IN THE SUPREME COURT OF GUAM

PEOPLE OF GUAM,
Plaintiff-Appellee,

v.

ANTHONY JOSEPH CAMACHO,
Defendant-Appellant.

OPINION

Cite as: 2009 Guam 6

Supreme Court Case No.: CRA07-007
Superior Court Case No.: CF0310-05

Appeal from the Superior Court of Guam
Argued and submitted on July 12, 2008
Hagåtña, Guam

Appearing for Defendant-Appellant:
Peter J. Sablan, *Esq.*
Assistant Public Defender
Public Defender Service Corporation
110 West O'Brien Drive
Hagåtña, Guam 96910

Appearing for Plaintiff-Appellee:
Marianne Woloschuk, *Esq.*
Office of the Attorney General
The Justice Building
287 West O'Brien Drive
Hagåtña, Guam 96910

BEFORE: ROBERT J. TORRES, Chief Justice; F. PHILIP CARBULLIDO, Associate Justice; KATHERINE A. MARAMAN, Associate Justice.

CARBULLIDO, J.:

[1] Defendant-Appellant Anthony Joseph Camacho appeals from a final judgment revoking his probation and sentencing him to three years in prison pursuant to a plea agreement in which he pleaded guilty to Possession of a Schedule II Controlled Substance (a third degree felony). Camacho argues that his probation was improperly revoked after two violations, and that the trial court erred in sentencing him by not using the sentencing factors in 9 GCA § 80.60.

[2] Because the scope of Camacho's plea agreement is ambiguous and did not conclusively cover the claims he presents to this court, we hold it does not bar this appeal. Nevertheless, because Camacho signed a valid plea agreement, violated the terms of probation therein, and was sentenced according to those terms, we find that Camacho's probation was properly revoked and the trial court did not err in sentencing him.

I. BACKGROUND

[3] Camacho was indicted for possession of a schedule II controlled substance (as a third degree felony) in violation of 9 GCA §§ 67.401.2(a) and (b)(1), and possession of less than one ounce of marijuana (as a violation) in violation of 9 GCA § 67.401.2(b)(3).

[4] Camacho entered into a written deferred plea agreement ("DPA") with the People of Guam ("People"), wherein he agreed to plead guilty to possession of a schedule II controlled substance, which plea would be deferred pending certain conditions. The DPA included an appeal-waiver provision, found in Paragraph 5:

> Defendant understands that he has a right to appeal his conviction in this case pursuant to 8 GCA §§ 130.10 and 130.15, and agrees to waive that right for the purpose of this plea.

Excerpts of Record ("ER") at 4 (Deferred Plea Agreement ("DPA"), Oct. 11, 2005).

[5] In its colloquy with Camacho, the trial court explained to Camacho that the crime to which he was pleading guilty carried a maximum three year sentence and a fine of five thousand dollars. The trial court also listed the rights Camacho normally would have been entitled to as a criminal defendant, which he was agreeing to waive in exchange for the DPA.

> The Court: You understand you still have the right to plead not guilty . . . right to a trial by jury . . . right to have legal counsel assist you in your defense . . . . You plead guilty today and I accept your Plea. You will waive your right to a jury trial, waive [your] right to appeal this case, and waive all your rights as I just told them to you. Do you understand that?

Supplemental Excerpts of Record ("SER"), tab 1 at 5-6 (Change of Plea, Oct. 11, 2005). Camacho responded that he understood and pleaded guilty. The court then found Camacho competent and capable to form a voluntary plea. The judge deferred accepting Camacho's Plea for a period of two years so long as he met a list of probationary conditions. Among the conditions imposed were 150 hours of community service, a fine of $5,000.00, enrollment and attendance in a drug rehabilitation program under the supervision of the Adult Drug Court ("ADC"), submittal to drug tests, and weekly reports to the probation office.

[6] During the deferred period, the Probation Office ("Probation") filed fifteen probation violation reports concerning Camacho, for which the trial court issued a warrant of arrest. The trial court sanctioned Camacho to sixteen days imprisonment for his violations of probation conditions.

[7] The trial court held a hearing to reconsider Camacho's DPA, to allow him to contest his termination from the ADC, and to impose sentence. Camacho did not contest being terminated from ADC, and the trial court granted the People's motion to terminate. The trial court accepted the DPA, and the written Judgment found that Camacho violated his DPA. Therein, the order suspended the three year prison sentence in the DPA so long as Camacho pay a fine of $5,000.00, perform 150 hours of community service, enroll in and attend a drug rehabilitation

program at the Department of Mental Health and Substance Abuse ("DMHSA"), and abide by the conditions of probation. The conditions of probation included reporting to the DMHSA within 72 hours, the successful completion of the program, and weekly reports and drug tests at the Probation Office. ER at 19-23 (Judgment, Aug. 15, 2007).

[8] On May 22, 2007, Probation filed a first violation report against Camacho for failure to report to Probation for drug testing. ER at 24 (Violation Rpt., May 22, 2007). Less than two months later, Probation filed a second violation report against Camacho for failure "to report in person once a week and call three times a week," failure to pay the fine or any balance on it, and failure to report to the DMHSA for an assessment and treatment. ER at 26 (Violation Rpt., July 17, 2007).

[9] The trial court subsequently heard the People's motion to revoke probation. Camacho answered and admitted to the two violation reports. The People asked the trial court to revoke Camacho's probation and sentence him to three years in prison. Camacho opposed the People's position, but the trial court revoked his probation and sentenced him, in accordance with the DPA, to three years' incarceration followed by five years' probation with the same conditions.

[10] Judgment was filed and Camacho timely appealed.

II. JURISDICTION

[11] This court has jurisdiction over appeals from final judgment pursuant to 48 U.S.C. § 1424-1(a)(2) (Westlaw current through Pub. L. 111-1 (2009)); 7 GCA §§ 3105, 3107(b) and 3108(a) (2005); and 8 GCA §§ 130.15(a) and (c) (2005). Title 7 GCA § 3107(b) states in relevant part that "[t]he Supreme Court shall have jurisdiction of all appeals arising from judgments, final decrees, or final orders of the Superior Court in criminal cases and in civil cases and proceedings." 7 GCA § 3107(b) (2005).

