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

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS,
Plaintiff-Appellee,

v.

JIN SONG LIN,
Defendant-Appellant.

SUPREME COURT NO. 2014-SCC-0008-CRM
SUPERIOR COURT NO. 12-0122

ORDER DENYING MOTION TO DISMISS

Cite as: 2014 MP 19

Decided December 18, 2014

Colin M. Thompson and Robert Tenorio Torres, Saipan, MP, for Defendant-Appellant Jin Song Lin
Teresita J. Sablan, Assistant Attorney General, Office of the Attorney General, Saipan, MP, for Plaintiff-Appellee Commonwealth of the Northern Mariana Islands

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

MANGLONA, J.:

¶ 1 The Commonwealth has moved to dismiss Jing Song Lin's ("Lin") appeal because he signed a plea agreement waiving his right to appeal the issues he raises in his brief. For the reasons discussed below, the Court DENIES the motion to dismiss.

I. Facts and Procedural History

¶ 2 Lin was charged with various crimes but agreed to plead guilty to Sexual Abuse of a Minor in the Third Degree in exchange for dismissal of the remaining charges. In the plea, Lin acknowledged: (1) the court would not be bound by the Commonwealth's recommendation for a sentence; (2) he was prepared to accept any punishment permitted by law; (3) he discussed the case with counsel; and (4) he was "giving up his right to . . . appeal the plea of guilty or any other order or ruling in the case, including the sentence." *Commonwealth v. Jin Song Lin*, No. 12-0122A (NMI Super. Ct. Oct. 8, 2013) (Plea Agreement at 3). These points were then covered again during a court hearing. Subsequently, the court imposed the maximum sentence without the possibility of probation, parole, early release, work release, weekend release, or any other similar programs.

¶ 3 Notwithstanding the waiver provision, Lin filed an appeal in which he did not discuss the waiver but did allege two defects in the proceedings: (1) the sentence was not supported by findings as required by 6 CMC § 4115; and (2) the sentence was not individualized—instead, it was a mechanical application of a maximum sentence policy. In support of this latter argument, Lin presents thirty-two sentencing orders from his sentencing judge covering a range of crimes, defendants, and circumstances where the maximum sentence was imposed without the possibility of probation, parole, early release, work release, weekend release, or a similar program.

¶ 4 The Commonwealth now moves to dismiss Lin's appeal based on the waiver in the plea agreement.

II. Discussion

¶ 5 The Commonwealth argues Lin's appeal is barred because he waived the right to appeal in his plea agreement. The Court begins by analyzing whether the waiver is valid and, if so, whether the waiver is nonetheless unenforceable.

A. Validity

¶ 6 The Commonwealth argues Lin's waiver of his right to appeal is valid. This presents three questions: can he waive the right, did he waive the right, and does the waiver cover his appeal. Each is addressed in turn.

¶ 7 First, the Court evaluates whether Lin can waive his right to appeal. Overwhelmingly, federal and state courts agree that a defendant can waive this right. *United States v. Khattak*, 273 F.3d 557, 560–62 (3d Cir. 2001) (holding a defendant can bargain away his right to appeal after acknowledging that ten other circuits have reached the same conclusion); *State v. Perkins*, 737 P.2d 250, 251 (Wash. 1987) (allowing a defendant to waive the right to appeal after recognizing that "[i]t may be fairly said that the majority of courts which have considered the issue have held there is nothing illegal per se about a waiver of the right to appeal" and citing cases in support of that proposition). *But see State v. Ethington*, 592 P.2d 768, 769-70 (Ariz. 1979) (holding that a defendant cannot waive his right to appeal in a plea bargain). Thus, the Court holds that a defendant can waive the right to appeal as part of the plea bargaining process.

¶ 8 Second, the Court considers whether Lin did waive the right to appeal. Such a waiver is only enforceable if it was made knowingly and voluntarily. *E.g.*, *United States v. Bibler*, 495 F.3d 621, 623-24 (9th Cir. 2007); *United States v. Hahn*, 359 F.3d 1315, 1325 (10th Cir. 2004); *see also Commonwealth v. Kawai*, 1 NMI 66, 69 (1990) (suggesting "knowingly and voluntarily" is required for a plea agreement). This inquiry focuses on the language in the plea and the court's colloquy with the defendant. *E.g.*, *Hahn*, 359 F.3d at 1325. Here, Lin's signed plea stated that he acknowledged entering into the agreement voluntarily, knowingly, and intelligently after receiving the advice of competent and effective counsel. The trial court also conducted an on-the-record inquiry where Lin confirmed he did not have mental health issues, had not been recently drinking, consulted with his attorney, understood the plea and its potential ramifications, and recognized he would not have the right to appeal. After this inquiry, the court asked Lin if he still wished to proceed and whether he was entering this plea freely and voluntarily; Lin responded affirmatively to both questions. Lin's own representations in the plea and before the court, without any signs of duress or confusion, are sufficient to conclude that he entered the plea knowingly and voluntarily. Accordingly, the Court concludes that Lin did waive the right to appeal.

