FOR PUBLICATION

Appeal No. 02-024-GA

IN THE SUPREME COURT OF THE

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS,
Plaintiff-Appellee,

v.

DAVID T. DIAZ,
Defendant-Appellant.

OPINION

Cite as: *Commonwealth v. Diaz*, 2003 MP 14

Criminal Case No. 01-0381-E

Argued and submitted August 13, 2003

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BEFORE: DEMAPAN, Chief Justice; CASTRO and MANGLONA, Associate Justices.

MANGLONA, Associate Justice:

¶1 David T. Diaz ("Diaz") timely appeals both the trial court's denial of his motion for a new trial and the imposition of sentence. We have jurisdiction pursuant to Article IV, Section 3 of the Constitution and 1 CMC § 3102(a). We affirm the denial of the new trial but vacate the sentence imposed because the trial court misinterpreted the sentencing statute.

ISSUES PRESENTED AND STANDARDS OF REVIEW

¶2 This appeal presents the following two issues for our consideration:

1. Whether the trial court erred in denying, because it was untimely, Diaz' motion for a new trial based on ineffective assistance of counsel; and

2. Whether the trial court incorrectly applied 6 CMC § 2141(b)(1) when sentencing Diaz.

We review for abuse of discretion the trial court's denial of a motion for a new trial based on ineffective assistance of counsel. *See United States v. Cochrane*, 985 F.2d 1027, 1029 (9th Cir. 1993). We review *de novo* its determination of whether the defendant received ineffective assistance of counsel. *Commonwealth v. Esteves*, 3 N.M.I. 447, 453 (1993). The trial court's determination that it lacked jurisdiction to hear the motion is an issue of law, reviewed *de novo*. *Office of the Attorney General v. Rivera*, 3 N.M.I. 436, 441 (1993) ("The issue of jurisdiction is a question of law and subject to de novo review."). A trial court's interpretation of a statute is reviewed *de novo*. *Commonwealth v. Cabrera*, 1997 MP 1 ¶2, 5 N.M.I. 44, 45 (*citing In re "S.S."*, 3 N.M.I. 177, 179 (1992)).

FACTUAL AND PROCEDURAL BACKGROUND[1]

¶3 On April 22, 2002, a jury found Diaz guilty of trafficking a controlled substance in violation of 6 CMC § 2141(a)[2] and of criminal mischief in violation of 6 CMC § 1803(a)(1). Diaz filed a motion for a new trial on August 26, 2002. The trial court entered its Sentence and Commitment Order on August 28, 2002, which sentenced Diaz on two counts. For the count of Trafficking of a Controlled Substance, the trial court sentenced Diaz to, among other things, "thirty (30) years imprisonment, with five years suspended" and a $2,000 fine. Excerpts of Record [hereinafter E.R.] at 2. For the count of Criminal Mischief, the trial court sentenced Diaz to "one (1) year imprisonment, all suspended" along with various fees.[3] *Id*. (emphasis omitted).

¶4 On September 23, 2002, the trial court held a hearing on Diaz' motion for a new trial. The trial court orally denied the motion, holding that the motion was not made in a timely fashion,[4] and entered its final written decision on September 30, 2002.

¶5 Diaz timely appealed on September 30, 2002.[5]

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[1] The facts are taken from the Appellant's Opening Brief.

[2] Section 2141(a) of Title 6 of the Commonwealth Code reads:

> (a) It shall be unlawful for any person knowingly or intentionally:
>
> (1) To manufacture, deliver or possess with intent to manufacture, deliver or dispense, a controlled substance; or
>
> (2) To create, distribute, or possess with intent to deliver, a counterfeit controlled substance.

6 CMC § 2141(a).

[3] This sentence was not appealed and is undisturbed on appeal.

[4] The Court: What is it? Four months after his conviction?
Counsel: Yes, that is correct.
The Court: That's when he came in?
Counsel: Yes, Your Honor.
The Court: I don't think that that's proper. So I'm going to deny the motion for a new trial. Thank you.
Excerpts of Record [hereinafter E.R.] at 13:38.

[5] Diaz actually filed his notice of appeal on September 23, 2002. Commonwealth Rule of Appellate Procedure 4(b) reads, in pertinent part: "[a] notice of appeal filed after the announcement of a decision, sentence or order but before entry of the judgment or order shall be treated as filed after such entry and on the day thereof."

