Scott v. ROP, 10 ROP 92 (2003)

FELICIA SCOTT,
Appellant,

v.

REPUBLIC OF PALAU,
Appellee.

CRIMINAL APPEAL NO. 01-10
Criminal Case No. 99-279

Supreme Court, Appellate Division
Republic of Palau

Argued: February 20, 2003
Decided: April 17, 2003
⊥93
Counsel for Appellant: Johnson Toribiong

Counsel for Appellee: David Matthews

BEFORE: LARRY W. MILLER, Associate Justice; R. BARRIE MICHELSEN, Associate Justice; DANIEL N. CADRA, Associate Justice Pro Tem.

Appeal from Supreme Court, Trial Division, the Honorable KATHLEEN M. SALII, Associate Justice, presiding.

MICHELSEN, Justice:

In this appeal, Felicia Scott challenges her conviction of four counts of arson and raises objection to her sentence. Although Scott does not contest the trial court's finding that she is guilty of arson, she argues that her conviction of more than one count violates the Double Jeopardy Clause of the Palau Constitution in two respects. First, she contends that Palau's arson statute does not contemplate a separate arson count for each structure damaged. She therefore concludes that Counts II and IV, which refer to two other structures that caught fire as the original blaze spread, do not support separate convictions beyond the first count. Second, she argues that the allegations of Counts I and III state the same offense. Last, she raises numerous challenges to her sentence, which she contends require a remand.

⊥94 For the reasons set forth below we vacate Appellant's convictions on Counts II and IV, vacate her sentence on Count III, and affirm the Trial Division's restitution order.

I. BACKGROUND

On October 22, 1999, a fire broke out in a building the parties refer to as Ongalibang's

Apartments in Koror. According to the evidence at trial, the fire started in the second floor apartment of Jersey Iyar, consumed the remainder of the building where a number of other apartments and businesses were located, and then spread to the next door building that housed SGV Electronics, as well as to a neighboring residence owned by Owen Wess. The evidence was overwhelming that Scott started the fire due to her enmity of Iyar and her intent to inflict loss on him.

Scott was charged with four counts of arson. Count I charged a violation of 17 PNC § 401(a) and (b) for the burning of "a dwelling, Ongalibang's Apartments, which includes Micro Laundry and two salons." Count II charged another violation of 17 PNC § 401(a) and (b) for the burning of the Wess building. Count III returned to Ongalibang's Apartments and charged a violation of 17 PNC § 401(a) and (b) for the burning of "an office and/or other building or shelter, Ongalibang's Apartments, which includes Micro Laundry and two salons." Finally, Count IV charged a violation of 17 PNC § 401(a) and (b) for the burning of the SGV Electronics building. The Trial Division found Scott guilty of all four counts and sentenced her to five years imprisonment on each count. The Trial Division stated that

> [t]he sentences are to run concurrently and with all but the first five (5) years suspended . . . . After serving the first five (5) years in prison, Defendant shall be placed on supervised probation for the remainder of her sentence. . . . Failure of Defendant to comply with any of the terms and conditions herein may be grounds for revocation and part or all of the remainder of the jail sentence may be imposed.

II. DISCUSSION

A. Palau's Arson Statute

Title 17, Section 401 states:

> (a) Every person who shall unlawfully, wilfully and maliciously set fire to or burn any office, warehouse, store, barn, shed, cook-house, boat, canoe, lumber, copra or any other building or shelter, crop, timber or other property, shall be guilty of arson, and upon conviction thereof shall be fined not more than $1,000.00, or imprisoned not more than five years, or both.
>
> (b) If the building is a dwelling or if the life of any person be placed in jeopardy, he shall be fined not more than $5,000.00, or imprisoned not more than 20 years, or both.

These provisions date from the early Trust Territory period, and the language ⊥95 follows the format of the United States Code.[1] Section 401(a) contains the elements of the offense of

[1]That statute provides:

> Whoever, within the special maritime and territorial jurisdiction of the United States,

arson. Section 401(b) is a sentence enhancement provision which affects the sentencing range and allows for significant increases in the jail term and fine if the damaged building was a dwelling place or "if the life of any person be placed in jeopardy" as the result of the arson.

