Gotina v. ROP, 8 ROP Intrm. 56 (1999)
WILLIAM GOTINA, et al.,
Appellants,

v.

REPUBLIC OF PALAU,
Appellee.

CRIMINAL APPEAL NO. 99-02
Criminal Case No. 100-99

Supreme Court, Appellate Division
Republic of Palau

Decided: October 28, 1999

Counsel for Appellants: Marvin Hamilton

Counsel for Appellee: Steven Carrara, Assistant Attorney General

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

PER CURIAM:

On August 4, 1999, the Trial Division sentenced appellants to two years' imprisonment for conspiracy to fish unlawfully, and fined them $10,000 to $25,000 on each of two counts of unlawful fishing. Appellants brought this appeal challenging the Trial Division's denial of their Motion to Arrest Judgment, and seeking relief from their sentences on the grounds that imprisonment is unauthorized and the fines imposed are excessive. Appellants subsequently moved for expedited consideration of this appeal because they are already serving the period of imprisonment.

⊥57 We agree that appellants' claims of unlawful imprisonment, which we find to be meritorious, should be addressed without further delay. We therefore grant the motion for expedited review in part as it pertains to the claims of unlawful imprisonment. Addressing the merits of those claims herein, we affirm the denial of appellants' Motion to Arrest Judgment, but we hold that there is no legal authority to impose a prison sentence in this case and we therefore vacate the sentences of imprisonment.

Appellants, however, have not demonstrated any urgency with respect to their claims challenging the fines imposed upon them. We accordingly deny the motion for expedited review of these claims, which will be considered on a non-expedited basis in accordance with the regular appellate calendar.[1]

[1] In moving for expedited review, appellants waived their right to file a reply brief.

I. MOTION TO ARREST JUDGMENT

Appellants contend that the trial court erred in denying their post-trial Motion to Arrest Judgment and to dismiss the unlawful fishing charges in Counts Five and Seven and the conspiracy charge in Count Nine. [2] Appellants brought this motion pursuant to Rule 34 of the Rules of Criminal Procedure, which provides that "[t]he court on motion from a defendant shall arrest judgment if the . . . information does not charge an offense or if the court was without jurisdiction of the offense charged." According to appellants, the trial court should have arrested judgment as to all three counts because defects in the information divested it of jurisdiction, and should have arrested judgment as to Count Nine on the additional ground that this Count of the information did not charge an offense. We disagree.

Appellants contend that all three counts of the information are jurisdictionally deficient because: 1) the dates of the alleged offenses are too vague to give appellants fair notice of the charges against them as required by Article IV, Sections 6-7 of the Constitution; 2) two of the dates overlap by a day, thus exposing appellants to double jeopardy in violation of Article IV, Section 6 of the Constitution; and 3) the information fails to plead that the offenses occurred within the statute of limitations. We find no merit in these contentions.

Count Five of the information pled unlawful fishing "on or before April 14" while Count Seven pled unlawful fishing "on or before April 15" and Count Nine pled conspiracy to fish unlawfully "on or before April 15." Testing the sufficiency of these allegations, as we must, in light of "practical rather than technical considerations," *see United States v. Bolton*, 68 F.3d 396, 400 (10th Cir. 1995), we find them adequate to afford ⊥58 appellants fair and reasonably particular notice of the charges against them. The "on or before" language used in the information has been construed as reasonably synonymous with the widely used "on or about" language, and as providing an equally sufficient measure of reasonable particularity as to the time of the alleged offense. *See United States v. Edmonson,* 962 F.2d 1535, 1541 (10th Cir. 1992); *United States v. Mitchell*, 765 F.2d 130, 133 (10th Cir. 1985). Because the dates pled in the information fairly apprise appellants of three distinct charges of conduct occurring within the statute of limitations, we find no merit in appellants' jurisdictional challenge to Counts Five, Seven and Nine.

Appellants seek dismissal of Count Nine on the additional ground that this Count fails to allege an offense of conspiracy. The crime of conspiracy is defined as follows:

However, because we deny the motion with respect to appellants' excessive fines challenge, and because the government has now filed a brief on the issue, appellants shall be permitted to file a reply brief regarding the excessive fines issue within the time provided by the Rules of Appellate Procedure.

[2] Appellants have not demonstrated any basis for expedited review of their contentions as to Counts Five and Seven, as appellants were merely fined and not imprisoned on these counts. However, because these contentions are closely intertwined with the nearly identical contentions as to Count Nine, we address them herein in the interests of clarity and judicial economy.

> [i]f two or more persons conspire either to commit any crime against the Republic, or to defraud the Republic or the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be guilty of conspiracy . . . .

17 PNC § 901. Appellants emphasize that this definition requires a conspiracy to "commit [a] crime,"[3] and aver that unlawful fishing in violation of 27 PNC §181 does not constitute a "crime." In support of this contention, appellants argue that crimes are defined in Title 17 of the Palau National Code, which is entitled "CRIMES," whereas the fishing offense underlying the conspiracy charge is codified under Title 27, which is entitled "FISHING," and thus cannot be characterized as a "crime."

