

IN THE
SUPREME COURT
OF THE
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS,
Plaintiff-Appellee,

v.

MARTIN I. KAPILEO,
Defendant-Appellant.

Supreme Court No. 2013-SCC-0037-TRF

Superior Court No. 12-01675-TR

OPINION

Cite as: 2016 MP 1

Decided April 5, 2016

Eden Schwartz and Michael Sato, Assistant Public Defenders, Office of the
Public Defender, Saipan, MP, for Defendant-Appellant.

Brian Flaherty and Emily Cohen, Assistant Attorneys General, Office of the
Attorney General, Saipan, MP, for Plaintiff-Appellee.

BEFORE: ALEXANDRO C. CASTRO, Chief Justice; JOHN A. MANGLONA, Associate Justice; PERRY B. INOS, Associate Justice.

MANGLONA, J.:

¶ 1 Defendant-Appellant Martin I. Kapileo (“Kapileo”) argues the trial court erred by failing to order a presentence investigation report (“PSI”) and by imposing an insufficiently individualized sentence. Additionally, he asserts remand to a different sentencing judge is necessary to minimize the suspicion of partiality. For the following reasons, we VACATE his sentence and REMAND for resentencing.

I. FACTS AND PROCEDURAL HISTORY

¶ 2 Kapileo, an off-duty police officer, collided with a pedestrian while driving his police car and failed to stop at the scene of the accident. He was convicted of multiple traffic code violations, including 9 CMC § 6101(a), which states “[t]he operator of any vehicle involved in an accident resulting in injury or death to any person or in damage to any real or personal property shall immediately stop the vehicle at the scene of the accident.”

¶ 3 At the sentencing hearing, Kapileo neither requested a PSI nor was one ordered by the trial court. However, the court allowed statements from both Kapileo and his spouse. Kapileo explained he was a former police officer and has five children, one of whom is disabled. His spouse acknowledged that her husband made a mistake and she apologized for his actions. The court then considered each party’s sentencing recommendation.

¶ 4 For violating § 6101(a), Kapileo was fined the minimum amount of \$200 but was sentenced to the maximum of five years imprisonment without the possibility of probation, parole, work release, weekend release, early release or other similar programs;¹ for violating 1 CMC § 7406(d), he was fined the

¹ The terms of the sentence in the oral pronouncement differs from those in the Sentencing and Commitment Order. At the sentencing hearing, the trial court imposed a “minimum mandatory [fine] of \$200,” but in the sentencing order, it did not impose a fine. *Compare* Tr. 345, *with Commonwealth v. Kapileo*, Traff. No. 12-01675 (NMI Super. Ct. July 31, 2013) (Sentencing and Commitment Order).

First, we note that there is not a “minimum mandatory” fine. Section 6101(f) provides a punishment of “imprisonment of not less than 90 days nor more than five years or by a fine of not less than \$200 nor more than \$2,000, or by both.” Thus, punishment under § 6101(f) can include any combination of 90 days to 5 years imprisonment and/or a \$200 to \$2,000 fine. Section 6101(f) does not require imposition of both a fine and imprisonment.

Second, when “oral and written criminal sentencing orders vary, an unambiguous oral order prevails, unless the written order is corrected under [NMI Rule of Criminal Procedure 36].” *Commonwealth v. Santos*, 4 NMI 348, 350–51 (1996). Here, the court unambiguously imposed the \$200 fine and the written order was not corrected under Rule 36. Thus, the oral pronouncement of the \$200 fine is the prevailing order.

maximum amount of \$500 but did not receive a term of imprisonment; for the other traffic offenses,² he was fined a total of \$1,100.

II. JURISDICTION

¶ 5 We have jurisdiction over Superior Court final judgments and orders. NMI CONST. art. IV, § 3; 1 CMC § 3102(a).

III. STANDARDS OF REVIEW

¶ 6 The trial court's failure to order a PSI is reviewed for plain error because Kapileo "neither requested a PSI nor objected to the court's failure to order one." *Commonwealth v. Salasiban*, 2014 MP 17 ¶ 9. The trial court's sentencing process is reviewed for abuse of discretion. *Commonwealth v. Borja*, 2015 MP 8 ¶ 35.

IV. DISCUSSION

A. Presentence Investigation Report

i. Applicable Rules of Procedure

¶ 7 The Commonwealth asserts that the trial court did not err by failing to order a PSI, arguing the sentencing requirements under NMI Rule of Criminal Procedure 32(c) are inapplicable in traffic cases because NMI Rule of Traffic Procedure 8(b) specifically addresses sentencing procedures.

