IN THE
SUPREME COURT OF THE REPUBLIC OF PALAU
APPELLATE DIVISION

CLIFFTON KLOULUBAK,
Appellant,
v.
REPUBLIC OF PALAU,
Appellee.

Cite as: 2017 Palau 16
Criminal Appeal No. 16-004
Appeal from Criminal Case No. 15-131

Decided: March 20, 2017

Counsel for Appellant .....Danail M. Mizinov
Counsel for Appellee .....James E. Oliver

BEFORE: JOHN K. RECHUCHER, Associate Justice
R. BARRIE MICHELSEN, Associate Justice
DENNIS K. YAMASE, Associate Justice

Appeal from the Trial Division, the Honorable Lourdes F. Materne, Associate Justice, presiding.

OPINION

PER CURIAM:

[¶ 1] Appellant Cliffton Kloulubak appeals his sentence of twenty-five years imprisonment for Manslaughter (17 PNC § 1303(a)(1)) in connection with the death of Kenneth Koshiba, who died after Kloulubak shot him three times with an air rifle. Kloulubak had originally been charged with Murder in the Second Degree (17 PNC § 1302), but agreed to plead guilty to Manslaughter. As part of the plea agreement, Kloulubak agreed to be sentenced as the Court deemed appropriate after a sentencing hearing. Kloulubak now appeals the sentence imposed by the Trial Division, arguing that it abused its discretion by improperly considering the fact that "a life was taken," an element of the offense of Manslaughter, as an aggravating factor in imposing the maximum sentence of twenty-five years imprisonment. For the foregoing reasons, we deny the appeal and affirm Kloulubak's sentence.

BACKGROUND

[¶ 2] On the night of October 10, 2015, Appellant's brother Mike Williams was involved in a physical altercation with the victim, Kenneth Koshiba. Several hours later, Kloulubak and Williams set out to confront the victim in retaliation for this fight. Kloulubak and Williams were driven to the house where the victim lived with his family by their brother, Lieb Decherong. When Decherong was questioned by police the next day, he told them that Kloulubak had been armed with a high powered air rifle, that he heard gun shots fired shortly after dropping the two of them off, that he saw Kloulubak and Williams chasing the victim, and that he picked Kloulubak and Williams up and drove them home after he saw the victim fall to the ground. Emergency responders arrived at around 3:15 a.m., discovered the victim, and transported him to Belau National Hospital, where he was pronounced dead on arrival at 3:23 a.m. An autopsy revealed that the victim had been beaten and shot three times, once in the arm, once in the back, and once in the chest, where the pellet killed the victim by penetrating his heart.

[¶ 3] On October 12, 2015, the Republic of Palau filed an Information charging Mr. Kloulubak with Murder in the Second Degree, in violation of 17 PNC § 1302. In July 2016, Mr. Kloulubak agreed to plead guilty to Manslaughter, in violation of 17 PNC § 1303(a)(1), in exchange for the Republic dropping the Second Degree Murder charge against him and for accepting guilty pleas to lesser charges from his brothers (Williams and Decherong) for their involvement in Koshiba's death. The plea agreement stipulated that the Court would determine Kloulubak's sentence after a sentencing hearing.

[¶ 4] On September 6, 2016, the Trial Division held a sentencing hearing at which two of Kenneth Koshiba's family members gave testimony. The victim's first cousin testified that Koshiba's death had been very hard for Koshiba's family, especially because most of the Koshiba's male cousins were off island, and asked that Kloulubak receive the maximum sentence. The victim's sister then testified about how much Koshiba meant to her and her family, about what a good person he was, and about the devastating impact his violent death has had on her and the rest of the family. She asked that Kloulubak be sentenced to the maximum term of twenty-five years to

bring justice for her brother and send a message to the community that such killings cannot be taken lightly.

[¶ 5] Kloulubak's counsel then gave a final statement emphasizing Kloulubak's distinguished service in the United States Military, that Kloulubak was acting to protect his little brother (Williams) who he thought had been attacked by the victim earlier that evening, and that Kloulubak's primary concern in the plea negotiations was that his brothers receive lenient sentences. Kloulubak's counsel acknowledged that Kloulubak had done an awful thing, but argued that he is not a bad person, and asked that he be sentenced to ten years imprisonment. The Republic then gave a final statement and emphasized that whatever happened between Williams and the victim, it had taken place hours before Koshiba was killed, that Kloulubak and his brothers had gone to the victim's house with at least the intent to inflict pain and bodily injury, and that Kloulubak had repeatedly shot the victim with an air gun that he knew could kill small animals. The Republic argued that even if Kloulubak and his brothers only intended to hurt the victim, Kloulubak's actions represent the most egregiously reckless killing imaginable, and do not warrant leniency. The Republic acknowledged that Kloulubak admitted responsibility, but argued that this was primarily to exonerate his brothers, that his brothers had in fact received lenient sentences, and that the Trial Division should hold Kloulubak responsible by sentencing him to twenty-five years imprisonment, plus a fine of ten thousand dollars.

