NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA, Appellant v. CARL E. WILHELM, Appellee	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 109 WDA 2013

Appeal from the Judgment of Sentence December 17, 2012
In the Court of Common Pleas of Cambria County
Criminal Division at No(s): CP-11-CR-0001122-2011

COMMONWEALTH OF PENNSYLVANIA, Appellee v. CARL WILHELM, Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 418 WDA 2013

Appeal from the Judgment of Sentence December 17, 2012
In the Court of Common Pleas of Cambria County
Criminal Division at No(s): CP-11-CR-0001122-2011

BEFORE: BOWES, ALLEN, and LAZARUS, JJ.

MEMORANDUM BY BOWES, J.: **FILED DECEMBER 9, 2013**

The Commonwealth of Pennsylvania appeals from the December 17, 2012 judgment of sentence, and it challenges the trial court's refusal to impose the drug-free school zone mandatory sentence upon Carl Wilhelm following his conviction of possession with intent to deliver ("PWID") and

possession. Carl Wilhelm ("Appellee") cross appeals *nunc pro tunc* and asserts that the trial court erred in failing to merge his sentence for possession with the sentence imposed for PWID. After careful review, we affirm the trial court's refusal to apply the mandatory minimum sentence; we strike the sentence imposed on the possession offense, vacate judgment of sentence, and remand for resentencing.

The facts giving rise to the within appeal are as follows. In February 2010, the Cambria County Drug Task Force, through a confidential informant, conducted a controlled buy of two oxycodone pills from Appellee. One year later, Appellee was charged in a criminal complaint with felony drug delivery and misdemeanor drug possession based on that single transaction. A jury convicted Appellee of both offenses.

Prior to sentencing, the Commonwealth notified Appellee that it intended to seek the school-zone mandatory two-year sentence of imprisonment pursuant to 18 Pa.C.S. § 6317. The trial court held an evidentiary hearing to determine whether the mandatory sentence was applicable. The evidence revealed that the drug delivery took place ninety-two feet from the Wilmor United Methodist Church, which the Commonwealth contended was a school within the meaning of the statute. Therein, religious education classes for children aged three to eight were conducted for forty-five minutes each Sunday in a basement classroom.

The trial court held that the Commonwealth failed to meet its burden of proof on the applicability of the school zone mandatory and declined to

impose it. The court sentenced Appellee as to the PWID offense to an aggregate sentence of fifteen to thirty months incarceration and as to the possession conviction twelve months probation to run concurrently. A motion for reconsideration filed by the Commonwealth was denied, and the Commonwealth appealed.

New counsel entered his appearance on Appellee's behalf and filed a petition seeking reinstatement of his client's right to file a cross appeal *nunc pro tunc*. The petition was granted, and Appellee filed the cross appeal, which was consolidated with the Commonwealth's appeal. Pursuant to Pa.R.A.P. 1925(b), both the Commonwealth and Appellee filed concise statements of errors complained of on appeal, and the court penned two Rule 1925(a) opinions.

The Commonwealth's sole issue on appeal is "Whether the sentencing court erred by not sentencing the Defendant to the statutorily-mandated two-year term of incarceration pursuant to 18 Pa.C.S.A. § 6317." Commonwealth's brief at 4. Appellee's issue in his cross appeal is "Whether the sentencing court should have merged the lesser-included offense of simple possession with possession with intent to deliver." Appellee's brief at 2.

The applicability of a mandatory sentencing provision implicates the legality of a sentence. ***Commonwealth v. Foster***, 960 A.2d 160 (Pa.Super. 2008), *affirmed by an equally divided court*, 17 A.3d 332 (Pa. 2011). In ***Commonwealth v. Manahan***, 45 A.3d 413 (Pa.Super. 2012),

this Court relied upon our Supreme Court's decision in ***Commonwealth v. Myers***, 722 A.2d 649 (Pa. 1998), in analyzing the appropriate standard of review of a sentence involving a mandatory minimum. The ***Myers*** Court "held that when reviewing factual findings and credibility determinations by a sentencing court, we accept the findings of fact unless they are clearly erroneous." ***Id***. at 652. The Court concluded therein that the inquiry as to whether there was sufficient evidence to establish that a defendant delivered the drugs within 1,000 feet of a school zone was fact-based. Since the issue also involves statutory interpretation, a question of law, our scope of review is plenary, and our standard of review is *de novo*. ***Commonwealth v. Dixon***, 53 A.3d 839 (Pa.Super. 2012).

