

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

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS,
Plaintiff/Appellee,

v.

EUGENE B. REPEKI, JR.,
THOMAS CH. BASA and
ANTHONY B. MAGOFNA,
Defendants,

THOMAS CH. BASA ,
Defendant/Appellant.

Supreme Court Appeal No. 01-038-GA
Criminal Case No. 00-0162B

OPINION

Cite as: Commonwealth v. Repeki, 2004 MP 19

Argued and submitted on May 6, 2003
Saipan, Northern Mariana Islands
Decided September 8, 2004

Attorney for Defendant/Appellant:
Colin M. Thompson
P.O. Box 501280
Lower Base
Saipan, MP 96950

Attorney for Plaintiff/Appellee:
Peggy Campbell
Assistant Attorney General
Office of the Attorney General
Commonwealth of the Northern Mariana Islands
Civil Division—Capitol Hill
Saipan, MP 96950

BEFORE: MIGUEL S. DEMAPAN, *Chief Justice*; ALEXANDRO C. CASTRO, *Associate Justice*; JESUS C. BORJA, *Justice Pro Tempore*.

DEMAPAN, Chief Justice:

¶1 The adult criminal court convicted Thomas Ch. Basa (“Basa”) of aggravated assault and battery. Basa was not convicted of second-degree murder or voluntary manslaughter. Basa appeals his conviction claiming that the adult criminal court lacked jurisdiction over him on the aggravated assault and battery charge, as he was a sixteen-year-old minor at the commission of the alleged criminal acts, and that he was entitled to a *Kastigar* hearing.

¶2 We find that jurisdiction was proper because the aggravated assault and battery was a lesser-included offense of second degree murder, an enumerated offense for which the adult criminal court had original jurisdiction. We also find that the trial court did not abuse its discretion in failing to hold a *Kastigar* hearing. Accordingly, we AFFIRM the denial of Basa’s post-trial motion to arrest judgment.

I.

¶3 The Commonwealth of the Northern Mariana Islands (“the Commonwealth”) brought a criminal information against Basa and two others, alleging murder in the second degree in violation of 6 CMC § 1101(b), voluntary manslaughter in violation of 6 CMC § 1102(a), and aggravated assault and battery in violation of 6 CMC § 1203(a). All three charges arose from the same criminal transaction, which involved the death of a security guard, Cesario P. Valerio (“the Victim”). At the time of the alleged criminal acts, Basa was a 16-year-old minor.

¶4 After being arrested, Basa waived his constitutional rights and gave a statement to Detective Mark Taisacan (“the Detective”), who was investigating the Victim’s death. Basa’s statement was tape-recorded. About nine months later, Basa was compelled to testify under a

grant of use and derivative use immunity at the trial of his co-defendant Eugene Repeki, Jr. (“Repeki”).¹ The Detective was present during Basa’s immunized testimony.

¶5 About seven months later, at a hearing on pretrial motions for Basa’s trial, the court granted Basa’s motion to exclude any evidence derived from his immunized testimony. Then, during Basa’s jury trial, Basa moved to strike the Detective’s testimony, asserting that it may have been influenced by Basa’s immunized testimony. Basa’s motion was denied on the ground that there was an independent source for the Detective’s testimony because the substance of the Detective’s testimony had been already available prior to Basa’s immunized testimony.

¶6 Subsequently, Basa was convicted of aggravated assault and battery. Basa filed a Motion to Arrest Judgment arguing that the adult criminal court lacked jurisdiction to enter the judgment of guilty on the aggravated assault and battery charge.² The court denied the motion, and Basa appeals.³

II.

¶7 This Court has jurisdiction pursuant to Article IV, Section 3 of the Commonwealth Constitution and Title 1, Section 3102(a) of the Commonwealth Code.

III.

¶8 The issues on appeal are: (1) Did the adult criminal court have jurisdiction over the aggravated assault and battery charge, without a transfer hearing, when Basa was a minor at the

¹ Pursuant to 6 CMC § 6502(b), such compelled testimony is allowed upon a court order, with a requirement that no such testimony or any information directly or indirectly derived from such testimony could be used against the witness in any criminal case.

² Basa also filed a Motion for Judgment of Acquittal on the basis that no evidence existed to establish that Basa inflicted the fatal injury. However, the Superior Court found Basa to have aided and abetted in the criminal activities and denied his motion. Basa does not appeal that denial.

