

Sungino v. ROP, 6 ROP Intrm. 70 (1997)
FRANCISCO SUNGINO,
Appellant,

v.

REPUBLIC OF PALAU
Appellee.

CRIMINAL APPEAL NO. 3-95
Criminal Case No. 201-94

Supreme Court, Appellate Division
Republic of Palau

Opinion

Decided: February 6, 1997

Counsel for Appellant: Oldiais Ngiraikelau

Counsel for Appellee: Carin C. Durye

BEFORE: ARTHUR NGIRAKLSONG, Chief Justice; JEFFREY L. BEATTIE, Associate Justice; ALEX R. MUNSON, Associate Justice¹

BEATTIE, Justice:

Appellant Francisco Sungino was convicted of one count of conspiracy to possess a controlled substance and one count of attempt to deliver a controlled substance. After the trial was completed, Sungino filed a motion to set aside the convictions, alleging that the Information under which he was charged was defective because (1) it failed to identify the controlled substance he conspired to deliver and attempted to deliver; and (2) it failed to allege that he acted with the requisite culpable mental state. The trial court denied the motion, and this appeal followed. We affirm.

I.

A criminal information is sufficient if it “contains the elements of the offense charged and fairly informs a defendant of **171** the charge against which he must defend.”² The distinction between an “essential elements” defect and a “factual specificity” defect in an information is of

¹ Part time Associate Justice sitting by designation.

² *Hamling v. United States*, 96 S.Ct. 2887, (1974). *Hamling* dealt with sufficiency of an indictment, but both forms of criminal accusatory pleadings have the same fundamental functions. *Hamling* also held that the indictment must be informative enough to enable a defendant to plead an acquittal or conviction as a double jeopardy bar to future prosecutions, but appellant does not argue that the information here was deficient in that respect.

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crucial importance when a criminal defendant elects to wait until after trial to make his objection to the information, for the Rules of Criminal Procedure require the latter type of objections to be made before trial. Rule 12(b) of the Rules of Criminal Procedure provides in pertinent part that:

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 (other than that it fails to show jurisdiction in the court or to charge an offense which objections shall be noticed by the court at any time during the pendency of the proceedings).

Turning to Sungino's argument that the Information was defective for failure to specify the particular controlled substance he conspired to and attempted to deliver, we hold that it does not involve a failure to charge an offense.³ When the **¶72** delivery of a controlled substance forms the basis of the offense of trafficking, the essential elements of the offense that must be present in the information are that the defendant knowingly or intentionally delivered a controlled substance. 34 PNC § 3301. There are a number of items which are defined as "controlled substances", and the one involved here, methamphetamine, is one of them. See 34 PNC § 3102 et seq. The delivery of any controlled substance, assuming a culpable mental state, is sufficient to constitute the offense of trafficking. Therefore, the Information stated the essential elements of the offenses of attempting to and conspiring to deliver a controlled substance, even though it failed to state that methamphetamine was the particular substance involved.⁴

³ The Amended Information, which we refer to herein as the Information, stated in pertinent part as follows:

COUNT I

CONSPIRACY TO DELIVER A CONTROLLED SUBSTANCE, in that between May 4, 1993 and August 23, 1994, Francisco Sungino did conspire with co-conspirators, [reciting names of co-conspirators] to commit a crime against the Republic of Palau, to wit: DELIVERY OF A CONTROLLED SUBSTANCE in violation of 34 PNC sections 3301 and 3305.

COUNT III

ATTEMPT TO DELIVER A CONTROLLED SUBSTANCE, in that between May 4, 1993 and August 23, 1994, FRANCISCO SUNGINO did attempt to commit a crime against the Republic of Palau, to wit: DELIVERY OF A CONTROLLED SUBSTANCE in violation of 34 PNC sections 3301 and 3305.

⁴ Although, as the trial court observed, the draftmanship of the Information could have been better, if Sungino was truly uncertain of the identity of the controlled substance the

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Because the alleged defect in the information--the failure to identify the controlled substance--did not constitute a failure to charge an offense, the objection to the Information based on that alleged deficiency was waived by the failure to make it before trial.

II.

Sungino's second basis for objecting to the sufficiency of the Information is that it failed to expressly allege that his actions were performed with the mental state necessary for the offenses charged. Where, as here, an offense requires a particular mental state, the mental state is an essential element of the offense that must be pled and proven. Therefore, this objection was not required to be made before trial. Rule 12 (b), Rules of Criminal **L73** Procedure.

Although the Information charged that Sungino conspired to commit the offenses of delivering a controlled substance and attempting to deliver a controlled substance without stating that this was done knowingly or intentionally, the trial court ruled that the Information was not defective. It held that the requisite mental state was incorporated into the Information, though not expressly stated. We agree. Conspiracy and attempt each "incorporates willfulness and specific intent" even if not expressly stated. See *United States v. Purvis*, 580 F.2d 853, 859 (5th Cir. 1978); 41 Am. Jur. 2d *Indictments and Information* § 112 (2d ed. 1968).

The only conspiracy case cited by Sungino which tends to support his argument is *United States v. Pollack*, 503 F.2d 87 (9th Cir. 1974). In *Pollack* the court reversed the conviction of a defendant for conspiracy in connection with his involvement in certain bank loan transactions. The statute which the defendant allegedly conspired to violate contained no mens rea, however, and the court looked to legislative history to read an intent to defraud element into the statute. Not only did the indictment fail to allege an intent to defraud, but the jury was not instructed that such an intent was an element of the offense. Thus, we do not find *Pollack* to be persuasive here. "Intent to accomplish an object cannot be alleged more clearly than by stating that parties conspired to accomplish it." *United States v. Purvis*, 580 F.2d 853, 859 (5th Cir. 1978) (quoting *Frohwerk v. United States*, 39 S.Ct. 249, 251 (1919)).

CONCLUSION

For the foregoing reasons, the decision of the trial court is AFFIRMED.

allegations were directed to, he could have filed a motion to dismiss the Information before trial or filed a motion for a bill of particulars which asked for an identification of the substance. In fact, he did file a motion for bill of particulars, but the motion did not seek any information regarding the identity of the controlled substance.