IN THE

Supreme Court

OF THE

Commonwealth of the Northern Mariana Islands

IN RE COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS,
Petitioner.

Supreme Court No. 2021-SCC-0002-PET

ORDER DENYING PETITION FOR WRIT OF MANDAMUS

Cite as: 2021 MP 6

Decided March 19, 2021

CHIEF JUSTICE ALEXANDRO C. CASTRO
ASSOCIATE JUSTICE JOHN A. MANGLOÑA
ASSOCIATE JUSTICE PERRY B. INOS

Superior Court Criminal Case No. 17-0092
Associate Judge Kenneth L. Govendo, Presiding

MANGLOÑA, J.:

¶ 1 Petitioner Commonwealth of the Northern Mariana Islands ("Commonwealth") petitions the Court for a writ of mandamus ordering the trial court to sentence Defendant Jiang Hong Sheng ("Sheng") in absentia, as he did not appear for sentencing hearings or the presentencing investigation, and cannot be located. It argues the court clearly erred by not: (1) sentencing Sheng in absentia; or (2) ruling on the motion asking it to do so. For the following reasons, the Court DENIES the petition.

I. FACTS AND PROCEDURAL HISTORY

¶ 2 In May 2018, a jury found Sheng guilty of assault with a dangerous weapon, assault and battery, and disturbing the peace. Sheng moved for a judgment of acquittal but his motion was denied. He then appealed his conviction but his appeal was dismissed in late 2019 for lack of a final judgment. Sentencing was set for late 2018 but was delayed until March 26, 2019 due to Super Typhoon Yutu and a delay in completing the presentencing investigation report ("PSI"). Sheng did not appear, and could not be located, for his sentencing hearing and a bench warrant was issued. Sheng had been released on cash bail before trial and until sentencing; the cash bail was forfeited at that point. He did not appear to assist with the PSI or at any subsequent hearings.

¶ 3 After Sheng's failure to appear, the Commonwealth filed a motion to sentence him in absentia, which Sheng's counsel opposed. The court held a hearing, at which it decided to sentence Sheng in absentia and asked both parties to submit sentencing memoranda. A sentencing hearing set for March 2020 was delayed several times due to COVID-19. When a hearing was finally held in June 2020, the court decided to take a second look at sentencing in absentia and release an order on the issue. The court reissued a bench warrant for Sheng and set no bail. It did not issue an order regarding sentencing in absentia so the Commonwealth renewed its motion. The court rejected the filing and Sheng has not been sentenced. Sheng's counsel has been unable to locate him.

¶ 4 The Commonwealth petitions for a writ of mandamus ordering the trial court to rule on its motion to sentence in absentia and argues it should be granted.[1] Soon after the Commonwealth's filing, the court scheduled a hearing on the motion to sentence in absentia, which we stayed sua sponte pending disposition of the petition.

II. JURISDICTION

¶ 5 We have original jurisdiction to issue writs of mandamus. NMI CONST. art. IV, § 3; 1 CMC § 3102(b).

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[1] We requested an answer from the court. It responded with a copy of its order setting a sentencing hearing.

III. DISCUSSION

A. Writs of Mandamus

¶ 6 Writs of mandamus are "reserved for the most dire of instances when no other relief is available." *NMHC v. Superior Court*, 2020 MP 18 ¶ 7. Whether we grant or deny a petition for writ of mandamus is guided by the *Tenorio v. Superior Court* factors:

> (1) the party seeking the writ has no other adequate means, such as a direct appeal, to attain the relief desired;
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> (2) the petitioner will be damaged or prejudiced in a way not correctable on appeal;
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> (3) the lower court's order is clearly erroneous as a matter of law;
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> (4) the lower court's order is an oft-repeated error, or manifests a persistent disregard of applicable rules; and
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> (5) the lower court's order raises new and important problems, or issues of law of first impression.
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> 1 NMI 1, 9-10 (1989).