[12] The People argue the court is without jurisdiction because Camacho waived his right to appeal. However, even a valid waiver of appellate rights does not deprive this court of jurisdiction to hear this appeal. *People v. Mallo*, 2008 Guam 23 ¶ 8. We have subject matter jurisdiction over Camacho's appeal notwithstanding his waiver of appeal. *Id.* (citing *United States v. Gwinnett*, 483 F.3d 200, 201 (3d Cir. 2007)). Nonetheless, we will not exercise our jurisdiction to review the merits of Camacho's appeal if we conclude that he knowingly, voluntarily, and intelligently waived his right to appeal unless the result would work a miscarriage of justice. *Id.* (quoting *Gwinnett*, 483 F.3d at 203).

III. STANDARD OF REVIEW

[13] Whether the waiver in Camacho's plea agreement bars this appeal is an issue reviewed *de novo*. *Mallo*, 2008 Guam 23 ¶ 10 (citing *United States v. Aguilar-Muniz*, 156 F.3d 974, 976 (9th Cir. 1998)).

[14] We review the trial court's revocation of probation for clear abuse of discretion. *People v. Angoco*, 1998 Guam 10 ¶ 4. We review an imposition of a sentence for an abuse of discretion. *See People v. Super. Ct. (Chiguina)*, 2003 Guam 11 ¶ 12. Sentences imposed following revocation of probation are reviewed under the same abuse-of-discretion standard that applies to sentences imposed following conviction. *Cf. United States v. Bolds*, 511 F.3d 568, 575 (6th Cir. 2007).

IV. DISCUSSION

A. Waiver of Right to Appeal

[15] As a preliminary matter, we must address whether the waiver in Camacho's plea agreement bars his appeal. A defendant may waive his right to appeal provided (1) his waiver is knowing, voluntary, and intelligent, *Mallo*, 2008 Guam 23 ¶ 15, and (2) the appeal falls within the scope of the waiver. *See United States v. Palmer*, 456 F.3d 484, 488 (5th Cir. 2006).

Because plea agreements are essentially contracts between the defendant and the People, *see Mallo*, 2008 Guam 23 ¶ 45, we must look to the terms of the agreement to determine the scope of an appeal waiver (i.e., whether the waiver applies to the circumstances at hand). *See also Rangel v. United States*, 155 F. Supp. 2d 949, 953 (N.D. Ill. 2001). Finally, given the significance of waiver of rights, "we apply appeal-waiver provisions 'narrowly' and construe them 'strictly against the Government,' in recognition of the fact that prosecutors' bargaining power generally exceeds that of defendants and that the government typically drafts such agreements." *United States v. Oladimeji*, 463 F.3d 152, 157 (2d Cir. 2006); *see also Mallo*, 2008 Guam 23 ¶ 16; *Palmer*, 456 F.3d at 488.

[16] The People argue that the appeal-waiver provision in the DPA precludes this appeal. The appeal-waiver provision is found in Paragraph 5 of the DPA, which provides:

> Defendant understands that he has a right to appeal his *conviction* in this case pursuant to 8 GCA §§ 130.10 and 130.15, and agrees to waive *that right* for the purpose of this plea.

ER at 4 (DPA) (emphases added).

[17] According to the People, Paragraph 5 of the DPA constituted a waiver of all of Camacho's appellate rights because it incorporated by reference all appeals pursuant to sections 130.10 and 130.15. Appellee's Br. at 5-6 (May 16, 2008). Section 130.10 provides: "An appeal may be taken in any criminal action in which the offense charged is not a violation." 8 GCA § 130.10 (2005). Section 130.15 provides:

> An appeal may be taken by the defendant:
>
> (a) From a final judgment of conviction. The commitment of a defendant by reason of mental illness, disease or defect shall be deemed to be a final judgment of conviction within the meaning of this Section.
>
> (b) From an order denying a motion for a new trial.
>
> (c) From any order made after judgment, affecting the substantial rights of the defendant.

> (d) Pursuant to § 40.80 [governing appeal of conditions of release].
>
> (e) From a judgment of conviction upon a plea of guilty or nolo contendere, where the defendant has filed with the trial court a written statement, executed under oath of penalty of perjury showing reasonable constitutional, jurisdictional or other grounds going to the legality of any proceedings held in this case under § 65.15(c) [suppression motions] of this Code and the trial court has executed and filed a certificate of probable cause for such appeal with the District Court.

8 GCA § 130.15 (2005).

[18] The People contend that the reference to sections 130.10 and 130.15 indicates that Camacho waived all of his appellate rights. We rejected this same argument in *Mallo*, and we do so again here. Paragraph 5 of the DPA stated that Camacho was waiving his right to appeal his *conviction pursuant to* these statutes. By agreeing to Paragraph 5, Camacho gave up the right to challenge his conviction. *See Mallo*, 2008 Guam 23 ¶ 19. Issues related to his guilt or innocence are within the scope of the pertinent waiver provision. The lack of an express mention of a waiver of the right to appeal a future probation revocation or sentence means that there is not a clear and unequivocal waiver of these rights.

[19] We are not persuaded by Justice Maraman's contentions on this issue as laid out in her concurring opinion. While she correctly defines "judgment of conviction" under section 130.15 as including the sentence, she does not convince us that Camacho's waiver under Paragraph 5 of the DPA was a knowing and intelligent waiver of his right to appeal a future revocation of his probation. In fact, the case which she cites, *Deal v. United States*, 508 U.S. 129 (1993), supports our finding that the language in the DPA is ambiguous. *Deal* makes the distinction between "conviction" and "judgment of conviction," the former being the finding of guilt, the latter including both the adjudication of guilt and the sentence. *Id.* at 131. Because Paragraph 5 mentions Camacho's "right to appeal his *conviction*" and then references a statute which uses the language "judgment of conviction," ER at 4, it is unclear exactly what right was being waived.

Given our duty to construe appeal waivers narrowly, we cannot say that Camacho's waiver of his right to appeal his conviction constituted a knowing and intelligent waiver of his right to appeal the revocation of his probation or other post-conviction issues related to sentencing.