ANALYSIS[6]

1. The trial court did not abuse its discretion in denying Diaz' untimely motion for a new trial.

¶6 Diaz admits that he did not file his motion for a new trial based on ineffective assistance of counsel within the time permitted by Rule 33 of the Commonwealth Rules of Criminal Procedure, which mandates that such motion be brought within seven days after the verdict or the finding of guilt. Rule 33 reads:

> The court on motion of a defendant may grant a new trial to him/her if required in the interest of justice. If trial was by the court without a jury the court on motion of a defendant for a new trial may vacate the judgment if entered, take additional testimony and direct the entry of a new judgment. A motion for a new trial based on the ground of newly discovered evidence may be made only before or within two years after final judgment, but if an appeal is pending, the court may grant the motion only on remand of the case. A motion for a new trial based on any other grounds shall be made within seven (7) days after verdict or finding of guilty or within such further time as the court may fix during the seven (7) day period.

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[6] Before we address the merits of the appeal, we must discuss the standard of review offered by Diaz. Commonwealth Rule of Appellate Procedure 28(a)(2) requires the Appellant's brief to include "[a] statement of the issues presented for review and the standard of review for each issue." Com. R. App. P. 28(a)(2). After listing the issues to be reviewed, counsel for Diaz stated: "[t]hese matters involve the trial court's interpretation of a statute and rule and are reviewed de novo. *Commonwealth of the Northern Mariana Islands v. Francisco M. Cabrera*, Appeal No. 95-016, Criminal Case No. 92-90 (1996)." We note that the authority, as cited, does not exist and, further, the case to which Diaz was attempting to cite is incorrectly cited as a slip opinion. *See* Supreme Court General Order No. 2001-100 ¶6. Focusing on the appeal number provided to us, we have determined that Diaz was attempting to cite either *Commonwealth v. Cabrera*, 4 N.M.I. 240 (1995) [hereinafter *Cabrera I*] or *Commonwealth v. Cabrera*, 1997 MP 1 [hereinafter *Cabrera II*]. This is not the only deficiency in the briefs. Diaz also violated Rule of Appellate Procedure 28(a)(4). *See infra* ¶7.

The Commonwealth violated Rule of Appellate Procedure 28(*l*) when it failed to demonstrate the jurisdiction of the Superior Court and of this Court by making either the statements required by Rule 28(*l*)(1)-(3) or a statement of agreement with appellant's statement as permitted by Rule 28(*l*). Furthermore, in its Brief, the Commonwealth, attempting (we assume) to direct us to *Cabrera II* (*Commonwealth v. Cabrera*, 1997 MP 1), incorrectly cited it numerous times as "*Commonwealth v. Cabrera*, Appeal No. 95-016 (N.M.I. Supreme Court, Submitted Nov. 7, 1996)" in violation of Supreme Court General Order No. 2001-100 ¶6. This violation may seem de minimus, but it was aggravated by two factors. First, each party used the incorrect format. Next, there are a series of *Cabrera* cases in relative proximity to the slip opinion incorrectly cited by each party. In addition to the two cases listed above, a third *Cabrera* opinion was issued. *See Commonwealth v. Cabrera*, 1997 MP 18. Thus, it was difficult to discern the precise arguments of the parties.

Due to these errors, an Order to Show Cause why counsel for each party should not be sanctioned shall issue in conjunction with this Opinion.

Id. Diaz argues, however, that Commonwealth Rule of Criminal Procedure 2, which states that the Rules of Criminal Procedure "are intended to provide for the just determination of every criminal proceedings…[t]hey shall be construed to secure simplicity in procedure, fairness in administration, and the elimination of unjustifiable expense and delay," obviates his need to timely file his motion, as it was impossible to comply[7] with the time limit imposed by Rule 33 due to the nature of his claim (ineffective assistance of counsel).

¶7 The trial court's denial of Diaz' motion for a new trial must stand for two reasons. First, there is absolutely no support in the record before this Court for the assertion Diaz makes which is necessary to his claim that "fairness in administration" of the Rules of Criminal Procedure should trump the bright line filing requirements of Rule 33. For example, Diaz claims that he "had tried more than sixty (60) times without success to reach his former attorney regarding the case." *See supra* n.7. He does not, however, follow (or precede) this assertion with any citation to the Excerpts of Record as required by Commonwealth Rules of Appellate Procedure 28(a)(3)[8] and (4)[9].

