NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellee	:	
	:	
v.	:	
	:	
LAURA WASHINGTON,	:	
	:	
Appellant	:	No. 1889 EDA 2014

Appeal from the Judgment of Sentence August 31, 2011
In the Court of Common Pleas of Philadelphia County
Criminal Division No(s).: CP-51-CR-0005694-2008

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

MEMORANDUM BY FITZGERALD, J.: **FILED JULY 31, 2015**

Appellant, Laura Washington, appeals from the judgment of sentence entered in the Philadelphia County Court of Common Pleas following a bench trial and conviction for possession with intent to deliver[1] ("PWID"), simple possession,[2] and criminal conspiracy.[3] She challenges the sufficiency of evidence for PWID and criminal conspiracy. We affirm Appellant's convictions, vacate the judgment of sentence, and remand for resentencing.

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* Former Justice specially assigned to the Superior Court.

[1] 35 P.S. § 780-113(a)(30).

[2] 35 P.S. § 780-113(a)(16).

[3] 18 Pa.C.S. § 903.

We adopt the facts and procedural history set forth by the trial court's opinion. ***See*** Trial Ct. Op., 11/6/14, at 1-6. We add that Appellant had three prior PWID convictions in 1988, to which counsel indicated no disagreement. N.T. Sentencing Hr'g, 8/31/11, at 6. We also note that Appellant stipulated to the weight of the drugs as approximately 14.64 grams. N.T. Trial, 7/13/11, at 171. Based in part on, *inter alia*, those prior convictions, the court sentenced Appellant to a mandatory minimum sentence of five to ten years. ***Id.*** at 13.

Appellant timely appealed and timely filed a court-ordered Pa.R.A.P. 1925(b) statement raising four issues, including a challenge to the sufficiency of evidence for PWID and conspiracy. Appellant did not challenge her conviction for simple possession.

Appellant opted to raise one issue in her appellate brief:

> Was the evidence sufficienct to convict . . . Appellant of the crimes where there was no evidence that . . . Appellant was involved in either of the sales of controlled substances observed and had no controlled substances in her possession.

Appellant's Brief at 7.

In support of her issue, Appellant's argument comprised one page of three paragraphs. After two paragraphs of law, we set forth her last paragraph as follows:

> Clearly, . . . Appellant was not observed having any involvement with either of the sales. She was found in actual possession of no controlled substances. The fact that . . . Appellant in this case was present when a crime

> was committed by another is insufficient unless there is evidence of her participation in the crime.

Id. at 11 (citation omitted).

The standard of review for a challenge to the sufficiency of evidence is *de novo*, as it is a question of law. ***Commonwealth v. Ratsamy***, 934 A.2d 1233, 1235 (Pa. 2007).

> [T]he critical inquiry on review of the sufficiency of the evidence to support a criminal conviction . . . does not require a court to ask itself whether **it** believes that the evidence at the trial established guilt beyond a reasonable doubt. Instead, it must determine simply whether the evidence believed by the fact-finder was sufficient to support the verdict.

Id. at 1235-36 (citations and some punctuation omitted). "When reviewing the sufficiency of the evidence, an appellate court must determine whether the evidence, and all reasonable inferences deducible from that, viewed in the light most favorable to the Commonwealth as verdict winner, are sufficient to establish all of the elements of the offense beyond a reasonable doubt." ***Id.*** at 1237 (citation and some punctuation omitted).

PWID is defined as follows:

> Except as authorized by this act, the manufacture, delivery, or possession with intent to manufacture or deliver, a controlled substance by a person not registered under this act, or a practitioner not registered or licenses by the appropriate State board, or knowingly creating, delivering or possessing with intent to deliver, a counterfeit controlled substance.

35 P.S. § 780-113(a)(30). "In order to uphold a conviction for possession of narcotics with the intent to deliver, the Commonwealth must prove beyond a

reasonable doubt that the defendant possessed a controlled substance and did so with the intent to deliver it." ***Commonwealth v. Aguado***, 760 A.2d 1181, 1185 (Pa. Super. 2000) (*en banc*).

