



**Filed**

Supreme Court of Guam, Clerk of Court

**IN THE SUPREME COURT OF GUAM**

**THE PEOPLE OF GUAM,**  
Plaintiff-Appellee,

**v.**

**RICHARD MINHO CHONG,**  
Defendant-Appellant.

**OPINION**

**Cite as: 2019 Guam 30**

Supreme Court Case No.: CRA18-015  
Superior Court Case No.: CF0198-14  
(consolidated with CF0517-15)

Appeal from the Superior Court of Guam  
Argued and submitted on August 20, 2019  
Hagåtña, Guam

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

**TORRES, J.:**

[1] Defendant-Appellant Richard Minho Chong appeals a final judgment finding him guilty of multiple crimes. Chong seeks reversal of his conviction on two grounds. First, Chong argues that the trial court erred in admitting statements he made during a custodial interrogation in violation of his right against self-incrimination and right to counsel. Second, Chong contends the trial court erred in not presenting two sentencing enhancements to the jury and, in the alternative, not undertaking judicial fact-finding as to the sentencing enhancements. For the reasons discussed below, we affirm.

**I. FACTUAL AND PROCEDURAL BACKGROUND**

[2] Two felony cases in which Chong was a defendant were joined for trial. The first, CF0198-14, involved allegations that Chong conspired to import, possess, manufacture, and traffic controlled substances. Chong was released on his personal recognizance. Chong's conduct while on release resulted in an indictment under a second felony case, CF0517-15, involving allegations he tampered with witnesses who may have been called to testify in CF0198-14. The original indictment in CF0517-15 included a notice of two felony-on-felony-release sentencing enhancements.

[3] Chong was present at a pre-trial conference where the prosecutor and defense counsel discussed a waiver of presentation of evidence regarding the felony-on-felony-release issue. Chong's trial counsel stated that he was prepared to stipulate that Chong was on felony release at the time he allegedly committed the acts underlying CF0517-15, and his counsel waived presentation of that issue to the jury if he could see a copy of the release conditions in CF0198-14. The court provided a copy of the order of conditional release to defense counsel. Chong's

counsel then waived the factual basis for the sentencing enhancement. Before jury selection commenced, Chong's counsel stipulated to the prosecution filing an amended second superseding indictment removing the sentencing enhancements of felony-on-felony-release. The jury was not presented with the issue.

[4] At trial, Guam Police Department ("GPD") Officer Jimmy Manglona testified that he advised Chong of his rights guaranteed by *Miranda v. Arizona*, 384 U.S. 436 (1966), and interviewed Chong following his arrest for alleged witness tampering. Chong indicated in writing that he understood each of his rights. However, Chong refused to sign the waiver-of-rights portion of the custodial interrogation form. Chong then made statements to Officer Manglona regarding the facts underlying both CF0198-14 and CF0517-15.

[5] The jury found Chong guilty of all charges under CF0198-14, and of four charges under CF0517-15. At a sentencing hearing, the trial court expressed the belief that the jury had decided the two felony-on-felony-release sentencing enhancements. This belief was also reflected in the judgment, which listed the sentencing enhancements under the jury's findings. Chong's sentence included two sentencing enhancements for felony-on-felony-release, each for five years to run consecutively to the other felony sentences but concurrently to each other. Chong timely filed a notice of appeal.

## II. JURISDICTION

[6] This court has jurisdiction over an appeal from a final judgment of conviction. 48 U.S.C.A. § 1424-1(a)(2) (Westlaw through Pub. L. 116-90 (2019)); 7 GCA §§ 3107(b), 3108(a) (2005); 8 GCA §§ 130.10, 130.15(a) (2005).

## III. STANDARD OF REVIEW

[7] As explained below, Chong's failure to move to suppress his custodial statements was a forfeiture subject to plain error review. *See United States v. Olano*, 507 U.S. 725, 733-34

(1993). Whether the trial court “violated the constitutional rule established in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), is a question of law that is reviewed *de novo*.” *People v. Guerrero*, 2017 Guam 4 ¶ 16 (quoting *People v. Quitugua*, 2015 Guam 27 ¶ 32).

#### IV. ANALYSIS

##### A. The Trial Court Did Not Err in Admitting Custodial Statements, as Chong Waived His Right Against Self-incrimination and Right to Counsel

[8] As an initial matter, the People argue that appellate review of whether the trial court erred in admitting testimony regarding Chong’s custodial statements is precluded because Chong did not move to suppress these statements. Appellee’s Br. at 8-9 (May 31, 2019).