¶8 It is not, however, surprising that Diaz failed to properly cite to the Excerpts of Record, because the Excerpts is devoid of any reference to the assertion that Diaz "tried

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[7]He argues: "[t]here is absolutely no way that the defendant could have filed his motion for a new trial because defendant had tried more than sixty (60) times without success to reach his former attorney regarding the case. Defendant's attempt to communicate with his former attorney fell on death [sic] ears." Appellant's Br. at 5.

[8] Commonwealth Rule of Appellate Procedure 28(a)(3) reads, in pertinent part: "[t]here shall follow a statement of the facts relevant to the issues presented for review, *with appropriate references to the record*." Com. R. App. P. 28(a)(3) (emphasis added).

[9] Commonwealth Rule of Appellate Procedure 28(a)(4) reads, in pertinent part: "[t]he argument shall contain the contentions of the appellant with respect to the issues presented, and the reasons therefore, *with citations to the* authorities, statutes and *parts of the record relied on*." Com. R. App. P. 28(a)(4) (emphasis added).

more than sixty (60) times without success to reach his former attorney regarding the case."[10]

¶9 As such, we can do nothing but speculate at this time as to whether Diaz was or was not denied the effective assistance of counsel at trial. Considering the current posture of Diaz' case, this is to be expected. "The issue of ineffective assistance of counsel at trial ordinarily is raised by collateral attack upon the conviction, and not on direct appeal." *Commonwealth v. Esteves*, 3 N.M.I. 447, 460 (1993). "We may, however, review the issue on direct appeal, but only where 'the record is sufficiently complete to [ ] decide the issue.'" *Id.* (*quoting U.S. v. O'Neal*, 937 F.2d 1369, 1376 (9th Cir. 1991) (*overruled on other grounds by In re Alcantor*, No. A-72101831, 1994 BIA LEXIS 4, at *29 (Department of Justice, Bd. of Immigration App., May 25, 1994)). As there is nothing in the record to substantiate Diaz' claim of ineffective assistance of counsel at trial, we are unable to subject the claim to *de novo* review. Consequently, we are unable to determine if Rule 2's requirement that the Rules be construed so as to secure "fairness in administration" trumps the filing requirement of Rule 33, as it applies to Diaz.

¶10 Notwithstanding the incomplete record, Diaz' argument also fails because it is without merit. Assuming, *arguendo*, that Diaz did, indeed, receive ineffective assistance of counsel at his trial, we are convinced that Rule 2 does not alter Diaz's need to file his motion for a new trial based on the ineffective assistance of counsel within the seven days required by Rule 33.

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[10] The trial court's Order Denying Defendant's Motion for a New Trial filed on September 30, 2002, does state:

> [o]n June 12, 2002, fifty-one (51) days after his conviction, Defendant submitted a letter to the court with allegations of ineffective assistance of counsel. Specifically, he claimed that his counsel had never spoken to him at CDC, had not followed up on any of his requests to speak to certain witnesses, nor in any meaningful manner represented him throughout the entire course of his criminal trial.

E.R. at 5.

¶11 Foremost, while Rule 2 does state that the Rules of Criminal Procedure "shall be construed to secure simplicity in procedure, fairness in administration, and the elimination of unjustifiable expense and delay," this does not mean that, in so applying the Rules, the trial court is to ignore their plain language. Commonwealth Rule of Criminal Procedure 33 *explicitly requires* that any motion for a new trial based on grounds other than newly discovered evidence be made "within seven (7) days after verdict or finding of guilty."

¶12 Further, as the trial court correctly concluded, this seven day period is of jurisdictional significance. Pursuant to Federal Rule of Criminal Procedure 33,[11] "[t]he seven-day period for filing a motion for a new trial, based upon any ground other than newly discovered evidence, is a jurisdictional limit on the district court's power to act." *United States v. Miller*, 869 F.2d 1418, 1420 (10th Cir. 1989).[12] Likewise, the limitations of Commonwealth Rule of Criminal Procedure 33 are jurisdictional in that they delineate the period of time in which the trial court may act.

