IN THE SUPREME COURT OF GUAM

PEOPLE OF GUAM,
Plaintiff-Appellee,

vs.

SEUNG KWEON CHUNG,
also known as JEONG SEUNG-KWON,
Defendant-Appellant.

Supreme Court Case No.: CRA02-002
Superior Court Case No.: CF0643-00

OPINION

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Appeal from the Superior Court of Guam
Argued and submitted on May 1, 2003
Hagåtña, Guam

Appearing for the Plaintiff-Appellee:
Gerad Egan
Assistant Attorney General
Office of the Attorney General
General Crimes Div.
Suite 2-200E, Guam Judicial Ctr.
120 W O'Brien Dr.
Hagåtña, Guam 96910

Appearing for the Defendant-Appellant:
Howard Trapp, Esq.
Howard Trapp Inc.
200 Saylor Bldg.
139 Chalan Santo Papa
Hagåtña, Guam 96910

BEFORE: F. PHILIP CARBULLIDO, Chief Justice; FRANCES M. TYDINGCO-GATEWOOD, Associate Justice; JANET HEALY WEEKS, Justice *Pro Tempore*

TYDINGCO-GATEWOOD, J.:

[1] Defendant-Appellant Seung Kweon Chung, also known as Jeong Seung-Kwon ("Chung") appeals from his convictions of Manslaughter (As a First Degree Felony), Vehicular Homicide While Intoxicated (As a Second Degree Felony), and a Special Allegation pursuant to Title 9 GCA § 80.37. Chung asserts that the lower court erred in accepting his guilty pleas without following the requirements set out in Title 8 GCA § 60.50 (a), (c) and (d). Specifically, Chung argues that the lower court accepted the guilty pleas without (1) first informing him of and determining that he understood the nature of the charges; (2) informing him that he waived his right to a trial of any kind; and (3) informing him of the maximum possible penalties provided by law. *See* Title 8 GCA §§ 60.50(a), (c) and (d). Chung also challenges the validity of the indictment by arguing that the lower court erred in applying the Special Allegation, charged pursuant to Title 9 GCA § 80.37, to the felonies of Manslaughter and Vehicular Homicide While Intoxicated. We agree with Chung that the lower court's failure to inform Chung of, and determine that he understood, the nature of the charges to which he was pleading guilty constitutes plain error. We therefore vacate the judgment of conviction and remand to permit Chung to withdraw his pleas of guilty.

I.

[2] On December 12, 2000, Chung was indicted on the following charges:

1. Manslaughter (As a First Degree Felony), in violation of 9 GCA 16.50(b);
2. Vehicular Homicide While Intoxicated, (As a Second Degree Felony), in violation of 16 GCA §§ 18111(b), 18101 and 18102(e);
3. Vehicular Homicide (As a Second Degree Felony), in violation of 16 GCA § 18111(a);
4. Vehicular Homicide (As a Second Degree Felony), in violation of 16 GCA § 18111(b);
5. Criminally Negligent Homicide (As a Third Degree Felony), in violation of 9 GCA§ 16.60;
6. Driving While Under the Influence of Alcohol (As a Misdemeanor), in violation of 16 GCA § 18102(a) ;

7. Driving While Under the Influence of Alcohol (BAC) (As a Misdemeanor, in violation of 16 GCA § 18102(b);
8. Reckless Driving With Injuries (As a Misdemeanor), in violation of 16 GCA§§ 9107(a) and (b).

[3] The indictment further alleges, as a Special Allegation to Charges 1 through 5:

> [t]hat in the commission of each of the above felony offenses, the Defendant, SEUNG KWEON CHUNG aka Jeong Seung-Kwon, did unlawfully use a deadly weapon, that is, a motor vehicle as defined in 9 GCA 16.10(d), in violation of 9 GCA 80.37.

[4] On January 15, 2002, Chung appeared in court with his attorney for a change of plea hearing. There, the defense counsel and the Government stipulated that the lower court was to determine the applicability of the Special Allegation to the charges of Manslaughter and Vehicular Homicide While Intoxicated. Chung thereafter entered a plea of guilty to both Manslaughter and Vehicular Homicide While Intoxicated. The remaining six charges were dismissed.