[20] In any case, the distinction between "conviction" and "judgment of conviction" as it relates to section 130.15(a) is irrelevant as Camacho's appeal is more properly characterized as an appeal under section 130.15(c). Subsection (c) provides defendants with the right to appeal "[f]rom any order made after judgment, affecting the substantial rights of the defendant." 8 GCA § 130.15(c). Thus, Camacho has a separate statutory basis to appeal from the order revoking his probation.[1]

[21] When a waiver provision in a plea agreement is ambiguous, we look also to the plea colloquy between the court and the defendant to determine whether the ambiguity was clarified when the judge advised the defendant of the rights he was waiving by entering a guilty plea. *Mallo*, 2008 Guam 23 ¶ 21. During the plea colloquy with Camacho, the court stated:

> You understand you still have the right to plead not guilty . . . right to a trial by jury . . . right to have legal counsel assist you in your defense . . . . You plead guilty today and I accept your Plea. You will waive your right to a jury trial, waive right to appeal this case, and waive all your rights as I just told them to you. Do you understand that?

SER, tab 1 at 5-6 (Change of Plea).

[22] The colloquy only mentions Camacho's "right to appeal this case." *Id.* at 6. This advisement, without more, is insufficient to clearly and unequivocally convey that Camacho agreed to waive his right to appeal a future probation revocation and sentencing. *See Mallo*, 2008 Guam 23 ¶ 22 (finding that same language in plea colloquy did not unequivocally convey that defendant waived his right to appeal his sentence).

[1] Probation revocation results in a defendant's loss of liberty, so it undeniably affects substantial rights.

[23] Absent an express waiver of a defendant's right to appeal from a sentence, courts are reluctant to find such a waiver from a defendant's general waiver of a right to appeal. *See, e.g., United States v. Carruth*, 528 F.3d 845, 846 (11th Cir. 2008) (rejecting government's argument that an appeal waiver extended to later revocation of supervised release, absent specific language in original plea waiver indicating defendant's willingness to waive right to appeal from sentence); *People v. Gurrola*, 841 N.Y.S.2d 718, 719 (N.Y. App. Div. 2007) (rejecting government's assertion that waiver of appeal entered by defendant in connection with original plea of guilty precluded him from challenging severity of his resentence); *People v. Venable*, 790 N.Y.S.2d 755, 755 (N.Y. App. Div. 2005) (defendant's original waiver of appeal does not preclude him from arguing on appeal that sentence imposed for underlying crime following revocation of probation is harsh and excessive).

[24] Here, there was no specific language in the DPA and the plea colloquy indicating Camacho's waiver of his right to appeal from his conviction included a waiver of his right to appeal from a future probation revocation and sentence. Even if the term "conviction" were to include the sentence, it would be too much of a stretch to find that it includes something as far removed as a revocation of probation. Given our duty to construe appeal waivers narrowly, we find that the plain language in the DPA and the plea colloquy did not constitute a waiver of anything other than Camacho's right to appeal his conviction. Accordingly, we turn to the merits of Camacho's appeal from the probation revocation and sentence.

B. Probation Revocation

[25] Camacho claims that the trial court improperly revoked his probation because the revocation did not "best satisfy the ends of justice and the best interests of the public." Appellant's Br. at 7, 9 (Apr. 15, 2008); *see also* 9 GCA § 80.66(a)(2) (2005). Title 9 GCA § 80.66 governs probation revocation proceedings. The statute provides, in relevant part:

> (a) At any time before the discharge of the offender or the termination of the period of suspension or probation:
>
> (1) upon a showing of probable cause that an offender has violated a condition of his suspension or probation, the court may summon the offender to appear before it or may issue a warrant for his arrest. . . .
>
> (2) the court, if satisfied that the offender has inexcusably failed to comply with a substantial requirement imposed as a condition of the order may revoke the suspension or probation and sentence or re-sentence the offender. Violation of a condition shall not result in revocation, however, unless the court determines that revocation under all the circumstances then existing will best satisfy the ends of justice and the best interests of the public.

9 GCA § 80.66(a)(1)-(2) (2005).

[26] Probation is a favor granted by the state, not a right to which a criminal defendant is entitled. *Parker v. State*, 676 N.E.2d 1083, 1085 (Ind. Ct. App. 1997). However, once the state grants that favor, it cannot simply revoke the privilege at its discretion. *Id.*; *Burns v. United States*, 287 U.S. 216, 223 (1932) ("While probation is a matter of grace, the probationer is entitled to fair treatment, and is not to be made the victim of whim or caprice."). Probation revocation implicates a defendant's liberty interest, which entitles him to some procedural due process. *Id.* However, a probationer faced with revocation of probation is not entitled to the full panoply of due process rights due other criminal defendants. *Angoco*, 1998 Guam 10 ¶ 7 (citing *Morrissey v. Brewer*, 408 U.S. 471 (1972)). Instead, a probationer retains the following due process rights: "(1) notice of claimed violations, (2) opportunity to appear and present evidence, (3) the conditioned right to confront adverse witnesses, (4) an independent decision maker, and (5) a written report of the hearing . . . ." *Id.* Camacho does not claim to have been denied any of these due process rights.

[27] Probation revocation is a two-step process. *Parker*, 676 N.E.2d 1083 at 1085. First, the trial court must make a factual determination that a violation of a condition of probation actually has occurred. *Id.* If a violation is proven, then the court must determine if the violation warrants

revocation of the probation. *Id.*; *see also State v. Davis*, 911 A.2d 753, 773 (Conn. App. Ct. 2006), *cert. granted in part*, 917 A.2d 999 (Conn. 2007) (court must next determine whether probation should be revoked because beneficial aspects of probation are no longer being served). "The goal of a revocation hearing is not to decide guilt or innocence, but to determine whether the defendant remains a good risk for probation." *People v. Manila*, 2005 Guam 6 ¶ 13 (quoting *State v. Brunet*, 806 A.2d 1007, 1011 (Vt. 2002)).

