IN THE

Supreme Court

OF THE

Commonwealth of the Northern Mariana Islands

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS,
Plaintiff-Appellee,

v.

MARIANO QUITUGUA FALIG, JR.,
Defendant-Appellant.

Supreme Court No. 2018-SCC-0003-CRM

ORDER DENYING PETITION FOR REHEARING

Cite as: 2020 MP 13

Decided June 4, 2020

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

Superior Court Criminal Case No. 16-0111
Associate Judge Joseph N. Camacho, Presiding

MANGLOÑA, J.:

¶ 1 Defendant-Appellant Mariano Quitugua Falig, Jr., ("Falig") petitions for rehearing, arguing that (1) *Commonwealth v. Babauta* misapplied the *United States v. Autery* standard of review; (2) the *Babauta* standard of review should not apply retroactively; (3) the failure to make a factual finding of an objection to procedural defects violates his rights to due process, fundamental fairness, and effective assistance of counsel; (4) the procedural defects in Falig's sentencing should be evaluated under an abuse of discretion standard; and (5) after finding an abuse of discretion, we should remand his case to a different trial court judge for resentencing. We render three findings. First, individualized sentencing will continue to receive appellate review as articulated by the *Babauta* standard. Second, parties have the opportunity to object to procedural defects at any time before or after pronouncement, and defects after pronouncement may require a party to move for reconsideration. And third, the Babauta standard applied and we still affirm his sentence. For those reasons, we DENY Falig's petition.

I. FACTS AND PROCEDURAL HISTORY

¶ 2 Falig pleaded guilty to possession of methamphetamine under 6 CMC § 2142(c)(1)[1] and was sentenced to the maximum term of five years, eligible for parole after four years.

¶ 3 At sentencing, Falig pointed the court to several unproven allegations in the pre-sentence investigation report that it should not consider when imposing a sentence. He made several arguments that he should receive the minimum sentence and probation rather than incarceration. Considering Falig's prior convictions, familiarity with the law as a former Correction Officer, and temporary restraining orders, the court imposed the five-year sentence. After pronouncing the sentence at the sentencing hearing, the court issued a sentencing order setting forth the same.

¶ 4 We affirmed his sentence because it was not mechanically imposed and it was properly individualized. In reaching this decision, the *Babauta* standard of review was applied retroactively to Falig's individualized sentencing issues. Falig argued the court used an impermissible aggravating factor and engaged in form-letter sentencing in its sentencing order, failing to individualize his sentence. We characterized these as procedural defects subject to plain error review under *Babauta* because Falig did not object below. We also found these

[1] 6 CMC § 2142(c)(1) reads:

> Any person found guilty of a first offense of possession of one gram or less shall be sentenced to a term of imprisonment of not less than 30 days. Any person convicted of a second offense of possession of less than one gram shall be sentenced to a term of not less than 60 days. Having been convicted of a second offense, any person convicted of subsequent offenses of possession of less than one gram shall be sentenced to a term of imprisonment of not less than 90 days.

claimed procedural defects were not errors and the court individualized his sentence.

¶ 5 Falig now petitions for rehearing of our decision.

II. STANDARD OF REVIEW

¶ 6 This petition requires review of both the facts and law underlying our opinion. The petition for rehearing "must state with particularity each point of law or fact that the petitioner believes the Court has overlooked or misapprehended and must argue in support of the petition." NMI SUP. CT. R. 40(a)(2). A petitioner cannot "raise new issues for the first time on rehearing, absent extraordinary circumstances." *Caiyun Mu v. Hyoun Min Oh*, 2017 MP 4 ¶ 5 (citing *N. Marianas Coll. v. Civil Serv. Comm'n*, 2007 MP 30 ¶ 2). "The petitioner cannot rehash the same arguments already heard and decided on appeal." *Id*.

III. DISCUSSION

¶ 7 Almost all of Falig's arguments involve the standard of review, the center of contention to which our recent sentencing decisions have gravitated. Those decisions have addressed specific issues involving the standard and its requirements as they have come to our attention. This case once again pulls us into the orbit of questions concerning the applicability of the standard, whether it applies retroactively, and what it means to preserve an objection.