[5] On April 18, 2002, the lower court applied the Special Allegation to the offenses of Manslaughter and Vehicular Homicide While Intoxicated. Chung was thereafter sentenced to forty years imprisonment as follows: fifteen years for Manslaughter, eight years for Vehicular Homicide While Intoxicated, with both sentences to run concurrently, and twenty-five years for the Special Allegation, to run consecutively to the sentence for Manslaughter. *See* Appellant's Excerpts of Record, p. 27 (Judgment).

[6] Chung filed a timely Amended Notice of Appeal and seeks a vacation of the judgment of conviction, based on several grounds.

II.

[7] This court has jurisdiction over this appeal pursuant to Title 7 GCA §§ 3107 and 3108 and Title 8 GCA §§ 130.15(a) and 130.60.

III.

[8] Chung appeals his conviction by asserting that the lower court failed to follow the requirements set out in Title 8 GCA § 60.50. Specifically, Chung argues that the lower court erred

(1) by failing to inform him of the nature of the charges of Manslaughter and Vehicular Homicide While Intoxicated and failing to determine that he understood the nature of those charges; (2) by failing to inform him that he was waiving his right to a trial of any kind; and (3) by failing to inform him of the maximum possible penalties provided by law. The lower court must satisfy these requirements pursuant to Title 8 GCA §§ 60.50(a),(c) and (d). Chung also challenges the validity of the indictment by arguing that the lower court erred in applying the Special Allegation pursuant to Title 9 GCA § 80.37 to the felonies of Manslaughter and Vehicular Homicide While Intoxicated, because the People failed to plead and prove the element of intent.

[9] Chung concedes that these issues were not raised in the lower court and thus we review for plain error. *See People v. Ueki*, 1999 Guam 4, ¶ 17; *United States v. Olano*, 507 U.S. 725, 731-32, 113 S. Ct. 1770, 1776 (1993); *United States v. Vonn*, 535 U.S. 55, 58, 122 S. Ct. 1043, 1046 (2001). In *Ueki*, we recognized the limitations on our authority to correct plain error, as defined by the United States Supreme Court in *United States v. Olano*. *Ueki*, 1999 Guam 4 at ¶ 17. First, Chung must demonstrate that there was an "error," which occurs "when there has been a violation of a legal rule, not waived by a defendant, during court proceedings, despite a failure to make a timely objection." *Id.* at ¶ 18. Second, the error must be "plain" in that it is "clear" or "obvious." *Id.* (citations omitted). Third, the plain error must affect Chung's substantial rights. *See id.* at ¶¶ 17, 23.

[10] In response to Chung's contentions, the People argue that the lower court adequately complied with the requirements found in Title 8 GCA § 60.50, and the judgment of conviction should therefore be affirmed. With respect to the Special Allegation, the People assert that the lower court found that Chung used a deadly weapon in the commission of the felonies of Manslaughter and Vehicular Homicide While Intoxicated, and the indictment and conviction of the Special Allegation pursuant to Title 9 GCA § 80.37 was proper.

[11] While we agree with the People that the court properly applied the Special Allegation to the respective felonies, we find that the lower court erred in failing to adhere to the requirements of section 60.50 in three respects, one of which constitutes plain error.

A. Guilty Plea Proceeding

[12] Title 8 GCA § 60.50 delineates the procedure that a judge must follow prior to accepting a defendant's guilty plea. Section 60.50 states:

> The court shall not accept a plea of guilty . . . without first, by addressing the defendant personally in open court, informing him of and determining that he understands the following:
>
> (a) the nature of the charge to which the plea is offered;
> (b) that the defendant has the right to plead not guilty, or to persist in that plea if it has already been made;
> (c) that if he pleads guilty . . . there will not be a further trial of any kind, so that by pleading guilty . . . he waives the right to a trial; and
> (d) the maximum possible penalty provided by law for the offense to which the plea is offered including that possible from the imposition of an extended term pursuant to §§ 80.38 and 80.40 of the Criminal and Correctional Code.

