ROP v. Gibbons, 1 ROP Intrm. 547A (1988)
REPUBLIC OF PALAU,
Appellant,

v.

JOHN C. GIBBONS,
Appellee.

CRIMINAL APPEAL NO. 1-88
Criminal Case No. 34-88

Supreme Court, Appellate Division
Republic of Palau

Opinion
Decided: September 12, 1988

BEFORE: ARTHUR NGIRAKLSONG, Associate Justice; ROBERT A. HEFNER, Associate Justice; FREDERICK J. O'BRIEN, Associate Justice Pro Tem.

HEFNER, Associate Justice:

BACKGROUND

The trial court found the following facts at the motion to suppress:[1]

1. Mr. Merol Ngirmeriil, Mr. Lucas Orrukem and Defendant were, on the night in question (February 9, 1988), present at the Kosiil Landing Bar.

2. Each of the above individuals were under the influence of alcohol, however, the ⊥547B Court FINDS that each was not so deeply under the influence of alcohol as to be unable to assess and control their actions there being no compelling evidence that this was the case.

3. All left Kosiil at about 11:30 p.m. after Defendant had stated to Mr. Ngirmeriil: "Be prepared because I still want to kill you."

4. Mr. Ngirmeriil instigated a conversation with Defendant in the parking lot of Kosiil which terminated when Defendant said: "I am going to shoot you" and reached for the glove compartment of his auto but was prevented from reaching same by Mr. Orrukem who held Defendant.

5. Defendant drove away, with Mr. Orrukem as his passenger, and Mr. Ngirmeriil

[1] Since the transcript of the hearing was not ordered and neither side has taken issue with the factual determinations of the trial court, this court incorporates them for our purposes.

followed in his auto. Mr. Ngirmeriil followed the Defendant's auto very closely, blinking his lights and honking his horn.

6. The Defendant stopped his auto in front of George Ngirarsaol's store on Ernguul Road. Mr. Ngirmeriil exited his auto and approached that of Defendant where a further confrontation occurred, the details of which ⊥547C are unclear.

7. Defendant and Mr. Ngirmeriil, each in their own auto with Mr. Orrukem still with Defendant, then drove on to a location in Idid where again, both autos stopped, in front of Rubeang's store.

8. Again, Defendant attempted to get to the glove compartment of his auto but was prevented from doing so by Mr. Orrukem first and then by Mr. Ngirmeriil who entered the vehicle and physically restrained Defendant. Again, Defendant stated as he attempted to gain access to the glove compartment that: "I am really going to shoot you."

9. Director Brell, whose house was nearby, arrived on the scene shortly thereafter as did Officer Blailes of the Department of Public Safety. Mr. Ngirmeriil told Officer Blailes: "There is a gun in this car so take it to the police station." Mr. Orrukem had told the Director that Defendant and Mr. Ngirmeriil were ". . .chasing each other with a gun."

10. The Director ordered the auto of Defendant impounded and it was driven to the ⊥547D police station by Defendant with Officer Blailes following.

11. The keys were held and the car locked and impounded at the Police Station. On February 10, 1988, the search warrant was secured, the auto was searched and the gun and ammunition at issue was seized from the glove compartment.

The search warrant which was issued on February 10, 1988 was supported by an affidavit which reads, in pertinent part:

"I, Valentine Tirso, being sworn on oath, depose and say:

I am a detective assigned to the Criminal Investigation Division, Bureau of Public Safety.

On February 10, 1988, Mr. Merol Ngirmeriil reported to Public Safety that he was at Kosiil Landing on the evening of February 9, 1988 until it closed at midnight. During the time that Mr. Ngirmeriil was at Kosiil Landing, Mr. Johnny Gibbons talked about Mr. Ngirmeriil's death and said "I will shoot you another time."

After Kosiil Landing closed at midnight, Mr. Ngirmeriil saw Mr. Lukas Orrukem and Mr. Gibbons leaving Kosiil Landing in a car driven by Mr. Gibbons, a red Toyota Sedan with license plate number 2972. Mr. Ngirmeriil followed the car driven by Mr. Gibbons to Mr. Orrukem's house where Mr. Gibbons again told Mr.

