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

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS,
Plaintiff-Appellee,

v.

PATRICK M. CALVO,
Defendant-Appellant.

Supreme Court No. 2016-SCC-0027-CRM
Superior Court Number 08-105-CR

SLIP OPINION

Cite as: 2018 MP 9
Decided November 19, 2018

Michele Harris, Chief Prosecutor, Office of the Attorney General, Saipan, MP, for Plaintiff-Appellee.[1]

Bruce Berline, Saipan, MP, for Defendant-Appellant.

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[1] Jonathan Wilberscheid was Assistant Attorney General during briefing and oral argument.

BEFORE: TIMOTHY H. BELLAS, Justice Pro Tempore; DAVID A. WISEMAN, Justice Pro Tempore; JOSEPH N. CAMACHO, Justice Pro Tempore.

BELLAS, J.P.T..:

¶ 1 Defendant-Appellant Patrick M. Calvo ("Calvo") appeals his sentence imposed on remand. Following his first appeal, Calvo was resentenced to eight years imprisonment, with one year suspended, and seven years supervised probation to commence following completion of his prison term, with credit for time already served. Calvo claims: (1) the court failed to individualize his sentence; (2) his sentence on remand was increased and therefore violated his Fourteenth Amendment due process protections against vindictive sentencing; and (3) correcting the technical defect on remand violated double jeopardy. For the reasons below, we AFFIRM Calvo's sentence.

I. FACTS AND PROCEDURAL HISTORY

¶ 2 This is Calvo's second appeal related to the sexual abuse of his minor daughter. *Commonwealth v. Calvo*, 2014 MP 7 ¶¶ 2–11 ("*Calvo I*"), provides the factual basis for the underlying offenses, court proceedings, and convictions. We summarize pertinent facts here.

¶ 3 Calvo was charged and convicted of three counts of unlawful sexual conduct and one count of disturbing the peace.[2] In June 2010, he was sentenced to eight years of imprisonment, seven years of probation, 1,500 hours of community service, and restitution. Calvo appealed his convictions and original sentence. We affirmed his convictions but remanded to the trial court to correct technical sentencing defects.[3] On remand in September 2016, Calvo was resentenced to eight years of imprisonment, with one year suspended, and seven years of probation to begin following his release. Under the new sentence, Calvo's unsuspended prison term was reduced by one year, but the total term of punishment remained fifteen years. Calvo appeals his sentence.

II. JURISDICTION

¶ 4 We have jurisdiction over final orders and judgements of the

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[2] Specifically, Calvo was convicted of Sexual Assault in the Second Degree in violation of 6 CMC § 1302(a)(1), punishable by imprisonment between two and fifteen years, Sexual Abuse of a Minor in the Second Degree in violation of 6 CMC § 1307(a)(3), punishable by imprisonment between five and fifteen years, Sexual Abuse of a Minor in the Third Degree in violation of 6 CMC § 1308(a)(1), punishable by imprisonment between two and five years, and Disturbing the Peace in violation of 6 CMC § 3101(a), punishable by imprisonment for up to six months.

[3] In *Calvo I*, we concluded Calvo's probationary sentence was technically improper because the court did not suspend any portion of the sentence. We stated that "[t]he sentence does not comply with 6 CMC § 4104 because it does not suspend at least some of the sentence." *Calvo*, 2014 MP 7 ¶ 65. We further noted, however, "[o]n remand, the trial court must cure this technical defect, *but is otherwise within its discretion to issue a substantially similar sentence*." *Id.* (emphasis added).

Commonwealth Superior Court. NMI CONST. art. IV, § 3.

III. STANDARD OF REVIEW

¶ 5 We consider three issues on appeal. First, whether the trial court imposed an individualized sentence. We review the trial court's sentencing decisions for abuse of discretion. *Commonwealth v. Kapileo*, 2016 MP 1 ¶ 6. Second, whether Calvo's sentence on remand violated his Fourteenth Amendment protections against vindictive sentencing. We review claims of constitutional violations de novo. *Commonwealth v. Lin*, 2014 MP 6 ¶ 9; *United States v. Horob*, 735 F.3d 866, 869 (9th Cir. 2013) ("Whether a district court's imposition of a higher sentence at resentencing was vindictive is reviewed under a de novo standard." (internal citations omitted)). Third, whether correcting the technical sentencing defect increased Calvo's sentence and therefore violated double jeopardy. We review double jeopardy questions de novo. *Commonwealth v. Peter*, 2010 MP 15 ¶ 4.

