IN THE SUPREME COURT OF GUAM

PEOPLE OF GUAM,
Plaintiff-Appellee,

v.

BLANE NGIRNGESANG ONGIIL,
Defendant-Appellant.

Supreme Court Case No.: CRA15-033
Superior Court Case Nos.: CF0611-14 and CF0674-10

OPINION

Cite as: 2016 Guam 34

Appeal from the Superior Court of Guam
Argued and submitted on May 16, 2016
Hagåtña, Guam

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

TORRES, C.J.:

[1] Defendant-Appellant Blane Ngirngesang Ongiil appeals from a final judgment sentencing him to three years incarceration for Driving While under the Influence of Alcohol ("DUI") (As a Third Degree Felony).[1] Ongiil argues Plaintiff-Appellee People of Guam ("the People") failed to provide sufficient evidence to obtain a DUI conviction under the fourth-offender statute, the trial court erred by allowing the People to mention Ongiil's exercise of his right to remain silent in violation of the Fifth Amendment, and he was not provided sufficient notice that his probation in a separate case would be at issue in his sentencing hearing in this case. The People argue that three prior DUI convictions were proven by two separate judgments, Ongiil "opened the door" by introducing evidence of his silence, and Ongiil was provided sufficient notice that his probation in a separate case would be at issue during his sentencing hearing.

[2] For the reasons detailed herein, we affirm in part, reverse in part, and remand to the trial court for further proceedings.

I. FACTUAL AND PROCEDURAL BACKGROUND

[3] Ongiil was indicted for Driving While Under the Influence of Alcohol (As a Third Degree Felony), Failure to Have a Driver's License in Immediate Possession (As a Violation), Failure to Have Insurance (As a Violation), and Straddling (As a Violation). After returning a verdict of guilty on all four charges, the trial court entered judgment and sentenced Ongiil to incarceration for a term of three years. Ongiil timely filed notices of appeal.

[1] Ongiil was also convicted of Failure to Have a Driver's License in Immediate Possession (As a Violation), Failure to Have Insurance (As a Violation), and Straddling (As a Violation). No fines were imposed for these violations.

[4] At trial, the People called Guam Police Department ("GPD") Officer Angelo Bueno, Jr. ("Bueno") to testify. On direct examination Bueno testified that he transported Ongiil from the scene of a traffic stop to a GPD Highway Patrol Station, where he was initially processed. Bueno testified that, at the Highway Patrol Station, Ongiil refused to consent to scientific testing of his blood, urine, or breath:

> PEOPLE: [H]ad you read the implied consent form?
>
> BUENO: I read the Guam implied consent form to the individual.
>
> . . . .
>
> I had the individual follow through while I read it to him.
>
> . . . .
>
> The individual refused to sign any documents.
>
> PEOPLE: Okay. And how did he . . . indicate that he refused?
>
> BUENO: He verbally informed me that he didn't want to sign any documents.

Transcripts ("Tr.") at 14, 16, 18 (Jury Trial, Jan. 28, 2015).

[5] On cross-examination, counsel for Ongiil asked Bueno about Ongiil's right to remain silent:

> COUNSEL: In fact, Mr. Ongiil has the right not to even say anything to you, right?
>
> BUENO: That's correct.
>
> COUNSEL: Okay. So he was exercising his right not to talk to you, right? Right?
>
> BUENO: That's correct.

Id. at 46.

[6] On redirect examination, Bueno testified that he read Ongiil his *Miranda* rights from a GPD custodial interrogation form. After eliciting this testimony, the People asked Bueno "after you read the Miranda rights, what was the response?" *Id.* at 58. Counsel for Ongiil objected,

arguing the question was "constitutionally impermissible evidence under the Fifth Amendment." *Id.* The court overruled the objection.

[7] The People then elicited testimony that Ongiil chose to invoke his right to remain silent:

> BUENO: I read each right step-by-step. . . . "You have the right to remain silent. You do not have to talk to me unless you want to do so." "Anything you say can and will be used against you in a court of law."
>
> . . . .
>
> PEOPLE: All right. And what was the response?
>
> BUENO: Uh, Mr. Ongiil refused to acknowledge any of his rights or waive it [sic].

