

**NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37**

COMMONWEALTH OF PENNSYLVANIA,

Appellee

v.

RAMON CUEVAS,

Appellant

IN THE SUPERIOR COURT OF  
PENNSYLVANIA

No. 132 EDA 2013

Appeal from the Judgment of Sentence November 30, 2012  
In the Court of Common Pleas of Philadelphia County  
Criminal Division at No(s): CP-51-CR-0010922-2011

BEFORE: BOWES, DONOHUE, and MUNDY, JJ.

MEMORANDUM BY BOWES, J.:

**FILED JULY 23, 2014**

Ramon Cuevas appeals from the judgment of sentence of two and one-half to five years incarceration followed by two years probation after he was found guilty of possession with intent to deliver ("PWID") at a bench trial. We affirm.

The trial court succinctly outlined the facts as follows.

On September 6, 2011 at around 5:40 p.m., Philadelphia Police Officer Eric Crawford was on routine patrol with his partner, Officer Harron, driving southbound of the 3000 block of North Lawrence Street, in Philadelphia, Pennsylvania. Officer Crawford was in a marked police vehicle as the passenger when he observed Ramon Cuevas, the Defendant, wearing a grey hoodie with black stripes and black pants, engaged in conversation with an unidentified Hispanic male wearing a grey hoodie and grey sweatpants. Officer Crawford observed the unidentified Hispanic male hand United States currency to the Defendant while the Defendant removed a baggie from his hoodie pocket. After the Defendant removed the baggie from his hoodie pocket, Officer Crawford observed the Defendant remove

small objects from the baggie and hand those objects to the unidentified Hispanic male.

At this time, Officer Crawford and Officer Harron exited their vehicle and the Defendant fled northbound on Lawrence Street, as the unidentified Hispanic male fled southbound on Lawrence Street. Officer Crawford pursued the Defendant and Officer Harron pursued the unidentified Hispanic male. As the Defendant reached just about the top of the block of the 3000 block of North Lawrence Street near Clearfield Street, the Defendant removed his hoodie. This slowed the Defendant down just enough to allow Officer Crawford to stop and apprehend the Defendant at the corner of Lawrence and Clearfield Streets. At this time, Officer Harron was rounding the corner of Clearfield Street and assisted Officer Crawford with the arrest. Officer Crawford directed Officer Harron to recover the hoodie which the Defendant had discarded during the chase. Officer Harron notified Officer Crawford that he was unable to stop the unidentified Hispanic male.

Recovered from the Defendant's hoodie were one clear sandwich baggie containing three clear ziplock packets, all containing a white powder substance, alleged cocaine, and one tan baggie containing twelve clear ziplock packets, all of which contained a green weedy substance, alleged marijuana. Also recovered from the Defendant's pants pocket was \$70 United States currency. The narcotics were submitted to the chem lab and did test positive for cocaine and marijuana respectively. Defendant was arrested and charged with possession with the intent to deliver a controlled substance, and knowing and intentional possession of a controlled substance.

Defendant's attorney, Mr. Young, called two witnesses at trial, Ms. Anna Maria Rodriguez and Ms. Keyla Rodriguez. Both witnesses testified that the Defendant had stopped at their house between 4:30 p.m. and 5:00 p.m. on September 6, 2011[,] and that the Defendant left around 5:30 p.m. The witnesses also testified that the Defendant was not wearing a hoodie but rather the Defendant was wearing a t-shirt and was jogging down their block to Fifth Street to catch the bus because it was raining at the time. Defendant's attorney, Mr. Young, also provided evidence that it was raining at the time of the incident which was in contradiction to Officer Crawford's testimony that he did not recall that it was raining at the time of the incident.

Trial Court Opinion, 1/8/13, at 1-3 (internal citations omitted).

The trial court found Appellant guilty of PWID and possession. At sentencing, Appellant admitted that the drug transaction occurred within a school zone and sought imposition of the then-applicable mandatory minimum sentence of two to four years. 18 Pa.C.S. § 6317. The Commonwealth, however, noted that the discretionary sentencing guidelines, when considering the guidelines school zone enhancement, was in excess of the mandatory. Specifically, the guideline range based on Appellant's prior record score of five was thirty-three months to sixty-three months plus or minus six months.<sup>1</sup> Accordingly, it asked that Appellant be sentenced to three to six years imprisonment for the PWID charge.