B. Counts II and IV

1. Standard of Review

Neither party correctly cited the standards of review for the matters under submission to this Court.[2] The Appellant recited no applicable standard of review and the Appellee recited the clearly inapplicable standard for the review of sufficiency of the evidence claims. Because Appellant's double jeopardy challenge was not presented to the Trial Division, we review this argument pursuant to ROP R. Crim. Pro. 52(b): "Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." Pursuant to that rule, an appellant must show that there was an "error or defect," that the error was "plain," and that the appellant's "substantial rights" were affected. *United States v. Olano*, 113 S. Ct. 1770, 1777 (1993);[3] *see also, e.g.*, *Minor v. ROP*, 5 ROP Intrm. 1, 4 (1994). When such an error is shown, this Court has the discretion to correct it if it "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings." *Olano*, 113 S. Ct. at 1776 (citations omitted and alteration in original).

Olano states that "[d]eviation from a legal rule is 'error' unless the rule has been waived." *Id.* at 1777. Impermissibly imposing multiple punishments on a ⊥96 defendant for a single offense is a deviation from a legal rule. *Accord United States v. Jarvis*, 7 F.3d 404, 412 (4th Cir. 1993). As to the second factor, the error must be obvious. "[I]t is abundantly clear that multiple prosecutions which run afoul of the Double Jeopardy Clause are constitutionally forbidden." *Olano*, 113 S. Ct. at 1777. Finally, in most cases, for a plain error to have affected substantial rights "means that the error must have been prejudicial: It must have affected the outcome of the [trial] court proceedings." *Olano*, 113 S. Ct. 1777-78. Thus, if Appellant can show, even at this late date, that she is currently being punished twice for the same offense, then

---

> willfully and maliciously sets fire to or burns, or attempts to set fire to or burn any building, structure or vessel, any machinery or building materials or supplies, military or naval stores, munitions of war, or any structural aids or appliances for navigation or shipping, shall be fined under this title or imprisoned not more than five years, or both.
>
> If the building be a dwelling or if the life of any person be placed in jeopardy, he shall be imprisoned for not more than 25 years, fined the greater of the fine under this title or the cost of repairing or replacing any property that is damaged or destroyed, or both.

18 U.S.C. § 81 (West Supp. 1997).

[2]Rule of Appellate Procedure 28(a)(7) states that briefs shall set forth any matters "necessary to inform the Appellate Division concerning the questions and contentions raised in the appeal." The standard under which the Appellate Division is to review the issues before it is a matter necessary to the questions raised on appeal.

[3]This court considers United Sates federal case law when construing comparably-worded language found in our rules. *See Doe v. Doe,* 6 ROP Intrm. 221 (1997); *King v. ROP,* 6 ROP Intrm. 131 (1997); *Secharmidal v. Tmekei,* 6 ROP Intrm. 83 (1997); *Gibbons v. ROP,* 1 ROP Intrm. 547MM, 547PP (1988).

her constitutional rights are presently being denied. Because her allegations assert an on-going, constitutional deprivation, rather than a past error raised too late to correct, we exercise our discretion to consider the argument using the "plain error" standard.

2. Applicable Law

Appellant argues that her conviction for more than one count of arson is a violation of the Double Jeopardy Clause. *See* Palau Const. art. IV, § 6. This Court has previously held that in construing Palau's Double Jeopardy Clause "we may look to the double jeopardy law as it has evolved in the United States for guidance in interpreting Article IV, Section 6." *Akiwo v. Supreme Court*, 1 ROP Intrm. 96 (1984). Therefore, there are three separate guarantees that are contained within the Double Jeopardy Clause: a defendant cannot be tried, convicted, or punished for the same offense more than once. *See, e.g.*, *United States v. Hatchett*, 245 F.3d 625, 630 (7th Cir. 2001) (citing *Illinois v. Vitale*, 100 S. Ct. 2260, 2264 (1980)). The issue in this case is whether Appellant has been punished more than once for the same offense.

This Court has adopted the approach of *United States v. Blockburger*, 52 S. Ct. 180 (1932), *see Kazuo v. ROP*, 3 ROP Intrm. 343, 348 (1993), and Appellant relies on *Blockburger*'s same evidence test for her articulation of the standard to be applied here. That test is applicable, however, only where a defendant is prosecuted under two different statutory provisions for one criminal act. In this case, Scott was prosecuted under the same statutory provision and therefore the same evidence test is inapplicable. Rather, when deciding whether multiple convictions under a single statutory provision are permissible, courts determine what "unit of prosecution" was intended by the statute in question.[4]

3. Application

Appellant argues that her convictions for Counts II and IV must be reversed because only one act of arson occurred, even though three structures were burned as a result of her conduct. Appellant's position is that once the Iyar apartment was set on fire, all the elements of the crime of arson were present, and the government may not divide the offense into several arson counts by charging separate crimes for each structure burned.

