IN THE

# Supreme Court

OF THE

# Commonwealth of the Northern Mariana Islands

---

**COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS,**
*Plaintiff-Appellee,*

***v.***

**GEORGE RAMEL DELOS SANTOS,**
*Defendant-Appellant.*

**Supreme Court No. 2017-SCC-0036-CRM**

---

**ORDER AFFIRMING CONVICTION AND SENTENCE**

**Cite as: 2020 MP 16**

Decided July 10, 2020

---

CHIEF JUSTICE ALEXANDRO C. CASTRO
ASSOCIATE JUSTICE JOHN A. MANGLONA
ASSOCIATE JUSTICE PERRY B. INOS

---

Superior Court Criminal Action No. 16-0178
Presiding Judge Roberto C. Naraja, Presiding

---

PER CURIAM:

¶ 1 Defendant-Appellant George Ramel Delos Santos's ("Delos Santos") initial court-appointed counsel on appeal made a motion to withdraw and filed an *Anders* brief. After reviewing the arguments and independently examining the record, we find no colorable claims and therefore AFFIRM the conviction and sentence.

## I. FACTS AND PROCEDURAL HISTORY

¶ 2 Delos Santos, aged fifty-five, performed cunnilingus on a six-year-old victim and pleaded guilty to Sexual Abuse of a Minor in the First Degree in violation of 6 CMC § 1306(a)(1).[1] The Commonwealth dropped additional charges of Disturbing the Peace and Assault and Battery. Delos Santos was sentenced to thirty years of imprisonment with five years suspended. He is eligible for parole after serving eight years and was given ten years of supervised probation. Delos Santos is undocumented and may be subject to removal upon release. The court considered aggravating factors, including the use of pornography to "groom" the victim and the possible transmission of a sexually transmitted disease to the victim. It also considered mitigating factors, including that Delos Santos supports a family in the Philippines.

¶ 3 Delos Santos appealed. He is indigent and has court-appointed counsel. His trial counsel withdrew due to a conflict of interest and Jose P. Mafnas ("Mafnas") was appointed. Trial counsel indicated in his motion to withdraw that Delos Santos intended to challenge his guilty plea and might make a motion to withdraw his plea in the Superior Court. However, there is no record that Delos Santos made such a motion. Mafnas filed an *Anders* brief, believing the appeal to be frivolous. He then withdrew as counsel due to a conflict of interest because he began employment with the CNMI Office of the Attorney General. Since Mafnas has already withdrawn as counsel, his motion to withdraw is moot. The Court appointed the current counsel. Delos Santos and current counsel did not file a supplemental *Anders* brief after being given notice to respond.

## II. JURISDICTION

¶ 4 The Supreme Court has jurisdiction over final judgments and orders of the Commonwealth Superior Court. NMI CONST. art. IV, § 3.

## III. DISCUSSION

¶ 5 An *Anders* brief is a procedure to reconcile conflict between the duty to zealously represent a client and the duty not to make frivolous arguments. When court-appointed counsel for an indigent defendant believes that there are no non-frivolous arguments on appeal, counsel can make a motion to withdraw, which must give the defendant's strongest arguments and discuss the plea colloquy and all adverse rulings. The procedure was pioneered in the U.S. Supreme Court case

---

[1] In pertinent part: "An offender commits the crime of sexual abuse of a minor in the first degree if . . . being 16 years of age or older, the offender engages in sexual penetration with a person who is under 13 years of age . . . ."

*Anders v. California*, 386 U.S. 738 (1967). We adopted this procedure in *Commonwealth v. Santos* but limited its application to plea-based convictions like this one. 2013 MP 10 ¶ 16.

¶ 6 The sole issue is whether there are any non-frivolous grounds for appeal. Under the framework adopted in *Santos*, we must conduct an independent examination of the record to determine if there are any non-frivolous arguments for appeal. "If that examination turns up a colorable claim, we will deny the motion to withdraw and order supplementary briefing. If not, we will summarily affirm the conviction." *Id.* ¶ 17. "A colorable claim is a claim that is reasonably supported by either law or policy, which, if accepted, may result in reversal." *Id.* ¶ 17 n.3.