After viewing the record in the light most favorable to the Commonwealth, the parties' briefs, and the decision of the Honorable Charles J. Cunningham, III, we affirm on the basis of the trial court's decision. ***See*** Trial Ct. Op. at 3-6, 9-10 (summarizing evidence of multiple drug transactions with confidential informant and proximity of inculpatory evidence to Appellant). The trial court's decision also addressed the legality of Appellant's sentence, which Appellant did not raise before this Court, under ***Alleyne v. United States***, 133 S. Ct. 2151 (2013).

It is well-settled, however, that this Court can *sua sponte* address a challenge to the legality of a sentence, so we address Appellant's ***Alleyne*** claim. ***See Commonwealth v. Watley***, 81 A.3d 108, 118 (Pa. Super. 2013) (*en banc*), *appeal denied*, 95 A.3d 277 (Pa. 2014). Subsection 7508(a)(3)(ii) follows:

> **§ 7508. Drug trafficking sentencing and penalties**
>
> **(a) General rule.—**Notwithstanding any other provisions of this or any other act to the contrary, the following provisions shall apply:
>
> * * *
>
> (3) A person who is convicted of violating section 13(a)(14), (30) or (37) of The Controlled Substance, Drug, Device and Cosmetic Act where the controlled substance is coca leaves or is any salt, compound,

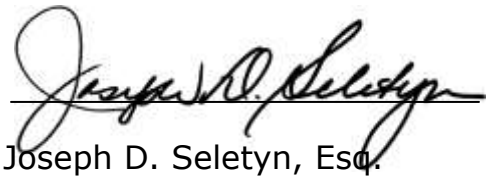
> derivative or preparation of coca leaves or is any salt, compound, derivative or preparation which is chemically equivalent or identical with any of these substances or is any mixture containing any of these substances except decocainized coca leaves or extracts of coca leaves which (extracts) do not contain cocaine or ecgonine shall, upon conviction, be sentenced to a mandatory minimum term of imprisonment and a fine as set forth in this subsection:
>
> * * *
>
> (ii) when the aggregate weight of the compound or mixture containing the substance involved is at least ten grams and less than 100 grams; three years in prison and a fine of $15,000 or such larger amount as is sufficient to exhaust the assets utilized in and the proceeds from the illegal activity; however, if at the time of sentencing the defendant has been convicted of another drug trafficking offense: five years in prison and $30,000 or such larger amount as is sufficient to exhaust the assets utilized in and the proceeds from the illegal activity . . . .

18 Pa.C.S. § 7508(a)(3)(ii). A defendant's stipulation to the weight of the drugs does not negate the requirement that a fact-finder find weight beyond a reasonable doubt. ***Commonwealth v. Fennell***, 105 A.3d 13, 20 (Pa. Super. 2014) (vacating mandatory minimum sentence because, *inter alia*, "we see no meaningful difference . . . between submitting the element to the jury and accepting a stipulation from a defendant."). In ***Commonwealth v. Thompson***, 93 A.3d 478 (Pa. Super. 2014), the Court held a mandatory minimum sentence imposed under 18 Pa.C.S. § 7508(a)(2)(ii), was illegal under ***Watley***, ***supra***, and ***Alleyne***, ***supra***. ***Id.*** at 494. Because we discern no substantive distinction between Section 7508(a)(2)(ii) in

Thompson and the instant Section 7508(a)(3)(ii), and that under ***Fennell***, Appellant's stipulation to the weight did not negate the ***Alleyne*** mandate, we hold the court erred by imposing a mandatory minimum sentence. ***See Fennell***, 105 A.3d at 20; ***Thompson***, 93 A.2d at 494.