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[11] Because the Commonwealth Rules of Criminal Procedure are patterned after the Federal Rules of Criminal Procedure, interpretations of the federal rules are "instructive." *Commonwealth v. Ramangmau*, 4 N.M.I. 227, 233 n.3 (1995). For an analysis of the historical jurisdiction of trial courts to entertain motions for a new trial and the Federal Rules of Criminal Procedure, see *United States v. Smith*, 331 U.S. 469, 473-74, 67 S. Ct. 1330, 1332-33, 91 L. Ed. 1610, 1613 (1947).

[12] *See also Lujan v. United States*, 204 F.2d 171, 172 (10th Cir. 1953); *United States v. Brown*, 742 F.2d 363, 368 (7th Cir. 1984); *United States v. Dukes*, 727 F.2d 34, 38 (2d Cir. 1984); *United States v. Tobin*, 701 F.2d 1108 (4th Cir. 1983); *United States v. Cook*, 670 F.2d 46, 48 (5th Cir. 1982); *United States v. Fontanez*, 628 F.2d 687, 691 (1st Cir. 1980); *United States v. Holy Bear*, 624 F.2d 853, 856 (8th Cir. 1980).

¶13 Finally, there is nothing "unfair" about the seven-day limit imposed by Rule 33 generally[13] or as it applies specifically to Diaz. Discussing FED. R. CRIM. P. 33, the United States Supreme Court noted that new trials:

> may be granted for error occurring at the trial or for reasons which were not part of the court's knowledge at the time of judgment. For the latter, the Rules make adequate provision. Newly-discovered evidence may be made ground for motion for new trial within two years after judgment. For the former, *habeas corpus* provides a remedy for jurisdictional and constitutional errors at the trial, without limit of time.[14]

Smith, 331 U.S. at 475, 67 S. Ct. at 1333, 91 L. Ed. at 1614 (citations omitted). Similarly, Commonwealth Rule of Criminal Procedure 33 affords adequate provision for the granting of new trials. The trial court did not err in denying, as untimely filed, Diaz' motion for a new trial.

2. The trial court misinterpreted the sentencing statute.

¶14 Diaz asserts that the trial court misinterpreted and, consequently, incorrectly applied 6 CMC § 2141(b)(1) when sentencing him. We agree. Section 2141(b)(1) reads, in pertinent part:

> (b) Any person who violates subsection (a) of this section with respect to:
> (1) A substance classified in Schedules I or II which is a narcotic drug or methamphetaminehydrochloride shall be sentenced for a first offense to a term of imprisonment for not less than 25 years, a fine of not more than $10,000, or both and the term of imprisonment shall not be subject to suspension, probation or parole. . .

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[13] One might, however, find an exception in the "unique circumstances" doctrine enunciated by the United States Supreme Court. *See Thompson v. INS*, 375 U.S. 384, 84 S. Ct. 397, 11 L. Ed. 2d 404 (1964). The doctrine holds, in short, that "courts may act on untimely motions when district judges induce parties to rely to their detriment on erroneous extensions of time." *United States v. Hocking*, 841 F.2d 735, 737 (7th Cir. 1988) (*citing Thompson*). This doctrine is inapplicable to the facts of Diaz's case, as there is nothing in the record to suggest, nor does Diaz claim, that the trial judge in any way induced Diaz to file his motion in an untimely fashion.

[14] The Anti-Terrorismand Effective Death Penalty Act of 1996 imposes a one-year statute of limitations on the filing of an application for a writ of *habeas corpus* in federal court concerning cases from state courts. 28 U.S.C.S. § 2244(d)(1) ("A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court"). Notwithstanding this change, ample time is still available to remedy errors made at trial with a writ of *habeas corpus.*

6 CMC § 2141(b)(1).

¶15 The crux of Diaz' argument is that the trial court failed to consider the possibility of foregoing incarceration and sentencing Diaz only to the payment of a fine not to exceed $10,000. *See* Appellant's Br. at 3-4. Diaz supports this assertion with references to the transcript of the sentencing hearing, discussed *infra*, wherein Diaz asserts it appears that the trial court felt obligated to, at a minimum, sentence Diaz to a period of 25 years incarceration.

