LEXSEE 831 F.2D 1164

United States of America, Appellee, v. Hector Luis Lopez Andino, Defendant, Appellant. United States of America, Appellee, v. Israel Mendez Santiago, Defendant, Appellant

Nos. 86-1583, 86-1584

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

831 F.2d 1164*; *1987 U.S. App. LEXIS 14279

October 28, 1987

PRIOR HISTORY: [**1] Appeals from the United States District Court for the District of Puerto Rico, Hon. Jose Antonio Fuste, U.S. District Judge.

COUNSEL: Francisco M. Dolz Sanchez, for Appellant Hector Luis Lopez Andino.

John T. Burns, by Appointment of the Court, for Appellant Israel Mendez Santiago.

Frank D. Allen, Jr., Civil Rights Division, Department of Justice, with whom Jessica Dunsay Silver, Civil Rights Division, Department of Justice, Wm. Bradford Reynolds, Assistant Attorney General, and Jose A. Quiles, Acting United States Attorney, were on brief, for Appellee.

JUDGES: Campbell, Chief Judge, Bownes and Torruella, Circuit Judges. Torruella, Circuit Judge (concurring).

OPINION BY: BOWNES

OPINION

[*1165] BOWNES, Circuit Judge

Defendants-appellants Hector Luis Lopez Andino and Israel Mendez Santiago, formerly members of the Puerto Rico Police, were convicted in district court of civil rights violations for assaulting and beating three men, one of whom died. Appellants make five arguments in challenging their convictions: (1) that the United States statutes under which they were convicted are inapplicable to Puerto Rico; (2) that their convictions violated the constitutional bar on [**2] double jeopardy because appellants previously had been convicted in Puerto Rico [*1166] Superior Court for their acts; (3) that their *sixth amendment* right to counsel was violated by their having been jointly represented; (4) that the jury was not properly instructed on the elements of the charged offenses; and (5) that the trial court erred by not instructing the jury on lesser offenses included in the offenses charged. We are not persuaded by any of appellants' arguments, and, therefore, we affirm their convictions.

I. SUMMARY OF THE EVIDENCE

The government's evidence described an incident in which officers of the law brutalized three citizens. Two eyewitnesses, as well as the victims of the assault, testified to the following. At about 4:00 P.M. on December 19, 1982, Angel Carmona Ortiz and Juan Ramon Figueroa Serrano met with Ruben Padilla Rios in a field near a housing project in Bayamon, Puerto Rico. Padilla Rios had come there to buy drugs. As the meeting broke up, two police officers -- appellant Lopez Andino, who was a sergeant, and Luis Ernesto Ortiz Maldonado -- approached with revolvers in hand. The three men were forced to lie face down in tall grass, and Lopez [**3] Andino instructed Ortiz Maldonado to go and bring a third officer, appellant Mendez Santiago. When he returned with Mendez Santiago, Ortiz Maldonado was carrying a nightstick.

The officers then subjected the men to an ordeal of physical abuse lasting about thirty minutes. Lopez Andino and Mendez Santiago interrogated them, asking

strategic choice by defense counsel. In any event, the court did not err in not giving lesser included offense instructions when defense counsel had neither requested them nor objected when they had been omitted from the charge.

VI. CONCLUSION

We hold that the statutes under which appellants were convicted are applicable to Puerto Rico, and that the court, therefore, had jurisdiction over appellants. Because Puerto Rico is a sovereign separate from the United States for purposes of double jeopardy, these prosecutions were not barred by prior convictions in Puerto Rico Superior Court. With respect to appellants' representation by the same counsel, even though the court's inquiry into the issue may have fallen short of what technically was required, no prejudice resulted from appellants having been jointly represented, and, [**24] therefore, any error would not suffice to upset the verdicts. Finally, we find no reversible error regarding the jury instructions or the district court's ruling that allowed the record to be supplemented with instructions that had been given to the jury but not typed initially as part of the transcript.

Affirmed.

CONCUR BY: TORRUELLA

CONCUR

TORRUELLA, Circuit Judge (Concurring).