Judgment of sentence vacated. Case remanded for resentencing.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 7/31/2015

FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
COURT OF COMMON PLEAS, CRIMINAL TRIAL DIVISION

COMMONWEALTH OF PENNSYLVANIA	:	
	:	1889 EDA 2014
v.	:	
	:	CP-51-CR-0005694-2008
LAURA WASHINGTON	:	(PCRA)

OPINION

STATEMENT OF THE CASE

This appeal arises after the Court granted Defendant's PCRA petition seeking allowance to file an appeal *nunc pro tunc* on the grounds of ineffective assistance of counsel. Defendant now complains that, because she was merely present in her home, she was not seen selling drugs and the drugs were not found on her person, the evidence at trial was insufficient to support her conviction on the charge of Possession With Intent to Deliver a Controlled Substance (PWID). Defendant's complaints are without merit.

PROCEDURAL HISTORY

Defendant was arrested on August 9, 2007, and charged with PWID, Criminal Conspiracy PWID and Simple Possession.[1] July 13, 2011, at the conclusion of her Jury trial, Defendant was found guilty on all charges. On August 31, 2011, Defendant was sentenced to concurrent periods of confinement in a state correctional

[1] 35 Pa.C.S.A. §780-113(a)(30), 18 Pa.C.S.A. 903(a) and 35 Pa.C.S.A. §780-113(a)(16). respectively.

facility of 5 to 10 years on the charge of PWID and 5 to 10 years on the charge of Conspiracy, for a total period of confinement of 5 to 10 years. Defendant was not sentenced on the charge of Simple Possession, which merged.

On September 9, 2011, Defendant filed a direct appeal to the Superior Court of Pennsylvania at 2436 EDA 2011. On November 11, 2011, Defendant's appeal was dismissed for failure to file the required docketing statement in compliance with Pa.R.A.P. 3517.

On August 8, 2012, Defendant filed a *pro se* petition, pursuant to the Post Conviction Relief Act (PCRA) §9545, seeking to restore her appellate rights *nunc pro tunc* on the grounds of ineffective assistance of counsel. On June 24, 2013, Matthew J. Wolfe, Esquire, was appointed to represent Defendant pursuant to Rule 904 of the Pennsylvania Rules of Criminal Procedure. On August 4, 2013, PCRA counsel filed an "Amended Petition For Post Conviction Relief" averring appellate counsel was ineffective for his failure to comply with Pa.R.A.P. 3517 in failing to file the required docketing statement. On May 29, 2014, Defendant filed a "Second Amended Petition For Post Conviction Relief" which raised no new issues. On May 29, 2014, by agreement of counsel, the Court entered an order, restoring Defendant's appellate rights *nunc pro tunc*.

On June 26, 2014, Defendant timely filed her Notice of Appeal to the Superior Court of Pennsylvania. On July 1, 2014, this Court filed and served on Defendant an order pursuant to Rule 1925(b) of the Pennsylvania Rules of Appellate Procedure, directing Defendant to file and serve a Statement of Errors Complained of on Appeal, within twenty-one days of the Court's order.

On July 21, 2014, Defendant timely filed her Statement of Errors Complained of on Appeal raising four issues, namely:

"1. The evidence was not sufficient to support the verdict of guilty of Possession With Intent to Deliver Controlled Substances or Conspiracy.

2. The prosecution at best proved that the Appellant was present at the scene. Mere presence is insufficient to support these verdicts.

3. There were controlled buys of controlled substances and the Appellant was not involved in any of them.

4. The Appellant had no controlled substances on her person when she was apprehended."

Although Defendant's issues number four in her Statement of Errors, she appears to be raising only one issue, namely, that the evidence at trial was insufficient to support her convictions. Furthermore, on August 20, 2014, Defendant filed a *pro se* "Amendment To Pending PCRA" raising a fifth issue, averring that since her sentencing on August 31, 2011, the United States Supreme Court, in its decision in ***Alleyne v. United States***, 133 S.Ct. 2151 (2013) decided June 17, 2013, created a new constitutional right which rendered her sentence illegal. Although Defendant's manner of raising this issue is unorthodox, the Court will nevertheless address it as it implicates the legality of her sentence.

