial and claiming (through written argument of his current attorney) that his public defender neither told him that he had the right to testify in his own defense nor explained the trial strategy behind testifying or not testifying. Therefore, Uchau's claim fails to meet the "sufficiently developed" standard required by *Saunders* for such a claim to be cognizable on direct appeal.

II. Malicious Prosecution or Abuse of Process

[¶ 16] Uchau's next argument is that the charges against him constitute malicious prosecution or an abuse of process. Uchau points to his advanced age and the fact that the prosecution commenced three years after he left office, although he provides no further details or explanation to substantiate his claim.

[¶ 17] This is not the appropriate venue in which to raise such a claim. There are no Palauan statutes or case law regarding the common law torts of malicious prosecution or abuse of process, but the important point to note is that these are civil torts, not defenses to a criminal prosecution.

> The difference between the two often is explained as a matter of timing and scope: malicious prosecution is the appropriate cause of action for challenging the whole of a lawsuit − i.e., asserting that the suit has no basis and should not have been brought − while abuse of process covers the allegedly improper use of individual legal procedures *after* a suit has been filed properly.
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> *Simon v. Navon*, 71 F. 3d 9, 15 (1st Cir. 1995) (emphasis in original).

[¶ 18] Notably, "[o]ne element that must be alleged and proved in a malicious prosecution action is termination of the prior criminal proceeding in favor of the accused." *Heck v. Humphrey*, 512 U.S. 477, 484 (1994).

[¶ 19] Regarding abuse of process, "the gravamen of that tort is not the wrongfulness of the prosecution, but some extortionate perversion of lawfully initiated process to illegitimate ends." (citations omitted). *Id*. at 487 n.6

[¶ 20] Uchau's argument is frivolous.

III. Right to Examine All Witnesses and Evidence

[¶ 21] Uchau argues that his right under Article IV § 7 of the ROP Constitution (which provides, *inter alia*, that an accused "shall be permitted full opportunity to examine all witnesses") was violated when the prosecution refused to give defense counsel an opportunity to examine notes taken by OSP Investigator Dolynn Tell which she may have reviewed before testifying at trial. The prosecution initially objected to sharing these notes, arguing that they constituted the work product of the OSP. Furthermore, the prosecution argued that Investigator Tell had later memorialized all the information contained in the notes by creating the Affidavit of Probable Cause filed in this case.

[¶ 22] Whether or not these notes constituted work product of the OSP is at this point irrelevant. The record clearly shows that, despite its objections, the prosecution shared the notes in question with defense counsel.

> THE COURT: Thank you. And that is, and so the Republic's position and arguments [that these notes were outside the disclosure requirements because they constituted work product] is preserved on the record. And *the requested notes have been provided to Defense Counsel who has had a chance to review them*. Any other preliminary matters?
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> MR. HANLEY (defense counsel): No, Your Honor.
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> THE COURT: Continue with cross examination.
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> MR. HANLEY: Thank you.
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> Tr. 96: 19-27 (emphasis added).

[¶ 23] No objection was made to this resolution of the issue at trial. Therefore, this issue is reviewed pursuant to the "plain error" rule. ROP R. Crim. P. 52(b). Because Defendant's counsel was provided with the requested notes at a time when they were still of use to the defense, the Defendant's substantial rights were not affected.

IV. Sufficiency of the Evidence

[¶ 24] Uchau submits that the Trial Court erred in finding that the prosecution had proven each element (including the intent element) of the offenses beyond a reasonable doubt. He cites to 17 PNC § 2301—"Misconduct in Public Office"—and argues that this offense requires willful neglect of an employee's duties. Uchau points out that the prosecution provided no evidence establishing Uchau's intent to defraud the Palau or Peleliu governments, nor any evidence that Uchau willfully neglected his duties as governor, both of which Uchau claims is a necessary element to proving guilt.