I concur in the result of this opinion and in most of its language, but cannot agree with certain portions of Part III which refer to the constitutional status of Puerto Rico. First, the statements contained in the objected section are unnecessary to reach the conclusion in this case, which I believe is otherwise correct. More importantly, the conclusion reached regarding Puerto Rico's sovereignty status for purposes of the *double jeopardy clause* is erroneous. If we were required to decide that issue, I would be forced to vote that a double jeopardy impediment does exist to the federal prosecution.

The majority should and could have avoided the quagmire of Puerto Rican status litigation by limiting its discourse on double jeopardy to a ruling, as it tentatively indicates, *ante* slip op. at p. 6, [**25] that separate Puerto Rico/federal offenses are involved. It would have correctly concluded under *Blockburger v. United States, 284 U.S. 299, 304, 76 L. Ed. 306, 52 S. Ct. 180 (1932)*, that the charges against appellants in the Commonwealth courts (aggravated assault and involuntary manslaughter, *33 L.P.R.A. §§ 4032(f), 4005* (1983 & Supp. 1986)), and those in this forum (conspiracy to violate civil rights and deprivation of rights under color of law, *18 U.S.C. §§ 241, 242 (1982)*), involved "offenses . . . requir[ing] proof of different element[s]," *Blockburger, 284 U.S. at 304*. Thus the Puerto Rico/federal prosecutions do not implicate the *double jeopardy clause*.

The majority, unnecessarily to my view, has decided that no double jeopardy exists in this case because Puerto Rico is a "dual sovereign" with the United States for double jeopardy purposes. Such a conclusion is incorrect because Puerto Rico is *constitutionally* a territory, thus lacking that separate sovereignty which would allow consecutive Puerto Rico/federal prosecutions for what would otherwise be the same offenses. *See Puerto Rico v. Shell Co., 302 U.S. 253, 82 L. Ed. 235, 58 S. Ct. 167 (1937)*. [**26]

Not the least of the majority's errors stem from the fact that it overlooks that the Puerto Rican Federal Relations Act (Pub. L. 600) [4] is merely an act of Congress. It is not a treaty, and certainly not a part of the Constitution. Thus, under well-established constitutional precedent, as an act of Congress it does not bind future Congresses. *Community-Service Broadcasting of Mid-America, Inc. v. Federal Communications Commission, 192 U.S. App. D.C. 448, 593 F.2d 1102, 1103* [*1173] *(D.C. Cir. 1978)* (Skelly-Wright, C.J.) ("To be sure, Congress is generally free to change its mind; in amending legislation Congress is not bound by the intent of an earlier body. But it is bound by the Constitution."). Like any other act of Congress it may be repealed, modified, or amended at the unilateral will of future Congresses. Thus, as will be further discussed *post*, the *ultimate source of power* in Puerto Rico, even after the enactment of P.L. 600, is Congress, a situation which deprives Puerto Rico of the rudiments of sovereignty basic to the application of the "dual sovereignty" rule.

4 Pub. L. No. 600, 64 Stat. 319 (1950), allowed the people of Puerto Rico "to organize a local government pursuant to a constitution of their own adoption."

[**27] Although some events subsequent to the passage of P.L. 600 have tended to overlook and obscure the facts, [5] the legislative history of that Act leaves no doubt that even though its passage signaled the grant of internal self-government to Puerto Rico, no change was intended by Congress or Puerto Rico authorities in the territory's *constitutional* status or in Congress' continuing plenary power over Puerto Rico pursuant to the Territory Clause of the Constitution. [6] *See People v. Balzac, 258 U.S. 298, 42 S. Ct. 343, 66 L. Ed. 627 (1922); Downes v. Bidwell, 182 U.S. 244, 45 L. Ed. 1088, 21 S. Ct. 770 (1901).* In the hearings which culminated in the passage of P.L. 600, Antonio Fernos Isern, Puerto Rico's Resident Commissioner before Congress, expressly stated that the bill "would not change the status of the island of Puerto Rico relative to the United States. . . . It would not alter the powers of sovereignty over Puerto Rico under the terms of the Treaty of Paris." *Hearings Before the House Committee on Public Lands on H.R. 7674 and S. 3336,* 81st Cong., 2d Sess. 63 (1950). He and Luis Munoz Marin, Puerto Rico's senior statesman and driving [**28] force in seeking this grant of local autonomy, also expressed this interpretation of P.L. 600 by stating their understanding that Congress would retain authority to revoke or modify Puerto Rico's Constitution. [7] In accord with this view, the Secretary of the Interior, the Senate report accompanying the Senate version of P.L. 600, S. 3336, and the Senators who sponsored S. 3336 all explicitly stated that the new bill would not affect the underlying relationship between Puerto Rico and the United States. [8] Furthermore, the report accompanying the draft of the bill which became P.L. 600 also indicated that the measure did not change Puerto Rico's fundamental relationship to the United States. H.R. Rep. No. 2275, 81st Cong., 2d Sess., 3 (1950). [9]

