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

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS,
Plaintiff-Appellee,

v.

VICTOR VAL B. HOCOG,
Defendant-Appellant.

Supreme Court No. 2016-SCC-0010-CRM
Superior Court No. 14-0027-CR

OPINION

Cite as: 2017 MP 15

Decided December 21, 2017

Matthew C. Baisley, Office of the Attorney General, Saipan, MP, for Plaintiff-Appellee.

Cindy A. Nesbit, Office of the Public Defender, Saipan, MP, for Defendant-Appellant.

BEFORE: JOHN A. MANGLONA, Associate Justice; PERRY B. INOS, Associate Justice; ROBERT J. TORRES, Justice Pro Tem.

PER CURIAM:

¶ 1 Defendant-Appellant Victor Val B. Hocog ("Hocog") appeals the trial court's order denying reconsideration of motion to correct illegal sentence. For the reasons set forth herein, we AFFIRM.

I. FACTS AND PROCEDURAL HISTORY

¶ 2 The Commonwealth of the Northern Mariana Islands ("Commonwealth") charged Hocog with Illegal Possession of a Controlled Substance in violation of 6 CMC § 2142(b). The parties negotiated and entered into a plea agreement, in which Hocog agreed to plead guilty to the charge, be sentenced to fifteen months imprisonment, pay a $2,000 fine, and receive thirty months of drug rehabilitation services after his release from imprisonment. Hocog agreed to rehabilitation conditioned upon the Commonwealth withdrawing a motion to forfeit Hocog's $10,000 bond.

¶ 3 The parties presented the plea agreement at a change of plea hearing. At the hearing, defense counsel objected to a clause in the plea agreement proposing the Office of Adult Probation ("OAP") monitor Hocog's compliance with the rehabilitation provision. Defense counsel asserted the clause was illegal because the court was not authorized to impose probation under the sentencing statute. After a discussion with the judge, the parties agreed to designate the Office of the Attorney General ("OAG") as the monitoring agent and amended the plea agreement accordingly. Defense counsel also amended the agreement by adding a provision stating, "No term herein are [sic] probationary matters." *Commonwealth v. Hocog*, Crim. No. 14-0027 (NMI Super. Ct. Sept. 25, 2014) (Plea Agreement at 3) ("Plea Agreement").

¶ 4 The court accepted the plea agreement and issued a Judgment of Conviction and Commitment Order reflecting the terms of the plea agreement, including the thirty-month rehabilitation provision. *Commonwealth v. Hocog*, Crim. No. 14-0027 (NMI Super. Ct. Nov. 5, 2014) (J. Conviction & Commitment Order at 4–5) ("Judgment and Order"). The Judgment and Order required Hocog to provide proof of his rehabilitation to the OAG by June 15, 2015, and instructed the OAG, through the Attorney General Investigative Division, to monitor his compliance. *Id*. If Hocog failed to abide by the rehabilitation provision, the Judgment and Order dictated he would be in violation of 6 CMC § 3307, the criminal contempt statute.

¶ 5 Eight months later, Hocog filed a motion to correct illegal sentence pursuant to NMI Rule of Criminal Procedure 35(a), arguing the court did not have authority to enforce the rehabilitation provision and the provision was thus illegal. The court denied the motion. Hocog then filed a motion to reconsider the

court's denial. When the motion to reconsider was denied on February 16, 2016, he filed this appeal on February 26, 2016.

II. JURISDICTION

¶ 6 We have jurisdiction over all final judgments and orders issued by the Superior Court. NMI CONST. art. IV, § 3.

¶ 7 A criminal defendant must file a notice of appeal within thirty days of the entry of judgment. NMI SUP. CT. R. 4(b)(1)(A). Further, the filing of a motion under NMI Rule of Criminal Procedure 35(a)[1] does not suspend the time for filing a notice of appeal from a judgment of conviction. NMI SUP. CT. R. 4(b)(5).

¶ 8 The Judgment and Order was issued in November 2014, so a timely appeal would have to have been filed within thirty days of its issuance. Hocog filed his appeal in February 2016, well past the thirty-day limit.[2] Thus, we decline to review the Judgment and Order. However, the appeal was filed within the thirty-day limit to appeal the order denying his motion to reconsider.

¶ 9 We have jurisdiction to review orders denying motions to reconsider. *Manglona v. Commonwealth*, 2002 MP 7 ¶ 2. After his motion to reconsider was denied on February 16, 2016, Hocog filed his appeal ten days later on February 26, 2016. Because Hocog filed his appeal within the thirty-day limit imposed by NMI Supreme Court Rule 4(b)(1)(A), we have jurisdiction to hear his appeal.

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[1] Rule 35(a) provides: "The court may correct an illegal sentence at any time and may correct a sentence imposed in an illegal manner within the time provided herein for the reduction of sentence."

