ROP v. Olkeriil, 6 ROP Intrm. 361 (1997)

REPUBLIC OF PALAU,
Plaintiff,

v.

Morning Star Olkeriil,
Defendant.

CRIMINAL CASE NO. 74-97

Supreme Court, Trial Division
Republic of Palau

Order
Decided: August 29, 1997

Counsel for Plaintiff: Scott Campbell, Assistant Attorney General

Counsel for Defendant: Marvin Hamilton

R. BARRIE MICHELSEN, Associate Justice:

A. BACKGROUND

Defendant has moved to dismiss the three counts of the information based upon deficiencies in the affidavits of probable cause. Since there is more than one basis in Palau law for the requirement of the filing of a probable cause affidavit, it is useful here to identify the specific basis for Defendant's objection in this case.

First, 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 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.

Ngerur v. Supreme Court , 4 ROP Intrm. 134, 136-137 (1994). The Defendant here was, at the request of the government, released on his own recognizance at his initial appearance. Since there currently are no pretrial restraints upon the Defendant, the issues ⊥362 addressed in the *Ngerur* case are not germane here.[1]

The second reason that an affidavit of probable cause must be filed is a matter of statutory law. The gist of Title 18 PNC § 210 is that no penal summons or arrest warrant shall

[1] Defendants may also request a review of an initial probable cause determination to challenge the admissibility of evidence obtained as a result of the arrest of the accused. 18 PNC § 220. In these motions the Defendant does not seek to suppress evidence.

issue unless supported by probable cause. Furthermore, a fair reading of the section would construe it to mean that each separate offense must be supported by probable cause. The result is that no person need be compelled to appear to answer to a complaint or information alleging a criminal offense unless the charge is supported by an affidavit

> showing to the satisfaction of the court that there is probable cause to believe or strongly suspect that the offense complained of has been committed by such person or persons...

Id.

The Defendant's motion to dismiss is directed at this statutory requirement. The Government, while not conceding any deficiencies in the affidavits as filed, has filed a supplemental affidavit to obviate the objection of Defendant. The Defendant argues that the supplement affidavit is "unreliable and inconsequential."[2]

An examination of each count, and the probable cause affidavits, follows.

B. COUNT ONE: FALSE ARREST

Count One alleges a charge of false arrest:

> On or about March 15, 1997 in Meyuns, the State of Koror, Morning Star Olkeriil did unlawfully detain another, to wit Waylard Kloulechad Erbai, by force and against his will, then and there not being in possession of authority ⊥363 to do so in violation of 17 PNC § 1401.

Title 17 PNC § 1401 states in pertinent part:

> Every person who shall unlawfully detain another by force and against his will, then and there not being in possession of authority to do so, shall be guilty of false arrest...

The affidavit of Officer Hideo alleges Erbai was found by the Defendant crossing his yard around 1:30 a.m. The affidavit further asserts the Defendant put a gun to the back of Erbai's head, then "pulled" him into the house and held him at gunpoint, accused him of being one of those responsible for some rock throwing and other misdemeanor activity directed at Defendant's house, and threatened to shoot him. While the incident continued inside the house the gun was, on two occasions, again put against Erbai's head. The affidavit states that Defendant eventually let Erbai leave after thirty to forty minutes, but Defendant said in parting that if he found out Erbai was one of those responsible he would shoot him.

The original affidavits make no mention of the fact that the Defendant was an off-duty

[2] Because the supplemental affidavit does not change the analysis I need not, and do not, rely upon it.

police officer at the time of this incident, but Defendant's argument regarding Count One is premised on the fact, and it is undisputed by the Government that Defendant was employed as a national government police officer on the date in question. Defendant therefore argues that the allegations in the affidavits constitute an arrest pursuant to the provisions of 18 PNC § 211(b), (c), or (d). These subsections detail when an officer or a private citizen may make an arrest, and when an officer may detain a person temporarily for questioning. He also suggests there was cause to arrest for a curfew violation of the Koror Municipal ordinance.

In my view, the acts of the Defendant do not constitute an "arrest" pursuant to Title 18, even if the Defendant was an off- duty police officer at the time of the allegations. There was no statement of cause and authority for the arrest [18 PNC § 217], and no statutorily mandated disposition of arrestee occurred [18 PNC §§ 271-218]. Indeed, one would be hard pressed to note any similarities between the allegations and a lawful arrest. The detention ended, according to the affidavit, with an act of criminal threatening.

The status of being a police officer is not a defense to what otherwise are criminal acts. Teruo v. FSM, 2 FSM Intrm. 167 (App. 1986). "Punishment is no part of the police officer's assignment. ⊥364 A policeman who chooses to mete out punishment violates his office and does so at his own peril." Loch v. FSM, 1 FSM Intrm. 566, 574 -575 (App. 1984). I believe these two case from the Federated States of Micronesia are a correct statement of the general law. Here, the allegations in the affidavit allege actions more akin to the act of a vigilante. The acts as alleged in the original affidavit do not show a lawful detention.

C. COUNT TWO: ASSAULT AND BATTERY

Defendant also seeks a review of the affidavit of probable cause, and its sufficiency, with respect to Count Two.
Count Two, reads:

> . . . Morning Star Olkeriil did unlawfully assault, strike, beat, wound or otherwise do bodily harm to Waylard Koulechad Erbai with a dangerous weapon, to wit, a handgun in violation of 17 PNC § 504.

Title 17, section 504 provides:

> Every person who shall unlawfully commit assault and battery upon another by means of a dangerous weapon shall be guilty of assault and battery with a dangerous weapon.