¶ 8 "Other rules and laws which govern criminal procedure shall, insofar as they are applicable, implement the rules prescribed by [the NMI Rules of Traffic Procedure]." NMI R. TRAFF. P. 2. In *Commonwealth v. Castro*, we held that both the traffic and criminal rules apply when a defendant is charged with a traffic violation punishable as a crime. 2002 MP 13 ¶ 19. Indeed, "[t]he rules of traffic procedure are not, and were not intended to be, the sole authority in traffic-related cases. . . . [They] exist to supplement other applicable rules." *Id.* If a traffic and criminal rule are not incongruous with one another, then both must be applied. *See id.* (applying two non-conflicting "distinct rules of procedure").

¶ 9 Here, like *Castro*, Kapileo was convicted of more than a mere traffic infraction—he was convicted of a crime.³ Further, NMI Rule of Traffic Procedure 8(b) and NMI Rule of Criminal Procedure 32(c)(1) do not conflict. Rule 32(c)(1) outlines when a defendant is entitled to a PSI:

The probation service of the court shall make a presentence investigation and report to the court before the imposition of sentence or the granting of probation unless, with the permission

² Kapileo was fined the maximum amount of \$500 for each violation of 9 CMC § 5853(a) and (c). For violating 9 CMC § 5408, he was fined the maximum amount of \$100.

³ Here, Kapileo's 9 CMC § 6101(a) conviction was punishable under 9 CMC § 6101(f). Section 6101(f) states that "[a]ny person violating the provisions of this section by failing to stop after being involved in an accident resulting in injury to any person . . . shall be guilty of a felony"

of the court, the defendant waives a presentence investigation and report, or the court finds that there is in the record information sufficient to enable the meaningful exercise of sentencing discretion, and the court explains this finding on the record.

The report shall not be submitted to the court or its contents disclosed to anyone unless the defendant has pleaded guilty or nolo contendere or has been found guilty, except that a judge may, with the written consent of the defendant, inspect a presentence report at any time.

In contrast, NMI Rule of Traffic Procedure 8(b) addresses a defendant's right to present witnesses: "[i]n all cases, except those where a plea of guilty has been entered, the court shall hear all the witnesses prior to judgment and sentence." Because the rules can be read together, they do not conflict; therefore, both must be applied.

ii. Rule of Criminal Procedure 32(c)

¶ 10 Kapileo asserts the trial court violated Rule of Criminal Procedure 32(c) because it failed to order a PSI. Further, he argues the lack of a PSI affected the outcome of the sentencing hearing because it would have revealed his police service record, other facts about his family and community involvement, and the extent of his physical disability. Additionally, Kapileo contends the error affected the fairness and integrity of the proceedings because PSIs are essential for individualized sentencing, increase accuracy and uniformity at sentencing, and aid appellate review.

¶ 11 We review the trial court's failure to order a PSI for plain error because Kapileo neither requested a PSI nor objected to the trial court's failure to order one. *Salasiban*, 2014 MP 17 ¶ 9. To prevail, the appellant must establish "the court's failure to order a PSI was an error that was plain and affected his substantial rights." *Id.* ¶ 10. If each element is met, we may exercise our discretion to remedy the error. *Id.* We will remedy the error if it "seriously affects the fairness, integrity or public reputation of judicial proceedings." *Id.* (quoting *Puckett v. United States*, 556 U.S. 129, 135 (2009)).

¶ 12 The trial court is required to order a PSI before sentencing unless the defendant waives his right to a PSI or the court explains how the record contains sufficient information enabling the meaningful exercise of sentencing discretion. NMI R. CRIM. P. 32(c)(1). Here, the trial court did not order a PSI nor did it explain why a PSI was unnecessary. Kapileo also did not waive his right to a PSI. Thus, the trial court erred and the error was plain or obvious. *See Salasiban*, 2014 MP 17 ¶¶ 18–21 (holding the trial court plainly erred because the defendant did not waive his right to a PSI and the trial court did not explain why a PSI was unnecessary).