Id. at 58-59. Bueno also testified that Ongiil did not speak to him or make any incriminating statements before being advised of his *Miranda* rights.

[8] Ongiil moved for acquittal on the DUI charge after close of the People's case-in-chief. The trial court denied his motion.

[9] During presentation of his case, Ongiil opted to testify in his own defense. Ongiil testified that Bueno did not read him the implied consent form. He did not testify regarding the *Miranda* form or his refusal to answer questions.

[10] During closing arguments, the People did not mention Ongiil's *Miranda* rights or his exercise of the right to remain silent. Defense counsel, however, raised Ongiil's Fifth Amendment privilege against self-incrimination and his exercise of the attendant right to remain silent. First, defense counsel stated the following: "[Ongiil] said I'm not going to talk, which had [sic] a right to, and I'm not going to sign anything." Tr. at 38 (Jury Trial, Jan. 30, 2015). Next, counsel stated that Ongiil waived his right not to testify at trial: "Ongiil didn't have to testify, yet he testified. . . . [T]o tell you the truth." *Id.* at 42.

[11] The People filed a Sentencing Memorandum, one week prior to sentencing. The Sentencing Memorandum included the following:

> [Ongiil] was found guilty of the crimes in this case while about six months away from completing all conditions of probation under CF0674-10. . . . The People also ask that the Court revoke [Ongiil's] probation in CF0674-10 and sentence [Ongiil] to three (3) years jail to be served concurrently with the sentence in this case.

Record on Appeal ("RA"), CF0611-14, tab 56 at 3 (Sentencing Mem., Mar. 6, 2015). During sentencing, the trial court revoked Ongiil's probation in case CF0674-10.

II. JURISDICTION

[12] The Supreme Court of Guam has jurisdiction over this appeal pursuant to 48 U.S.C.A. § 1424-1(a)(2) (Westlaw through Pub. L. 114–248 (2016)), and 7 GCA §§ 3107 and 3108(a) (2005).

III. STANDARD OF REVIEW

[13] Issues of statutory interpretation in criminal matters are subject to *de novo* review. *See People v. Camacho*, 2015 Guam 37 ¶ 10.

[14] "Where a defendant has raised the issue of sufficiency of evidence by motion for acquittal in the trial court, the denial of the motion is reviewed *de novo*." *People v. Fegarido*, 2014 Guam 29 ¶ 18 (citing *People v. Anastacio*, 2010 Guam 18 ¶ 10).

[15] We review an alleged violation of the Fifth Amendment *de novo*. *People v. Muritok*, 2003 Guam 21 ¶ 10 (citing *United States v. Mares*, 940 F.2d 455, 461 (9th Cir. 1991)).

[16] We generally review the trial court's revocation of probation for abuse of discretion. *People v. Angoco*, 1998 Guam 10 ¶ 4 (citing *United States v. Daly*, 839 F.2d 598, 599–600 (9th Cir. 1988)). We review *de novo* the issue of whether the trial court infringed upon a defendant's constitutional rights. *See People v. Cruz*, 2016 Guam 15 ¶¶ 16, 18 (reviewing alleged violation

of Fifth and Sixth Amendments *de novo*); *People v. Diego*, 2013 Guam 15 ¶ 8 ("Evidentiary rulings which infringe on constitutional rights are reviewed *de novo*." (citation omitted)); *People v. Naich*, 2013 Guam 7 ¶ 22 ("We review a constitutional speedy trial claim *de novo*." (citation omitted)); *People v. Manila*, 2005 Guam 6 ¶ 10 ("The grant of a motion to dismiss on double jeopardy grounds is reviewed *de novo*." (citations omitted)).

IV. ANALYSIS

A. Whether Two Judgments of Conviction May Satisfy the Three-Conviction Requirement of 16 GCA § 18107

[17] Ongiil argues there was insufficient evidence to convict him under 16 GCA § 18107 because he was previously convicted of DUI only twice, instead of three times, as required by the statute. *See* Appellant's Br. at 8 (Dec. 21, 2015). Specifically, he argues that because only two judgment documents were presented at trial, the People failed to prove that he had three separate "convictions."[2] *Id.* The People argue that a single judgment document may prove multiple convictions and that the two judgments satisfied the three-conviction requirement of 16 GCA § 18107. Appellee's Br. at 20-22 (Dec. 31, 2015).

