

**NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37**

|                               |   |                          |
|-------------------------------|---|--------------------------|
| COMMONWEALTH OF PENNSYLVANIA, | : | IN THE SUPERIOR COURT OF |
|                               | : | PENNSYLVANIA             |
| Appellee                      | : |                          |
|                               | : |                          |
| v.                            | : |                          |
|                               | : |                          |
| CHRISTOPHER GLADNEY,          | : |                          |
|                               | : |                          |
| Appellant                     | : | No. 1496 EDA 2014        |

Appeal from the Judgment of Sentence April 11, 2014  
In the Court of Common Pleas of Philadelphia County  
Criminal Division No(s): CP-51-CR-0002090-2013

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

JUDGMENT ORDER BY FITZGERALD, J.: **FILED JULY 31, 2015**

Appellant, Christopher Gladney, appeals from the judgment of sentence entered in the Philadelphia County Court of Common Pleas following a plea of no contest to possession of a controlled substance with intent to deliver<sup>1</sup> ("PWID") and possession of a controlled substance.<sup>2</sup> We vacate the judgment of sentence and remand for resentencing.

We adopt the facts and procedural history set forth by the trial court. **See** Trial Ct. Op., 2/12/15, at 1-3. Appellant timely appealed and timely

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\* Former Justice specially assigned to the Superior Court.

<sup>1</sup> 35 P.S. § 780-113(a)(30).

<sup>2</sup> 35 P.S. § 780-113(a)(16).

J. S42036/15

filed a court-ordered Pa.R.A.P. 1925(b) statement. Appellant raises the following issue:

Did the trial court impose the mandatory minimum sentence pursuant to 18 Pa.C.S. § 7508 in violation of the United States Supreme Court's recent decision in ***Alleyn v. United States***?

Appellant's Brief at 3.

Appellant argues that the *en banc* Superior Court in ***Commonwealth v. Vargas***, 108 A.3d 858 (Pa. Super. 2014) (*en banc*), held that 18 Pa.C.S. § 7508 was unconstitutional. He contends that because he was sentenced under 18 Pa.C.S. § 7508(a)(3)(i), this Court must vacate his sentence and remand for resentencing. We agree Appellant is entitled to relief.

In ***Commonwealth v. Dixon***, 53 A.3d 839 (Pa. Super. 2012), this Court set forth the following standard of review:

Application of a mandatory sentencing provision implicates the legality, not the discretionary, aspects of sentencing. In reviewing the trial court's interpretation of statutory language, we are mindful of the well-settled rule that statutory interpretation implicates a question of law. Thus, our scope of review is plenary, and our standard of review is *de novo*.

***Id.*** at 842 (citations and punctuation omitted).

Recently, in a series of cases, this Court has held that mandatory minimum sentences imposed under 18 Pa.C.S. § 7508 were illegal. ***See Commonwealth v. Mosley***, 114 A.3d 1072, 1091 (Pa. Super. 2015) (vacating mandatory minimum sentence imposed under 18 Pa.C.S. § 7508(a)(3)(ii)); ***Commonwealth v. Vargas***, 108 A.3d 858, 876 (Pa.

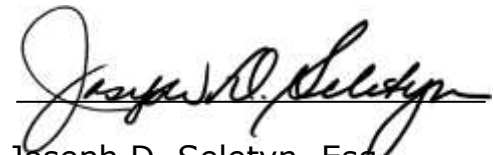
J. S42036/15

Super.) (*en banc*) (holding "18 Pa.C.S. § 7508 unconstitutional in its entirety."), *appeal denied*, 154 EAL 2015 (Pa. July 29, 2015); ***Commonwealth v. Cardwell***, 105 A.3d 748, 755 (Pa. Super. 2014) (concluding trial court erred by imposing mandatory minimum sentence under 18 Pa.C.S. § 7508(a)(4)(i)); ***Commonwealth v. Fennell***, 105 A.3d 13, 20 (Pa. Super. 2014) (vacating mandatory minimum sentence imposed per 18 Pa.C.S. § 7508(a)(7)(i)); ***Commonwealth v. Thompson***, 93 A.3d 478, 493 (Pa. Super. 2014) (holding mandatory minimum sentence under 18 Pa.C.S. § 7508(a)(2)(ii) was illegal). Instantly, given the ***Mosley*** Court vacated a mandatory minimum sentence imposed under Subsection 7508(a)(3)(ii), which is virtually identical to the instant Subsection 7508(a)(3)(i) at issue, we similarly vacate Appellant's sentence and remand for resentencing. ***See Mosley***, 114 A.3d at 1091.

