IN THE

SUPREME COURT

OF THE

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS,

Plaintiff-Appellee,

v.

MARIANO QUITUGUA FALIG, JR.,

Defendant-Appellant.

SUPREME COURT NO. 2018-SCC-0003-CRM
SUPERIOR COURT NO. CR-16-0111

OPINION

Cite as: 2019 MP 11

Decided December 13, 2019

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

Robert Charles Lee, Assistant Attorney General, Office of the Attorney General, Saipan, MP, for Plaintiff-Appellee.

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

MANGLOÑA, J.:

¶ 1 Defendant-Appellant Mariano Quitugua Falig, Jr. ("Falig") seeks to vacate his sentence on appeal, arguing (1) the trial court mechanically imposed his sentence; (2) the trial court failed to properly individualize his sentence; and (3) his case should be remanded to a different judge for resentencing. For the following reasons, we AFFIRM Falig's sentence.

I. FACTS AND PROCEDURAL HISTORY

¶ 2 In September 2016, Falig pleaded guilty to violating 6 CMC § 2142(c)(1)[1] for possession of 0.3 grams of methamphetamine and for violating his probation conditions imposed in a previous criminal case.

¶ 3 Falig was sentenced to the maximum term of five years, with one year of parole eligibility after four years served. *Commonwealth v. Falig*, No. 16-0111 (NMI Super. Ct. Jan. 10, 2018) (Sentencing and Commitment Order 5) ("Sentencing Order"). At the sentencing hearing, Falig's daughter spoke, asking the court to impose a short sentence and stating her father was "a really good guy." Tr. 4. Falig then spoke, reading a letter in which he took full responsibility for his actions, apologizing for his crimes, and asking for a chance to change his behavior. In sentencing Falig, a number of unproven incidents were cited in the presentence investigation report ("PSI"), considered to be "contact with the criminal justice system . . . but not necessarily criminal convictions" and given "very little weight or no weight at all." Tr. 12–13. In addition, the court acknowledged Falig's acquittal of a federal charge and mentioned the assault and criminal mischief charges in his previous criminal case, Case No. 14-0114, criminal cases in Guam, and minor traffic offenses. Sentencing Order 2. The temporary restraining orders filed against Falig by his wife, on the other hand, were considered to be "pressing." Tr. 13. These received "weight" based on Falig's increased use of meth, the wife's statements of increased verbal and emotional abuse, Falig's threats to kill her, her subsequent distress, and the passing of her baby during birth. *Id*.

¶ 4 The court then announced mitigating factors. Defendant's reliance on his alleged meth addiction was noted, but the court indicated that "[d]efendant is not being punished because he is an addict. Defendant is being punished because he

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[1] 6 CMC § 2142(c)(1) states:

> Any person found guilty of a first offense of possession of one gram or less shall be sentenced to a term of imprisonment of not less than 30 days. Any person convicted of a second offense of possession of less than one gram shall be sentenced to a term of not less than 60 days. Having been convicted of a second offense, any person convicted of subsequent offenses of possession of less than one gram shall be sentenced to a term of imprisonment of not less than 90 days.

committed a crime of possessing a controlled substance." Sentencing Order 4. Before discussing other mitigating factors, the court stated "[t]here's nothing in the PSI or arguments from counsels, there would be a particular mitigating factor such as but not limited to these." Tr. 13. It then noted Falig's failure to mention other mitigating factors such as cooperating with law enforcement to identify other criminals, drug dealers, or drug users, his youth or age, or any documentation of mental illness or disability. *Id*. at 13–14.

¶ 5 In accordance with 6 CMC § 4115,[2] the court articulated its specific findings. Probation was unavailable because Falig's sentence was not suspended. Sentencing Order 6. It further found parole eligibility was preferable because it provided an "added benefit of a review" of whether, after four years, Falig's behavior would continue to be a danger to the community, the victims, or his family. *Id*. Finally, the court mentioned Falig was a repeat offender, took note of the restraining orders, and referenced the wife's claims about Falig's actions necessitating the temporary restraining orders.

¶ 6 Falig appeals his sentence of five years.