¶16 The Commonwealth agrees with Diaz that, pursuant to § 2141(b)(1), he could have been sentenced for a violation of § 2141(a) to a fine, independent of a period of incarceration. *See* Commonwealth's Br. at 2 ("[T]he court understood that prison or a fine could be imposed individually, or together"). The Commonwealth argues that, while it appears "that the trial court did not seriously consider[15] a sentence of only a fine and that a sentence of incarceration would be imposed," *id.*, sufficient evidence exists to infer that the trial court possessed a "correct understanding of the range of sentences possible." *Id*. In support of this contention the Commonwealth points to the trial court's statement: "[s]o, the court's view is that 6 CMC § 2141 can be considered for sentencing this

[15] The Commonwealth offers the following as justification why the trial court would not seriously consider sentencing Diaz to only a fine:

> This is defendant's third drug-related conviction. In addition, the defendant endangered other persons while fleeing the police and possessed equipment to counter surveillance of him. Finally, defendant possessed over 100 grams of the controlled substance. The court had previously asked the parties to address the question of whether the court could impose a life sentence due to this conviction. The court determined that a life sentence for this conviction would not be lawful.

Commonwealth's Br. at 2 (citations and footnote omitted).

morning, calling for a conviction, a sentence of a minimum of twenty-five years, ten thousand dollars, or both."[16] E.R. at 21.

¶17 Section 2141(b)(1) was amended in 1998, after the *Cabrera I* and *Cabrera II* decisions. The plain language of the current version of § 2141(b)(1) mandates the imposition of one of three punishments: a fine not exceeding $10,000; a term of imprisonment for not less than 25 years; or both. 6 CMC § 2141(b)(1); *see Cabrera II*, 1997 MP 1 ¶4 (interpreting a previous version of 6 CMC § 2141(b)(1); *Cabrera I*, 4 N.M.I. at 250-51 (same). The question is whether the trial court realized that the three discrete options existed, and accordingly sentenced Diaz pursuant to the statute. We must vacate Diaz' sentence, for we are unclear as to how the trial court interpreted the statute.

¶18 We are not convinced that the trial court understood that it could sentence Diaz to only a fine.[17] While it is true that the trial court correctly stated that the range of penalties pursuant to § 2141(b)(1) included "a sentence of a minimum of twenty-five years, ten thousand dollars, or both," E.R. at 21, this is nothing more than a recitation of the language of the statute. As was seen in *Cabrera I*, a trial court can easily misinterpret the plain language of a statute. *Cabrera I*, 4 N.M.I. at 251. In fact, *Cabrera II* shows that a trial court can misinterpret the plain language of a statute even with the guidance of a published Opinion from this Court. *Cabrera II*, 1997 MP 1 ¶4. Thus, the fact that, in

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[16] The Commonwealth argues:

> The statement clearly implies that the court understood that prison or a fine could be imposed individually, or together. While it is apparent that the trial court may have wanted to impose a term of imprisonment of less than twenty-five years, the court realized that, having determined that imprisonment is appropriate, the sentence must be for the statutory period.

Id.

[17] This is not to say that the trial court *should* impose a sentence which includes only a fine in this instance, only that the trial court *could* have done so.

Diaz' instance, the trial court correctly read the statute does not necessarily mean that the trial court correctly interpreted what was written.

¶19 While the fact that the trial court may have had many reasons not to seriously consider sentencing Diaz to only a fine is persuasive, it is not determinative of the question. For, while the trial court was admittedly aware of Diaz' previous convictions, reckless conduct, and the large amount of controlled substance trafficked by Diaz, the trial court also, numerous times, expressed great regret that a minimum period of incarceration was mandated by the legislature.