We first address the third *Tenorio* factor—whether the court's order is clearly erroneous as a matter of law—as it is dispositive. "A writ is not appropriate if the petitioner has not shown clear error." *In Re Commonwealth*, 2018 MP 8 ¶ 14. Because we find no clear error here, we do not address the other *Tenorio* factors.

i. Clear Error

¶ 7 The Commonwealth argues the court has erred because sentences should be imposed without unreasonable delay. It argues sentencing has been unreasonably delayed in this case and the court should therefore be ordered to sentence Sheng. In the alternative, the Commonwealth argues Sheng voluntarily waived his right to be present at the sentencing hearings and the court can thus sentence him in absentia. This argument is based on the Federal Rules of Criminal Procedure, and a change to them which the Commonwealth suggests we adopt by caselaw. The Commonwealth also contends the court has failed to rule on the motion to sentence in absentia and therefore lost jurisdiction. It argues this justifies issuing a writ.[2] Finally, the Commonwealth submits several policy arguments regarding the failure to promptly sentence a defendant, including the potential loss of evidence due to the passage of time, the inability to secure a final judgment which can be appealed, and the denial of justice for victims, among others.

¶ 8 We find the court did not clearly err in not sentencing the defendant in absentia. We address the Commonwealth's argument as to unreasonable delay, however, to provide guidance.

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[2] The court set a sentencing hearing to address this issue but it was stayed by this Court.

a. Sentencing in Absentia

¶ 9 The Commonwealth's argument centers on the assertion that the waiver of the right to be present at sentencing is implied by the language of NMI Rule of Criminal Procedure 43 ("Rule 43") and that a subsequent change to the corresponding federal rule should be applied here. Sheng responds by arguing the current language of Rule 43 precludes the court from sentencing the defendant in absentia. He also contends the subsequent inclusion of the voluntary waiver rule for felony sentencing in Rule 43 is a substantive, not a modest, difference between the federal and NMI criminal procedure rules, precluding application of it in this case.

¶ 10 A rule should be read according to its plain meaning. *See Commonwealth v. Minto*, 2011 MP 14 ¶ 34; *Chen's Corp. v. Frank*, 2007 MP 4 ¶ 9. The Sixth Amendment to the United States Constitution and Article 1, Section 4(b) of the NMI Constitution require the defendant's presence at sentencing. This right is embodied in NMI Rule of Criminal Procedure 43:

> (a) Presence Required. The defendant shall be present at arraignment, at the time of the plea, at every stage of the trial including the impaneling of the jury and the return of the verdict, and at the imposition of sentence, except as otherwise provided by this rule.
> (b) Continued Presence Not Required. The further progress of trial to and including the return of the verdict shall not be prevented and the defendant shall be considered to have waived his/her right to be present whenever a defendant, initially present,
> > (1) voluntarily absents himself/herself after the trial has commenced . . . .

¶ 11 Section (a)'s language "at every stage of the trial . . . and at the imposition of sentence," expressly requires the defendant's presence at sentencing. Rule 43(b)'s ("section (b)") language "progress of trial to and including the return of the verdict," does not include sentencing. Section (b), then, appears to limit a defendant's waiver of right to be present to only stages of trial up to the verdict; the defendant cannot waive their right to be present—by voluntarily absenting themselves—at sentencing.

¶ 12 Our Rule 43 is identical to Federal Rule 43, before it was amended in 1995.[3] One of the amendments adopted that year added a provision allowing a defendant to voluntarily waive presence at sentencing.[4] But the Commonwealth

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[3] We may look to the federal rules for guidance. *Commonwealth v. Laniyo*, 2012 MP 1 ¶ 6.

[4] The amendment included the following addition to Federal Rule 43: "A defendant who was initially present at trial, or who had pleaded guilty or nolo contendere, waives the right to be present under the following circumstances: . . . in a noncapital case, when the defendant is *voluntarily absent during sentencing*." Fed. R. Crim. P. 43(b) (1995) (emphasis added).

argues the pre-1995 language of Federal Rule 43—and therefore the language of NMI Rule 43—implies the waiver in section (b) applies to sentencing. And if the language does not so imply, it asserts the application of voluntary waiver to sentencing is a natural extension of the pre-1995 rule and therefore a modest change that we are permitted to apply.

