

FOR PUBLICATION

Appeal No. 2000-039

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

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS,
Plaintiff/Appellant

v.

JOSEPH A. ARRIOLA,
Defendant/Appellee

OPINION and ORDER DISMISSING APPEAL

Cite as: *Commonwealth v. Arriola*, 2002 MP 8

Argued and submitted June 7, 2001
Decided May 1, 2002

For Appellant:

James J. Benedetto
Assistant Attorney General
Office of the Attorney General
Capitol Hill Admin. Building
Saipan, MP 96950

For Appellee:

G. Anthony Long, Esq.
PMB 1797, P.O. Box 10001
Lim Building, 2nd Floor
San Jose
Saipan, MP 96950

BEFORE: MIGUEL S. DEMAPAN, Chief Justice; ALEXANDRO C. CASTRO, Associate Justice; DAVID A. WISEMAN, Justice *Pro Tempore*

WISEMAN, Justice *Pro Tempore*:

¶1 Appellant, Commonwealth of the Northern Mariana Islands [hereinafter COMMONWEALTH], appeals a September 15, 2000 Superior Court order granting a jury trial and a November 8, 2000 Superior Court order denying reconsideration. This Court dismisses COMMONWEALTH'S appeal for lack of jurisdiction based upon two reasons. First, COMMONWEALTH waived the right to appeal the November 8, 2000 order denying reconsideration. Second, the appeal of the September 15, 2000 order was untimely.

I. BACKGROUND

¶2 On March 2, 2000, COMMONWEALTH filed a criminal information against Appellee, Joseph A. Arriola [hereinafter ARRIOLA], charging five counts of sexual abuse of a child in violation of 6 CMC § 1311 (a). (Appellee Excerpts of Record [hereinafter ER] at 3-5.) If found guilty, ARRIOLA would be subject to imprisonment of five years or less and/or a fine of \$2000 or less. 6 CMC § 1311 (c). Pursuant to 7 CMC § 3101, only those subjected to a potentially longer period of imprisonment or a larger monetary fine are entitled to a jury trial.¹

¹ Section 3101(a) of Title 7 of the Commonwealth Code states as follows:

Any person accused by information of committing a felony punishable by more than five years imprisonment or by more than \$2,000 fine, or both, shall be entitled to a trial by a jury of six persons. The Commonwealth Rules of Criminal Procedure apply, except that the jury shall be of six persons or such smaller number as the parties may stipulate with the approval of the court.

¶3 ARRIOLA moved the lower court for a jury trial and the court granted ARRIOLA'S motion on September 15, 2000. *Commonwealth v. Arriola*, Crim. No. 00-0127 (N.M.I. Super. Ct. Sept. 15, 2000) (Decision and Order Granting Defendant's Motion for Jury Trial). In apparent response to the court's order, COMMONWEALTH moved the court for reconsideration on September 13, 2000. The court heard argument on October 10, 2000 and issued an order denying reconsideration on November 8, 2000. (Appellee ER at 16-29.) On December 5, 2000, COMMONWEALTH filed a notice of appeal relating to the September 15, 2000 order granting a jury trial and the November 8, 2000 order denying reconsideration. (Appellee Supp. ER at 1-2.) We must consider, as a threshold matter, whether we have jurisdiction over this appeal.

II. JURISDICTION

A. *Waiver of Appeal - November 8, 2000 Order*

¶4 It is well settled within the Commonwealth, and within the Ninth Circuit, that issues not raised in a party's opening brief are waived. *In re Blankenship*, 3 N.M.I. 209, 216 (1992); *see also Barnett v. U.S. Air, Inc.*, 228 F.3d 1105, 1111 (9th Cir. 2000) (employer's failure to raise issue whether employee was disabled under ADA in its opening and reply briefs waived that issue); *Paracor Finance v. General Elec. Capital Corp.*, 96 F.3d 1151, 1168 (9th Cir. 1996); *Smith v. Marsh*, 194 F.3d 1045, 1052 (9th Cir. 1999) ("arguments not raised by a party in its opening brief are deemed waived"); *Brookfield Communications, Inc. v. West Coast Entertainment Corp.*, 174 F.3d 1036, 1046 n.7 (9th Cir. 1999) ("Brookfield chose not to argue its trademark dilution claim or its state law causes of action in its opening brief. We accordingly deem those issues waived."); *Zukle v. Regents of University of California*, 166 F.3d 1041, 1045 n.10 (9th Cir. 1999) ("Zukle did not raise her race, sex or sexual harassment claims in her opening brief; therefore she has waived any appeal from the

district court's grant of summary judgment on these claims.").

