

2014 FEB 26 PM 3:11

BY *[Signature]*
CLERK OF THE COURT

FOR PUBLICATION

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

**IN THE SUPERIOR COURT
FOR THE
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS**

**COMMONWEALTH OF THE
NORTHERN MARIANA ISLANDS,**

Plaintiff,

v.

DENMARE E. MALABANAN,

Defendant.

Criminal Case No. 07-0075

**ORDER GRANTING DEFENDANT'S
MOTION TO DISMISS REVOCATION,
TERMINATING PROBATION, AND
ORDER AND JUDGMENT
CONVERTING RESTITUTION IN
CRIMINAL CASE INTO A CIVIL
JUDGMENT**

I. INTRODUCTION

THIS MATTER came before the Court for a Status Conference on December 23, 2013 at 1:30 p.m. in Courtroom 202A. Denmare E. Malabanan ("Defendant") was represented by Assistant Public Defender Eden Schwartz. The Commonwealth of the Northern Mariana Islands ("the Commonwealth" or "the CNMI") was represented by Assistant Attorney General, Jacinta M. Kaipat. On December 2, 2013, Defendant filed a Motion to Dismiss Revocation of Probation. At the Status Conference, Defendant requested a date when this Motion could be heard. The hearing on this Motion was set for January 16, 2014, at 1:30 p.m.

II. PROCEDURAL AND FACTUAL BACKGROUND

Pursuant to a plea agreement filed on December 27, 2007, Defendant pleaded guilty to Assault and Battery as set forth in Count II of the Information filed on April 13, 2007. On

1 December 27, 2007,¹ Defendant was sentenced to one year imprisonment, all suspended
2 except for four days.² Defendant was ordered to pay \$2,000.00 in restitution, and Defendant
3 was placed on probation for a period of one year with a \$100.00 per year probation fee.
4 Defendant's probation term was extended four times. Due to the several extensions,
5 probation was not set to terminate until December 27, 2013. Defendant requested the
6 extensions to allow for more time to pay the restitution and probation fees. Defendant's
7 requests were granted. The Commonwealth asserts that, to date, Defendant still owes
8 \$60.00³ in probation fees and \$1,492.00 in restitution.

9 To detail the extensions, at a hearing on November 9, 2011, at 1:30 p.m., Defendant
10 requested an extension of his probation, apparently, to allow more time for Defendant to pay
11 off his restitution. The Court granted Defendant's request. Defendant would have violated
12 the restitution condition of his probation then and there had the Court not granted the
13 extension. Again, on December 3, 2012, Defendant's probation was extended, per
14 Defendant's request, until December 27, 2013. Again, Defendant requested the extension,
15 apparently, to allow more time to pay off the still outstanding restitution and probation fees.

16 On June 24, 2013, Defendant was arrested on two counts of Assault and Battery, one
17 count of Criminal Mischief, one count of Criminal Trespass, and two counts of Disturbing
18 the Peace, as charged in Criminal Case No. 13-0162. In response to this arrest, the Office of
19 Adult Probation ("OAP") petitioned the Court to revoke Defendant's probation, claiming
20 that Defendant has violated the terms of his probation by failing to obey all laws of the
21 CNMI.

22 Defendant asserts that his probation cannot be revoked because the Court lacked
23 jurisdiction to extend probation beyond the statutory maximum of three years for a
24 misdemeanor offense.

26 ¹ Defendant's Motion to Dismiss erroneously states that Defendant's probation term began on December 28,
2007.

27 ² Defendant was given credit for time already served from March 31, 2007 until April 4, 2007.

28 ³ The Commonwealth actually asserted that Defendant owes \$260.00 in probation fees; however, as discussed
below, the maximum amount of time for probation in this case is three years; thus, the probation fee is capped
at \$300.00, not \$500.00 as is asserted.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23

III. LEGAL STANDARD

On this Motion, the Court is faced with two issues: (1) whether the Court has authority to extend probation beyond the statutory maximum; and (2) if not, does the Court retain jurisdiction over the outstanding restitution and probation fee debts.