¶ 13 Before Federal Rule 43 was amended, courts were split as to whether the defendant could waive their presence at sentencing so the court could then sentence them in absentia. In *United States v. Brown*, the United States Court of Appeals for the Fifth Circuit held that a defendant must be present at sentencing. 456 F.2d 1112, 1114 (5th Cir. 1972). There, the defendant had been resentenced in absentia on remand from an appeal. *Id.* at 1113. The *Brown* court held that Rule 43 permitted absence during trial but only in extraordinary cases with the defendant's express waiver of the right to be present could the defendant be sentenced in absentia. *Id.* at 1114 (citing *Illinois v. Allen*, 397 U.S. 337 (1970) and *United States v. Boykin*, 222 F. Supp. 398 (D. Md. 1963)).

¶ 14 Several circuits followed the *Brown* holding and applied its reasoning. In *United States v. Songer*, the Tenth Circuit held that a defendant must be present for sentencing. 842 F.2d 240, 244 (10th Cir. 1988). In that case, the defendant fled after the jury convicted him of drug smuggling and did not appear for sentencing. *Id.* at 241. The court imposed the defendant's sentence of property forfeiture in absentia. *Id.* The government argued that because the Constitution allowed trial in absentia, it followed that sentencing in absentia should also be allowed, relying on a similar rationale posited in *Brewers v. Raines*, 670 F.2d 117, 119 (9th Cir. 1982). *Id.* at 241–42. But the *Songer* court rejected these arguments, pointing to the constitutional rights of confrontation and presence, and cases limiting the latter to the stages of trial "where [the defendant's] absence might frustrate the fairness of the proceedings." *Id.* at 242 (quoting *Faretta v. California*, 422 U.S. 806, 819 n.15 (1975)). The court referenced several policy reasons, including presentation of mitigating evidence and challenges to aggravating evidence, public accountability, and deterrence, which render the right of presence indispensable. *Id.* at 243. It reasoned that the arrangement of Rule 43's text also required presence at the imposition of sentence because subsection (a)'s requirements were not subject to subsection (b)'s exception, since that exception was limited by the language "to and including the return of the verdict." *Id.* at 243–44. Thus, presence at sentencing was a requirement the defendant could not waive. *Id.* at 244.

¶ 15 The D.C. Circuit added to this commentary, noting the "unequivocal" language in Rule 43 that the defendant "shall be present" and that, as a matter of policy, the right to be present serves the interests of the appearance of justice at public sentencings and the ritual of pronouncing judgment. *United States v. Lastra*, 973 F.2d 952, 955 (D.C. Cir. 1992). There, the judgment imposing the sentence was signed outside the defendant's presence after the court told the parties it would provide an answer for a sentencing issue before the end of the day and before executing the sentencing papers. *Id.* at 954. Based on the above

reasoning, it found the defendant had to be present when the court announced her sentence. *Id.* at 955–56.

¶ 16 Thus, before the 1995 amendment, the majority of circuits held Federal Rule 43 required presence at sentencing and, absent extraordinary circumstances, did not allow defendants to waive their right to be present through voluntary absence. One circuit, however, ruled a defendant could voluntarily waive their right to presence and the court could move forward with sentencing in their absence. *Brewer v. Raines*, 670 F.2d 117, 118–20 (9th Cir. 1982). There, the defendant fled and the court sentenced him in absentia. *Id.* at 118. The court extended the rule that a defendant may waive the right to presence at trial, holding they could also waive the right to presence at sentencing by voluntarily absenting themselves. It also mentioned that on policy grounds, a defendant should not be able to break up proceedings by absenting themselves whenever they please. *Id.* at 119. As a result, the court found the defendant had voluntarily absented himself and the court could sentence him in absentia. *Id.* at 120.

¶ 17 We find the majority's view of the pre-1995 Federal Rule 43—identical to NMI Rule 43—persuasive. It confirms that section (b) does not extend waiver of the right to presence to sentencing and therefore does not impact the requirement in section (a) that the defendant be present at the imposition of sentence. But the Commonwealth still argues that the 1995 amendment expressly allowing waiver of the right to presence is a modest change we may apply.

¶ 18 We have held that "clerical, stylistic, and other modest changes to the Federal Rules presumptively apply in the Commonwealth while substantive revisions, such as an effort to resolve a split among United States Courts of Appeal, require approval via Commonwealth statute, court rules, or case law." *Commonwealth v. Santos*, 2013 MP 8 ¶ 12.

