

**NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37**

COMMONWEALTH OF PENNSYLVANIA,

Appellee

v.

CHRISTOPHER YOUNGER,

Appellant

IN THE SUPERIOR COURT OF  
PENNSYLVANIA

No. 1601 WDA 2012

Appeal from the Judgment of Sentence Entered August 29, 2012  
In the Court of Common Pleas of Allegheny County  
Criminal Division at No(s): CP-02-CR-0011526-2010

BEFORE: BENDER, P.J.E., LAZARUS, J., and OTT, J.

MEMORANDUM BY BENDER, P.J.E.:

**FILED AUGUST 20, 2014**

Appellant, Christopher Younger, appeals from the judgment of sentence of an aggregate term of 3-6 years' incarceration, three years' consecutive probation, and three years' concurrent probation, following his conviction for possession with intent to deliver heroin (PWID) and criminal conspiracy. After careful review, we conclude that Appellant's sentence violated the Due Process Clause of the Fourteenth Amendment and the jury trial guarantee of the Sixth Amendment. Accordingly, we vacate his sentence on that basis and remand for resentencing.

Due to our disposition in this matter, a summary of the facts leading to Appellant's conviction are unnecessary at this time. However, a brief recitation of the procedural history of this case is in order. Following his arrest on March 6, 2010, Appellant was charged by criminal information on

October 13, 2010, with one count of PWID (heroin), 35 P.S. § 780-113(a)(30), two counts of possession of a controlled substance (possession), 35 P.S. § 780-113(a)(16), one count of possession of drug paraphernalia, 35 P.S. § 780-113(a)(32), and one count of criminal conspiracy to commit PWID, 18 Pa.C.S. § 903(a)(1). One count of possession was withdrawn prior to Appellant's jury trial, which began on March 28, 2012, and concluded on April 2, 2012. Ultimately, the jury found Appellant guilty of PWID and conspiracy, but not guilty of the remaining offenses. Appellant immediately filed a post-trial motion for extraordinary relief alleging that the verdict was not unanimous. The trial court denied that motion by order dated April 18, 2012.

On August 29, 2012, the trial court sentenced Appellant to 3-6 years' incarceration and a consecutive term of 3 years' probation for PWID. Appellant received a concurrent term of 3 years' probation for his conspiracy conviction. Appellant filed post-sentence motions on September 10, 2012. The trial court denied those motions by order dated September 17, 2012. On October 15, 2012, Appellant filed a timely notice of appeal. On October 16, 2012, the trial court ordered Appellant to file a Pa.R.A.P. 1925(b) statement (concise statement). Appellant complied with that order on November 7, 2012 by filing a concise statement. At this point, several delays occurred as Appellant changed counsel twice. Ultimately, however, Appellant retained current counsel, Lucas A. Kelleher, Esq. Attorney Kelleher entered his appearance on September 17, 2013. Appellant then

filed, by leave of court, a supplemental concise statement on November 26, 2013. The trial court issued its Rule 1925(a) opinion on January 31, 2014.

Appellant now raises the following questions for our review:

A. Given the Commonwealth waived RRRRI eligibility requirements per 61 Pa.C.S.A. [§] 4505(b), did the trial court abuse its discretion by not determining [Appellant's] RRRRI minimum sentence and noting the same in its Sentencing Order?

B. Given [Appellant] was acquitted of simple possession, and given that there was no evidence [Appellant] knew of the controlled substances found in Mr. Miller's vehicle or possessed said substances, was the evidence insufficient to convict [Appellant] of Possession with Intent to Deliver and Criminal Conspiracy?

C. Given [Appellant] was acquitted of Simple Possession, and given that there was no evidence [he] knew of the controlled substances found in Mr. Miller's vehicle or possessed said substances, was the evidence against the weight of the verdict?

D. Given that [Appellant] was acquitted of Simple Possession, yet convicted of Possession with Intent to Deliver, did the jury render an inconsistent verdict contrary to law that requires reversal?

E. Given that all indications were that Juror #11 had intended to vote "not guilty[,"] besides his equivocal responses during the Court's polling of the jury, and the evidence indicated Juror #11 was inappropriately pressured towards a guilty vote despite his professed reasonable doubt of [Appellant's] guilt, did the trial court commit an abuse of discretion by finding the jury convicted [Appellant] by unanimous vote and/or by denying [Appellant's] Motion for Extraordinary Relief?

F. Given that [Appellant] met all the criteria outlined in 61 Pa.C.S.A [§] 3903, which defines an eligible offender for the Department of Corrections Boot Camp facility, did the lower court commit an abuse of discretion by not sentencing [Appellant] to the same?

G. Given that [Appellant] had an expectation of privacy in the Toyota Avalon, did the lower court err [by] refusing to suppress the evidence found in the vehicle?

H. Given that there were false statements contained within the affidavit supporting the search warrant, did the lower court err in allowing the evidence gained through the execution of said warrant to be admitted against [Appellant]?

I. Given that Detective Goob was qualified as an expert in narcotics investigations, did the lower court err when it permitted him to testify as to the ownership and use of the vehicles, as it was outside the scope of his expertise?

J. Given that all the information contained within [Appellant's] bail background form had no relevance to the charges, but could and did prejudice him, did the lower court err in admitting [the] form into evidence?