Judgment of sentence vacated. Case remanded for resentencing.

Jurisdiction relinquished.

Judgment Entered.

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Joseph D. Seletyn, Esq.  
Prothonotary

Date: 7/31/2015

IN THE COURT OF COMMON PLEAS  
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA  
TRIAL DIVISION – CRIMINAL SECTION

COMMONWEALTH OF PENNSYLVANIA : CP-51-CR-0002090-2013  
 :  
 v. : 1496 EDA 2014  
 :  
 CHRISTOPHER GLADNEY :  
 :

OPINION

CP-51-CR-0002090-2013 Comm. v. Gladney, Christopher  
Opinion

COVINGTON, J.



FILED

FEB 12 2015

Criminal Appeals Unit  
First Judicial District of PA

PROCEDURAL HISTORY

On September 17, 2013, following an open Nolo Contendre plea, the defendant was determined guilty of Manufacture, Delivery, or Possession With Intent to Manufacture or Deliver (18 §780-113 §§A(30)) and Intentional Possession of a Controlled Substance By Person Not Regulated (18 §780-113 §§A(16)). A Presentence Report was ordered by the Court and prepared on October 28, 2013.

On February 28, 2014, defense counsel filed a Motion to Withdraw No Contest Plea. On April 11, 2014, defense counsel withdrew the Motion to Withdraw No Contest Plea, and litigated a Motion to Bar Application of Mandatory Minimum Sentence. Defense counsel’s motion was denied. On April 11, 2014, following the sentencing hearing, defendant was sentenced to three (3) to six (6) years incarceration, with credit for time served.

On May 12, 2014, the defendant filed a timely notice of appeal.

## FACTUAL HISTORY

On September 17, 2013, before entering the plea of nolo contendere in open court, the Defendant read and discussed a written colloquy with his attorney. N. T. 9/17/2013 p 7. The colloquy detailed the charges, the maximum sentence, and his rights at trial. The colloquy also required the Defendant to sign in confirmation that he was not threatened or promised anything, and he agreed to go forward with his no contest plea with no plea bargain agreement of any kind. The court explained and compared the difference between a trial and a nolo contendere plea. *Id.* at 7-8. Defendant was informed he would not be able to defend himself against the Commonwealth's assertions. *Id.* at 9. The Court further clarified that if she only hears one side of the story she will believe that side, and with a plea of no contest she would find the Defendant guilty. *Id.* at 8.

Following the colloquy, the Commonwealth summarized the facts as follows, "At the location of 3200 North Sydenham Street, in the city and county of Philadelphia, on the date of December 4, 2012, at approximately 6:10 p.m., ...defendant was seen engaging in a drug transaction with the confidential informant. This defendant was seat[ed in a car]. The informant came to [the] window and made an exchange with the defendant for two packets of crack cocaine...within minutes... by [a] police officer. There was an amount of three hundred and thirty-five dollars, along with twenty-three blue packets matching the crack cocaine in the defendant's open fly in his pants... There [were] also six white pills... and one was recovered. All of these were placed on property receipts, including the currency... [T]hese items were sent to the [chemistry] lab and they tested positive for crack cocaine." N.T. 9/17/2013, pp. 14-15. The chemistry lab determined the weight to be 1.6 milligrams for the initial two packets and

2.399 grams for the twenty-three (23) blue ziplock packets. The seven white pills tested positive for oxycodone and the round blue tablet, tested positive for Schedule II morphine. *Id.* at 15.

Defendant testified he did not contest the facts. *Id.* at 16. The Court Crier proceeded to arraign the Defendant. *Id.*

### **STANDARD OF REVIEW**

The standard of review applied to reviewing the sufficiency of the evidence is “whether, viewing all the evidence admitted at trial in the light most favorable to the verdict winner, there is sufficient evidence to enable the fact-finder to find every element of the crime beyond a reasonable doubt.” *Commonwealth v. Gray*, 867 A.2d 560, 567 (Pa. Super 2004). In applying this test, the appellate court may not weigh the evidence and substitute its judgment for the fact-finder. *Id.* In addition, the “Commonwealth need not preclude every possibility of innocence. The Commonwealth may sustain its burden of proving every element of the crime beyond a reasonable doubt by means of wholly circumstantial evidence.” *Commonwealth v. Kerry*, 906 A.2d 1237, 1240 (Pa. Super. 2006).

