Skilang v. ROP, 11 ROP 187 (2004)

ERNEST SKILANG,
a/k/a Earney Ngirkelau,
Appellant,

v.

REPUBLIC OF PALAU,
Appellee.

CRIMINAL APPEAL NO. 03-005
Criminal Case No. 02-024

Supreme Court, Appellate Division
Republic of Palau

Argued: March 26, 2004
Decided: July 6, 2004
⊥188
Counsel for Appellant: Johnson Toribiong

Counsel for Appellee: David Matthews

BEFORE: ARTHUR NGIRAKLSONG, Chief Justice; LARRY W. MILLER, Associate Justice; R. BARRIE MICHELSEN, Associate Justice.

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

MICHELSEN, Justice:

In this criminal appeal Appellant Skilang seeks reversal of his conviction of trafficking in methamphetamine. After trial, he was found guilty and sentenced to 25 years in prison and fined $50,000. On appeal, Skilang asserts that the evidence demonstrates that police entrapped him and that he was merely acting as a procuring agent for the police. Because there is ample factual evidence supporting the trial court's guilty verdict, we affirm.

FACTS

We begin by setting forth the facts underlying the conviction in the light most favorable to the verdict. *Ngirarorou v. ROP*, 8 ROP Intrm. 136, 139 (2000). Those facts, in turn, are reviewed under a clearly erroneous standard. *Id*. At 137.

Because Skilang was a suspect in drug trafficking, police enlisted the aid of a confidential informant to procure methamphetamine from him. That informant was called as a witness by the Government at trial. He testified that he had been a paid police informant in a previous case and

stated that he was told by the detectives they wanted him to approach Skilang to buy methamphetamine. On January 31, 2002, he contacted Skilang between 11:40 a.m. and noon about such a purchase. His story was that he had some friends arriving from Saipan who would like to use "ice." The informant testified: "I asked him if he had the, if he had some stuff and he said yes." A price of $300 was negotiated. The informant then left to obtain in the purchase price from the police, and returned to Skilang with the payment. The informant said that "I gave him the money, he told me to go to the AM PM downtown, Koror branch [a retail store] and wait for him."

According to the money receipt, the informant was given the recorded money to use for the purchase at 12:59 p.m. The police observed the transaction, and arrested Skilang at 1:50 p.m. Hence, the full sequence of events only took about two hours.

Skilang's version of the events was different, although he conceded that he did deliver methamphetamine as charged. Skilang testified that he originally told the informant that he was not in the business of selling methamphetamine. Skilang stated that the informant then provided Skilang with the name of a third party from whom Skilang could procure narcotics. At first Skilang ⊥189 refused. However, after the informant pleaded with him, Skilang relented and agreed to buy from the third party, then delivered the methamphetamine to the informant.

ANALYSIS

Skilang first asserts that the trial court gave "no consideration" to his entrapment defense, but provides no basis for that contention. The Government did not object to the introduction of evidence regarding the defense. The trial court never indicated that entrapment issues would not be examined. In the complete absence of any indication to the contrary, we must assume that the trial court considered and rejected it.

The remaining question is whether any issues concerning that defense were preserved for appeal. At the conclusion of the trial, Skilang did not request for specific fact findings and the court entered a general verdict.[1] The failure of a defendant to request special findings limits appellate review. "[S]pecial findings help the defendant to preserve issues for appeal and aid proper appellate review of the non-jury trial conviction." 25 James Wm. Moore et al., *Moore's Federal Practice* ¶ 623.06[1] (3d ed. 1998). "The defendant may waive the Rule 23(c) right to special findings of fact . . . but if defendant does so, on appeal, 'findings will be implied in support of the judgment if the evidence, viewed in a light most favorable to the Government, warrants them.'" *Id.* § 623.06[2] (quoting *United States v. Musser*, 873 F.2d 1513, 1519 (D.C. Cir. 1989)). We therefore agree with the argument of the Government that the trial court "could reasonably reject the entrapment evidence in that the testimony at trial was that Defendant gave drugs to the [informant] immediately upon the [informant] requesting them and that the [informant] did not use threats or force to make the Defendant distribute ice to him."