This argument raises the question whether the unit of prosecution for Palau's ⊥97 arson statute is established by the words "set fire or burn," such that the focus would be on the original act of starting the fire, or whether the emphasis should be on the word "any," so that "any" structure that is part of a resulting conflagration may be charged as a separate and distinct offense.

---

[4]This approach is sometimes referred to as the same transaction test, *see Hunnicut v. State*, 755 P.2d 105, 109-10 (Okla. 1988), and has also been extrapolated from *Blockburger*. For cases reciting the unit of prosecution test, see *Whalen v. United States*, 100 S. Ct. 1432, 1444 (1980); *Sanabria v. United States*, 98 S. Ct. 2170, 2182 (1978); *United States v. Dixon* , 273 F.3d 636, 642 (5th Cir. 2001); *United States v. Weathers*, 186 F.3d 948, 952 (D.C. Cir. 1999); *United States v. Clark*, 184 F.3d 858, 871 (D.C. Cir. 1999); and *State v. Westling*, 40 P.3d 669, 671 (Wash. 2002).

There is no legislative history for this Trust Territory carry-over provision, and surprisingly we have not found reported cases, even under the analogous federal statute, where the facts concerned an intentionally set fire that spread to other structures. We turn then to state law cases from the United States. The facts of this case, and Palau's statute, share some similarities with the facts and law at issue in *State v. Westling*, 40 P.3d 669 (Wash. 2002), which concerned an appeal of three convictions for a fire started in a car. There the resulting blaze damaged not only the car that was the target of the arsonist but two other vehicles as well. The defendant was convicted of three counts of arson. The appellate court held only one conviction could be sustained. Because Washington's arson statute criminalizes the causing of "a fire" that damages "any automobile," the court concluded, as a matter of statutory construction, that "one conviction is appropriate where one fire damages multiple automobiles, i.e., by use of the word 'any' the statute speaks in terms of 'every' and 'all' automobiles damaged by the one fire." *Id.* at 671.

We believe a comparable construction of Palau's statute is appropriate. Section 401(a) makes it a crime to "set fire or burn" (with the requisite mental state) any of the structures listed in the statute, as well as any "other property." We do not believe that the legislature intended these property categories to represent separate units of prosecution. Rather, we find that where a defendant starts only one fire, the statute permits only one conviction.[5]

This view is supported by the structure of § 401 itself. The division of the statute into subsections (401(a) and 401(b)) suggests that the law does not gauge the seriousness of the arson by the number of structures damaged, or by a dollar amount of resulting loss. Rather, the crime of arson is punishable by enhanced penalties when a dwelling house is involved in the crime or "if the life of any person be placed in jeopardy." In short, the seriousness of the crime of arson is based upon the risk posed to human life, not on the number of structures involved.

We therefore vacate Scott's convictions for Counts II and IV.

C. Counts I and III

Appellant also argues that Counts I and III allege the same crime and act of arson, the only material difference being that Count I alleges facts that allow for the sentence enhancements of § 401(b). The Government ⊥98 did not directly address this issue in its brief, but conceded at oral argument that convictions for both counts are problematic.

In Count I, the Government charged facts that would trigger the enhanced penalty provisions of § 401(b). It alleged the arson of "a dwelling, Ongalibang's Apartments, which

[5]Even if we did not believe that the unit of prosecution in § 401 was the act of setting the fire rather than each structure burned, we could find at most that the statute is ambiguous on the point and resolve the matter according to the rule of lenity, that is, in favor of a single offense rather than multiple offenses. *See Rewis v. United States* , 91 S. Ct. 1056, 1059 (1971) (stating that "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity"); *see also United States v. Universal C.I.T. Credit Corp*., 73 S. Ct. 227, 229 (1952) ("[W]hen choice has to be made between two readings of what conduct [the legislature] has made a crime, it is appropriate, before we choose the harsher alternative, to require that [the legislature] should have spoken in language that is clear and definite.").

includes Micro Laundry and two salons." Count III omitted the enhanced penalty allegation, and simply charged arson of "an office and/or other building and shelter, Ongalibang's Apartments, which includes Micro Laundry and two salons." In both counts, the allegation was that an act of arson was directed at a single structure–Ongalibang's Apartments. In short, the Government charged Scott twice for the arson committed at Ongalibang's Apartments–once alleging facts making the crime subject to the enhanced penalty provision, and once not alleging those facts.