¶ 8 *Commonwealth v. Babauta* outlined the current standard, articulating that we should review a sentence for plain error where appellants failed to object below.[2] 2018 MP 14 ¶ 12. For the first time, we clarified whether plain error review, which had been applied to other, discrete sentencing issues, should be applied overall to the trial court's sentencing decision. Not only did we survey the instances in which other jurisdictions apply plain error, but we also analyzed the Ninth Circuit's decision in *United States v. Autery*. There, the court carved out an exception to plain error review for challenges to a sentence's substantive reasonableness. 555 F.3d 864, 869–71 (9th Cir. 2009). It did so based on the rationale that an objection was unnecessary because any argument as to the appropriateness of the sentence had already been made in the parties' briefs and at the hearing before the court's rulings. *Id*. at 871. Thus, any substantive reasonableness errors, whether the party objected to them or not, would be reviewed for an abuse of discretion. *Id*. We adopted *Autery*'s exception and rationale for substantive reasonableness challenges in *Babauta*. Otherwise, we

[2] These arguments stem from the application of NMI Rule of Criminal Procedure 52(b) as interpreted in light of Federal Rule of Criminal Procedure 51(b), which mandates plain error review be applied in instances where a party has failed to object at the trial court level. NMI. R. CRIM. P. 52(b); FED. R. CRIM. P. 51(b).

held courts should review preserved procedural errors for an abuse of discretion but unpreserved procedural errors for plain error. 2018 MP 14 ¶ 12.

¶ 9 Falig posits that *Autery*'s reasoning for abuse of discretion review of substantive reasonableness challenges should be interpreted as follows. He first argues that by pronouncement of the sentence the court has already made its decision, making any subsequent objection "redundant and futile," *Autery*, 555 F.3d at 371, thereby eliminating a party's opportunity to object. Without such opportunity, Falig argues parties can never avail themselves of the abuse of discretion standard.

¶ 10 Falig is incorrect and misinterprets the reasoning in *Autery*. Though the timing of the objections or arguments is relevant to applying the abuse of discretion standard to substantive reasonableness challenges, more critical to the analysis is that the party *has already presented the substance* of the argument to the court in its initial, original arguments. The *Autery* court emphasizes that the arguments have already been made, so arguing those points again by way of objection is redundant: "in a substantive reasonableness challenge, the parties have *already fully argued* the relevant issues . . . and the court is *already apprised* of the parties' positions . . . requiring the parties to *restate their views after sentencing* would be both redundant and futile." *Id*. (emphases added). The prior presentation of the argument, not the timing of the objection, is what makes a later objection redundant and futile. Whether the argument has been or could have been made is what determines which standard will apply.

¶ 11 A recent United States Supreme Court decision supports this reasoning as to substantive reasonableness objections. In *Holguin-Hernandez v. United States*, the Court explained what a party must do to object to the substantive reasonableness of the sentence:

> *[b]y "informing the court" of the "action" he "wishes the court to take," Fed. Rule Crim. Proc. 51(b), a party ordinarily brings to the court's attention his objection to a contrary decision*. And that is certainly true in cases such as this one, where a criminal defendant advocates for a sentence shorter than the one ultimately imposed. *Judges, having in mind their "overarching duty" under § 3553(a), would ordinarily understand that a defendant in that circumstance was making the argument (to put it in statutory terms) that the shorter sentence would be "sufficient" and a longer sentence "greater than necessary" to achieve the purposes of sentencing*. Nothing more is needed to preserve the claim that a longer sentence is unreasonable.

140 S. Ct. 762, 766 (2020) (quoting *Pepper v. United States*, 562 U.S. 476, 493 (2011)) (emphases added) (internal citations omitted). In its later discussion about references to reasonableness in arguments or objections, the Court looked to the intent of the rule-makers when drafting Federal Rule of Criminal Procedure 51 and reasoned that "they chose not to require an objecting party to use any

particular language or even wait until the court issues its ruling. The question is simply whether the claimed error was 'brought to the court's attention.'" *Id.* (internal citations omitted). The Court appears to emphasize that as long as the party brings the error to the court's attention, whether in its initial arguments or by objection after a ruling, that will be sufficient to preserve a substantive reasonableness argument on appeal. The timing of the objection is irrelevant, as long as the substance of the substantive reasonableness error is argued either in the party's brief, at the hearing, or by objection after the court's ruling.

