IN THE SUPREME COURT OF GUAM

PEOPLE OF GUAM,
Plaintiff-Appellee,

v.

RAYMOND TORRES TEDTAOTAO,
Defendant-Appellant.

Supreme Court Case No.: CRA16-011
Superior Court Case No.: CF0218-13-01

OPINION

Cite as: 2017 Guam 12

Appeal from the Superior Court of Guam
Argued and submitted on May 1, 2017
Tiyan, Guam

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BEFORE: KATHERINE A. MARAMAN, Chief Justice; F. PHILIP CARBULLIDO, Associate Justice; ROBERT J. TORRES, Associate Justice.

TORRES, J.:

[1] Defendant-Appellant Raymond Torres Tedtaotao appeals from his Judgment of Conviction. This is the third time this case has come before the court. Plaintiff-Appellee People of Guam ("the People") appealed an issue related to sentencing, which was resolved in *People v. Tedtaotao*, 2015 Guam 9 (hereinafter, "*Tedtaotao I*"). Tedtaotao also previously appealed his conviction alleging the trial court committed multiple errors. The court overturned Tedtaotao's conviction for attempted murder but otherwise affirmed his conviction on the remaining charges in *People v. Tedtaotao*, 2015 Guam 31 (hereinafter, "*Tedtaotao II*"). In this present appeal, Tedtaotao asserts the trial court erred in admitting certain video evidence during trial in violation of Guam Rules of Evidence (GRE) 403 and 802. Tedtaotao also argues that he was denied effective assistance of trial counsel.

[2] For the reasons set forth herein, we affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

[3] Tedtaotao was indicted in connection with a home break-in and assault on the charges of Attempted Murder (as a First Degree Felony), First Degree Robbery (as a First Degree Felony), Aggravated Assault (as a Second Degree Felony), and Burglary (as a Second Degree Felony). A jury convicted Tedtaotao on all counts alleged in the indictment. Tedtaotao was originally sentenced to life imprisonment. Shortly thereafter, however, the trial court *sua sponte* resentenced Tedtaotao, lowering the original sentence to a total term of imprisonment of 55

years. The People appealed the *sua sponte* resentencing, but the court affirmed the sentencing procedure employed by the trial court in *Tedtaotao I*.

[4] Tedtaotao also appealed his conviction in a separately filed appeal, arguing that (1) his conviction of attempted murder failed to allege an offense; (2) the evidence was insufficient to convict on the offense of attempted murder; (3) the trial court erred in instructing the jury on the attempted murder charge; (4) Tedtaotao's right to a speedy trial was violated; and (5) the People committed a *Brady* violation. In *Tedtaotao II*, the court reversed and vacated Tedtaotao's conviction of attempted murder, affirmed the remainder of Tedtaotao's conviction, and remanded the case. On remand, the trial court resentenced Tedtaotao to a total of 45 years of incarceration to be served consecutively and dismissed the attempted murder charge. Judgment was entered, and Tedtaotao timely appealed.

II. JURISDICTION

[5] This court has jurisdiction over appeals from a final judgment of conviction rendered in the Superior Court of Guam. 48 U.S.C.A. § 1424-1(a)(2) (Westlaw through Pub. L. 115-68 (2017)); 7 GCA §§ 3107(b), 3108(a) (2005); 8 GCA §§ 130.10, 130.15(a) (2005).

III. ANALYSIS

[6] Tedtaotao asserts in the present appeal that the trial court erred in admitting certain video evidence during trial in violation of GRE 403 and 802 and that he was denied effective assistance of trial counsel. In opposition, the People argue, among other things, that this appeal should be barred in its entirety under this court's prior decision in *Babauta v. Babauta*, 2013 Guam 17 (hereinafter, "*Babauta II*") and the "mandate rule" because Tedtaotao waived these arguments by not raising them in his first appeal. For the reasons discussed below, we agree that Tedtaotao

waived the arguments he puts forth in the present appeal and the Judgment of Conviction should be affirmed.

[7] "It is well-settled 'that where an argument could have been raised on an initial appeal, it is inappropriate to consider that argument on a second appeal following remand.'" *United States v. Henry*, 472 F.3d 910, 913 (D.C. Cir. 2007) (quoting *Nw. Ind. Tel. Co. v. F.C.C.*, 872 F.2d 465, 470 (D.C. Cir. 1989)). The rationale for this rule is premised upon an understanding that "[t]he most rudimentary procedural efficiency demands that litigants present all available arguments to an appellate court on the first appeal." *Omni Outdoor Advert., Inc. v. Columbia Outdoor Advert., Inc.*, 974 F.2d 502, 505 (4th Cir. 1992) (citation omitted). "If parties who lost on appeal were allowed to return to appellate courts to advance different, previously available theories, cases could languish for years before final resolution and already crowded court dockets would swell even more." *Id.*