The court sentenced Appellant to two and one-half to five years incarceration to be followed by two years probation. Appellant did not file a timely post-sentence motion, but this timely appeal ensued. The trial court directed Appellant to file and serve a Pa.R.A.P. 1925(b) concise statement of errors complained of on appeal. Appellant complied, and the court authored its Rule 1925(a) decision. The matter is now ready for this Court's consideration. Appellant presents three issues for our review.

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<sup>1</sup> The guideline ranges applicable herein are from the Sixth Edition of the Sentencing Guidelines and not the current edition, which applies to offenses committed on or after September 27, 2013. The Sixth Edition guidelines set forth that the youth school zone enhancement adds twelve months to the lower limit of the standard range and thirty-six months to the upper limit. **See** 204 Pa.Code 303.9(b) (Sentencing Guidelines 6<sup>th</sup> Edition, 6/3/05; readopted 9/6/08 and 9/13/12).

- A. Was sufficient evidence presented by the Commonwealth to support a conviction?
- B. Was Appellant's conviction against the weight of the evidence?
- C. Did the trial court issue a greater sentence than necessary?

Appellant's brief at 4.

Appellant's first claim relates to the sufficiency of the evidence. In considering a sufficiency claim, "[w]e must determine whether the evidence admitted at trial, and all reasonable inferences drawn therefrom, when viewed in a light most favorable to the Commonwealth as verdict winner, support the conviction beyond a reasonable doubt." **Commonwealth v. Brown**, 52 A.3d 320, 323 (Pa.Super. 2012). The Commonwealth may establish its burden "by wholly circumstantial evidence and any doubt about the defendant's guilt is to be resolved by the fact finder unless the evidence is so weak and inconclusive that, as a matter of law, no probability of fact can be drawn from the combined circumstances." **Id.** This Court cannot "re-weigh the evidence and substitute our judgment for that of the fact-finder." **Id.** Further, "the entire record must be evaluated and all evidence actually received must be considered." **Id.**

"Where there is sufficient evidence to enable the trier of fact to find every element of the crime has been established beyond a reasonable doubt, the sufficiency of the evidence claim must fail." **Brown, supra** at 323. "The evidence established at trial need not preclude every possibility of

innocence and the fact-finder is free to believe all, part, or none of the evidence presented.” ***Id.***

Appellant argues that the Commonwealth failed to demonstrate that he possessed the drugs in question. In disregard of our well-ensconced standard of review, Appellant maintains that Officer Crawford’s testimony cannot be deemed credible since he could not recall whether it was raining on the date in question. Setting aside that we view the evidence in a light most favorable to the Commonwealth and do not disturb credibility findings, an inability to recall something does not mean that the person denied the fact in question.

Appellant also asserts that his two witnesses credibly testified that he did not have a hoodie. Appellant’s reliance on his own witnesses’ testimony also ignores this Court’s standard of review. The fact-finder was permitted to reject Appellant’s witnesses’ testimony and accept that of Officer Crawford. Officer Crawford testified that he never lost sight of Appellant and, as he gave chase, Appellant removed his hoodie and threw it to the ground. When Officer Harron recovered the discarded hoodie, it contained cocaine and marijuana. Hence, Appellant’s sufficiency claim is devoid of merit.

Appellant’s second issue is a challenge to the weight of the evidence. A weight claim must be preserved in a timely post-sentence motion. Appellant failed to raise this issue until he included it in his Rule 1925(b)

statement. Hence, the issue is waived. **Commonwealth v. Lofton**, 57 A.3d 1270, 1273 (Pa.Super. 2012) (“Failure to properly preserve the claim will result in waiver, even if the trial court addresses the issue in its opinion.”).