[2] NMI Supreme Court Rule 4(b)(1) provides a defendant's notice of appeal must be filed within thirty days of the entry of judgment or the filing of the government's notice of appeal, whichever is later. However, in *Commonwealth v. Borja*, we held that because of our constitutional authority, Rule 4(b)(1) is not a mandatory jurisdictional rule. 2015 MP 8 ¶ 19. The rule however, is an "inflexible claim processing rule[], mandatory if invoked by a party but forfeitable if not invoked." *Id.* Thus, as long as a party objects to the timeliness of the appeal any time up to and including in its merits brief, the rule is mandatory. *Id.* Because the Commonwealth objected to the timeliness of Hocog's appeal in its opening brief, the time limits in Rule 4(b)(1) are mandatory.

The appeal, however, is a narrow one—we review only the denial of the motion to reconsider.

III. STANDARDS OF REVIEW

¶ 10 We review the denial of a motion to reconsider under the abuse of discretion standard. *Angello v. Louis Vuitton Saipan, Inc.*, 2000 MP 17 ¶ 3. A trial court abuses its discretion if it "base[s] its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence." *Commonwealth v. Palacios*, 2003 MP 6 ¶ 2 (quoting *Lucky Dev. Co., Ltd. V. Tokai, USA, Inc.*, 3 NMI 79, 84 (1992)).

IV. DISCUSSION

¶ 11 A motion to reconsider is only granted when there is "an intervening change of controlling law, the availability of new evidence, or the need to correct clear error or prevent manifest injustice." *Commonwealth v. Eguia*, 2008 MP 17 ¶ 7 (quoting *Camacho v. J.C. Tenorio Enterprises, Inc.*, 2 NMI 407, 414 (1992)). Hocog argues the court abused its discretion when it ignored three instances of clear error: (1) it illegally imposed rehabilitation as a punishment; (2) it violated the separation of powers guaranteed by the NMI Constitution; and (3) it improperly interfered with plea negotiations. We examine each issue for abuse of discretion. *Angello*, 2000 MP 17 ¶ 3.

A. Legality of Rehabilitation

¶ 12 Hocog entered a guilty plea to one count of Illegal Possession of a Controlled Substance pursuant to 6 CMC § 2142.[3] Hocog argues the court committed clear error by imposing an illegal sentence. Specifically, he asserts the plea provision requiring drug rehabilitation is illegal.

¶ 13 As a general rule, a court cannot enforce an illegal provision in a plea agreement. *See United States v. Greatwalker*, 285 F.3d 727, 729 (8th Cir. 2002) ("There can be no plea bargain to an illegal sentence."). A sentence is illegal if it "is one 'not authorized by the judgment of the conviction' or 'in excess of the permissible statutory penalty for the crime.'" *United States v. Vences*, 169 F.3d 611, 613 (9th Cir. 1999) (quoting *United States v. Fowler*, 794 F.2d 1446, 1449 (9th Cir. 1986)); *see United States v. Wainwright*, 938 F.2d 1096, 1098 (10th Cir. 1991) (vacating defendant's restitution order as unauthorized by the judgment of conviction where the restitution statute did not authorize payment for losses stemming from charges not resulting in convictions); *cf. United States v. Bibler*, 495 F.3d 621, 624 (9th Cir. 2007) (affirming defendant's conviction where "the district court sentenced appellant to a term of years beneath the maximum allowed by statute").

¶ 14 Hocog argues rehabilitation is not authorized by 6 CMC § 4104, the sentencing statute, because rehabilitation is inherently a probationary term.[4] He

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[3] Section 2142(b) states: "Any person who violates subsection (a) of this section with respect to any controlled substance except marijuana shall be sentenced to a term of

cites *Commonwealth v. Calvo* for the proposition that under Section 4104(a),[5] in order to impose probation, "the court must first suspend[ ] execution or imposition of any sentence of imprisonment or fine." 2014 MP 7 ¶ 64 (quoting 6 CMC § 4104(a)) (internal quotation marks omitted). Further, 6 CMC § 2142(b), under which Hocog is charged, disallows both probation and suspension of a sentence. Thus, Hocog argues, rehabilitation violates both Sections 2142(b) and 4104(a).

¶ 15 We find Hocog's argument unavailing. In *Calvo*, we interpreted 6 CMC § 4104 to require suspension of a sentence before imposition of probation. *Id.* However, our interpretation of Section 4104 in *Calvo* was unwarranted. "A basic principle of statutory construction is that language must be given its plain meaning." *In re Estate of Rofag*, 2 NMI 18, 29 (1991). Section 4104(a) plainly states that whenever a defendant's sentence is suspended, probation may be imposed. However, the statute's text does not support the converse proposition: although a court can impose probation when all or part of a sentence is suspended, a defendant's sentence does not have to be suspended for probation to be imposed. Further, while Section 4104 applies to a suspended sentence, it does not address a plea agreement willingly and knowingly entered into.