II. JURISDICTION

¶ 7 We have jurisdiction over final judgments and orders of the Commonwealth Superior Court. NMI CONST. art. IV, § 3.

III. STANDARDS OF REVIEW

¶ 8 There are three issues on appeal. First, we review whether the sentence was mechanically imposed for an abuse of discretion. *Commonwealth v. Jin Song Lin*, 2016 MP 11 ¶ 8. Second, we review whether the court properly individualized the sentence. We review Falig's sentence for procedural defects first, then whether the sentence is substantively unreasonable. *Commonwealth v. Babauta*, 2018 MP 14 ¶ 12. A sentence's alleged procedural defects will be reviewed for plain error where no objection is preserved. *Id*. We then review the sentence's substantive reasonableness for an abuse of discretion, whether or not an objection is preserved. *Id*. Finally, because we affirm the sentence, we do not reach the question of remand to a different judge.

¶ 9 At the time this appeal was filed, our jurisprudence dictated that we review sentencing matters for an abuse of discretion. Pending this appeal, we decided *Commonwealth v. Babauta*, 2018 MP 14, and *Commonwealth v. Hocog*, 2019 MP 5. In *Babauta*, the Commonwealth argued the plain error standard of review applied where a defendant failed to object to preserve error on appeal. 2018 MP 14 ¶ 5. In response, we applied a bifurcated standard of review for sentencing dispositions. Whether a defendant-appellant challenges the procedural aspects of a sentence or its substantive reasonableness will determine whether plain error or abuse of discretion applies. A procedural defect in the sentencing to which the

[2] 6 CMC § 4115 states: "The court, in imposing any felony sentence, shall enter specific findings why a sentence, fine, alternative sentence, suspension of a sentence, community service or probation, will or will not serve the interests of justice."

defendant failed to raise an objection is reviewed for plain error. *Id.* ¶ 12. We review a sentence's substantive reasonableness for an abuse of discretion. *Hocog*, 2019 MP 5 ¶ 9; *Babauta*, 2018 MP 14 ¶ 12.

¶ 10 Our decisions in *Babauta* and *Hocog*, issued while this case was pending on appeal, now raise the issue of retroactivity. We have ruled upon the issue of retroactivity of public laws and statutes in the civil context. *See*, *e.g.*, *Commonwealth v. Bashar*, 2018 MP 11 ¶¶ 26–30; *Nevada D.H.H.S. Div. of Welfare v. Lizama*, 2017 MP 16 ¶¶ 15–17. We have never touched upon the issue in the criminal context or how it would apply to standards of review. Thus, we now look to federal caselaw for guidance.

¶ 11 The Fifth Circuit ruled on retroactivity of a standard of review in the criminal context. There, the defendant argued a newly announced standard of review would be an ex post facto law in violation of the United States Constitution, and therefore should not be applied retroactively. *United States v. Mejia*, 844 F.2d 209, 211 (5th Cir. 1988). Ex post facto violations do not occur "if the change in the law is merely procedural and does 'not increase the punishment, nor change the ingredients of the offense or the ultimate acts necessary to establish guilt.'" *Id.* (citing *Miller v. Florida*, 482 U.S. 423, 433 (1987))., The Fifth Circuit held that a change in the standard of review is "procedural rather than substantive because it neither increases the punishment nor changes the elements of the offense or the facts that the government must prove at trial." *Id.* at 211; *see also United States v. Bell*, 371 F.3d 239, 241–42 (5th Cir. 2004). Because changing the standard of review for insufficient evidence to support a jury's conviction did not increase punishment, change the elements of the offense, or alter the facts the government must prove at trial, the change was procedural and therefore could be applied retroactively. *Mejia*, 844 F.2d at 211.

¶ 12 We are persuaded by the Fifth Circuit's decision applying standards of review retroactively so long as it represents a procedural change. Adopting the change in the standard of review in *Babauta* in this decision constitutes a procedural, rather than a substantive, change because it does not increase punishment or change the elements of the crime. Therefore, we apply the standard of review set out in *Babauta* to this case.