[18] Ongiil was charged with Driving While Under the Influence of Alcohol ("DUI") (As a Third Degree Felony). RA, CF0611-14, tab 40 at 1-2 (Am. Indictment, Jan. 26, 2015). This charge included both the basic crime of DUI, 16 GCA § 18102(a),[3] as well as a violation of the "fourth offender" DUI statute, 16 GCA § 18107.

[2] Ongiil does not raise on appeal whether the evidence presented in the underlying trial was sufficient to establish a single conviction of simple DUI under 16 GCA § 18102(a).

[3] Title 16 GCA § 18102(a) provides:

> It is unlawful for any person, while under the influence of an alcoholic beverage or any controlled substance, or under the combined influence of an alcoholic beverage and any controlled substance, to operate or be in physical control of a motor vehicle.

16 GCA § 18102(a) (as amended by Guam Pub. L. 30-156:6 (July 8, 2010)).

[19] Title 16 GCA § 18107 is a repeat offender statute that establishes a more severe penalty for DUI when committed within five years of three other "separate [DUI] convictions":

> If any person is convicted of a violation of § 18102 of this Chapter and the offense occurred within five (5) years of *three (3) or more separate convictions* of a violation of said § 18102 or of three (3) or more separate convictions of a prior offense as defined in § 18101(c) of this Chapter, or any combination thereof resulting in three (3) or more prior convictions, that person shall be punished by imprisonment in the custody of DOC or GPD for not less than a mandatory one (1) year nor more than six (6) years, and by a fine of not less than Four Thousand Dollars ($4,000) nor more than Seven Thousand Dollars ($7,000). The person's privilege to operate a motor vehicle shall be revoked by the Department of Revenue and Taxation pursuant to § 18201 of this Chapter for a period of not less than five (5) years.

16 GCA § 18107 (2005) (emphasis added).

1. Statutory Interpretation

[20] "[T]he word 'conviction' can mean either the finding of guilt or the entry of a final judgment on that finding." *Deal v. United States*, 508 U.S. 129, 131 (1993);[4] *see also Conviction*, *Black's Law Dictionary* (10th ed. 2014) (defining conviction as (1) "[t]he act or process of judicially finding someone guilty of a crime; the state of having been proved guilty"; and (2) "[t]he judgment (as by a jury verdict) that a person is guilty of a crime.").

[21] As a matter of statutory interpretation, the meaning of a word "must be drawn from the context in which it is used." *Deal*, 508 U.S. at 132. "[I]n determining legislative intent, a statute should be read as a whole, and therefore, courts should construe each section in conjunction with other sections." *Sumitomo Constr. Co. v. Gov't of Guam*, 2001 Guam 23 ¶ 17; *see also Amerault v. Intelcom Support Servs., Inc.*, 2004 Guam 23 ¶ 14 ("In determining the plain meaning of a statutory provision, we look to the meaning of the entire statutory scheme containing the

[4] In *Deal*, the United States Supreme Court, interpreting a federal criminal statute, defined "conviction" as "the finding of guilt by a judge or jury that necessarily precedes the entry of a final judgment." 508 U.S. at 132. This meaning of conviction stands apart from the accompanying sentence and the judgment of conviction. *See id.*

provision for guidance."). "It is an 'elementary' canon of construction that 'effect must be given, if possible, to every word, clause and sentence of a statute.'" *Pangelinan v. Gutierrez*, 2000 Guam 11 ¶ 19 (citing Sutherland Stat. Const. § 46.06 (5th ed.)), *aff'd*, 276 F.3d 539 (9th Cir. 2002).