IV. DISCUSSION

A. Individualized Sentence

¶ 6 Calvo argues his sentence impermissibly used elements of the crime as aggravating factors. He claims the trial court disregarded our holding in *Kapileo*, and that using elements of a crime as aggravating factors, even when other aggravating factors are present, poisons the entire sentence. Specifically, he argues that the court should not have used the victim's age or her familial relationship to Calvo when imposing its sentence. He therefore contends the court did not sufficiently individualize his sentence.

¶ 7 We review whether the sentence was sufficiently individualized for an abuse of discretion, *Kapileo*, 2016 MP 1 ¶ 25, giving "great deference to the trial court's sentencing decision" and "revers[ing] only if no reasonable person would have imposed the same sentence." *Commonwealth v. Lin*, 2016 MP 11 ¶ 15; *Commonwealth v. Palacios*, 2014 MP 16 ¶ 12 (internal citations omitted). "The Legislature intends for courts to impose individualized sentences when statutes provide for a range of punishment." *Kapileo*, 2016 MP 1 ¶ 25. Here, Calvo's convictions provide for a range of punishment; therefore, the trial court had to individualize his sentence.[4] To properly individualize a sentence, the trial court must examine and measure "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." *Id.*

¶ 8 In *Kapileo*, we considered, in part, whether the trial court imposed a sufficiently individualized sentence following the defendant's convictions for multiple traffic code violations. 2016 MP 1 ¶¶ 1–2. We found the sentence was insufficiently individualized because the court failed to acknowledge whether mitigating factors influenced its decision. *Id.* ¶ 24. We also held "an individualized sentence should not include essential elements of the crime as aggravating factors because otherwise, every offense arguably would implicate

[4] *See supra* n.2.

aggravating factors merely by its commission, thereby eroding the basis for the gradation of offenses and the distinction between elements and aggravating circumstances." *Id.* ¶ 25. (citations and internal quotation marks omitted). "Elements of a crime establish the actions the Commonwealth must prove beyond a reasonable doubt to convict a defendant—they are not factors particular to a defendant at sentencing." *Id.*[5]

¶ 9 Although *Kapileo* indicated that courts should not use elements of the crime as aggravating factors in rendering a sentence, we do not read *Kapileo* as an absolute bar on using elements of an offense to articulate the degree, severity, or nature of the crime. In fact, these factors may be important considerations when imposing a sentence. *See State v. Fuentes*, 85 A.3d 923, 933 (N.J. 2014) (internal citations omitted) ("The single most important factor in the sentencing process [is] assessing the degree to which defendant's conduct has threatened the safety of its direct victims and the public."). Rather, we find that *Kapileo* stands for the proposition that a sentence based *solely* on the elements of a crime is improper and insufficiently individualized. A sentence which discusses aggravating and mitigating factors is not necessarily improper if it uses elements of an offense to discuss the degree, severity, or nature of a crime. To be clear, *Kapileo* does not stand for the proposition that merely referencing an element of the offense is an abuse of discretion. It is an abuse of discretion when a sentencing judge relies *solely* on the elements of the offense as aggravating or mitigating grounds. Sentencing courts do not operate in a vacuum; a sentencing judge should not have to navigate a minefield to avoid even the mere mention of an element or risk abusing its discretion.

¶ 10 Here, when imposing its sentence, the trial court considered the victim's age and her relationship to Calvo as aggravating factors. *Commonwealth v. Calvo*, Crim. No. 08-0105A (NMI Super. Ct. June 11, 2010) (Sentencing & Commitment Order at 5) ("SCO"). Both age and parentage are elements of Sexual Abuse of a Minor in the Second Degree. 6 CMC § 1307(a)(3). As to age, the court noted, "[a]t the time, the minor victim was only thirteen years old, which is a *pivotal age for a young girl*, and the *adverse psychological and emotional effects of this assault will most likely be with the victim for the rest of her life*." SCO at 5. (emphasis added). Although the court used the victim's age, an element of the offense, as an aggravating factor, the court is not barred from recognizing that the sexual abuse suffered by the victim at her age may result in psychological trauma. The court did not use the victim's age to prove that the victim was indeed thirteen, but rather to illustrate how vulnerable the victim was and how destructive the offense was on her well-being. SCO at 5. This is distinguishable from *Lin*, where we concluded that because the sentence was

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[5] Similarly, in *Lin*, we considered, in part, whether the trial court abused its discretion by imposing the maximum sentence following the defendant's guilty plea for Sexual Abuse of a Minor in the Third Degree. We found the sentence "lacks individualization because the trial court imposed the maximum sentence based on the crime committed." 2016 MP 11 ¶ 18.

based on the act of the crime, the trial court abused its discretion. *Lin*, 2016 MP 11 ¶ 18. Here, the sentence was not based on the act of the crime; rather, the court used the victim's age to illustrate the kind of trauma the victim suffered, which describes the *nature* and *severity* of the crime.