The statute at issue provides in pertinent part:

> (a) **General rule**.--A person 18 years of age or older who is convicted in any court of this Commonwealth of a violation of section 13(a)(14) or (30) of the act of April 14, 1972 (P.L. 233, No. 64), known as The Controlled Substance, Drug, Device and Cosmetic Act, shall, if the delivery or possession with intent to deliver of the controlled substance occurred within 1,000 feet of the real property on which is located a public, private or parochial school.
>
> . . . .
>
> (b) **Proof at sentencing.** – The 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 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. § 6317.

It is the Commonwealth's position that the Sunday school class conducted in the basement of the Methodist Church rendered the church a "school" for purposes of the drug-free school zone mandatory. It relies upon principles of statutory construction and our decision in ***Commonwealth v. Lewis***, 885 A.2d 51 (Pa.Super. 2005), in support of its contention that a religious education class is a parochial school under the plain meaning of the statute. The only difference according to the Commonwealth between the preschool and Sunday school located in a church in ***Lewis*** and the instant case is the frequency of classes.

Appellee notes that 18 Pa.C.S. § 6317 is a penal statute that must be strictly construed. ***Commonwealth v. Dixon***, 53 A.3d 839 (Pa.Super. 2012). ***See*** 1 Pa.C.S. § 1928. While that does not require that words be given their narrowest meaning, it does mandate that any ambiguity in the language of the statute be interpreted in the light most favorable to the criminal defendant. ***See Commonwealth v. Wilgus***, 40 A.3d 1201, 1210 (Pa. 2012). Appellee argues that the legislature did not intend to include within the definition of a school a church that offers one forty-five minute religious education class per week. Had the legislature so intended, Appellee posits, it could have enumerated churches as locations giving rise to drug-

free school zones. In support of his position, Appellee relies upon ***Dixon***, ***supra***, where this Court found that the legislature could have included daycare facilities within the definition of drug free zones, but did not. Furthermore, Appellee contends that ***Lewis*** is factually distinguishable because the church therein operated a preschool on the premises that conducted daily classes designed to prepare young children for kindergarten. Appellee maintains that the fact that the church had Sunday religious instruction was not the basis of the holding of that case.

The Commonwealth introduced evidence that the Methodist Church was located within 1000 feet of the bar where the drug transaction took place. The only alleged school on the premises consisted of one forty-five minute religious education class per week, which was held in the basement of the church during the four-year period from 2007 to 2011. There was no evidence that a school certified by the Department of Education was conducted on the premises; rather, the class was approved by church trustees. N.T., Sentencing, 12/17/12, at 13-14. The purpose was to teach the Bible, prayers, songs and proper behavior to children aged three to eight. ***Id***. at 18. In 2010, there were between five and eight children participating. The teacher was not a Pennsylvania-certified teacher. ***Id***.

The sentencing court found the evidence insufficient to prove the applicability of the school zone mandatory by a preponderance of the evidence. It characterized the arrangement as a Sunday religious education

program run by a church, and not a school. We are inclined to agree based largely on our decision in ***Dixon***, ***supra***. However, we need not reach this issue as the United States Supreme Court decision in ***Alleyne v. United States***, 133 S.Ct. 2151 (2013), applying ***Apprendi v. New Jersey***, 530 U.S. 466 (2000) (Thomas, J., concurring) to mandatory minimum sentences, is dispositive herein.[1] In ***Alleyne***, the Supreme Court held that facts that increase a mandatory minimum sentence are elements of the offense that must be submitted to the jury and found beyond a reasonable doubt.