[22] When looking to the entire statutory scheme of Title 16, we find that the meaning of "conviction" was intended by the legislature to be distinct from the meaning of "judgment of conviction." For example, another section within the same statute employs both the word "conviction" and the phrase "judgment of conviction" in contrast to one another. *See* 16 GCA § 18117 (2005) ("Only one (1) challenge shall be permitted to the constitutionality of a *separate conviction* of a violation of § 18102 of this Chapter, which was entered in a separate proceeding to declare a *separate judgment of conviction* constitutionally invalid . . . ." (emphases added)). In other parts of the Code, the legislature has acknowledged that a judgment of conviction may include multiple crimes. *See* 9 GCA § 80.10(b) (2005) ("Where the judgment of conviction included more than one crime . . . ."). In contrast, the terms of 16 GCA § 18107 suggest that "conviction," in the context of the section, was intended by the legislature to mean a finding of guilt for a single criminal act. Section 18107 references "convictions *of a violation*." 16 GCA § 18107 (2005) (emphasis added) ("If any person is convicted of a violation of § 18102 of this Chapter and the offense occurred within five (5) years of three (3) or more separate convictions of a violation of said § 18102 . . . ."). It does not refer to a "judgment of conviction" as in other sections. *See id.*

[23] With this interpretation in mind, we must now determine whether the record contained sufficient evidence to support Ongiil's conviction.

2. Sufficiency of the Evidence

[24] We review a claim of insufficient evidence *de novo*, inquiring "as to whether the evidence in the record could reasonably support a finding of guilty beyond a reasonable doubt." *People v. Camacho*, 2015 Guam 37 ¶ 9 (citations omitted) (quoting *People v. Root*, 2005 Guam 16 ¶ 33). In *Camacho*, we summarized our review as follows:

> Because this is a highly deferential standard of review, when a criminal defendant asserts that there is insufficient evidence to sustain the conviction, this court reviews the evidence in the light most favorable to the prosecution to ascertain whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Thus, when reviewing a jury conviction for sufficiency, the only relevant question is whether that finding was so insupportable as to fall below the threshold of bare rationality.

Camacho, 2015 Guam 37 ¶ 11 (emphasis, citations, and internal quotation marks omitted).

[25] At trial, the People admitted two judgments into evidence as Exhibits 13 and 14. Tr. at 21-22, 25, 46-47 (Jury Trial, Jan. 28, 2015). Taken together, the judgments show that Ongiil pleaded guilty to four separate DUI offenses within five years of the charges giving rise to the present case. The judgment filed August 8, 2012, was entered against Ongiil for one count of Driving While Under the Influence of Alcohol (As a 3rd Degree Felony), in violation of 16 GCA §§ 18102(a) and 18107. People v. Ongiil, CF0611-14/CF0674-10 (People's Ex. 13 at 1 (Judgment, Aug. 5, 2012)). The judgment filed April 13, 2010, was entered against Ongiil for three separate counts of Driving While Under the Influence of Alcohol (As a Misdemeanor), in violation of 16 GCA § 18102(a). People v. Ongiil, CF0611-14/CF0674-10 (People's Ex. 14 at 1 (Judgment, Apr. 13, 2010)). This judgment was a consolidated decision from three separate cases, CM0015-10, CM0146-10, and CM0186-10. *See id.* The violations were described as separate counts, "one count in each case." *Id.*

[26] Based on this evidence, the People proved the elements of 16 GCA § 18107 at trial, namely that Ongiil was "convicted of a violation of § 18102 . . . within five (5) years of three (3) or more separate convictions of a violation of said § 18102." 16 GCA § 18107. A rational trier of fact could have found these elements beyond a reasonable doubt. Therefore, Ongiil's conviction under section 18107 was supported by sufficient evidence.

[27] We affirm Ongiil's conviction under 16 GCA § 18107 because the People proved that Ongiil was convicted under section 18102 within five years of three or more separate convictions.

B. Whether the Trial Court Erred by Allowing the People to Mention Ongiil's Exercise of his Fifth Amendment Right to Remain Silent

[28] Ongiil argues the People intentionally introduced his assertion of the right to remain silent over his objection, in violation of the Fifth Amendment to the United States Constitution. Appellant's Br. at 8-9. The People argue that Ongiil "opened the door" by introducing evidence of his own silence, and therefore it was not error for the People to explore the issue further. Appellee's Br. at 26-27 (citing *United States v. Ahrenholz*, 569 F.2d 420, 422 (5th Cir. 1978); *Bradford v. Stone*, 594 F.2d 1294, 1296 (9th Cir. 1979) (per curiam), *overruled on other grounds by Harris v. Reed*, 489 U.S. 255 (1989); *United States v. Murtaugh*, No. 5:08-CR-184 (FJS), 2009 WL 2405899, at *4 (N.D.N.Y. 2009)). They argue in the alternative that any error was harmless. Appellee's Br. at 28.