5 Including our own decision in *Mora v. Mejias, 206 F.2d 377 (1st Cir. 1953),* as well as the representations of our government to the United Nations' Committee on Information from Non-Self Governing Territories. *See* United Nations Document, A/AC 35/L.148.

6 U.S. Const. art. IV, § 3: "The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory and other property belonging to the United States.

[**29]

7 Munoz Marin testified regarding Congress' authority over the Puerto Rican Constitution that "Congress can always get around and legislate again." *See Hearings before the House Committee on Public Lands on H.R. 7674 and S. 3336,* 81st Cong., 2d Sess., 17-34 (1950). Similarly, Fernos Isern testified that "the authority of the Government of the United States, of the Congress, to legislate in case of need would always be there." *Id. at 18. See also Hearings before a Senate Subcommittee of the Committee on Interior and Insular Affairs on S. 3336,* 81st Cong., 2d Sess., 4 (1950).

8 The Secretary of the Interior testified that if P.L. 600 was passed there would be no change in ". . . Puerto Rico's political, social and economic relationship to the United States." *Id. at 50.* Senators O'Mahoney and Butler, the sponsors of S. 3336, stated that the bill would not affect the relationship of Puerto Rico with the United States. 96 Cong. Rec., 81st Cong., 2d Sess., 446 (1950). The Senate report which accompanied S. 3336 indicated that "the measure would not change Puerto Rico's fundamental political, social and economic relationship to the United States." S. Rep. No. 1779, 81st Cong., 2d Sess., 3 (1950). The Senate approved S. 3336 without debate. 96 Cong. Rec. 8321 (1950).

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9 The House Public Lands Committee approved H.R. 7644, which was identical to S. 3336. This draft became P.L. 600 thereafter and was signed into law by the President on July 3, 1950.

After P.L. 600 was enacted, Puerto Rico drafted a constitution which was then presented by the President to *Congress* for approval. H.R. Doc. No. 435, 82d Cong., 2d Sess. (1952). In urging its approval Resident Commissioner Fernos testified before [*1174] the House that "this is a fundamental provision which emphasizes the fact that Puerto Rico continues to maintain its station within the United States political system." *Hearings before the House Committee on Interiors and Insular Affairs on H.R. Res. 430,* 82d Cong., 2d Sess., 6 (1952). The Committee recommended approval in a report which again repeated that there was no change contemplated in the political, social and economic relationship between Puerto Rico and the United States. *House Report No. 1832,* 82d Cong., 2d Sess., 3 (1952). The record of the Senate hearings also clearly shows that it was well understood that the new Puerto Rico Constitution [**31] would have no effect on Puerto Rico's territorial status. [10]

10 During the Senate hearings, the Committee's legal counsel stated:

> It is our hope and it is the hope of the Government, I think, not to interfere with the relationship but nevertheless the basic power inherent in the Congress of the United States, which no one can take away, is in Congress.

Hearings before the Senate Committee on Interior and Insular Affairs on S.J. Res. 151, 82d Cong., 2d Sess., 40-47 (1952). Numerous statements appear on the record by members of Congress supporting this view and to the effect that no change was envisioned in the constitutional status of Puerto Rico. *Id.* at 37 (Senator Guy Gordon); *id.* at 40-47 (Senator O'Mahoney); *id. at 49 (Senator Long)*.