¶20 For example, the trial court stated:

> Mr. Diaz, dangkulo nu mina'ase hu nu hagu. Ti baihu dagge hao nu i mina'ase hu ni hagu, lao i lai ginagagao na baihu sentensia hao biente singko anus minimum mandatory sa enao gue i lai ginagagao. Mampos este na sentensia, fino' Mr. Arriola, ha interpret i legislative history serious. Lao hafa hit to cho'gue yanggen enao gue ilek-na i legislature? Enao gue i minimum mandatory sentence. Malago ha'yu na baihu punish hao less, baihu na'e hao sentence less, I sentensia-mu less, lao ti sina gi iyoko responsibilidat na baihu na'e hao less. Esta i jury kumentus. Esta i jury nu sinangane-hao na guilty hao of estague na crime. Gof dangkulo mina'ase hu, dangkulo lokkue mina'ase niha lokkue i jury siguro, lao gi presente ti relevant enao. I sentensia-mu thirty years, beinti sinku añus I minimum poro hun serve yan five years on probation after iyomu twenty five years na sentence.[18]

[18] The Commonwealth translated this passage to read:

> Mr. Diaz, I have great empathy for you. I do not lie when I say I empathize with you but the law requires that I sentence you to the minimummandatory of 25 years because that is what the law requires. This sentencing, as Mr. Arriola put it, is a serious interpretation of the legislative history. What can we do when the legislature speaks. That is the minimum mandatory sentence. I want to give you less punishment, less sentencing, but as it is my responsibility I can not give you less. The jury has spoken. The jury has spoken that you are guilty of this crime. I greatly empathize with you and I am sure the jury feels the same empathy for you, but at present that is irrelevant. Your sentence is for [30] years, 25 years minimum and five years on probation after you have served the 25 years sentence.

E.R. at 23-24. The trial court also said, "[b]ut like I just said to you in Chamorro, dangkulo mina'ase hu nu hagu, lao ti sina baihu diroga I statute." E.R. at 25.[19] Further:

> I must tell you that while punishing a person twenty-five years mandatory minimum for the status of drug addiction would be cruel and unusual. But punishing a person for engaging in the distribution of drugs, this court takes the position that it is not unusual and it is not cruel. So what are we looking at? We're looking at a minimum of twenty-five years.

E.R. at 20.

¶21 Perhaps the most persuasive argument the Commonwealth could have made, but did not, is the fact that the trial court, in sentencing Diaz to thirty years incarceration, chose to give a sentence more harsh than the twenty five years mandated by statute if the trial court determined incarceration was appropriate. In *Cabrera I* we stated, "[t]he fact that the trial court sentenced Cabrera to eight years imprisonment indicates that the court not only considered incarceration to be a proper sentence, but that such a sentence should be more than the [then] minimum five-year period." *Cabrera I*, 4 N.M.I. at 251 n.70. Here, by sentencing Diaz to more than the mandatory minimum amount of time, a thirty year sentence with five years suspended,[20] one could infer that the trial court determined that a fine alone would not suffice.[21]

¶22 That said, we remain in equipoise as to whether the trial court incorrectly assumed it must incarcerate Diaz or whether it correctly interpreted 6 CMC § 2141(b)(1). The following exchange seems to highlight the problem:

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[19] This was translated by the Commonwealth to read: "I empathize with you, but I cannot circumvent the statute."

[20] *See infra* ¶¶ 26-30 for a discussion on the suspension of a portion of Diaz' sentence.

[21] At oral arguments, counsel for Diaz conceded that to be a "point well taken," and stated that the thirty years imprisonment to which Diaz was sentenced "seems somewhat inconsistent with" the trial court's repeatedly stated desire to sentence Diaz to a shorter period of incarceration.

Counsel: The alternative here by the use of the word "or" which is conjunctive, and it's a word used to indicate the alternative is to fine Mr. Diaz ten thousand dollars for this particular offense of drug trafficking. The statute is very clear, Your Honor, on its face. Now, if the

The Court: What about the last one "or both"?

Counsel: Or both, it means either "or". "Or" is used as a conjunctive word.

The Court: Or both?

Counsel: Or both, yes.

The Court: Not an --

Counsel: So it's either -- it means either or not just imposing a mandatory sentence. "Or" is used as a function word to indicate the alternative. So by the word "or" at the end here "or both" indicates the court can use either or. However, if the court -- if the court imposes incarceration for the offense committed, the court must impose a sentence of at least twenty-five years without parole, incarceration or suspension.

The Court: So what you're saying is that the court is given that option--

Counsel: The court is given that option, yes, Your Honor.

The Court: -- option to pick one or the other--

Counsel: One or the other or both.

The Court: -- because of the –

Counsel: One or the other or both.

The Court: -- because of the "or both" language?