Ngirmeriil, "I will shoot you" and tried to open the compartment of the car he was driving to get a gun. Mr. Ngirmeriil jumped into ⊥547E Mr. Gibbons's car and held Mr. Gibbons so that he wouldn't be able to open the compartment.

Mr. Orrukem reported to Officer Blailes that after he and Mr. Gibbons left Kosiil Landing, Mr. Ngirmeriil followed them in his car and Mr. Gibbons tried several times to open the compartment of the car he was driving to get something, but Mr. Orrukem blocked Mr. Gibbon's hand. Mr. Orrukem also stated that to the police that when Mr. Ngirmeriil stopped them intending to get into a fight with Mr. Gibbons, Mr. Gibbons also tried to open the compartment of the car he was driving to get a gun and Mr. Orrukem stopped him by holding his hand.

That based on the above information, I have reasonable cause to believe that the Red Toyota Sedan, License Plate number 2972, contains the following:

FIREARM(S) AND AMMUNITION(S).

Based on the above information, I respectfully request the Court to issue a search warrant for the automobile described above for:

FIREARM(S) AND AMMUNITION(S)."

RULINGS OF THE TRIAL COURT - WHAT IS WARRANTED?

On June 14, 1988, the trial court granted the defendant's motion to quash the search warrant on the ground that the affidavit of Officer Tirso is "conclusionary and insufficient under any test to support a finding of probable cause," and "it fails to establish the required elements of veracity and personal knowledge of the affiant's information(s) and indeed does not even specifically identify such informant(s) except for Officer Blailes whose information by itself even if ⊥547F shown to have been transmitted to the affiant is insufficient to establish probable cause since it is conclusionary."

With the search warrant quashed, the trial court turned to the defendant's motion to suppress and held that any search or seizure in the Republic of Palau without a warrant is unlawful. The rationale supporting this conclusion was that though the U.S. Constitution provides that persons are to be free from "unreasonable" searches and seizures, the Palau Constitution, § 6 of Article IV, omits any reference to "reasonable" or "unreasonable" conditions. The government moved for a rehearing and on June 14, 1988, the trial court reiterated its conclusion that there is no Constitutional authority for any search or seizure "except when justified by a warrant issued by a justice or judge on probable cause."

THE APPEAL - FACT OR FICTION

Faced with what the government considered to be a ruling which cripples law enforcement capabilities (and which the trial court acknowledged to be a far reaching decision),

the government filed an appeal labeled "interlocutory" and "by way of petition for supervisory writs of mandamus and certiorari. . ." . The defendant raises the issue as to whether the government has any right of appeal.

The rights of the government on appeal in criminal cases are set forth in 14 PNC § 603(a):

> In a criminal case, the government shall have the right of appeal only when a ⊥547G written enactment intended to have the force and effect of law has been held invalid. Action on any such appeal shall be limited as provided in section 604 of this chapter.

The powers of the appellate court in criminal cases are set forth in 14 PNC § 604(c):

> In a criminal case, the appellate or reviewing court may set aside the judgment of conviction, or may commute, reduce (but not increase), or suspend the execution of the sentence, and, if the defendant has appealed or requested a new trial, the appellate or reviewing court may order a new trial; but if the government has appealed in a criminal case as authorized in section 603 of this chapter, the appellate or reviewing court may not reverse any finding of not guilty, and its powers shall be limited to a reversal of any determination of invalidity of an enactment intended to have the force of law. (Code 1966, § 200; Code 1970, tit. 6, § 355.)

The trial court's ruling effectively declared invalid two "enactments": 18 PNC §§ 211 and 301. The former section, § 211, specifically authorizes an arrest of a person without a warrant while § 301 provides for a seizure or search incident to an arrest without any requirement of a search warrant.

Even though interlocutory appeals are not favored in criminal trials, *U.S. v. Ferrantino*, 738 F.2d 109, 111 (6th Cir. 1983) and the government has appeal rights only granted by law, see *Abrey v. United States*, 431 U.S. 651, 656, 97 S.Ct. 2034, 2038 (1977), the government has come within the parameters of 14 PNC § 603(a).