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[1] *See* ROP R. Crim. P. 23: "The court shall make a general finding and shall in addition, on request made before the general finding, find the facts specifically. Such findings may be oral. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact appear therein."

Skilang contends that this Court should apply a *de novo* review of the trial court's determination regarding entrapment. However, the cases cited by Skilang all relate to a court's failure to provide a proper jury instruction on the issue of entrapment. Such case law is inapplicable in instances such as this, where the argument (which we have already rejected) is that the trial court did not consider the entrapment defense at all. We therefore decline the Appellant's request to reverse the conviction "as a matter of law."

Skilang also generally canvasses the law of entrapment and identifies two separate frameworks used to analyze an entrapment defense.

> Courts currently employ two different approaches to the defense of entrapment, each involving a distinct test and rationale, and each with somewhat different procedural consequences. The federal courts and the majority of the states adopt what is commonly known as the "subjective" theory of entrapment, first discussed by the Supreme Court in *Sorrells v. United States*, 53 S. Ct. 210 (1932), and further developed in *Sherman v. United States*, 78 ⊥190 S. Ct. 819 (1958). The rationale of these decisions is that the applicable prohibitory statute under which a defendant is convicted is deemed to contain an implied exception when the prohibited conduct has been instigated by government officials.
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> Although the subjective test has adherents in the federal courts and the majority of states, several jurisdictions have recently adopted the objective approach to the defense, either by statute or through judicial decision. Predictably, these jurisdictions emphasize the deterrent purposes of the defense. The Model Penal Code explicitly adopts the deterrent rationale of the objective approach to entrapment and therefore requires that the defense be submitted to the trial judge rather than the jury.

Guam v. Teixeira, 859 F.2d 120, 121, 122 (9th Cir. 1988) (citations omitted).

Skilang urges the Court to adopt the objective approach. We need not choose either framework as part of this appeal, because there is nothing in this record to indicate that Skilang requested the application of the objective test, much less that the trial court failed to apply it. Hence, there is no error to correct.

Skilang also contends that the conviction should be set aside because he was "procuring agent" for the police. This argument has no merit because the procuring agent defense is inconsistent with Palauan statutory law. Under prior United States federal statutory law, which prescribed penalties for individuals involved in a "sale" of drugs, a defendant could avoid liability for that charge by showing that defendant had purchased the drug as an agent acting upon instructions of a principal. *United States v. Prince*, 264 F.2d 850 (3d Cir. 1959). Hence, a "procuring agent" jury instruction was appropriate where a defendant was charged with selling narcotics and there was evidence that the defendant was acting on behalf of a buyer rather than

the seller. *United States v. Sawyer*, 210 F.2d 169, 170 (3d Cir. 1954). The legal theory was that as an *agent* for the buyer (the undercover police officer or informant), a defendant was a principal in or was conspiring to purchase rather than sell the contraband. *Henderson v. United States*, 261 F.2d 909 (5th Cir. 1958). In the United States, the language of 21 U.S.C. § 802(8) now prohibits "distribution" of controlled substances generally, so that procuring drugs for others is clearly within the scope of the statute. Thus, the procuring agent defense has been eliminated "*in toto*." *United States v. Hernandez*, 480 F.2d 1044, 1046 (9th Cir. 1973).

In this case, Skilang was charged under the provisions of the Controlled Substance Act, which makes it unlawful to knowingly and intentionally "manufacture, deliver or possess with intent to manufacture, deliver or dispense, a controlled substance." 34 PNC § 3301. According to the statutory definition, "deliver" means "the actual, constructive, or attempted transfer of a controlled substance *whether or not there exists an agency relationship*." 34 PNC § 3002(e) (emphasis added). Hence, the legislative language expressly nullifies ⊥191 an agency defense.

Skilang's actions clearly fall within the scope of the statutory definition of trafficking. Thus the argument advanced by Skilang, based as it is upon the requirement of former United States statutory law that the government prove the defendant to be a seller, has no application to the prosecution for trafficking of a controlled substance in Palau.

CONCLUSION

The general verdict entered by the Trial Division is supported by the evidence in this case. Skilang has identified no error of law in the record. We therefore affirm the judgment of the Trial Division.