A. The Court’s Authority and the Statutory Maximum Probation Term

Probation in the CNMI is controlled by one of two statutes: 6 CMC § 4105 or 6 CMC § 4113. See *Commonwealth v. Monton*, 2008 MP 14 ¶ 7. Probation in this matter is imposed under 6 CMC § 4105(b)(1), which states, “[t]he court may impose any period of probation, not to exceed: (1) [t]hree years from the date the probationer is sentenced, or released from any period of incarceration, whichever is greater, upon conviction for any misdemeanor.”⁴ A search of the CNMI’s case law has returned no cases on point; however, persuasive opinions from federal appellate courts have analyzed similar issues. The Ninth Circuit has stated, “[i]t is irrelevant that the defendant agreed to the extension of the probationary period. . . . [T]he defendant’s consent cannot be used to make an illegal extension of probation legal.” *United States v. Rodriguez*, 682 F. 2d 827, 830 (9th Cir. 1982).⁵

In *United States v. Workman*, 617 F.2d 48, 51 (4th Cir. 1980), at the end of the defendant’s probationary period, a fine that was imposed as part of his probation remained partially unpaid. *Id.* The fact that the probation period expired did not prevent the court from exercising its jurisdiction to enforce the payment of the fine. *Id.* The district court in

⁴ Note, this does not states that the court can impose three years probation for a misdemeanor, it states that the court only has probation jurisdiction for three years following date the probationer is sentenced or released, unless the period is tolled as discussed in footnote 6. In reading this, it appears that, if a defendant is sentenced and released on May 5, 2014, and the defendant is not ordered to go to report to OAP until May 5, 2015, the statutory maximum would be May 5, 2017, regardless of the date the defendant’s probation actually begins.

⁵ However, the Second Circuit has stated that they “reject [the] contention that the district judge [is] without jurisdiction to revoke probation [after the probationary period] had expired. . . . probation may be revoked within five years of the date probation commences . . . so long as the violation . . . occur[ed] during the probation period.” *Gammarano v. United States*, 732 F. 2d 273, 276-77 (2d Cir. 1984). Thus, if it were the case that Defendant violated his probation within the statutory maximum time, whether or not the statutory maximum time has passed, it appears the Court may still be able to revoke probation.

1 *Workman* was authorized to order an execution against the defendant’s property in order to
2 satisfy the amount outstanding, despite the expiration of the probation period. *Id.*⁶

3 Interestingly, some states, such as Arizona, have statutes that allow for the extension
4 of probation beyond the statutory maximum in a few specific situations, one of which is the
5 issue here, to allow more time to repay restitution. See Ariz. Rev. Stat. § 13-902 (2013).
6 The CNMI, however, has no such statute.

7
8 **B. Outstanding Restitution and Probation Fee**

9 “The [c]ourt may order that a probationer’s wages from employment be garnished to
10 satisfy any outstanding restitution sum” at the termination of probation. 6 CMC § 4109(c).
11 Additionally, “[when] restitution is ordered as a condition of probation . . . a restitution order
12 . . . is not discharged by the completion of any period of probation, or by the serving of any
13 sentence imposed.” 6 CMC § 4109(g). 6 CMC § 4109(h) states:

14 A restitution order under this section is a judgment lien that:

15 (1) Attaches to the property of the person subject to the order;

16 (2) May be perfected; and

17 (3) May be enforced against the probationer as if the order were a civil
18 judgment enforceable by execution, to satisfy any payment that is delinquent
19 under the restitution order by the person in whose favor the order is issued, or
20 the person’s assignee. Nothing in this section limits the authority of the court
21 to enforce fines and orders of restitution to the victims, including, but not
22 limited to, the court’s authority to revoke the probationer’s probation for
failure to comply with any part of the restitution order.