⊥547H Were this court not to review the ruling of the trial court at this point in time and remand back for trial, the likely scenario would be the acquittal of the defendant because of the suppression of the very items for which the defendant stands charged. [2] The government would then appeal the ruling (and acquittal) of the trial court which effectively has voided the above two cited sections. Thus, at this point, the trial court ruling has, in fact, disposed of the matter. Judicial economy reinforces the decision to decide the propriety of the trial court's ruling now. When a ruling of the trial court, for all intents and purposes, has disposed of a matter, an appellate court can entertain an appeal although a formal judgment terminating the matter in the trial court has not been entered. [3] See, *Mills v. State of Alabama*, 384 U.S. 214, 217, 86 S.Ct.

---

[2] The defendant is charged with possession of a firearm and possession of ammunition.

[3] Both the government and the defendant have indicated that should the appeal go

1434, 1436 (1966) (exception to rule allowing appeals only of "final judgments" where decision is essentially final as the result is preordained).

STANDARD FOR ISSUANCE OF SEARCH WARRANT

Search warrants may be issued only upon a showing of probable cause. *United States v. Nocella*, 849 F.2d 33, 39 (1st Cir. 1988). Probable cause is determined under an objective standard, *United States v. Figueroa* , 818 F.2d 1020, 1023 (1st Cir. 1987), and need not be tantamount to proof beyond a reasonable doubt. *United States v. Hoffman* , 832 F.2d 1299, 1306 (1st Cir. 1987). Probability, and not a prima facie showing of criminal activity, is the standard of probable cause. *Illinois v. Gates*, 462 U.S. 213, 235, 103 S.Ct. 2317, 2330 (1983). Therefore, an affidavit is sufficient when it demonstrates in some trustworthy fashion the likelihood that an offense has been committed and that there is sound reason to believe that a particular search will turn up evidence of it. *United States v. Aquirre*, 839 F.2d 854, 857-58 (1st Cir. 1988).

In determining whether the government has made a sufficient showing of probable cause, a reviewing court must examine the "totality of the circumstances." *See, Illinois v. Gates, supra* , at 230, 103 S.Ct. at 2328, and evaluate, inter alia, the veracity and reliability of any informants, and the basis of their knowledge. *See*, e.g., *United States v. Figueroa, supra* , at 1024, *United States v. Ciampa* , 793 F.2d 19, 22 (1st Cir. 1986). A weakness in any one or more of the elements is not necessarily fatal to a finding of probable cause. Indeed, there is no hard-core checklist of independent factors, mechanistically to be applied. All of the relevant ⊥547J data should be used instead to illuminate "the common sense, practical question whether there is 'probable cause' to believe that the contraband or evidence is located in a particular place." *Illinois v. Gates, supra* , at 230, 103 S.Ct. at 2328. What matters, in the long run, is whether the issuing magistrate had a "substantial basis" for finding the existence of probable cause. *Id.* at 238-39, 103 S.Ct. at 2332-33.

AFFIDAVIT OF VALENTINE TIRSO

In this case, the search warrant was issued on the basis of the affidavit of Valentine Tirso. The trial court found that the affidavit was not based upon personal knowledge and did not specifically identify the informants Tirso obtained the information from, with the exception of Officer Blailes whose information the court found to be conclusory.

Officer Tirso's affidavit contains his account of what Ngirmeriil reported to Public Safety as well as what Lukas Orrukem reported to Officer Blailes. Both of these accounts clearly indicate that there was reasonable cause to believe that there was a gun in the red Toyota sedan driven by Johnny Gibbons. Although the information related in Tirso's affidavit is clearly hearsay, this is not a situation in which the police obtained information through an anonymous, and therefore, unverifiable tip. Rather, in this situation, two named individuals reported substantially the same incident to the police and Tirso, as a police detective, related this ⊥547 K information to the court in his affidavit. The affidavit sufficiently identified the informants Tirso

---

forward, they request this court to address the merits of the matter and, in fact, the briefs and oral argument for both addressed fully the merits.

obtained the information from. Although Tirso's affidavit is not phrased so as to indicate whether Ngirmeriil spoke directly to him, this is not determinative here. What the court must examine is whether the information contained therein, viewed with common sense under the totality of the circumstances, supplies probable cause to believe that contraband or evidence of a crime will be found in a particular place.