¶ 11 The court also discussed Calvo's role as a father in its sentencing order, which is an element of 6 CMC § 1307(a)(3). It explained:

> there is no greater gift to men but to have an opportunity to guide a child to a decent adult life. A jury of his peers found that Patrick Calvo squandered that gift in one of the most vicious ways a man could ever poison his own child—his own daughter. The criminal justice system alone is not capable of healing the wounds wrought from this very deepest betrayal of trust—by any measure of punishment.

SCO at 5. The court did not rely solely on Calvo being the victim's natural parent to justify its sentence, but rather used Calvo's relationship with the victim to explain the nature and severity of the offense. It stressed the precious gift of fatherhood and how a jury of his peers found that Calvo squandered his opportunity to positively impact his daughter's life. *Id.* Particularly, the court noted that Calvo "took advantage of his position of power" and violated his responsibility to "watch over and care for the victim." *Id.* While the element of the offense is being a natural parent, the court considered "the nature and circumstances of the offense" (Calvo violating his responsibility to care for his daughter) "and the role of the actor therein" (Calvo taking advantage of his position of power) to further explain its sentence.

¶ 12 The sentence is also sufficiently individualized because it considered additional aggravating factors and mitigating factors. Specifically, regarding aggravating factors, the trial court noted that "the victim suffered nightmares, trouble sleeping, and a loss of appetite." SCO at 5. It further expressed serious concerns as to whether or not Calvo could be successfully rehabilitated. With respect to mitigating factors, the trial court acknowledged Calvo's involvement in various Department of Corrections programs, including "providing education assistance to other inmates" and help "developing and implementing in training project [sic] of other inmates." *Id.* at 4. It also considered numerous letters of support received from individuals pleading for a lenient sentence.

¶ 13 Here, the sentencing order does mention elements of the offense, namely, the victim's age and relationship to Calvo. However, we still find the sentence sufficiently individualized because the court used the elements of the offense to demonstrate the severity of the crime, and additional aggravating factors to further support the sentence. Therefore, we find Calvo's 2016 sentence is sufficiently individualized and the court did not abuse its discretion.

B. Vindictive Sentence

¶ 14 Calvo also argues that his sentence should be vacated because his sentence imposed on remand was increased and the court failed to rebut the presumption

of vindictiveness. He claims the presumption of vindictiveness is raised because the legal portion of his June 2010 sentence was only eight years while his September 2016 sentence subjected him to fourteen years punishment—a substantial increase. Calvo relies on Ninth Circuit precedent to support his argument that the legal portion of his sentence was limited to the eight-year imprisonment term. *See United States v. Thompson*, 979 F.2d 743, 745 (9th Cir. 1992) (concluding that converting three years of imprisonment to special parole does not constitute an illegal increase in sentence); *United States v. Jordan*, 895 F.2d 512, 514–15 (9th Cir. 1999) (holding that when considering a Rule 35 motion to correct or reduce a sentence, courts can only reduce the excess of an illegal sentence); *United States v. Wingender*, 711 F.2d 869, 870 (9th Cir. 1983) (concluding that an ambiguous sentence is illegal and can be clarified without violating double jeopardy).

¶ 15 Whether a sentence is vindictively imposed is an issue of first impression and we turn to federal case law for guidance. We review de novo whether a sentence is vindictively imposed. *Horob*, 735 F.3d at 869. "Due process of law . . . requires that vindictiveness against a defendant for having successfully attacked his first conviction . . . play no part in the sentence he receives after a new trial." *Alabama v. Smith*, 490 U.S. 794, 798 (1989) (citations omitted). "[T]o assure the absence of such a motivation, we have concluded that whenever a judge imposes a more severe sentence upon a defendant after a new trial, the reasons for him doing so must affirmatively appear." *Id.* The presumption of vindictiveness, however, is not automatically triggered when a defendant receives an increased sentence on retrial or remand. *Id*. at 799. Rather, the presumption is raised if there is a reasonable likelihood that the "increase in sentence is the product of actual vindictiveness on the part of the sentencing authority." *Id*.