[29] Ongiil points to one instance of constitutional error in his brief. Appellant's Br. at 5-6. He contends that the People violated the Fifth Amendment by eliciting testimony from Bueno that "Ongiil refused to acknowledge" his right to remain silent and refused to waive it. *Id.* (quoting Tr. at 59 (Jury Trial, Jan. 28, 2015)). He quotes the following excerpt from the trial transcript:

> BUENO: I read each right step-by-step. . . . "You have the right to remain silent. You do not have to talk to me unless you want to do so. Anything you say can and will be used against you in a court of law."
>
> . . . .
>
> PEOPLE: All right. And what was the response?
>
> BUENO: Uh, Mr. Ongiil refused to acknowledge any of his rights or waive it.

Tr. at 58-59 (Jury Trial, Jan. 28, 2015).

[30] However, Ongiil overlooks the fact that this testimony followed the introduction of silence testimony by his own counsel. This testimony was elicited by the People during redirect examination of Bueno. Prior to this questioning, Ongiil's own counsel, during cross-examination, introduced the fact that he exercised his constitutional right to remain silent. Tr. at 45-46 ("Mr. Ongiil has the right not to even say anything to you, right? . . . So he was exercising his right not to talk to you, right?").

[31] Therefore, we are asked to determine whether the People's mention of Ongiil's silence at trial, after introduction of such evidence by Ongiil's counsel, was error, and if so, whether the error was harmless beyond a reasonable doubt.

[32] The Fifth Amendment to the United States Constitution creates a privilege against self-incrimination for a criminal defendant. U.S. Const. amend. V ("No person . . . shall be compelled in any criminal case to be a witness against himself."). Interpreting this privilege, the United States Supreme Court, in *Miranda v. Arizona*, forbid the use of any statements made by a defendant while in custody as substantive evidence of guilt unless obtained after "the use of procedural safeguards."[5] 384 U.S. 436, 444 (1966). The Court also stated that the privilege

[5] The Court provided an example of such safeguards: "Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed." *Miranda*, 384 U.S. at 444.

extends to the defendant's choice to invoke the right to remain silent. *Id.* at 468 n.37 ("[I]t is impermissible to penalize an individual for exercising his Fifth Amendment privilege when he is under police custodial interrogation. The prosecution may not, therefore, use at trial the fact that he stood mute or claimed his privilege in the face of accusation."); *Muritok*, 2003 Guam 21 ¶ 11 ("The United States Supreme Court, in recognition of the Fifth Amendment privilege against self-incrimination, forbids the use of a defendant's silence while 'in custody.'" (citation omitted)). However, a defendant may waive the privilege against self-incrimination after being warned of his rights if such waiver is exercised "voluntarily, knowingly and intelligently." *Miranda*, 384 U.S. at 444.

[33] Further, where a defendant introduces evidence of his own silence, either on direct examination (during his own testimony) or on cross-examination of a government witness, it is not error for the People to explore the issue. *See Ahrenholz*, 569 F.2d at 422; *Bradford*, 594 F.2d at 1296.

[34] Ongiil argues that the People violated the Constitution by using his exercise of the right to remain silent against him. While it is true that *Miranda* generally prohibits using such evidence against a defendant at trial,[6] this case presents a distinct set of circumstances. Here, Ongiil introduced his own post-arrest silence at trial prior to any mention by the People.

Ongiil does not raise the issue of whether he was properly informed of his rights. *See generally* Appellant's Br. at 1-12. Ongiil did not offer any testimony as to the advisement of his *Miranda* rights despite the fact that he, himself, testified at trial. *See* Tr. at 3-120 (Jury Trial, Jan. 29, 2015). The People introduced testimony at trial that he was properly informed. Tr. at 58 (Jury Trial, Jan. 28, 2015) ("I advised him of his *Miranda* rights.").

[6] *United States v. Fairchild*, 505 F.2d 1378, 1383 (5th Cir. 1975) ("Miranda establishes that the prosecution may not use as a part of its case in chief a criminal defendant's silence following his arrest and warning. This evidence, even though it might be relevant and probative, is normally excluded.").