Section 504 "clearly incorporates the offense of assault and battery, a common law crime." *Takada v. Trial Div.*, 3 ROP Intrm. 262, 263 (1993).

Section 503 states that the crime of assault and battery occurs if the accused did "unlawfully strike, beat, wound, or otherwise do bodily harm to another. . . ."

I first note that the word, "or" represents separate alternatives, so only one of the four statutory alternatives ["strike, beat, wound, or otherwise do bodily harm"] need be present. [3] The affidavit does not allege a wounding or bodily harm, so the focus will be on whether the affidavit shows the presence of one of the other two alternatives.

> Silence regarding the specific definition of a term used in statute compels us to start with the assumption the legislative purpose is expressed by the ordinary meaning of the word used.

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ROP v. Ngiraboi, 2 ROP Intrm. 257, 264 (1991).

The word "strike" is not defined in *Black's Law Dictionary* , except in terms relating to employer-employee relations. In a general sense, to "strike" could mean, in this context,

> to deal a blow to, as with the fist, a weapon, or a hammer; to inflict; deliver; to drive so as to cause impact; to thrust forcibly; to come into forcible contact or cause collision with . . . .

Webster's College Dictionary, Random House, 1996 ed.

> To "beat"
>
> [i]n the criminal law and the law of torts, with reference to assault and battery, the term includes any unlawful physical violence offered to another. See Battery.

Black's Law Dictionary , 6th ed. 1990. The terms "beating" or "striking" by definition require some contact. However wounds or physical injuries need not result. Therefore contacts that amount to an offer of physical violence constitutes an assault and battery, even if no injury results.

Based upon the definitions of the words used in the statute, both the act of putting a handgun to the back of another's head (a rather extreme example of "an offer of physical violence"), and the act of physically pulling the victim into the actor's residence, are acts of assault and battery, and both constitute acts committed "by means of" a dangerous weapon.[4]

Judge Kennedy [now Justice Kennedy], when construing 18 USC § 924 in *United States v. Stewart*, 779 F.2d 538, 540 (9th Cir. 1985) stated:

> If the firearm is within the possession or control of a person who commits an underlying crime as defined by the statute, and the circumstances of the case show that the firearm facilitated or had a role in the crime such as emboldening an actor

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[3] *Reiter v. Sonotone Corp.*, 99 S.Ct. 2326, 2331 (1979).

[4] I find the variance between the information ["with a dangerous weapon"] and the statute ["by means of a dangerous weapon"] immaterial.

> who had the opportunity or ability to display or discharge the weapon to protect himself or ⊥366 intimidate others, whether or not such display or discharge in fact occurred, there is a violation of the statute.

The statute discussed by Judge Kennedy in the *Stewart* case is not the statute at issue here. Nonetheless, his phraseology is useful when attempting to give meaning to the expression "by means of a dangerous weapon."

When a dangerous weapon is within the possession or control of a person who commits an assault and battery as defined by section 503, and the facts demonstrate that the dangerous weapon "facilitated or had a role in the crime such as emboldening an actor who had the opportunity or ability to display or discharge the weapon to protect himself or intimidate others," then the underlying crime has been committed "by means of" a dangerous weapon.

Once a dangerous weapon is displayed, it changes, and limits, the degree of resistance that can be offered. A person might be very combative if involuntarily pulled toward a residence. The physical opposition will be decidedly less if a dangerous weapon was displayed at the outset. After all, that is a principal purpose of using a dangerous weapon while committing a crime. The fact that the gun was put in a pocket after being brandished does not mean that the continuing battery is not committed "by means of a dangerous weapon."

D. MOTION TO STRIKE

Defendant seeks to strike the word "assault" from the allegations of Count Two because it is, at a minimum, irrelevant.

> Since in most cases assault and battery exist together, is has become customary in jurisprudence to refer to the term 'assault and battery' as if it were a legal unit, or a single concept. Actually however, assault and battery are separate and different legal concepts.

6 Am. Jur. 2d, "*Assault and Battery*" § 7 at 13-14, 1963 ed. Accord: *Trust Territory v. Benemang*, 5 TTR 32 (Yap 1970). Regardless of what those terms may mean in other contexts, in Title 17, chapter 5 of the Code "Assault and Battery" is a defined term, and is distinguished from the term "assault," which is defined in section 501. A violation of section 504 cannot occur if only a section 501 assault occurred. In other words a simple "assault" committed with a dangerous weapon is not an "assault and battery with a dangerous ⊥367 weapon."[5] The addition of the word "assault" in Count Three is therefore surplusage, and will be stricken. Rule 7(d), ROP R. Crim. Pro.[6]

E. COUNT THREE: ASSAULT

The Third Count in the information alleges:

> ...Morning Star Olkeriil did unlawfully offer or attempt, with force or violence, to strike, beat, wound, or to do bodily harm to another, to wit Waylard Kloulechad Erbai in violation of 17 PNC § 501.

In this case the original affidavits (and the supplemental affidavit for that matter) allege no acts of the Defendant other than those that are part of the acts constituting the allegations of assault and battery by means of a dangerous weapon.

Since there is no basis to charge an assault independent of the alleged acts constituting assault and battery by means of a dangerous weapon, Count Three is dismissed.

F. CONCLUSION

The affidavits support a probable cause finding with respect to Counts One and Two. The affidavits do not support an allegation of an assault other then the acts subsumed into the allegations of Counts One and Two. Count Three is dismissed. The word "assault" is stricken from Count Two.

SO ORDERED.

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[5] It is, likely, an aggravated assault. 17 PNC § 502.

[6] "Surplusage. The court on motion of the defendant may strike surplusage from the information." Rule 7 (d) ROP R. Crim. Pro.