Title 8 GCA § 60.50 (1993).

[13] This section is based on the proposed Rule 11(c) of the Federal Rules of Criminal Procedure and ABA, Project on Minimum Standards for Criminal Justice Pleas of Guilty § 1.4 (Approved draft 1968). *See* Notes to 8 GCA § 60.50. We therefore turn to case law interpreting the federal Rule 11 for guidance and instruction. *See Guam v. Ojeda*, 758 F.2d 403, 406 (9th Cir. 1985). The United States Supreme Court in *Henderson v. Morgan* held that "a plea cannot support a judgment of guilt unless it was voluntary in a constitutional sense." *Henderson v. Morgan*, 426 U.S. 637, 644-45, 96 S.Ct. 2253, 2257 (1976). The Court explained that, "[w]ithout adequate notice of the nature of the charge against him, or proof that he in fact understood the charge, the plea cannot be voluntary in [the] constitutional sense" that it must be an "intelligent admission of guilt." *Id.* at n.13. Although provisions such as section 60.50 are not "constitutionally mandated," they are designed to ensure that a defendant's guilty plea is "truly voluntary." *McCarthy v. United States*, 394 U.S. 459, 465, 89 S. Ct. 1166, 1170 (1969). This determination is "constitutionally required." *Id.*

1. Nature of the charge

[14] The first requirement of Title 8 GCA § 60.50 is that the defendant know and understand the nature of the charges to which he is pleading guilty. *See* 8 GCA § 60.50. "[B]ecause a guilty plea is an admission of all the elements of a formal criminal charge, it cannot be truly voluntary unless the defendant possesses an understanding of the law in relation to the facts." *McCarthy*, 394 U.S.

at 466, 89 S. Ct. at 1171. The procedure embodied in section 60.50 directs a "judge to inquire whether a defendant who pleads guilty understands the nature of the charge against him and whether he is aware of the consequences of his plea." *Id.* at 464, 895 S. Ct. at 1170. Such a provision "better able[s] [a judge] to ascertain the plea's voluntariness" and to "develop a more complete record to support his determination in a subsequent post-conviction attack." *Id.* at 466, 89 S. Ct. at 1170-71. A judge fails to comply with this provision where he or she "does not personally inquire whether the defendant understood the nature of the charge," through the exposure of "the defendant's state of mind on the record." *Id.* at 467, 89 S. Ct. at 1171.

[15] To ascertain whether the trial court adequately complied with section 60.50, we turn to the relevant portion of the colloquy at the January 15, 2002 guilty plea proceeding, which follows:

THE COURT:	All right. Mr. Chung, sir, the Court is informed that without the benefit of a plea agreement today, *you have agreed to enter a Guilty plea to two charges, and these are: Manslaughter, as a first degree felony and Vehicular Homicide While Intoxicated, as a second degree felony.*
THE DEFENDANT:	*Yes, Your Honor.*
	* * *
THE COURT:	All right. As to the factual basis here, is there a stipulation or does the Government wish to proffer on the record what it would have shown had the matter gone to trial?
MR. EGAN:	I'd ask, Your Honor, if the Defendant will stipulate that the facts of the case support the charges of Manslaughter and Vehicular Homicide While Intoxicated, the first and second charges of the Indictment?
THE COURT:	Mr. Torres?
MR. TORRES:	Yes, so stipulated, Your Honor.
THE COURT:	All right. The Defendant has stipulated that on or about November 29, 2001, in Guam, he did unlawfully and recklessly cause the death of another person, namely, Elizabeth Mendiola Cruz, as contained in the First Charge. The Defendant has also stipulated that on or about November 29, 2001, in Guam, he did, while intoxicated, negligently operate and drive a vehicle, said negligence proximately causing the death of another person, namely, Elizabeth Mendiola Cruz, in violation of local statute. All right. *Let me address the Defendant then. Mr. Chung, today you are pleading Guilty to Manslaughter, as a first degree felony. Is that correct*?
THE DEFENDANT:	*Yes, Your Honor.*
	* * *
THE COURT:	*All right. Also, the Court is informed today that you are pleading Guilty to Vehicular Homicide While Intoxicated. . . . Is that correct?*
DEFENDANT:	*Yes, Your Honor.*

Transcript, vol. II of III, pp.10-11, 14-15 (Change of Plea, Jan. 15, 2002).