K. Given that there were no weapons charges levied against [Appellant], did the lower court err when it admitted prejudicial hearsay testimony alleging [Appellant] possessed a handgun at a time prior to his arrest, and did it err when it did not grant a motion *in limine*/mistrial regarding the same issue?

L. Given that the Commonwealth did not provide [Appellant's] alleged statement that he offered to inform on a drug dealer to the defense in discovery, and given that the alleged statement contradicts the information in the affidavit supporting the search warrant, did the prosecution commit misconduct in referring to the statement during trial, and did the lower court err in allowing prejudicial testimony regarding the alleged statement into evidence?

M. Given that the recent United States Supreme Court decision ***Alleyne v. United States*** [, 133 S. Ct. 2151 (2013),] requires that evidence supporting the imposition of a mandatory sentence be submitted to a jury and proven beyond a reasonable doubt, must [Appellant's] case be remanded for resentencing without regard to mandatory sentencing provisions, as such evidence was not determined by the jury to have been proven beyond a reasonable doubt?

Appellant's Brief at 5-7.

We begin (and end) with Appellant's final issue. Appellant contends that his sentence violated the Due Process Clause of the Fourteenth Amendment and the jury trial guarantee of the Sixth Amendment, pursuant to the Supreme Court of the United States' decision in **Alleyne**. Although Appellant did not raise this claim in his concise statement, it is not waived, as "[a] challenge to the legality of the sentence may be raised as a matter of right, is non-waivable, and may be entertained so long as the reviewing court has jurisdiction." **Commonwealth v. Robinson**, 931 A.2d 15, 19–20 (Pa. Super. 2007) (*en banc*). As this Court has previously held, **Alleyne** claims implicate the legality of a sentence. **See Commonwealth v. Munday**, 78 A.3d 661, 664 (Pa. Super. 2013).

In **Alleyne**, the Supreme Court held that any fact that increases the mandatory minimum sentence for a crime is considered an element of the crime "which ha[s] to be found by [a] jury beyond a reasonable doubt." **Alleyne**, 133 S.Ct. at 2163. In **Commonwealth v. Thompson**, 93 A.3d 478 (Pa. Super. 2014), we applied **Alleyne** to find that a mandatory minimum sentence was illegally imposed when it was "apparent from the record that the facts that permitted application of that mandatory sentence were not determined by the fact-finder nor proven beyond a reasonable doubt." **Thompson**, 93 A.3d at 493.

Here, Appellant was subjected to the mandatory minimum sentencing provision set forth in 18 Pa.C.S. § 7508(a)(7)(ii), a provision nearly identical

to that which was at issue in **Thompson**. Section 7508(a)(7)(ii) provides, in pertinent part, as follows:

(7) 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 or a mixture containing it is heroin shall, upon conviction, be sentenced as set forth in this paragraph:

...

**(ii) when the aggregate weight of the compound or mixture containing the heroin involved is at least 5.0 grams but less than 50 grams: a mandatory minimum term of 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: a mandatory minimum term of 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; and

18 Pa.C.S. § 7508 (emphasis added).

Here, the Commonwealth sought imposition of the above-highlighted 3-year mandatory minimum sentence based upon evidence that Appellant had possessed, with the intent to deliver, 17.35 grams of heroin. **See** Commonwealth's Notice of Intent to Seek Mandatory Sentence in Accordance with 18 Pa.C.S. § 7508, 4/4/12, at 2. The trial court indicates that it imposed that mandatory minimum sentence. Trial Court Opinion, 1/31/14, at 2.

Appellant claims that the trial court's determination that his PWID conviction involved 17.35 grams of heroin was not a fact placed before the

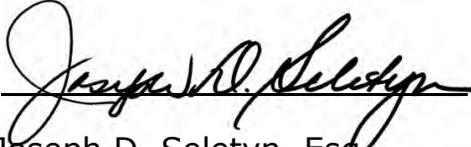
jury, nor was the amount determined under the beyond-a-reasonable-doubt standard. The Commonwealth concedes this point, stating that “[f]rom a careful review of the record, it is not apparent that the exact weight of the heroin recovered ... in this case was a subject of any witness’ testimony. Accordingly, there may be a basis for resentencing in this matter.” Commonwealth’s Brief at 46.

After careful review, we agree. There is nothing in the record that indicates that the weight of the heroin involved in this case was a matter placed before the jury, nor is there any indication that a finding regarding that weight was made under the beyond-a-reasonable-doubt standard. Revealingly, the jury’s verdict slip does not in any way indicate that the matter was put before it.

Therefore, by application of ***Alleynes***, we conclude that the imposition of the mandatory minimum sentence provided by 18 Pa.C.S. § 7508(a)(7)(ii) in this case violated Appellant’s due process and jury trial rights. As such, we vacate Appellant’s sentence and remand this case for resentencing. In light of this disposition, we decline to address Appellant’s remaining claims at this time. We note, however, that we do so without prejudice to Appellant’s ability to raise those claims in any appeal stemming from his new sentence.

Judgment of sentence ***vacated***. Case ***remanded*** for resentencing. Jurisdiction ***relinquished***.

Judgment Entered.

A handwritten signature in black ink, appearing to read "Joseph D. Seletyn". The signature is written in a cursive style and is positioned above a horizontal line.

Joseph D. Seletyn, Esq.  
Prothonotary

Date: 8/20/2014