As a detective assigned to the Criminal Investigation Division of the Bureau of Public Safety, Tirso was clearly in a position to know what Ngirmeriil reported. In determining whether under the "totality-of-the-circumstances" an affidavit is sufficient for a probable cause determination, the expertise and experience of law enforcement officers may be taken into account. *See, United States v. Figueroa, supra*, 818 F.2d at 1024.

As previously noted, probable cause deals "with probabilities. These are not technical; they are factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." *Brinegar v. United States* , 338, U.S. 160, 175, 69 S.Ct. 1302, 1310 (1949).

Common sense tells us that when two individuals report to the police that there is contraband, in this case a gun, in a certain place that the probability exists that such contraband exists and is located where they say it is. Thus, ⊥547L Tirso's affidavit was based on sufficiently reliable information and contained enough facts to supply the probable cause necessary for the issuance of a search warrant. Therefore, the affidavit of Tirso was sufficient.

ARREST OF THE DEFENDANT
AND SEIZURE OF HIS AUTOMOBILE

The trial court found that when Director Brell and Officer Blailes arrived on the scene, they were told there was a gun in the defendant's automobile. The vehicle was then impounded and defendant drove it to the police station followed by Officer Blailes.

The possession of firearms is illegal in Palau. 17 PNC § 3306. At this point, police officers had two individuals inform them that a gun was in defendant's possession. Our inquiry now turns to whether, based on the statements made by Ngirmeriil and Orrukem at the scene, the police had probable cause to arrest the defendant and seize his automobile.

It is basic that an arrest with or without a warrant must stand on firmer ground than mere suspicion, although the arresting officer need not have in hand evidence which would suffice to convict. The quantum of information which constitutes probable cause to arrest is evidence which would warrant a man of reasonable caution to believe that a felony has been committed. *Wong Sun v. United States* , 371 U.S. 471, 479, 83 S.Ct. 407, 413 (1963). Probable cause is a fluid concept - turning on the assessment of probabilities in ⊥547M particular factual contexts - not readily, or even usefully, reduced to a neat set of legal rules. *Illinois v. Gates, supra* , 462 U.S. at 232, 105 S.Ct. at 2329. Probable cause exists when known facts and circumstances are sufficient to warrant a man of reasonable prudence in the belief that an offense has been or is being committed. Probable cause does not emanate from an antiseptic courtroom, a stale library,

or a sacrosanct adytum, nor is it a pristine philosophical concept existing in a vacuum, rather it requires a pragmatic analysis of everyday life on which reasonable and prudent men, not legal technicians, act. It is to be viewed from the vantage point of a prudent, reasonable, cautious, police officer on the scene at the time of the arrest guided by experience and training. *United States v. Davis*, 458 F.2d 819, 821 (DC Cir. 1972).

In the instant case, statements by Ngirmeriil and Orrukem provided Officer Blailes with probable cause to believe that defendant was in possession of a firearm. In assessing probabilities, it thus appeared more probable than not that defendant was in possession of a firearm and Officer Blailes was therefore able to make an arrest based upon the information provided to him. Once the police had facts sufficient to indicate there was probable cause to believe that defendant was in possession of an illegal firearm, they could have searched defendant's automobile even if no search warrant was obtained. *United States v. Ross,* 456 U.S. 798, 810, 102 S.Ct. 2157, 2164-65 (1982). However, in order to assure that defendant's ⊥547N rights were not violated, the police did not search defendant's vehicle at this point in time.

The next inquiry is whether the defendant actually was arrested. The record indicates that Director Brell ordered defendant's automobile impounded and defendant was told to drive his automobile to the police station while Officer Blailes followed him.

An arrest takes place when, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave. *United States v. Mendenhall*, 466 U.S. 544, 554, 100 S.Ct. 1870, 1877 (1980). The question here is <u>not</u> whether the officer intended to arrest defendant. *See, Florida v. Royer* , 460 U.S. 491, 504, 103 S.Ct. 1319, 1328 (1983). Nor is the question whether defendant subjectively perceived that he was under arrest, for the test is stated in objective "reasonable man" terms. *See, United States v. Johnson*, 626 F.2d 753, 755 (9th Cir. 1980).

