

Malsol v. ROP, 8 ROP Intrm. 161 (2000)
FLAVIA “TK” MALSOL,
Appellant,

v.

REPUBLIC OF PALAU,
Appellee.

CRIMINAL APPEAL NO. 98-04
Criminal Case No. 33-96

Supreme Court, Appellate Division
Republic of Palau

Argued: March 8, 2000
Decided: April 18, 2000

Counsel for Appellant: Carlos H. Salii
Counsel for Appellee: Steven Carrara

BEFORE: JEFFREY L. BEATTIE, Associate Justice; LARRY W. MILLER, Associate Justice;
R. BARRIE MICHELSEN

BEATTIE, Justice:

Flavia Malsol appeals her convictions for conspiracy to commit murder and first-degree murder. She argues that she is entitled to a new trial because the government’s late disclosure of evidence prevented her from presenting a witness whose testimony would have been critical to her defense. She also argues that her counsel was ineffective for failing to move for a continuance in order to locate and present the witness. We affirm.

BACKGROUND

The following facts were elicited at trial. Al Timlick, the victim, had not responded to a friend’s repeated phone calls, so the friend contacted the police and Timlick’s landlord. Together they entered the apartment and found Timlick’s body in a pool of blood, on the night of Monday, October 9, 1995.

A police officer testified that the police received a call on their “crime-stopper” telephone line indicating that Malsol knew something about the crime. The police interviewed Malsol, but Malsol denied knowing anything about the crime, and stated that she had found by the road some items that were identified as belonging to the victim. In a second interview, Malsol gave a confession implicating herself and four others, alleging that they plotted to kill Timlick because he owed them money for drugs.

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Malsol was interviewed a third time, and in that interview, stated that her previous confession was a lie. In this interview, Malsol gave two materially similar accounts of the crime, that differed mainly as to whether there were one or two other persons involved.¹ She stated that she and a friend nicknamed “Boy” went to Timlick’s apartment to collect money he owed them for drugs. Boy entered the apartment while she remained outside, where she could hear Boy and Timlick arguing. Boy came outside and broke off part of a stick that was holding up a plant in a green flower pot. Malsol then heard Timlick saying “you’re hurting me” and when Boy opened the door again she saw blood on the right wall. She entered the apartment and saw Timlick, still alive. Timlick’s face and back were bloody, and she observed Boy continue to beat and kick Timlick. Timlick fell to the floor, and L162 she noticed the stick between his head and the wall. Timlick grabbed her shirt and asked for help but she pushed his hand away, and he died shortly thereafter. Boy then took numerous items from the apartment including a checkbook, an oval ring with a green stone, a briefcase, a little brown bag, cash from a rectangular box with cigarettes and chips in it, and earrings. She described Timlick’s clothing as a white or light blue long-sleeved shirt and long pants.

The pathologist who performed the autopsy testified that Timlick had died between midnight Sunday and 1:00 p.m. Monday. The doctor testified that Timlick had been beaten with a blunt object about the head, neck, chest, and scrotum, had bruises that he believed were incurred by being kicked, and had died as a result of the attack.

At trial, Malsol testified to the following. All of her statements to the police were lies that she had told to end the police’s persistent questions. She gave the confessions because an assistant attorney general had promised that if she testified, she would be moved off-island and receive government support, and she was unhappy here and liked that idea. She had been in Melekeok with her family on October 8, 1995 until approximately midnight, when they returned home, whereupon she went to sleep. She went to school on Monday, October 9. The information that she told police about the murder came from the newspaper, the police, or were simply made up. She named the others because she was angry with them because they had not repaid money that they had borrowed from her. The week before the third interview, she had used methamphetamine and heroin, and was detoxing off those drugs during the interview. Malsol’s mother testified, and corroborated her alibi.

At trial, Malsol submitted the written statement of William Cummings, Timlick’s neighbor in the next apartment. Cummings wrote the statement on October 13, 1995, but the government had not revealed the existence of the statement until the week before trial. Defense counsel stated that he was unable to locate Cummings, who had moved from Palau by that time. In his statement, Cummings recounted his whereabouts from Saturday, October 7 until Wednesday, October 11. Cummings’ statement was detailed and definite in reciting his whereabouts and activity during that time period, except in regard to his statements about Timlick.

A Supreme Court Justice and two special judges heard the evidence and found that

¹ Initially Malsol stated that only she and Boy were present, but later she stated that a third male accompanied them.

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Malsol's confessions contained details about the crime scene which were not published in the newspaper. They found Malsol guilty of first-degree murder by aiding and abetting a person or persons, and conspiracy to commit murder. The judges discounted Cummings' statement because the portion referencing his recollection of seeing Timlick was uncertain.

