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

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS,
Plaintiff-Appellee,

v.

ANTHONY H. BORJA,
Defendant-Appellant.

Supreme Court No. 2017-SCC-0021-CRM
Superior Court No. 12-0203T

ORDER GRANTING PETITION FOR REHEARING

Cite as: 2019 MP 7

Decided September 27, 2019

J. Robert Glass, Jr., Assistant Attorney General, Office of the Attorney General, Saipan, MP, for Plaintiff-Appellee.

Nancy A. Dominski, Assistant Public Defender, Office of the Public Defender, Saipan, MP, for Defendant-Appellant.

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

INOS, J.:

¶ 1 Defendant-Appellant Anthony H. Borja ("Borja") petitions for rehearing in *Commonwealth v. Borja*, 2018 MP 13. He maintains (1) our reliance on *Commonwealth v. Calvo*, 2018 MP 9, is improper and the record is inadequate to demonstrate a sufficiently individualized sentence; and (2) our determinations concerning his parole eligibility are unfounded. For the following reasons, we GRANT Borja's petition.

I. FACTS AND PROCEDURAL HISTORY

¶ 2 In 2018, Borja appealed his sentence of ten years' imprisonment and a six-year restriction on parole eligibility for sexual abuse of a minor in the second degree. He argued his sentence was not sufficiently individualized, the restriction on parole was not properly justified, and the case should be remanded to a different judge for resentencing.

¶ 3 We concluded the court rendered an individualized sentence because it considered several mitigating factors, including Borja's age, good behavior while incarcerated, "good physical and mental health . . . his indigency," and "the victim's admitted attraction and unchanged behavior." *Borja*, 2018 MP 13 ¶ 10 (internal quotation marks omitted). The court measured these against the various aggravating factors, including his juvenile record, the relationship between the victim and Borja, "and the concern for future contact between the two before the victim reaches the age of majority." *Id*. ¶ 12. While the court acknowledged the victim's youth, an essential element of an offense courts generally cannot rely on as a sentencing factor, we found "the court merely uses the victim's age to articulate that she was indeed very young." *Id*. ¶ 11. We affirmed the maximum ten-year sentence.

¶ 4 With respect to the parole eligibility restriction, we found the court made him eligible for parole earlier than what the statute permitted. Specifically, we stated that at the time Borja pled guilty, the relevant statutory provisions did not require an offender to serve a minimum amount of time before being eligible for parole. Thus, we found "Borja would be eligible for parole after serving at *least* two-thirds of his sentence, [or] six years and eight months." *Id*. ¶ 21. However, Borja was made eligible for parole by the trial court after six years, which is eight months sooner than what the statute permitted. Because of this, we remanded his case to the same sentencing court with instructions to correct the defect.

¶ 5 Borja now petitions for rehearing of our decision.

II. STANDARDS OF REVIEW

¶ 6 The petition raises two overarching issues: (1) our reliance on *Calvo* is improper and the record is inadequate to demonstrate an individualized sentence; and (2) our interpretation of his parole eligibility is unfounded. A petition for rehearing "must state with particularity each point of law or fact that the

petitioner believes the Court has overlooked or misapprehended and must argue in support of the petition." NMI SUP. CT. R. 40(a)(2). Raising the same issues and arguments, or raising new issues not asserted in the original appeal is not permissible unless extraordinary circumstances exist. *N. Marianas Coll. v. Civil Serv. Comm'n*, 2007 MP 30 ¶ 2. "If a petition for rehearing is granted, the Court may . . . [m]ake a final decision of the case without re-argument; [r]estore the case to the calendar for re-argument or resubmission; or [i]ssue any other appropriate order." NMI SUP. CT. R. 40(a)(4)(A)–(C).

IV. DISCUSSION

A. Individualized Sentencing

¶ 7 Borja maintains our reliance on *Calvo*, 2018 MP 9, is misplaced. First, he asserts a pro tempore Justice in *Calvo* was so biased that he "justif[ed] his illegal sentencing practices" in drafting the opinion. Pet. Reh'g 1. Second, he argues our reliance on *Calvo* is unfounded because *Calvo* itself was decided incorrectly. Namely, because *Calvo* "improperly allows for the use of elements as aggravating factors," our decision in *Borja* cannot stand. *Id*. Finally, Borja asserts that because there is no accurate record of how the factors were weighed, the court cannot come to an individualized sentence in the absence of the impermissible aggravating factors.

¶ 8 We consider each of Borja's arguments in turn. First, other than citing the statutory provision mandating recusal when a Justice's impartiality might reasonably be questioned, *see* 1 CMC § 3308, Borja cites virtually no supporting authority for his assertion of bias. Thus, this argument is deemed waived. *Kim v. Baik*, 2016 MP 5 ¶ 30 (internal citation omitted) ("[W]hen parties insufficiently develop an argument, we have the discretion to find the issue waived.").

¶ 9 Second, the use of impermissible aggravating factors when sentencing does not unequivocally require vacating the sentence. *Commonwealth v. Hocog*, 2019 MP 5 ¶ 19. Rather, we have announced that vacating a sentence because the court used an impermissible aggravating factor will depend on the extent the court relied on those factors. *See Hocog*, 2019 MP 5 ¶ 19–20. In *Taitano*, we concluded because there were other sufficient aggravating factors, the use of an impermissible aggravating factor did not necessarily constitute an insufficiently individualized sentence. *Taitano*, 2018 MP 12 ¶ 46; *cf. Commonwealth v. Lin*, 2016 MP 11 ¶ 17–18 (finding the court's reliance on elements of the crime as aggravating factors renders an insufficiently individualized sentence). *Calvo*'s holding that the use of an impermissible aggravating factor does not render the whole sentence defective is consistent with our caselaw.[1] Insofar as Borja asserts

[1] In *Borja*, we stated: "Although the court notes its mention of the victim's age to highlight an element of the crime, there is no indication from the SCO or the sentencing hearing transcript that the court attempted to discuss the 'degree, severity, or nature' of victim's age. Rather the court merely uses the victim's age to articulate that she was indeed very young." *Borja*, 2018 MP 13 ¶ 11. Borja does not raise this as a concern, but we address the statement sua sponte. Our determination that the use of an impermissible factor does not by itself create an insufficiently individualized sentence

this proposition is incorrect, he has failed to provide any new or determinative authority for us to come to a contrary conclusion. Therefore, any claim that reliance on *Calvo* is improper is meritless.

