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CASE COMMENT

STANDARD OF REVIEW FOREIGN STATUTORY LAW AND INTERNATIONAL LAW

*Andy Ingram**

I. FACTS

The U.S. Coast Guard took the defendant into custody after his vessel, named *Notty*, was seized in the Caribbean Sea at the end of a high-speed chase.¹ During the chase, the occupants of the vessel jettisoned many bales of marijuana.² McPhee and the two other occupants were taken into custody.³ The master of the vessel claimed that it was registered in the Bahamas, but after the Bahamian authorities did not provide an affirmative and unequivocal assertion that the vessel was Bahamian, the Coast Guard deemed the vessel stateless and took the crew to Key West, Florida.⁴

McPhee and the other crew members were indicted for conspiracy to possess marijuana with intent to distribute (count one) and possession of marijuana with intent to distribute (count two) while on board a vessel subject to the jurisdiction of the United States, in violation of 46 U.S.C. appendix §§ 1903(j) and 1903(a).⁵ McPhee entered a conditional plea of

* J.D., University of Florida Levin College of Law, May 2005.

1. *United States v. McPhee*, 336 F.3d 1269, 1271 (11th Cir. 2003). The Coast Guard Cutters *Tampa* and *Bear* had been conducting law enforcement surveillance between eastern Cuba and the Caribbean. When the *Bear* ordered the *Notty* to heave to, the *Notty* attempted to flee. The *Tampa* fired warning shots in front of the *Notty*, but the *Notty* used evasive maneuvers for approximately twenty more minutes. The cutters and air surveillance eventually stopped the *Notty* and a party from the *Bear* boarded it.

2. *Id.* at 1272. Coast Guard personnel observed the crew of the *Notty* tossing packages overboard. A total of 2092 pounds of marijuana were recovered.

3. *Id.* at 1271. The two crew members taken with McPhee were Darron Lloyd Rolle and Dave Mario Williams. All three claimed Bahamian nationality.

4. *Id.* No registration was found on board the vessel. Inquiry directed at the Bahamian authorities did not result in an affirmative and unequivocal assertion that the vessel was registered in the Bahamas.

5. 46 U.S.C. app. § 1903.

(a) Vessels of the United States or vessels subject to the jurisdiction of the United States

It is unlawful for any person on board a vessel . . . subject to the jurisdiction of the United States . . . to knowingly or intentionally manufacture or distribute, or

guilty to count one.⁶ He reserved the right to appeal the district court's denial of his motion to dismiss for lack of jurisdiction under Federal Rules of Criminal Procedure 11(a)(2).⁷ McPhee claimed that the *Notty* never left the territorial waters of the Bahamas and, therefore, that the United States did not have the authority to arrest him.⁸ The Eleventh Circuit Court of Appeals affirmed that the United States did have jurisdiction because the vessel was stateless and intercepted on the high seas.⁹

II. HISTORY

The Coast Guard was able to seize the *Notty* because it was a stateless vessel operating in international waters.¹⁰ The district court concluded that the *Notty* was in international waters because it was more than twelve nautical miles beyond the Bahamas.¹¹ In cases dealing with international jurisdiction, the appellate courts review the trial court only for clear error.¹²

The right of the United States to exercise jurisdiction over stateless vessels operating on the high seas is well established in case law.¹³ The

to possess with intent to manufacture or distribute, a controlled substance.

(j) Attempt or conspiracy

Any person who attempts or conspires to commit any offense defined in this chapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

Id.

6. *McPhee*, 336 F.3d at 1270-71. He was given a 57-month sentence for conspiracy to possess with intent to distribute 100 kilograms or more of marijuana.

7. FED. R. CRIM. P. 11(a)(2) provides

With the consent of the court and the government, a defendant may enter a conditional plea of guilty or nolo contendere, reserving in writing the right to have an appellate court review an adverse determination of a specified pretrial motion. A defendant who prevails on appeal may then withdraw the plea.

8. *McPhee*, 336 F.3d at 1272.

9. *Id.* at 1278.

10. *Id.* at 1272.

11. *Id.*

12. *Id.* at 1271.

13. *United States v. Holmes*, 18 U.S. (5 Wheat.) 412, 416-17 (1820); *United States v. Klintonck*, 18 U.S. (5 Wheat.) 144, 152 (1820). These early cases discuss the government seizing and trying individuals aboard stateless vessels on the high seas for piracy.