¶ 13 To show that the error affected his substantial rights, the appellant must demonstrate "a 'reasonable probability' [the error] affected the outcome of the proceeding." *Id.* ¶ 11 (quoting *United States v. Marcus*, 560 U.S. 258, 262

(2010)). This standard “enforce[s] the policies that underpin Rule 52(b) generally, to encourage timely objection and reduce wasteful reversals by demanding strenuous exertion to get relief for unpreserved error.”⁴ *United States v. Dominguez Benitez*, 542 U.S. 74, 82 (2004). Thus, the appellant must show a reasonable probability that the error affected the outcome of the proceeding to their detriment: “if it is equally plausible that the error worked in favor of the [appellant], the [appellant] loses; if the effect of the error is uncertain so that we do not know which, if either side it helped, the [appellant] loses.” *United States v. Rodriguez*, 398 F.3d 1291, 1300 (11th Cir. 2005).

¶ 14 Here, Kapileo argues that the failure to order a PSI affected the outcome of the proceeding because it would have revealed mitigating circumstances and led to a more lenient sentence. However, because PSIs contain aggravating factors, it remains equally plausible that the failure to order the PSI benefitted Kapileo. We do not know the contents of a non-existent PSI. Because Kapileo has not shown that there is a reasonable probability the failure to order the PSI would have changed the outcome of the sentence, he has not satisfied the third prong of plain error review.

B. Individualized Sentence

¶ 15 “We review the trial court’s sentencing process for abuse of discretion.” *Borja*, 2015 MP 8 ¶ 35. “When reviewing a sentence for abuse of discretion, reversal is appropriate only if no reasonable person would have imposed the same sentence.” *Commonwealth v. Palacios*, 2014 MP 16 ¶ 12 (citing *Banks v. State*, 732 So.2d 1065, 1068 (Fla. 1999); *State v. Branch*, 919 P.2d 1228, 1235 (Wash. 1996); *State v. Gerrard*, 584 P.2d 885, 887 (Utah 1978)). “[T]he trial court ‘enjoy[s] nearly unfettered discretion in determining what sentence to impose.’” *Id.* (quoting *Commonwealth v. Camacho*, 2002 MP 6 ¶ 135).

¶ 16 At the sentencing hearing, Kapileo addressed the court and apologized for his actions. He stated that his family has “been going through hardship” and it has been difficult for him to think about the events of that day. Tr. 333. After, his wife addressed the court and acknowledged that Kapileo made a mistake.

¶ 17 Kapileo’s attorney also addressed the court. He urged the court to impose a lenient sentence, noting that Kapileo was terminated from his employment as a police officer, is the father of five young children, and his wife will be the sole supporter of their family. Because of Kapileo’s family’s impending financial hardship, counsel requested the court impose the minimum mandatory fine and jail sentence. Alternatively, if the sentence were to impose a term of imprisonment greater than the minimum, he requested that the amount of days

⁴ Federal Rule of Criminal Procedure 52(b) is substantially similar to NMI Rule of Criminal Procedure 52(b). *Compare* FED. R. CRIM. P. 52(b) (“A plain error that affects substantial rights may be considered even though it was not brought to the court’s attention.”), *with* NMI R. CRIM. P. 52(b) (“Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.”).

exceeding the minimum be suspended. Last, he requested that Kapileo maintain his privilege to seek parole.

¶ 18 The Commonwealth argued the maximum sentence was warranted because Kapileo, who was a police officer at the time of the accident, hit a pedestrian with his police-marked truck and fled the scene. The Commonwealth emphasized the defendant's actions ran contrary to his police officer oath to enforce and uphold the law in the community.

¶ 19 The court then imposed the maximum sentence for each violation, except for the maximum fine in regards to 9 CMC § 6101(a) and three days imprisonment under 1 CMC § 7406(d). In imposing its sentence, the court explained that the punishment must deter other drivers from fleeing the scene of an accident and implied that Kapileo's failure to conduct himself as a law enforcement official was an aggravating factor. It also suggested that Kapileo lacked integrity and character because he performed actions that constituted elements of the crimes:

[I]t is obvious to this court that you possess [neither integrity nor character]. You had an open beer can in the vehicle, that was wrong. You drank alcohol while operating a motor vehicle, that was wrong. You used a government vehicle to transport a family member from Dandan to Garapan, that was wrong. You failed to exercise due care to avoid colliding with a pedestrian, that was wrong. You failed to immediately stop when an accident occurred, that was wrong.