[¶ 25] As a preliminary matter, Uchau was not convicted of "Misconduct in Public Office."[2] He was convicted of violating §§ 604(a) and (d) (the conflict of interest provisions) of the Code of Ethics. Section 611(a) provides criminal penalties for anyone who "knowingly or willfully" violates any provision of the Code of Ethics. This phrase in a criminal statute generally means "no more than that the person charged with the duty knows what he is doing," not that "he must suppose that he is breaking the law." *An Guiling v. ROP*, 11 ROP 132, 137-138 (2004) (internal quotations and citations omitted). Furthermore, Black's Law Dictionary defines "willful" to mean "voluntary and intentional, but not necessarily malicious." *Black's Law Dictionary* 1834 (10th ed. 2009). Therefore, it is immaterial whether the prosecution proved intent to defraud or willful neglect of duties, as neither of these are elements of the offense.

[¶ 26] Turning to the substance of Uchau's insufficiency of evidence claim, an appellate court's review of the evidence to support a conviction is limited, and such claims are evaluated under the "clear error" standard. *See, e.g., Alik v. ROP*, 18 ROP 93, 100 (2001); *Aichi v. ROP*, 14 ROP 68, 69 (2007); *Uehara v. ROP*, 17 ROP 167, 181 (2010). Essentially, the question to ask is "whether, viewing the evidence in the light most favorable to the prosecution, and giving due deference to the trial court's opportunity to hear the witnesses and observe their demeanor, any reasonable trier of fact could have found the essential elements of the crime were established beyond a reasonable doubt." *Alik*, 18 ROP at 100 (quoting *Aichi*, 14 ROP at 69). Because it is the trial court's function as the trier of fact to "determine the factual content of ambiguous testimony" (*Labarda v. ROP*, 11 ROP 43, 46 (2004)), an appellate court must uphold a conviction even if that court would have decided the case differently in the first instance. *Alik*, 18 ROP at 100.

[¶ 27] Focusing specifically on the intent requirement, mere assertions by a convicted defendant that the prosecution failed to provide adequate

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[2] In fact, the section that Uchau cites, 17 PNC § 2301, was expressly repealed in April 2013 by RPPL 9-21 § 3 as part of the "Penal Code of the Republic of Palau Act" (undertaken by the Palau Legislature to update Title 17 of the PNC along the lines of the Model Penal Code). The current text of Misconduct in Public Office is located at 17 PNC § 3918.

evidence to show the required intent, with no further substantiation, "fail[s] to show that the trial court's findings so lack evidentiary support in the record that no reasonable trier-of-fact could have reached the same conclusion." *Pamintuan v. ROP*, 16 ROP 32, 55 (2008). In a prior case involving a prosecution brought by the OSP for alleged violations of the Code of Ethics, *Remengesau v. ROP*, 18 ROP 113 (2011), the defendant contended that the prosecution had failed to introduce evidence sufficient to establish each element of the offense beyond a reasonable doubt. He had been convicted of violations of the Code of Ethics for incomplete financial disclosure statements required by 33 PNC § 605(c)(5) for failure to disclose information regarding the transfer of five pieces of land into his possession. The Appellate Division viewed his appeal as "essentially simply disagreeing with the [trial] court's evaluation of the evidence, which is far from reversible error." *Id*. at 119. As to the trial court's finding that the prosecution had proven the intent requirement beyond a reasonable doubt, the Court held that this was not clear error because the trial court's decision was based on the bills of sale and deeds of transfer for the property in question, the defendant's signature on the disclosure forms, and the testimony of three witnesses. *Id*.

[¶ 28] In the instant case, the evidence upon which the trial court based its decision is more than enough to survive the clear error standard. The prosecution's evidence consisted primarily of testimony from four witnesses, documentation regarding the two checks at issue (including supporting documents such as accounts payable vouchers and bank statements), and the business license for "6 K's Pool & Retail Store" listing Uchau as the sole owner. Importantly, the two checks (one of which was personally signed by Uchau) were both drawn from the Peleliu State Government General Account, made payable to Uchau, and mentioned in the description that they were payment to Uchau for catering services. The most crucial evidence for the prosecution was the testimony of State Treasurer Ngiruos, who testified that Uchau specifically directed her to issue the two relevant checks in his name so that he could deposit them, and told her that he would later use the money to buy or prepare food and drinks. Ngiruos further testified that she only issued these checks (despite the improper documentation and procedure) because Uchau (whom she described as her "superior") directed her to do so. As further evidence of his intent, the prosecution pointed to Uchau's initial

attempts to avoid blame by claiming that his daughters actually owned "6 K's Pool & Retail Store," and Uchau's long tenure as a public servant (both as Governor and a member of the Peleliu State Legislature), which meant he was charged with knowledge of the Code of Ethics provisions. When considered cumulatively, this evidence is more than sufficient to uphold Uchau's conviction.

