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

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS,
Plaintiff-Appellee,

v.
ANTHONY HERRERA BORJA,
Defendant-Appellant.

Supreme Court No. 2017-SCC-0021-CRM
Superior Court No. 12-0203

OPINION

Cite as: 2018 MP 13
Decided December 18, 2018

J. Robert Glass, Jr., Assistant Attorney General, Office of the Attorney General, Saipan, MP for Plaintiff-Appellee.

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

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

INOS, J.:

¶ 1 Defendant-Appellant Anthony Herrera Borja ("Borja") appeals and seeks to vacate his sentence imposed on remand. He argues: (1) the court failed to individualize his sentence; (2) the court impermissibly restricted his parole eligibility; and (3) his case should be remanded to a different judge for resentencing. For the reasons below, we AFFIRM Borja's prison term but REMAND with specific instructions to correct the defect in parole eligibility.

I. FACTS AND PROCEDURAL HISTORY

¶ 2 This is Borja's second appeal. We first considered Borja's sentence in *Commonwealth v. Borja*, 2015 MP 8 ("*Borja I*"). In May 2013, he was charged with one count of Sexual Abuse of a Minor in the First Degree, one count of Indecent Exposure in the First Degree, and two counts of Disturbing the Peace. Pursuant to a plea agreement, he pled guilty to Sexual Abuse of a Minor in the Second Degree ("SAM 2") in violation of 6 CMC § 1307(a)(2), which carries a maximum imprisonment of ten years. He received the maximum sentence with no parole eligibility.[1]

¶ 3 On appeal, we vacated Borja's sentence and remanded for resentencing, holding the court failed to individualize his sentence because it only considered the crime and did not include his specific circumstances as an offender.

¶ 4 On remand, the court reviewed two witnesses' testimonies, the presentence investigation report, the sentencing memorandums, Borja's allocution, and counsel's arguments. It then resentenced Borja to ten years' imprisonment and rendered him eligible for parole after serving six years.[2] He timely appeals.

II. JURISDICTION

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

III. STANDARDS OF REVIEW

¶ 6 Borja raises three issues on appeal. First, whether the court properly individualized his sentence. We review sentencing decisions for an abuse of discretion. *Commonwealth v. Lizama*, 2017 MP 5 ¶ 7. Second, whether the court impermissibly denied Borja's parole eligibility, which we also review for abuse of discretion. *Id.* Finally, whether this matter should be remanded to a different judge for re-sentencing. "We have discretion to remand to a different sentencing judge when 'reassignment is advisable to preserve the appearance of justice' and

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[1] Borja did not appeal his parole restriction in *Borja I.*

[2] *Commonwealth v. Borja*, No. 12-0203T-CR (NMI Super. Ct. June 23, 2017) (Sentencing and Commitment Order) ("SCO").

would not 'entail waste and duplication of effort out of proportion to any gain in preserving the appearance of justice.'" *Commonwealth v. Hocog*, 2015 MP 19 ¶ 11 (quoting *Commonwealth v. Lee*, 2005 MP 19 ¶ 26).

IV. DISCUSSION

A. Individualized Sentence

¶ 7 We first consider whether, on remand, the court properly individualized Borja's sentence. He contends the court impermissibly imposed the maximum term without sufficiently individualizing his sentence. In particular, he argues the court impermissibly used elements of the offense as aggravating factors and wrongfully used his juvenile record and disciplinary offenses as aggravating factors. He also asserts the court failed to consider the number of mitigating circumstances present. The Commonwealth asserts the court articulated and considered over a dozen sentencing factors and did individualize Borja's sentence.