In order to determine if there was an arrest the court must assess the totality of the circumstances surrounding the officer's encounter with the defendant. *People v. Pancoast* , 659 P.2d 1348, 1351 (Colo. 1982). If defendant's delivery of his automobile and presence at the police station were ordered, as appears to be the case here, it may be presumed that defendant was under arrest. See, *United States v. Guana-Sanchez* , 484 F.2d 590, 591 (7th Cir. 1973). The fact that defendant drove his own automobile to the station may indicate ⊥547O that the defendant was acting in a voluntary manner and could be considered free to go at any time. See, *State v. Coy* , 672 P.2d 599, 601 (Kan. 1983). However, in *Coy* the defendant was asked if he would go to the station and this does not appear to be the situation here. In this case, defendant was apparently told to proceed to the station where his automobile was impounded. Ordering defendant's presence at the police station for purposes of impounding his automobile clearly indicates that defendant could not reasonably believe that he was free to leave. Thus, this is a situation which amounted to an arrest even though there were no formal words of arrest and no booking. See, 2 LaFave, Search & Seizure 2nd Ed. § 5.1(a).

At this point, when Officer Blailes ordered defendant to proceed to the police station and defendant could not have reasonably believed he was free to go, the passenger compartment of

defendant's automobile, including the glove box, could have been searched as a "contemporaneous incident of that arrest." *New York v. Belton* , 453 U.S. 454, 460, 101 S.Ct. 2860, 2864 (1981). However, in impounding the vehicle and removing any danger that defendant or anyone else might gain access to the vehicle to remove or destroy any evidence contained therein, there was no longer any reason not to obtain a search warrant for the vehicle. See, *United States v. Chadwick* , 433 U.S. 1, 13, 97 S.Ct. 2476, 2484-85 (1977). The police had exclusive control over defendant's vehicle and they then proceeded to obtain a search warrant based on Tirso's affidavit of probable ⊥547P cause. They chose a judicial determination as to whether the facts known to them constituted sufficient probable cause to search the vehicle. In doing so, the police went to greater lengths than were necessary to assure that defendant's rights were not trampled on. Accordingly, the evidence seized pursuant to this search warrant should not have been suppressed.

CONSTITUTIONALITY OF WARRANTLESS SEARCHES AND SEIZURES

The trial court concluded its opinion with the sweeping assertation that Article IV § 4 of the Republic of Palau Constitution prohibits searches and seizures without a warrant under any circumstances. This conclusion appears to be based upon the fact that the word "unreasonable" does not appear in that section.

Article IV § 4 of the Republic of Palau Constitution provides that:

> "Every person has the right to be secure in his person, house, papers and effects against entry, search and seizure."

Article IV § 6 of the Republic of Palau Constitution states, inter alia, 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."

⊥547Q

1 PNC § 403 declares that:

> The rights of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.

The trial court began its analysis with a determination that "there is no conflict or inconsistency" between 1 PNC § 403 and Article IV §§ 4-6 of the Constitution. We agree. Thus, 1 PNC § 403 cannot be given precedence over any of the provisions of Article IV of the Constitution.

The trial court next asserts that because the word "unreasonable" was not included in Article IV § 4 of the Constitution, there can be no search or seizure in Palau without a warrant. Such a broad declaration is neither logical nor practical and must be overruled.

First of all, Article IV § 4 of the Constitution speaks only of the general right of persons to be secure against search and seizure. This section does not address any situation in which a search or seizure may occur, whether with or without a warrant. Taken in a vacuum and construed literally, this section would prohibit any search or seizure under any circumstances. However, this declaration of such a fundamental right is not the end of the analysis for this right clearly must give way in certain situations. If a warrant is ⊥547R obtained pursuant to Article IV § 6 and 1 PNC § 403, this right of security must give way pursuant to a finding that there is probable cause to believe that a crime has been committed. Thus, the right to be secure against search and seizure is not, and cannot be, an absolute right.