¶ 16 Rehabilitation in this case is not a form of probation, but rather a valid bargained-for term and condition of Hocog's plea agreement. The parties themselves stated in the plea agreement that "[n]o term herein are probationary matters." Plea Agreement at 3. This was echoed at the change of plea hearing where the judge asked, "[s]o is rehabilitation a probationary matter?" To this question, Hocog's counsel answered, "[n]o." Tr. 59.

¶ 17 Even if rehabilitation is not an illegal provision, in the alternative Hocog asks us to determine whether a defendant may be sentenced to rehabilitation under Section 2142. But that question is improperly framed given the facts of this case. The court, on its own accord, did not impose rehabilitation on Hocog—Hocog and the Commonwealth entered into a voluntary plea agreement prior to the change of plea hearing. As a condition of the plea agreement, the parties agreed to the rehabilitation provision. In fact, Hocog himself initially proposed

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imprisonment of not more than five years not subject to suspension, parole or probation, and a fine of $2,000."

[4] Because the combined period of Hocog's incarceration and rehabilitation is forty-five months—less than the sixty-month maximum sentence imposed by Section 2142(b)—we need not address whether the length of the rehabilitation term is illegal.

[5] Section 4104(a) provides in relevant part:

> Whenever a sentencing Court of the Commonwealth suspends execution or imposition of any sentence of imprisonment or fine, for any violation of the Commonwealth Code, the court may impose any terms and conditions of probation which benefit the community and serve the interests of justice.

the rehabilitation condition. Because the parties agreed to rehabilitation as a condition of the plea, the relevant legal question is whether the court may allow rehabilitation as a condition of a plea agreement.

¶ 18 "Conditions imposed as part of a plea arrangement are valid if the parties agree to them and they do not violate any statute or contravene public policy . . . ." *People v. Avery*, 650 N.E.2d 384, 386 (N.Y. 1995); *see also United States ex rel. Selikoff v. Comm'r of Correction*, 524 F.2d 650, 653 (2d Cir. 1975) ("[T]he trial judge's discretion in accepting a guilty plea should not be overturned unless such plea or its acceptance by the court is constitutionally infirm.").

¶ 19 No NMI statute explicitly prohibits rehabilitation as a condition of a plea agreement. As discussed in paragraphs 14 and 16, Section 2142 expressly prohibits courts from imposing suspension, parole, and probation, but it does not prohibit courts from imposing rehabilitation. And drug rehabilitation does not contravene public policy. *See Avery*, 650 N.E.2d at 386 (noting a plea agreement conditioned on defendant's successful completion of a drug rehabilitation program "furthers important public policy goals."); *see, e.g.*, PL 19-16, § 2(d) (appropriating $100,000 "to the Commonwealth Healthcare Corporation [] for a Community Drug Free Rehabilitation Program"). Thus, a defendant may agree to rehabilitation as a condition of a plea agreement. Accordingly, there was no clear error in accepting the plea agreement. Thus, the court did not abuse its discretion.

B. Separation of Powers

¶ 20 Hocog argues the court abused its discretion because his sentence violated the NMI Constitution's separation of powers doctrine. First, he argues the court created a sentence not authorized by statute, thereby usurping the power of the legislature. Second, he claims the court improperly delegated authority to the OAG, diluting our own power and expanding that of the executive branch.

1. Legislative Power

¶ 21 The separation of powers doctrine operates "to confine legislative powers to the legislature, executive powers to the executive, and those powers which are judicial in character to the judiciary." *Marine Revitalization Corp. v. Dep't of Land & Natural Res.*, 2010 MP 18 ¶ 12. Hocog asserts the court created an unauthorized punishment by allowing the rehabilitation provision into the plea agreement despite the lack of statutory authority, usurping the legislature's power to create punishments. But as established in paragraphs 12–19, the court's acceptance of a valid plea condition is not the creation of an unauthorized punishment, and therefore cannot be a usurpation of legislative power.

2. Delegation to OAG

¶ 22 Hocog argues the court further violated the separation of powers doctrine when it directed the OAG to monitor his compliance because the OAG has no power to perform post-conviction monitoring. He argues such delegation to the OAG is an improper expansion of the OAG's power.

¶ 23 We disagree. The OAG is empowered to prosecute violations of Commonwealth law. NMI CONST. art. III, § 11. Section 3307, Title 6 of the Commonwealth Code provides it is a violation of law to fail to comply with a court order. This includes the Judgment and Order, which contains the rehabilitation provision. The OAG, therefore, has the duty and power to prosecute Hocog if he fails to abide by the rehabilitation condition. In this case, the extent of "monitoring" meant merely for Hocog to "submit to the OAG proof of drug rehabilitation by June 15, 2015." Judgment and Order at 4–5. The task of receiving proof of drug rehabilitation falls within the OAG's power to prosecute violations. Because the power to prosecute violations requires the use of discretion, it entails receiving and gathering information of a defendant's compliance with the law. Accordingly, since the court neither created new law nor gave the OAG new authority, it did not violate the separation of powers doctrine.