¶ 19 Federal Rule 43(c)(1)(B), as amended in 1995, allows the defendant to voluntarily absent themself during sentencing. The committee note accompanying the 1995 amendment explains the change was

> intended to remedy the situation where a defendant voluntarily flees before sentence is imposed. Without the amendment, it is doubtful that a court could sentence a defendant who had been present during the entire trial but flees before sentencing. Delay in conducting the sentencing hearing under such circumstances may result in difficulty later in gathering and presenting the evidence necessary to formulate a guideline sentence. The right to be present at court, although important, is not absolute. The caselaw, and practice in many jurisdictions, supports the proposition that the right to be present at trial may be waived through, inter alia, the act

> of fleeing. *See generally Crosby v. United States*, 506 U.S. 255 (1993).
> Fed. R. Crim. P. 43 advisory committee's note.

The change has been recognized as remedying the circuit split and addressing the defendant's right to and voluntary waiver of presence at sentencing when he or she flees. *United States v. Achbani*, 507 F.3d 598, 601–02 (7th Cir. 2007).

¶ 20 While the Commonwealth asserts the extension of the waiver to the sentencing stage would be a modest change, the language of our rule does not indicate or imply such extension would be warranted. As written, Rule 43(a) explicitly requires presence at sentencing and it does not include explicit language allowing for waiver of the right to be present during sentencing. The amendment of the federal rule also resolved a circuit split, which we held in *Santos* to be a substantive change. 2013 MP 8 ¶¶ 12–13. Applying the amendment here, then, would be a substantive change that would need to be made via statute, rule, or caselaw. As in *Santos*, we find this change exceptionally substantive to make by caselaw; such a change should be accomplished through the rulemaking process, like the amendment to Federal Rule 43.

¶ 21 The court's failure to sentence the defendant in absentia is not clear error because Rule 43 does not allow such an action.

b. Unreasonable Delay

¶ 22 While we conclude the court did not err in not sentencing the defendant in absentia, we briefly address the issue of unreasonable delay to provide guidance. The Commonwealth argues the defendant's sentencing has been unreasonably delayed in violation of NMI Rule of Criminal Procedure 32. Yet it states: "Certainly, the delay attributed to the Defendant refusing to appear for his sentencing would not be unreasonable; however, the trial court is still left with the ability to sentence Defendant in absentia." Pet. 9. This statement, coupled with our holding that the defendant may not be sentenced in absentia, leaves little of the Commonwealth's argument left. The Commonwealth also mentions the delays in preparing the PSI, and the delays caused by Super Typhoon Yutu, and COVID-19. The case before us is rare, as an unreasonable delay claim is usually presented by the defendant rather than the Commonwealth.

¶ 23 NMI Rule of Criminal Procedure 32(a)(1) states that a "[s]entence shall be imposed without unreasonable delay." Our jurisprudence addresses Rule 32 in several contexts: for example, whether the court properly ordered a PSI, as required by the rule; the interpretation of "imposed"; whether the court asked the defendant for a statement; and how the rule operates in the context of plea withdrawal. *Commonwealth v. Kapileo*, 2016 MP 1; *Commonwealth v. Reyes*, 2016 MP 3; *Commonwealth v. Rios*, 2015 MP 12; *Commonwealth v. Borja*, 2015

MP 8; *Commonwealth v. Lin*, 2014 MP 19. We have never, however, interpreted the phrase "unreasonable delay" or its parameters.

¶ 24 In *Pollard v. United States*, the United States Supreme Court assumed "arguendo that sentence is part of the trial for purposes of the Sixth Amendment." 352 U.S. 354, 361 (1957). It found that whether a delay under Rule 32 was unreasonable depended on the circumstances and that the delay must not be purposeful or oppressive. *Id*. The Court held there was no unreasonable delay because the error that caused the delay was unknown to the court, and therefore the delay was not purposeful. *Id.* at 362. In contrast, other courts had held there had been unreasonable delays in sentencing which were caused by a party's deliberate acts or a persistent failure to be ready for trial. *Id.* But the Court did not discuss how long a delay must be to rise to the level of "unreasonable."