¶ 7 *Anders* sought to square the right to counsel with the duty not to make frivolous appeals. *Douglas v. California*, 372 U.S. 353 (1963), had established four years earlier that equal protection of rich and poor under the Fourteenth Amendment requires that an indigent defendant receive the benefit of counsel in a first appeal as of right. *Gideon v. Wainwright*, 372 U.S. 335 (1963), incorporated the Sixth Amendment's right to counsel for criminal defendants against the states. *Anders* held that an appellate court could grant a motion to withdraw by counsel believing the appeal to be frivolous only if "accompanied by a brief referring to anything in the record that might arguably support the appeal." 386 U.S. at 744. That is, counsel cannot simply make a bare assertion that the appeal lacks merit.

¶ 8 The Court further clarified this requirement in *McCoy v. Court of Appeals, Dist. 1*, 486 U.S. 429, 442 (1988), stating:

> Unlike the typical advocate's brief in a criminal appeal, which has as its sole purpose the persuasion of the court to grant relief to the defendant, the *Anders* brief is designed to assure the court that the indigent defendant's constitutional rights have not been violated. To satisfy federal constitutional concerns, an appellate court faces two interrelated tasks as it rules on counsel's motion to withdraw. First, it must satisfy itself that the attorney has provided the client with a diligent and thorough search of the record for any arguable claim that might support the client's appeal. Second, it must determine whether counsel has correctly concluded that the appeal is frivolous.

Here, Mafnas's *Anders* motion to withdraw itself is moot, since we have granted his separate motion to withdraw due to conflict of interest. Even so, his *Anders* brief satisfies Delos Santos's constitutional right to appellate counsel. We find that Mafnas provided Delos Santos with a diligent search of the record and that the appeal is indeed without merit.

¶ 9 First, we address the threshold question of whether this appeal is barred by waiver. We conclude it is not, as the Commonwealth has not raised the issue. We then address four arguments on the merits raised in the brief and find no colorable claim. As part of our independent examination of the record, we further

discuss the substantive reasonableness of the sentence, which was listed by trial counsel in the Docketing Statement as the basis of the appeal but not discussed by new counsel. Again, we find no colorable claim and therefore affirm the conviction.

*A. Waiver of the right to appeal*

¶ 10 Delos Santos changed his plea without a plea agreement. Tr. 33. However, he still waived the right to appeal at the change of plea hearing. Our previous cases dealing with appellate waiver, *Commonwealth v. Jin Song Lin*, 2014 MP 19, and *Commonwealth v. Sablan*, 2020 MP 11, have dealt with written plea agreements that explicitly waived the right to appeal. Since the Commonwealth has not raised the issue of waiver here, it is no barrier to proceeding to the merits.

¶ 11 In *United States v. Calderon*, 428 F.3d 928, 930–31 (10th Cir. 2005), the Tenth Circuit held that an appeal waiver did not bar review on the merits because the issue was raised only by defense counsel in an *Anders* brief and not the prosecution. The situation here is similar. The Commonwealth has not raised the issue of waiver in a motion to dismiss, so defense counsel's raising the issue does not bar our consideration of the merits of Delos Santos's claims.

*B. Arguments on the Merits*

*i. Adequacy of Plea Hearing*

¶ 12 The *Anders* brief first raises the adequacy of the plea hearing under NMI Rule of Criminal Procedure 11 ("Rule 11"). The court must address the defendant in open court and ensure that he understands the consequences of his guilty plea, including the charge, the maximum possible penalty, and forfeiture of the right to a trial. NMI R. CRIM. P. 11(c); *United States v. King*, 257 F.3d 1013, 1021 (9th Cir. 2001) (applying FED. R. CRIM. P. 11(c)); *Commonwealth v. Attao*, 2005 MP 8 ¶ 9 n.7. Rule 11 colloquy errors are reversible unless harmless. *King*, 257 F.3d at 1021.

¶ 13 Here, the plea colloquy complied with the requirements of Rule 11. The court asked Delos Santos through an interpreter whether he understood that he was waiving his right to a trial, the right to appeal, and the right to question witnesses. It asked whether he was pleading guilty knowingly and willingly, whether his lawyer explained the immigration consequences, and whether he understood the penalties. Delos Santos answered in the affirmative to all queries and admitted to factual predicates to each element of the offense. Tr. 55–61. We find no error in the Rule 11 colloquy.

*ii. Factual Basis in the Record to Support Guilty Plea*

¶ 14 "The court should not enter a judgment upon" a guilty plea unless "there is a factual basis for the plea." NMI R. CRIM. P. 11(f). This is to "protect a defendant who is in the position of pleading voluntarily with an understanding of the nature of the charge but without realizing that his conduct does not actually fall within the charge." *Commonwealth v. Lizama*, 2015 MP 2 ¶ 11 (quoting *McCarthy v. United States*, 394 U.S. 459, 467 (1969)). If sufficiently specific, "an indictment or information can be used as the sole source of the factual basis

for a guilty plea . . . ." *Id*. ¶ 15 (quoting *United States v. Garcia-Paulin*, 627 F.3d 127, 133 (5th Cir. 2010)).