Likewise, Article IV § 4 does not preclude warrantless searches merely because it does not contain the word "unreasonable." Although Article IV, §4 does not address the issue of under what circumstances a search or seizure may be made, 1 PNC § 403 does by providing that persons have the right to be secure against all "unreasonable" searches and seizures. Since Article IV § 4 and 1 PNC § 403 are not in conflict and 1 PNC § 403 prohibits only unreasonable searches, while Article IV § 4 does not address any situation in which any search or seizure can be made, there can be no doubt that only "unreasonable" searches and seizures are prohibited. The fact that Article IV § 4 does not provide for exceptional circumstances allowing searches and seizures without a warrant is of no moment here since Article IV § 4 does not address any situation in which a search or seizure can be made; this is left to 1 PNC § 403 which precludes only "unreasonable" searches and seizures.

Although it is the preferred practice that a warrant be obtained prior to a search, *United States v. Vertresca*, 380 U.S. 102, 107, 85 S.Ct. 741, 745 (1965), or an arrest, *Beck v. Ohio*, 379 U.S. 89, 96, 85 S.Ct. 223, 228 (1964), there are ⊥547S obviously numerous situations in which it would not be practical to require police to obtain a warrant prior to taking any action.[4]

As previously noted, a "seizure" or arrest occurs when, under the totality of the circumstances, a reasonable person would believe he is not free to leave. *United States v. Mendenhall*, supra, 466 U.S. at 554, 100 S. Ct. at 1877. Although an arrest warrant should be obtained if possible, the police may make warrantless public arrests on the basis of probable cause. *United States v. Watson* , 423 U.S. 411, 423, 96 S.Ct. 820, 827 (1976). This is because police often encounter situations in which there is no time to go before a magistrate to obtain a

[4] This conclusion became abundantly clear during oral argument when defendant's counsel conceded that a reasonable interpretation of Article IV § 4 would allow a warrantless arrest of a person when he/she commits a crime in the presence of a police officer and would also allow the warrantless seizure of items incident to the arrest. The most startling example of the result of the trial court's ruling would be when a police officer sees a person with an illegal gun shoot and kill another person. Under the ruling, the police officer could not arrest the person nor seize the gun but must make out an affidavit and find a magistrate to issue a warrant of arrest and search warrant. What the killer does in the meantime is left to the speculation of the reader.

warrant as there is a danger that the suspect will escape, *Id.* at 421, 96 S.Ct. at 826, or there is reason to believe that evidence will be destroyed or removed. *Cupp v. Murphy* , 412 U.S. 291, 296, 93 S.Ct. 2000, 2004 (1973). Any requirement that an ⊥547T arrest could not take place without a warrant "would constitute an intolerable handicap for legitimate law enforcement." *United States v. Watson, supra*, 423, U.S. at 418, 96 S.Ct. at 825.

Similarly, police are not required to obtain a search warrant to stop an automobile when they have probable cause to believe it contains contraband or evidence of crime. *Arkansas v. Sanders*, 442 U.S. 753, 760, 99 S.Ct. 2586, 2591 (1979). This is because the inherent mobility of vehicles often creates exigent circumstances that make the warrant requirement impractical, *United States v. Chadwick, supra* , 443 U.S. at 12, 97 S.Ct. at 2484, and because the physical characteristics and use of automobiles results in a lessened expectation of privacy, *New York v. Class*, 106 S.Ct. 960, 965 (1986).

The foregoing is not meant to be an exhaustive list of situations in which police may make a search or seizure without first obtaining a warrant. Rather, it is only to illustrate the necessity of warrantless searches and seizures in certain situations. Clearly, any judicial proclamation prohibiting warrantless searches and seizures under any circumstances would serve only to effectively handicap law enforcement officers in situations in which immediate action is necessary.

Based on the foregoing, this court holds that it shall entertain this appeal, reverses the motion to quash and reinstates the search warrant and reverses the motion to suppress. The gun and ammunition which were found pursuant to the search warrant are admissible as evidence against the ⊥547U defendant. This case is remanded to the trial court for further proceedings consistent with this opinion.