¶ 12 Circuit courts seem to adopt this rationale as well. *See United States v. Hall*, 785 F. App'x 203, 204–05 (5th Cir. 2019) (holding defendant's sentence to be substantively reasonable under an abuse of discretion or plain error standard where he makes the arguments for the first time on appeal and did not object to the sentence's substantive reasonableness after it was pronounced); *United States v. Majors*, 426 F. App'x 665, 667–68 (10th Cir. 2011) ("But when the substantive reasonableness of a sentence is challenged 'we do not require the defendant to object in order to preserve the issue' . . . so long as the defendant made the argument in the district court before sentence was pronounced . . . .") (quoting *United States v. Torres-Duenas*, 461 F.3d 1178, 1183 (10th Cir. 2006)); *United States v. Lamb*, 431 F. App'x 421, 423-25 (6th Cir. 2011) ("Consequently, substantive reasonableness need not be raised until appeal . . . ."); *see also United States v. Miller*, 557 F.3d 910, 915–16 (8th Cir. 2009) ("A defendant need not object to preserve an attack on the length of the sentence imposed if he alleges only that the District Court erred in weighing the § 3553(a) factors."); *United States v. Mancera-Perez*, 505 F.3d 1054, 1058–59 (10th Cir. 2007) ("We therefore clarify *Torres-Duenas*'s exception allowing reasonableness review of unpreserved substantive sentencing challenges to require that the defendant have at least made the argument for a lower sentence before the district court."). Widespread acceptance of this rationale bolsters the reasoning in *Autery*.

¶ 13 The approach for objections to procedural defects, errors which may occur at any time during the sentencing hearing, provides similar flexibility as to timing by allowing parties to object at any time during the hearing, including after pronouncement. Some circuits have noted that it is impossible to object to some procedural defects until after the court pronounces the sentence because it is at pronouncement when the court errs. *Lamb*, 431 F. App'x at 424 ("An objection cannot be 'preserved' in advance of a sentencing event that has yet to occur—and which may never occur."). Regardless, courts have remedied that issue by holding objections to procedural defects may be made at any point during the sentencing hearing, including after pronouncement. *See United States v. Flores-Mejia*, 759 F.3d 253, 255–58 (3d Cir. 2014) ("[W]e now hold that a defendant must raise any procedural objection to his sentence at the time the procedural error is made, *i.e.*, when sentence is imposed without the court having given meaningful review to the objection. Until sentence is imposed, the error has not been committed."); *see also United States v. Wagner-Dano*, 679 F.3d 83, 90–94 (2d Cir. 2012) ("[O]ur decision in *United States v. Villafuerte*, 502 F.3d 204 (2d Cir. 2007), held that plain-error analysis applies where an appellant argues for

the first time on appeal that the district court failed to consider the § 3553(a) sentencing factors."); *see also United States v. Romero*, 491 F.3d 1173, 1178 (10th Cir. 2007) (reviewing procedural defect for plain error where defendant failed to object after the court imposed the sentence); *United States v. Knows His Gun*, 438 F.3d 913, 918 (9th Cir. 2006) (reviewing the court's alleged failure to sufficiently address and apply § 3553(a) factors for plain error where defendant failed to object on that ground). Notably, the Sixth Circuit has adopted a specific procedure requiring the trial court to elicit any objections after the pronouncement of the sentence; a defendant's failure to so object results in plain error review on appeal. *United States v. Bostic*, 371 F.3d 865, 871–73 (6th Cir. 2004). Contrary to Falig's assertions that such objections after pronouncement of the sentence would be disrespectful, disruptive, or redundant, other jurisdictions have not so found, and have found in some cases those objections to be considerate, manageable, and necessary.

¶ 14 The argument that we misapprehended *Autery*'s reasoning concerning objections as it applies to procedural defects therefore fails. In federal sentencing hearings, parties can make arguments or object after each ruling on sentencing enhancements rather than after the pronouncement at the end of the hearing. Parties can also object after pronouncement. Falig, too, had this opportunity. He points to no place in the record where he objected to procedural errors and our review of the record finds no instance either. If it is the sentencing order rather than the oral pronouncement that contains the error, he can move for reconsideration, calling attention to the error. Because Falig failed to either object or move for reconsideration, we properly applied the bifurcated standard of review from *Babauta*.