¶ 15 At the change of plea hearing, Delos Santos admitted to facts sufficient to prove each element of the offense. He stated his age, fifty-five as of August 2016 when the conduct occurred, and admitted to performing cunnilingus on the victim, who was under thirteen at that time. But because no evidence was presented at the change of plea hearing outside Delos Santos's own statements, he could potentially challenge this as a violation of the *corpus delicti* rule.

¶ 16 The *corpus delicti* rule applies in the Commonwealth, *Commonwealth v. Caja*, 2001 MP 6 ¶¶ 31–36, and renders extrajudicial statements without corroboration insufficient for a conviction. Admissions at a change of plea hearing are not, however, extrajudicial, and most courts hold that *corpus delicti* is inapplicable to guilty pleas. In *State v. Weiher*, 1990 Ohio App. LEXIS 2551 (Ohio Ct. App. June 11, 1990), the court found that "the facts alleged in the indictment provide sufficient proof of the *corpus delicti* of the crime . . . ." *Id*. at *9. In *State v. Rubiano*, 150 P. 3d 271, 273–74 (Ariz. Ct. App. 2007), the Arizona appellate court held that the *corpus delicti* rule simply doesn't apply to the guilty plea context because a plea is a statement in a judicial proceeding, not an extrajudicial statement. That is, "the danger that a defendant will be convicted based on coerced or otherwise unfairly elicited and untrustworthy admissions is not the same in the change-of-plea context as it is in the extrajudicial context." *Id.* at 274. The historical purpose of the *corpus delicti* rule was to protect against convictions based solely on unreliable, perhaps unfairly obtained confessions, whereas in a change of plea hearing the judge is charged with ensuring "the defendant's plea and admission of guilt is made with the knowing, voluntary, and intelligent waiver of all relevant constitutional rights." *Id.; but see Commonwealth v. Fears*, 836 A.2d 52, 67 (Pa. 2003) (not holding *corpus delicti* inapplicable to guilty plea, but instead affirmed conviction under closely related crime exception to *corpus delicti*).

¶ 17 The weight of authority holds that guilty pleas are not extrajudicial statements and *corpus delicti* is inapplicable. We are persuaded by this authority and hold that *corpus delicti* is inapplicable to guilty pleas. Even if *corpus delicti* were applicable, there is sufficient corroborating evidence in the record. The victim's mother testified at the sentencing hearing, and the victim testified to the crime to a detective. Though no corroboration was presented at the hearing, Delos Santos's admission was not an extrajudicial statement. There was sufficient factual basis in the record to support a guilty plea.

### *iii. Illegal Sentence*

¶ 18 The brief next raises the question of whether the sentence is illegal. With thirty years of imprisonment, five years suspended, and ten years of supervised probation, Delos Santos has a combined period of imprisonment or supervised probation totaling thirty-five years. 6 CMC § 1306(a)(1) carries a maximum prison sentence of thirty years. 6 CMC § 1306(b). But the CNMI, unlike some jurisdictions, does not determine its maximum length of probation by reference

to the maximum length of imprisonment. Several jurisdictions impose probation terms with a length determined in reference to the maximum prison sentence, including Indiana, Minnesota, and Wisconsin. Our statute, however, simply caps the maximum allowable probation term at ten years for a felony. 6 CMC § 4105(b)(2). The sentence is not illegal since both the length of imprisonment and the length of probation fall within statutorily permissible bounds.

*iv. Ineffective Assistance of Counsel*

¶ 19 The brief then asks whether Delos Santos received ineffective assistance of counsel below.[2] To show ineffective assistance of counsel, the defendant must "show that the counsel's performance was deficient" and that "the deficient performance prejudiced the defense." *Strickland v. Washington*, 466 U.S. 668, 687 (1984). There is a strong presumption that counsel is not ineffective. *Id*. at 690. In the context of a guilty plea, the defense is prejudiced if "there is a reasonable probability that, but for counsel's errors, [the defendant] would not have pleaded guilty and would have insisted on going to trial." *Hill v. Lockhart*, 474 U.S. 52, 59 (1984). This argument is difficult to substantiate from the record on appeal.