¶ 9 Third, the Court evaluates whether Lin's claims on appeal fall within the scope of his waiver. As part of a plea agreement, the waiver's scope is determined by applying contract principles. *E.g., United States v. Ready*, 82 F.3d 551, 556 (2d Cir. 1996). Based on these principles, unambiguous language is enforced according to the meaning that language expresses. *E.g.*, *United States v. Caruthers*, 458 F.3d 459, 470 (6th Cir. 2006); *see also Manglona v. Baza*, 2012 MP 4 ¶ 28 (acknowledging that unambiguous language controls contract interpretation); *Riley v. Public School Sys.*, 4 NMI 85, 89 (1994) (approving trial court's plain meaning construction when the terms were unambiguous). Here, Lin agreed to waive his right "to appeal the plea of guilty or any other order or ruling in the case, including the sentence." *Commonwealth v. Jin Song Lin*, No. 12-0122A (NMI Super. Ct. Oct. 8, 2013) (Plea Agreement at 3). This language is unambiguous—it is a complete waiver of the right to appeal *any* issue. Therefore, the Court holds that the issues that Lin seeks to raise on appeal fall within the scope of his appeal waiver.

B. Enforcement

¶ 10 While the waiver would appear to foreclose Lin's appeal, not all waivers are enforceable. In the Commonwealth, NMI Rules of Criminal Procedure 11 and 32 govern plea bargains. These rules are based on versions from the federal rules. *Commonwealth v. Attao*, 2005 MP 8 ¶ 9 n.7; *Commonwealth v. Santos*, 2013 MP 18 ¶ 13. This similarity means the Court looks at federal precedent to interpret many of the aspects involved with plea bargains, *Attao*, 2005 MP 8 ¶ 11 n.7 (looking to federal precedent to interpret Rule 11); *Santos*, 2013 MP 18 ¶ 20 (looking to federal precedent to interpret Rule 32),[1] such as acceptance, procedure, withdrawal, and court participation in negotiations, NMI Sup. Ct. R. 11 & 32 (addressing various aspects of plea agreements). Thus, it follows that the Court should look to federal case law to determine other aspects of pleas—such as when their provisions are not enforceable.[2]

¶ 11 Here, the Court is prompted to determine when federal courts decline to enforce appeal waivers. All the federal courts agree that these waivers are not ironclad. *See Ready*, 82 F.3d at 555 ("[N]o circuit has held these [appeal] waivers are enforceable on a basis that is unlimited and unexamined."). Underlying this agreement is the notion that, notwithstanding an otherwise valid waiver, precluding appeals on certain issues would be unjust. *See Caruthers*, 458 F.3d at 471 (noting courts agree that "a defendant who waives his right to appeal does not subject himself to being sentenced entirely at the whim of the district court."). But the circuits are divided on when they will decline to enforce a waiver.

¶ 12 Six circuits have articulated an overarching framework—the miscarriage-of-justice analysis—that guides their determination of when a waiver will not be enforced. *United States v. Guillen*, 561 F.3d 527, 530-31 (D.C. Cir. 2009);[3] *United States v. Johnson*, 410 F.3d 137, 151 (4th Cir. 2005); *Hahn*, 359 F.3d at 1325; *United States v. Andis*, 333 F.3d 886, 891 (8th Cir. 2003); *United States v. Teeter*, 257 F.3d 14, 25 (1st Cir. 2001); *Khattak*, 273 F.3d at 562. This standard is "more a concept than a constant," *United States*

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[1] *Santos* did not call into question the viability of federal precedent for reviewing plea bargains nor did it reject modern precedent for much of the plea-bargain analysis. *See Santos*, 2013 MP 18 ¶¶ 19-20 (restricting the opinion to NMI Rule of Criminal Procedure 32(d) and adopting the position taken by a majority of the circuits before the rules were amended). Instead, *Santos* was narrow; it cautioned that post-amendment cases may not apply to interpreting Rule 32's procedures for withdrawing a plea. *Id.* ¶ 22 n.3.

[2] Turning to a single body of case law for interpreting the same concept—plea bargains—provides consistency and avoids unnecessarily complicating the evaluation by bifurcating the analysis between federal and state law. Because this is a prudential decision based on consistency rather than a decision dictated by the presence of a court rule addressing the ability to not enforce a waiver, *Santos*' limitation on precedent from after the 1983 amendments is not applicable.