¶ 8 We review courts' sentencing decisions for an abuse of discretion. *Lizama*, 2017 MP 5 ¶ 7. "When reviewing a sentence for abuse of discretion, reversal is appropriate only if no reasonable person would have imposed the same sentence." *Commonwealth v. Palacios*, 2014 MP 16 ¶ 12. We give "great deference to the trial court's sentencing decision[,]" *Commonwealth v. Lin*, 2016 MP 11 ¶ 15, and recognize courts "enjoy nearly unfettered discretion in determining what sentence to impose." *Palacios*, 2014 MP 16 ¶ 12 (quoting *Commonwealth v. Camacho*, 2002 MP 6 ¶ 135). Under this highly deferential standard, courts are allowed to consider a myriad of factors related to the crime and the offender. *See Williams v. New York*, 337 U.S. 241, 247–51 (1949) (encouraging courts to use all available information to fashion a sentence). A sufficiently individualized sentence considers the four sentencing pillars and examines and measures "the relevant facts, the deterrent value of the sentence, the rehabilitation and reformation of the offender, the protection of society, and the disciplining of the wrongdoer." *Borja*, 2015 MP 8 ¶ 39. In reviewing mitigating factors, "[i]t is not enough to merely mention mitigating factors in passing. Rather, the court must 'examine and measure' those mitigating factors to the sentence it issues." *Lizama*, 2017 MP 5 ¶ 11. Moreover, we held in *Kapileo* that courts cannot rely solely on elements of the offense to justify its sentence. 2016 MP 1 ¶ 25. However, courts can use elements of an offense as aggravating factors to illustrate the degree, nature, or severity of the crime. *Commonwealth v. Calvo*, 2018 MP 9 ¶ 9 ("*Calvo II*").

¶ 9 We consider whether the court examined and measured mitigating circumstances. In *Borja I*, we vacated the sentence and remanded, in part, because the court "failed to acknowledge mitigating factors provided by Borja, and it sentenced [him] without ordering or considering the contents within a [presentence investigation report]." 2015 MP 8 ¶ 40. We noted the importance of mitigating factors in a sentencing justification and cautioned against a sentencing rationale that focused solely on the crime. *Id.* ¶ 39.

¶ 10 The court did not merely mention the mitigating factors in passing. Rather,

the court's statements at the sentencing hearing demonstrated that despite its own reservations of the victim's ability to "understand . . . the meaning of . . . consent or adult activity," it nonetheless acknowledged the victim's admitted attraction and unchanged behavior as mitigating factors. The court also considered as a mitigating circumstance Borja's good behavior since his initial sentencing. It specifically noted Borja's community service documented in various certificates such as the Community Service Certificate and the Department of Homeland Security Certificate. Further, it gave serious thought to Borja's age, noted his good physical and mental health, and acknowledged his indigency, ultimately finding that a fine would be inappropriate. Unlike *Borja I*, where the court failed to consider any of the mitigating factors, here, the court considered a number of Borja's mitigating circumstances.

¶ 11 We next consider whether the court appropriately considered permissible aggravating factors. Pursuant to 6 CMC § 1307(a)(2), SAM 2 includes the following elements: (1) the offender is sixteen years of age or older; (2) the victim less than thirteen years old; and (3) there was sexual contact between the offender and victim or the offender influences the victim to engage in sexual contact. The court did use an element of the crime as an aggravating factor. Specifically, it addressed the victim's prepubescent age, and in the SCO, stated: "[d]efendant's sexual abuse of a young victim . . . is deeply ingrained deviant behavior that endangers other family members and other young members of the CNMI Community." SCO at 8. Generally, elements of an offense alone cannot be used to justify a sentence; however, as we recently held in *Calvo II*, courts are permitted to use elements of a crime to articulate the "degree, severity, or nature" of an offense. 2018 MP 9 ¶ 9. Although the court notes its mention of the victim's age to highlight an element of the crime, there is no indication from the SCO or the sentencing hearing transcript that the court attempted to discuss the "degree, severity, or nature" of victim's age. Rather the court merely uses the victim's age to articulate that she was indeed very young.

¶ 12 Unlike *Borja I*, where the sole justification for the sentence was the crime, here, the court articulated additional aggravating factors to justify imposing the maximum penalty. *Compare Borja I*, 2015 MP 8 ¶ 40 (maximum sentence imposed solely based on crime) *with* SCO at 8 (discussing various factors when imposing the maximum sentence). It considered Borja's juvenile record, numerous documented disciplinary and adverse actions while in high school, the familial relationship between the victim and Borja, and the concern for future contact between the two before the victim reaches the age of majority.