[35] On direct examination by the People, Bueno testified that Ongiil verbally refused to sign the GPD implied consent form.[7] Tr. at 18 (Jury Trial, Jan. 28, 2015). On cross-examination, Ongiil's counsel questioned Bueno regarding a host of reasons for which one might refuse to provide consent to DUI testing.[8] *Id.* at 45-46. As an example of a reason for which Ongiil may have refused to sign, his counsel suggested that he "has the right not to even say anything" and "he was exercising his right not to talk." *Id.* at 46.

[36] The silence testimony may have been elicited in response to the People's questions regarding Ongiil's failure to consent to breath, blood, and urine testing. However, a defendant's failure to consent to DUI testing, specifically a blood-alcohol test, may be used against the defendant as substantive evidence of guilt and such use does not violate the Fifth Amendment. 16 GCA § 18201(f) (2005); *South Dakota v. Neville*, 459 U.S. 553, 562-64 (1983). Further, the testimony regarding Ongiil's refusal to consent to testing did not introduce his right to remain silent.

[37] Based on the record, we find that questioning by Ongiil's counsel first introduced to the jury Ongiil's Fifth Amendment privilege against self-incrimination, the attendant right to remain silent, and Ongiil's decision to exercise that right. Tr. at 45-46 (Jury Trial, Jan. 28, 2015).[9]

[7] The implied consent form informs a DUI suspect of the Guam implied consent laws, 16 GCA § 18201(a)-(g), provides an opportunity to consent to the suspect's choice of tests, and informs the suspect of the consequences of failing to submit to testing. Tr. at 14-20 (Jury Trial, Jan. 28, 2015).

[8] For example, Ongiil's counsel asked questions as to whether a suspect might not "trust the test," whether a suspect fears he will not be released even if he consents to testing, and whether refusal results in an administrative hearing. Tr. at 44-45 (Jury Trial, Jan. 28, 2015).

[9] Ongiil attempted at oral argument to distinguish between the silence referenced by his own counsel at trial in response to the implied consent form and the silence referenced by the People thereafter. However, the trial transcripts clearly indicate that Ongiil's counsel first introduced his Fifth Amendment privilege against self-incrimination and the attendant right to remain silent. Tr. at 45-46 (Jury Trial, Jan. 28, 2015) ("Mr. Ongiil has the right not to even say anything to you, right? . . . So he was exercising his right not to talk to you, right?").

While *Miranda* generally prohibits using evidence of a defendant's silence against him at trial,[10] this case presents circumstances that justify deviation from the general rule. Questioning by Ongiil's counsel "opened the door" to the People to explore the issue. *See Ahrenholz*, 569 F.2d at 422; *Bradford*, 594 F.2d at 1296; *cf. Ohler v. United States*, 529 U.S. 753, 755 (2000) (when a party introduces evidence of a fact through his or her own questioning at the trial level, claims of error on the basis of that same fact are prohibited on appeal). Therefore, it was not error for the People to elicit further testimony on redirect regarding Ongiil's silence. Further, the People did not belabor the point so as to cause undue prejudice to Ongiil. Ongiil was not questioned at all concerning his eventual refusal to answer further questions when he took the stand in his own defense. *See* Tr. at 3-123 (Jury Trial, Jan. 29, 2015). No inference of guilt deriving from Ongiil's eventual refusal to answer further questions was stressed at any point by the People during summation. Indeed, it was Ongiil's own counsel who raised his silence a second time during closing argument.

[38] Ongiil cites three cases in support of his argument that the People's use of his silence was error. Appellant's Br. at 8 (citing *Miranda*, 384 U.S. 436 (1996); *Doyle v. Ohio*, 426 U.S. 610 (1976); *Griffin v. California*, 380 U.S. 609 (1965)).

[39] In *Doyle*, the United States Supreme Court held that a defendant's silence, after arrest and *Miranda* warning, could not be used by a prosecutor to impeach a defendant. 426 U.S. at 611. In that case, defendants exercised their right to remain silent after arrest and receiving a *Miranda* warning. *See id.* at 610-15. At trial, defendants provided exculpatory statements for the first time, testifying that they were framed for the crime. *Id.* at 612-13. On cross-examination, the

[10] *Fairchild*, 505 F.2d at 1383 ("Miranda establishes that the prosecution may not use as a part of its case in chief a criminal defendant's silence following his arrest and warning. This evidence, even though it might be relevant and probative, is normally excluded.").

prosecutor sought to elicit testimony from the defendants regarding their silence in order to impeach them and discredit their theory of the case. *Id.* at 613-14.

