ROP v. Tomei, 7 ROP Intrm. 25 (1998)
REPUBLIC OF PALAU,
Appellee,

v.

MEO TOMEI,
Appellant.

CRIMINAL APPEAL NO. 98-1
Criminal Case No. 134-97

Supreme Court, Appellate Division
Republic of Palau

Hearing: February 25, 1998
Decided: February 27, 1998

Counsel for Appellant: Marvin Hamilton, Esq.

Counsel for Appellee: Jerrlyn U. Sengebau, Esq.

BEFORE: ARTHUR NGIRAKLSONG, Chief Justice; JEFFREY L. BEATTIE, Associate Justice; and R. BARRIE MICHELSEN, Associate Justice.

PER CURIAM:

On February 2, 1998, the Trial Division sentenced appellant Meo Tomei to five years' [sic] imprisonment in Koror Jail. [1] During the sentencing hearing, appellant moved to have his sentence stayed pending appeal. The court denied the motion. On February 18, 1998, appellant filed a notice of appeal along with a motion to stay his sentence pending the outcome of his appeal. On February 25, 1998, we held a hearing to consider that motion.

⊥26 Rule of Appellate Procedure 9(b) provides that release pending appeal is proper only if the court finds:

> (1) that the person is not likely to flee or pose a danger to the safety of any person or the community if released; and (2) that the appeal raises a substantial question of law or fact which is sufficiently important to the merits that a contrary appellate ruling is likely to require the person's release or a new trial.[2]

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[1] The Trial Division suspended three years of appellant's sentence.

[2] Appellant contends that ROP R. App. P. 9(b) is not the proper rule to apply and that the Court should look to the standards enunciated in ROP R. Crim. P. 46. *See Ngiraked & Kerradel v. ROP*, 3 ROP Intrm. 324 (1993); *ROP v. Tmetuchl*, 1 ROP Intrm. 296 (1986). We believe that Rule 9(b) is the appropriate rule and will follow the standards set forth therein.

Because we do not have a transcript of the findings of fact made by the Trial Division, it is difficult to assess whether appellant poses a risk to the community if released. However, it is unnecessary to address that issue because we find that appellant has not raised a substantial question of law or fact. *See Ongesii v. ROP*, 5 ROP Intrm. 136, 137 (1995) (substantial question is one that is "toss-up" or nearly so); *King v. ROP* , 5 ROP Intrm. 131, 133 (1995) (substantial question is one that court could resolve in appellant's favor as easily as in appellee's favor).

Appellant contends that the Trial Division made two critical errors: 1) failing to suppress evidence seized pursuant to a search warrant whose supporting affidavit was not sworn before a judge; and 2) finding that the suspect substance was methamphetamine when the prosecution's expert witness admitted it was possible that she did not actually test the substance admitted into evidence.

Sections 303 and 305 of Title 18 of the Palau National Code provide, in conjunction, that an affidavit supporting a search warrant may be sworn in front of the Clerk of Courts; such an affidavit does not have to be sworn in front of a judge. The procedure here conformed to the statute.

Nonetheless, Rule 41(c)(1) of the Palau Rules of Criminal Procedure states that "[a] warrant shall issue only on an affidavit or affidavits sworn to before a justice or judge and establishing the grounds for issuing the warrant . . . ." If we apply Rule 41 to these facts, then the variance is harmless error and is to be disregarded. *See* ROP R. Crim. P. 52(a). A criminal defendant's fundamental rights are not jeopardized by the fact that affidavits may be sworn in front of the Clerk of Courts instead of judges and justices. A judge or justice still will be the one deciding whether to issue the warrant. *See* Palau Constitution, Art. IV, § 6.

Appellant's citation to *United States v. Elliot*, 210 F. Supp. 357 (D. Mass. 1962), does not alter our conclusion. It is true that in finding a search warrant to be invalid, the court in *Elliot* relied on the fact that the affidavit had not been sworn to before a judge or a commissioner as required by Fed. R. Crim. P. 41(c). *Id.* at 360. But that was just one of several reasons the court gave for striking down the warrant. Appellant has not directed us to and we have not been able to locate any American cases in the 36 years since the district court issued *Elliot* that stand for the same proposition. In sum, we cannot ⊥27 find that appellant has raised a substantial question of law on this issue.

We cannot find that appellant has raised a substantial question of fact on his second argument either, namely that the court erred by finding the suspect substance to be methamphetamine. We do not have the expert witness's testimony before us and given the conflicting statements of counsel concerning that testimony, we are not convinced that the possibility of error is as high as appellant contends.

Accordingly, appellant Meo Tomei's motion to stay his sentence pending appeal is DENIED.