

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

COMMONWEALTH OF PENNSYLVANIA : CP-51-CR-0014888-2012
:
v. :
:
Angel Ramos Delgado : SUPERIOR COURT
NO. 482 EDA 2014

OPINION

Ehrlich, J.

Angel Ramos Delgado, hereinafter Defendant, was found guilty, after a non-jury trial with all facts stipulated, of possession with intent to deliver controlled substances (“PWID”) and conspiracy to commit PWID on September 30, 2013.¹ The charges stem from controlled narcotics purchases at 3235 North Rorer Street in the Kensington Section of Philadelphia on September 19, 2012, and September 20, 2012. The Defendant was sentenced on December 23, 2013, to concurrent terms of incarceration of three (3) to six (6) years. Defendant filed a timely post-sentence motion that was denied on January 7, 2014. A timely appeal followed.

On appeal, Defendant avers four points of error:

- I. Did not the trial court err in applying the mandatory minimum sentencing statute, 18 Pa.C.S. § 7508, because procedural provisions of section 18 Pa.C.S. § 7508(b) of the statute are unconstitutional under *Alleynes*, 133 S.Ct. 2151 (2013), the statute is not severable under 1 Pa.C.S. § 1925, and therefore the mandatory minimum[] sentencing statute is wholly void and unenforceable.

¹ 35 Pa.C.S. § 780-113 (A)(30); 18 Pa.C.S. § 903(C)

- II. Was not the evidence insufficient to establish conspiracy beyond a reasonable doubt where the [C]ommonwealth failed to present evidence that the defendant had ongoing access to the drugs sold on the first day and those recovered from the house, and therefore presented insufficient evidence that the drugs recovered at the end of a three day surveillance and execution of a search warrant, were possessed by appellant within the, and in furtherance of the conspiracy.
- III. Did not the trial court err in applying the mandatory minimum sentencing statute at 18 Pa.C.S. § 7508 to the conviction for criminal conspiracy.
- IV. Was not the trial court's imposition of three to six year state incarceration sentences on each charge [] unreasonable, manifestly excessive and an abuse of discretion where the court failed to conduct an individualized sentencing, did not properly consider the sentencing factors, and instead imposed an unconstitutional mandatory minimum sentence.

As will be discussed below, the sufficiency and constitutional claims are without merit. This court does concede, however, that the sentence for conspiracy is inconsistent with established jurisprudence. As such, the verdict of guilt should be affirmed, as well as the sentence for PWID. The appropriate resolution of the conspiracy sentence is left to the Superior Court.

The Evidence

The evidence admitted during the stipulated trial established that on September 19, 2012, Philadelphia Police Officer Regino Fernandez and other members of the Narcotics Field Unit met with a confidential informant (“CI”) to arrange a controlled narcotics purchase from 3235 North Rorer Street in Philadelphia. N.T., Preliminary Hearing, 12/13/2012, pp. 5–6.² The CI was searched for narcotics and U.S. currency, with negative results. *Id.* Then, the CI was provided with \$160 in prerecorded “buy money” and sent to the target location. *Id.* Officer Fernandez,

² During the hearing, Officer Fernandez positively identified the Defendant and his co-defendant, Tommy Gonzalez, as the men involved in the narcotics transaction. *Id.* at 6.

while undercover, followed the CI and established a surveillance location about fifteen to thirty feet from the target. *Id.* at 6–7, 10. The CI approached the Defendant and Mr. Gonzalez and engaged the men in brief conversation. *Id.* at 7. He then handed Defendant the buy money. *Id.* Mr. Gonzalez entered the residence and returned in approximately one to two minutes. *Id.* When he emerged from the house, he handed the CI an object. *Id.* After the transaction, both Defendant and Mr. Gonzales returned to the residence. *Id.* The CI was followed out of the area by Officer Morales (first name not given). *Id.* The CI provided Officer Fernandez with a clear, plastic baggy tied in a knot, containing a large chunk of an off-white substance alleged to be crack cocaine. *Id.* The recovered substance tested positive for crack cocaine base. *Id.*

On September 20, 2012, Police Officer Joseph McCook, along with Officer Morales, participated in the narcotics investigation targeting the Rorer Street residence. *Id.* at 16. Again, a CI was used to make a controlled narcotics purchase. *Id.* Officer Morales searched the CI for narcotics and U.S. currency. *Id.* at 16–17. Officer Morales then provided the CI with \$180 in prerecorded buy money. *Id.* at 17. Officer McCook observed the Defendant emerge from the target residence prior to the CI's arrival. *Id.* at 17. The Defendant, while speaking with the CI, walked directly past Officer McCook. *Id.* The Defendant then accepted \$180 of the buy money, and handed the CI a small, white object. *Id.* The object was later surrendered to Officer Morales, who conducted a field test with positive results. *Id.* at 17–18.