Counsel: Yes, that's correct, Your Honor. The use of the word, I --

The Court: What kind of language are you speaking?

E.R. at 7-8.

¶23 While it is unclear from the above passage whether the trial court's confusion stems from a misunderstanding of the plain language of the statute or from counsel's use of the word "conjunctive" when he assuredly meant "disjunctive," we tend to think it may be the former. After some discussion, the trial court went on to say: "[t]his statute contemplates … providing for a minimum mandatory sentence of twenty five years for a person convicted of ice trafficking, drug trafficking." E.R. at 17.

¶24 Further, we cannot say with certainty that the court interpreted the statute correctly when the attorney for the Commonwealth seemed to misinterpret the statute as well.[22] At sentencing, the Assistant Attorney General made the following argument:

> There's a range. There's always a range for sentence. The question is, where does this defendant fit in that sentence range? I have heard one word about that. All I've heard is you should ---- one thing I heard, you should give him a ten thousand dollar fine. *It doesn't even make any sense. We're here to determine whether he should get the twenty five year mandatory minimum or something more than that* . . . And he got caught and he got convicted after he had his day in court and his time in front of the jury and *it would not be right for this court to sentence him to the minimum, the bare minimum of twenty five years without parole.*

E.R. at 13-14. Clearly, if one interprets 6 CMC § 2141(b)(1) correctly, the "bare minimum" is not twenty-five years of incarceration without parole; the theoretical minimum is a nominal fine. 6 CMC § 2141(b)(1). It should also be noted that the strength of the Commonwealth's argument that the trial court correctly interpreted § 2141(b)(1) is somewhat lessened by its statement at oral argument that the record below was unclear and that we should remand to the trial court for resentencing.[23]

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[22] This is not to say that the vacation of a sentence will necessarily follow any time the Attorney General's Office is less than precise or mistaken in its arguments to the court.

[23] At the August 13, 2003 appellate hearing, the following exchange took place between the Court and counsel for the Commonwealth:

> Court: So the question is whether the trial court was following *Cabrera* or was going around *Cabrera*--
> Counsel: Exactly.
> Court: at the time … it was sentencing Diaz?
> Counsel: Exactly. And the record's not clear on that point. Ok?
> Court: So what do you recommend [we] do when the record is not clear?
> Counsel: I believe you either have two choices, Your Honor. You can overrule *Cabrera* and read the statute in the context of the legislative history, or you could send the case back down with instructions as to what, … in fact, this Court wants to see on the record when it makes such a sentencing determination.

¶25 Because we are unconvinced that the trial court was aware of the minimum sentence available under 6 CMC § 2141(b)(1) when sentencing Diaz, we must vacate his sentence. *See Cabrera I*, 4 N.M.I. at 251.

3. The term of imprisonment may not be suspended.

¶26 We raise *sua sponte* the fact that the trial court suspended a portion of Diaz' sentence. Section 2141(b)(1) states that "the term of imprisonment shall not be subject to suspension, probation or parole." 6 CMC § 2141(b)(1). "We construe statutory language 'according to its plain-meaning, where it is clear and unambiguous,'" *Town House, Inc. v. Saburo*, 2003 MP 2 ¶11 (*quoting Gioda v. Saipan Stevedoring Co., Inc.*, 1 N.M.I. 310, 315 (1990)). Since the plain language of 6 CMC § 2141(b)(1) unambiguously dictates that the term of imprisonment "shall not be subject to suspension," the trial court's suspension of five years of Diaz' period of incarceration is not permissible.

¶27 Each party at oral argument agreed that the trial court should not have suspended a portion of the sentence. The Commonwealth agreed that the trial court's "hands are tied" when it comes to suspending the sentence.[24] Counsel for Diaz agreed that, "under the language here, of 2141(b), there can be absolutely no suspension here whatsoever."

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[24] On August 13, 2003, the following exchange took place between the Court and Counsel for the Commonwealth:

> Court: Does the statute allow the judge to suspend any portion of the sentence?
> Counsel: You're looking at which charge, for which charge? For the drug charge? Or for the
> Court: Yes, the drug charge.
> Counsel: Well, if you look at 2141(b)(1)(d), after the first offense language where it reads "10,000, or both" it goes on to say "and the term of imprisonment shall not be subject to suspension, probation, or parole," so that language is clear. There's no suspension of that particular sentence. Once the sentence is imposed for this offense, it's not subject to any of those things. And the legislature was pretty clear. It put that language in the statute.
> Court: So in other words, the trial judge's hands are tied in this case?
> Counsel: Right.