[9] Under 8 GCA § 65.15(c), a motion to suppress evidence must be raised prior to trial. 8 GCA § 65.15(c) (2005). Title 8 GCA § 65.45 provides that the failure of a party to make a request which must be made prior to trial “shall constitute a waiver thereof, but the court for cause shown may grant relief from the waiver.” 8 GCA § 65.45 (2005). The U.S. Supreme Court has distinguished waivers from forfeitures: “Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the ‘intentional relinquishment or abandonment of a known right.’” *Olano*, 507 U.S. at 733 (1993) (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)). This distinction is important because a waiver precludes appellate review, while a forfeiture is subject to plain error review. *See id.* at 733-34. At issue is whether Chong’s failure to bring a motion to suppress evidence prior to trial constitutes a waiver or a forfeiture.

[10] In *United States v. Johnson*, 415 F.3d 728 (7th Cir. 2005), the Seventh Circuit explained that “a true waiver occurs only through an *intentional* relinquishment of an argument, while a forfeiture is the result of a *neglectful* failure to pursue an argument.” 415 F.3d at 730. It noted that “[i]f a defendant, out of neglect, fails to move to suppress evidence in the [trial] court, that conduct is more akin to a forfeiture than a waiver.” *Id.* The court reasoned that a rule that

allowed a court to grant relief from the “waiver” for good cause was also more like a forfeiture. *Id.* This ruling is in line with our precedent in *People v. Mateo*, 2017 Guam 22. In *Mateo*, we applied plain error review when a defendant argued on appeal that the trial court erred in admitting field tests but had neither moved to suppress this evidence nor objected during trial to its admission. 2017 Guam 22 ¶ 29.

[11] Here, there is no evidence that Chong intentionally relinquished or abandoned his right to challenge the admission of the custodial statements. Therefore, we find that he forfeited, rather than waived, the issue, and we review for plain error. Under plain error review, we “will not reverse unless (1) there was an error; (2) the error is clear or obvious under current law; (3) the error affected substantial rights; and (4) reversal is necessary to prevent a miscarriage of justice or to maintain the integrity of the judicial process.” *People v. Gargarita*, 2015 Guam 28 ¶ 11 (quoting *People v. Felder*, 2012 Guam 8 ¶ 19).

[12] “Testimonial evidence that is a product of custodial interrogation is inadmissible unless a defendant waived the privilege against self-incrimination. To be valid, the waiver must be voluntary, knowing and intelligent.” *People v. Sangalang*, 2001 Guam 18 ¶ 12 (citations omitted). A waiver is voluntary if it is “the product of a free and deliberate choice rather than intimidation, coercion, or deception.” *People v. Hualde*, 1999 Guam 3 ¶ 30 (quoting *Moran v. Burbine*, 475 U.S. 412, 421 (1986)). A waiver is knowing and intelligent if it was “made with a full awareness both of the nature of the right being abandoned and the consequences of the decision to abandon it.” *Id.* (quoting *Moran*, 475 U.S. at 421). To determine whether a waiver was valid, we consider “the totality of the circumstances, including the background, experience, and conduct of the defendant.” *Sangalang*, 2001 Guam 18 ¶ 13 (quoting *United States v. Garibay*, 143 F.3d 534, 536 (9th Cir. 1998)).

[13] “There is a presumption against a finding of a waiver, and the prosecution bears the burden of proving by a preponderance of the evidence that a defendant knowingly and intelligently waived his *Miranda* rights.” *Id.* The People need not show that a waiver of the right to remain silent or the right to counsel guaranteed by *Miranda* was express. *See North Carolina v. Butler*, 441 U.S. 369, 375-76 (1979); *see also Berghuis v. Thompkins*, 560 U.S. 370, 384 (2010). “As a general proposition, the law can presume that an individual who, with a full understanding of his or her rights, acts in a manner inconsistent with their exercise has made a deliberate choice to relinquish the protection those rights afford.” *Berghuis*, 560 U.S. at 385.

#### **1. Chong waived his right against self-incrimination**

[14] In the *Berghuis* case, the U.S. Supreme Court held that a defendant waived his *Miranda* rights when he answered an interrogating officer’s question after refusing to sign a form acknowledging his rights and remaining silent for nearly three hours. *Id.* at 385-86. The Court reasoned that (1) the defendant’s understanding of English was sufficient evidence he understood the rights presented, (2) the fact that he answered the officer’s questions was a sufficient “course of conduct indicating waiver,” and (3) there was no evidence that the defendant was coerced. *Id.* (quoting *Butler*, 441 U.S. at 373).