¶ 16 As noted in paragraph 14, Calvo relies on various Ninth Circuit cases to justify his argument that the legal portion of his sentence was limited to the eight-year prison term. We do not find Calvo's provided authority convincing because each case involved correcting or reducing a sentence under Federal Rule of Criminal Procedure 35 motions. Although our jurisdiction has a similar rule, Commonwealth Rule of Criminal Procedure 35 ("Rule 35"), Calvo did not move for the court to correct his sentence; he directly appealed to our Court. Instead, we find the rationale in *United States v. Moreno-Hernandez*, 48 F.3d 1112 (9th Cir. 1994) persuasive. While resentencing based on a Rule 35 motion only allows a court to amend the illegal portion of a sentence, "[a] resentencing mandate from an appellate court, however, *does away with the entire initial sentence*, and authorizes the [trial] court to impose 'any sentence which could lawfully have been imposed originally.'" *Moreno-Hernandez*, 48 F.3d at 1116 (citing *Kennedy v. United States*, 330 F.2d 26, 29 (9th Cir. 1964) (quoting *United States v. Chiarella*, 214 F.2d 838, 842 (2d Cir. 1958)) (emphasis added). Thus, in *Moreno-Hernandez*, the Ninth Circuit concluded: "the court was free to reconsider the entire 'sentencing package' and to restructure the sentences . . . ." *Id.*

¶ 17 Therefore, in *Calvo I*, when we remanded to the trial court to cure the technical defect, it was "free to reconsider the entire 'sentencing package'" and impose probation. *Id.* The only issue with the original sentence was that a portion of the prison term needed to be suspended before the trial court could impose probation. The probation itself, however, was well within the statutory scheme. The trial court, on remand, was free to impose a sentence that was consistent with *Calvo I*, and it did. Calvo was resentenced to eight years of imprisonment, with one year suspended, and seven years of probation, resulting in a one-year reduction of Calvo's prison sentence. *See* SCO at 7–8. As such, because the court resentenced Calvo pursuant to our sentencing mandate, the resentence on remand is legal. We therefore decline to address the merits of Calvo's argument. His resentence was not increased, and the presumption of vindictiveness is not triggered.

C. Double Jeopardy

¶ 18 Finally, we consider whether Calvo's remanded sentence violated double jeopardy. Calvo's argument rests on whether an increased sentence on remand violates double jeopardy. He contends that his new sentence is a second punishment because he had a legitimate expectation of finality based on his original sentence. Thus, Calvo claims that once we ruled that the imposition of probation needed to be corrected, he had an expectation of finality based on the eight-year prison term alone, without any additional probation period.

¶ 19 We review the double jeopardy claim de novo. *Peter*, 2010 MP 15 ¶ 5; *Commonwealth v. Taisacan*, 2005 MP 9 ¶ 21. In *Calvo I*, we stated: "[d]ouble jeopardy protects an individual against: (1) a second prosecution for the same offense after acquittal; (2) a second prosecution for the same offense after conviction; and (3) multiple punishments for the same offense." 2014 MP 7 ¶ 40 (citations and internal quotation marks omitted).

¶ 20 As explained in paragraph 3, Calvo's original sentence subjected him to a total of fifteen years of punishment, including the probationary period. It is well-settled in our jurisprudence that probation is included in a sentence. *Commonwealth v. Rios*, 2015 MP 12 ¶ 31 ("Probation is part of the punishment imposed in the original sentence.") (citations omitted); *Commonwealth v. Santos*, 4 NMI 348, 351 (1996) ("The probationary period itself comprises a portion of the sentence.") (citations omitted). Therefore, he could not have an expectation of finality related solely to his eight-year prison term. In *Calvo I*, we clearly instructed the trial court to correct a technical defect; the sentencing court was otherwise within its authority to issue a substantially similar sentence. Calvo's only reasonable expectation was to receive an individualized sentence within the sentencing range prescribed for the offenses he was convicted of. The sentencing court complied with that expectation. Calvo's double jeopardy protections were thus not violated and we therefore need not discuss the double jeopardy claim any further.

V. CONCLUSION

¶ 21 For the foregoing reasons, we AFFIRM Calvo's 2016 sentence.

SO ORDERED this 19th day of November, 2018.

/s/
TIMOTHY H. BELLAS
Justice Pro Tempore

/s/
DAVID A. WISEMAN
Justice Pro Tempore

/s/
JOSEPH N. CAMACHO
Justice Pro Tempore