IV. DISCUSSION

A. Mechanical Sentencing

¶ 13 Under the guise of an individualized sentencing argument, Falig argues the court mechanically imposed the maximum sentence. He asserts the language in his sentencing order reflects "nearly verbatim" language of other sentencing orders, that portions were "cut-and-paste," that the written and oral sentencing orders were prepared in advance, and that the imposed sentence was "greater than necessary." Opening Br. 2–4 (quoting *Tapia v. United States*, 564 U.S. 319, 325 (2011)). In response, the Commonwealth relies on the adoption, in *Commonwealth v. Jin Song Lin*, 2016 MP 11, of the *Woosley v. United States*, 478 F.2d 139 (8th Cir. 1973), three-factor test to determine whether a sentence

was imposed mechanically. 2016 MP 11 ¶ 10 (citing *Woosley*, 478 F.2d at 140–43). The Commonwealth also argues Falig failed to prove any of the *Woosley* factors. In addition, the Commonwealth maintains that the sentencing orders Falig provides to show a mechanical sentencing policy do not concern similar crimes and defendants.

¶ 14 We review whether a sentence was mechanically imposed for an abuse of discretion. *Jin Song Lin*, 2016 MP 11 ¶ 8. "Reversal is appropriate if the trial court failed to exercise its discretion at all in sentencing." *Id*. (citing *Woosley*, 478 F.2d at 144).

¶ 15 In *Jin Song Lin*, we adopted the *Woosley* three-factor test:

> (1) The judge's prior record of imposing the maximum imprisonment term for a specific offense; (2) the judge's comments indicating a predetermined policy of issuing the statutory maximum for a particular crime; and (3) the lack of reasons for the severity of punishment other than the judge's reflexive attitude.

Id. ¶ 10. We emphasized, however, that we must consider the entire sentencing process and its context in determining whether the *Woosley* factors should be applied. *Id*. (internal citations omitted). There, the defendant offered thirty-two sentencing orders in which the same judge sentenced the defendant to the maximum sentence for various crimes. *Id*. ¶ 12. Only seven of those sentencing orders sentenced defendants for a similar crime as that of the defendant and had been issued intermittently. *Id*. The court also contemplated or "gave some thought" to the sentence when it considered mitigating and aggravating factors by way reviewing evidence and hearing testimony. *Id*. ¶¶ 13–14. For these reasons, defendant's sentence was not mechanically imposed. *Id*. ¶ 14.

¶ 16 Like the defendant in *Jin Song Lin*, Falig identifies two sentencing orders, "with greatly varied individual characteristics, charges and facts," containing the same language as Falig's sentencing order to argue his sentence was mechanically imposed. Opening Br. 2–3. First, Falig himself acknowledges that the orders consider the individual characteristics, charges, and facts of those cases, cutting against his argument that his order results from mere cutting and pasting. Second, as the Commonwealth points out, those orders relate to different defendants, taking into account their individual circumstances, and crimes of sexual abuse, and assault and battery. App. A, 3–4, 7–8. Those sentencing orders include facts about those defendants' criminal histories, the effect of their crimes on the victim, and factors effecting rehabilitation. *Id*. Because the sentencing orders Falig presents as "form-letter" sentencing orders do not concern the same crime for which Falig is sentenced, we are not persuaded the prior record of imposing the maximum term demonstrates a mechanical sentencing policy. Opening Br. 3.

¶ 17 The court also contemplated or "gave some thought" to the sentence imposed on Falig. It reviewed Falig's PSI report, allowed his daughter to speak,

allowed Falig to read his letter, and permitted the parties to argue mitigating and aggravating factors affecting Falig's sentence. In particular, the statement imposing the sentence states that "the court makes these findings that based on the PSI, arguments from counsels, the court records, defendant has prior cases in the CNMI and Guam." Tr. 13. Falig's criminal history and certain other incidents, disputed by the parties as unproven, would not be considered. Tr. 13–14. The comments regarding imposition of the maximum sentence and reasons for the severity of the punishment also do not show a mechanical sentencing policy.

¶ 18 Thus, viewing the sentencing process in its full context and based on our analysis of the *Woosley* factors, we find Falig's sentence was not mechanically imposed.