On September 21, 2012, officers received information and proceeded to 3207 Rorer Street, a short distance from the target location. *Id.* at 18–19. There, officers arrested the Defendant and Mr. Gonzales. *Id.* at 18. Currency in the amount of \$420 was recovered from Mr. Gonzales; nothing was recovered from Defendant. *Id.* at 19. Officers then executed a search and seizure warrant on 3235 North Rorer Street. *Id.* Recovered from inside the residence, in the

refrigerator, were four bundles of heroin containing a total of fifty packets of the drug. *Id.* at 20. In addition to the heroin, there were three clear bags containing powder cocaine, and one clear bag containing crack cocaine. *Id.* All of which tested positive for narcotics. *Id.* There was also one pill bottle in the kitchen cabinet that contained fifty pills alleged to be Clonazepam (a benzodiazepine). *Id.* at 21. Mail in the name of Mr. Gonzales and photographs of him were located in the living room of the residence. *Id.* Also located in the living room, were two scales and one bag containing new and used yellow Ziploc packets. *Id.*

In addition to the testimony, summarized above, from the preliminary hearing, the Commonwealth moved into evidence the 75–49 (police investigation report), the narcotics seizure analysis, and the property receipts in this case. N.T., 09/30/2013, p. 10. Defense counsel stipulated to the admissibility of “all non-hearsay evidence.” *Id.*

Discussion

Sufficiency of the Evidence

The test for the sufficiency of the evidence is well-settled:

In reviewing a claim regarding the sufficiency of the evidence, an appellate court must determine whether the evidence was sufficient to allow the fact finder to find every element of the crimes charged beyond a reasonable doubt. In doing so, a reviewing court views all the evidence and reasonable inferences therefrom in the light most favorable to the Commonwealth. Furthermore, in applying this standard, the Commonwealth may sustain its burden of proof by means of wholly circumstantial evidence. When performing its review, an appellate court should evaluate the entire record and all evidence received is to be considered, whether or not the trial court’s rulings thereon were correct. Additionally, we note that the trier of fact, while passing on the credibility of witnesses and the weight of the evidence, is free to believe all, part, or none of the evidence.

Commonwealth v. Galvin, 603 Pa. 625, 634-35, 985 A.2d 783, 789 (2009) (internal citations omitted).

Specifically, the defendant challenges the sufficiency of the evidence as it relates to his conviction for conspiracy to commit PWID. To sustain a conviction of criminal conspiracy:

The Commonwealth must establish that the defendant (1) entered into an agreement to commit or aid in an unlawful act with another person or persons, (2) with a shared criminal intent, and (3) an overt act done in furtherance of the conspiracy. Circumstantial evidence may provide proof of the conspiracy. The conduct of the parties and the circumstances surrounding such conduct may create a web of evidence linking the accused to the alleged conspiracy beyond a reasonable doubt.

Additionally[,] an agreement can be inferred from a variety of circumstances including, but not limited to, the relation between the parties, knowledge of and participation in the crime, and the circumstances and conduct of the parties surrounding the criminal episode. These factors may coalesce to establish a conspiratorial agreement beyond a reasonable doubt where one factor alone might fail.

Commonwealth v. Bricker, 882 A.2d 1008, 1017 (Pa. Super. 2005) (quoting *Commonwealth v. Jones*, 874 A.2d 108, 121–22 (Pa. Super. 2005)).

In the instant case, during both controlled narcotics purchases, Defendant committed overt acts that—in combination with the circumstances surrounding the purchases—created a web of evidence linking him to Mr. Gonzales and the significant quantities of narcotics recovered from 3235 North Rorer Street. On September 19, 2012, the CI approached Defendant and Mr. Gonzales, engaged them in brief conversation, and then handed the buy money to Defendant. Mr. Gonzales entered the residence and returned shortly thereafter, providing the CI with narcotics. Here, the proximity and interactions between the Defendant and Gonzales allowed this court to infer an agreement to sell drugs. Moreover, the Court has held that an overt act need not be committed by the defendant; it need only be committed by a co-conspirator. *Bricker, supra*. Similarly, and even more damning for Defendant, on September 20, 2012, the CI handed the buy money to Defendant and Defendant himself provided narcotics in return.

