

ROP v. Shmull, 9 ROP 236 (Tr. Div. 2000)
REPUBLIC OF PALAU,
Plaintiff,

v.

TEMMY SHMULL, JOAN DEMEI, LOWRY KING, and TJL & CO.,
Defendants.

CIVIL ACTION NO. 99-248

Supreme Court, Trial Division
Republic of Palau

Decided: May 3, 2000

[1] **Constitutional Law:** Search and Seizure; **Criminal Law:** Search and Seizure

If a store is open to the general public, then a law enforcement officer, as much as any other person, is free to enter onto the business premises without a search warrant, but a store owner has the right to refuse entry at any time to any person or to close his business entirely, and thus a police officer does not necessarily have the right to search an open business.

[2] **Constitutional Law:** Search and Seizure; **Criminal Law:** Search and Seizure

Where a business owner does not exercise the right to exclude police officers from entering an open store, police are entitled to enter store and open coolers inside without a search warrant.

[3] **Constitutional Law:** Search and Seizure; **Criminal Law:** Search and Seizure

Once police were lawfully on premises, opening coolers was permissible without a warrant because, in the context of a fish market, the use of the closed containers indicated only an intention to keep the fish fresh, not to withhold it from view.

[4] **Constitutional Law:** Search and Seizure; **Criminal Law:** Search and Seizure

Where no prior illegality exists to vitiate consent to seize an item, consent obviates the need for a warrant.

LARRY W. MILLER, Associate Justice:

Following a hearing and briefing by the parties, now before the Court is defendants' motion to suppress the fish taken from TJL Fish Market from being used as evidence in this case. As the Court sees it, three events raise potential search-and-seizure issues: the entry by conservation officers into the store, their looking into closed coolers to find the fish in question, and their taking the fish from the store.

The only close question, in the Court's view, concerns the officers' initial entry into the store. As recounted at the hearing, a report had been received that morning that illegal fish were being offered for sale at the store. Three officers were sent to investigate. When they arrived, someone inside the store turned the "Open" sign to "Closed" and apparently locked one of the entrances into the store. A second entrance remained open, and when two individuals – apparently customers – exited through that door, two of the officers entered the store. A third officer entered the store through an open back door.

[1] The facts of this case fall within two poles. On the one hand, if a store is open to the general public, then a law enforcement officer, as much as any other person, is free to enter onto the business premises without a search warrant. *Maryland v. Macon*, 105 S. Ct. 2778, 2782 (1985) ("officer's action in entering . . . bookstore and examining the **1237** wares that were intentionally exposed to all who frequent the place of business . . . did not constitute a search"); see also *Lewis v. United States*, 87 S. Ct. 424, 427 (1966) ("A government agent, in the same manner as a private person, may accept an invitation to do business and may enter upon the premises for the very purposes contemplated by the occupant."); see generally 1 D. Rudstein, C. Erlinder & E. Thomas, *Criminal Constitutional Law* (1999), at ¶ 2.03[2][B]. On the other hand, a store owner has the right to refuse entry at any time to any person or to close his business entirely, notwithstanding that other persons are or have been allowed on the premises. Thus, the Court does not view it as determinative that the store was open earlier that morning when the informant first saw the fish or even that there were other customers there when the officers arrived. In the Court's view, the defendants would have been within their rights, even at that point, to deny the officers entry onto what was, after all, their property.

[2] Here, however, while the Court believes that defendants had the right to exclude the officers from entering the store, they did not exercise it. While one door was apparently locked, another door – leading directly into the fish market – remained open and in use by customers. Nor did defendants or their employees verbally direct the officers not to enter, whether by saying "Sorry, we're closed", or simply, "Bom cheroid". In these circumstances, since a third party arriving on the scene would likely have felt free to enter through the open door, the Court believes that the police – in the absence of a direction not to enter – were also entitled to do so.¹

[3] Having concluded that the officers were lawfully in the store, it is a short step to conclude that they, like any other customer – and again in the absence of being told not to – were similarly entitled to open the coolers where the fish were found.² At least in the context of a fish market, the use of closed containers indicates only an intention to keep the fish fresh, not to withhold

¹Less clear is the entry of the third officer through the back door. Absent some showing that the back door was in general use by customers, the Court does not believe that the police could justifiably have used the back entry if the front doors were both locked. Here, however, since part of the storefront remained open, and allowed the entry of two officers, any wrong in the back entry by the third would appear to be harmless.

²To the extent it should be pertinent to any appeal, the Court does not find that express consent was given to open the coolers. Neither of the officers who testified mentioned such consent in their contemporaneous reports, or even in their direct testimony. One mentioned it only on redirect testimony, and the second said on cross only that he "believed" he had asked first before looking in the coolers.

them from public view.

[4] Finally, it appears undisputed that consent was given by the cashier of the store for the officers to take with them the suspected illegal fish.³ As the Court has found no prior illegality that might serve to vitiate that consent, defendants can make no legitimate complaint in that regard.

It ought to be said that while the Court **L238** has found no wrongdoing, the officers here might have been well-advised to have taken the brief time necessary to obtain a search warrant. A search warrant prevails against a locked door and, if nothing else, avoids the uncertainty inherent in resisting a motion to suppress. That having been said, however, this motion is denied.

³Without addressing fully the question of whether actual or apparent authority to give consent should be the standard, *compare State v. Lopez*, 896 P.2d 889, 899-903 (1995) *with Illinois v. Rodriguez*, 110 S. Ct. 2793 (1990), the Court believes that the consent given here, in the presence of one of the store's owners, was plainly sufficient.