Tr. 342. It noted that Kapileo had three chances to "make things right": at the scene of the accident, by pulling over; at a parking lot on Middle Road, by turning around and returning to the accident; and before turning north onto Beach Road, by turning south and reporting the accident at DPS Central. *Id.* In total, Kapileo was sentenced to five years imprisonment and a \$1,600 fine.

¶ 20 Kapileo asserts the trial court erred by imposing an insufficiently individualized sentence. He claims the court failed to consider his family's reliance on him and the financial hardship they would suffer as a result of his incarceration and unemployment. Further, he argues the court impermissibly considered elements of the crime as aggravating factors.

¶ 21 The Legislature intends for courts to impose individualized sentences when statutes provide for a range of punishments. *Borja*, 2015 MP 8 ¶ 38 (citing *United States v. Hartford*, 489 F.2d 652, 655–56 (5th Cir. 1974); *United States v. Daniels*, 446 F.2d 967, 971–72 (6th Cir. 1971)). Here, Kapileo was convicted of violating 9 CMC §§ 6101(a), 5853(a), 5853(c), and 5408, and 1 CMC § 7406(d). Because these statutes all provide for a range of punishment,⁵ the trial court was required to individualize its sentence.

⁵ Kapileo's 9 CMC § 6101(a) violation was punishable under 9 CMC § 6101(f) because he failed to stop after being involved in the accident. Punishment for

¶ 22 “A sentence is individualized if it considers both the crime and the offender—it must examine and measure the relevant facts, the deterrent value of the sentence, the rehabilitation and reformation of the offender, the protection of society, and the disciplining of the wrongdoer.” *Id.* ¶ 39 (citing *Williams v. New York*, 337 U.S. 241, 247–48 (1949); *Daniels*, 446 F.2d at 972). PSIs aid trial courts in providing individualized sentences because they supply “facts and insights into both the background[] and potentialities (for good or evil) of” defendants.” *Commonwealth v. Fu Zhu Lin*, 2014 MP 6 ¶ 38 (quoting *United States v. Long*, 656 F.2d 1162, 1165 (5th Cir. Unit A Sept. 1981)). Information contained within a PSI is essential for imposing an individualized sentence; thus, NMI Rule of Criminal Procedure 32 “compels courts to explain why a PSI would not be necessary to making a careful and individualized sentence that considers factors beyond the crime itself.” *Id.* ¶¶ 36–38, 42.

¶ 23 In *Palacios*, we held the trial court did not abuse its discretion because a reasonable person could have justified the sentence. 2014 MP 16 ¶ 13. There, the trial court ordered a PSI, considered information specific to the defendant, and noted significant aggravating factors that supported its imposition of the maximum sentence. *Id.* ¶¶ 5, 13. In contrast, in *Borja*, we held “the sentence was insufficiently individualized because the court based its imposition of the maximum sentence solely on the act of the crime.” 2015 MP 8 ¶ 40. There, the court’s indifference to individualizing the sentence was apparent because it “failed to acknowledge mitigating factors provided by Borja, and it sentenced [him] without ordering or considering the contents within a PSI.” *Id.*

¶ 24 Here, although the court considered aggravating factors, such as Kapileo’s lack of remorse immediately following his culpable actions, the sentence lacks sufficient individualization because the court failed to consider or discuss information contained within a PSI, such as whether the defendant had a prior record. The court also failed to acknowledge whether any mitigating factors influenced its decision.⁶ Because a reasonable person would not attempt

violation of § 6101(f) includes any combination of 90 days to five years imprisonment and/or a \$200 to \$2,000 fine. *See supra* note 1. At the time of Kapileo’s sentencing, violations of §§ 5853(a) and 5853(c) were “punishable by a fine only, of not more than \$500 per offense.” 9 CMC § 5853 (1997), *repealed and reenacted by* PL 19-13, § 4. In regards to the § 5408 violation, the court did not specify the statute it utilized in imposing its sentence; however, 9 CMC § 7112 states that “[e]xcept where a different penalty is provided, every person who fails . . . to comply with or violates any provision of this title is guilty of an infraction punishable by a fine of not more than \$100 for the first conviction” Last, violation of 1 CMC § 7406(d) is “punishable by a fine of up to \$500, and/or three days imprisonment.”

⁶ Not only did the trial court fail to acknowledge any mitigating factors that may have influenced its decision, but it seems unlikely that the court actually considered such factors. Here, it was brought to the court’s attention that Kapileo’s family faced serious financial hardship as a result of his convictions. Despite this, the court imposed the maximum fine for the 1 CMC § 7406(d) violation and the 9 CMC

to sentence a defendant to the maximum sentence without the requisite information for individualizing a sentence, we conclude that the trial court abused its discretion in its sentencing process.

