Ngerur v. Supreme Court of the Republic of Palau, 4 ROP Intrm. 134 (1994)

TOBIAS NGERUR, VICTOR SILMAI,
Petitioner,

v.

SUPREME COURT OF THE REPUBLIC OF PALAU, TRIAL DIVISION,
Respondent.

SPECIAL PROCEEDING NO. 1-94
Criminal Case No. 268-93

Supreme Court, Trial Division
Republic of Palu

Order denying petition for writ of prohibition or mandamus
Decided: February 22, 1994

Attorney for Petitioner Ngerur: Ed Irvin, Public Defender

Attorney for Petitioner Silmai: Gerald G. Marugg.

Attorney for Respondent ROP: Nicolas Mansfield, Acting Attorney General

BEFORE: ARTHUR NGIRAKLSONG, Chief Justice; JEFFREY L. BEATTIE, Associate Justice; PETER T. HOFFMAN, Associate Justice.

HOFFMAN, Justice:

Rules 21(b) of the Rules of Appellate Procedure states: "If the court is of the opinion that the writ should not be granted, it shall be denied." Pursuant to this Rule, we hereby deny the petition for the reasons set forth below.

Petitioners were originally arrested without a warrant and later rearrested pursuant to a warrant signed by a judge, after reviewing an information and an affidavit of probable cause. The information charges both Petitioners with possession with intent to ⊥135 sell methamphetamine, and Petitioner Silmai with malicious mischief. Petitioners have filed separate petitions seeking a writ of mandamus, or in the alternative a writ of prohibition, to compel the Trial Division to conduct a preliminary examination or to prohibit the court from proceeding without one. We are therefore called upon to address the question of whether either the Palau Constitution or the Palau National Code guarantees Petitioners the right to such a hearing.

We note at the outset that there is some question as to the appropriateness of a petition for writs of this nature as a vehicle for resolving this issue. Inasmuch as this issue has not been briefed by the parties, we will leave its resolution for another day and proceed directly to the merits of the petition.

This is a case of first impression in the Republic of Palau. Accordingly, we have elected to look to the United States for initial guidance. The United States Supreme Court has held that the Fourth Amendment of the United States Constitution "requires a judicial determination of probable cause as a prerequisite to extended restraint of liberty following arrest." *Gerstein v. Pugh*, 95 S.Ct. 854, 863 (1975). Article IV, Sections 4 and 6, of the Palau Constitution contain provisions that are similar to the Fourth Amendment of the United States Constitution, and *Gerstein* provides a sound interpretation of the Fourth Amendment that is consistent with ensuring an important right for defendants in criminal cases. Accordingly, we hold that Article IV, Sections 4 and 6, of the Palau Constitution require a judicial determination ⊥136 of probable cause as a prerequisite to any extended pretrial restraint on the liberty of an arrested person. What must be determined is whether there is probable cause to believe a crime has been committed and that the arrested person has committed it.

We agree with *Gerstein* that this issue can be determined without an adversary hearing, not only because the consequences of a probable cause determination are not as great as those presented at trial, but because the determination does not involve a heavy burden of proof requiring difficult resolution of conflicting evidence and credibility issues. The probable cause standard for pretrial detention is the same as the standard for arrest. See *Baker v. McCollan*, 99 S.Ct. 2689 (1979). It follows that a person arrested pursuant to a warrant issued by a judge after determining probable cause "is not constitutionally entitled to a separate judicial determination that there is probable cause to detain him pending trial." Id. at 2694.

In the instant case, Petitioners were arrested pursuant to a warrant issued by a judge who determined probable cause. Thus, they have no constitutional right to a preliminary examination to make a second determination of probable cause.

Petitioners argue that they have a right to a preliminary examination under 18 PNC §§ 504(a), 506. This argument is not persuasive. Under 18 PNC § 504(a), an arrested person brought before an official who is not a judge is entitled to a preliminary examination before the official. Similarly, 18 PNC § 506 grants an arrested person the right to a preliminary examination if "it ⊥137 appears it will not be practicable to bring [the] arrested person promptly before a court. . . ." These statutes, which were originally enacted in the earlier days of the Trust Territory when judges were often unavailable for extended periods, see *Sonada v. Trust Territory*, 7 TTR 442 (App. Div. 1976), are designed to provide for a determination of probable cause before any extended restraints on the liberty of an arrested person who is not promptly brought before a judge. Here, the Petitioners were brought before a judge and the statutes are therefore inapplicable. See *Borja v. Trust Territory*, 6 TTR 584 (App. Div. 1974) (construing Trust Territory statute from which § 504 was adopted); accord, *Sonada*, 7 TTR 442.

Petitioners next argue that they have been denied equal protection of the law, in violation of Article IV, Section 5 of the Palau Constitution, since persons arrested without warrants are allowed a preliminary examination at which they can examine and confront witnesses. This argument is specious. First, even persons arrested without warrants have no right to a preliminary examination under the statutes if they are promptly brought before a judge.

Moreover, equal protection does not require identical treatment of persons who are not similarly situated. Therefore, it does not require that persons arrested pursuant to a warrant be treated in the same manner as those arrested without a warrant in respect to obtaining a judicial determination of probable cause. The right to examine witnesses at a preliminary examination flows from the right to have a preliminary examination. Petitioners, having already had a judicial determination of probable cause, have ⊥138 no right to a preliminary examination.

To summarize, we hold that Article IV, Sections 4 and 6, of the Palau Constitution require a judicial determination of probable cause as a prerequisite to any extended pretrial restraint of liberty. The determination does not have to take the form of a preliminary examination. A preliminary examination is not a prerequisite to prosecution by information. If a judge has determined probable cause exists to arrest a person, the arrested person has no right to a separate probable cause determination as a condition to his pretrial detention. However, a judge may exercise his discretion to hold a preliminary examination if he deems it to be in the interests of justice, as might be the case, for example, if he learns of information relating to probable cause that comes to light after an arrest warrant has been signed.

Petitioners contend that a preliminary examination is important because it enables a defendant to evaluate the government's case, hear testimony that will be used at trial, ascertain the prosecution's evidence, and determine if grounds exist to file a motion to suppress. While these incidental benefits or a preliminary examination may often be the real motivation behind a defendant's request for a preliminary examination, the sole purpose is to determine probable cause. The Rules of Criminal Procedure provide various other methods of discovering the evidence to be used at trial and of discovering certain particulars of the case against a defendant.

Finally, Petitioner Silmai attacks the sufficiency of the ⊥139 affidavit of probable cause in regard to the malicious mischief allegation in the information. We will not address this claim. In light of our ruling today, Silmai will be held for trial on the methamphetamine charge and will therefore not be prejudiced by our refusal to entertain the issue in this special proceeding. Moreover, any remedy he is seeking regarding the insufficiency of the affidavit may be raised before the Trial Division. See *ROP v. Asanuma and Malsol* , Criminal Appeal No. 5-91, slip op. at 2 (Sept. 6, 1991).

The Petition for Writ of Prohibition or Mandamus is hereby DENIED.