Additionally, only moments before the controlled buy, the Defendant emerged from the target residence, where the drugs were later recovered.

Here, the relations between, and conduct of, the Defendant and Mr. Gonzales indicate an illicit business partnership. It is, therefore, sufficient to conclude beyond a reasonable doubt that a conspiracy existed. In light of the uncontroverted web of facts linking the Defendant to Mr. Gonzales and the drugs, the verdict of guilt for criminal conspiracy should be affirmed.

Legality of Sentence

Application of Mandatory Minimum to Conspiracy

The Defendant also challenges the application of a concurrent term of three to six years' incarceration for the conspiracy to commit PWID. In *Commonwealth v. Watson*, the Superior Court held that because the inchoate crime of conspiracy was not specifically enumerated among the offenses applicable to Section 7508 on mandatory minimum sentencing, it does not apply. 945 A.2d 174, 178 (Pa. Super. 2008). The sentencing issue there is substantially similar to the instant case.

In *Watson*, the Defendant was found guilty of conspiracy to commit PWID and sentenced to five to ten years' incarceration, pursuant to the enhanced mandatory minimum sentence under 18 Pa.C.S. §7508(a)(3)(ii). The Court vacated the sentence for conspiracy after finding that Section 7508 was not applicable for a conspiracy to commit PWID charge. *Id.*³ The relevant portion of Section 7508 states:

(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

³ In *Watson*, the defendant was not found guilty of a substantive PWID charge, whereas in the instant case the Defendant was convicted of both PWID and conspiracy to commit PWID.

. . . shall, upon conviction, be sentenced to a mandatory minimum term of imprisonment.

(3)(ii) When the aggregate weight of the compound or mixture containing the substance involved is at least 10 grams and less than 100 grams; three years in prison and a fine of \$15,000 . . . however, if at the time of sentencing the defendant has been convicted of another drug trafficking offense; five years in prison and \$30,000

18 Pa.C.S. § 7508(a)(3)(ii)

Under Section 905 of the Crimes Code, conspiracy usually carries the same grade as the substantive crime, which means that the Defendant may be subject to the same maximum penalty. 18 Pa.C.S. § 905(a). However, Section 905 does not require imposition of a mandatory minimum sentence under Section 7508. *Watson, supra* at 148. The *Watson* Court reasoned that when a statute is silent as to whether a sentencing provision applies to a violation of Section 903 for criminal conspiracy, the sentencing provision does not apply. *Id.* at 180.⁴

Though, as noted above, the maximum sentence available to the court is the same as the maximum penalty for a substantive PWID conviction:

§ 905. Grading of criminal attempt, solicitation and conspiracy.

(a) Grading.--Except as otherwise provided in this title, attempt, solicitation and conspiracy are crimes of the same grade and degree as the most serious offense which is attempted or solicited or is an object of the conspiracy.

18 Pa.C.S. § 905(a).

Therefore, the court could have legally sentenced the Defendant to the statutory maximum of 10 years. 35 P.S. § 780-113(f)(1.1). Also, it should be noted the conspiracy term

⁴ See also *Commonwealth v. Adams*, 760 A.2d 33 (Pa. Super. 2000) (holding that the recidivist enhancement provision did not apply to inchoate crimes because the plain language of the sentencing provision limited application of the enhancement clause to “convictions for 35 P.S. § 780-113(a)(14)(30)”; *Commonwealth v. Young*, 922 A.2d 913 (Pa. Super. 2007) (holding that the recidivist enhancement provision of the Drug Act did not apply to the inchoate crime of conspiracy to sell drugs.)

was made concurrent to the PWID sentence of three to six years. If the conviction for PWID is affirmed, the Defendant will not face any increased penalty for the conspiracy count. This court, however, fully recognizes and respects *Watson* and its holding, and also understands that it characterized the conspiracy sentence as a “mandatory minimum.” N.T., Sentencing, 12/23/2013, p. 24. As such, the Court will duly resentence the Defendant should the Superior Court vacate the sentence.