Eleventh Circuit in *United States v. Marino-Garcia*, recently affirmed this principle.¹⁴ In *Marino-Garcia*, the Coast Guard seized another vessel transporting marijuana in the Caribbean.¹⁵ The defendants claimed that the government had no jurisdiction over them because there was no evidence that the marijuana was destined for the United States, and therefore the United States had no legitimate interest in the activities of the vessel.¹⁶ The Eleventh Circuit responded by ruling that a nexus between the drug traffickers and the United States was unnecessary because all stateless vessels on the high seas are subject to seizure by any nation.¹⁷ The circuit court affirmed the criminal sentences of the crew members.¹⁸ The ruling in this case is an affirmation of customary international law as interpreted by most commentators.¹⁹

The “U.N. Convention on the Law of the Sea” (Convention) gives every coastal nation twelve nautical miles of territorial sea in which to exercise exclusive jurisdiction.²⁰ The twelve nautical miles are measured from the base line.²¹ A normal base line is the low water line along the coast as marked on large-scale charts officially recognized by the coastal state.²² The low water line is the elevation of the water at low tide.²³ The low tide elevation is defined as a naturally formed area of land, which is surrounded by and above water at low tide but is submerged at high tide.²⁴ Although the United States is not a party to the Convention, the United States regards the Convention as being customary international law with

14. *United States v. Marino-Garcia*, 679 F.2d 1373 (11th Cir. 2003).

15. *Id.* at 1378.

16. *Id.*

17. *Id.* at 1383.

18. *Id.* at 1387.

19. *Marino-Garcia*, 679 F.2d at 1382-83. The opinion discusses many cases spanning U.S. legal history, as well as the works of legal scholars.

20. U.N. Convention on the Law of the Sea, Dec. 10, 1982, art. 3, pt. II, § 2, 21 I.L.M. 1245, 1272.

21. *Id.*

22. *Id.* art. 5.

23. *Id.*

24. *Id.* art 13(1).

exceptions not relevant here.²⁵ The principle is codified in the Restatement (Third) on Foreign Relations Law.²⁶

In cases dealing with international jurisdiction issues such as the one presented in the instant case, an appellate court reviews the decision of the lower court only for clear error.²⁷ In *United States v. Tinoco*, the Coast Guard seized a vessel that was carrying cocaine.²⁸ The defendants appealed the government's jurisdiction over them.²⁹ The Eleventh Circuit affirmed the convictions by the trial court, stating that it only reviewed this issue for clear error.³⁰

III. INSTANT CASE

The instant case concerns one of jurisdiction in the territorial waters of another sovereign, and the determination of how those waters are measured. The Eleventh Circuit heard the two main arguments of the defendant on appeal,³¹ and found both of them insufficient to reverse or remand the trial court's decision.³² The instant court found that the arguments by the defendant were not of sufficient weight to overcome the deference given to the trial court.³³

25. Proclamation on an Exclusive Economic Zone, Mar. 10, 1983, 22 I.L.M. 461, 461-62. The United States does not recognize the Convention as it applies to deep seabed mining. The government does recognize the customary law on territorial seas with regard to traditional ocean uses such as navigation. The government recognizes territorial sea claims up to twelve nautical miles.

26. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 522 (1987).

27. *United States v. Tinco*, 304 F.3d 1088, 1114 (11th Cir. 2002).

28. *Id.* at 1093. The Coast Guard chased the suspect ship as it tossed bails of cocaine into the water. After catching the suspect ship, additional bales of cocaine were found. All men on board claimed Colombian nationality and Colombian registry was claimed for their ship. The ship bore no markings to indicate Colombian registry. The ship was deemed stateless by the Coast Guard.

29. *Id.* at 1114. When the Coast Guard radioed the Colombian Navy to find out if the ship and crew were Colombian, the Coast Guard told the Colombian Navy that the crew of the suspect ship were uncooperative to questions. The Colombian Navy responded that it could not confirm the registry of the ship without more information. This allowed the Coast Guard to declare the vessel stateless. The crew contest that they were cooperative to questioning, and so the ruling of the Colombian Navy was based on false information.

30. *Id.*

31. *United States v. McPhee*, 336 F.3d 1269, 1274 (11th Cir. 2003).

32. *Id.* at 1278.