[16] Chung correctly asserts that the lower court committed plain error in failing to determine that he understood the nature of the charges to which he was pleading guilty, in violation of the requirement found in section 60.50(a). Although the trial court's recitation of the indictment may be sufficient to *inform* Chung of the nature of the charges, there is no indication or acknowledgment by Chung in the record that he *understood* the trial court's explication, if any, of the nature of the charges. *See United States v. Bruce*, 976 F.2d 552, 560 (9th Cir. 1992) ("[R]ecitation [of the indictment] would suffice to inform the defendant of the nature of the charges against him only in exceedingly simple and easily-understood cases . . . and in any case 'clearly does nothing to establish on the record that the court personally determined that the defendant *understood* the nature of the charges.'")(citations omitted); *United States v. Wetterlin*, 583 F.2d 346, 350 (7th Cir. 1978), *cert. denied*, 439 U.S. 1127, 99 S. Ct. 1044 (1979) (reversing conviction where, during a guilty plea proceeding, "[t]he judge made no effort to explain the law of conspiracy generally or by reference to the specific charge of this case, nor did he personally inquire and determine that the defendant understood the nature of the charges").

[17] The United States Supreme Court in *Henderson* noted that "it may be appropriate to presume that in most cases defense counsel routinely explain the nature of the offense in sufficient detail to give the accused notice of what he is being asked to admit." *Henderson*, 426 U.S. at 647, 96 S. Ct. at 2258. However, before we may apply this presumption, some factual basis in the record must exist from which we can conclude that Chung's counsel explained the nature of the charges to him and that Chung thereby understood the nature of the charges. *Accord, United States v. Bigman*, 906 F.2d 392, 395 (9th Cir. 1990) (concluding that the record contained insufficient evidence from which the court could apply the *Henderson* presumption). The record shows that trial court did not inquire of Chung whether he understood the nature of the charges of Manslaughter and/or Vehicular Homicide While Intoxicated. The trial court also did not inquire of Chung's counsel, nor did Chung's counsel inform the court, that Chung was informed of, and that he understood, the nature of the charges against him. Thus, there exists no facts upon which we may base the *Henderson*

presumption. Accordingly, we find that the trial court erred in failing to determine whether Chung understood the nature of the charges to which he was pleading guilty, as required by Title 8 GCA § 60.50.

[18] Section 60.50 makes clear the judge's duty to inquire whether a defendant understands the nature of the charges to which he is pleading guilty. *See* 8 GCA § 60.50. The record is devoid of any action by the trial court to satisfy such a requirement. Further, the error affects Chung's substantial rights. *See Ueki*, 1999 Guam 4 at ¶ 23. Without inquiring of Chung whether he understood the nature of the charges against him, Chung cannot be deemed, in a constitutional sense, to have voluntarily entered his pleas of guilty to such charges. *See Boykin v. Alabama*, 395 U.S. 238, 242, 89 S. Ct. 1709, 1711 (1969) (holding that an error is reversible where "'the record does not disclose favorably that the defendant voluntarily and understandingly entered his pleas of guilty.'") (*quoting* the dissenting opinion in the case appealed from, *Boykin v. Alabama*, 207 So.2d 412, 415 (1968). We hold that such error constitutes plain error. The error is plain, clear and obvious. *See Ueki*, 1999 Guam 4 at ¶ 18. Moreover, such error "'seriously affected the fairness, integrity or public reputation of judicial proceedings,'" and we therefore vacate the trial court's judgment of conviction. *Ueki*, 1999 Guam 4 at ¶ 17 (brackets omitted) (*quoting Olano*, 507 U.S. at 732, 113 S. Ct. at 1776).