¶ 13 While the court did rely on additional aggravating factors in imposing the sentence, we also examine whether it was proper for the court to use Borja's juvenile adjudications and documented disciplinary actions as aggravating factors. Based on *Palacios*, courts possess a great deal of discretion when imposing sentences. As articulated by the United States Supreme Court in *Williams*, courts are encouraged to consider as many factors as available when imposing sentences. 337 U.S. at 247–49 (recognizing courts are not limited to

considering information only admissible during trial). Such factors may include juvenile adjudications, *see United States v. Smalley*, 294 F.3d 1030, 1033 (8th Cir. 2002) (recognizing the use of juvenile adjudications when imposing a sentence); *United States v. Bucaro*, 898 F.2d 368, 373 (3d Cir. 2013) (same); *United States v. Williams*, 891 F.2d 212, 215 (9th Cir. 1989) (same), or school disciplinary records. *See Grant v. State*, 218 S.W.3d 225, 232 (Tex. App. 2007) (permitting court to consider defendant's high school disciplinary record); *see also In the Interest of C.M.*, 769 S.E.2d 737, 742 (Ga. Ct. App. 2015) (same). We therefore hold courts are permitted to consider both juvenile adjudications and school disciplinary records when imposing sentences.

¶ 14 The court also addressed the four sentencing pillars: rehabilitation, deterrence, retribution, and incapacitation. It was particularly concerned with preventing future contact between Borja and the victim before she reaches the age of majority. Unique to Borja's circumstance was the victim's continued attraction to him and her belief that the incidents did not adversely affect her. The court, in part, fashioned its sentence to prevent such contact. It believed the sentence would not only serve as an individual deterrent but also as a general deterrent to other criminals, stressing the need to protect the "children of the CNMI."[3] Tr. at 22.

¶ 15 Based on the reasons articulated above, we find the court sufficiently individualized Borja's sentence. First, the court examined and measured mitigating factors. It considered the victim and her mother's statements, the impact the incident had on the victim, Borja's post-conviction behavior, and financial adeptness prior to sentencing. Second, while the court did use an element of the crime as an aggravating factor, it did not base the sentence solely on that factor; it considered other permissible factors. Lastly, the court addressed the relevant sentencing factors and provided a rationale for each sentencing pillar. We cannot say that no reasonable person, based on the aforementioned, would not render the same sentence. We find the court did not abuse its discretion.

B. Parole Eligibility

¶ 16 In addition to imposing the maximum sentence, the court deemed Borja ineligible for parole until he serves a minimum of six years of his sentence. Borja argues the court insufficiently justified his parole restriction.[4]

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[3] The court noted:

> The [c]ourt finds a sentence of 10 years to be appropriate as it would be a deterrent – it would be a specific deterrent as defendant will learn from his crime . . . and not commit similar crimes. It will also be a general deterrent as it will be an example to others not to commit similar crimes.

Tr. at 21.

[4] Borja also asserts a constitutional parole claim, arguing parole should not be decided by the court but rather by the Board of Parole. The Commonwealth contends Borja

¶ 17 "[W]hen a trial court restricts a defendant's parole eligibility greater than the statutory minimum, it must state why the extended restriction is warranted for the defendant." *Lin*, 2016 MP 11 ¶ 23. A "trial court must explain on the record why the parole eligibility term prescribed by statute would be insufficient to protect the public and insure the defendant's reformation." *Id*. (internal quotation marks omitted). Failing to provide "individualized justification" for restricting a defendant's parole eligibility is an abuse of discretion. *Lizama*, 2017 MP 5 ¶ 22. However, although courts may impose parole restrictions greater than the statutory minimum, courts cannot render defendants eligible for parole below the statutory minimum. *See id.* ¶ 20 (noting that defendant is eligible for parole not until serving one-third of the minimum mandatory unsuspended prison term). We review 6 CMC § 4252 to further clarify.

¶ 18 When reviewing the parole statute, "our principal responsibility is to discern and give effect to the intent of the legislature." *In re Commonwealth*, 2018 MP 8 ¶ 25 (internal citations and quotation marks omitted). "[W]e give [statutory] language its plain meaning, so long as that meaning is clear, unambiguous, and will not lead to a result that is absurd or defies common sense." *Commonwealth v. Diaz*, 2013 MP 20 ¶ 17. "If the statute is ambiguous, however, we interpret it to effectuate legislative intent." *In re Commonwealth*, 2018 MP 8 ¶ 25.