EVIDENCE AT TRIAL

Pennsylvania State Police Trooper, Eurilel Thwaites, testified that he has been a member of the Pennsylvania State Police for approximately two years and before that a member of the Philadelphia Police Department for approximately thirteen years, serving ten of those years with the Narcotics Field Unit. (N.T. 7/12/11, pgs. 64, 65) On August

27, 2007, he was the assigned investigator investigating the sale of drugs at 1319 South Wilton Street in the City of Philadelphia with the aid of a confidential informant (CI), using pre-recorded buy money. (N.T. 7/12/11, pgs. 67-69, 99) At approximately 7:00 p.m., as team leader, he observed the CI knock on the door of the premises and be admitted by a tall thin black male. A short time later CI returned to his partner, Officer Young, without the buy money, handing him "four clear packets containing a chunky substance" which tested "positive for cocaine base." (N.T. 7/12/11, pgs. 73, 74) Based on this information, Trooper Thwaites obtained a search warrant for the premises. (N.T. 7/12/11, pg. 78)

Two days later, on August 29, 2007, at approximately 7:20 p.m., prior to executing the warrant, Trooper Thwaites again sent the same CI to the premises to make another purchase. (N.T. 7/12/11, pgs. 80-82) (Commonwealth Exhibit, C-5) Approximately two to three minutes after observing the CI complete a purchase, which also tested positive for cocaine base, he ordered his team to execute the warrant. (N.T. 7/12/11, pgs. 82, 83, 106) On entering the house, he encountered Defendant sitting in a chair to his left, and another woman he identified as the person making the sale that day to the CI, standing to his right. (N.T. 7/12/11, pgs. 86, 91) He also testified that a third person encountered in the premises was released after it was determined that there was no evidence linking him to the premises or the drug sales. (N.T. 7/12/11, pgs. 92, 93)

Philadelphia Officer Norma Clement, searched Defendant and recovered "one hundred and thirty-three dollars plus the twenty dollars in pre-recorded buy money[2] and also a key that had a chain attached to it that had the name Laura, which is the

[2] This buy money was from the August 29, 2007 purchase. The buy money from the August 27, 2007 purchase was never recovered. (N.T. 7/12/11, pg. 121)

Defendant's first name." Trooper Thwaites then verified the key recovered by Officer Clement "worked the front" door. (N.T. 7/12/11, pgs. 93, 94, 104, 105, 121, 142)

In addition to the buy money and key, Trooper Thwaites testified that Officer Young recovered twenty-eight packets containing a white powder substance of alleged cocaine and twenty-three packets containing a white chunky substance of alleged crack cocaine, identical to the packets purchased by the CI. These packets were found to Defendant's immediate left in the living room. (N.T. 7/12/11, pgs. 94, 95, 143, 148, 149)

In addition to the money and drugs, Officer Bolds recovered from the living room "a couple of pieces of mail that was in the name of the defendant and addressed to the defendant at that location." No other mail was recovered. (N.T. 7/12/11, pgs. 96, 105, 119)

Philadelphia Police Officer Levaun Rudisill, a veteran of fourteen years in narcotics enforcement, testified that on August 29, 2007, he was assigned as back up in the execution of the search warrant issued for 1319 South Wilton Street. (N.T. 7/12/11, pgs. 152, 153) His assignment on entering the premises was to clear the second floor of people and search for drugs. On searching the front bedroom he recovered a black duffle bag from the floor in front of the bed. (N.T. 7/12/11, pgs. 154-155) Officer Rudisill testified that among the items removed from the bag were two grinders, unused packets, a scale and a bottle of Inostil, all of which are used in the drug trade. (N.T. 7/12/11, pgs. 157-160) In addition to the duffle bag, a bowl and a razor blade were recovered from the top of the TV in the room. (N.T. 7/12/11, pgs. 157, 161) Officer Rudisill also testified that during his search of the room he found female clothing consistent with that worn by Defendant. (N.T. 7/12/11, pg. 162)