[15] Chong received a custodial interrogation form stating his *Miranda* rights, and he could read and understand English. This is sufficient evidence to conclude that Chong understood his *Miranda* rights. *See id.* As in *Berghuis*, Chong’s willingness to speak with the officer was a “course of conduct indicating waiver,” notwithstanding his refusal to sign the advice-of-rights form. *Id.* at 386 (quoting *Butler*, 441 U.S. at 373). Moreover, there is no evidence that Chong was coerced. Accordingly, Chong knowingly and intelligently waived his right against self-incrimination.

## 2. Chong waived his right to counsel

[16] The U.S. Supreme Court has made clear that a defendant “must unambiguously request counsel.” *Davis v. United States*, 512 U.S. 452, 459 (1994). A defendant “must articulate his desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney.” *Id.* In *Davis*, the Court saw no reason to disturb the lower courts’ finding that a defendant’s remark to agents—“Maybe I should talk to a lawyer”—was not a request for counsel and ruled there was no ground for suppression of the defendant’s statements. *Id.* at 462.

[17] Chong’s argument regarding the violation of his right to counsel is rooted both in the Fifth Amendment and the Sixth Amendment. He argues that because he was already represented by counsel in CF0198-14, Officer Manglona’s questioning of him on matters underlying that case violated his Sixth Amendment right to counsel. Appellant’s Br. at 27 (Apr. 12, 2019). Chong also argues, impliedly based on the Fifth Amendment, that he invoked his right to counsel by not signing the waiver form. Appellant’s Reply Br. at 3 (June 17, 2019) (“Chong’s express refusal to waive his rights by signing the form . . . was a clear assertion by Chong of his rights as enumerated on the form.”). As explained by the U.S. Supreme Court:

As a general matter . . . an accused who is admonished with the warnings prescribed by [the Supreme Court] in *Miranda* . . . has been sufficiently apprised of the nature of his Sixth Amendment rights, and of the consequences of abandoning those rights, so that his waiver on this basis will be considered a knowing and intelligent one.

*Montejo v. Louisiana*, 556 U.S. 778, 786-87 (2009) (omissions in original) (quoting *Patterson v. Illinois*, 487 U.S. 285, 296 (1988)). The *Montejo* Court further held that a defendant may waive this right even if he is already represented by counsel, and that the decision to waive his Sixth Amendment right to counsel “need not itself be counseled.” *Id.* at 786 (citing *Michigan v. Harvey*, 494 U.S. 344, 352-53 (1990)).

[18] On review of the facts surrounding the interrogation at issue, we find that Chong did not “articulate his desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney.” *Davis*, 512 U.S. at 459. Therefore, Chong did not invoke his right to counsel, and he knowingly and intelligently waived this right by speaking with Officer Manglona. Further, because we find a valid waiver of the Fifth Amendment protections enumerated in the custodial rights form, we hold that this sufficed to validly waive his Sixth Amendment right to counsel as well. *See Montejo*, 556 U.S. at 786 (“[W]hen a defendant is read his *Miranda* rights (which include the right to have counsel present during interrogation) and agrees to waive those rights, that typically does the trick, even though the *Miranda* rights purportedly have their source in the *Fifth* Amendment.”).

[19] As Chong waived both his right against self-incrimination and his right to counsel, the trial court did not err in admitting the custodial statements.

**B. The Trial Court Did Not Err in Not Submitting the Felony-on-Felony-Release Sentencing Enhancements to the Jury and Not Undertaking Judicial Fact-finding on the Issue**

[20] As the U.S. Supreme Court has noted, “Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.” *Apprendi*, 530 U.S. at 490; *see also Guerrero*, 2017 Guam 4 ¶ 21; *Quitugua*, 2015 Guam 27 ¶ 37; *People v. Muritok*, 2003 Guam 21 ¶ 43. “Therefore, facts that support a sentencing enhancement must be submitted to a jury and proved beyond a reasonable doubt.” *Guerrero*, 2017 Guam 4 ¶ 21 (citing *Apprendi*, 530 U.S. at 494 n.19). The Court provided further guidance on a defendant’s *Apprendi* right in *Blakely v. Washington*, 542 U.S. 296 (2004). In *Blakely*, the Court noted that “the ‘statutory maximum’ for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts*