¶ 20 Delos Santos could argue that counsel was ineffective in not moving to withdraw plea before sentencing. He indicated a desire to make a motion to withdraw plea after sentencing, which is permissible under NMI Rule of Criminal Procedure 32(d) only to "correct manifest injustice." NMI R. CRIM. P. 32(d); *see also Commonwealth v. Santos*, 2013 MP 18 ¶ 8 ("*Santos II*"). There is no record of such a motion. Before sentencing, a defendant can make a motion to withdraw for a "fair-and-just reason." *Santos II*, 2013 MP 18 ¶ 20. We have adopted the more stringent version of the "fair and just" test, which requires "'substantial reasons' such as procedural or constitutional defects in the plea, or a renewed claim of innocence combined with additional facts that, if accepted as true, would form 'a legally cognizable defense to the charges.'" *Id*. ¶ 10 (quoting *United States v. Barker*, 514 F.2d 208, 220–22 (D.C. Cir. 1975)). No such facts or defects in the plea are in evidence.

¶ 21 It is unlikely that a motion to withdraw plea would have been granted, so there is not a reasonable probability that, but for different choices by counsel, Delos Santos would not have pleaded guilty. Delos Santos has had two court-appointed attorneys since his trial-level counsel withdrew, and neither has filed a post-sentencing motion to withdraw his guilty plea. Delos Santos stated in his plea colloquy that he was informed by counsel of the important consequences of his plea. He cannot plausibly argue either that counsel was ineffective in not moving to withdraw before sentencing or that there is reason to grant a post-sentencing motion to withdraw his guilty plea.

---

[2] Ineffective assistance of counsel is "ordinarily raised by collateral attack upon the conviction and not on direct appeal," but we may review the issue on direct appeal where "the record is sufficiently complete." *Commonwealth v. Shimabukuro*, 2008 MP 10 ¶ 8.

¶ 22 Nor is there a colorable ineffective assistance claim based on immigration consequences. In *Commonwealth v. Shimabukuro*, 2008 MP 10 ¶¶ 15–21, we found no ineffective assistance of counsel when a defendant alleged that counsel misrepresented immigration law. The trial court found the defendant's allegation not credible. Here, Delos Santos stated at the Change of Plea hearing that counsel informed him of the potential immigration consequences of his plea. There is no evidence that his counsel failed to inform him of immigration consequences. Delos Santos has no colorable claim of ineffective assistance of counsel.

*v. Substantive Reasonableness*

¶ 23 The *Anders* brief does not raise a substantive reasonableness of the sentence argument, though trial counsel stated in the Docketing Statement that this was the basis of the appeal. Such an argument would revolve around the court's weighing of aggravating and mitigating factors. *See, e.g.*, *Commonwealth v. Falig*, 2019 MP 11 ¶¶ 26–31; *Commonwealth v. Martin*, 2020 MP 10 ¶¶ 23–25. To properly individualize a sentence, the sentencing court must weigh these factors to arrive at a reasonable sentence within the statutory range. *Commonwealth v. Taitano*, 2018 MP 12 ¶ 42. Here, a substantive reasonableness argument would not trigger reversal. The sentencing court explained its weighing of factors at length both at the hearing and in the written sentencing order. Tr. 100–102. It weighed the defendant's use of pornography to "groom" the victim and transmission of a sexually transmitted disease to the victim as aggravating factors and the defendant's acceptance of responsibility and support of a family in the Philippines as mitigating factors. We reverse a sentence for substantive reasonableness only "if no reasonable person would have imposed the same sentence." *Commonwealth v. Jin Song Lin*, 2016 MP 11 ¶ 15 (quoting *Commonwealth v. Palacios*, 2014 MP 16 ¶ 12). The sentencing court's weighing of factors was reasonable, and there is no colorable substantive reasonableness claim.

## V. CONCLUSION

¶ 24 Though Mafnas has already withdrawn as counsel, his *Anders* brief provided Delos Santos with constitutionally adequate assistance on appeal. Neither Delos Santos nor subsequently-appointed counsel has contested the finding that there is no colorable claim in this appeal. After an independent examination of the record, we agree and therefore AFFIRM his conviction and sentence.

SO ORDERED this 10th day of July, 2020.

/s/
ALEXANDRO C. CASTRO
Chief Justice

/s/
JOHN A. MANGLOÑA
Associate Justice

/s/
PERRY B. INOS
Associate Justice

COUNSEL

J. Robert Glass, Jr., Saipan, MP, for Plaintiff-Appellee.

Shelli L. Neal, Saipan, MP, for Defendant-Appellant.