¶ 25 Since then, the issue has usually arisen as a Sixth Amendment speedy trial claim. In assessing the claim, courts apply four factors: (1) the length of delay; (2) the reason for delay; (3) the defendant's assertion of the right; and (4) prejudice to the defendant. *Barker v. Wingo*, 407 U.S. 514 (1972). "[N]one of the factors identified [is] either a necessary or sufficient condition to the finding of the deprivation of the right of a speedy trial." *Id.* at 533. The *Barker* Court emphasized that the factors must be considered with the circumstances in a "balancing process." *Id.* at 533. "The length of the delay is to some extent a triggering mechanism. Until there is some delay which is presumptively prejudicial, there is no necessity for inquiry into the other factors that go into the balance." *Id.* at 530. While the issue in this case is not presented as a Sixth Amendment speedy trial claim, the factors and analysis used in adjudicating such claims are useful here.

¶ 26 Some courts have addressed whether the length of delay makes it unreasonable as well as the circumstances that caused the lengthy delay. Courts have found periods of twenty months, eight and one-half years, ten years, and sixteen months, balanced with reasonable and non-prejudicial circumstances, not to constitute unreasonable delay. *United States v. Gould*, 2011 U.S. Dist. LEXIS 30058, No. CR 03-2274, *83 (D.N.M. March 16, 2011); *United States v. De Luca*, 529 F. Supp. 351, 355 (S.D.N.Y. 1981); *Hicks v. Wilkinson*, 781 F. Supp. 2d 350 (W.D. La. 2011); *McLean v. Green*, 2009 U.S. Dist. LEXIS 122079, No. CV-05-5603 (E.D.N.Y. April 15, 2009).

¶ 27 The United States Court of Appeals for the Ninth Circuit specifically addressed unreasonable delay due in part to a defendant's absence in *Walsh v. United States*. 374 F.2d 421 (9th Cir. 1967). It held that sentencing had not been unreasonably delayed where the trial court had not anticipated a United States Supreme Court case requiring the defendant's presence at sentencing and the appellant had filed various petitions that required time for research. *Id.* at 426. The court relied on the rule stated in *Pollard* and found that these circumstances were not oppressive or purposeful so as to constitute unreasonable delay. *Id.*; *see also United States v. Burgess*, No. 92-1095, 1993 U.S. App. LEXIS 4107 (6th Cir. Feb. 24, 1993) (finding no unreasonable delay where delay was caused by

defendant's filing of sixteen post-trial motions and failure to tender transcript almost a year after motion filed).

¶ 28 Other courts have found it difficult to find unreasonable delay when the delay is caused by the defendant, including delays due to the defendant's fugitive status. For example, a Colorado appellate court found no unreasonable delay for a delay of two years due to the defendant's fugitive status after conviction. *State v. Sterling*, 596 P.2d 1082, 1086 (Wash. Ct. App. 1979). But that presumptively unreasonable delay was weighed against the state's negligent handling of the case and the defendant's assertion of the possibility of prejudice. *Id*.

¶ 29 Delays due to natural disasters are also often deemed reasonable. A Louisiana circuit court, for example, held that large storms, such as Hurricane Katrina, that disrupted court processes led to a delay, but not an unreasonable one. *State v. Burton*, 2008 La. App. Unpub. LEXIS 172, No. 2007-KA-1342, *16–23 (La. Ct. App. 2008). Therefore, natural disasters may weigh against unreasonable delay.

¶ 30 As these cases demonstrate, determining unreasonable delay requires factual findings about the causes and length of the delay, which must be made by the trial court. Future litigants must therefore present unreasonable delay questions to enable the trial court to make appropriate factual determinations.

IV. CONCLUSION

¶ 31 We hold the trial court may not sentence the defendant in absentia and therefore find no clear error. We DENY the petition for writ of mandamus.

SO ORDERED this 19th day of March, 2021.

/s/
ALEXANDRO C. CASTRO
Chief Justice

/s/
JOHN A. MANGLOÑA
Associate Justice

/s/
PERRY B. INOS
Associate Justice

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