23
24 ⁶ In *Workman*, the Fourth Circuit analyzed tolling in relation to statutory maximums on probationary time
25 limits, a similar issue. In *Workman*, the court analyzed 18 U.S.C. § 3651, a federal statute similar to 6 CMC §
26 4105, which limits federal probation, including extensions, to a maximum of five years. *Id.* at 50. The court in
27 *Workman* stated that the term of probation is tolled for anytime that the defendant is not under probationary
28 supervision due to his own bad acts, including imprisonment or punishment for an unrelated offense, a
violation of the conditions of his/her probation, or anytime the defendant is outside of the jurisdiction and not
under probationary supervision. *Id.* at 51. However, the term of probation is not tolled when the interruption
in probationary supervision is in no part due to the defendant. *Id.* In *Workman*, the defendant successfully
appealed a probation revocation action based upon infringement of his constitutional rights. *Id.* The eleven
months and ten day gap in his probation during the probation revocation hearing and appeal were not tolled
against his five year term. *Id.* Such a ruling would be persuasive in future probation issues where it applies.

1 probation exceeds the statutory maximum. *See* CMC § 4105(b)(1). Following the Ninth
2 Circuit’s ruling in *Rodriguez*, 682 F. 2d at 830, and extending it to the CNMI, Defendant’s
3 consent to an extension of the probationary period beyond the statutory maximum is
4 irrelevant. Thus, the fact that Defendant requested the extension is inconsequential. The
5 Court cannot extend probation any further than the statutory maximum.⁷

6 Defendant’s requests for the Extensions were granted because he complied with
7 every term of his probation except for the payment of restitution and the payment of the
8 probation fees. Defendant’s effort to comply with probation was noticed by the Court and,
9 thus, the Court was lenient when Defendant requested the Extensions. Defendant is now
10 challenging the Court’s leniency. The case law and statutes support the contention that the
11 Court cannot now revoke his probation, more than three years after the date Defendant was
12 sentenced. *See Gammorano*, 732 F. 2d at 276-77; *see also* 6 CMC § 4109.

13 The Court retains jurisdiction over the outstanding debts, despite its lack of
14 jurisdiction to revoke probation. *See* 6 CMC § 4109. Pursuant to 6 CMC § 4109, the Court
15 may convert the outstanding debt into a civil judgment and execute upon it. Thus, the
16 outstanding \$1,552.00 shall be converted into a split civil judgment. \$60.00 shall be
17 converted into a judgment in favor of the OAP. \$1,492.00 shall be converted into a civil
18 judgment in favor of the victim, Mr. Joaquin Sablan.⁸

19 \\\
20 \\\
21 \\\
22 \\\
23 \\\
24 \\\

25 _____
26 ⁷ Enacting a statute similar to the Arizona statute discussed above, namely, Ariz. Rev. Stat. § 13-902 is left to the
Legislator’s perogative.

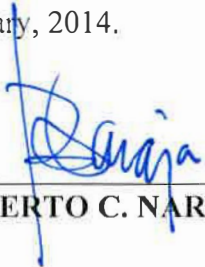
27 ⁸ All of the methods for collecting a civil judgment shall be available to the judgment creditors in this case for
28 use against Defendant. 7 CMC §§ 4201-4210. The split and individual civil judgments shall accrue interest at
the statutory rate of nine percent per year from the date that the judgment was entered. 7 CMC § 4101. With
the assistance of the OAP, the Court shall retain civil jurisdiction over this matter and shall oversee and
maintain the enforcement of this judgment.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

IV. CONCLUSION

The Commonwealth did not oppose this Motion and the statutory maximum three year for probation term has expired, thus, Defendant's Motion to Dismiss Revocation of Probation in the instant criminal matter is granted. Defendant's outstanding probation conditions, including the probation fee of \$60.00 and restitution in the amount of \$1,492.00 are hereby converted into civil judgments

IT IS SO ORDERED this 26th day of February, 2014.



ROBERTO C. NARAÑA, Presiding Judge