Alleyne was construed by an *en banc* panel of this Court in ***Commonwealth v. Watley***, 2013 PA Super 303, n.2 (Pa.Super. 2013), as rendering 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 [minimum] sentence based on a preponderance of the evidence standard." ***Alleyne*** also provided the basis for this Court's recent decision in ***Commonwealth v. Munday***, 2013 PA Super 273 (Pa.Super. 2013), holding illegal a five-year mandatory minimum term of incarceration imposed pursuant to 42 Pa.C.S § 9712.1(c) because the facts necessary for imposition of the mandatory minimum were not submitted to the fact finder and adjudicated under the beyond-a-reasonable-

---

[1] The Commonwealth mentioned the Supreme Court's decision in ***Alleyne v. United States***, 133 S.Ct. 2151 (2013), in a footnote in its brief, but stated that it was inapplicable to the instant case.

doubt burden of proof. There, the fact at issue was whether the defendant was in physical possession or control of a firearm at the time of the offense. The trial court therein treated the possession of a weapon issue as a sentencing factor rather than as an element of the offense, engaged in fact finding, and applied a preponderance of the evidence standard. We held on appeal that, despite our legislature's "express statutory language to the contrary[,]" ***Alleyne*** undeniably establishes "that when a mandatory minimum sentence is under consideration based upon judicial factfinding of a 'sentencing factor,' that 'sentencing factor' is, in reality, "an element of a distinct and aggravated crime" and, thus, requires it be proven beyond a reasonable doubt. ***Alleyne***, 133 S. Ct. at 2163." ***Munday***, ***supra*** at *12.[2]

In the instant case, 18 Pa.C.S. § 6317 imposes a two-year mandatory minimum sentence based upon judicial fact finding by a preponderance of the evidence that a drug transfer occurred within a certain distance of a building that constitutes a school. The rationale of ***Alleyne*** and ***Munday*** is applicable as the statute automatically increases a defendant's minimum sentence based on a trial court's finding of proof by a preponderance of the evidence that the drug-related activity occurred within 1000 feet of a school. Thus, the imposition of the mandatory minimum in this case would have

---

[2] We declined to address whether 18 Pa.C.S.§ 9712.1 is facially invalid in light of ***Alleyne v. United States***, 133 S.Ct. 2151 (2013), because the issue had not been presented.

resulted in an illegal sentence, and we affirm on this alternative basis. ***In re T.P.***, 2013 PA Super 280, *3 (Pa.Super. 2013) (well-settled doctrine in this Commonwealth that a trial court can be affirmed on any valid basis appearing of record).

Appellee's sole contention on his cross appeal is that his sentences for simple possession and PWID should have merged. Appellee's failure to file a post-sentence motion or delineate this claim in his Pa.R.A.P. 1925(b) statement is not fatal to our ability to address it here. Merger is an unwaivable challenge to the legality of sentence. ***Commonwealth v. Berry***, 877 A.2d 479, 482-83 (Pa.Super. 2005) (*en banc*), (a claim sentences should merge is a challenge to the legality of the sentence and is never waived); ***Commonwealth v. Dixon***, 997 A.2d 368 (Pa.Super. 2010) (failure to file a post-sentence motion not fatal to a defendant's claim that crimes should have merged for purposes of sentencing).

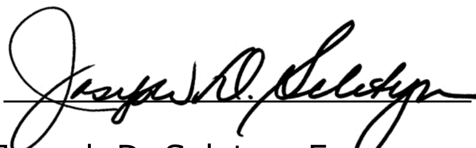
Appellant contends that the trial court mistakenly imposed a sentence of twelve months probation on his conviction for simple possession. Appellee correctly notes that possession is a lesser-included offense of PWID, ***Commonwealth v. Rippy***, 732 A.2d 1216 (Pa. 1999), and that the offenses merge for sentencing purposes. He argues that no additional sentence should have been imposed on the possession conviction.

We agree with Appellee that his sentence for simple possession merged with PWID and that it was error to impose an additional sentence on

that offense. ***Commonwealth v. DeLong***, 879 A.2d 234 (Pa.Super. 2005). Hence, we strike the sentence imposed at the possession count. However, since our decision could potentially upset the overall sentencing scheme of the trial court, we vacate the judgment of sentence and remand for resentencing. In all other respects, we affirm.[3]

Judgment of sentence vacated. Case remanded for resentencing consistent with this opinion. Jurisdiction relinquished.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 12/9/2013

[3] We observe that the Commonwealth is precluded from seeking the mandatory minimum upon remand. ***Commonwealth v. Kunkle***, 817 A.2d 498 (Pa.Super. 2003) (under § 6317, the Commonwealth must present its evidence supporting a mandatory sentence enhancement at the original sentencing hearing, and where it fails to meet that burden, it cannot cure the deficiency at resentencing).