Although Scott did not couch her challenge in these terms, she is alleging that Counts I and III of the information are multiplicitous. "An [information] is multiplicitous when it charges in separate counts two or more crimes, when in law and fact, only one crime has been committed." *United States v. Handakas*, 286 F.3d 92, 97 (2d Cir. 2002) (internal quotes and citations omitted).

Once again neither party briefed or argued the appropriate standard of review. This Court's research has determined, however, that because the issue was not raised before trial, it has not been preserved on appeal. ROP Rule of Criminal Procedure 12(b)(2) sets forth the time for various challenges to a criminal information: "Any defense, objection, or request which is capable of determination without the trial of the general issue may be raised before trial by motion. . . . The following must be raised prior to trial: . . . (2) Defenses and objections based on defects in the information . . . ." Rule 12(f) states: "Failure by a party to raise defenses or objections or to make requests which must be made prior to trial . . . shall [] constitute waiver thereof, but the court for cause shown may grant relief from the waiver."

It is clear that the trial court could have determined any objection to the multiplicity of the information without the trial of the general issue of Scott's guilt or innocence. Thus, by not raising an objection to the multiplicitous counts before trial, Appellant has waived any right to challenge the resulting convictions on those counts. Although it could be claimed that the failure to raise the issue before trial is another "plain error" and hence reviewable using the analysis of the challenge to Counts II and IV, this issue is directly governed by the specific provisions of Rule 12(f), rather than the more generally applicable Rule 52(b). *See United States v. Weathers*, 186 F.3d 948, 952-58 (D.C. Cir. 1999) (explicating the difference between review under Rule 12(f) and Rule 52(b) and the rationale for applying waiver in cases of multiplicitous charging documents and plain error review in other instances).[6]

⊥99 Even though Scott waived any challenge to the multiplicity of her convictions on both Counts I and III, the separate question whether the sentences were multiplicitous remains. *See United States v. Haddy*, 134 F.3d 542, 548 n.7 (3d Cir. 1998) ("Multiplicity [of convictions] may

[6]In rejecting plain error review for Rule 12(b)(2) challenges, the court in *Weathers* stated:

> *Olano* itself recognized that there is a difference between waiver and forfeiture. While Rule 52(b) does not mention "waiver," Rule 12(f) expressly does. Yet, on defendant's reading, the waiver language of Rule 12(f) would add nothing to the forfeiture principle of Rule 52(b). Defendant's "waiver" of his multiplicity claim under Rule 12(f) would have no consequence other than that it would be reviewed for plain error, the same result as if there were no Rule 12(f). We cannot concluded that the Supreme Court intended to render Rule 12(f) a nullity in a decision that did not even mention it.

result in multiple sentences for a single offense in violation of double jeopardy . . . .").[7] "Unlike a claim of multiplicity of convictions, a complaint about the multiplicity of sentences can be raised for the first time on appeal." *United States v. Dixon*, 273 F.3d 636, 642 (5th Cir. 2001) (internal quotes, alterations, and citations omitted). For the reasons stated in II.B.1 above, we review under the plain error standard. The unit of prosecution test leads us to conclude that just as § 401 does not permit multiple convictions for the destruction of multiple structures where a defendant set only one fire, it also does not permit the imposition of multiple punishments based on the characterization of a single structure once as "a dwelling" and once as "an office and/or other building or shelter."[8]

We therefore vacate Scott's sentence that resulted from the conviction on Count III.

D. Sentencing

Finally, we reject Scott's request that we direct the Trial Division to review its restitution order in light of our vacation of her convictions on Counts II and IV. Palau's restitution statute, 17 PNC § 3105, states: "If a defendant is convicted . . . of a wilful wrong causing damage to another, the court may . . . order restitution or compensation to the owner or person damaged . . . ." Scott was convicted of arson and that "wilful wrong" caused damage to every person who lost real or personal property as a result of her conduct. We can divine nothing within the statute that would limit her liability only to those who owned or occupied the building for which her convictions stand.

III. CONCLUSION

For the reasons stated herein, Appellant's convictions and sentences for Counts II and IV and her sentence for Count III are hereby vacated.

---

[7]Appellant raised a separate double jeopardy challenge to her sentence, which we reject as meritless.

[8]In the Trial Division's sentencing order, Scott's sentences were imposed "concurrently" but the remainder of the sentencing order seems to contemplate consecutive sentences. We address the question of multiplicity of sentences despite the existence of this ambiguity because regardless of any clarification that the Trial Division could make on remand, the result must be that Appellant's sentence will be limited to one five-year term of imprisonment. In the interest of judicial economy, therefore, we resolve the issue rather than remanding to the trial court for clarification and resentencing.