[28] Guam has codified the due process requirements for probation revocation by requiring that an evidentiary hearing be held on the revocation and providing for confrontation and cross-examination of witnesses and representation by counsel. 9 GCA § 80.68 (2005). When a probationer admits to the violations, the procedural due process safeguards and an evidentiary hearing are not necessary. *Gosha v. State*, 873 N.E.2d 660, 663 (Ind. Ct. App. 2007). Instead, the court can proceed to the second step of the inquiry and determine whether the violation warrants revocation. *Id.* In making the determination of whether the violation warrants revocation, the probationer must be given an opportunity to present evidence that explains and mitigates his violation. *Id.*

[29] According to Camacho, the trial court erred when it revoked his probation because he had only two violations, which were merely "technical" in nature. Appellant's Br. at 6. He contends that revocation under such circumstances was unduly harsh. Thus, he argues, the revocation of his probation was improper under 9 GCA § 80.66 because it does not "best satisfy the ends of justice and the best interests of the public." *Id.* at 7, 9; *see also* 9 GCA § 80.66(a)(2).

[30] The standard of proof required at a probation revocation hearing is that the evidence and the facts be such as reasonably necessary to satisfy the judge that the probationer's conduct has not been as required by the conditions of probation. *Angoco*, 1998 Guam 10 ¶ 8. "[T]he trial court's decision to revoke probation must be based on credible evidence, [but] the defendant

bears the burden of showing an excuse for the failure to comply with the condition." *State v. Peters*, 609 A.2d 40, 43 (N.J. 1992) (holding the lower court did not abuse its discretion when it revoked defendant's probation for failure to report to seven of fourteen probation appointments, pay fines, and take drug tests).

[31] Considering the case at hand, Camacho admitted to the probation violations and did not provide the trial court with a sufficient excuse for his failures.[2] On appeal and at the continued revocation hearing, Camacho's only excuse for his non-compliance was that no date appeared on the Judgment to indicate when he should report to DMHSA. While it is true that the Judgment did not provide a specific date by which Camacho had to report to DMHSA, it did state that he "shall diligently report [to DMHSA] within seventy two (72) hours from either his release from the Department of Corrections or his guilty plea whichever is the latter." ER at 21 (Judgment, Aug. 15, 2007) (alteration in original). Camacho's excuse is unfounded because he should have reported to DMHSA as prescribed in the Judgment.

[32] Next, we consider whether the failure to report or call the probation office was a serious violation warranting revocation. The trial court found that Camacho breached a substantial requirement of probation by failing to report because protection of the public depends in part on maximum contact between a probation officer and probationer. Although the trial court opined that the failure to pay the fine may not be as serious a factor in revoking probation, it felt on the other hand that Camacho's failure to report for drug tests was a substantial violation because "the whole theory behind this condition is to make sure that he's clean and sober." SER, tab 2 at 22 (Cont'd Mot. Revoke Probation). We agree with the trial court that, given the fact that the crime

[2] On September 26, 2007, Camacho's counsel stated that he is "not going to contest the violations as written by Probation. He's going to admit to the violations." SER, tab 2 at 10 (Mot. Revoke Probation).

for which Camacho was convicted was a drug offense, the failure to report for drug tests was a serious violation warranting revocation of probation. *See Peters*, 609 A.2d at 43.

[33] Camacho argues that it was improper for the trial court to consider his past violations while in the ADC in determining whether to revoke his probation because he was already punished for those violations with jail time of sixteen days, termination from ADC, adjudgment of guilt, and sentence of five years of traditional probation. Instead, Camacho contends, the trial court should have only looked at the two violations that occurred after he was placed on traditional probation.

[34] Although we agree that Camacho was already punished for his violations while in the ADC, the consideration of those violations in deciding to revoke probation was not an abuse of discretion. The plain language of the probation revocation statute, 9 GCA § 80.66(a)(2), allows the trial court to revoke probation after even a single violation, so long as the court determines that such revocation will best serve the ends of justice and interests of the public. Although Camacho technically had only two violations while on traditional probation, he had a history of failing to comply with the conditions of his probation – fifteen reported violations while in the ADC. After the trial court gave him another opportunity to prove that he was a good risk for probation, he violated the conditions of probation two more times. The trial court was permitted to consider Camacho's history of non-compliance with the conditions of his probation to determine whether the beneficial aspects of probation were still being served. *See Manila*, 2005 Guam 6 ¶ 34 (trial court can consider defendant's conduct during probation as evidence of rehabilitative potential). The trial court did not err in finding that the two new violations coupled with Camacho's previous violations warranted revocation of probation.

[35] In short, the trial court did not abuse its discretion in considering past ADC violations and in determining that, in light of the nature of Camacho's violations (i.e., the failure to report for

drug tests), revocation would "best satisfy the ends of justice and the best interests of the public." *See* 9 GCA § 80.66(a)(2). We do not hold that simply because a defendant admits to violating the conditions of his probation, revocation necessarily best satisfies the ends of justice and the best interests of the public. Rather, our finding that it was not an abuse of discretion for the trial court to revoke probation is based on the particular circumstances of this case, where the defendant was on probation for a drug conviction but failed to comply with the condition of reporting for drug tests. Simply because we find against the defendant under these circumstances does not mean that we would do so where a defendant has admitted to the violations but other circumstances, such as the relationship between the type of violation and the crime for which he was convicted, are different.

[36] "The low burden of proof required for establishing the occurrence of a violation does not leave much for reviewing courts to question of a trial court's actions. Furthermore, the high standard of review provides a trial court with wide latitude in reaching a decision to revoke probation." *Angoco*, 1998 Guam 10 ¶ 9. Camacho has failed to provide a sufficient excuse or reason to substantiate a reinstatement of his probation. The possibility of revocation was spelled out in the plea agreement, and the probationary conditions by which Camacho was to abide in order to avoid revocation were violated. The trial court did not abuse its discretion in revoking Camacho's probation.[3]

[3] Justice Maraman contends that Camacho's appeal is frivolous because, having admitted to the probation violations, he merely argues that the trial court abused its discretion in not being lenient. In support of her argument, Justice Maraman points to other jurisdictions that have amended their court rules or statutes to circumscribe similar appeals. In particular, she notes California's statute regulating appeals from probation revocation where the defendant has admitted to the violation. However, Guam does not have a similar statute limiting a defendant's right to appeal when he has admitted to violating his probation. Moreover, notwithstanding the fact that Camacho admitted to the violations, he makes a non-frivolous threshold argument as to the issue of whether the trial court erred in considering his violations while in the ADC when deciding to revoke probation. This issue could properly be considered given the circumstances of this case, where a defendant's past violations are taken into account in the decision to revoke probation, even though he was already punished for those violations.