The final position Appellant advances is that the court imposed an excessive sentence. This issue relates to the discretionary aspects of his sentence. **See Commonwealth v. Dodge**, 77 A.3d 1263 (Pa.Super. 2013). Appellant, however, failed to raise this issue at sentencing or in a post-sentence motion. Thus, the issue is waived. **Commonwealth v. Cartrette**, 83 A.3d 1030, 1042-1043 (Pa.Super. 2013) (*en banc*). Moreover, Appellant neglected to provide a separate Pa.R.A.P. 2119(f) statement in his brief and the Commonwealth has objected. Hence, Appellant’s discretionary sentencing challenge is waived on that ground as well. **Commonwealth v. Brouger**, 978 A.2d 373, 375 (Pa.Super. 2009).

Nonetheless, we note that Appellant was subject to a mandatory minimum sentencing provision based on the drug deal occurring within a school zone. In light of **Alleyne v. United States**, 133 S.Ct. 2151 (2013), Pennsylvania’s mandatory minimum statutes, not pertaining to prior convictions, are unconstitutional. **Commonwealth v. Watley**, 81 A.3d 108, 116 (Pa.Super. 2013) (*en banc*).<sup>2</sup> This Court has on multiple occasions

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<sup>2</sup> **Alleyne v. United States**, 133 S.Ct. 2151 (2013), was decided on June 17, 2013; Appellant was sentenced on November 30, 2012.

considered **Alleyn**e issues to relate to the legality of a defendant's sentence. **Watley, supra; Commonwealth v. Munday**, 78 A.3d 661 (Pa.Super. 2013); **Commonwealth v. Thomson**, 2014 PA Super 106.

In **Watley**, we noted the complexity involving illegal sentencing questions and that this Court and our Supreme Court have struggled to agree upon a settled bright line definition. **See also Commonwealth v. Tobin**, 89 A.3d 663, 668 (Pa.Super. 2014) (collecting cases noting the difficulty in setting the parameters of an illegal sentencing question). We recognized the position of Chief Justice Castille that sentences that do not exceed a statutory maximum or implicate merger should not be considered illegal sentences.<sup>3</sup> The **Watley** Court also discussed retroactivity concerns, implicitly considering **Alleyn**e a new rule of law in light of the High Court's express abrogation of its own decisions in **Harris v. United States**, 536 U.S. 545 (2002), and **McMillan v. Pennsylvania**, 477 U.S. 79 (1986).

Citing to precedent governing mandatory minimum sentencing challenges as implicating the legality of a sentence, we opined that, "based on existing precedent, an **Alleyn**e claim can present a legality of sentence issue[.]" **Watley, supra** at 118. Ultimately, we concluded that the defendant's sentence under 42 Pa.C.S. § 9712.1, a firearm mandatory, was not illegal because the facts that triggered the mandatory minimum

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<sup>3</sup> Justice Eakin has also repeatedly expressed this view. **See e.g. Commonwealth v. Foster**, 17 A.3d 332 (Pa. 2011) (Eakin, J. concurring).

sentence were proven and decided by the jury beyond a reasonable doubt. In contrast, in **Munday**, we concluded that a trial court's imposition of a mandatory minimum sentence under § 9712.1 was an illegal sentence. The **Munday** Court determined that **Alleynes** issues are derivative of **Apprendi** claims,<sup>4</sup> which are considered illegal sentencing questions.<sup>5</sup>

In **Thomson**, the court sentenced the defendant under 18 Pa.C.S. § 7508(a)(2)(ii), a drug mandatory based on the weight of the drugs involved, and § 7508(b), which permitted the court to sentence based on a preponderance standard. The **Thomson** Court found that the facts necessary to apply the mandatory sentence were not determined by a factfinder or beyond a reasonable doubt. Relying on **Watley**, this Court vacated the sentence, although the defendant did not raise the issue.

We are cognizant that our Supreme Court recently granted allowance of appeal in **Commonwealth v. Johnson**, \_\_\_ A.3d \_\_\_ (Pa. 2014) (filed June 13, 2014), to determine whether imposition of a mandatory sentence under the school zone provision applicable here presents a non-waivable illegal sentencing claim. While our Supreme Court has yet to speak on this issue,

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<sup>4</sup> **Apprendi v. New Jersey**, 530 U.S. 466 (2000).