33. *Id.*

The first main argument for the defendant was that the trial court erred in judging the position of the *Notty* when the Coast Guard cutter *Tampa* intercepted it.³⁴ There were at least three different sources for the position of the Coast Guard vessel.³⁵ The Law Enforcement checklist placed the *Tampa* three miles north of Cuba.³⁶ The Miami Command Center Chronological Phone Log (Phone Log) placed the *Tampa* within twelve miles of Cay Verde and Cay Santo Domingo.³⁷ The Phone Log is prepared by individuals in Miami based on coordinates transmitted to them via satellite from the *Tampa*.³⁸ The third source of the position of the *Tampa* was the navigation chart kept by the crew of the *Tampa*.³⁹ This chart placed the *Tampa* in international waters and was the one chosen by the trial court and affirmed by the instant court as being the most accurate source of information.⁴⁰ The crewman responsible for charting the *Tampa*'s position testified that the *Notty* was no more than 1000 yards from the *Tampa*.⁴¹

The instant court briefly outlined its reasons for accepting one information source and rejecting two others. At oral argument, counsel for the defendant conceded that the Law Enforcement Checklist was not accurate.⁴² The Phone Log showed the *Tampa* in a position close to or in violation of standing orders.⁴³ A crewman from the *Tampa* testified that this proves that the Phone Log is inaccurate.⁴⁴ The instant court found that there was no clear error in the trial court's decision to accept one information source as accurate, and reject two others.⁴⁵

34. *Id.* at 1274.

35. *Id.*

36. *McPhee*, 336 F.3d at 1274. This position is in the territorial waters of Cuba, as Cuba claims the twelve nautical miles customary in international law. This location is irrelevant however, as the defendant's counsel admitted at oral argument that this position is incorrect.

37. *Id.* This places the *Tampa* and the *Notty* within Bahamian territorial waters.

38. *Id.*

39. *Id.*

40. *Id.* This chart shows the *Tampa* seventeen miles east of Cay Santo Domingo. This position is ten miles south of the position shown by the Command Center.

41. *McPhee*, 336 F.3d at 1274. If this chart was marked accurately, this would have placed the *Notty* and the *Tampa* in international waters.

42. *Id.*

43. The standing order was "not to take the ship into water less than six meters deep." *Id.*

44. *Id.* at 1274. The crew man was Lieutenant Thomas F. Walsh. Walsh was the Operations Officer and Navigator on the *Tampa*. He was responsible plotting the *Tampa*'s position on the navigational chart accepted by the circuit court.

45. *Id.*

The defendant's second argument is that even if the navigation chart offered by the Coast Guard is accurate, it still places the *Notty* in Bahamian territorial waters and the Bahamian government did not consent to the enforcement of American law within its territorial waters.⁴⁶ The instant court chose not to address the issue of whether the Bahamas has accepted the enforcement of American law by the United States in the territorial waters of the Bahamas because it found that the *Notty* was in international waters.⁴⁷ The parties agreed that Bahamian territorial waters extend twelve nautical miles from its shores.⁴⁸ The determining question was from where to measure the twelve nautical miles.⁴⁹ The defense asserted that St. Vincent Rock is an island for purposes of measuring territorial waters.⁵⁰ The government asserted that St. Vincent Rock is a rock and not an island.⁵¹ Both parties agreed that the 1993 Archipelagic Waters and Maritime Jurisdiction Act of the Bahamas (the Act) provides the controlling definition.⁵² Judicial notice was taken of the Bahamas claim to a twelve mile territorial limit.⁵³ Applying the definitions in the Act, the instant court found that the base line from which the twelve mile limit is measured is the low water line along the coast of each island.⁵⁴ The instant court accepted that St. Vincent Rock is not an island because it is not marked on the *Tampa*'s navigational chart as an island.⁵⁵ A crewman from the *Tampa* testified that St. Vincent Rock does not qualify as land because it is normally submerged, and only above the water line part of the time.⁵⁶ The Act defines an island as a naturally formed area of land, which is

46. *McPhee*, 336 F.3d at 1275.

47. *Id.* at 1273.

48. *Id.* at 1276.

49. *Id.*

50. *Id.*

51. *McPhee*, 336 F.3d at 1276. The government argued that St. Vincent Rock was a rock and not an island; otherwise it would be called St. Vincent Island. The circuit court noted that labels are not altogether satisfying, because something could be both a rock and an island at the same time. To demonstrate this, the circuit court reproduced a substantial passage from Paul Simon and Art Garfunkel's song "I am a Rock." Paul Simon & Art Garfunkel, *I am a Rock*, on SOUNDS OF SILENCE (Columbia Records 1966).