¶ 15 Applying this two-part standard retroactively to cases on appeal when *Babauta* was decided is also grounded in federal law. In general, under federal criminal law, new rules are applied retroactively to cases pending. *Griffith v. Kentucky*, 479 U.S. 314, 322–23 (1987). "Failure to apply a newly declared constitutional rule to criminal cases pending on direct review violates basic norms of constitutional adjudication." *Id*. at 322. The United States Supreme Court in *Griffith v. Kentucky* explained that "the nature of judicial review [] precludes us from 'simply fishing one case from the stream of appellate review, using it as a vehicle for pronouncing new constitutional standards, and then permitting a stream of similar cases subsequently to flow by unaffected by that rule.'" *Id*. And "selective application of new rules violates the principle of treating similarly situated defendants the same." *Id*. at 323. These statements express the belief that cases involving similar issues should receive the same treatment, which includes applying the same rules.

¶ 16 The Fifth Circuit has expanded upon whether a rule may be retroactively applied by creating a test that determines whether a change in the rule should be characterized as a procedural or substantive change. *United States v. Mejia*, 844 F.2d 209, 211 (5th Cir. 1988). That test consists of three prongs: whether the change increases the punishment, changes the elements of the offense, or changes

the facts the government must prove at trial. *Id*. at 211; *United States v. Bell*, 371 F.3d 239, 241–42 (5th Cir. 2004). If the answer to any of the prongs is yes, the change is substantive because it affects the defendant's substantive rights, and therefore should be applied non-retroactively, or prospectively. If the answer to all prongs is no, the change is procedural and may be applied retroactively. In *United States v. Bell*, the Fifth Circuit adopted this approach in applying the changed standard of review to a sentencing decision that occurred before the Act's or rule's enactment. 371 F.3d at 241–42. There, the court applied a change in the standard of review outlined in a statute concerning sentencing departures. In doing so, it relied on the Supreme Court's jurisprudence, its prior decision in *Mejia*, and the reasoning that a change in the standard of review was procedural because it does not impact a defendant's substantive rights. *Id*. at 242. A change after the fact of the crime to a standard on which a defendant relied could not have affected her criminal behavior. *Id*. The court agreed that it was the substance of sentencing rules, not the level of deference given to the trial court when examining the trial court's error, that impacts defendants. *Id*. The *Bell* court, however, is not alone in its reasoning, as other courts have justified retroactive application with a similar rationale. *United States v. Phillips*, 367 F.3d 846, 861 (9th Cir. 2004); *see United States v. Mallon*, 345 F.3d 943, 946–47 (7th Cir. 2003) (explaining "procedural innovations that don't tinker with the substance as a side effect" can be applied retroactively).

¶ 17 Falig maintains that *Mejia* and *Bell* are factually and legally distinguishable from his case because both revolve around the sufficiency of evidence in support of convictions. He argues that to now apply plain error review to unpreserved objections violates his Sixth Amendment right to effective trial counsel because his counsel did not know they would need to object to preserve that standard. This, he asserts, rendered his counsel ineffective. *Mejia* may be factually distinguishable because it concerns the defendant's conviction and not his sentencing, but it is legally significant because it is the case announcing the retroactivity test, upon which later appellate panels rely. Falig's case and *Bell*, on the other hand, are legally similar because at issue in each case are alleged procedural defects in sentencing, and *Bell* provides reasoning for the retroactive application of a new standard of review in that context.

¶ 18 Falig further argues the retroactive application of the *Babauta* standard violated his Fourteenth Amendment rights to due process and fundamental fairness and his equivalent rights under Article I, Sections 4(a) and 5 of the NMI Constitution. The Ninth Circuit has held that retroactive application of a new standard of review is not barred by the Fourteenth Amendment's Due Process Clause. *Phillips*, 367 F.3d at 861. In *United States v. Phillips*, the court considered whether the new standard of review prescribed in a congressional act, effective before the defendant's sentencing, applied. *Id*. at 860–61. There, the defendant argued that he had a "legitimate and reasonable expectation that there would be an established degree of appellate deference" by the trial court. *Id*. at 861. The Ninth Circuit disagreed, stating: "Reliance on a particular standard of appellate review, however, does not implicate the Due Process Clause." *Id*. A

standard of appellate review is considered a procedural rule regulating secondary conduct, that is, the court's conduct. *Id*. Application was not barred by the Due Process Clause because it did not impact primary conduct, or the defendant's conduct—the crime he committed—or warrant protection for the defendant's "reliance interest" on the standard of review to be applied on appeal. *Id*. Likewise, Falig's interest in application of a certain standard of review on appeal does not implicate or violate his Due Process rights.