Trooper Thwaites testified that, in addition to the duffle bag, Officer Rudisill recovered one clear plastic bag containing "bulk crack cocaine" and a second bag containing "bulk powdered cocaine" from the duffle bag. (N.T. 7/12/11, pgs. 98, 100, 101, 107, 131) (Commonwealth Exhibit, C-5) The drugs were then submitted "to the Police Chem Lab for further analysis." (N.T. 7/12/11, pg. 101)

It was stipulated at trial that "one plastic bag with white chunks, approximately 14.46 grams" tested "positive for cocaine base." It was also stipulated the "28 ziplock packets," recovered from the living room, also tested "positive for cocaine." (N.T., 7/12/11 pg. 171)

Trooper Thwaites testified that after Officer Rudisill called to him that he had recovered drugs from the front bedroom, Defendant said "[s]omething to the effect, 'Did you all get them out of my room?' Or something about her room. 'That's my room,' or something to that effect." (N.T. 7/12/11, pgs. 97, 130)

DISCUSSION OF THE ISSUE RAISED

I. THE EVIDENCE AT TRIAL WAS SUFFICIENT TO SUSTAIN DEFENDANT'S GUILTY VERDICTS.

Defendant, in her Statement of Errors, appears to be raising only one issue, namely, that the evidence at trial was insufficient to support her convictions. In essence, she states the evidence was insufficient because "[m]ere presence is insufficient to support these verdicts," Defendant was not involved in the "controlled buys of controlled substances" and, lastly, she had "no controlled substances on her person" at the time of her arrest. As noted below, Defendant's presence was more than a mere coincidence.

Furthermore, it makes no difference whether or not Defendant was observed selling drugs or had drugs on her person at the time if her arrest. Defendant's complaints are without merit.

Defendant was convicted of PWID pursuant to 35 Pa.C.S.A. § 780-113 which provides in part: "(a) The following acts and the causing thereof within the Commonwealth are hereby prohibited:....(30) Except as authorized by this act, the manufacture, delivery, or possession with intent to manufacture or deliver, a controlled substance by a person not registered under this act." Defendant does not challenge the presence of cocaine, "a controlled substance." She is challenging the sufficiency of the evidence supporting her conviction for the possession of cocaine on the theory that, although she was present, there was no evidence that she had narcotics on her person and that there was no direct evidence of her participation in the illegal sale of drugs out of her home.

"A claim challenging the sufficiency of the evidence is a question of law. Evidence will be deemed sufficient to support the verdict when it establishes each material element of the crime charged and the commission thereof by the accused, beyond a reasonable doubt. Where the evidence offered to support the verdict is in contradiction to the physical facts, in contravention to human experience and the laws of nature, then the evidence is insufficient as a matter of law. When reviewing a sufficiency claim the court is required to view the evidence in the light most favorable to the verdict winner giving the prosecution the benefit of all reasonable inferences to be drawn from the evidence." ***Commonwealth v. Fisher***, 47 A.3d 155, 157 (Pa. Super. 2012) citing ***Commonwealth v. Widmer***, 560 Pa. 308, 744 A.2d 745, 751-52 (Pa. 2000)

In considering such a claim, the Superior Court "may not weigh evidence, nor substitute the fact-finder's judgment with this Court's...The facts and circumstances which have been established by the Commonwealth are not required to 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. Hennigan***, 753 A.2d 245, 253 (Pa. Super. 2000) A court may draw inferences from the facts so long as the inferred facts are more likely than not to flow from the proven facts. ***Commonwealth v. Wodjak***, 466 A.2d 991, 996 (Pa. 1983)

"Possession of a prohibited item can be established by actual possession or constructive possession. When contraband is not found on the defendant's person, the Commonwealth must establish constructive possession. Constructive possession is a legal fiction, a pragmatic construct to deal with the realities of criminal law enforcement. Constructive possession is an inference arising from a set of facts that possession of the contraband was more likely than not. We have defined constructive possession as conscious dominion. We subsequently defined conscious dominion as the power to control the contraband and the intent to exercise that control. To aid application, we have held that constructive possession may be established by the totality of the circumstances. Additionally, it is possible for two people to have joint constructive possession of an item of contraband." ***Commonwealth v. Hopkins***, 67 A.3d 817, 820-21 (Pa. Super. 2013) (internal quotation and citations omitted)