C. Sentence

[37] We next turn to Camacho's claim that the trial court erred in sentencing him because it did not use the sentencing guidelines set forth in 9 GCA § 80.60.

[38] We find the statute that Camacho insists should have been considered by the trial court, 9 GCA § 80.60[4], inapposite to sentencing determinations after probation revocation. The factors listed in that statute are to be used by the trial court in making the initial determination of whether to suspend a sentence and place a defendant on probation, not in sentencing a defendant after probation has been revoked. Here, Camacho had already been sentenced to a term of probation; he was then sentenced to incarceration after his probation was revoked. Clearly, the trial court was not required to reexamine the section 80.60 factors in deciding what sentence to

[4] Title 9 GCA § 80.60 provides in pertinent part:

> (a) When Sentence May Not Require Prison Term. The court, in its discretion, may make disposition in respect to any person who has been convicted of a crime without imposing sentence of imprisonment unless a minimum term is made mandatory by a provision of [sic] Guam Codes.
>
> . . . .
>
> (c) The following factors, while not controlling, shall be accorded weight in determining whether to suspend imposition of sentence or to place the offender on probation whether:
>
> (1) The offender's criminal conduct neither caused nor threatened serious harm.
>
> (2) The offender did not contemplate that his criminal conduct would cause or threaten serious harm.
>
> (3) There were substantial grounds tending to excuse or justify the offender's criminal conduct, though failing to establish a defense.
>
> (4) The offender has compensated or will compensate the victim of his criminal conduct for the damage or injury which was sustained.
>
> (5) The offender has no history of prior delinquency or criminal activity or has led a law-abiding life for a substantial period of time before the commission of the present crime.
>
> (6) The offender is particularly likely to respond affirmatively to probationary treatment.
>
> (d) If a person who has been convicted of a crime is not sentenced to imprisonment, the court shall place him on probation if he is in need of the supervision, guidance, assistance or direction that probation can provide.

9 GCA § 80.60 (2005).

impose, as that statute only applies to initial determinations of probation, not to sentencing after probation has just been revoked.

[39] Instead, the applicable statute in this case is 9 GCA § 80.66, which governs sentencing upon a revocation of probation. The statute provides, in relevant part:

> (a) When the court revokes a suspension or probation, it may impose on the offender *any sentence that might have been imposed originally* for the crime of which he was convicted.

9 GCA § 80.66(b) (2005) (emphasis added). Thus, the only guidelines the court was obligated to follow were those used in sentencing Camacho for the crime underlying his probation, possession of a schedule II controlled substance. The relevant statutes are 9 GCA §§ 67.401.12 and 80.50(b)[5]. Under 9 GCA § 67.401.12,

> a person who has not been previously convicted of a felony relative to the possession of any controlled substance and has been convicted of a felony for the first time relative to possession of methamphetamine shall be sentenced to a term of imprisonment of no more than three (3) years and a fine of Five Thousand Dollars ($5,000.00). Sentence in these cases must also include mandatory community service of no less than one hundred and fifty (150) hours, mandatory enrollment and attendance in a drug rehabilitation program at the Department of Mental Health and Substance Abuse or any other drug rehabilitation program approved by the Superior Court, and a mandatory term of probation of five (5) years.

9 GCA § 67.401.12 (2005). This is the exact sentence which was imposed upon Camacho by the trial court after his probation was revoked.

[40] We also reject Camacho's contention that the trial court's sentence included punishment for his probation violations. When a defendant is sentenced after a revocation of probation, he is sentenced for the conviction for which he was placed on probation, not for his probation violations. *Manila*, 2005 Guam 6 ¶ 29. The only form of punishment Camacho received for his probation violations was the revocation of his probation; the sentence he received after the

[5] A fine may not exceed "Five Thousand Dollars ($5,000.00), when the conviction is of a felony of the third degree." 9 GCA § 80.50(b) (2005).

revocation was to punish him for the crime for which he had been convicted. The fact that Camacho was sentenced within the statutory range for his crime defeats any argument that he was sentenced to more time than he should have been.

[41] Furthermore, Camacho has no basis to complain about the sentence that was imposed because he was sentenced according to the terms of the DPA voluntarily entered into with the Government. Paragraphs 9 and 10 of the DPA provide, in pertinent part:

> 9. The Attorney General and Defendant agree, in consideration for Defendant's *deferred plea* to the following:
>
> . . .
>
> a. Defendant shall serve three (3) years imprisonment, at the Department of Corrections, with credit for time served. This period of incarceration shall be suspended, subject to the terms and conditions of probation set forth below;
>
> . . .
>
> e. Defendant must complete all terms of the following conditions of probation within the time period for which defendant's guilty plea has been deferred. If defendant fails to complete all conditions of probation, the court may enter the defendant's plea of guilty . . . and sentence the defendant accordingly up to and including the maximum term of incarceration and probation or parole;
>
> . . .
>
> g. The court will not accept the defendant's guilty plea . . . so long as the defendant faithfully complies with the conditions herein described. Failure to abide by the above conditions shall be deemed as a violation of the court ordered supervision. If the court finds the defendant in violation of the court's orders as set out in this plea agreement, the court shall enter the defendant's plea of guilty . . . and sentence the defendant accordingly. . . .
>
> 10. Defendant understands that *if he violates any conditions of his release or of his probation*, that *the Court may find him in violation and sentence him to serve the maximum sentence in this case.*

ER at 5-6, 8 (DPA) (second and third emphases added).

[42] The language in the plea agreement is clear that the trial court was authorized to sentence Camacho up to a term of three years upon the violation of his conditions of probation. This is

consistent with 9 GCA § 80.66(b) because the trial court could have originally sentenced Camacho to three years imprisonment for his conviction.

[43] Because Camacho's sentence is the precise term he agreed to serve in the DPA and is authorized by the relevant sentencing statute for his offense, we find that the trial court did not abuse its discretion in sentencing Camacho as it did.