Malsol appeals her convictions, raising two related issues. She argues that she should receive a new trial because the government did not disclose Cummings' statement until the week before trial, and his testimony at trial could have shown that Timlick was alive on the morning of October 9th, which, if true, would give her an alibi because she was at school that day. She also argues that her counsel was ineffective for failing to move for a continuance so that Cummings could be located and summoned for trial.

1163 DISCUSSION

Suppression of Exculpatory Evidence

Malsol argues that the government's late disclosure of the existence of Cummings' statement was a due process violation that was not cured by the admission of the written statement because she was deprived of the opportunity to question Cummings in person. The government, which had long been in possession of the statement, concedes that it failed to disclose the statement in a timely fashion, but contends that Malsol has made no showing that she could have located the witness or that the witness could testify with any more certainty than he did in his written statement.²

Malsol's argument fails because the trial court committed no error. At trial, when defense counsel moved to admit Cummings' written statement, there was vigorous debate between the prosecution and defense counsel about the admissibility of the statement. Before the court ruled, defense counsel stated: "I want to reserve my right to ask for a continuance if the Court rejects this, the statement because, uh, so I'm resting conditionally, I suppose. If the statement comes in, then I won't move for continuance." The trial court ruled that the statement was admissible. Counsel did not ask for a continuance or for any other relief. Because Malsol only requested the admission of the statement, and the trial court granted her motion, Malsol got all the relief she had requested. The trial court committed no error.

² This issue is the direct result of the Office of the Attorney General's long-standing refusal to adopt an open-file policy regarding information provided to criminal defendants. An open-file policy in this context is a prosecutor's decision to disclose all material in the government's file, other than attorney work product or material covered by a privilege. An exception is also made when there is a concern that disclosure carries the potential for intimidation or violence in a particular case. It has been noted that an open-file policy "may increase the efficiency and fairness of the criminal process." *Strickler v. Greene*, 119 S.Ct. 1936, 1949 n.23 (1999). In some cases, it may facilitate a plea or dismissal, and in other cases, aid the defense in its preparation. We do not view a prepared defense as a negative in the criminal justice system. The closed-file policy risks delays at trial and reversal of convictions or grant of a new trial on appeal, and, at the least, unnecessarily multiplies issues for appeal.

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Ineffective assistance of counsel

Malsol argues that her counsel was ineffective for failing to move for a continuance in order to locate Cummings. The government contends that trial counsel was not ineffective because there is no indication that the witness could be located.

This Court recently held that ineffective-assistance-of-counsel claims can be heard on direct appeal only if the record is sufficiently developed to permit meaningful appellate review of the claims. *Saunders v. Republic of Palau*, 8 ROP Intrm. 93, 96 (1999). Because the record contains sufficient facts such that we can review this argument, we will do so. A defendant has an ineffective assistance of counsel claim where counsel's performance was deficient and the deficiency prejudiced the defense. *Id.* at 93.

In order to grant a continuance on the grounds of the unavailability of a witness, the movant must be able to show that: 1) due diligence was exercised to obtain the witness' attendance; 2) the witness would tender **1164** substantial favorable evidence; 3) the witness was available and willing to testify; and 4) the denial of a continuance would materially prejudice the defendant. *United States v. Botello*, 991 F.2d 189, 193 (5th Cir. 1993).³ In *Botello*, the defendant did not know the whereabouts of a witness, and the witness lived beyond the subpoena power of the court. *Id.* The appellate court found that the trial court did not abuse its discretion in denying the motion for a continuance. *Id.* at 193-94.

Neither the Palau National Code nor the Palau Rules of Criminal Procedure provide that a witness who is not in Palau and not a citizen or national of Palau can be compelled to return to testify. Defense counsel conceded at trial that he had attempted, unsuccessfully, to locate Cummings. The prosecutor also stated that he did not know of Cummings' whereabouts. Malsol has not alleged that she would have been able to locate Cummings; she admits that he left no forwarding address when he left Palau. Nor does she allege that Cummings would have been willing to return to testify, and that if he did, his testimony would be any different than his written statement. Rather, she concedes that she has no idea whether his live testimony would have been more or less favorable to her.

Because Malsol could not show that Cummings would have tendered substantial favorable evidence, and that he was available and willing to testify, she could not have made a showing that justified a continuance, and counsel's failure to request one caused no prejudice.

CONCLUSION

Although Malsol contends that the government's untimely disclosure of evidence constituted a due process violation, she cannot point to any error by the trial court. Because her counsel could not have made the showing necessary for a continuance, counsel was not ineffective for failing to move for a continuance in order to locate the witness. The judgment of

³ See also *United States v. Costello*, 760 F.2d 1123, 1127 (11th Cir. 1985) (affirming denial of continuance partly because no one knew the exact whereabouts of the witness and there was no indication that the witness could have been located within a reasonable time).

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the trial court is AFFIRMED.