[¶ 6] After hearing this testimony and argument, the Trial Division recounted the aggravating and mitigating factors it had examined before arriving at a sentence in this case. The only mitigating factor it found was that Kloulubak had accepted responsibility for his actions and was not offering any excuses. The Court considered whether Kloulubak's military record was a mitigating factor, but concluded it was not because, while it might help explain why Kloulubak took the actions he did, it was also cause for concern that a similar incident could happen again. The Trial Division then turned to the aggravating factors, which it stated outweighed the mitigating factors in this case, and which it summarized as follows:

> Defendant along with his brothers showed up at the victim's house in the early morning hours, they lured him out of the house, he was

> beaten, chased down the street, he was shot and then he [was] left to die. [I] completely understand the family's [grief at] how this violent crime occurred. The Republic makes a compelling argument [that this was not] a reckless act but more of [an] intentional [act]. And another aggravating factor is the fact that the Defendant had no issue or issues with the victim. The fight was between the Defendant's brother and the victim and there was a space of hours before the attack so that's why I say the Republic makes a compelling argument that [this] violent attack was intentional and that the victim [was] left to die in a ditch on the side of the road.

Sentencing Tr. at 19. After considering these factors, the Trial Division went on to state that:

> those are the aggravating factors that the Court looked at and I looked at them again just now, and one thing that I think that would justify the sentence that I'm about to give is the fact that even all the violent acts that occurred, a life was taken. That I think is the number one factor that or the utmost factor that the Court looked at in deciding the amount of jail time for Mr. Kloulubak, that a life was taken, something that nothing and nothing could rectify.

Id. The Trial Division then sentenced Kloulubak to twenty-five years, the maximum prison term for a class A felony under 17 PNC § 662, and ordered Kloulubak to pay restitution for hospital expenses and a portion of funeral expenses, but declined to impose any additional fine. The Trial Division also told Kloulubak that it was "the right thing" for him "to be upfront with the Court and take responsibility for causing the death of Mr. Koshiba so that your brothers would be spared . . . long sentence[s,]" but that "this is the consequence of your options from that evening that Mr. Koshiba's life was taken . . . ." *Id.* at 20.

STANDARD OF REVIEW

[¶ 7] The precise punishment to which a defendant should be sentenced within the range created by the OEK is entrusted to the sound discretion of the Trial Division. "Absent a showing of an abuse of that discretion, an appellate court is not justified in modifying a sentence imposed by the trial

court." *Rasa v. Trust Territory*, 6 TTR 535, 547 (1973). "An abuse of discretion occurs when a relevant factor that should have been given significant weight is not considered, when an irrelevant or improper factor is considered and given significant weight, or when all proper and no improper factors are considered, but the court in weighting those factors commits a clear error of judgment." *Eller v. ROP*, 10 ROP 122, 128-29 (2003) (quoting *United States* v. *Kramer*, 827 F.2d 1174, 1179 (8th Cir. 1987)).

DISCUSSION

[¶ 8] For sentencing purposes, most felonies are classified by Palau's Penal Code as class A, class B, or class C felonies. 17 PNC § 621 (a). The category of class A felonies includes a variety of serious crimes, including Manslaughter (§ 1303), Robbery (§ 2701), Money Laundering (§ 3302), and Theft of $20,000 or more of Government Property (§ 2615). The Penal Code provides that a defendant who is convicted of a class A felony may be sentenced to a term of imprisonment of up to twenty-five years. 17 PNC § 662. In determining the particular sentence to be imposed, the Trial Division must consider a number of factors, including "[t]he nature and circumstances of the offense and the history and characteristics of the defendant" and "[t]he need for the sentence imposed . . . to reflect the seriousness of the offense, to promote respect for law, and to provide just punishment for the offense." 17 PNC § 618. The weight each factor should be given is "generally left to the discretion of the sentencing court, taking into consideration the circumstances of each case." *State v. Kong*, 315 P.3d 720, 727 (Hawai'i 2013).

[¶ 9] Kloulubak argues that the Trial Division abused its discretion by giving significant weight to an improper sentencing consideration, the fact that "a life was taken" when Kloulubak shot the victim repeatedly with an air rifle. Kloulubak claims that this factor is "clearly impermissible" because it is an element of the offense of Manslaughter, which requires proof that the defendant "recklessly cause[d] the death of another person." 17 PNC § 1303 (a)(1). Kloulubak contends that it was an abuse of discretion for the Trial Division to "endorses the proposition that an individual, by merely meeting the elements of the offense must receive the maximum penalty." Kloulubak does not argue that his conduct warrants a sentence of less than twenty-five years, but instead argues that the Trial Division's sentence must be vacated

because its logic fails to take into account the circumstances surrounding Kloulubak's conduct and would lead to unwarranted sentencing disparities.