VII. CONCLUSION

[44] Because the scope of the waiver of appeal language in the DPA is ambiguous, we hold that the waiver provision does not encompass post-conviction issues related to sentencing. For the reasons stated above, we find that the trial court properly revoked Camacho's probation and did not err in sentencing him. We therefore **AFFIRM** the judgment of the trial court.

Original Signed By: **F. Philip Carbullido**
F. PHILIP CARBULLIDO
Associate Justice

Original Signed By: **Robert J. Torres**
ROBERT J. TORRES
Chief Justice

MARAMAN, J., concurring:

[45] I concur with the result reached by the majority. However, I would affirm the judgment on different grounds. Contrary to the majority's conclusion, I find that Camacho knowingly and voluntarily waived his right to appeal his sentence as a part of "a final judgment of conviction" under 8 GCA § 130.15(a). Moreover, the trial court carried out its duty by imposing a final sentence which complied with the statutory minimum pursuant to 9 GCA § 67.401.12 for first offense felony possession of methamphetamine. Finally, I find that Camacho's appeal pursuant to 8 GCA § 130.15(c) of the probation revocation order frivolous under 7 GCA § 25106 and should be dismissed.

I. Waiver of Sentence

[46] Camacho not once suggested that the plea agreement or waiver were invalid in his opening brief, nor submitted a reply brief after the government raised the issue of waiver of appeal pursuant to the plea agreement. Even in addressing this as a threshold issue, I find that Camacho knowingly and voluntarily waived the right to appeal his sentence. Paragraphs 2, 4, 5, 9 and 10 of the Deferred Plea Agreement ("DPA") provide in part:

> 2. Defendant voluntarily, and without coercion or promises apart from this Plea Agreement, agrees to enter a deferred plea to the charge of possession of a schedule II controlled substance (As a Third Degree Felony), a violation of 9GCA §§ 67.401.2(a) and (b)(1). Pursuant to 9 GCA §§ 67.401.12 and 80.50(b), this offense carries a sentence of no more than three (3) years incarceration and a fine of five thousand dollars ($5,000.00). . . .
>
> . . .
>
> 4. Defendant understands that he has a right to move for a reduction of his sentence within one hundred twenty (120) days of sentencing pursuant to 8 GCA § 120.46, and agrees to waive that right for the purpose of this plea. . . .
>
> 5. Defendant understands that he has a right to appeal his conviction in this case pursuant to 8 GCA §§ 130.10 and 130.15, and agrees to waive that right for the purposes of this plea. . . .
>
> . . .

> 9. The Attorney General and Defendant agree, in consideration for Defendant's deferred plea to the following:
>
> That as to the charge of possession of a schedule II controlled substance (As a Third Degree Felony), the Court's acceptance and entry of the Defendant's guilty plea shall be deferred for a period of two (2) years:
>
> a. Defendant shall serve three (3) years imprisonment, at the Department of Corrections, with credit for time served. This period of incarceration shall be suspended, subject to the terms and conditions of probation set forth below. . . .
>
> 10. Defendant understands that if he violates any conditions of his release or of his probation, that the Court may find him in violation and sentence him to serve the maximum sentence in this case.

ER at 4-8 (DPA) (original typeface omitted).

[47] This court should not interpret the plea agreement in a manner that would render the waiver of appeal meaningless. *See United States v. Michlin*, 34 F.3d 896, 901 (9th Cir. 1994) ("We reject defendants' argument that under the language of the plea agreements they did not waive their right to appeal *incorrect* applications of the Sentencing Guidelines. Defendants' construction of the plea agreement would render the waiver meaningless."); *United States v. Granik*, 386 F.3d 404, 412 (2d Cir. 2004) ("We have also frequently noted the dangers of piecemeal non-enforcement of plea agreements, albeit in the context of challenges to appellate waivers. Knowing and voluntary appellate waivers included in plea agreements must be enforced because, if they are not, "'the covenant not to appeal becomes meaningless and would cease to have value as a bargaining chip in the hands of defendants.'") (internal citation omitted).

[48] Looking at the entirety of the plea agreement, it is difficult to determine what other understanding Camacho could have interpreted other than Camacho was waiving the right to appeal the judgment of conviction, which included waiving his right to appeal his sentence. From the language of the plea agreement, if Camacho violated the terms and conditions of probation, the court would revoke his probation and could sentence him to serve the maximum sentence. Camacho repeatedly violated multiple terms and conditions of his probation and as a

result, Camacho had to serve the sentence required by the terms of the plea which specifically incorporated 9 GCA § 67.401.12.

[49] When Camacho waived his right to appeal his conviction pursuant to 8 GCA § 130.15, he waived any right to appeal the judgment of conviction that would have normally been available to him, which would have been 8 GCA § 130.15(a). The majority conflates the jurisdiction statute allowing appeal of probation revocation with the jurisdiction statute allowing appeal of conviction and sentence. Camacho appeals two different issues which have two separate statutory jurisdictional bases for appeal. Appeal of the probation revocation falls under an "order made after judgment" pursuant to section 130.15(c).[6] 8 GCA 130.15(c) (2005). However, 130.15(c) is not the statutory jurisdictional basis to appeal the sentence which is a part of the judgment of conviction. Camacho's appeal challenging the sentence falls under 130.15(a) and Camacho waived his right to appeal his sentence under 130.15(a).

[50] Under paragraph 5 of the DPA, Camacho waived his right to appeal his "judgment of conviction" under 8 GCA § 130.15.[7] ER at 4. Under 8 GCA § 120.18, a judgment of conviction includes the sentence. 8 GCA § 120.18 (2005). Thus, under the clear language of the plea agreement, Camacho agreed to waive not only his right to appeal his conviction but also his right to appeal his sentence. *See Deal v. United States*, 508 U.S. 129, 132 (1993). In *Deal v. United States*, the U.S. Supreme Court sought to interpret the meaning of "conviction" by reference to the meaning of "judgment of conviction" in Rule 32(b)(1) of the Federal Rules of Criminal Procedure. *Id.* at 132. The U.S. Supreme Court concluded that "conviction" by itself meant a

[6] Section 130.15(c) originally comes from California Penal Code, § 1237(3) (which California later recodified as California Penal Code, § 1237(2) during the time of the California cases cited below and is currently § 1237(b)). The California Supreme Court found that under the same statutory language, an order revoking probation is an appealable order after judgment. *See, e.g.*, *People v. Coleman*, 533 P.2d 1024, 1029 & n.1 (Cal. 1975); *People v. Vickers*, 503 P.2d 1313, 1315 & n.2 (Cal. 1972).