"Exclusive control over the contents of a residence may properly be inferred from a showing that the accused is the only occupant ... of that residence." ***Commonwealth v. Stamps***, 427 A.2d 141, 145 (Pa. 1981) ***Stamps*** held that the evidence was sufficient to

find that male Defendant constructively possessed heroin found under a couch cushion in a "parlor-bedroom," when he was arrested in another part of the house, in part because the "parlor-bedroom" contained male clothing and appeared to be occupied by the Defendant. ***Id.***

It is clear that the Commonwealth met its burden in establishing Defendant had constructive possession of the narcotics recovered at the time of her arrest. Viewing the evidence in a light most favorable to the Commonwealth, Defendant was in close proximity to at least 28 packets of cocaine in her living room, she was in possession of the pre-marked buy money used by the CI just minutes earlier, she was in possession of the only key to the premises, the female seen selling the drugs to the CI moments before was also present in the room and the only mail recovered was addressed to Defendant at that location. In addition, female clothing consistent with that worn by Defendant was found in the front bedroom. Furthermore, when the black duffle bag was recovered from the front bedroom, Defendant was heard to utter something to the effect, "Did you all get them out of my room?" or "That's my room." Viewing the totality of the circumstances, this evidence was sufficient to establish Defendant's conscious dominion and power to control the contraband as well as her intent to exercise that control.

Once it is determined that Defendant possessed the cocaine, the "Commonwealth must then prove beyond a reasonable doubt that the defendant possessed a controlled substance with the intent to deliver it." ***Commonwealth v. Carpenter***, 955 A.2d 411, 414, citing C***ommonwealth v. Kirkland***, 831 A.2d at 610. "When determining whether a defendant had the requisite intent to deliver, relevant factors for consideration are 'the manner in which the controlled substance was packaged, the behavior of the defendant,

the presence of drug paraphernalia, and large sums of cash.'" ***Carpenter, Supra.***, at 414 citing ***Commonwealth v. Ratsamy,*** 934 A.2d 1233, 1237-1238 (2007). "The expert testimony of a witness qualified in the field of drug distribution, coupled with the presence of drug paraphernalia, is sufficient to establish intent to deliver." ***Carpenter, Supr.***, citing ***Commonwealth v. Bull,*** 422 Pa. Super. 67, 618 A.2d 1019, 1021 (Pa. Super. 1993).

Philadelphia Police Officer James Johnson, an eighteen year veteran of narcotics enforcement, was qualified, without objection, as an expert in the manner "drugs are manufactured, packaged and sold." (N.T., 7/12/11 pgs. 166, 167) Officer Johnson testified that it was his expert opinion that the drugs possessed by Defendant were "with the intent to deliver." He based his opinion on the type of drug paraphernalia including, "new and unused baggies, the actual razor blade, the cutting items and agents, as well as the actual scale." (N.T., 7/12/11 pg. 168) He also took into account the weight and volume of the drugs recovered. (N.T., 7/12/11 pg. 178)

Defendant was found guilty of conspiracy pursuant to 18 Pa.C.S.A. 903(a)(1) which provides in part: (a) "A person is guilty of conspiracy with another person or persons to commit a crime if with the intent of promoting or facilitating its commission he: (1) agrees with such other person or persons that they or one or more of them will engage in conduct which constitutes such crime or an attempt or solicitation to commit such crime." "Conspiracy is established when the Commonwealth proves the defendant entered into an agreement to commit or aid in the commission of an unlawful act, there was a shared criminal intent, and an overt act was taken in furtherance of the conspiracy. The essence of a criminal conspiracy is a common understanding, no matter how it came