“When reviewing sentencing matters, [an appellate court] must accord the sentencing court great weight as it is in the best position to view defendant’s character, displays or remorse, defiance or indifferences, and the overall nature of the crime.” *Commonwealth v. Cappellini*, 690 A.2d 1220, 1225 (Pa. Super. 1997) (quoting *Commonwealth v. Viera*, 659 A.2d 1024, 1030 (Pa. Super. 1995)). The sentencing function is vested in the sound discretion of the trial court, whose judgment will not be disturbed by an appellate court in the absence of an abuse of discretion. *Commonwealth v. Walls*, 926 A.2d 957, 962 (Pa. 2007).

## DISCUSSION

Pursuant to the 1925(b) Statement of Errors Complained of on Appeal, the defendant asserts that (1) the Court erred by finding that all of the controlled substances recovered from Defendant were possessed with the intent to deliver, where there was insufficient evidence to determine what amount of controlled substance was possessed for personal use and what amount was intended to be delivered, and (2) the Court erred by sentencing defendant under 41 Pa.C.S. 7508, titled Drug trafficking sentencing and penalties, where it is unconstitutional under *Alleyne v. United States*, 133 S. Ct. 2351 (US. 2013).

### **I. There Was Sufficient Evidence to Find Defendant Possessed the Controlled Substances With the Intent to Deliver**

The above facts show Defendant's guilty plea entered on September 17, 2013 was knowing, intelligent, and voluntary. In terms of its effect upon a case, a plea of nolo contendere is treated the same as a guilty plea. *Commonwealth v. Winston*, 791 A.2d 1227, 1230 (Pa. Super. 2001) (quoting *Commonwealth v. Miller*, 748 A.2d 733, 735 (Pa. Super. 2000)). The law does not require that the defendant be pleased with the outcome of the decision to enter a plea, only that it be knowingly, voluntarily, and intelligently made. *Commonwealth v. Meyers*, 642 A.2d 1103, 1105 (Pa. Super. 1994). An analysis of the voluntariness of a plea warrants consideration of the totality of the circumstances surrounding the entry of the guilty plea. *Commonwealth v. Shekerko*, 639 A.2d 810, 813 (Pa. Super. 1994).

In the instant case, at Defendant's no contest plea hearing, the Commonwealth introduced evidence indicating Defendant possessed 2.399 grams of crack cocaine. After the Commonwealth read the summary of facts for the case, Defendant replied, "I do not contest." N.T. 9/17/2013, p. 16. At the plea hearing, defense counsel indicated he intended to file a motion for a *Carol* hearing. *Id.* at 5. Defense counsel failed to ever file a *Carol* motion, or

challenge the weight of the controlled substances. At the sentencing hearing on April 11, 2014, defense counsel explicitly stated, "I'm certainly not objecting to the one-year mandatory based on the weight that was entered into the evidence at the no contest plea." N.T. 4/11/2014, p. 4. In defense counsel's motion to bar application of the mandatory minimum sentence he describes 18 Pa.C.S. § 7508(a)(3)(i) as "an enhancement for sentencing purposes when a person has been previously convicted of violating the same or similar action." See Exhibit A.

There is sufficient uncontradicted evidence Defendant was possessed 2.399 grams crack cocaine with the intent to deliver. Defendant knowingly, voluntarily, and intelligently replied he did not contest the facts stated by the Commonwealth. As a plea of no contest is deemed the same as a plea of guilty in terms of effect on the case, Defendant admitted to all the facts listed by the Commonwealth. These facts indicated Defendant posed the controlled substances after police observed him engage in a transaction with a confidential informant. There was no evidence proffered to indicate Defendant possessed any of the crack cocaine for personal use.

## **II. Defendant's Sentence Was Proper**

The Pennsylvania Courts have not found Pa.C.S. § 7508 to be facially unconstitutional in its entirety. See *Commonwealth v. Fennel*, 105 A.3d. 13 (Pa. Super. 2014). Defendant's case is distinguishable from *Alleyne v. United States*, *Commonwealth v. Newman*, and *Fennell*. There is nothing in *Alleyne v. United States*, suggests it applies to a guilty plea where Defendant admits to the facts that would implicate a mandatory minimum sentence. 133 S.Ct. 2151 (U.S. 2013). In *Newman*, the defendant was found guilty following a jury trial. 99 A.3d 86 (Pa. Super. 2014) (*en banc*). In *Fennell*, the defendant was found guilty following bench trial. 105 A.3d. 13 (Pa. Super. 2014).