2. Right to a Trial of Any Kind

[19] Chung next argues that the lower court committed plain error by accepting his guilty plea without first informing him of and determining that he understood that, by pleading guilty, there would not be a further trial of any kind, as required by Title 8 GCA § 60.50(c). While we agree that the trial court erred in this regard, we disagree that such error rises to the level of plain error.

[20] Prior to accepting a defendant's guilty plea, section 60.50(c) requires a judge to inform a defendant and determine that he understands that if he pleads guilty, "there will not be a further trial of any kind, so that by pleading guilty . . . he waives the right to a trial." Title 8 GCA § 60.50(c). Chung, like other criminal defendants, has a constitutional right to a jury trial through the Sixth Amendment, made applicable to the states through the Fourteenth Amendment. *See* U.S. CONST.

amends. VI., XIV. However, Chung fails to provide this court with any legal authority that he has a constitutional right to a bench trial. In fact, under Title 8 GCA § 85.10, cases are "required to be *tried by jury* . . . unless the defendant waives a jury trial in writing with the approval of the court and the consent of the government." Title 8 GCA § 85.10 (1993) (emphasis added). Moreover, the committee notes to Rule 11 of the Federal Rules of Criminal Procedure reveal that the purpose of such language was to clarify "those defendants who, though knowing they have waived trial by jury, are under the mistaken impression that some kind of trial will follow." FED. R. CRIM. P. 11, Comm. n. 1974.

[21] In this case, the trial court properly informed Chung of, and determined that he understood, that by pleading guilty he waived his right to a jury trial. However, the trial court erred in failing to advise Chung that there would not be a "further trial of any kind." 8 GCA 60.50(c).

[22] While we find error, we hold that such error does not rise to the level of plain error because "an appropriate admonition and understanding of a right to trial by jury comprehends advice and understanding of a right to trial without jury." *People v. Wallace*, 269 N.E.2d 482, 483 (Ill. 1971). Chung was advised of his right to a jury trial and was also advised of various other rights, such as the right to cross-examine witnesses presented by the People, the right not to testify, the right to present a case in his defense. Transcript, vol. II of III, pp. 13-14 (Change of Plea, Jan. 15, 2002). The trial court properly determined that Chung understood that by pleading guilty, he would waive these rights. Transcript, vol. II of III, p. 13-14 (Change of Plea, Jan. 15, 2002). Thus, the trial court's failure to advise him that there would not be a further trial of any kind has not affected his substantial rights. The trial court's error in this respect does not "seriously affect[] the fairness, integrity or public reputation of judicial proceedings," and therefore, we find no plain error. *Ueki*, 1999 Guam 4 at ¶ 17 (quotation marks and citations omitted).

B. Maximum Penalty

[23] Chung argues that the trial court committed plain error by failing to inform him of and determine that he understood the maximum penalty for the offenses to which he was pleading guilty, as required by Title 8 GCA § 60.50(d). More specifically, Chung argues that the trial court failed

to inform him (1) that the sentence imposed for the Special Allegation shall run consecutive to the sentence for the underlying offenses; and (2) that the sentence included a mandatory special parole term of three years, pursuant to Title 9 GCA § 80.37.[1] Although we agree with Chung that the lower court committed errors in both of these respects, we find that such errors do not amount to plain errors.