We disagree. The Code explicitly states that "[t]he classification of the titles . . . of this Code, and the headings herein, are made for the purpose of convenient reference and orderly arrangement, and no implication, inference or presumption of a legislative construction shall be drawn therefrom." 1 PNC § 205. Thus, the Code itself precludes us from inferring the definition of "crime" from the headings affixed to the different Titles of the Code. Furthermore, numerous offenses that are clearly crimes under our laws are codified outside of Title 17. *See, e.g.*, 34 PNC § 3301-07 (defining offenses and penalties for trafficking and possession of controlled substances).

The proper question is whether the fishing offenses at issue can, in fact, properly be characterized as crimes irrespective of where they are positioned in the Code. A crime is defined as any act "in violation of penal law," or any act "committed . . . in violation of a law forbidding . . . it, and to which is annexed, upon conviction" any punishment, including a fine. *See Black's Law Dictionary* 370 (6th ed. 1990). The fishing offenses underlying the conspiracy charge are clearly violations of laws forbidding such acts and are clearly punishable by a fine. [4] Moreover, these fishing ⊥59 laws distinguish between civil penalties that may be imposed on parties found liable in civil proceedings, *see* 27 PNC § 183, and criminal penalties that may be imposed upon offenders found "guilty of an offense." *See* 27 PNC § 182.

For these reasons, we find that the fishing offenses underlying the conspiracy charge constitute crimes and thus satisfy Section 901's requirement of a conspiracy "to commit a crime against the Republic." Because Count Nine properly alleges a conspiracy offense, appellants were not entitled to arrest of judgment pursuant to Rule 34 of the Rules of Criminal Procedure.

II. SENTENCES OF IMPRISONMENT

Appellants contend that even if they were properly tried and convicted of conspiracy to fish illegally, they may not lawfully be sentenced to a term of imprisonment for that offense. We agree, and accordingly vacate the sentences of imprisonment.

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[3] In this case there is no allegation of a conspiracy to defraud.

[4] *See* 27 PNC § 181 (enumerating "prohibited acts"); 27 PNC §§ 182-83 (prescribing penalties for committing prohibited acts).

The penalties for conspiracy are set forth in 17 PNC § 901, which provides, in relevant part, that "[i]f . . . the offense, the commission of which is the object of conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum penalty provided for such misdemeanor." Appellants contend that unlawful fishing is a misdemeanor, and thus that the sentence for conspiracy to commit unlawful fishing cannot exceed the maximum penalty for unlawful fishing, which consists only of a fine and does not include imprisonment. *See* 27 PNC §182(b). We concur.

The Code provides that "[a] felony is a crime or offense which may be punishable by imprisonment for a period of more than one year. Every other crime is a misdemeanor." 17 PNC § 101. The crimes that appellants were charged with conspiring to violate do not carry any penalty of imprisonment, [5] and thus cannot be characterized as felonies. Because "every other crime" that is not a felony is a misdemeanor, the unlawful fishing crimes underlying appellants' conspiracy convictions constitute misdemeanors.

Appellee argues that, even if a crime is "technically a misdemeanor," it may be considered a felony if it is "important and serious enough." The clear statutory language defining felonies as crimes punishable by imprisonment of over a year and characterizing all other crimes as misdemeanors forecloses this argument. [6] Appellee further argues that imprisonment is necessary to ensure "effective enforcement" of fisheries laws that are "essential to the Republic's economic and spiritual well-being." However, it is for the legislature, and not the courts, to prescribe the types and limits of punishments for particular crimes, and the courts must defer to legislative policy ⊥60 judgments in that regard. *See United States v. Bajakajian*, 118 S. Ct. 2028, 2037 (1998) (quoting *Solem v. Helm*, 103 S. Ct. 3001, 3009 (1983)). The legislature has clearly limited the punishment for conspiracy to commit a misdemeanor to the maximum penalty for the misdemeanor itself, which in this case consists of a fine rather than imprisonment.[7] We therefore vacate the sentences of imprisonment.

III. CONCLUSION

For the foregoing reasons, we grant appellants' motion for expedited review in part as it pertains to appellants' urgent claims of unlawful imprisonment, and herein consider and dispose of these claims. However, we otherwise deny appellants' motion for expedited review, and refer

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[5] *See* 17 PNC § 182(b) (prescribing fines for violations of, *inter alia*, 17 PNC § 181(a) and (g)).

[6] Likewise, the unequivocal statutory language providing that "every" crime that is not a felony is a misdemeanor precludes the trial court's suggestion that some crimes are neither felonies nor misdemeanors.

[7] Appellants also argue that the prison sentences violate the United Nations Convention on the Law of the Sea, which the Republic ratified on September 30, 1996. Article 73(3) of the Convention provides that "Coastal State penalties for violations of fisheries laws and regulations in the exclusive economic zone may not include imprisonment." Because the statutes at issue do not authorize imprisonment, there is no conflict between Palauan statutory law and Article 73(3) of the Convention, and we need not further consider issues relating to the Convention.

the appeal on the excessive fines issue for scheduling and disposition in accordance with the regular appellate calendar.

We hereby AFFIRM the denial of appellants' post-trial Motion to Arrest Judgment, but VACATE the sentences of imprisonment and any resulting commitment orders. This order is effective immediately.