As Pa.C.S. § 750 has not been found facially unconstitutional, the Court must analyze the constitutionality of the statute as it was applied in the instant case. In the instant case, Defendant was found guilty following a no contest plea. Further, in the instant case, Defendant did not contest the facts presented by the Commonwealth. As there was sufficient evidence Defendant possessed the requisite amount of a controlled substance, discussed *supra*, Defendant's only challenge can be to the application of Pa.C.S. § 7508 based on his prior convictions.

“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 v. New Jersey*, 120 S. Ct. 2348, 2362-63 (US. 2000). “Moreover, there is a vast difference between accepting the validity of a prior judgment of conviction entered in a proceeding in which the defendant had the right to a jury trial and the right to require the prosecutor to prove guilt beyond a reasonable doubt, and allowing the judge to find the required fact under a lesser standard of proof.” *Apprendi, supra* at 2366. “The *Alleyne* decision, therefore, renders those Pennsylvania mandatory minimum sentencing statutes that do not pertain to prior convictions constitutionally infirm insofar as they permit a judge to automatically increase a defendant's sentence based on a preponderance of the evidence standard. *Comonwealth. v. Watley*, , 81 A.3d 108, 117 (Pa. Super. 2013) *appeal denied*, 95 A.3d 277 (Pa. 2014).

It is clear the courts distinguish mandatory minimum sentence statutes that involve material facts from those involving prior convictions. As applied in the instant case, Pa.C.S. § 7508 only requires a finding that the defendant was previously convicted under the same or similar provision. Although, the determination of prior convictions was determined at

sentencing, by a preponderance of the evidence standard, this is distinguishable from *Newman* and *Fennell* as it pertains to prior convictions, not the facts of the offense leading to sentencing. Thus, the Courts sentence issued pursuant to Pa.C.S. § 7508 was proper and constitutional.

**CONCLUSION**

For the foregoing reasons, it is respectfully requested the Trial Court's sentence be affirmed.

**BY THE COURT:**

A handwritten signature in black ink, appearing to read 'RCovington', written over a horizontal line.

**Roxanne E. Covington**  
**February 10, 2015**

# EXHIBIT "A"

EDWARD C. MEEHAN JR. & ASSOCIATES  
Edward C. Meehan Jr., Esquire  
Attorney ID No. 55789  
211 North 13<sup>th</sup> Street, Suite 701  
Philadelphia, PA 19107  
215.564.4173

Attorney for CHRISTOPHER GLADNEY

|                              |   |                         |
|------------------------------|---|-------------------------|
| COMMONWEALTH OF PENNSYLVANIA | : | COURT OF COMMON PLEAS   |
|                              | : | CRIMINAL TRIAL DIVISION |
|                              | : |                         |
| v.                           | : | CP-51-CR-0002090-2013   |
|                              | : | OTN# N 836758-6         |
|                              | : |                         |
| CHRISTOPHER GLADNEY          | : | CHARGES: PWID (F)       |
| PP# 885341                   | : |                         |
| SID# 282-66-17-1             | : |                         |

**ORDER FOR HEARING**

**AND NOW**, this                    day of                    , 2014, upon application of **EDWARD C. MEEHAN Jr., ESQUIRE**, a hearing is set on the enclosed petition/motion for the                    day of                    , 2014, in **Courtroom 602**, at a.m. for the Office of the District Attorney of Philadelphia to show why the attached Motion for Bar Application of Mandatory provision in 18 Pa.C.S.A Section 7508(a)(3)(i) should not be **GRANTED**.

**BY THE COURT:**

\_\_\_\_\_  
J.

EDWARD C. MEEHAN JR. & ASSOCIATES  
Edward C. Meehan Jr., Esquire  
Attorney ID No. 55789  
211 North 13<sup>th</sup> Street, Suite 701  
Philadelphia, PA 19107  
215.564.4173

Attorney for CHRISTOPHER GLADNEY

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|                              |   |                         |
|------------------------------|---|-------------------------|
| COMMONWEALTH OF PENNSYLVANIA | : | COURT OF COMMON PLEAS   |
|                              | : | CRIMINAL TRIAL DIVISION |
|                              | : |                         |
| v.                           | : | CP-51-CR-0002090-2013   |
|                              | : | OTN# N 836758-6         |
|                              | : |                         |
| CHRISTOPHER GLADNEY          | : | CHARGES: PWID (F)       |
| PP# 885341                   | : |                         |
| SID# 282-66-17-1             | : |                         |

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ORDER

AND NOW, this                      day of                      , 2014, upon application of **EDWARD C. MEEHAN Jr., ESQUIRE**, it is the **ORDER** of this Court that petitioner's Motion to Bar Application of the Mandatory sentencing provision in 18 Pa.S.C.A. Section 7508(a)(3)(i) is **GRANTED**.