¶ 10 As to the third contention—that the record insufficiently weighs the various factors—we have stated that "the court is not required to address those factors, one by one, in some rote incantation when explicating its sentencing decision." *Hocog*, 2019 MP 5 ¶ 24 (internal quotation marks omitted) (quoting *United States v. Suárez-González*, 760 F.3d 96, 101 (1st Cir. 2014)). Further, the statement that the court did not provide a record is patently untrue. Certainly, sentencing courts should be as thorough as possible in justifying a sentencing decision. However, our review of the record does not suggest the court failed to weigh factors at all, but rather examined and measured the factors it found to be the most pertinent. To the extent that Borja maintains the sentence is not individualized—this is not grounds for reconsideration as this is just a recital of an argument already heard and decided on appeal. Consequently, we do not find merit in this third argument and do not go any further.

B. Parole Eligibility

¶ 11 Borja maintains we incorrectly held he must serve two-thirds of his unsuspended sentence before he is eligible for parole. He maintains the law requires he serve two-thirds of the mandatory five-year minimum before he is eligible for parole. As a result, the sentencing court restricted his parole eligibility for longer than what is required. Because the court did not provide appropriate justification in restricting his parole eligibility, the parole restriction is invalid.

¶ 12 We grant the petition for rehearing and reconsider our previous statements concerning Borja's parole restriction. As indicated previously, NMI Supreme Court Rule 40(a)(4)(A) states that "[i]f a petition for rehearing is granted, the Court may . . . [m]ake a final decision of the case without reargument." Borja's argument is premised on whether the parole restriction is consistent with the current parole provisions. Although properly brought to our attention, we find the original statutory provisions control his parole eligibility and reconsider our determinations consistent therewith.

¶ 13 We write to clarify that Public Laws 12-82 and 12-41—the provisions prior to the current statutes—determine the maximum sentence Borja may serve and when he would be eligible for parole. *See* 6 CMC §§ 1307(b), 4252(e) (requiring an offender to serve two thirds of the five-year minimum sentence). In 2012, Borja was charged with multiple offenses, including sexual abuse. Under Public Law 12-82, the maximum penalty for the crime of sexual abuse of a minor in the second degree is ten years imprisonment. The law did not impose a mandatory minimum sentence a defendant must serve. Under to Public Law 12-

---

remains. In that statement, we noted that the sentencing court itself did not appear to expressly discuss the severity of the impact of the victim's age. However, we found that the court, in effect, used the victim's age to express the particular youthfulness of the victim.

41, he is eligible for parole after serving one-third of his unsuspended prison sentence. Borja's unsuspended sentence is ten years. Without further restriction, Borja would be parole eligible after serving three years and four months.

¶ 14 Because Borja's eligibility for parole was restricted greater than what was lawfully required, we must determine whether the sentencing court properly justified the parole restriction. *See Lin*, 2016 MP 11 ¶ 23. We review for plain error where a court has procedurally erred and the defendant-appellant has failed to object, and we review for abuse of discretion for the parole restriction's substantive unreasonableness. *See Commonwealth v. Babauta*, 2018 MP 14 ¶ 12.

¶ 15 Here, the court considered a number of factors in restricting parole eligibility. In particular, it reasoned that restricting eligibility for parole until the victim reached the age of majority would allow the victim to make a more informed decision on her relationship with Borja. *See Commonwealth v. Borja*, Crim. Case No. 12-0203 (NMI Super. Ct. June 23, 2017) (Sentencing and Commitment Order at 9) ("[T]h[e] Court [hopes] that the victim will be mature enough to make an adult decision as to her relationship with [Borja]."); *Commonwealth v. Borja*, Crim. Case No. 12-0203 (NMI Super. Ct. June 23, 2017) (Sentencing Transcript at 22) ("[T]he Court – one of the main concern[s] is that . . . the victim finds – is . . . physically attracted to [Borja], the Court is concerned about that. . . . [E]ligibility of parole after the first 6 years will allow the victim to be 18, an adult, and can – can hopefully make an adult decision as to that."). The court considered the victim's statement that she did not feel adversely affected by Borja's conduct as well as Borja's young age at the time of the offense (18 years old). Ultimately, the court determined that six years was sufficient time to offset any potential danger to the victim.

¶ 16 We find the court did not commit plain error and did not abuse its discretion in justifying Borja's parole eligibility restriction. There was no procedural error in its justification, such as reliance on an impermissible aggravating factor. Further, the court carefully considered when the victim would reach the age of majority to determine Borja's parole eligibility. We find this a proper justification and do not perceive the restriction as substantively unreasonable.

V. CONCLUSION

¶ 17 For the foregoing reasons, we GRANT Borja's petition but AFFIRM the sentence.

SO ORDERED this 27th day of September, 2019.

/s/
ALEXANDRO C. CASTRO
Chief Justice

/s/
JOHN A. MANGLOÑA
Associate Justice

/s/
PERRY B. INOS
Associate Justice