[24] Title 8 GCA § 60.50(d) requires the trial court to inform a defendant of and determine that he understands the maximum possible penalty for the offenses to which he is pleading guilty. *See* 8 GCA § 60.50(d). Several courts have addressed the trial court's obligations under the similar Federal Rule of Criminal Procedure, Rule 11, where the sentence includes a mandatory, versus a discretionary, consecutive sentence. The Ninth Circuit specifically held that where the trial judge has no discretion to impose a sentence concurrently, the defendant must be informed of the mandatory nature of the consecutive sentence before a guilty plea may be validly taken. *See United States v. Neely*, 38 F.3d 458, 461 (9th Cir. 1994) ("[b]ecause the imposition of a consecutive sentence is a direct consequence of a federal guilty plea where the federal court lacks discretion to order a concurrent sentence, a federal defendant must be advised of the court's lack of discretion before he can enter a voluntary plea of guilty.") (citations omitted). However, other courts have held that the trial court does not have an obligation to inform a defendant of a consecutive sentence requirement. *See Tindall v. United States*, 469 F.2d 92, 92-93 (5th Cir. 1972) (holding that where the trial court clearly informed the defendant of the maximum sentences possible and carefully questioned him to determine whether his pleas were completely voluntary, the court was not

[1] Title 9 GCA § 80.37, with respect to sentencing for the use of deadly weapons in the commission of a felony, states:

> Whoever unlawfully possesses or uses a deadly weapon in the commission of a felony punishable under the laws of Guam shall, in addition to the punishment imposed for the commission of such felony, be imprisoned for a term of not less than five (5) years nor more than twenty-five (25) years, and shall be fined not less than one thousand dollars ($1,000), but not more than five-thousand ($5,000) . . . . The sentence shall include a special parole term of not less than three (3) years in addition to such term of imprisonment. . . . The term required to be imposed by this Section shall not run concurrently with any term of imprisonment imposed for the commission of any other felony.

Title 9 GCA § 80.37 (1996).

required by Rule 11 to advise the defendant that the federal sentence must run consecutively to state sentence); *United States v. General*, 278 F.3d 389, 395 (4th Cir. 2002), *cert. denied*, 536 U.S. 950, 120 S. Ct. 2643 ("Rule 11, however, does not require a district court to inform the defendant of mandatory consecutive sentencing."); *United States v. Parkins*, 25 F.3d 114, 119 (2nd Cir. 1994), *cert. denied*, 513 U.S. 1008, 115 S. Ct. 530 (holding that the trial court need not advise that federal sentence would be consecutive to state sentence because whether federal sentence would run concurrently or consecutively to state sentence is of collateral consequence since while period of time in prison may be longer, the federal sentence was not effected in any way).

[25] We recognize that section 60.50, like Rule 11, concerns itself with those "consequences [of a plea] of which it is objectively deemed that the defendant must be informed to enter a voluntary plea." *United States v. Myers*, 451 F.2d 402, 404 (9th Cir. 1972). Because we find that the mandatory nature of a consecutive sentence is a "factor that necessarily affects the maximum term of imprisonment,"and is therefore a consequence of the plea, we adopt the law of the Ninth Circuit and hold that a trial court must advise a defendant of the mandatory nature of a consecutive sentence in order to adequately comply with the requirements of Title 8 GCA § 60.50(d). *Id.*

[26] The relevant dialogue from Chung's change of plea proceeding, concerning the maximum penalty under Title 9 GCA § 80.37, is as follows:

THE COURT:	And also before accepting your plea, I need to advise you that at the time of sentencing, the Court will consider the allegation of Possession and Use of a Deadly Weapon In the Commission of a Felony. And if this offense – this allegation does apply, then there is an additional term of incarceration of five to twenty-five years. Do you understand that?
THE DEFENDANT:	Yes, Your Honor.
	* * *
THE COURT:	All right. So let me ask you then at this point, Mr. Chung, knowing what the penalties are that are provided by the law, and the additional possible penalty for the Special Allegation that will be determined at a later point, how do you wish to plead . . . .

Transcript vol II of III, pp.15-16 (Change of Plea, Jan. 15, 2002).