BY THE COURT:

\_\_\_\_\_  
J.

EDWARD C. MEEHAN JR. & ASSOCIATES  
Edward C. Meehan Jr., Esquire  
Attorney ID No. 55789  
211 North 13<sup>th</sup> Street, Suite 701  
Philadelphia, PA 19107  
215.564.4173

Attorney for CHRISTOPHER GLADNEY

|                              |   |                         |
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|                              | : | CRIMINAL TRIAL DIVISION |
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|                              | : |                         |
| CHRISTOPHER GLADNEY          | : | CHARGES: PWID (F)       |
| PP# 885341                   | : |                         |
| SID# 282-66-17-1             | : |                         |

**MOTION TO BAR APPLICATION OF MANDATORY MINIMUM SENTENCE**

Defendant, Christopher Gladney, by his attorney, Edward C. Meehan Jr.,  
Esq.:

1. In this case, the Commonwealth seeks to invoke the mandatory minimum sentencing statute, 18 Pa. C. S. § 7508(a)(3)(i) which provides an enhancement for sentencing purposes when a person has been previously convicted of violating the same or similar section.

2. § 7508 has a subsection titled, "Proof at sentencing," which provides that the facts establishing applicability of the mandatory minimum sentence shall not be elements of the crime and are to be determined by the sentencing judge at sentencing by a preponderance of the evidence. § 7508(b).

3. The Sixth Amendment of the United States Constitution as applied to the States via the Due Process Clause of the Fourteenth Amendment, however,

mandates that "any fact that, by law, increases the penalty for a crime is an 'element' that must be submitted to the jury and found beyond a reasonable doubt." Alleyne v. United States, 133 S. Ct. 2151, 2155 (2013) (citing Apprendi v. New Jersey, 530 U.S. 466, 483 (2000)). See also United States v. Gaudin, 515 U.S. 506, 510 (1995) (Sixth Amendment right to trial by impartial jury, in conjunction with Due Process Clause, requires that each element of crime be proved to jury beyond reasonable doubt). Because a mandatory minimum sentence increases the potential penalty for a crime, any fact that triggers application of that mandatory minimum sentence is an "element" that must be submitted to a jury and proven beyond a reasonable doubt. Alleyne, 133 S. Ct. at 2155.

4. As such, 18 Pa. C. S. § 7508 is facially unconstitutional in that it requires procedures that the Sixth and Fourteenth Amendments prohibit.

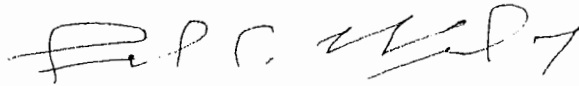
5. Moreover, the unconstitutional provisions of § 7508 are not severable under 1 Pa. C. S. § 1925 as they are so explicit, prominent, and central to the statute that it cannot be presumed that the General Assembly would have enacted the statute absent these provisions. Excising the unconstitutional provisions of § 7508 would eviscerate the statutory methodology for its implementation, thereby creating an incomplete statute incapable of execution in accordance with legislative intent. Thus, severability is not proper and § 7508 is wholly inoperative.

6. Finally, "where a legislative scheme is determined to have run afoul of constitutional mandate, it is not the role of [the] Court to design an alternative scheme which may pass constitutional muster." Heller v. Frankston, 475 A.2d 1291,

1296 (Pa. 1984). Therefore, this Court should bar application of § 7508(a)(3)(i) in the instant case.

**WHEREFORE**, Defendant prays that this Court bar imposition of the mandatory minimum sentence because the statute requiring same is facially unconstitutional.

Respectfully submitted,

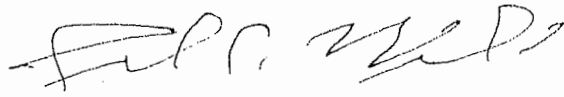
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Edward C. Meehan Jr., Esq.,  
Attorney for Christopher Gladney



**VERIFICATION**

The facts set forth in the foregoing are true and correct to the best of the undersigned's knowledge, information and belief, and are subject to penalties for unsworn falsification to authorities under Pennsylvania Crimes Code Section 4904 (18 Pa.C.S. Section 4904).



**EDWARD C. MEEHAN JR., ESQUIRE**

**DATE:**

4/11/14