[7] Title 8 GCA § 130.15 provides defendants a right to appeal from a "judgment of conviction." 8 GCA § 130.15(a) (2005).

"finding of guilt by a judge or jury that necessarily precedes the entry of a final judgment of conviction" whereas "a judgment of conviction" "includes both the adjudication of guilt *and the sentence.*" *Id.* at 131 (emphasis added).

[51] By a similar analysis, I find that 8 GCA § 120.18 (which is analogous to Rule 32(b)(1) of the Federal Rules of Criminal Procedure) provides the proper interpretation of "judgment of conviction" as used in 8 GCA § 130.15. Camacho, having waived his rights under 8 GCA § 130.15, thus waived his right to appeal the "judgment of conviction" which includes the sentence.

[52] Additionally, when a defendant waives his right to file a motion to reduce his sentence pursuant to 8 GCA § 120.46, that is the functional equivalent of waiving the right to appeal the sentence. The Vermont Supreme Court in *State v. Parker* addressed a very similar plea term that referenced a state statute with similar language to 8 GCA § 120.46.[8] *See State v. Parker*, 583 A.2d 1275, 1276 (Vt. 1990). Like in *Parker*, a defendant who agrees to such a plea term cannot circumvent said term by attempting to directly appeal rather than following proper procedure by first motioning the lower court for reconsideration of the sentence under 8 GCA § 120.46. *See id.* at 1276. For Camacho, who waived his rights under section 120.46, this appeal raises a claim for the first time without the issue ever being litigated and decided below pursuant to section

[8] In *State v. Parker*, the defendant waived his rights under 13 V.S.A. § 7042(a), which includes the following section:

> Any court imposing a sentence under the authority of this title, within 90 days of the imposition of that sentence, or within 90 days after entry of any order or judgment of the supreme court upholding a judgment of conviction, may upon its own initiative or motion of the defendant, reduce the sentence.

13 V.S.A. § 7042; *see also Parker*, 583 A.2d at 1276. Compare to 8 GCA § 120.46:

> The court may reduce a sentence within one hundred twenty (120) days after the sentence is imposed, or within one hundred twenty (120) days after receipt by the court of a mandate issued upon affirmance of the judgment or dismissal of the appeal, or within one hundred twenty (120) days after entry of any order or judgment of the Supreme Court of Guam, having the effect of upholding a judgment of conviction.

8 GCA § 120.46 (2005).

120.46. *See id.* Under circumstances such as Camacho's, this court should not entertain an appeal of a sentence, since the issue was not first litigated before the trial court under 8 GCA § 120.46, nor is there plain error. *See Sinlao v. Sinlao*, 2005 Guam 24 ¶ 30 (observing that a court generally will not consider issues for the first time on appeal). By waiving his right to reduce his sentence pursuant to 8 GCA § 120.46, Camacho is estopped from trying to achieve the same outcome through the appellate process without first presenting the issue before the trial court.

II. Trial Court Complying With Statutory Minimum

[53] I find, as many jurisdictions have, that the trial court's sentencing jurisdiction is statutorily defined.[9] Section 67.401.12 provides the mandatory sentencing requirements for first time offenders of a third degree felony due to possession of methamphetamine stating:

> In cases where § 67.401.11 is applicable to the sentencing of a person, a person who has not been previously convicted of a felony relative to the possession of any controlled substance and has been convicted of a felony for the first time relative to possession of methamphetamine shall be sentenced to a term of imprisonment of no more than three (3) years and a fine of Five Thousand Dollars ($5,000.00). Sentence in these cases must also include mandatory community service of no less than one hundred and fifty (150) hours, mandatory enrollment

[9] Recently, the issue of the trial court's authority as it relates to mandatory minimum sentencing statutes was presented to this court in *People of Guam v. Gay*, 2007 Guam 11 ¶ 4. However, this Court did not reach the merits of *Gay* due to lack of ripeness. *Gay*, 2007 Guam 11 ¶ 11. On the issue of a court's obligation to impose statutorily mandated minimum sentences, *see, e.g.*, *Bozza v. United States*, 330 U.S. 160, 166-67 (1947) (finding that a court may correct a sentence that it had no authority to originally impose in order to substitute the original sentence with the sentence required by statute); *United States v. Godoy*, 678 F.2d 84, 88 (9th Cir. 1982) (trial court's failure to impose mandatory forfeiture provision for conviction of RICO violations resulted in illegal sentence which should have been corrected upon government's motion to modify sentence); *State v. Simpkins*, 884 N.E.2d 568, 572, 574-75 (Ohio 2008) (finding that the trial court is obligated to alter a statutorily-invalid sentence in a way which might increase its severity to comply with sentencing statute even after the defendant has commenced to serve his sentence.); *State v. Williams*, 800 So. 2d 790, 798 (La. 2001); *State v. Wika*, 574 N.W.2d 831, 833-34 (N.D. 1998); *State v. Babbel*, 813 P.2d 86, 88 (Utah 1991); *Gray v. United States*, 585 A.2d 164, 165-66 (D.C. 1991); *State v. Powers*, 742 P.2d 792, 796 (Ariz. 1987); *Williams v. State*, 692 P.2d 233, 235 (Wyo. 1984); *State v. Ohnmacht*, 342 N.W.2d 838, 843-45 (Iowa.1983) (finding that the court is still obliged to impose statutory minimum even if plea agreement explicitly states that defendant would be sentence below the statutorily mandatory minimum); *Christopher v. United States*, 415 A.2d 803, 804-05 (D.C. 1980) (finding that trial court had the authority to correct sua sponte a sentence that contradicted sentencing statute and impose period of incarceration greater than one originally ordered, even though prisoner had begun to serve the void sentence.); *State v. Fountaine*, 430 P.2d 235, 239 (Kan. 1967); *see also People v. Cates*, 87 Cal. Rptr. 3d 919, 925 (Ct. App. 2009); *In re Renfrow*, 79 Cal. Rptr. 3d 898, 901-02 (Ct. App. 2008) (finding that imposition and suspension of execution of unauthorized sentence was subject to correction upon revocation of probation); *People v. Jack*, 261 Cal. Rptr. 860, 861-62 (Ct. App. 1989).