[27] Although the lower court did not specifically identify as "consecutive" the sentence to be imposed under Title 9 GCA § 80.37, the court informed Chung that it would be an "additional term of incarceration of five to twenty-five years." We find that while the trial court did not use the term "consecutive," such survives plain error scrutiny, given the trial court's use of the term "additional." First, although the term "consecutive" would more effectively convey the nature of the sentence to be imposed, the term "additional" is sufficiently synonymous with "consecutive" and therefore the error is neither "clear" nor "plain." Moreover, the recognized split in the circuit courts with respect to this issue indicates that the error "is not obvious or clear under current law." *United States v. Humphrey*, 164 F.3d 585, 588 (11th Cir. 1999) (quotation marks and citation omitted). Second, Chung's substantial rights have not been affected by the lower court's choice of words in this case. For the above reasons, we find that when the trial court informed Chung that the sentence to be imposed for the Special Allegation, if it applied, would be an "additional" term of incarceration, such satisfied the requirement that Chung be informed that the sentence would run "consecutively" to the underlying offenses to which Chung pleaded guilty and thus no plain error occurred.

[28] Turning to Chung's claim of second point of error with respect to section 60.50(d), we find that the lower court, in failing to inform Chung of the mandatory special parole under Title 9 GCA § 80.37, failed to comply with Title 8 GCA § 60.50(d). As previously discussed, Title 8 GCA § 60.50 concerns itself with those "consequences [of a plea] of which it is objectively deemed that the defendant must be informed to enter a voluntary plea." *Myers*, 451 F.2d at 404. In *United States v. Sanclemente-Bejarano*, the trial court failed to advise the defendant of the mandatory three year period of supervised release which is a component of the Special Allegation. *United States v. Sanclemente-Bejarano*, 861 F.2d 206, 210 (9th Cir. 1988). On appeal, the issue was "whether the defendant knew before pleading guilty that he could be sentenced to a term as long as the one he eventually received." *Id.* Finding that the trial court advised the defendant that the maximum possible penalty for his offense was life imprisonment, but he was actually sentenced to fifteen years in prison and a five-year term of supervised release, the appellate court held that the prejudice that resulted from not informing him of the supervised release, and the court's error, were harmless. *See*

id.

[29] Thus, although the court erred in failing to inform Chung of the mandatory special parole, Chung was informed of the maximum possible penalties for the Special Allegation as well as for each of the offenses to which he was pleading guilty, which totals fifty-five (55) years imprisonment. He was actually sentenced to fifteen years for Manslaughter and eight years for Vehicular Homicide to be served concurrently and twenty-five years for the Special Allegation, to be served consecutive to the two concurrent periods of incarceration, amounting to a total of forty (40) years imprisonment. Chung was advised of the maximum possible penalties for each conviction as well as the Special Allegation, which totaled fifty-five (55) years, and subsequently received a sentence of forty (40) years imprisonment. Thus we hold that the resulting prejudice from the court's omission was harmless. As a result, although the court erred in failing to inform Chung of the mandatory parole term, we hold that the error does not rise to the level of plain error because Chung's substantial rights were not affected.

C. Deadly Weapon

[30] Title 9 GCA § 80.37 imposes an additional punishment on those who use a deadly weapon in the commission of a felony. It reads in relevant part:

> Whoever unlawfully possesses or uses a deadly weapon in the commission of a felony . . . shall, in addition to the punishment imposed for the commission of such felony, be imprisoned for a term of not less than five (5) years nor more than twenty-five (25) years. . . .

Title 9 GCA § 80.37 (1996).

[31] A "deadly weapon" is defined as "any firearm, or other weapon, device, instrument, material or substance, whether animate or inanimate, which in the manner it is used or is intended to be used is known to the defendant to be capable of producing death or serious bodily injury." Title 9 GCA § 16.10(d) (1993). The phrase "known to the defendant," requires the Government to prove the defendant's subjective knowledge that the "weapon" is capable of producing death or serious bodily injury. *See People v. Pangelinan*, Crim. No. 90-0065A, 1991 WL 255847, at *5-*6 (D. Guam App. Div. Nov. 18, 1991).