<sup>5</sup> The panel in **Commonwealth v. Munday**, 78 A.3d 661 (Pa.Super. 2013), did not discuss that **Apprendi** claims are considered illegal sentencing issues because the sentence imposed, if in violation of **Apprendi**, exceeds the statutory maximum, whereas **Alleynes** claims do not. **See Commonwealth v. Watley**, 81 A.3d 108, 118 n.7 (Pa.Super. 2013) (*en banc*).



based on **Watley, Munday, and Thomson**, mandatory minimum sentencing issues related to **Alleynes** claims can present a non-waivable legality of sentence question.<sup>6</sup> **See Marks v. Nationwide Ins. Co.**, 762 A.2d 1098, 1101 (Pa.Super. 2000) (“as long as the decision has not been overturned by our Supreme Court, a decision by our Court remains binding precedent.”).

Although a mandatory minimum sentence was applicable, we decline to find that Appellant’s sentence is illegal. Here, Appellant actually requested at sentencing that the court impose the mandatory minimum sentence of two to four years, which was less than the applicable advisory guideline sentencing range. The sentencing court imposed the higher guideline sentence. Thus, Appellant’s sentence was not mandatorily increased based on elements not proven beyond a reasonable doubt, but was increased by the discretion of the judge based on admitted facts and consideration of the sentencing guidelines. In this respect, we are aware that the school zone issue increased the advisory guideline range that the

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<sup>6</sup> Based on **Alleynes**, a sentencing court does not have authority to increase a defendant’s sentence pursuant to a mandatory minimum statute based on facts determined by a preponderance of the evidence. This could, in certain situations, fall within the description of an illegal sentence as one imposed by a court without constitutional authority. Of course, while a court may lack constitutional authority to mandatorily increase a sentence based on disputed facts not determined beyond a reasonable doubt, it nonetheless may retain the power to impose an aggravated sentence within its discretion. Unlike **Commonwealth v. Foster**, 960 A.2d 160 (Pa.Super. 2008), *affirmed by* 17 A.3d 332 (Pa. 2011) (OAJC), the trial court herein did not reject consideration and application of the guidelines based on the mandatory sentencing provision.

court considered. As Appellant makes no challenge relative to this fact, and no case has ruled that application of such guidelines under similar circumstances presents an illegal sentencing claim, we decline to provide him relief.<sup>7</sup> **But see Commonwealth v. Stokes**, 38 A.3d 846 (Pa.Super. 2011) (challenge to application of deadly weapon used sentencing guideline was discretionary sentencing claim in contrast to application of firearm mandatory which was an illegal sentencing question).

Further, since Appellant waived his jury trial right, the court was the fact-finder in this case. While the mandatory minimum statute permitted the court to reach the school zone findings based on a preponderance of the evidence standard rather than beyond a reasonable doubt, Appellant did not dispute that the drug sale occurred within a school zone. Indeed, Appellant placed on the record at sentencing that the sale occurred within a school zone. As Appellant admitted that the crime occurred within the requisite school zone, the fact that increased his sentence was undisputed and, for practical purposes, stipulated. **Cf. Watley, supra**. Accordingly, we discern no sentencing error.

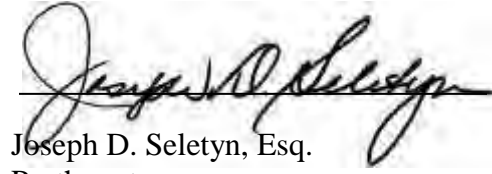
Judgment of sentence affirmed.

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<sup>7</sup> In **U.S. v. Booker**, 543 U.S. 220 (2005), the United States Supreme Court ruled that mandatory sentencing guidelines that increase a sentence beyond the statutory maximum otherwise applicable violate a defendant's jury trial right. The **Booker** Court then issued a separate remedial decision that declared the federal sentencing guidelines would thereafter be advisory. Here, Pennsylvania's advisory guidelines do not increase a sentence beyond the applicable statutory maximum.

J-S41009-14

Judgment Entered.

A handwritten signature in black ink, appearing to read "Joseph D. Seletyn", written over a horizontal line.

Joseph D. Seletyn, Esq.  
Prothonotary

Date: 7/23/2014