[¶ 29] The Trial Court's decision in *ROP v. Gibbons*, 10 ROP 209 (Tr. Div. 2003), is a particularly useful reference when determining what constitutes sufficient evidence for establishing a criminal violation of 33 PNC § 604. In this case, the then-Governor of Koror State was found guilty of violating section 604 by attempting to sublease land to a corporation for a proposed scrap metal salvage operation. The court parsed section 604 into the following five elements: (1) defendant was an employee (2) who used his government position (3) to take, participate in taking, or attempt to influence any official action (4) in circumstances where it was reasonably foreseeable that the actions could have a material financial effect on him (5) that was different from the effect on the public generally. *Id*. at 211.

[¶ 30] Using this framework, it is clear that the Trial Court did not err in finding that the prosecution had proven every element of the offense beyond a reasonable doubt. Uchau was unquestionably an employee. As the Governor, he had the authority to disburse state funds, which he did so by instructing the State Treasurer to issue checks in his name from the State's General Account.[3] Because this money went directly to Uchau, it was more than merely "reasonably foreseeable" that his direction to issue the checks in his name would benefit him financially, while having no material effect on the general public.

[¶ 31] Both at trial and on appeal, Uchau has repeatedly tried to minimize the seriousness of his criminal offenses, characterizing them as simply "minor infractions" or "technical violations." Although his transgressions may seem slight to him, the Republic has a strong interest in rigorously

[3] This action clearly constitutes an "official action" because 33 PNC § 601(k) defines "official act" to mean "*a decision, recommendation, approval, disapproval, or other action . . . which involves the use of discretionary authority*."

enforcing the conflict of interest provisions in the Code of Ethics, even in cases where there is no proof of fraud or undisclosed assets. In *Gibbons*, the Trial Court provided a compelling justification for such vigorous enforcement, which merits repeating here:

> The question in this case is not whether the proposed scrap metal project was in the public interest, nor even whether the defendant genuinely believed it was. It is entirely possible that a government official's sincere view of the public interest may coincide with his private interest. But the Code of Ethics Act was enacted to "ensure that government officials perform their duties . . . free from bias caused by their own financial interests," and "embodies a recognition of the fact that an impairment of impartial judgment can occur in even the most well-meaning men when their personal economic interests are affected by the business they transact on behalf of the Government." Conflict of interest statutes, like the provisions of the Ethics Act at issue here, "are aimed at eliminating temptation, avoiding the appearance of impropriety and assuring the government of the officer's undivided and uncompromised allegiance." By repeatedly using his public position to advance a project in which he had a private financial interest, defendant violated the Act.

Gibbons, 10 ROP at 213 (citations omitted).

[¶ 32] Uchau's final argument regarding the sufficiency of evidence relates to the exception included in 33 PNC § 604(a), which states that "An employee who is unable to disqualify himself on any matter because he is the only person authorized by law to perform the official action will not be in violation of this subsection if he has complied with the disclosure requirements in section 605." Uchau argues that, because it was undisputed that he had disclosed his ownership of "6 K's Pool & Retail Store," this exception should apply. However, Uchau would have only been able to take advantage of this exception if he had shown that he was "unable to disqualify himself [from selecting catering services and authorizing the disbursement of

state funds for such services] because he was the only person authorized by law to perform the official action." Uchau failed to produce any evidence that he was the only person authorized by law to select the catering services for the summer camp and bone collection ceremony. Furthermore, the only evidence introduced at trial on this point suggests that there were at least two other establishments on Peleliu that could have provided the required catering services. Therefore, Uchau cannot credibly argue that the Trial Court committed clear error by finding that the exception contained in § 604(a) did not apply.