[8] This "is a prudential rule rather than a jurisdictional one . . . ." *Crocker v. Piedmont Aviation, Inc.*, 49 F.3d 735, 739 (D.C. Cir. 1995) (citations omitted). The relevant question in determining whether an appellant's claim is barred is "whether the party had sufficient incentive to raise that issue in the prior proceedings." *United States v. Lee*, 358 F.3d 315, 324 (5th Cir. 2004) (quoting *Hass v. United States*, 199 F.3d 749, 753 (5th Cir. 1999)); *see also People v. Senior*, 41 Cal. Rptr. 2d 1, 5 (Ct. App. 1995) (defendant waived argument where "[t]here is *no apparent justification* as to why this issue could not have been raised the first time defendant's case was before this court" (emphasis added)).

[9] Courts sometimes analyze this issue purely as a question of waiver, *see, e.g.*, *Senior*, 41 Cal. Rptr. 2d at 1-2, but at other times courts have analyzed this issue in the context of the

"mandate rule." The "mandate rule" holds that after an appeal, both the parties and the lower court are bound on remand by the mandate issued by the appellate court. *See generally Babauta II*, 2013 Guam 17. This is an adjunct to the "law of the case" doctrine. *See Crocker*, 49 F.3d at 739-40; *see also Babauta II*, 2013 Guam 17 ¶ 28 (collecting cases). "[A] legal decision made at one stage of litigation, unchallenged in a subsequent appeal when the opportunity to do so existed, [governs] future stages of the same litigation, and the parties are deemed to have waived the right to challenge that decision at a later time." *Williamsburg Wax Museum, Inc. v. Historic Figures, Inc.*, 810 F.2d 243, 250 (D.C. Cir. 1987). "It would be absurd that a party who has chosen not to argue a point on a first appeal should stand better as regards the law of the case than one who had argued and lost." *Fogel v. Chestnutt*, 668 F.2d 100, 109 (2d Cir. 1981). Thus, where a party has previously appealed his or her conviction, he or she may not raise purported trial errors in a second appeal that could have been but were not raised during the earlier-filed appeal. *See United States v. Fiallo-Jacome*, 874 F.2d 1479, 1480-81 (11th Cir. 1989). "[T]here is no reason why [appellant] should get 'two bites at the appellate apple.'" *Id.* at 1482.

[10] This court has addressed the "mandate rule" in only one prior case, *Babauta II*. Prior to deciding *Babauta II*, the court had previously considered an appeal in the same case in *Babauta v. Babauta*, 2011 Guam 15 (hereinafter, "*Babauta I*"). In *Babauta I*, the appellant "sought, *inter alia*, reimbursement or credit for his separate property contributions toward the down payment on and improvements to the marital residence during the marriage, as well as for his post-separation payments on the mortgage and other expenses related to the residence." *Babauta II*, 2013 Guam 17 ¶ 7. "This court affirmed the trial court's denial of reimbursement for the separate funds used for the down payment on the residence . . . ." *Id.* ¶ 8. On remand, the

appellant sought further reimbursement for a home equity line that he previously claimed was a separate property contribution toward the down payment on the marital residence but now claimed was a community debt which he satisfied with his separate funds after separation of the parties. *Id.* ¶ 23. The trial court held that this issue could have been raised in the initial appeal but was not, and therefore, the appellant "was barred from raising it on remand." *Id.* ¶ 11. We affirmed. *Id.* ¶ 46.

[11] Tedtaotao attempts to distinguish *Babauta II* on the basis that the issues presented in this appeal were not newly raised for the first time on remand. Reply Br. at 5-6 (Mar. 2, 2017). Rather, Tedtaotao posits that the facts here are more similar to those presented in *United States v. Kellington*, 217 F.3d 1084 (9th Cir. 2000). In *Kellington*, after a full trial on the merits, the defendant was found guilty of obstruction of justice. 217 F.3d at 1091. The defendant then moved for a judgment of acquittal or, in the alternative, a new trial. *Id.* The trial court granted the defendant's motion for a judgment of acquittal and ruled that the motion for a new trial was moot. *Id.* The prosecution appealed and the Ninth Circuit reversed, stating in its mandate: "REVERSED AND REMANDED FOR ENTRY OF JUDGMENT AND FOR SENTENCING." *Id.* at 1092. In the first appeal, neither party raised the issue of the trial court's refusal to substantively address the motion for a new trial. On remand, the defendant renewed that motion, and the trial court granted it. *Id.* The prosecution appealed that decision, arguing that the new motion was outside the scope of the appellate court's mandate. *Id.* The Ninth Circuit, however, held that the trial court properly considered the renewed motion.[1] *Id.*

[1] The issue of waiver was decided 2-1 by the hearing panel. *See Kellington*, 217 F.3d at 1101-04 (Tashima, J., dissenting).