into being, that a particular criminal objective be accomplished. Therefore, a conviction for conspiracy requires proof of the existence of a shared criminal intent. An explicit or formal agreement to commit crimes can seldom, if ever, be proved and it need not be, for proof of a criminal partnership is almost invariably extracted from the circumstances that attend its activities. Thus, a conspiracy may be inferred where it is demonstrated that the relation, conduct, or circumstances of the parties, and the overt acts of the co-conspirators sufficiently prove the formation of a criminal confederation. The conduct of the parties and the circumstances surrounding their conduct may create 'a web of evidence' linking the accused to the alleged conspiracy beyond a reasonable doubt. Even if the conspirator did not act as a principal in committing the underlying crime, he is still criminally liable for the actions of his co-conspirators taken in furtherance of the conspiracy. ***Commonwealth v. McCoy***, 69 A.3d 658, 664-65 (Pa. Super. 2013) (Internal citations and quotations omitted)

When Trooper Thwaites first entered the premises he immediately encountered Defendant and another woman, whom he identified as the person who had sold narcotics to his CI just prior to the execution of the warrant. At the time of her arrest, Defendant was in close proximity to a significant quantity of drugs, and, more significantly, was in possession of the pre-recorded buy money used minutes before. Furthermore, as discussed above, a significant quantity of uncut drugs as well as drug paraphernalia was recovered from her bedroom. The evidence at trial was sufficient to establish that not only was Defendant present, but that she was an active participant in the sale of narcotics from her home.

II. THE IMPOSITION OF DEFENDANT'S MANDATORY SENTENCE WAS LEGALLY PROPER UNDER THE LAWS OF PENNSYLVANIA.

Defendant, in her *pro se* fifth complaint, relying on the U.S. Supreme Court's decision in ***Alleyne v. United States***, 133 S.Ct. 2151 (2013), states that recent changes in the law have rendered the imposition of her mandatory sentence illegal. Defendant's complaint is without merit.[3]

Defendant was sentenced to a mandatory minimum of five years imprisonment pursuant to 35 P.S.C.A. 7508(a)(3) which provides in relevant part: "A person who is convicted of violating section 13(a)(14), (30) or (37) of The Controlled Substance, Drug, Device and Cosmetic Act where the controlled substance is coca leaves or is any salt, compound, derivative or preparation of coca leaves.....shall, upon conviction, be sentenced to a mandatory minimum term of imprisonment and a fine as set forth in this subsection:...(ii) when the aggregate weight of the compound or mixture containing the substance involved is at least ten grams and less than 100 grams; three years in prison .....however, if at the time of sentencing the defendant has been convicted of another drug trafficking offense: five years in prison....."

Defendant's complaint that imposition of her mandatory sentence was rendered illegal by ***Alleyne*** is without merit. The Court notes that the holding in ***Alleyne*** did not declare mandatory minimum sentences illegal per se, but instead extended its decision in ***Apprendi v. New Jersey***, 530 U.S. 466, 530 U.S. 466; 120 S. Ct. 2348 (2000) in holding that any fact that triggers an increase in the mandatory minimum sentence for a crime is

[3] This court has previously ruled that the mandatory minimum is constitutionally barred, but under other facts and circumstances ***Commonwealth v. Hunt***, CP-51-CR-0000783-2013; 12 EAP 2014

necessarily an element of the offense and that such fact must be found "beyond a reasonable doubt" by a jury. *Id.* at 2163-2164 ***Alleyne*** reasoned that "the core crime and the fact triggering the mandatory minimum sentence together constitute a new, aggravated crime" and consequently that the Sixth Amendment requires that every element of the crime, including any fact that triggers the mandatory minimum, must be alleged in the charging document, submitted to a jury, and found beyond a reasonable doubt. *Id.* at 2160-2164

The Court notes further that Defendant was sentenced almost two years prior to ***Alleyne.*** Although Pennsylvania appellate courts have not yet made a definitive ruling regarding the retroactive application of ***Alleyne***, our Superior Court in ***Commonwealth v. Watley***, 81 A.3d 108 (Pa. Super. 2013) did allow retroactive application where ***Alleyne*** was decided after the defendant was sentenced, but during the pendency of his direct appeal. Because ***Alleyne*** implicates the constitutionality of mandatory sentences, the Court will treat ***Alleyne*** as having retroactive application to Defendant's sentence.