B. Individualized Sentencing

¶ 19 Falig's arguments center on allegations of the use of boilerplate language and improper consideration and weight of mitigating and aggravating factors. We determine whether Falig makes these arguments as alleged procedural defects or as challenges to the sentence's substantive reasonableness and then review each in turn. We find Falig's sentence was properly individualized and that the court did not plainly err or abuse its discretion.

i. Procedural Defects

¶ 20 Falig makes several arguments as to why his sentence was procedurally defective. Again, he asserts his sentencing order was prepared in advance, "form-letter sentencing," imposing a sentence "greater than necessary," as well as one not supported by specific findings. Opening Br. 2–4 (citation omitted). Thus, because the sentence was copied and pasted from other sentencing orders, Falig concludes his sentence could not have been individualized. *Id*. at 3. He further argues the court used elements of the crime as aggravating factors. Falig argues prior crimes that are violent, involving weapons and drugs, or great bodily harm, should result in a sentence nearer to the maximum. Because Falig did not commit such a crime, he concludes he should receive a sentence nearer to the minimum.

¶ 21 We first consider whether Falig's sentence contained any procedural defects, reviewable for plain error where no objection is preserved. *Hocog*, 2019 MP 5 ¶ 24; *Babauta*, 2018 MP 14 ¶ 12. "Under plain error review, 'we examine whether (1) there was error; (2) the error was plain or obvious; [and] (3) the error affected the appellant's substantial rights." *Babauta*, 2018 MP 14 ¶ 16 (quoting *Commonwealth v. Reyes*, 2016 MP 3 ¶ 11). As to "the third element, 'there must be a 'reasonable probability' the error affected the outcome of the proceeding.'" *Id*. (quoting *Commonwealth v. Salasiban*, 2014 MP 17 ¶ 11). If the error either worked in favor of the appellant or the effect was that it could have helped either side, the appellant fails to prove plain error. *Commonwealth v. Kapileo*, 2016 MP 1 ¶ 13.

¶ 22 Falig claims two procedural defects: first, that the court used boilerplate language in sentencing him, so there was effectively no justification; second, the

court used impermissible aggravating factors in sentencing him. As to the first defect, under 6 CMC § 4115, the court must make specific findings to justify a sentence, alternative sentence, suspension of a sentence, or probation. Where a court evinces a complete failure to provide specific findings, the court has committed procedural error. *Hocog*, 2019 MP 5 ¶ 29 (citing *Gall v. United States*, 552 U.S. 38, 51 (2007)). But, even if the court did provide a justification for his sentence, we have held reliance on an impermissible aggravating factor constitutes a procedural defect. *Id.* ¶ 13. In *Commonwealth v. Kapileo*, 2016 MP 1, we held "an individualized sentence should not include essential elements of a crime as aggravating factors." *Id.* ¶ 25. Elements of a crime as they bear on the nature and severity of the crime may be considered. *Commonwealth v. Calvo*, 2018 MP 9 ¶ 9. Further, the court may consider an impermissible factor if it does not rely solely on that factor. *Commonwealth v. Taitano*, 2018 MP 12 ¶ 45. But "procedural error may exist even when other permissible aggravating factors are present." *Hocog*, 2019 MP 5 ¶ 19.

¶ 23 Here, Falig asserts that because the court used "form-letter" language, it failed to individualize his sentence. Opening Br. 3. Falig specifically points out the language used in the specific findings in his sentencing order mirrors that used in the sentencing orders in *Hocog* and *Borja*. While the sentencing orders include the same language defining deterrence, retribution, incapacitation, and rehabilitation, they also include various facts and individual circumstances for the defendants and convictions in each of the sentencing orders for defendants Hocog, Borja, and Falig. While the court may have come to the same conclusion, that each deserved the maximum sentence, it did so for different reasons in each case. Therefore, it did not "copy and paste" its findings for all three defendants. Accordingly, the court did not fail to individualize Falig's sentence in this way or fail to provide specific findings for his sentence.