[12] *Kellington* is easily distinguishable from the facts presented here. First, in *Kellington*, the second appeal concerned a motion that was determined *after* the initial remand. Tedtaotao, on the other hand, appeals on the basis of alleged errors made prior to the initial appeal that were not addressed for the first time or revisited after the original remand. At least one Ninth Circuit case has distinguished *Kellington*, in part, on this basis. *See United States v. Scharringhausen*, 4 Fed. App'x 499, 500 n.2 (9th Cir. 2001); *cf. United States v. Boesen*, 599 F.3d 874, 878 (8th Cir. 2010) (holding that mandate rule barred motion for new trial on remand because motion was not timely made prior to initial appeal); *United States v. Renick*, 273 F.3d 1009 (11th Cir. 2001) (same). Second, the defendant in *Kellington* had prevailed on his motion for acquittal in the trial court; it was the prosecution that filed the initial appeal. Because the defendant had prevailed below, he did not have the proper incentive to raise the issue of a motion for a new trial on appeal. In contrast, Tedtaotao was the appellant in *Tedtaotao II*, and he had every incentive at that time to raise all issues that would potentially reverse his conviction.

[13] Tedtaotao also argues that *Babauta II* is distinguishable from the facts presented here because, in *Babauta II*, the court had already directly addressed in the first appeal whether the appellant was entitled to reimbursement for the home equity line at issue. Reply Br. at 5. He attempts to distinguish *Senior*—another case relied upon by the People—for a similar reason. *Id.* at 9-10. Here, according to Tedtaotao, the court did not previously address GRE 403 errors, hearsay errors, or ineffective assistance claims. *See id.* This, however, views the relevant question too narrowly. The more apt analogy would be whether the court previously upheld the conviction of Tedtaotao. In his prior appeal, Tedtaotao raised several arguments that, if successful on appeal, would have resulted in a complete reversal of his conviction on all counts.

He stated in his original appellate brief, for example, that "all of the convictions should be vacated and the matter should be dismissed." *People v. Tedtaotao*, CRA14-015, Appellant's Br. at 21 (Dec. 24, 2014) (published as *Tedtaotao II*, 2015 Guam 31). The court, however, affirmed Tedtaotao's conviction on all but one count. *See Tedtaotao II*, 2015 Guam 31 ¶ 57. Revisiting these convictions would therefore be outside the scope of this court's mandate on remand. *See United States v. Perez*, 493 F. App'x 432, 434 (4th Cir. 2012) ("Because it has not been tendered to the appellate court for decision, an issue that has been waived on an initial appeal is 'not remanded' to the district court even if other issues in the case are returned to the court below.").

[14] Finally, Tedtaotao argues unconvincingly that even if the mandate rule applies, the issues raised in the present appeal are in the scope of the court's prior mandate because the court ordered a new sentencing—and thus, Tedtaotao asserts, implicitly ordered that a new judgment be entered. Reply Br. at 7-8. Tedtaotao attempts to frame this new judgment as permitting appellate review of the issues presented in this appeal. *Id.* He does not, however, challenge in this appeal anything related to the sentencing or other events that occurred on remand. Even if the court accepted Tedtaotao's framing and "the issue [he] now seeks to raise was technically embraced in our remand order," an appellant nevertheless waives an argument where "all of the factual predicates upon which defendant's present contention rests were available at the time of defendant's initial appeal." *Senior*, 41 Cal. Rptr. 2d at 5.

[15] Tedtaotao frames the effect of the new judgment too broadly. In *United States v. Wright*, the appellate court in the defendant's first appeal reversed a conviction due to the improper admission of evidence. 716 F.2d 549, 550 (9th Cir. 1983). In the second appeal, the defendant attempted to contest the seizure of additional evidence not at issue in the first appeal. The Ninth

Circuit, however, refused to reach the merits because the relevant search had been subject to a suppression hearing that was held prior to the initial appeal. *Id.* Here, Tedtaotao argues that resentencing opened up all issues incorporated into the new judgment. But this goes too far.

> It does not follow that because [a convicted defendant] appealed one aspect of the sentence, they preserved every other objection for review on remand. In fact, because they had already objected in the [trial] court on those very grounds, they had every incentive and opportunity to appeal the sentence on those grounds as well. Because they did not, the arguments are waived.

United States v. Griffith, 522 F.3d 607, 610 (5th Cir. 2008).

IV. CONCLUSION

[16] For the reasons discussed above, we hold that Tedtaotao waived for direct appeal issues that could have been but were not raised in his initial appeal. Therefore, the Judgment of Conviction is **AFFIRMED**.

/s/
F. PHILIP CARBULLIDO
Associate Justice

/s/
ROBERT J. TORRES
Associate Justice

/s/
KATHERINE A. MARAMAN
Chief Justice