[3] While the D.C. Circuit nominally asserts it relies on the miscarriage-of-justice analysis only to address claims arising from the trial court's failure to follow a proscribed sentencing procedure, this limited application does not accurately represent the circuit's approach. *Guillen*, 561 F.3d at 531. The D.C. Circuit developed their jurisprudence on appeal waivers by stating the court was drawing on the experiences from the other circuits. *Id.* at 530. After this statement, the D.C. Circuit exclusively drew its exceptions from and cited only to circuits applying the miscarriage-of-justice framework as their guiding principle. *Id.* (citing, among others, *Hahn* and *Teeter*). Fairly construed, *Guillen* is the D.C. Circuit's adoption of the miscarriage-of-justice analysis as the standard for deciding when not to enforce an appeal waiver.

v. Santiago, 769 F.3d 1, 10 (1st Cir. 2014) (internal quotations omitted), which helps explain why the courts do not agree on how to find a miscarriage of justice. The First and Third Circuits have a non-exhaustive list of *factors* that guide their analysis. *Khattak*, 273 F.3d at 563; *Teeter*, 257 F.3d at 26. In contrast, the Eighth Circuit and the D.C. Circuit have set forth a non-exhaustive list of *circumstances* that guide the court's analysis, *Andis*, 333 F.3d at 891-92; *Guillen*, 561 F.3d at 530-31, and the Tenth Circuit has set forth an exhaustive list of *circumstances* where enforcing a waiver is a miscarriage of justice, *Hahn*, 359 F.3d at 1327. Eschewing factors and lists altogether, the Fourth Circuit has indicated its inquiry is more concerned with whether the defendant is innocent or the error "would seriously affect fairness, integrity, or public reputation of judicial proceedings." *United States v. Hughes*, 401 F.3d 540, 555 (4th Cir. 2005) (internal quotations omitted).

¶ 13 Similar to the circuits applying the miscarriage-of-justice framework, the Second Circuit has adopted its own overarching analysis and will decline to enforce a waiver when the result would be unfair. *United States v. Ready*, 82 F.3d 551, 559 (2d Cir. 1991). While slightly narrower than the miscarriage-of-justice standard, the Second Circuit's test is closely related. *Compare id.* (focusing on fairness), *with Hahn*, 359 F.3d at 1327 (listing fairness as one of the considerations), *and Hughes*, 401 F.3d at 555 (same).

¶ 14 The remaining circuits have not adopted a unifying theory, and instead, have articulated exceptions on a more ad-hoc basis. *See, e.g.*, *United States v. Bibler*, 495 F.3d 621, 624 (9th Cir. 2007) (setting forth various exceptions without a specific principle); *Caruthers*, 458 F.3d at 471-72 (declining to adopt a specific framework while holding that a waiver is not enforceable when the defendant claims the sentence exceeded the maximum); *Jones v. United States*, 167 F.3d 1142, 1144-45 (7th Cir. 1998) (determining when to not enforce a waiver by surveying other jurisdictions' conclusions but not their reasoning).

¶ 15 Given this split, the Court adopts the miscarriage-of-justice framework as applied by the First and Third Circuits because it is the best fit for the Commonwealth. *Cf. Deleon Guerrero v. Dep't Pub. Safety*, 2013 MP 17 ¶ 18 (applying the sounder rule when there was no majority position for a 7 CMC § 3401 analysis). This approach is preferable for two reasons. First, compared to an ad-hoc decision process (used by various circuits), a non-exhaustive list of circumstances (used by the Eighth and D.C. Circuit), or an ambiguous, overarching concept such as fairness (used by the Second Circuit), a framework with specific factors offers more predictability to practitioners as they evaluate the merits of a potential appeal and better guidance to this Court as it evaluates new claims. Second, compared to a framework with delineated exceptions (used by the Tenth Circuit), a standard with factors is better situated to addresses the underlying fairness concerns justifying courts' decisions to not enforce waivers. Accordingly, the Court adopts the First and Third Circuit's miscarriage-of-justice framework.

¶ 16 Having adopted a standard for evaluating when the Court will decline to enforce an appeal waiver, the question becomes whether Lin's waiver remains enforceable for each of his claims. To decide that, we consider: "the clarity of the error, its gravity, its character (e.g., whether it concerns a fact issue, a sentencing guideline, or a statutory maximum), the impact of the error on the defendant, the impact of correcting the error on the government, and the extent to which the defendant acquiesced in the result." *Teeter*, 257 F.3d at 26; *accord Khattak*, 273 F.3d at 563. Applying these factors, a waiver is not enforceable when the sentence was based on impermissible factors, the sentence exceeds the statutory maximum, or the defendant received ineffective assistance of counsel. *Teeter*, 257 F.3d at 25 n.9 & n.10; *see Khattak*, 273 F.3d at 563 (adopting the analysis in *Teeter*). With this guidance in mind, the inquiry turns to each of Lin's claims.