¶ 24 Falig next claims the court improperly relied on impermissible aggravating factors. Here, the court stated "[s]o that it is absolutely clear, Defendant is not being punished because he's an addict. Defendant is being punished because he committed a crime of possessing a controlled substance." Sentencing Order 4. Falig misinterprets the court's motivation underlying these statements. First, it made this statement in reference to Falig's addiction as a mitigating factor, not an aggravating factor. Second, in saying this, the court attempts to emphasize that it assessed punishment for his conviction of the crime of possession, not for his alleged addiction. It mentions this so others may not misconstrue its reference to Falig's addiction. The statement does not stand as a consideration of an aggravating factor, but as one clarifying that addiction is not a crime.

¶ 25 We find that the court did not render a procedurally defective sentence. "[D]efendants are more likely to receive an individualized assessment and punishment for the crime when a sentence comports with the procedures ensuring individualization." *Hocog*, 2019 MP 5 ¶ 15. Where the court complied with sentencing procedure, we cannot say the sentence was defective. Thus, we find

no plain error.

ii. Substantive Reasonableness

¶ 26 Falig asserts the court gave no weight to certain mitigating factors, failed to recognize mitigating factors used in federal cases, and relied on unproven allegations as aggravating factors. He then argues he should be sentenced in proportion with the circumstances of the crime, resulting in a sentence near the lower end of the statute's penalty range. As for aggravating factors, Falig takes issue with the consideration of his previous employment as a correction officer and his knowledge of the law. The court, however, failed to make specific findings to support the maximum sentence or explain how the mitigating and aggravating factors were weighed, according to Falig. Finally, Falig contends it also failed to explain why he was not a candidate for probation.

¶ 27 We review the substantive reasonableness of a sentence for an abuse of discretion. *Babauta*, 2018 MP 14 ¶ 12. When reviewing for an abuse of discretion we defer to the sentencing court's decision and reverse "only if no reasonable person would have imposed the same sentence." *Jin Song Lin*, 2016 MP 11 ¶ 15 (citing *Commonwealth v. Palacios*, 2014 MP 16 ¶ 12). When the legislature imposes a sentencing range, the court must weigh mitigating and aggravating factors to reach an individualized sentence. *Taitano*, 2018 MP 12 ¶ 42 (citing *Borja*, 2015 MP 8 ¶ 38). A sufficiently invidualized sentence will reflect the severity of the circumstances:

> [A] sentencing court should tailor its sentence to the circumstances . . . includ[ing], among others, the nature of the crime, the need for deterrence or retribution, and the characteristics of the defendant such as remorsefulness, criminal history, and the ability to be rehabilitated. Given that these circumstances change from case to case, one would expect the severity of the sentences to ebb and flow with those changed circumstances.

Commonwealth v. Fu Zhu Lin, 2014 MP 6 ¶ 48. Where courts consider many mitigating factors, it need not consider each and every one in its sentencing decision. *See Hocog*, 2019 MP 5 ¶ 24 (quoting *United States v. Suárez-González*, 760 F.3d 96, 101 (1st Cir. 2014) ("Although required to consider Section 3553(a) factors, 'the court is not required to address those factors, one by one, in some rote incantation when explicating its sentencing decision.'")).

¶ 28 We first address Falig's arguments regarding consideration of certain mitigating factors. Mitigating factors may be absent for good reason, depending on the particular factor. Falig is correct in that the sentencing order makes no mention of Falig's remorse or acceptance of responsibility. In fact, "[t]here was nothing in the PSI/Memorandum, Briefs/Memorandum or any arguments from counsels that would have been a particular mitigating factor such as (but not limited to)" the factors listed in the sentencing order. Sentencing Order 5. This is true for both the factors of remorse and acceptance of responsibility. However,

the court need not address every possible mitigating factor. Here, the sentencing order's language suggests the court considered, and found no arguments for, the mitigating factors it believed to be the most relevant. Doing so does not constitute an abuse of discretion. As for Falig's assertion that the crime's lack of violence or force is a mitigating factor, we find this to be irrelevant. Falig's crime was one of possession. Because force is not an element of possession, it makes little sense to consider the lack of force as a mitigating factor. Finally, the court made no finding of Falig's addiction, so drug addiction counseling as a mitigating factor required neither consideration nor weight.[3]