Constitutionality of the Mandatory Minimum under 18 Pa.C.S. § 7508

Defendant’s claims I, IV, essentially address the same ultimate issue, *i.e.*, the constitutionality of the mandatory minimum sentence as applied in this case, in light of the holding of the United States Supreme Court in *Alleyne v. United States*, — U.S. —, 133 S.Ct. 2151, 186 L.Ed.2d 314 (2013). As such, these issues will be discussed together.

The Superior Court of Pennsylvania recently held in *Commonwealth v. Thompson*, — A.3d —, 2014 PA Super 106 (May 22, 2014) that a trial court’s imposition of a mandatory minimum sentence, pursuant to 18 Pa.C.S. § 7508, constituted an illegal sentence, requiring *vacatur*. In that case, the Court noted that “it [was] apparent from the record that the facts that permitted application of the mandatory sentence were *not determined by the fact-finder, nor proven beyond reasonable doubt.*” *Thompson*, 2014 PA Super 106 at *11. Furthermore,

[a]ccording to the *Alleyne* Court, a fact that increases the sentencing floor is an element of the crime. Thus, it ruled that facts that mandatorily increase the range of penalties for a defendant must be submitted to a fact-finder and proven beyond a reasonable doubt. 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.

Thompson, supra. (citing *Commonwealth v. Watley*, 81 A.3d 108, 117 (Pa. Super. 2013) (footnote omitted) (emphasis added).

In contrast to the instant case, Mr. Thompson was tried by a jury of his peers. Here, Defendant waived his right to a trial by jury and was tried by this court, sitting as fact-finder. N.T., 09/20/2013, pp. 5–9. Also, distinguishable from *Thompson*, this court specifically found the facts—beyond a reasonable doubt—that were necessary to impose the mandatory minimum. *See id.* at 19–20; N.T., Sentencing, 12/23/2013, pp.19–21.

Here, the Defendant was sentenced to three to six years of incarceration as mandated by 18 Pa.C.S. § 7508(a)(3)(i). Indeed, this court made a specific factual finding at trial, *i.e.*, that the Defendant was responsible for all of the drugs recovered from 3235 North Rorer Street (6.863 grams of cocaine)⁵, thus qualifying him for a mandatory minimum of one year. *Id.* Nevertheless, he was sentenced in accordance with the enhanced mandatory minimum of three years because of his prior conviction for PWID. *See* 18 Pa.C.S. § 7508(a)(3)(i) (“[H]owever, if at the time of sentencing the defendant has been convicted of another drug trafficking offense: a mandatory minimum term of three years in prison....”).

In light of the above discussion, the mandatory sentence imposed in this case was consistent with *Alleyne*, *Watley*, and *Thompson*, namely: the facts necessary for the application of the mandatory minimum were found by the fact-finder, beyond a reasonable doubt. There is, however, an additional level of inquiry required. For the mandatory minimum sentence under 18 Pa.C.S. § 7508 to be lawful, the aforementioned unconstitutional sections of the statute must be excised. The relevant portions of 18 Pa.C.S. § 7508 state:

(b) Proof of sentencing.--Provisions of this section *shall not be an element of the crime*. Notice of the applicability of this section to the defendant shall not be required prior to conviction, but reasonable notice of the Commonwealth's intention to proceed under this section shall be provided after conviction and before

⁵ Narcotics seizure analysis, Commonwealth’s Exhibit C-3; N.T., Sentencing, 12/23/2013, P. 15.

sentencing. The applicability of this section shall be determined at sentencing. *The court* shall consider evidence presented at trial, shall afford the Commonwealth and the defendant an opportunity to present necessary additional evidence and *shall determine, by a preponderance of the evidence*, if this section is applicable.