52. *McPhee*, 336 F.3d at 1276. This Act was enacted by the legislature of the Bahamas as Act No. 32 of 1993 and is deposited with the United Nations.

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.* at 1277. Lieutenant Joseph Kramek, an attorney for the Coast Guard, gave this testimony.

surrounded by and above water at mean high water.⁵⁷ He also explained that St. Vincent Rock does not fit the definition of low tide elevations.⁵⁸ The Act defines low tide elevation as a naturally formed area of land, which is surrounded by and is above water at mean low water but is submerged at mean high water.⁵⁹ The instant court stated that the defendant submitted nothing to support a finding that St. Vincent Rock lies within the breadth of the Bahamian territorial sea.⁶⁰ The instant court reviewed the district court's finding for clear error that St. Vincent Rock is not an island.⁶¹

IV. ANALYSIS

The instant court was charged with the task of evaluating a ruling or international jurisdiction.⁶² To do this, the instant court needed to make a ruling on the standard of review for international jurisdiction and to determine whether a particular land formation qualified as a place from which to measure territorial waters.⁶³ The instant court decided to continue to allow broad discretion for both the trial court and the enforcing authority represented here by the Coast Guard.⁶⁴

The instant court's ruling that any "stateless vessel" on the high seas can be subjected to the jurisdiction of any sovereign is supported in case law and customary international law.⁶⁵ The Eleventh Circuit court in *United States v. Marino-Garcia* affirmed previous case law that any nation may subject stateless vessels on the high seas to its jurisdiction.⁶⁶ The case law on the right of the government to seize ships on the high seas and try the crew in criminal courts goes back at least as far as 1820, to the cases

57. *McPhee*, 336 F.3d at 1277. This definition comes from the Act section 2.

58. *Id.*

59. *Id.* This definition comes from the Act section 4(5).

60. *Id.* at 1277-78. The Act section 4(4) states that where a low tide elevation lies wholly or partly within the breadth of sea which would be the territorial sea of the Bahamas if all low tide elevations were disregarded for the purpose of measurement of the breadth thereof, the low tide elevation shall be treated as an island.

61. *Id.* at 1276.

62. *See McPhee*, 336 F.3d at 1275.

63. *See id.* at 1278.

64. *Id.*

65. *Id.*

66. *United States v. Marino-Garcia*, 679 F.2d 1373, 1383-84 (11th Cir. 2003).

of *United States v. Klintock*⁶⁷ and *United States v. Holmes*.⁶⁸ Additionally, customary international law recognizes this right of sovereigns as well.⁶⁹ The defendant did not challenge this assertion by the government.⁷⁰ The government had a strong basis to claim the right to seizure based on the depth and variety of the case law.⁷¹

The government's case depended on the location of the *Notty*, when the Coast Guard encountered it, and whether that point of water qualified as international waters.⁷² International waters are those waters twelve miles from the shoreline of the sovereign territory.⁷³ The instant court made this determination based on domestic law,⁷⁴ international law,⁷⁵ and the law of the Bahamas.⁷⁶ The instant court had to resolve the question concerning the location from which the twelve mile base line would be measured.⁷⁷ The instant court followed the wording of the Act when it chose to use the low water line along the coast of the nearest island.⁷⁸ The defendant claimed that St. Vincent Rock was the nearest island, and should be used to measure the territorial waters of the Bahamas.⁷⁹ Based on testimony from the crew of the *Tampa* stating that St. Vincent Rock was usually submerged, and bolstered by navigational charts showing the point as a part of the ocean, the instant court decided that St. Vincent Rock did not qualify as an island under the definition provided by the Act.⁸⁰ The instant court used multiple sources of law, navigational charts, and witness testimony to determine that the place where the *Notty* was located

67. *United States v. Klintock*, 18 U.S. (5 Wheat.) 144 (1820).

68. *United States v. Holmes*, 18 U.S. (5 Wheat.) 412 (1820).

69. *Marino-Garcia*, 679 F.2d at 1383-84. The discussion concludes that "stateless vessels have no rights under international law" and so all nations "have the right to assert jurisdiction over stateless vessels on the high seas." See *supra* text accompanying note 21.

70. *McPhee*, 336 F.3d at 1274.

71. See *id.* at 1278.

72. *Id.* at 1274-76.