[40] *Doyle* is distinguishable from the current facts because in *Doyle*, the defendants did not introduce testimony of their own silence. Ongiil, unlike the *Doyle* defendants, volunteered this information. Further, the People did not seek to impeach exculpatory testimony. In *Doyle*, the prosecution aimed to impeach the defendant's theory of the case. The prosecution raised the defendant's silence in order to create the inference that innocent people would have exonerated themselves prior to trial by telling the police their story. Here, the People merely elicited testimony that explored a topic already introduced by the defendant.

[41] In *Griffin*, the Court held that comments by the trial court and the prosecution "on the defendant's failure to testify" were error, in violation of the Fifth Amendment privilege against self-incrimination. 380 U.S. at 609. In that case, the defendant did not take the stand to testify at trial on the issue of guilt. *Id.* at 609-10. The trial court instructed the jury that it may make certain inferences based on the defendant's failure to testify, and the prosecutor made additional statements to the jury about the defendant's failure to take the stand. *Id.* at 610-11.

[42] *Griffin* is likewise distinguishable from the facts of the present case because Ongiil chose to testify in his own defense. Unlike in *Griffin*, Ongiil raised the issue of his own silence prior to any mention by the court or the People. Thus, the Court's holding in *Griffin* regarding comments on failure to testify in one's own defense is inapplicable here.

[43] Ongiil's counsel first raised Ongiil's silence while cross-examining Bueno: "Mr. Ongiil has the right not to even say anything to you, right? . . . So he was exercising his right not to talk to you, right?" Tr. at 45-46 (Jury Trial, Jan. 28, 2015). From this point forward, the jury was aware of Ongiil's right to remain silent and his assertion of that right. Therefore, a simple

reiteration of these facts in rebuttal testimony does not constitute error. Further, the People did not emphasize these facts in a way that could be portrayed as unduly prejudicial. The People merely elicited testimony that Ongiil "refused to acknowledge any of his rights or waive [them]." *Id.* at 58-59.

[44] For these reasons, we find that there was no error with regard to the People's use of Ongiil's silence at trial and no violation of the Fifth Amendment.

C. Whether the Trial Court Erred by Revoking Ongiil's Probation without Written Notice

[45] Ongiil argues the trial court did not have jurisdiction to revoke his probation because he was not provided notice that his probation would be at issue in the sentencing hearing.[11] Appellant's Br. at 10-11. The People argue that their Sentencing Memorandum provided Ongiil with proper notice and that the trial court complied with all relevant statutory requirements. Appellee's Br. at 31-33. Ongiil responds by arguing that the sentencing memorandum was "not a notice document." Appellant's Reply Br. at 3.

[46] Title 9 GCA § 80.68(a) states the following:

> The court shall not revoke a suspension or probation or increase the requirements imposed thereby on the offender except after a hearing *upon written notice* to the offender of the grounds on which such action is proposed. The offender shall have the right to hear and controvert the evidence against him, to offer evidence in his defense and to be represented by counsel.

9 GCA § 80.68(a) (2005) (emphasis added). Title 9 GCA § 80.68(a) is a verbatim adoption of Model Penal Code ("MPC") § 301.4, based upon its adoption by other states. 9 GCA § 80.68(a),

[11] It should be noted that Ongiil's Opening Brief fails to cite any authority to support his argument that the People's Sentencing Memorandum was insufficient as a notice document. Appellant's Br. at 10. He makes no attempt to rectify this deficiency in his Reply Brief. *See* Appellant's Reply Br. at 3 (reiterating argument with no authority to support). "Rules 13(a)(9)(A) and (B) of the Guam Rules of Appellate Procedure require that arguments in an appellant's brief must contain appellant's contentions supported by citations to appropriate legal authority and factual record as well as state the applicable standard of review for each issue." *Macris v. Richardson*, 2010 Guam 6 ¶ 8 (citing GRAP 13(a)(9)(A), (B)). While we nevertheless agree with Ongiil's position on the issue of probation notice, his Opening Brief failed to conform to the requirements of GRAP 13(a)(9)(A). We caution against such practice.