¶ 29 Falig's next assertion that his sentence should be tempered by the small amount of meth he possessed is also unavailing. Under 6 CMC § 2142,[4] the legislature provides minimum penalties for possession of particular amounts of controlled substances other than marijuana, with the maximum penalty for possession of any amount being five years. Thus, a defendant can be sentenced to any amount of time between the minimum and maximum. When doing so, the court will look to mitigating and aggravating factors to tailor the sentence to the circumstances and the defendant, adjusting the sentence up or down as needed. Here, the court engaged in that analysis, adjusting Falig's sentence toward the higher end of the penalty range based on prior criminal cases and temporary restraining orders and no particular mitigating factors. Parole remained the only option because probation can be imposed only when a sentence is suspended. Although harsh, imposing the maximum sentence in light of the mitigating and aggravating factors analysis was not an abuse of discretion.

¶ 30 Finally, Falig's employment and knowledge of the law were considered in the analysis of aggravating factors in imposing the maximum sentence. A correction officer's job is to enforce the law, which requires knowledge of the law. The court relied on this fact because the defendant knew that possession of this substance was illegal. Such knowing possession in light of Falig's employment seems to worsen the crime. Similarly, in *Kapileo*, the court considered the defendant's employment as a police officer when issuing the sentence. 2016 MP 1 ¶¶ 2, 18–19. We accepted, without expressly holding, the consideration of Kapileo's employment as a police officer as an aggravating

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[3] In the Sentencing Order, the court states "Defendant claims that he is not an addict." Sentencing Order 3. Conversely, "Defendant is not being punished because he is an addict." *Id*. at 4. Other than these references, the court makes no findings as to whether Falig is or is not an addict. It appears the court wished to ensure its statements were not construed as imposing a penalty for addiction alone.

[4] 6 CMC § 2142(b) states: "Any person who violates subsection (a) with respect to any controlled substance except marijuana shall be sentenced to a term of imprisonment of not more than five years, a fine of not more than $2,000, or both."

factor. *Id*. Here, we do the same, finding no abuse of discretion in the use or weight given to this aggravating factor.[5]

¶ 31 Imposition of the maximum sentence reflects a balancing of Falig's personal, criminal, and employment backgrounds. We do not find that a reasonable person could not have imposed this sentence, and therefore we find no abuse of discretion.[6]

V. CONCLUSION

¶ 32 For these reasons, we AFFIRM Falig's sentence.

SO ORDERED this 13th day of December, 2019.

/s/________________________
ALEXANDRO C. CASTRO
Chief Justice

/s/________________________
JOHN A. MANGLOÑA
Associate Justice

/s/________________________
PERRY B. INOS
Associate Justice

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[5] Falig makes one final argument: that there was insufficient evidence for the temporary restraining orders imposed against him. Specifically, Falig relies on our decision in *Commonwealth v. Demapan*, 2008 MP 16 ¶¶ 50–52, for the proposition that issuing the maximum sentence for Falig was based on an adjudicated crime's element not yet proven beyond a reasonable doubt, or on an unadjudicated crime's element not yet proved by a preponderance of the evidence. This argument, in part, is an objection to the court's mention of Falig's threats to his common law wife that added stress to her pregnancy and "on some level, however slight, contributed to the death of the baby during delivery." Sentencing Order 6. Falig argues the court had no evidence to support this fact, may not make conclusory statements unsupported by facts, and made this finding based on speculation.

We find this argument unavailing. First, Falig erroneously relies upon *Demapan*, in which we addressed only whether an element or sentencing factor may be used to enhance a criminal sentence beyond the maximum. In fact, all the cases Falig cites concern that issue, rather than if there is sufficient evidence to support a claim relied upon in sentencing. *Demapan* and these cases are distinguishable and therefore irrelevant for purposes of our analysis of sufficiency of the evidence. Second, the other cases Falig cites relate to the use of charging papers and arrests to establish guilt. These cases are distinguishable, however, because the court would not give weight to arrests and Falig's charging papers were never at issue. Tr. 12.

[6] Because we fail to find either plain error or an abuse of discretion in the court's sentencing, we need not reach whether the case be remanded to a different judge for resentencing.