V. Fines Imposed by Trial Court as Part of Sentence

[¶ 33] Uchau does not challenge the Trial Court's imposition of one-year supervised probation for each count. However, he appeals the other two components of his sentence—the $10,800 in total fines, and the $1,525 OSP fee.

A. $10,800 in Total Fines

[¶ 34] Uchau argues that the Appellate Division should lower the $10,800 in total fines ($9,600 for Count One and $1,200 for Count Two) imposed by the Trial Division as part of his sentence because this amount is excessive in relation to the seriousness of his offense. Title 17 PNC § 652 authorizes the imposition of fines as part of the sentence, and this section also provides the factors that the sentencing judge must consider when imposing a fine. Here, Uchau does not argue that the Trial Court failed to comply with section 652, or improperly weighed the relevant factors. [4] Therefore, there is no basis to reverse the Trial Court's determination, particularly since these fines merely require him to return the amount taken in violation of the statute.

[¶ 35] Therefore, both fines are upheld.

B. Fee of $1,525 Payable to the OSP

[¶ 36] At sentencing the OSP recommended that the court sentence Uchau to pay fees to the OSP associated with costs it incurred during the

[4] Our review is also greatly limited by Appellant's failure to include a transcript of the sentencing hearing.

prosecution. Specifically, the OSP requested that Appellant pay a $1,525 fee to reimburse the OSP for subpoena production charges from Bank of Hawaii that the OSP had to pay in order to access Appellant's bank records.

[¶ 37] In its sentencing order, the Trial Court stated "The Court also sentences defendant to pay fees to the Office of the Special Prosecutor in the amount of $1,525, as authorized by 17 PNC § 617(f)." However, this section merely lays out the order in which a defendant's payments should be made ("When a defendant is ordered to make monetary payments as part of his or her sentence, payments by the defendant shall be made in the following order of priority: (1) Restitution; (2) Fines; (3) Other fees"). It does not provide an independent basis for awarding fees to the government upon obtaining a conviction at trial.

[¶ 38] In the Republic's sentencing recommendation, the OSP justified its request for fees by pointing out that several sections in 17 PNC Chapter 6 refer to defendants who could be ordered to pay fees or costs. For example, 17 PNC § 617(f), § 640, and §§ 655(a)-(f) all refer to criminal defendants who have been ordered to pay "fees" and/or "costs." According to the OSP, the logical inference from the repeated appearance of the terms "fees" and "costs" is that a trial court has the authority to award a fee to the government as part of a convicted defendant's sentence.

[¶ 39] Although fees are clearly contemplated as a possible component in Title 17's sentencing process, currently the only fee expressly established by statute is a "probation service fee." 17 PNC § 659.

[¶ 40] Fees and costs are expected to be established by statute, rather than as a matter of discretion by the sentencing court.

> "Fees" are generally those amounts paid to a public official, such as a clerk of the court, by a party for particular charges typically delineated by statute; in contrast, "costs" are those items of expense incurred in litigation that a prevailing party is allowed by the rule to tax against the losing party.

U.S. v. Idaho ex rel. Dir., Idaho Dept. of Water Res., 508 U.S. 1, 8 (1993).

[¶ 41] See e.g., 17 PNC § 635(c); "The Court may require the defendant to contribute to the cost of conducting urinalysis or similar other testing procedure and cost of substance abuse treatment."

[¶ 42] Reimbursement expenses of the prosecution, such as billings from a bank for document retrieval, are neither a "fee" nor a "cost" authorized by statute.

[¶ 43] Therefore, the portion of the Trial Court's sentence which ordered Uchau to pay "fees" to the OSP in the amount of $1,525 is reversed.

CONCLUSION

[¶ 44] For the reasons stated herein, we **AFFIRM** Defendant's conviction. We **AFFIRM** the sentence of one year supervised probation for each Count (to run concurrently) and the sentence of $10,800 in total fines ($9,600 for Count One and $1,200 for Count Two). However, we **REVERSE** the sentence of a $1,525 fee to the Office of the Special Prosecutor.

SO ORDERED, this 30th day of October, 2017.