> and attendance in a drug rehabilitation program at the Department of Mental Health and Substance Abuse or any other drug rehabilitation program approved by the Superior Court, and a mandatory term of probation of five (5) years.

9 GCA 67.401.12. The court carried out its duty to apply the statutory terms as required by 9 GCA 67.401.12 and the plea agreement stipulated that the "Defendant shall serve three (3) years imprisonment." ER, at 5 (DPA). Camacho fails to articulate any grounds to challenge sentence terms that he agreed to and which comply with the mandatory minimum pursuant to 9 GCA § 67.401.12.

III. Frivolous Appeal from Probation Revocation

[54] I find that Camacho's 130.15(c) appeal of the trial court's probation revocation order frivolous under 7 GCA § 25106 and therefore would not reach the merits of this case. As a threshold issue, probation revocation is civil in nature and would thus fall under 7 GCA § 25106. *See Gagnon v. Scarpelli*, 411 U.S. 778, 782 (1973) (finding that probation revocation is not criminal); *People v. Manila*, 2005 Guam 6 ¶ 13; *Isaac v. State*, 605 N.E.2d 144, 147 (Ind. 1992); *State v. Lillibridge*, 519 N.W.2d 82, 83 (Iowa 1994) (citing *Gagnon v. Scarpelli*, 411 U.S. 778, 782 (1973) to support the conclusion that probation revocation is civil); *State v. Yates*, 934 A.2d 222, 223 (R.I. 2007).

[55] Camacho admitted violating the terms of his probation, his probation was revoked and on appeal, Camacho merely argues that the trial court abused its discretion in not being lenient. Many courts have found similar appeals from probation revocation (where the defendant admits to violating terms of probation and only contests abuse of discretion) to be frivolous and have either amended their court rules or statutes to circumscribe such appeals or have directly dismissed such an appeal as frivolous. *See, e.g.*, Ariz. Rev. Stat. Ann. § 13-4033(b) (2008); Cal. Penal Code § 1237.5 (West 2008); Ga. Code Ann. § 5-6-35(a)(5), (b)-(f) (West 2008) (stating state's discretionary review process which specifies that parties do not have the right to a direct

appeal from a trial court's order of revoking a defendant's probation); *State v. Baca*, 926 P.2d 528, 529-33 (Ariz. 1996); *People v. Buttram*, 69 P.3d 420, 424-25 (Cal. 2003); *Barrow v. State*, No. 07-02-0351-CR, 2003 WL 22207708, at *1-2 (Tex. App. 2003); *see also United States v. Yoakum*, 186 Fed. Appx. 672, 673 (7th Cir. 2006); *United States v. Nave*, 302 F.3d 719, 721 (7th Cir. 2002) (finding that defendant did not suggest that plea agreement or waiver were invalid, but only raised frivolous arguments relating to his conviction and sentencing).[10]

[56] The purpose for 7 GCA § 25106 is to discourage and weed out frivolous appeals in order to promote judicial economy. This is especially so in classes of cases where, on the face of the facts, the argument will always lose. Such is the case where a defendant admits to violating the terms of probation but only argues on appeal that the trial court abused its discretion when it revoked probation pursuant to the terms that the defendant previously had agreed upon. I find the concerns articulated by the above jurisdictions persuasive in my determination that Camacho's appeal from his probation revocation is frivolous under 7 GCA § 25106.

[57] As a policy matter, I do not that think dismissing such a case for being frivolous is overly harsh. The U.S. Supreme Court has acknowledged the problem of frivolous criminal appeals. In *Anders v. California*, the court found that:

> . . . if counsel finds his case to be wholly frivolous, after a conscientious examination of it, he should so advise the court and request permission to

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[10] For example, California's statute regulating appeal from probation revocation states:

> [n]o appeal shall be taken by the defendant from . . . a revocation of probation following an admission of violation, except where both of the following are met:
>
> (a) The defendant has filed with the trial court a written statement, executed under oath or penalty of perjury showing reasonable constitutional, jurisdictional, or other grounds going to the legality of the proceedings.
>
> (b) The trial court has executed and filed a certificate of probable cause for such appeal with the clerk of the court.

Cal. Penal Code § 1237.5 (West 2008). For policy considerations regarding dismissing frivolous appeals under Cal. Penal Code § 1237.5, see *Buttram* at 425 (Cal. 2003) and *People v. Young*, 278 Cal. Rptr. 784, 789 (Ct. App. 1991) (stating same purpose as specifically applying to probation revocation).

> withdraw. . . . the court . . . then proceeds, after a full examination of all the proceedings, to decide whether the case is wholly frivolous. If it so finds it may grant counsel's request to withdraw and dismiss the appeal insofar as federal requirements are concerned.

Anders v. California, 386 U.S. 738, 744 (1967). The U.S. Supreme Court again returned to the issue in *Smith v. Robbins* and recognized the need to ". . . enable the State to 'protect itself so that frivolous appeals are not subsidized and public moneys not needlessly spent.'" *Smith v. Robbins*, 528 U.S. 259, 277-78 (2000) (quoting *Griffin v. Illinois*, 351 U.S. 12, 24 (1956)). Even the Guam Supreme Court dismissed a criminal appeal as frivolous in *People v. Leon Guerrero*. *People v. Leon Guerrero*, 2001 Guam 19 ¶¶ 2, 9-10, 23, 30, 36. Certainly, if an attorney can determine that a criminal appeal is frivolous and an appellate court can dismiss a criminal appeal as frivolous, then this court under 7 GCA § 25106 is empowered to determine that a civil appeal of probation revocation is frivolous, especially when no substantive grounds are raised.

Original Signed By: Katherine A. Maraman

KATHERINE A. MARAMAN
Associate Justice