C. Plea Negotiations

¶ 24 Hocog claims the judge interfered with plea negotiations at the change of plea hearing, thereby violating NMI Rule of Criminal Procedure 11(e). Rule 11(e) prohibits the judge from participating in plea negotiations.[6] "The purpose of such prohibition is to preserve the judge's impartiality after the negotiations are completed, as judicial involvement detracts from a judge's objectivity . . . ." *Commonwealth v. Attao*, 2005 MP 8 ¶ 9.

¶ 25 However, judicial participation is allowed after a plea agreement is disclosed in open court. *See* FED. R. CRIM P. 11(e)(1) advisory committee's note on 1974 amendment ("The judge should not participate in plea discussions leading to a plea agreement. It is contemplated that the judge may participate in such discussions as may occur when the plea agreement is disclosed in open court.");[7] *United States v. Kraus*, 137 F.3d 447, 452 (7th Cir. 2009) ("[O]nce the parties have themselves negotiated a plea agreement and presented that agreement to the court for approval, it is not only permitted but expected that the court will take an active role in evaluating the agreement."); *United States v. Carver*, 160 F.3d 1266, 1269 (10th Cir. 1998) ("[The] stringent prohibitions of Rule 11(e) do not apply once 'the parties have concluded their agreement, and the prosecutor has laid it out in open court,' even if the agreement is not formal and binding." (quoting *United States v. Frank*, 36 F.3d 898, 902–03 (9th Cir. 1994))).

¶ 26 Here, neither party alleges the judge had any involvement in negotiations prior to the change of plea hearing. The judge only entered discussions after the

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[6] NMI Rule of Criminal Procedure 11(e)(1) explains, "[t]he court shall not participate in any [plea negotiation] discussions."

[7] Our NMI Rules of Criminal Procedure are patterned after the Federal Rules of Criminal Procedure. When considering possible NMI Rule of Criminal Procedure 11 violations, we have looked to federal interpretations for guidance. *Commonwealth v. Attao*, 2005 MP 8 ¶ 9 n.7.

parties negotiated, put in writing, executed, and presented the agreement in open court. Notwithstanding the judge's ability to evaluate the agreement, Hocog argues the trial court impermissibly advocated for the rehabilitation provision of the plea agreement, violating Rule 11(e).

¶ 27 The record does not support such characterization of the judge's involvement. Before presenting the agreement, Hocog and the Commonwealth had agreed that Hocog would receive rehabilitation services, compliance would be monitored via the OAP, and Hocog would face the possibility of a contempt charge. The judge only inquired into the legality of the monitoring provision when defense counsel stated that the OAP was without authority to monitor compliance. In fact, the judge suggested counsels return with a revised plea agreement, but defense counsel responded that the OAG could implement the monitoring provision instead, filing a charge of criminal contempt upon noncompliance. Tr. 64.[8]

¶ 28 As another aspect of the impermissible interference into plea negotiations, Hocog claims he was coerced into accepting the plea agreement. Hocog, however, cites no evidence supporting this contention. On the contrary, Hocog concedes he and his attorney first proposed the rehabilitation condition. Prior to the change of plea hearing, Hocog and the Commonwealth filed an executed plea agreement which included the rehabilitation provision. This plea agreement stated Hocog intended to plead guilty, where pleading guilty meant accepting the rehabilitation provision. When Hocog arrived at the change of plea hearing, the executed plea agreement still contained the rehabilitation provision. Taken as a whole, we have no doubt Hocog came to the hearing with the intention of entering a guilty plea and knowledge this plea would require him to comply with the rehabilitation condition. Accordingly, we conclude the judge participated appropriately under Rule 11(e).

V. CONCLUSION

¶ 29 For the foregoing reasons, the court did not abuse its discretion. Thus, we AFFIRM the order denying Hocog's motion to reconsider.

So ORDERED this 21st day of December, 2017.

/s/
JOHN A. MANGLONA
Associate Justice

[8] Hocog specifically points to one statement by the court as evidence of advocacy: "Guess what? This agreement is a three-party agreement. If the court doesn't agree, then we don't have the agreement." Tr. 68. The statement is not advocacy; it is an accurate description of plea-bargaining procedure. Our rules of criminal procedure explain that a plea agreement is only embodied in the judgment and sentence if the court agrees to it. *See* NMI R. CRIM P. 11(e)(3). If the court does not accept the plea agreement, it has no legal force.

/s/
PERRY B. INOS
Associate Justice

/s/
ROBERT J. TORRES
Justice Pro Tem.