After several intervening debates and hearings, the constitution enacted by Puerto Rico was approved, *but only after it was amended by Congress*, by the elimination of Section 20 thereof. *Conference Report*, H.R. Rep. 2350, 82d Cong. [**32] , 2d Sess., 1-3 (1952). The amended constitution became Pub. L. 447, 66 Stat. 327 (1952), and thereafter was again adopted in Puerto Rico, as amended. 4 *Diario de Sesiones de la Convencion Constituyente de Puerto Rico*, 2532-2534 (1961 ed.).

This process has led a noted constitutional scholar to state that:

> "Though the formal title has been changed, in constitutional theory Puerto Rico remains a territory. This means that Congress continues to possess plenary but unexercised authority over Puerto Rico. Constitutionally, Congress may repeal Public Law 600, annul the Constitution of Puerto Rico and veto any insular legislation which it deems unwise or improper. From the perspective of constitutional law the compact between Puerto Rico and Congress may be unilaterally altered by the Congress. The compact is not a contract in a commercial sense. It expresses a method Congress chose to use in place of direct legislation . . . Constitutionally, the most meaningful view of the Puerto Rican Constitution is that it is a statute of the Congress which involves a partial and non-permanent abdication of Congress' territorial power."

Helfeld, Congressional Intent and Attitude [**33] *Toward Public Law 600 and the Constitution of the Commonwealth of Puerto Rico*, 21 Rev. Jur. U.P.R. 255 (1952).

Several independent factors are available to indicate that federal power over Puerto Rico's internal affairs remained after 1952, although it was exercised to a much lesser degree than pre-1952. Even after 1952, this Court of Appeals continued to serve as Puerto Rico's court of last resort just as it had pre-1952. *See 28 U.S.C. § 1293* (repealed 1961). That is, after 1952 appeals could still be taken as a matter of right from decisions of the Supreme Court of Puerto Rico in *all* cases, including those involving the *lexi fori* of Puerto Rico. This situation continued until 1961, when Congress *unilaterally* withdrew the right to appeal from the Supreme Court of Puerto Rico to this Court and put such decisions on an equal footing with the decisions of the highest courts of the states. *See* Pub. L. No. 87-189, § 3, 75 Stat. 417 (1961). [11]

11 Puerto Rico also continued to be treated as a territory after 1952 under the provisions of the Federal Aviation Act of 1958, 49 U.S.C. §§ 1301 *et seq.*, pursuant to which this statute was made applicable to *intra* Puerto Rico air travel. 49 U.S.C. § 1301, paras. 20(a), 21(a), and (31).

[**34] Perhaps more significantly, however, several courts ruled that the legislative history of P.L. 600 showed no intent to make a change in Puerto Rico's territorial status. *Americana of Puerto Rico v. Kaplus, 368 F.2d 431, 436 (3d Cir. 1966)* ("Puerto Rico is [*1175] a 'territory' within the purview of Article IV, Section 3 [of the Constitution]"); *Detres v. Lions Bldg. Corp., 234 F.2d 596, 600 (7th Cir. 1956)* ("Puerto Rico both before and after the adoption and approval of its constitution was a territory of the United States"); *Lummus Company v. Commonwealth Oil Refining Co., 195 F. Supp. 47, 50 (S.D. N.Y. 1961)* ("absolutely clear terms"); *Nestle Products, Inc. v. United States, 64 Cust.*

Ct. 158, 310 F. Supp. 792, 796 (Customs Court, 1970) (P.L. 600 "did not change Puerto Rico's fundamental political relationship to the United States").