³ Although the court noted in its order denying Basa’s motion to arrest judgment that Basa’s “motion fail[ed]” because of its untimeliness, it nonetheless discussed the merits of Basa’s contentions before denying the motion. Additionally, in consideration of Basa’s Motion for Reconsideration, the court stated that regardless of the timeliness of Basa’s motion to arrest judgment, the court’s denial of the motion was based on the “rationales that are contained in the [c]ourt’s decision[.]” i.e., the denial was in fact based on the merits of Basa’s contentions.

commission of the offense? (2) Did the court abuse its discretion in denying Basa a *Kastigar* hearing?

A. Jurisdiction

¶9 The first issue on appeal is whether the adult criminal court had jurisdiction over the aggravated assault and battery charge, without a transfer hearing, when Basa was a minor at the commission of the alleged offense. The issue of whether jurisdiction exists is a question of law, subject to a *de novo* review. *Rajapaksha v. Jayaweera*, 1997 MP 13 ¶3.

¶10 The adult criminal court had jurisdiction over the aggravated assault and battery charge even without a transfer hearing because aggravated assault and battery is a lesser-included offense of murder, an enumerated offense for which jurisdiction is automatically removed from the juvenile court pursuant to 6 CMC § 5103(a). Generally, proceedings brought against a delinquent child—any minor who violates any Commonwealth law, ordinance, or regulation—must be brought in the juvenile court. 6 CMC § 5101, 6 CMC § 5103(a). And the juvenile court has exclusive original jurisdiction over all juvenile delinquency proceedings. *In re N.T.M.*, 1999 MP 24 ¶9. However, under 6 CMC § 5103(a), a juvenile 16 years of age or older accused of certain enumerated offenses, namely murder, rape, or a traffic offense must be treated in the same manner as an adult. Thus, where a juvenile, 16 years of age or older, is charged with such an enumerated offense, the juvenile court is automatically divested of jurisdiction and the minor is subject to the original jurisdiction of the adult criminal court. *In re N.T.M.*, 1999 MP 24 ¶9. Moreover, once the adult court acquires jurisdiction over a juvenile, it may convict and sentence the juvenile for a lesser-included offense even when the lesser-included offense, if charged alone at the outset of the proceedings, would not have removed the case from the juvenile court jurisdiction. *Walker v. Arkansas*, 827 S.W.2d 637, 639 (Ark. 1992)

(“Jurisdiction is determined from pleadings.”); *Colorado v. Davenport*, 602 P.2d 871, 872 (Colo. 1979) (“jurisdiction is not lost simply because the juvenile defendant is convicted of a lesser offense”); *Williams v. Mississippi*, 459 So. 2d 777, 779 (Miss. 1984) (“the jurisdiction of a court depends upon the state of affairs existing at the time it is invoked”); see *Dicus v. Second Judicial Dist. Court of Nevada*, 625 P.2d 1175 (Nev. 1981), *overruled in part on other grounds by Barton v. Nevada*, 30 P.3d 1103 (Nev. 2001) (“when the adult court acquires jurisdiction in a prosecution of an offense excluded from juvenile court jurisdiction, jurisdiction is maintained to convict of the charged crime and its lesser included offenses”); see also *Worthy v. Georgia*, 324 S.E.2d 431, 433 (1985) (jurisdiction “over capital felonies committed by juveniles must necessarily extend to related lesser crimes which are part of the same criminal transaction.”). Such jurisdiction over a lesser-included offense is consistent with Com. R. Crim. P. 31(c), which provides that a defendant may be found guilty of any offense necessarily included in the offense charged. Accordingly, each count on an information notifies a defendant not only that he is to be tried for the offense explicitly charged, but also that the jury may be instructed as to lesser-offenses included within that charge. *United States v. Stolarz*, 550 F.2d 488, 492 (9th Cir. 1977), *cert. denied*.