Instantly, the imposition of Defendant's mandatory minimum sentence pursuant to 35 P.S.C.A. 7508(a)(3)(ii) was predicated on two findings of fact. Firstly, that the aggregate weight of the drugs seized exceeded ten grams. Ordinarily this is just the sort of sentencing factor contemplated by ***Alleyne*** that would have to be submitted to a jury for determination. However, this was obviated, when, as noted above, the parties stipulated at trial that one of the many bags recovered from Defendant's bedroom tested "positive for cocaine" and weighed "approximately 14.64 grams." (N.T., 7/12/11 pg. 171) "A stipulation is a statement that the fact agreed upon is proven." ***Commonwealth v. Lemanski***, 365 Pa. Super. 332, 357, 529 A.2d 1085, 1097 (1987) Furthermore, "[a]

valid stipulation is to be enforced according to its terms. The parties are bound to accept the facts to which they have stipulated, and the remedy for violation of the stipulation is reversal." *Id.* at 529 A.2d 1097 *Lemanski*, further held that a stipulation between counsel was binding on the jury. Clearly then, Defendant's stipulation to the fact of the weight of the drugs was binding on the jury, obviating the necessity of submitting it to them for a further finding.

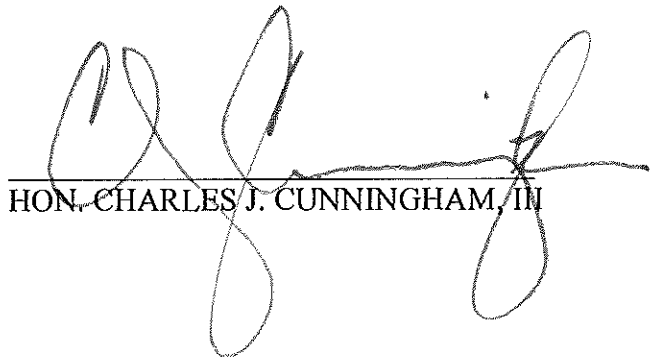
Secondly, that Defendant had "another drug trafficking offense." Again, it was stipulated at her sentencing hearing that Defendant had three prior "drug trafficking" convictions for PWID.[4] (N.T., 8/31/11 pgs. 5, 6) In ***Commonwealth v. Aponte***, 855 A.2d 800, 811 (Pa. 2004), decided after ***Apprendi*** but prior to ***Alleyne***, our Supreme Court held that, "in cases where the fact which increases the maximum penalty is not a prior conviction and requires a subjective assessment, anything less than proof beyond a reasonable doubt before a jury violates due process. Additionally, any judicial finding which results in punishment beyond the statutory maximum must be submitted to a jury and proven beyond a reasonable doubt. Where, however, the judicial finding is the fact of a prior conviction, submission to a jury is unnecessary, since the prior conviction is an objective fact that initially was cloaked in all the constitutional safeguards, and is now a matter of public record." (Internal citations omitted) Furthermore, ***Alleyne*** did not address this holding, but recognized it in specifically noting that "[i]n *Almendarez–Torres v. United States,* 523 U.S. 224, 118 S.Ct. 1219, 140 L.Ed.2d 350 (1998), we recognized a narrow exception to this general rule for the fact of a prior conviction. Because the parties do not contest that decision's vitality, we do not revisit it for purposes of our decision today." ***Supra***. 133 S.Ct. at 2160 n.1

[4] The Court's records reflect Defendant had one PWID conviction in 1988 and two in 1989.

CONCLUSION

After careful consideration of the record before it, the Court finds there was sufficient evidence to support Defendant's conviction on the charges of PWID, Simple Possession and Conspiracy. The court finds further that Defendant's sentence was proper.

BY THE COURT:



November 4, 2014

HON. CHARLES J. CUNNINGHAM, III