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reflected in the jury verdict or admitted by the defendant.” 542 U.S. at 303; *see also Guerrero*, 2017 Guam 4 ¶ 24. The Court elaborated that a defendant may waive his *Apprendi* rights—known as a “*Blakely* waiver”—and “consent to judicial factfinding as to sentence enhancements, which may well be in his interest if relevant evidence would prejudice him at trial.” *Blakely*, 542 U.S. at 310; *see also Guerrero*, 2017 Guam 4 ¶ 24. “Because the Sixth Amendment protects a defendant’s fundamental right to have a jury determination of facts that may alter the defendant’s sentence, waiver of the right must also be made with ‘express, intelligent consent, and agreed to by the People and the lower court.’” *Guerrero*, 2017 Guam 4 ¶ 26 (citation omitted). “[C]ourts indulge every reasonable presumption against waiver of fundamental constitutional rights and . . . do not presume acquiescence in the loss of fundamental rights.” *Id.* ¶ 25 (omission in original) (quoting *Zerbst*, 304 U.S. at 464).

[21] Chong argues that he did not waive his *Apprendi* right. *See* Appellant’s Br. at 36-39. He contends the trial court did not personally address him regarding his purported *Blakely* waiver and he did not sign a written waiver or stipulation evidencing his understanding of his *Apprendi* right. *Id.* at 36.

[22] Generally, a court need not engage in a colloquy with a defendant to ensure that the defendant is entering a stipulation knowingly and voluntarily. *See, e.g., United States v. Ferreboeuf*, 632 F.2d 832, 836 (9th Cir. 1980); *State v. Humphries*, 336 P.3d 1121, 1124-25 (Wash. 2014) (en banc). In *Ferreboeuf*, the defendant argued that a stipulation signed by the defendant’s attorney to two elements of a charged crime was invalid because such stipulations required a trial court to personally question the defendant to determine voluntariness. 632 F.2d at 835-36. The court rejected the defendant’s argument, stating that “[s]uch a rule would needlessly delay and confuse the conduct of a typical trial.” *Id.* at 836. Instead, the court held:

[W]hen a stipulation to a crucial fact is entered into the record in open court in the presence of the defendant, and is agreed to by defendant's acknowledged counsel, the trial court may reasonably assume that the defendant is aware of the content of the stipulation and agrees to it through his or her attorney.

*Id.* The court further noted, "Unless a criminal defendant indicates objection at the time the stipulation is made, he or she is ordinarily bound by such stipulation." *Id.* (collecting cases).

[23] Here, Chong's counsel stipulated that Chong was on felony release when he allegedly attempted to tamper with witnesses. Chong was present and did not object. Chong's counsel also stipulated to the amended second superseding indictment removing the sentencing enhancement, and Chong did not object to excluding the sentencing enhancement in the jury instructions and verdict forms. Therefore, the trial court did not err in not submitting the felony-on-felony-release sentencing enhancements to the jury, as Chong waived his *Apprendi* right by stipulating he was on felony release when he allegedly attempted to hinder prosecution.

[24] Chong also argues that even if he waived his *Apprendi* right, the trial court was required, and failed, to undertake a judicial fact-finding regarding the sentencing enhancements. *See* Appellant's Br. at 39-42. The trial court appears to have made a factual finding at the pre-trial conference when it stated that "there are the pleadings which indicate [Chong] was released. . . . He is charged with various felonies for which then he was released, and so the notice, being charged with a felony while on felony release . . . [are] able to come forward." Tr. at 6-7 (Pre-Trial Conference, July 9, 2018). Even assuming the trial court did not make such a factual finding, there was no error here. Chong stipulated he was on felony release when he allegedly attempted to hinder prosecution, and there was no need for judicial fact-finding—the facts were established. *See Guerrero*, 2017 Guam 4 ¶ 24 ("[T]he 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.*" (quoting *Blakely*, 542 U.S. at 313)). Therefore,

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the trial court did not err in not submitting the felony-on-felony-release sentencing enhancements to the jury and not undertaking judicial fact-finding on the issue.

**V. CONCLUSION**

[25] For these reasons, we **AFFIRM** the Judgment of Conviction.

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/s/  
F. PHILIP CARBULLIDO  
Associate Justice

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/s/  
ROBERT J. TORRES  
Associate Justice

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/s/  
KATHERINE A. MARAMAN  
Chief Justice