¶11 In the present case, Basa was charged with second-degree murder, voluntary manslaughter, and aggravated assault and battery. Even though aggravated assault and battery was a separately charged offense, it was also a lesser-included offense of second-degree murder. Appellate courts determine whether an offense is a lesser-included offense of a charged offense *de novo*. *Commonwealth v. Kaipat*, 4 N.M.I. 300, 303 n.10 (1995), *aff’d*, 91 F.3d 151 (9th Cir. 1996). An offense is a lesser-included offense if its elements are a subset of the charged offense. *Id.* at 303. Here, we find that aggravated assault and battery was a lesser-included offense of

second-degree murder because Basa had to have necessarily committed aggravated assault and battery⁴ in committing second-degree murder⁵ on the Victim.

¶12 Therefore, the adult criminal court had jurisdiction over the offense of aggravated assault and battery, if not as a charged offense, then certainly as a lesser-included offense of second-degree murder. It is important to note that in Basa's case, the separately charged offense was also a lesser-included offense of an enumerated offense. Accordingly, we limit our discussion regarding jurisdiction to situations such as the one presented in Basa's case and hold that in such situations, the adult criminal court has jurisdiction to convict on the separately charged offense. To hold otherwise would be unsound, as the adult criminal court would have the power to convict on the exact same offense as a lesser-included offense of the enumerated offense anyway. Additionally, even if Basa had not been explicitly charged with aggravated assault and battery, by virtue of his being charged with second-degree murder Basa was on notice that he may be convicted of a lesser-included offense, such as aggravated assault and battery. *Stolarz*, 550 F.2d at 492 (finding that a defendant is not only notified that he is to be tried for the offense explicitly charged, but also that the jury may be instructed as to lesser-offenses included within that charge.).

¶13 Basa claims that he should have been given a hearing before the aggravated assault and battery charge was removed from the jurisdiction of the juvenile court. We disagree. An offender 16 years of age or older may be treated in all respects as an adult if, in the opinion of the court, his or her physical and mental maturity so justifies. 6 CMC § 5102. Generally, the

⁴ Pursuant to 6 CMC § 1203(a), aggravated assault and battery is committed when a person causes serious bodily injury, purposely, knowingly or recklessly.

⁵ Pursuant to 6 CMC § 1101, murder is the unlawful killing of a human being by another human being with malice aforethought. Pursuant to 6 CMC § 1101(b), second-degree murder is murder which is not one of the types specified as first-degree murder. Pursuant to 6 CMC § 1101(a), first-degree murder is a murder which is: (1) willful, premeditated, and deliberated; (2) perpetrated by poison, lying in wait, torture, or bombing; or (3) one that occurs during the perpetration or attempted perpetration of arson, rape, burglary, robbery, or any sexual abuse of a child.

following must take place to satisfy due process in determining whether the juvenile's maturity justifies the transfer of jurisdiction: (1) a hearing, where (2) the juvenile is entitled to be represented by counsel, (3) the juvenile's attorney is given access to the juvenile's social records on request, and (4) the juvenile is entitled to a statement of reasons in support of the transfer order. *In re J.J.C.*, 2000 MP 8 ¶15. However, 6 CMC § 5103(a) provides that a juvenile 16 years of age or older accused of murder, rape, or a traffic offense shall be treated in the same manner as an adult. Thus, the transfer of jurisdiction out of the juvenile court into the adult court is automatic where an enumerated offense is involved. And as discussed above, once the adult court acquires jurisdiction in a prosecution of an offense excluded from the juvenile court jurisdiction, the jurisdiction is maintained to convict on the charged crime as well as its lesser-included offenses. *Walker*, 827 S.W.2d at 639; *Davenport*, 602 P.2d at 872; *Williams*, 459 So. 2d at 779; *see Dicus*, 625 P.2d at 1176; *see also Worthy*, 324 S.E.2d at 433. Because we hold that the adult court has jurisdiction over the charged offense where the charged offense at issue is also a lesser-included offense of one of the enumerated offenses listed under 6 CMC § 5103(a), no transfer hearing was required for the adult court to obtain jurisdiction over the aggravated assault and battery charge in Basa's case.