[32] In construing the breadth of section 80.37, the Ninth Circuit has held that, "[t]he enhancement statute *contains no exceptions and applies to all felonies*. There is no question that the legislature has the power to impose multiple punishments for the same conduct." *Guam v. Iglesias*, 839 F.2d 628, 629 (9th Cir. 1988) (emphasis added). Indeed, it is "an unambiguous expression of the Guam legislature's intent to impose additional punishment on those who use weapons in the commission of felonies. That legislative intent should be honored." *Guam v. Borja*, 732 F.2d 733, 736 (9th Cir. 1984), *cert. denied*, 469 U.S. 919, 105 S. Ct. 300 (1984).

[33] Chung relies on *United States v. Dayea*, 32 F.3d 1377 (9th Cir. 1994), in support of his argument that an enhancement pursuant to Title 9 GCA § 80.37 is authorized only where a defendant uses an instrument capable of causing serious bodily injury with the intent to injure the victim and where the underlying charges allege the same. However, *Dayea* involved the federal sentencing guidelines, which, in its application notes, define a "dangerous weapon" as "any instrument that is not ordinarily used as a weapon (e.g., a car, a chair, or an ice pick) if such an instrument is involved in the offense *with the intent to commit bodily injury*." U.S. FED. SENTENCING GUIDELINES § 2A2.2 n.1 (2003) (emphasis added). This definition, which requires proof of the intent to commit bodily injury, is not found in Guam's statute. As noted previously, the culpability element to be applied exists in the definition of a deadly weapon as one "which in the manner it is used or is intended to be used *is known to the defendant* to be *capable* of producing death or serious bodily injury." 9 GCA § 16.10.(1993) (emphasis added).

[34] Because "intent to injure" is simply not an element of the underlying charge, nor is it a fact to be proved through the special allegation, it follows that it need not be charged in the indictment. Chung's argument that the Special Allegation cannot be applied to the charges of manslaughter and vehicular homicide is without merit. No plain error has occurred.

D. The Special Allegation

[35] In light of our finding of plain error with respect to Chung's guilty pleas to the felonies of Manslaughter and Vehicular Homicide While Intoxicated, we turn to the viability of the Special Allegation as found by the court.

[36] After Chung waived his right to a jury trial on the Special Allegation, the trial court determined that the Special Allegation applied to the offenses to which Chung pleaded guilty. Title 9 GCA § 80.37 states, "[w]hoever unlawfully possesses or uses a deadly weapon *in the commission of a felony punishable* under the laws of Guam shall, *in addition to the punishment imposed for the commission of such felony*, be imprisoned . . . and . . . fined. . . . ." Title 9 GCA § 80.37 (1996) (emphasis added). Clearly, without the underlying convictions on the felonies of Manslaughter or Vehicular Homicide While Intoxicated, the Special Allegation cannot stand. The language of the statute requires, in addition to a finding that the defendant unlawfully used and possessed a dangerous weapon, that he did so "in the commission of a felony" and further requires that the punishment for possessing and using the deadly weapon in this manner be imposed in addition to the punishment for the commission of such felony. *Id.* Therefore, our reversal of Chung's convictions on the Manslaughter and Vehicular Homicide While Intoxicated felony offenses requires that the finding on the Special Allegation also be reversed.

IV.

[37] We hold that the trial court committed plain error in accepting Chung's pleas of guilty to the offenses of Manslaughter and Vehicular Homicide While Intoxicated without first informing him of, and determining that he understood, the nature of the charges, as required by Title 8 GCA § 60.50. We further hold that the trial court erred in failing to inform Chung of, and determine that he understood, that he waived his right to a trial of any kind, but that such error does not constitute plain error. We also hold that the trial court erred in failing to inform Chung of the mandatory consecutive sentence and mandatory special parole pursuant to Title 9 GCA § 80.37, but that such error similarly does not amount to plain error. Finally, while we hold that the trial court correctly applied the Special Allegation, found in Title 9 GCA § 80.37, to the felonies of Manslaughter and Vehicular Homicide While Intoxicated, the trial court's finding must be reversed because the underlying felony convictions were reversed.

[38] Accordingly, we **REVERSE** the judgment of conviction and finding of the Special Allegation and **REMAND** to the trial court with instruction to allow Chung to withdraw his guilty pleas.