If *Mora v. Mejias, supra*, and other cases from this circuit [12] cast some doubt regarding Puerto Rico's post-1952 constitutional status and Congress' continuing plenary power over Puerto Rico, this doubt should have been dissipated by the Supreme Court's [**35] rulings in *Califano v. Torres, 435 U.S. 1, 55 L. Ed. 2d 65, 98 S. Ct. 906 (1977)* and *Harris v. Rosario, 446 U.S. 651, 64 L. Ed. 2d 587, 100 S. Ct. 1929 (1980)*. In those cases, in the course of sustaining the validity of Congressional legislation which discriminated against Puerto Rico and its residents, the Court affirmed the continuing validity of *Downes v. Bidwell* and *People v. Balzac*, [13] and reaffirmed the existence of Congress' post-1952 plenary power over Puerto Rico pursuant to the Territory Clause of the Constitution. *Califano, 435 U.S. at 3 n.4*; *Harris, 446 U.S. at 651-652, 653-656* (Marshall, J., dissenting). *See also Puerto Rico v. Branstad, 483 U.S. 219, 107 S. Ct. 2802, 97 L. Ed. 2d 187 (1987)* (Scalia, J., concurring).

12 *Compare United States v. Valentine, 288 F. Supp. 957 (D.C. P.R. 1968)* and *First Federal S. & L. v. Ruiz de Jesus, 644 F.2d 910 (1st Cir. 1981)* with *Sea-Land Services, Inc. v. Municipality of San Juan, 505 F. Supp. 533 (D.C. P.R. 1980)* and *Rodriguez v. Popular Democratic Party, 457 U.S. 1, 72 L. Ed. 2d 628, 102 S. Ct. 2194 (1981). See also* the *dicta* in *United States v. Quinones, 758 F.2d 40, 42 (1st Cir. 1985)* (Puerto Rico ceased being a territory in 1952 and the authority of Congress over Puerto Rico emanates thereafter from the "compact" between United States and Puerto Rico, which Congress cannot unilaterally amend).

[**36]

13 *Balzac* was cited as valid authority by the Supreme Court as recently as last year in *Posadas de Puerto Rico Assoc. v. Tourism Co., 478 U.S. 328, 106 S. Ct. 2968, 2971 n.1, 92 L. Ed. 2d 266 (1986). See also Torres v. Puerto Rico, 442 U.S. 465, 468-471, 61 L. Ed. 2d 1, 99 S. Ct. 2425 (1978).*

Because Puerto Rico, notwithstanding P.L. 600, is still *constitutionally* a territory, *Puerto Rico v. Shell Co.* prevents the application of the "dual sovereignty" doctrine. That principle is applicable only where separate political entities *which derive their power from different sources* are involved. *Shell Co., supra; Heath v. Alabama, 474 U.S. 82, 106 S. Ct. 433, 437, 88 L. Ed. 2d 387 (1985)*; *United States v. Wheeler, 435 U.S. 313, 319-22, 55 L. Ed. 2d 303, 98 S. Ct. 1079 (1978)*; *United States v. Lanza, 260 U.S. 377, 382, 67 L. Ed. 314, 43 S. Ct. 141 (1922)*. In *Shell Co.* the Court held that a territory derived its authority from Congress and therefore was not a sovereign for double [**37] jeopardy purposes.

Although, as the majority points out, there is no question but that in enacting P.L. 600 Congress intended to grant Puerto Rico autonomy over local matters, *Examining Board v. Flores de Otero, 426 U.S. 572, 594, 49 L. Ed. 2d 65, 96 S. Ct. 2264 (1976)* ("[a] degree of autonomy and independence normally associated with States of the Union"), and "sovereignty over matters not ruled by the Constitution"; *Rodriguez v. Popular Democratic Party, 457 U.S. 1, 8, 72 L. Ed. 2d 628, 102 S. Ct. 2194 (1982)*, it is significant that the Supreme Court has never joined these two catch phrases to say that Puerto Rico has a degree of *sovereignty* similar to that of the States.

