

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,

Appellee

v.

KHALIL THOMPSON,

Appellant

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 3246 EDA 2013

Appeal from the Judgment of Sentence November 4, 2013
In the Court of Common Pleas of Philadelphia County
Criminal Division at No(s): CP-51-CR-0008247-2012

BEFORE: SHOGAN, MUNDY, and FITZGERALD,* JJ.

MEMORANDUM BY SHOGAN, J.:

FILED JULY 31, 2015

Appellant, Khalil Thompson, appeals from the judgment of sentence entered following his convictions of possession of a controlled substance with intent to deliver ("PWID") and simple possession of a controlled substance. We vacate the judgment of sentence and remand for resentencing.

The trial court set forth the underlying facts of this case as follows:

On June 12, 2012 at around 6:45 pm, shortly after watching James Reed sell a packet of cocaine to Lisa Dawkins a few blocks away and then make a call from a cellphone, Police Officer Christopher Hulmes observed Appellant drive a Chevy Impala up to Reed's location outside of a bar. Reed got into the passenger side of the vehicle and made a quick call from a cell phone that Appellant had handed him. Appellant proceeded to pull a white bag from the center console and removed a clear baggie of marijuana, which he handed to Reed for inspection. Both men

* Former Justice specially assigned to the Superior Court.

saw Officers Wright and Flynn as they approached the car and attempted to shove the white bag under the front seat; they were arrested. Recovered from Appellant's lap was the baggie of marijuana. Recovered from the white bag were six packets of marijuana, six packets of crack cocaine, five packets of cocaine powder, more than one hundred Oxycodone pills and more than fifty Xanax pills. Police also confiscated \$350 from Appellant and 75 packets of cocaine from the stash that Reed had been utilizing.

Trial Court Opinion, 8/25/14, at 1-2.

On August 12, 2013, following a nonjury trial, Appellant was convicted of the crimes stated above. The trial court found Appellant not guilty of conspiracy. On November 4, 2013, the trial court sentenced Appellant to a mandatory term of incarceration of three to six years, followed by one year of probation for the conviction of PWID.¹ This timely appeal followed.

Appellant presents the following issue for our review:

Should this matter be remanded for resentencing because under the recently decided case of ***Commonwealth v. Vargas***, [108 A.3d 858 (Pa. Super. 2014) (*en banc*)], the sentencing scheme employed by the lower court was unconstitutional?

Appellant's Brief at 4.

¹ Although the sentencing court did not explicitly state that it was imposing a mandatory sentence pursuant to 18 Pa.C.S. § 7508, nevertheless, it appears to have applied section 7508. In the criminal information, the Commonwealth indicated that it intended to proceed with the mandatory minimum sentence applicable under 18 Pa.C.S. § 7508. Furthermore, in its appellate brief the Commonwealth has conceded that the trial court imposed the mandatory minimum sentence under 18 Pa.C.S. § 7508. Commonwealth's Brief at 4 n.2. Moreover, at sentencing, the trial judge stated, "This is a mandatory sentence, and as far as I know, it's the only reason I'm imposing it." N.T., 11/4/13, at 7.

Appellant argues that the trial court imposed an illegal mandatory minimum sentence for his conviction of PWID, which was based upon the weight of the drugs in question. In support of his argument that his mandatory minimum sentence is illegal, Appellant cites this Court's recent decision in **Vargas**, which held that under the United State Supreme Court's decision in **Alleyne v. United States**, ___ U.S. ___, 133 S.Ct. 2151 (2013), as well as this Court's decisions in **Commonwealth v. Newman**, 99 A.3d 86 (Pa. Super. 2014) (*en banc*) and **Commonwealth v. Valentine**, 101 A.3d 801 (Pa. Super. 2014), 18 Pa.C.S. § 7508 is unconstitutional.

Although Appellant did not contest the imposition of the mandatory minimum sentence under **Alleyne** at the time of sentencing or in his Pa.R.A.P. 1925(b) statement, "a challenge to a sentence premised upon **Alleyne** ... implicates the legality of the sentence and cannot be waived on appeal." **Newman**, 99 A.3d at 90. Moreover, this Court may address the legality of a sentence *sua sponte*. **Commonwealth v. Watley**, 81 A.3d 108, 118 (Pa. Super. 2013) (*en banc*), *appeal denied*, 95 A.3d 277 (Pa. 2014).

This Court has held that 18 Pa.C.S. § 7508 is invalid pursuant to **Alleyne**. **See Commonwealth v. Fennell**, 105 A.3d 13, 20 (Pa. Super. 2014) (holding that, notwithstanding the fact triggering imposition of mandatory sentence under 18 Pa.C.S. § 7508 was stipulated to at trial, the statute was unconstitutional). As Appellant observes, an *en banc* panel of

this Court has stated that “a mandatory minimum sentence imposed under this statute is illegal.” **Vargas**, 108 A.3d at 876 (citing **Fennell**). **See also Cardwell**, 105 A.3d 748 (Pa. Super. 2014) (holding trial court erred by imposing mandatory minimum sentence under Section 7508, even where parties stipulated to weight of drugs; applying **Newman** and its progeny, and concluding that Section 7508(b) is not severable from remainder of statute; and remanding for resentencing without imposition of mandatory minimum sentence).

The Commonwealth has essentially conceded that, pursuant to the current case law, the mandatory minimum sentence invoked here, 18 Pa.C.S. § 7508, has been held to be unconstitutional by this Court.² Commonwealth’s Brief at 7. Accordingly, because we have held 18 Pa.C.S. §

² We observe that the Commonwealth has recognized that case law authored by this Court is controlling unless the Supreme Court rules otherwise and has reserved its right to seek further review on this issue. Commonwealth’s Brief at 7-8. Indeed, we must follow the decisional law established by our own Court. **Commonwealth v. Santiago**, 980 A.2d 659, 666 n.6 (Pa. Super. 2009).

Furthermore, we note that recently in **Commonwealth v. Hopkins**, 98 MAP 2013, ___ A.3d ___ (Pa. filed June 15, 2015), our Supreme Court, in a direct appeal filed by the Commonwealth from an order of the Court of Common Pleas, relied upon **Alleyn** and struck down as unconstitutional the mandatory minimum sentencing scheme regarding drug-free school zones set forth in 18 Pa.C.S. § 6317. In pertinent part, the Court in **Hopkins** refused to sever the violative provisions from the statute, which was the same determination reached by this Court in **Newman**.

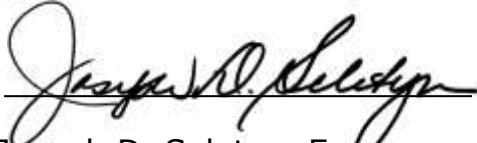
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7508 to be unconstitutional, we vacate the judgment of sentence and remand for resentencing.

Judgment of sentence vacated. Case remanded for resentencing.

Jurisdiction relinquished.

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: 7/31/2015