¶ 19 The Board of Parole may grant parole to any person convicted of SAM 2 after serving "*at least* two-thirds of the minimum mandatory sentence . . . unless further restricted by the sentencing court." 6 CMC § 4252(d) (emphasis added). The plain meaning of the statute is clear and the terms are unambiguous. When convicted of SAM 2, before parole can be granted, a person must serve not less than two-thirds of minimum mandatory of the unsuspended prison term imposed by a court. *See Lizama*, 2017 MP 5 ¶ 20. Moreover, courts are not permitted to render persons eligible for parole below the statutory minimum.

¶ 20 *Lizama* helps illustrate our holding. There, when discussing parole

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waived his right to assert a constitutional claim for the first time on appeal and failed to sufficiently brief his argument precluding further review. We agree that Borja scantly addressed this issue in his brief and during oral argument, he conceded it was insufficiently argued.

As we have consistently held in *Commonwealth v. Guiao*, 2016 MP 15 ¶¶ 11–19, *Commonwealth v. Calvo*, 2014 MP 10 ¶ 7, *In re Estate of Camacho*, 2012 MP 8 ¶ 13 n.7, and *Guerrero v. Dep't of Pub. Lands*, 2011 MP 3 ¶ 24, issues insufficiently developed by parties will not be addressed. The requirements for parties' briefs are clearly outlined under NMI Supreme Court Rules 28(a)(9)(A) and 28(b). "The requirement underscores the nature of our adversarial system, that as reviewing courts we are not self-directed boards of legal inquiry and research, but essentially as arbiters of legal questions presented and argued by the parties before them." *Guiao*, 2016 MP 15 ¶ 12 (internal citations and quotation marks omitted). Because Borja did not sufficiently develop his argument, we will not address the merits of his constitutional claim.

eligibility, we noted that Lizama was entitled to parole after serving *at least* one-third of his sentence. Lizama's parole was entirely restricted and we noted "had the trial court not restricted [his] parole eligibility, he would have been eligible for parole after serving one year and eight months of his five-year term." *Id.* We determined that it *at least* equates to the statutorily prescribed percentage of the minimum mandatory unsuspended prison term (i.e., for SAM 2, two-thirds of the minimum mandatory unsuspended prison term), and for Lizama it was not less than one year and eight months. Similarly, in *Lin*, we held that when a court restricts parole *greater* than the *statutory minimum*, it must provide rationale. 2016 MP 11 ¶ 23. Because a rationale was required to justify parole restrictions greater than what is statutorily prescribed, we read "unless further restricted" to mean an additional or greater restriction. *Id.* We determined that parole cannot be granted unless a person has served no less than the applicable minimum prison term, and that a court can only *additionally* restrict parole eligibility. To find otherwise would diminish the meaning of "at least."

¶ 21 We apply the same rationale here. When Borja pled guilty to SAM 2 it did not carry a mandatory minimum sentence. *See* 6 CMC § 1307(b) (2002).[5] Under 6 CMC § 4252, Borja would be eligible for parole after serving *at least* two-thirds of his sentence, which is six years and eight months. Here, the court rendered Borja eligible for parole after serving six years, eight months earlier than the statute permitted. We remand to the same sentencing court with explicit instructions to only correct the parole restriction error.[6]

V. CONCLUSION

¶ 22 For the foregoing reasons, we AFFIRM Borja's prison sentence and REMAND to the same sentencing judge to cure the technical parole eligibility defect.

SO ORDERED this 18th day of December, 2018.

/s/
ALEXANDRO C. CASTRO
Chief Justice

[5] SAM 2 now carries a mandatory minimum sentence of five years. 6 CMC § 1307(b) (2013).

[6] Because we find the court sufficiently individualized Borja's sentence and remand only to correct the parole eligibility restriction error, we will not reach the merits of whether the case should be remanded to a different judge for resentencing.

/s/
JOHN A. MANGLOÑA
Associate Justice

/s/
PERRY B. INOS
Associate Justice