Commonwealth of the Northern Mariana Islands,
Plaintiff/Appellant,
v.
Ge Ai Ping,
Defendant/Appellee.
Appeal No. 97-053
Criminal Case No. 96-0291
July 26, 1999

Argued and submitted April 28, 1999

Counsel for Appellant: Kevin A. Lynch, Assistant Attorney General, Saipan.

Counsel for Appellee: Bruce Berline (Law Offices of Bruce Berline), Saipan.

BEFORE: DEMAPAN, Chief Justice, CASTRO, Associate Justice, and TAYLOR, Justice *Pro Tem*.

CASTRO, Associate Justice:

¶1 **[1]** This is an appeal by the Commonwealth of the Northern Mariana Islands ("Prosecution") from the trial court's imposition of a sentence inconsistent with the sentence contained in a written plea agreement. We have jurisdiction pursuant to Article IV, Section 3 of the Commonwealth Constitution. N.M.I. Const. art. IV, § 3. We reverse and remand.

ISSUE PRESENTED AND STANDARD OF REVIEW

¶2 **[2]** The issue is whether the trial court erred when it imposed a sentence less severe than that contained in the parties' written plea agreement entered into pursuant to Rule 11(e)(1)(C) of the Commonwealth Rules of Criminal Procedure. This is a question of law which we review *de novo*. *Agulto v. Northern Marianas Inv. Group, Ltd.*, 4 N.M.I. 7, 9 (1993).

FACTUAL AND PROCEDURAL BACKGROUND

¶3 Defendant Ge Ai Ping was charged in one case with kidnaping, burglary, theft, assault and battery, and in a separate case with perjury. Defendant has been incarcerated since her arrest on January 28, 1997. Sometime during the period of her incarceration, the Defendant gave birth. Much of the child's first year was spent in jail with the mother.

¶4 In November of 1997, the parties entered into a written plea agreement which provided that if the Defendant pled guilty to kidnaping, the Prosecution would dismiss all other charges in both criminal cases. The agreement specifically cited Com. R. Crim. P. 11(e)(1)(C) as the procedure for establishing the plea and sentence. The agreement further provided in relevant part as follows:

> In consideration of the Defendant's admission of the charge, the Government and the Defendant, by and through BRUCE L. BERLINE, agree that the following disposition is in the best interest of the Defendant and in the best interest of the public: The Defendant shall serve twenty (20) years in jail, all suspended except for six (6) years, with credit for time served.

Plea Agreement as to Ge Ai Ping, Excerpts of Record ("E.R.") at 5a. "The parties agree that the Agreement is conditioned upon the Court *accepting, in full, the terms and conditions contained in this Agreement*." *Id.* at 8a (emphasis added).

¶5 At the December 5, 1997 hearing, the trial court accepted the Defendant's guilty plea to the charge of kidnaping. The court then sentenced the Defendant to ten years of imprisonment, all suspended except for the first three years. When the Prosecution objected to the sentence substituted by the court and requested a short recess, the court responded:

> I don't think the Government has the right to withdraw a plea agreement. Once they entered into a plea agreement, the sentence is up to the court. So, recess is - - there's no purpose for a recess. So, umm I want - - I want you to explain to her that I don't - - I don't do this because I condone what she did. I do this because I feel sorry for the baby. I think it's - - I think it's sufficiently difficult for a parent to have to explain to a child why she had to be brought up for the first year of her life in a jail. So, the - - all the other conditions will apply . . . .

Transcript of Proceedings, E.R. at 19a.

¶6 The trial court then dismissed all of the other counts with prejudice and subsequently issued its written order. *Commonwealth v. Ge Ai Ping*, Crim. No. 96-0291 (N.M.I. Super. Ct. Dec. 11, 1997) ([Unpublished] Judgment and Commitment Order). The Prosecution timely appealed.

ANALYSIS

¶7 **[3,4]** The plea agreement procedure is governed by Rule 11(e) of the Commonwealth Rules of Criminal Procedure, which is essentially identical to Rule 11(e) of the Federal Rules of Criminal Procedure.[1]

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[1] In interpreting Commonwealth procedural rules, it is appropriate to consult the interpretation of counterpart federal rules. *Govendo v. Micronesian Garment Mfg., Inc.*, 2 N.M.I. 270, 283 n.14 (1991).

Like its federal counterpart rule, Com. R. Crim. P. 11(e) sets forth three types of plea agreements, under which the Prosecution may do any of the following:

> (A) move for dismissal of other charges; or
>
> (B) make a recommendation, or agree 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; or
>
> (C) agree that a specific sentence is the appropriate disposition of the case.

Com. R. Crim. P. 11(e)(1)(A), (B) and (C).

¶8 Here, the plea agreement expressly stated that it was made pursuant to Rule11(e)(1)(C) and specified that "the Defendant shall serve twenty (20) years in jail, all suspended except for six (6) years, with credit for time served." E.R. at 5a. At the hearing, the trial court stated that it was accepting the plea agreement, but nevertheless imposed a sentence disposition different from the one provided in the agreement. The court reasoned that once the parties have "entered into a plea agreement, the sentence is up to the court." E.R. at 19a.