Furthermore, I do not believe that quoting these catch phrases, which if carefully analyzed in context appear to be mere *dicta*, is substantively helpful. The Court had utilized such characterizations of Puerto Rico's local autonomy long before P.L. 600 was enacted and the succeeding events took place. In fact in the *Shell* case, the Court stated that the Foraker Act of 1900, 31 Stat. 77 (1900), Puerto Rico's original Organic Act, was essentially the same as [*1176] [**38] other territorial legislation whereby "the power of the Territorial legislature was apparently as plenary as that of the legislature of a State," and quoted an earlier case which stated that "the powers thus exercised by the Territorial legislatures are nearly as extensive as those exercised by any State legislature." *Shell, 302 U.S. at 260*. With each new organic act, first the Foraker Act in 1900, then the Jones Act in 1917, 39 Stat. 951 (1917), and then the Puerto Rican Federal Relations Act in 1950 and later amendments, Congress has simply delegated more authority to Puerto Rico over local matters. But this has not changed in any way Puerto Rico's *constitutional* status as a territory, or the source of power over Puerto Rico. Congress continues to be the *ultimate source of power* pursuant to the Territory Clause of the Constitution. More recent cases further illustrate the flaw in the majority's reasoning.

In a unanimous opinion written by Chief Justice Burger in *Waller v. Florida, 397 U.S. 387, 25 L. Ed. 2d 435, 90 S. Ct. 1184 (1970)*, the Court ruled that the *double jeopardy clause*, as applied through the *Fourteenth Amendment*, bars successive [**39] prosecutions by a state and municipality for the same alleged crime. The Court stated:

> . . . The apt analogy to the relationship between municipal and state governments is to be found in the relationship between the government of a Territory and the Government of the United States. The legal consequence of that relationship was settled in *Grafton v. United States, 206 U.S. 333, 51 L. Ed. 1084, 27 S. Ct. 749 (1907)*, where this Court held that a prosecution in a court of the United States is a bar to a subsequent prosecution in a territorial court, since both are arms of the same sovereign. [citing also *Puerto Rico v. Shell, supra*].

Id. at 393. The Court concluded that "in this context a 'dual sovereignty' theory is an anachronism." *Id. at 395*.

In *United States v. Wheeler, 435 U.S. 313, 55 L. Ed. 2d 303, 98 S. Ct. 1079 (1978)*, also a unanimous opinion, the Court recognized as separate sovereigns for double jeopardy purposes, Indian tribes, because the tribes originally were separate sovereignties as nations, the vestiges of which sovereignty they still retained. *Id. at 328*. The Court [**40] differentiated the federal/tribal situation from the state/municipal and federal/territorial scenarios. Although it specifically recognized that Congress had given Puerto Rico "an autonomy similar to that of the states . . .," *id. at 319-20 n.13*, it "reiterated that successive prosecutions by federal and territorial courts are impermissible because such courts are 'creations emanating from the same sovereignty'." *Id. at 318*. The Court similarly noted its holding in *Waller* prohibiting successive state municipal prosecutions "despite the fact that state law treated the two as separate sovereigns." *Id. at 318-19*.

The important point in all this, one which I believe is overlooked by the majority, is that it makes no difference how the legislature, whether state or federal, has treated the political subdivision; rather *it is the source from which the political entity derives its authority that determines who is sovereign*. What differentiates *Grafton, Shell* and *Waller* from the cases establishing the "dual sovereignty" exception to the *double jeopardy clause* is "not the extent of control exercised by one prosecuting authority [**41] over the other but rather the *ultimate source of the power* under which the respective prosecutions were undertaken." *Id. at 320* (emphasis supplied). "City and State, or Territory and Nation, are not two separate sovereigns to whom the citizen owes separate allegiance in any meaningful sense, but one alone." *Id. at 322*. They thus are not separate sovereigns for double jeopardy purposes. [14]

> 14 Reliance by the majority on the authority of *United States v. Benmuhar, 658 F.2d 14 (1st Cir. 1981)*, is inappropriate because that case, as the present one, also involved different crimes in the Puerto Rico/federal jurisdictions, i.e., arson and destruction of property (Puerto Rico) versus conspiracy (federal). Thus *Blockburger* was applicable, not the "dual sovereignty" theory.

[*1177] Because I believe that Puerto Rico *constitutionally* remains a territory, I am unable to agree with the majority's conclusion regarding "dual sovereignty."

As previously [**42] indicated, I would have avoided reaching these constitutional issues by ruling pursuant to *Blockburger* that separate Puerto Rico/federal crimes are involved in the present cases. Since such a result allows me to agree with the outcome reached by the majority, however, I concur with the affirmance of the conviction.