¶15 Here, COMMONWEALTH filed its notice of appeal on December 5, 2000. (Appellee ER at 1-2; Notice of Appeal.) COMMONWEALTH stated in the notice of appeal that the following two orders were being appealed from: (1) "order denying motion for reconsideration of order granting motion for jury trial, dated November 8, 2000, and (2) order granting motion for jury trial, dated September 15, 2000." (Appellee Supp. ER at 1-2.)

¶16 Although COMMONWEALTH stated that the above two orders were being appealed from, it only briefed the issues surrounding the September 15, 2000 order in its opening brief. Specifically, COMMONWEALTH listed in its opening brief that the issue being presented is as follows: "[w]hether the trial court erred in granting the Appellee's Motion for a Jury Trial." (Appellant Opening Br. at 9.) Issues relating to the order denying reconsideration were not addressed.

¶17 As the Ninth Circuit Court of Appeals explained in *Greenwood v. FAA*, 28 F.3d 971, 977 (9th Cir. 1994), "[w]e review only issues which are argued specifically and distinctly in a party's opening brief. We will not manufacture arguments for an appellant, and a bare assertion does not preserve a claim." (internal citation omitted).

¶18 Accordingly, COMMONWEALTH'S statement in its notice of appeal, that the November 8, 2000 order denying reconsideration was being appealed, was nothing more than a "bare assertion" because the issue was never briefed or even raised again on appeal. Thus, it is the Court's holding that COMMONWEALTH has waived the right to appeal the November 8, 2000 order.

B. Timeliness of Appeal- September 15, 2000 Order

¶19 Pursuant to statute, an appeal by the Commonwealth in a criminal case, "shall be taken within 30 days after the decision, judgment or order has been rendered and shall be diligently prosecuted." 6

CMC § 8101 (b). This statute imposes a thirty day time limit in which to seek review. This Court has previously held, "[a] criminal statute providing the government with a limited right to appeal is to be strictly construed." *Commonwealth v. Nethon*, 1 N.M.I. 458, 461 (1990).

¶10 Here, the Superior Court entered judgment granting ARRIOLA'S motion for a jury trial on September 15, 2000. *Commonwealth v. Arriola*, Crim. No. 00-0127 (N.M.I. Super. Ct. Sept. 15, 2000) (Decision and Order Granting Defendant's Motion for Jury Trial). A strict construction of 6 CMC § 8101 (b) would require COMMONWEALTH to file a notice of appeal within thirty days, or no later than October 15, 2000. COMMONWEALTH filed its notice of appeal eighty-one days later, on December 5, 2000. (Appellee ER at 1-2; Notice of Appeal.) Thus, the appeal was untimely.

¶11 A court lacks jurisdiction to decide an appeal if the notice of appeal is not timely filed because the timely filing of a notice of appeal is "mandatory and jurisdictional." *Lucky Dev. Co. v. Tokai U.S.A., Inc.*, 2 N.M.I. 450, 455-56 (1992); *Tudela v. Marianas Pub. Land Corp.*, 1 N.M.I. 179, 185 (1990) (citing *Browder v. Director, Dep't of Corrections of Ill.*, 434 U.S. 257, 264-65, 98 S. Ct. 556, 561, 54 L. Ed. 2d 521 (1978)). See also *Socop-Gonzalez v. INS*, 272 F.3d 1176, 1190 (9th Cir. 2001) (citing *Stone v. INS*, 514 U.S. 386, 399-400, 115 S. Ct. 1537, 1546, 131 L. Ed. 2d 465 (1995)) (describing statutes specifying the time for review as "mandatory and jurisdictional").

¶12 Accordingly, this Court lacks jurisdiction over the September 15, 2000 appeal because the appeal was untimely and we **DISMISS**.

III. CONCLUSION

¶13 For the foregoing reasons, COMMONWEALTH'S appeal is **DISMISSED**.

SO ORDERED this 1st day of May, 2002.

/s/ Miguel S. Demapan
MIGUEL S. DEMAPAN, Chief Justice

/s/ Alexandro C. Castro
ALEXANDRO C. CASTRO, Associate Justice

/s/ David A. Wiseman
DAVID A. WISEMEN, Justice *Pro Tempore*