¶ 17 First, Lin contends the trial court erred by failing to make an adequate finding on the record to justify the sentence. He highlights that 6 CMC § 4115 requires the Court to enter specific findings about why a sentence is appropriate. Lin contends the court did not comply with that mandate because the court merely gave an overview of the case and sentencing objectives before imposing the maximum sentence without the possibility of parole.[4] Ordinarily, this is where the Court would apply the miscarriage-of-justice standard. But doing so here would be futile because Lin's claim alleges a practice that undermines the effectiveness of that standard because that practice (not supplying specific findings) prevents us from having the information we need to meaningfully review the properness of the sentence.

¶ 18 Because of that, the alleged failure to provide § 4115 findings supports not enforcing the waiver to this claim. To rule otherwise would effectively insulate waivers from miscarriage-of-justice challenges asserting the court relied on impermissible factors.[5] In other words, without the § 4115 findings, it becomes significantly harder—if not impossible—to prove impermissible factors colored the sentence. Because these statutorily required findings are important to give effect to the impermissible-factors exception to waiver enforcement, and Lin has made a sufficiently supported claim that these findings were not made, the Court holds that the waiver is not enforceable for Lin's § 4115 claim.

¶ 19 Second, Lin argues the trial court erred by imposing a sentence based on a mechanical standard rather than the individualized inquiry required by *Fu Zhu Lin*, 2014 MP 6 ¶ 37. In support, he presents

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[4] At the sentencing hearing, the court imposed its sentence after stating:

> Based on the charges and arguments as well as the videotape, statements from the parties as well as Mr. Lin in particular, as this case involves sexual abuse in the third degree of a 13-year-old female child touching of sexual areas, the court imposes the full maximum sentence of five years and without the possibility of parole, probation, early release, weekend or work release or other similar programs.

Sent. Tr. 19.

[5] As noted above, every circuit applying the miscarriage-of-justice standard recognizes a claim that the court relied on impermissible factors as one that is beyond the reach of an appeal waiver.

thirty-two sentencing orders covering a range of defendants, crimes, and circumstances where the court imposed the same sentence: the maximum amount of time without the possibility of probation, parole, early release, work release, weekend release, or any similar type of programs. Here, the Court can properly apply the miscarriage-of-justice standard to determine whether the waiver should be enforced.

¶ 20 Applying an appeal waiver to a substantiated, but not yet proven, mechanical-sentencing claim would be a miscarriage of justice. Justice, if nothing else, requires that each defendant's guilt or innocence (as well as sentence) will be determined based on the particular facts and circumstances giving rise to the case. *See Fu Zhu Lin*, 2014 MP 6 ¶ 37 (explaining a bedrock principle of sentencing is an individualized determination). A judge disregarding an individualized inquiry in favor of a rigid, mechanical policy fails to even give lip service to the call of justice. Thus, if proven, Lin's claim would seriously affect the fairness, impartiality, and integrity of judicial proceedings. In light of these potential effects on critical components of judicial proceedings, the Court declines to enforce the waiver to bar Lin's individualized-sentence claim because to do so would be a miscarriage of justice.[6]

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[6] This conclusion is reinforced by the specific factors listed by the First and Third Circuits. If proven, the error would have a significant effect on Lin because he would be resentenced—likely to a reduced term. By contrast, correcting the error would not have a significant effect on the Commonwealth because the parties have already argued about the appropriate sentence—all that would be required on remand would be resentencing. Finally, it cannot be said the defendant acquiesced in the result (if the error is proven) because the Court presumes a defendant agreeing to be sentenced by a judge believes the sentence is going to be individualized. *See Ready*, 82 F.3d at 559 (explaining there is a presumption that the parties to a plea bargain contemplated that the judge will act legally in executing the agreement). Accordingly, the non-exhaustive factors set forth by the First and Third Circuits also support declining to enforce the waiver for Lin's claim that the trial court's sentencing was mechanical rather than individualized.

III. Conclusion

For the reasons discussed above, the Court DENIES the Commonwealth's motion to dismiss Lin's appeal.

SO ORDERED this 18th day of December, 2014.

/s/
ALEXANDRO C. CASTRO
Chief Justice

/s/
JOHN A. MANGLONA
Associate Justice

/s/
PERRY B. INOS
Associate Justice