[¶ 10] We hold that it was not an abuse of discretion for the Trial Division to consider and give weight to the fact that "a life was taken, something that nothing and nothing could rectify" when imposing Kloulubak's sentence. Kloulubak quotes this statement in isolation, characterizing it as an improper aggravating factor because it shows nothing more than the fact that Kloulubak's conduct met the required elements of Manslaughter. The Trial Division did not characterize this factor as an "aggravating factor," instead discussing it as "one thing that . . . would justify the sentence" after enumerating the many aggravating factors which separately justify imposing the maximum sentence in this case. Section 618(a) does not limit the Trial Division to considering aggravating and mitigating factors, and in fact directs the Court to consider "the seriousness of the offense," which often requires consideration of the facts which constitute the essential elements of that offense. This statement clearly reflects the Trial Division's assessment of the seriousness of the offense and the need to provide a just punishment, considerations the Trial Division is expressly directed to consider under 17 PNC § 618 (b)(1).

[¶ 11] Kloulubak's argument also ignores the fact that the sentencing range at issue here is not the range the OEK decided upon for Manslaughter specifically, but rather the range prescribed by the OEK to be used for all class A felonies. Class A felonies are all particularly serious crimes which may warrant harsh sentences in appropriate circumstances, but only Manslaughter involves the taking of a life. The Trial Division does not abuse its discretion by treating Manslaughter as a more serious offense than other class A felonies, such as Robbery or Theft of Government Property. This is especially true in this case, where the need for a harsh punishment was emphasized by testimony given by two relatives of the victim about the devastating impact Koshiba's death had on their family, and that Kloulubak had admitted to bearing the bulk of the responsibility for the what the family viewed as a murder perpetuated in the middle of the night in front of their home. A defendant who commits Robbery or Theft of Government Property can often heal the damage caused by paying restitution. The Trial Division

did not abuse its discretion by considering the fact that there is nothing Kloulubak can do to rectify the harm he has done to Koshiba and his family.

[¶ 12] Kloulubak urges us to adopt sentencing considerations from United States case law governing when the government may impose the death penalty. In the United States, the constitutional prohibition on cruel and unusual punishment requires the death penalty to be reserved for the worst criminals who commit the worst crimes. *See Zant v. Stephens*, 462 U.S. 862, 877 n.15 (1983). This is because "the penalty of death is qualitatively different from a sentence of imprisonment, however long. Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two." *Gardner v. Florida*, 430 U.S. 349, 363 (1977) (White, J. concurring). Palau does not allow the death penalty, so the special considerations which arise when sentencing a defendant to death in the United States are not relevant to a sentence of imprisonment in Palau.

[¶ 13] Kloulubak also urges us to adopt the reasoning of various Untied States cases in which a defendant's sentence was vacated because the sentencing court double counted certain aggravating factors when calculating the appropriate sentencing range under the United States Federal Sentencing Guidelines ("U.S. Guidelines"). Kloulubak acknowledges that Palau's sentencing procedure is different from the one laid out in the U.S. Guidelines, but argues that we should apply the logic of U.S. Guidelines cases by analogizing the determination of the base-level offense to the guilt/innocent phase of Palauan criminal proceedings and analogize the enhancement consideration required by the U.S. Guidelines to the sentencing phase of Palauan criminal proceedings. From this analogy, Kloulubak requests we hold that the specific conduct used to determine what offense has been committed must be distinct from the considerations used by the Trial Division to impose a sentence in order to avoid impermissible double counting.

[¶ 14] As noted above, we hold that the Trial Division does not abuse its discretion by considering Manslaughter to be a particularly serious class A felony. We also hold that the concept of double counting under the U.S. Guidelines is not relevant to this case, and note that case law applying the U.S. Guidelines is generally unlikely to be relevant to our review of the Trial Division's sentencing process. The sentencing system set forth by the U.S.

Guidelines provides an extensive list of specific factors and instructs the sentencing judge on how to weigh them. While a U.S. federal court retains discretion to intentionally depart from the guidelines, the court "must correctly calculate the recommended Guidelines sentence and use that recommendation as the starting point and initial benchmark." *U.S. v. Munoz-Camaena*, 631 F.3d 1028, 1030 (9th Cir. 2011) (internal citations and quotations omitted). Appellate courts first review the correctness of this calculation for "significant procedural error," which includes incorrectly calculating a higher sentencing range than called for by the Guidelines, and often requires a remand for resentencing even if the sentence imposed is otherwise reasonable. *Molina-Martinez v. U.S.*, 136 S. Ct. 1338, 1345-47 (2016). Only after a federal appellate court satisfies itself that there is no significant procedural error will it evaluate the sentence imposed under an abuse of discretion standard. *Gall v. U.S.*, 552 U.S. 38, 51 (2007) By contrast, Palauan criminal sentencing law only requires the Trial Division to consider the general factors set forth in 17 PNC § 618, and the Court has broad discretion to weigh those factors as it deems appropriate. Palauan law has no analog to the U.S. Guidelines concept of "significant procedural error," so we will only vacate a defendant's sentence if the defendant establishes that the Trial Division abused its broad sentencing discretion. Kloulubak has not done so in this appeal.

CONCLUSION

[¶ 15] The sentencing transcript shows that the Trial Division found numerous aggravating factors which provide ample justification for Defendant's twenty-five year sentence for Manslaughter. We hold that the Trial Division did not abuse its discretion by also considering the fact that "a life was taken, something that nothing and nothing could rectify" in determining Kloulubak's sentence. Defendant's sentence is **AFFIRMED**.

SO ORDERED, this 20th day of March, 2017.