¶9 **[5,6,7,8]** Rule 11 provides that "[i]f the agreement is of the type specified in subdivision (e)(1)(A) or (e)(1)(C), the court may accept or reject the agreement, or may defer its decision as to the acceptance or rejection until there has been opportunity to consider the presentence report." Com. R. Crim. P. 11(e)(2). If the court accepts the 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*." Com. R. Crim. P. 11(e)(3) (emphasis added). 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. Com. R. Crim. P. 11 (e)(4). Thus, the plain language of Rule 11 makes clear that when the court is presented with an (e)(1)(A) or (C) plea agreement, the court may only accept or reject the agreement in its entirety.

¶10 The Ninth Circuit Court of Appeals has addressed this very issue[2] and has concluded that the lower court may not modify such plea agreements: "[t]he rules contain no provision for the district court to modify

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[2] We note that the parties did not submit any authorities on point, but that the Court's own research uncovered a number of directly relevant cases.

a Rule 11(e)(1)(C) plea agreement, . . . and this court has stated that 'Rule 11(e)(3) prohibits a district court from sentencing a defendant to a sentence less severe than that provided for in the plea agreement accepted by the court.'" *United States v. Mukai*, 26 F.3d 953, 955 (9th Cir. 1994) (*quoting United States v. Semler*, 883 F.2d 832, 833 (9th Cir. 1989)). In *Mukai*, the district court relied on the Ninth Circuit's decision in *United States v. Fernandez*, 960 F.2d 771 (9th Cir. 1992), which suggested that an exception to this general rule might apply if "exceptional circumstances" exist. In *Fernandez*, the court stated:

> When a plea agreement is made pursuant to Fed. R. Crim. P. 11(e)(1)(C), the trial court may accept or reject the agreement, but absent exceptional circumstances, it may not accept the defendant's guilty plea and impose a sentence greater, *United States v. Herrera*, 640 F.2d 958, 960 n.2 (9th Cir. 1981) (dictum); *United States v. Burruezo*, 704 F.2d 33, 38 (2nd Cir. 1983), or less severe, *Semler*, 883 F.2d at 833, than agreed upon.

Fernandez, 960 F.2d at 773 (emphases added).

¶11 **[9,10]** The phrase "exceptional circumstances" refers to a standard described in *United States v. Semler*, where the court suggested that after initially sentencing a defendant, in an "exceptional case" the district court may reduce the sentence in response to a Rule 35(b) motion. *Semler*, 883 F.2d at 835. In *Semler*, the court stated:

> The government's view that Rule 35(b) never permits the reduction of a sentence entered pursuant to a Rule 11(e)(1)(c) agreement is plainly inconsistent with the broad language and purpose of Rule 35(b) and is not directly mandated by Rule 11. . . . Nonetheless, because Congress in enacting Rule 11(e)(3) intended to protect prosecutors' bargains, we conclude that Rule 35(b) permits a district court to reduce a sentence imposed pursuant to an accepted Rule 11(e)(1)(c) agreement *only in those exceptional cases where the sentence is plainly unjust or unfair in light of the information the district court received after sentencing the defendant*.

Id. Thus, the defendant's contention in the instant case that any error committed by the trial court is harmless error because the court could have reduced the sentence pursuant to Com. R. Crim. P. 35(b)[3] fails to take into account that such an exceptional case can only come about in light of information the court receives *after* initially sentencing the defendant. Here, any facts that might have constituted exceptional circumstances were already before the court at the time of sentencing.

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[3] The language of Com. R. Crim. P. 35(b) is the same as the version of FED. R. CRIM. P. 35(b) considered by the court in *United States v. Semler*, 883 F.2d 832, 833 (9th Cir. 1989). After November 1, 1987, the applicable version of FED. R. CRIM. P. 35(b) only provides for reduction of sentence upon motion of the government.

¶12 **[11]** In the absence of a Rule 35(b) motion, no "exceptional circumstances" have been previously recognized in the Ninth Circuit as grounds for disregarding the sentence contained in a Rule 11(e)(1)(C) plea agreement. *Mukai*, 26 F.3d at 955.

> Moreover, there exists no reason to implement such an exception. The time for the court to evaluate whether the impact of exceptional circumstances renders the agreement inappropriate is prior to acceptance and, as the court explained in *Semler*, if the court later finds the disposition in the plea agreement objectionable, it "should not reduce the sentence unilaterally in such cases, but rather should withdraw its acceptance of the plea agreement and permit the parties to renegotiate a more appropriate sentence or opt for trial."

Id. (*citing Semler*, 883 F.2d at 835).

¶13 Accordingly, the *Mukai* court held that the district court erred in concluding that "exceptional circumstances" justified disregarding the terms of the plea agreement it had accepted. *Id.* at 956. In the present case, even if the trial court was of the opinion that exceptional circumstances justified a less severe sentence than that contained in the plea agreement, the court should not have unilaterally reduced the sentence. Instead, the court's only options were to accept the plea agreement in its entirety or reject it and allow the parties an opportunity to renegotiate the sentence.

CONCLUSION

¶14 For the foregoing reasons, the judgment of the trial court is hereby **REVERSED** and **REMANDED**. The trial court is directed to withdraw its modified acceptance of the plea agreement. The court must then either accept the entire original plea agreement, including its sentence disposition, or reject the agreement and allow the parties the opportunity to renegotiate the agreement or proceed to trial.