18 Pa.C.S. § 7508(emphasis added)

Individual portions of all statutes are presumptively severable. *Commonwealth v. Williams*, 574 Pa. 487, 527, 832 A.2d 962, 986 (2003). Indeed, “the provisions of every statute shall be severable.” 1 Pa.C.S. § 1925. Further, “if any provision of any statute or [its] application ... is held invalid, the remainder of the statute ... shall not be affected thereby[.]” *Id.* That is, “unless the court finds that the valid provisions of the statute are so essentially and inseparably connected with, and so depend upon, the void provision or application, that it cannot be presumed the General Assembly would have enacted the remaining valid provisions without the void one.” *Id.* Without delving into the recesses of the legislative history, it seems reasonable to conclude—by considering the guideposts for determining legislative intent⁶—that the Legislature passed Section 7508 to create more significant and consistent penalties for drug trafficking. Indeed, a brief review of the legislative history reveals that mandatory minimums were intended to increase uniformity in sentencing, enhance deterrence by increasing the certainty of incarceration, reduce crime through the incapacitation of serious offenders, and seek

⁶ (c) When the words of the statute are not explicit, the intention of the General Assembly may be ascertained by considering, among other matters:

- (1) The occasion and necessity for the statute.
- (2) The circumstances under which it was enacted.
- (3) The mischief to be remedied.
- (4) The object to be attained.
- (5) The former law, if any, including other statutes upon the same or similar subjects.
- (6) The consequences of a particular interpretation.
- (7) The contemporaneous legislative history.
- (8) Legislative and administrative interpretations of such statute.

1 Pa.C.S. § 1921(c)

the retributive aims of providing proportional punishment. See Cynthia A. Kempinen, *A Multi-Method Study of Mandatory Minimum Sentences in Pennsylvania*, Pennsylvania Commission on Sentencing Research Bulletin, April, 2010, at 2; Pennsylvania Comm'n on Crime and Delinquency, Bureau of Statistics and Policy Research, *Mandatory Sentences in Pennsylvania* (1995).

Mandatory minimum sentences for drug trafficking were initially passed in March 25, 1988, and became effective on July 1, 1988. P.L. 262, No. 31, § 13. This coincided with the national crack cocaine epidemic that devastated urban communities in the 1980s and early 1990s. See Roland G. Fryer, Paul S. Heaton, Steven D. Levitt, and Kevin M. Murphy, *Measuring Crack Cocaine and Its Impact*. *Economic Inquiry*, 51: 1651–81 (2013), *Earlier version available at* http://scholar.harvard.edu/files/fryer/files/fhlm_crack_cocaine_0.pdf. Increased penalties were perceived to be necessary to combat increasing rates of drug-use and associated violence. See Pennsylvania Comm'n on Crime and Delinquency, *supra*. This was accomplished by removing discretion from judges to order traditional, individualized sentences in accordance with the Sentencing Guidelines and mandating incarceration sentences based on drug weight and recidivism.

In many instances, including this case, a standard guideline sentence would call for significantly less incarceration than the mandatory minimums in Section 7508. If this court was to conclude that the unconstitutional provisions of the statute were not severable, the consequences of such an interpretation would be to entirely negate the intent of the Legislature when they created the statute.

Thus, as the rules of construction counsel, the unconstitutional portions of 18 Pa.C.S. § 7508(b) are severable from the remaining valid provisions. The constitutional firmness of the

trial courts' adaptation to *Alleyne* has not yet been determined by our appellate courts.⁷ It remains their prerogative to determine the appropriateness of the *Alleyne* adaptations utilized by the trial courts, until and unless the Legislature provides the suitable statutory remedy.

⁷ Indeed, my learned colleague on the Court of Common Pleas has concluded that the unconstitutional portions of 18 Pa.C.S. § 9712.1, which has a nearly identical “proof at sentencing” provision to the instant statute, are not severable. *See Commonwealth v. Hunt* (Philadelphia No. 783-13, April 22, 2014) (Cunningham, J.); *but see Commonwealth v. Brown*, (Centre No. 1249-13, March 26, 2014) (Grine, J.) (denying the motion to hold 18 Pa.C.S. § 6317 facially unconstitutional and determining the unconstitutional portions severable). For an excellent compilation of recent decisions of the various courts of Common Pleas that have addressed *Alleyne*, *see Commonwealth v. Shifler*, (Franklin No. 289-14, April 21, 2014) (Van Horn, J.).

Conclusion

In summary, this court has carefully reviewed the entire record and finds no harmful, prejudicial, or reversible error and nothing to justify the granting of Defendant's request for relief, as it relates to the finding of guilt. For the reasons set forth above, however, this court concedes the application of the mandatory minimum for the conspiracy charge. As such, the sentence should be vacated and remanded to the trial court for a traditional, individualized sentencing.

J.