¶14 Finally, there is no legal basis for Basa's argument that the adult court lost jurisdiction over the aggravated assault and battery offense upon Basa's acquittal on the second-degree murder charge. Jurisdiction is independent of the outcome of the trial. Jurisdiction is determined from pleadings. *Walker*, 827 S.W.2d at 639.

i. Double Jeopardy

¶15 Additionally, holding that the adult criminal court did not have jurisdiction on the aggravated assault and battery charge would be inconsistent with the Double Jeopardy Clause of

the Commonwealth Constitution, Article 1, § 4(e). In other words, it would be inconsistent with the constitutional prohibition against double jeopardy, to have an adult proceeding for the murder charge and a separate juvenile proceeding for an offense that is also a lesser-included offense of the murder charge. The reason for Article 1, § 4(e) of the Commonwealth Constitution, which replicates the Double Jeopardy Clause of the 5th Amendment to the United States Constitution, is to protect against three types of abuses: (1) a second prosecution for the same offense after acquittal; (2) a second prosecution for the same offense after conviction; and (3) multiple punishments for the same offense. *Commonwealth v. Cabrera*, 1997 MP 18 ¶7. For purposes of the Double Jeopardy Clause, the lesser-included offense and the greater offense are the “same offense.” *Brown v. Ohio*, 432 U.S. 161, 167-68, 97 S. Ct. 2221, 2226, 53 L. Ed. 2d 187, 195 (1977).

¶16 Here, Basa would have been put in double jeopardy by having two separate proceedings, one in the juvenile court and the other in the adult court. For example, one could easily imagine a situation where Basa is convicted of the lesser-included offense of aggravated assault and battery in the adult court before his trial for the aggravated assault and battery charge in the juvenile court is completed. In such event, he would be facing a second prosecution for the same offense arising out of the same criminal acts—the very result prohibited by the Double Jeopardy Clause of the Commonwealth Constitution, Article 1, § 4(e). Therefore, it is only consistent with the Double Jeopardy Clause of the Commonwealth Constitution, Article 1, § 4(e) to hold that the adult criminal court had jurisdiction over the aggravated assault and battery charge.

B. *Kastigar* Hearing

¶17 A court's failure to hold a full evidentiary hearing pursuant to *Kastigar* is reviewed for abuse of discretion. *United States v. Dudden*, 65 F.3d 1461, 1468 (9th Cir. 1995).

¶18 Once the defendant has testified under a grant of statutory immunity, the government has the burden to prove that any evidence it intends to use against the defendant is derived from a legitimate source independent of the immunized statements. *Kastigar v. United States*, 406 U.S. 441, 461-62, 92 S. Ct. 1653, 1665, 32 L. Ed. 2d 212, 227 (1972). Before trial, the government must prove the independent sources by a preponderance of the evidence. *United States v. Crowson*, 828 F.2d 1427, 1429 (9th Cir. 1987). And the trial court's findings will be upheld unless clearly erroneous. *Id.* A hearing usually is required to determine whether the government can meet its burden under *Kastigar*. *Dudden*, 65 F.3d at 1468. However, the government may meet its burden of proof as to the existence of independent, prior sources through affidavits. *Crowson*, 828 F.2d at 1429.

¶19 Here, it is undisputed that Basa testified at Repeki's trial under a grant of use and derivative use immunity. It is also undisputed that about nine months prior to Basa's immunized testimony, Basa gave a tape-recorded non-immunized statement to the Detective. Both the tape-recording of Basa's non-immunized statement to the Detective and the Detective's notes were filed with the trial court before Basa ever testified under a grant of use and derivative use immunity. The trial court was informed by the Commonwealth at a pre-trial motions hearing that the Detective would be testifying as to Basa's non-immunized statement. Finally, an affidavit was filed by the Assistant Attorney General for the Commonwealth stating that no witness was prepared using Basa's immunized testimony, and that he did not discuss Basa's immunized testimony with the Detective. Therefore, despite the absence of a hearing pursuant to *Kastigar*, the trial court had sufficient reasons to conclude that the Commonwealth had met its

burden of proof as to the existence of an independent source for the Detective's testimony. Accordingly, the trial court did not abuse its discretion nor did it commit clear error.

IV.

¶20 For the foregoing reasons, the trial court's denial of Basa's post-trial motion to arrest the judgment of guilty as to the aggravated assault and battery charge is **AFFIRMED**.

SO ORDERED THIS 8th DAY OF SEPTEMBER 2004.

/s/
MIGUEL S. DEMAPAN
Chief Justice

/s/
ALEXANDRO C. CASTRO
Associate Justice

/s/
JESUS C. BORJA
Justice *Pro Tempore*