¶ 19 The *Babauta* standard changes the standard of review of an error based on a party's objection or lack thereof. The obligation to object to errors arises from the long-held principle that a failure to do so results in forfeiture of a claim for relief from the error. *Puckett v. United States*, 556 U.S. 129, 134 (2009); *Yakus v. United States*, 321 U.S. 414, 444 (1944); NMI R. CRIM. P. 51. Federal Rule of Criminal Procedure 51(b), like our Rule of Criminal Procedure 51, instructs parties on how to object and preserve a claim of error, by "informing the court . . . of the action the party wishes the court to take, or the party's objection to the court's action and the grounds for that objection." Failure to do so precludes review of the error, unless it is "plain error that affects substantial rights" not objected to under Federal Rule of Criminal Procedure 52(b) or NMI Rule of Criminal Procedure 52(b). This allows the trial court opportunity to correct the error, as the trial court is best placed to do so, and discourages parties from belatedly raising the error, thereby "sandbagging" the court. *Puckett*, 556 U.S. at 134. Here, Falig attempts to shift the blame for the purported failure to act when an error is committed, and the effect on the standard of review that results, to the appellate court. But parties should object to a sentencing error regardless of what standard of review would be applied on appeal. Effective defense requires bringing the court's attention to errors when they occur. A change in the appellate standard of review should not be the reason for a lack of defense or advocacy at the trial level.

¶ 20 As in *Babauta*, here, the parties did not have the opportunity to argue whether the new standard should apply; even under the prior abuse of discretion standard, the alleged procedural defects fail to pass the muster of even this more favorable (to Falig) standard. Under an abuse of discretion standard, we give deference to the court's decision and find reversal appropriate "only if no reasonable person would have imposed the same sentence." *Commonwealth v. Palacios*, 2014 MP 16 ¶ 12.

¶ 21 Falig argues the court erred in considering his addiction as an impermissible aggravating factor and engaged in form-letter sentencing. As we concluded in *Falig I*, neither of these alleged procedural defects is an error. The court mentioned Falig's addiction to clarify that punishment was imposed not because he was an addict but because he committed a possession crime. *See* Tr. 13. It noted the defendant relied on his addiction as a mitigating factor and then stated, "I want it to be very clear, so that it's absolutely clear here, the defendant is not being punished because he is an addict. Defendant is being punished because he committed a crime of possessing a controlled substance." *Id*. The

court did not consider the addiction as an aggravating factor but included these statements in its discussion of mitigating factors. This clarification does not amount to an error, let alone an abuse of discretion. The claim of form-letter sentencing likewise falls short of error, or an abuse of discretion, because it consists of references to the court's definitions of the four sentencing pillars under 6 CMC § 4115, rather than pointing to rote, identical statements about the defendant's characteristics or the crime's circumstances in other orders. While the sentencing orders to which Falig compares his own contain similar statements about the sentencing pillars, each sentencing order includes specific notes about each defendant's circumstances and the specific crime. App. 8, 17.

¶ 22 Because there is no sentencing error, we do not address whether the case should be remanded to a different judge. We addressed other arguments for clarification but note the petition's points lack support, as well as claims that facts or law were overlooked or misinterpreted.

IV. CONCLUSION

¶ 23 We continue to review individualized sentencing under the *Babauta* standard, which allows parties to object to procedural defects at any time. Our disposition in affirming his sentence does not change. For the foregoing reasons, we DENY the petition.

SO ORDERED this 4th day of June, 2020.

/s/
ALEXANDRO C. CASTRO
Chief Justice

/s/
JOHN A. MANGLOÑA
Associate Justice

/s/
PERRY B. INOS
Associate Justice

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