73. U.N. Convention on the Law of the Sea, Dec. 10, 1982, art. 3, pt. II, § 2, 21 I.L.M. 1245, 1272.

74. Proclamation on an Exclusive Economic Zone, Mar. 10, 1983, 22 I.L.M. 461, 462.

75. U.N. Convention on the Law of the Sea, Dec. 10, 1982, art. 3, pt. 2, § 2, 21 I.L.M. 1245, 1272.

76. 1993 Archipelagic Waters and Maritime Jurisdiction Act of the Bahamas §§ 4(1), (3).

77. *McPhee*, 336 F.3d at 1273.

78. *Id.* at 1276.

79. *Id.* at 1275.

80. *Id.* at 1277. The Act section 2 defines an island as a naturally formed area of land which is surrounded by and above water at mean high water.

qualified as international waters.⁸¹ These many authoritative sources gave the instant court a solid foundation for its ruling of where the base line should be measured.⁸²

The final issue for the instant court to address was the validity of the source that told where the *Notty* was located.⁸³ The standard of review for this decision was clear error.⁸⁴ The navigational chart that was produced by the crew of the *Tampa* as it seized the *Notty* was accepted by the instant court as the most accurate source of information.⁸⁵ This chart prepared by the crew of the *Tampa* indicated that the behavior of the *Tampa*'s crew was legal.⁸⁶ The instant court made no mention of the potential conflict of interest.⁸⁷ The Miami Command Center Chronological Phone Log indicated that the crew was behaving improperly by disobeying standing orders.⁸⁸ The testimony by the crew, which was accepted by the trial court, was that the crew could not have behaved improperly by seizing the *Notty* in the territorial waters of another sovereign because the crew did not behave improperly by violating standing orders, despite what the satellite from the Phone log had indicated.⁸⁹ The instant court chose to make no further inquiry as to the actual location of the two vessels.⁹⁰ The instant court also chose to make no inquiry as to whether the *Notty* was actually a stateless vessel.⁹¹ This reasoning is circular.⁹² The confirmation that the crew did not violate standing orders in seizing the *Notty* is based on the assumption that the crew did not violate standing orders by taking the ship into sovereign territory.⁹³

Based on the instant court's information, it found that the decision of the trial court did not amount to clear error, and so must be affirmed.⁹⁴ The trial court's findings as to the facts of the case were affirmed because the instant court did not have a "definite and firm conviction that a mistake

81. *See id.*

82. *See McPhee*, 336 F.3d at 1277.

83. *Id.* at 1274.

84. *Id.*

85. *Id.*

86. *Id.* The chart indicated that the *Tampa* had not violated the territorial waters of any nation when it seized the *Notty*.

87. *See McPhee*, 336 F.3d at 1277.

88. *Id.* at 1274.

89. *Id.*

90. *Id.*

91. *Id.*

92. *See McPhee*, 336 F.3d at 1274.

93. *See id.*

94. *Id.*

had been committed.”⁹⁵ The instant court said that even if they would have decided differently, the trial court could not be reversed because its findings were plausible.⁹⁶ Even more deference was given to the trial court’s findings concerning the credibility of witnesses.⁹⁷ The instant court reaffirmed the commitment of deferring to the trial court as a practice necessary for the proper functioning of the judiciary.⁹⁸

V. CONCLUSION

This case is an example of the deference given to trial courts by appeals courts, and the deference given to the government by trial courts. The charts of the Coast Guard showing that St. Vincent Rock was not an island were accepted without question.⁹⁹ Of the three sources showing the position of the Coast Guard vessels, the one accepted was prepared by the Coast Guard crew members with no third party accountability.¹⁰⁰ Objective information from a third party was rejected as less reliable than information provided by those whose self-interest were involved.¹⁰¹ In order to keep the wheels of the judiciary turning, appeals courts must only question the findings of trial courts in the most egregious of circumstances. If the view of the instant court is adopted as the majority view, it would give the Coast Guard needed flexibility in securing the borders of the United States, but may create a precedent of seizing vessels in violation of international law. Issues of applying standards of review to factual findings, witness credibility, statutory interpretation, and jurisdiction will continue to be dealt with in a way that allows the courts to function properly.

95. *Id.* at 1275.

96. *Id.*

97. *McPhee*, 336 F.3d at 1274. The instant court noted that the deference would be given to the trial court regarding witness testimony even if the instant court did find clear error.

98. *Id.* The instant court quoted the U.S. Supreme Court in explaining the necessity of deferring to the trial level courts. The explanation for the deference was the expertise of trial judges, and the desire to conserve judicial resources.

99. *See id.* at 1278.

100. *See id.*

101. *See id.* at 1275-76.