That said, we realize that a previous case, *Cabrera I*, could point otherwise. *See Cabrera I*, 4 N.M.I. at 250-51. Accordingly, a brief discussion of *Cabrera I* is needed to clarify the issue.

¶28 Cabrera was found guilty in 1993 of delivering a controlled substance in violation of § 2141(a)(1). *Id*. at 244. He was sentenced according to § 2141(b)(1) to "an eight-year prison term, with three years suspended and five years to be served without parole, probation, or suspension." *Id.* As it then existed, § 2141(b)(1) read:

> (b) Any person who violates subsection (a) of this section with respect to:
>
> (1)…methamphetamine[]hydrochloride may be sentenced to a term of imprisonment for not more than 10 years, a fine of not more than $10,000, or both; provided, however, the term of imprisonment shall not be less than five years and not be subject to suspension, probation or parole. . .

Id. at 250. After a discussion of whether the trial court "believed the statute required it to impose a mandatory minimum of five years of imprisonment, without suspension, probation, or parole," or whether the trial court knew it could impose "an alternative sentence consisting of, for example, only a fine," we stated that if the trial court realized that three discrete options existed yet still sentenced Cabrera to a period of incarceration, "the sentence it formulated falls well within the statutory guidelines and there is no error." *Id.* at 251.

¶29 To suggest that we had considered and decided whether the suspended portion of the sentence was statutorily permissible is to overreach, and read our holding too broadly. Our attention in the portion of *Cabrera I* that deals with sentencing pursuant to § 2141(b)(1) was focused solely on whether the statute mandated a minimum term of imprisonment, and not on whether the trial court could suspend a portion of the sentence contrary to the plain language of the statute.

¶30 Thus, when sentencing pursuant to § 2141(b)(1), the trial court has discretion as to whether the sentence shall include a term of imprisonment of no less than twenty five years; however, once that determination is made, the term of imprisonment ordered by the trial court may not be suspended. 6 CMC § 2141(b)(1).

¶31 Finally, we decline the Government's request, *supra* n.24, that we issue explicit instructions for the trial court to follow when sentencing an individual pursuant to § 2141(b)(1). As this appeal and *Cabrera I* and *II* cases have made clear, we expect the trial court to demonstrate that it correctly understood the range of sentencing possibilities. *See supra* ¶18; *Cabrera I*, 4 N.M.I. at 251. Generally, this will be accomplished by sentencing a convict within the permissible range of punishment.

¶32 The trial court, however, can create doubt as to whether it correctly interpreted and applied a sentencing statute by placing statements on the record that suggest that, but for the actions of the Legislature, the trial court would have shown lenience. This is not to say that the trial court cannot express a view that a particular statute is serious or harsh; however, when, after reviewing the record as a whole, we are not firmly convinced that the trial court correctly understood and applied a sentencing statute, we will not hesitate to find that a fundamental structural sentencing error has occurred. This problem can easily be avoided with the use of prepared remarks rather than speaking extemporaneously, particularly in the sentencing phase of a proceeding.

CONCLUSION

¶33 The Commonwealth Rule of Criminal Procedure 2 requirement that the Rules be construed "to secure simplicity in procedure, fairness in administration, and the elimination of unjustifiable expense and delay" does not obviate a defendant's need to

timely file a motion pursuant to Commonwealth Rule of Criminal Procedure 33. Accordingly, the trial court's denial of a new trial for Diaz is **AFFIRMED**. Because we are unclear as to whether the trial court understood the permissible range of sentencing possibilities, we **VACATE** the sentence imposed and **REMAND** to the trial court for resentencing consistent with this opinion.

SO ORDERED THIS 4TH DAY OF SEPTEMBER 2003.

/s/_____
MIGUEL S. DEMAPAN, CHIEF JUSTICE

/s/_____
ALEXANDRO C. CASTRO, ASSOCIATE JUSTICE

/s/_____
JOHN A. MANGLONA, ASSOCIATE JUSTICE