SOURCE; *see also* N.J. Stat. Ann. § 2C:45-4 (West). *Compare* 9 GCA § 80.68(a), *with* MPC § 301.4.

[47] Revocation of probation is governed by the procedural requirements set forth under the Local Rules of the Superior Court of Guam ("Local Rules"), Miscellaneous Rules ("MR"), Rule 1.2 (Post Judgment Appearance and Violations). Under these procedures, the Probation Division must file a Report of Violation with the trial court and serve a copy on the People. MR 1.2.(b)-(c). If the People decide to pursue sanctions, they must issue a Summons on Violation to the trial court, "indicating that the [People] wish[] to proceed with a violation hearing." MR 1.2.(d). The court must then schedule a violation hearing pursuant to 9 GCA § 80.66 and serve a notice document, in the form of a summons or warrant, on the defendant through his or her prior counsel of record. *Id.* The American Law Institute has recently recommended replacing MPC § 301.4 with a provision similar to our Local Rules. MPC Tentative Draft No. 3 at 113-114, § 6.15(1)(f), (2) (2014) ("[T]he *court shall provide written notice* of the alleged violation to the individual . . . ." (emphasis added)).

[48] While "a probationer faced with revocation of probation is not entitled to the full panoply of due process rights due other criminal defendants," he is guaranteed the most basic due process rights. *People v. Angoco*, 1998 Guam 10 ¶ 7 (citing *Morrissey v. Brewer*, 408 U.S. 471, 480 (1972)). Importantly, a probationer is guaranteed the following: "(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 involved parole revocation proceedings." *Id.* (citing *Gagnon v. Scarpelli*, 411 U.S. 778, 786 (1973)). While these rights are "meant to be a diminished form of due process rights," *id.* (citing *Morrissey*, 408 U.S. at 489), "a defendant must receive actual notice and an opportunity to be

heard prior to the revocation proceeding in order for due process to be satisfied." *State v. Nellom*, 836 A.2d 807, 814 (N.J. 2003).

[49] United States Supreme Court precedent and our own establishes that a defendant must receive notice of the allegations against him as a matter of basic due process. This is as true for revocation proceedings as for other criminal proceedings. Our Local Rules reflect due process considerations, providing well-defined procedural safeguards to ensure that a criminal defendant has notice of the allegations levied against him.

[50] Title 9 GCA § 80.68(a) requires the court to issue written notice to a probationer, consistent with Local Rules MR 1.2., when the People seek revocation of probation or an increase to the requirements imposed as conditions of probation. Here, the trial court did not issue a notice document compliant with Local Rules MR1.2. Notice to a defendant provided by the People alone, in the form of a sentencing memorandum, does not relieve the trial court of its fundamental responsibility to issue written notice. The People's Sentencing Memorandum alone was not sufficient to provide Ongiil with the required notice that his probation was subject to revocation by the court.

[51] For these reasons, we find the trial court committed reversible error in revoking Ongiil's probation without first providing him written notice as required by 9 GCA § 80.68(a). Consequently, we must reverse the trial court's revocation of Ongiil's probation and remand for further proceedings not inconsistent with this opinion.

V. CONCLUSION

[52] We affirm Ongiil's conviction under 16 GCA § 18107 because the conviction was supported by sufficient evidence, namely that Ongiil was convicted under 16 GCA § 18102 within five years of three or more separate convictions.

[53] We find that there was no error with regard to the trial court's consideration of the People's use of Ongiil's silence at trial in reaching the verdict and find no violation of the Fifth Amendment.

[54] We reverse the trial court's revocation of Ongiil's probation because the court failed to issue written notice, as required by 9 GCA § 80.68(a) and Local Rules MR 1.2., thereby depriving Ongiil of due process.

[55] Accordingly, we **AFFIRM** in part, **REVERSE** in part, and **REMAND** for further proceedings not inconsistent with this opinion.

/s/
F. PHILIP CARBULLIDO
Associate Justice

/s/
KATHERINE A. MARAMAN
Associate Justice

/s/
ROBERT J. TORRES
Chief Justice