¶ 25 Last, we note that an individualized sentence should not include essential elements of the crime as aggravating factors because “otherwise, every offense arguably would implicate aggravating factors merely by its commission, thereby eroding the basis for the gradation of offenses and the distinction between elements and aggravating circumstances.” *State v. Fuentes*, 85 A.3d 923, 933 (N.J. 2014) (quoting *State v. Kromphold*, 744 A.2d 640, 644 (N.J. 2000)). Elements of a crime establish the actions the Commonwealth must prove beyond a reasonable doubt to convict a defendant—they are not factors particular to a defendant at sentencing.

C. Remand to Different Sentencing Judge

¶ 26 Kapileo asserts this case should be remanded to a different sentencing judge in order to minimize the suspicion of partiality and to preserve the appearance of justice. He argues remand is necessary because during sentencing, the judge stated that Kapileo lacks integrity, has poor character, and abrogated his duties as a police officer. Last, he argues that reassignment would not entail waste or duplication of effort because the appellate record provides the requisite information to properly sentence Kapileo.

¶ 27 We consider three factors when determining whether reassignment to a different sentencing judge is necessary:

- (1) the difficulties, if any, that the [] court would have at being objective upon remand because of prior information received;
- (2) whether reassignment is advisable to preserve the appearance of justice; and
- (3) whether reassignment would entail waste and duplication of effort out of proportion to any gain in preserving the appearance of justice.

Commonwealth v. Hocog, 2015 MP 19 ¶ 33 (alteration in original) (quoting *Commonwealth v. Jong Hun Lee*, 2005 MP 19 ¶ 26). Remand to the original judge may be appropriate where “the original judge has gained familiarity with a detailed factual record, which is vital to the determination to be made on remand, and the reversal is not based on erroneous findings or the admission of prejudicial evidence that would be difficult to erase from the mind.” *Id.* ¶ 35 (internal quotation marks omitted) (quoting *United States v. Robin*, 553 F.2d 8, 9 (2d Cir. 1977)). However, we note that “[i]n the rare case where a judge has repeatedly adhered to an erroneous view after the error is called to his attention, reassignment to another judge may be advisable in order to avoid ‘an exercise in futility’” *Robin*, 553 F.2d at 11 (internal citations omitted) (quoting

§§ 5853(a), 5853(c), and 5408 violations. Moreover, it imposed a non-mandatory fine for the 9 CMC § 6101(a) violation. *See supra* note 1.

United States v. Tucker, 404 U.S. 443, 452 (1972) (Blackmun, J., dissenting)) (citing *United States v. Brown*, 470 F.2d 285, 288 (2d Cir. 1972)).

¶ 28 In *Hocog*, the appellant argued that his case should be reassigned to a different judge for resentencing to avoid the suspicion of partiality, preserve the appearance of justice, and because reassignment would not result in a duplication of effort. 2015 MP 19 ¶¶ 33–35. There, we held that reassignment was unnecessary to preserve the appearance of justice because Hocog’s sentence was “based on information properly before the court,” and “considerations of judicial economy weigh[ed] in favor of remanding to the same sentencing judge.” *Id.* ¶ 34–35. We noted that although a PSI and the existing record could adequately prepare a new judge for resentencing, judicial economy weighed against reassignment because “a new judge would need to spend substantial time becoming familiar with the details of the case, including review of the lengthy trial transcript.” *Id.* ¶ 35.

¶ 29 Here, like *Hocog*, judicial economy weighs in favor of remanding to the same sentencing judge. Although the original trial judge failed to properly sentence the defendant, nothing in the record could lead an objective observer to reasonably question the judge’s impartiality in resentencing. Further, reassignment would lead to substantial duplication of effort because it would require the judge to review the voluminous record. Thus, the gains in preserving the appearance of justice are outweighed by the waste and duplication of effort that reassignment would entail. We remand for resentencing before the same judge.

V. CONCLUSION

¶ 30 For the foregoing reasons, we VACATE the sentence and REMAND for resentencing.

SO ORDERED this 5th day of April, 2016.

/s/

ALEXANDRO C. CASTRO
Chief Justice

/s/

JOHN A. MANGLONA
Associate Justice

/s/

PERRY B. INOS
Associate Justice