

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

**COMMONWEALTH OF THE NORTHERN
MARIANA ISLANDS,**

Plaintiff,

v.

PEDRO PANGELINAN CABRERA,

Defendant.

Criminal Case No. 00-03 11

**ORDER GRANTING
MOTION TO WITHDRAW
PLEA AGREEMENT**

I. PROCEDURAL BACKGROUND

This matter came before the court on August 8, 2001, in Courtroom 220 at 9:00 a.m. on Defendant's motion to withdraw plea agreement. G. Anthony Long, Esq., appeared on behalf of the Defendant, Pedro Pangelinan Cabrera. Assistant Attorney General David Walsh, Esq., appeared on behalf of the Commonwealth. The court, having reviewed the briefs and having heard and considered the arguments of counsel, now renders its written decision.

II. FACTS

On May 23, 2001, this matter came before the court for a change of plea hearing. The parties presented the court with a written plea agreement entered into pursuant to Corn. R. Crim. P. 11(e)(1)(C),

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FOR PUBLICATION

The terms of the plea agreement provided that Defendant agreed to plead guilty to the crime of Kidnaping, in violation of 6 CMC § 1421(a)(2) as alleged in Count I of the Information. In exchange Defendant agreed to be sentenced to twenty (20) years of incarceration, with the implicit understanding that pursuant to 6 CMC § 4252 he would become eligible for parole **after** serving one-third of the sentence.

Also on May 23, 2001, the court entered a Judgment and Commitment Order wherein the court accepted Defendant's plea and adjudged Defendant to be guilty of Kidnaping, in violation of 6 CMC § 1421(a)(2). The court then proceeded to impose a sentence of twenty (20) years of incarceration without the possibility of parole.

On June 12, 2001, Defendant filed a motion to withdraw the plea agreement on the ground that the court improperly sentenced Defendant to twenty (20) years of incarceration without the **possibility** of parole when the plea agreement contained an implicit understanding that Defendant was to be sentenced to twenty (20) years of incarceration with the possibility of parole.

III. ISSUE

Whether the court shall grant Defendant's motion to withdraw the plea agreement on the **ground** that the court lacks the discretion to **modify** a written plea agreement entered into pursuant to Corn. R. Crim. P. 11(e)(1)(C).

IV. ANALYSIS

A. Timeliness of Motion to Withdraw Plea Agreement.

Pursuant to Corn. R. Crim. P. 32(d), "[a] motion to withdraw a plea of guilty. . . may be made only before sentence is imposed or imposition of sentence is suspended; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his/her plea." See Corn. R. Crim. P. 32(d). "The standard of review of the denial of a motion to withdraw a guilty plea after sentence is whether the trial court exceeded the bounds of discretion in concluding that there was no manifest injustice." *Commonwealth v. Cabrera*, 2 N.M.I. 315, 316 (1991), *aff'd* 979 F.2d 854 (9th Cir. 1992).

Here, Defendant was sentenced on May 23, 2001. Defendant did not move to withdraw his plea until June 12, 2001. As such, Defendant's motion is untimely. However, in the interest of preventing manifest injustice, the court exercises its discretion under Corn. R. Crim. P. 32(d) to hear Defendant's motion.

B. Authority of the Trial Court to Modify Plea Agreements / *Commonwealth v. Ge Ai Ping*.

There are three categories of Rule 11 plea agreements: an agreement that moves for the dismissal of other charges under Corn. R. Crim. P. 11(e)(1)(A); an agreement that makes a recommendation or agrees not to oppose the defendant's request for a particular sentence with the understanding that such a recommendation or request shall not be binding upon the court under Corn. R. Crim. P. 11(e)(1)(B); and an agreement that a specific sentence is the appropriate disposition of the case under Corn. R. Crim. P. 11(e)(1)(C). See Corn., R. Crim. P. 11, see also *United States v. Fernandez*, 960 F.2d 771, 773 n.1 (9th cir. 1992).

A plea agreement made pursuant to Corn. R. Crim. P. 11(e)(1)(B) differs from those made under Corn. R. Crim. P. 11(e)(1)(A) and Corn. R. Crim. P. 11(e)(1)(C) in that it is made "with the understanding that such recommendation or request shall not be binding on the court." See Corn. R. Crim. P. 11(e)(1)(B). When it is unclear whether the parties are proceeding pursuant to Corn. R. Crim. P. 11(e)(1)(A), Corn. R. Crim. P. 11(e)(1)(B), or Corn. R. Crim. P. 11(e)(1)(C), as often occurs in traffic cases, the court construes the plea agreement to be a non-binding recommendation under Corn. R. Crim. P. 11(e)(1)(B).

Here, however, the court was presented with a written plea agreement entered into pursuant to Corn. R. Crim. P. 11(e)(1)(C). In *Commonwealth v. Ge Ai Ping*, the Commonwealth Supreme Court held that "the plain language of Rule 11 makes clear that when the court is presented with a [Rule 11(e)(1)(A) or (C)] plea agreement, the court may only accept or reject the agreement in its entirety." *Commonwealth v. Ge Ai Ping*, App. No. 97053 (N.M.I. Sup. Ct. Jul. 26, 1999) (Opinion at 4) citing Corn. R. Crim. P. 11(e)(3). "If the court accepts the [plea] agreement, the court must inform the defendant that the court 'will embody in the judgment and sentence the disposition provided for in the plea agreement.'" *Id.*, citing Corn. R. Crim. P. 11(e)(4). "If the court rejects the agreement, the court

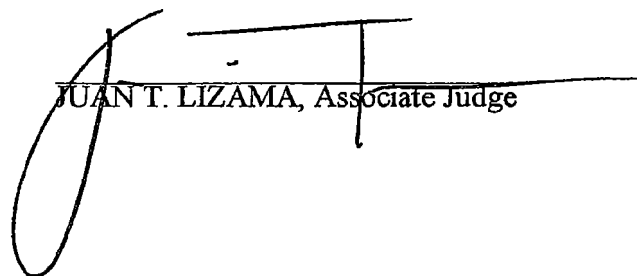
must so inform the parties, advise the defendant that the court is not bound by the plea agreement, and **afford** the defendant the opportunity to withdraw his plea.” *Id.*

In Commonwealth v. Ge Ai Ping the Commonwealth Supreme Court reversed the trial court because it imposed a lesser sentence on the defendant than that set forth in a plea agreement made pursuant to Corn. R. Crim. P. 11(e)(1)(C). *See Commonwealth v. Ge Ai Ping*, App. No. 97053 (N.M.; Sup. Ct. Jul. 26, 1999) (Opinion). Here, the court imposed a greater sentence than that set forth in the plea agreement. The court sentenced Defendant to twenty (20) years of incarceration without the possibility of parole despite the fact that the plea agreement contained an implicit understanding that Defendant was to be sentenced to twenty (20) years of incarceration with the possibility of parole. The holding in *Commonwealth v. Ge Ai Ping* applies to any modification of a plea agreement made pursuant to Corn. R. Crim. P. 11(e)(1)(C). As such, the court finds that it must **afford** Defendant the **opportunity** to withdraw **his** plea.

V. CONCLUSION

For the foregoing reasons, the court finds that it must afford Defendant the opportunity to withdraw his plea. As such, Defendant’s motion to withdraw the plea agreement is hereby GRANTED. A status conference is set for September 10, 2001, in Courtroom 220 at 1:30 p.m.

So ORDERED this 14 day of August, 2001.


JUAN T. LIZAMA, Associate Judge