

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA

Appellee

v.

SABINO HERNANDEZ, JR.

Appellant

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 1189 MDA 2012

Appeal from the Order June 4, 2012
In the Court of Common Pleas of Berks County
Criminal Division at No(s): CP-06-CR-0000467-2010

BEFORE: MUNDY, J., OLSON, J., and STRASSBURGER, J.*

MEMORANDUM BY MUNDY, J.:

Filed: March 8, 2013

Appellant, Sabino Hernandez, Jr., appeals from the June 4, 2012 order denying his petition filed pursuant to the Post Conviction Relief Act (PCRA), 42 Pa.C.S.A. §§ 9541-9546. After careful review, we affirm on the basis of the well-reasoned PCRA court opinion.

The relevant facts and procedural history of this case, as gleaned from the certified record, are as follows. This appeal stems from an incident that occurred on January 21, 2010, when police officers discovered illegal drugs and a firearm in Appellant's apartment. Appellant was arrested immediately and charged with possession with intent to deliver (PWID)¹ and other related offenses. Subsequently, on August 19, 2010, Appellant entered a negotiated

* Retired Senior Judge assigned to the Superior Court.

¹ 35 P.S. § 780-113(a)(30).

guilty plea to one count of PWID – marijuana. Pursuant to the plea agreement, the Commonwealth requested imposition of the mandatory minimum sentence found at 42 Pa.C.S.A. § 9712.1.² N.T., 08/19/10, at 3, 5, 7. Thereafter, the sentencing court accepted Appellant’s guilty plea and imposed a flat sentence of five years’ imprisonment.³ *Id.* at 8. Appellant did not file post-sentence motions or a direct appeal.

² Section 9712.1 provides, in pertinent part, as follows.

§ 9712.1. Sentences for certain drug offenses committed with firearms

(a) Mandatory sentence.---Any person who is convicted of a violation of section 13(a)(30) of the ... Controlled Substance, Drug, Device and Cosmetic Act, when at the time of the offense the person ... is in physical possession or control of a firearm, whether visible, concealed about the person or ... in close proximity to the controlled substance, shall likewise be sentenced to a minimum sentence of at least five years of total confinement.

42 Pa.C.S.A. § 9712.1.

³ We note that, generally, the minimum sentence imposed cannot exceed one-half of the maximum sentence imposed, and a flat sentence is an illegal sentence. *Commonwealth v. Stein*, 39 A.3d 365, 367 n.1 (Pa. Super. 2012).

Marijuana, however, is a Schedule I drug, but not a narcotic drug, and thus the maximum sentence permitted for [the appellant]’s conviction for 35 P.S. § 780–113(a)(30) was five years of imprisonment. As the mandatory minimum sentence was also five years pursuant to the applicability of 42 Pa.C.S.A. § 9712.1, [the appellant]’s minimum sentence

(Footnote Continued Next Page)

On February 7, 2011, Appellant timely filed a *pro se* PCRA petition. PCRA counsel was appointed, and on January 24, 2012, counsel filed an amended petition on Appellant's behalf. Subsequently, on May 8, 2012, the PCRA court conducted an evidentiary hearing. Thereafter, on June 4, 2012, the PCRA court denied Appellant's petition for post-conviction relief. This timely appeal followed on June 28, 2012.⁴

On appeal, Appellant raises the following issue for our review.

- A. Whether the PCRA [c]ourt erred in denying Appellant's [PCRA p]etition seeking relief in the form of a new sentencing hearing and appropriate resentencing where the [s]entencing [c]ourt imposed an illegal sentence upon Appellant as insufficient evidence was presented to establish by a preponderance that 42 Pa.C.S.A. § 9712 was applicable?

Appellant's Brief at 4.

"Our review of a PCRA court's decision is limited to examining whether the PCRA court's findings of fact are supported by the record, and whether its conclusions of law are free from legal error." ***Commonwealth v. Koehler***, 36 A.3d 121, 131 (Pa. 2012) (citation omitted). "Great deference is granted to the findings of the PCRA court, and these findings will not be (Footnote Continued) _____

converged with his maximum sentence, requiring the imposition of a flat five-year sentence.

Id. (internal citations omitted).

⁴ Appellant and the PCRA court have complied with Pa.R.A.P. 1925.

disturbed unless they have no support in the certified record.” ***Commonwealth v. Carter***, 21 A.3d 680, 682 (Pa. Super. 2011) (citation omitted). To be eligible for PCRA relief, a defendant must plead and prove by a preponderance of the evidence that his conviction or sentence arose from one or more of the errors listed at 42 Pa.C.S.A. § 9543(a)(2). Furthermore, these issues must be neither previously litigated nor waived. 42 Pa.C.S.A. § 9543(a)(3).

In the case *sub judice*, Appellant contests the legality of his sentence. Appellant’s Brief at 4. Specifically, Appellant avers that the Commonwealth failed to prove by a preponderance of the evidence that Appellant possessed the firearm found in his apartment, and that the firearm was located in close proximity to the controlled substance also found in his apartment. ***Id.*** at 10-11.

The standard of review applied to determine the legality of a sentence is well-settled.

If no statutory authorization exists for a particular sentence, that sentence is illegal and subject to correction. An illegal sentence must be vacated. In evaluating a trial court’s application of a statute, our standard of review is plenary and is limited to determining whether the trial court committed an error of law.

Commonwealth v. Poland, 26 A.3d 518, 523 (Pa. Super. 2011), *appeal denied*, 37 A.3d 1195 (Pa. 2012).

After a thorough review of the parties' briefs, the PCRA court's August 6, 2012 opinion, and the certified record, we conclude that the PCRA court did not err in sentencing Appellant pursuant to 42 Pa.C.S.A. § 9712.1. The PCRA court's August 6, 2012 opinion comprehensively discusses and properly disposes of Appellant's claim. Furthermore, we conclude that the PCRA court's findings are supported by competent evidence and that it did not err in denying Appellant's petition for PCRA relief.

Therefore, for purposes of our review, we adopt the thorough and well-reasoned August 6, 2012 opinion of the Honorable Scott D. Keller as our own. **See** PCRA Court Opinion, 8/6/12. Accordingly, we affirm the PCRA court's June 4, 2012 order denying PCRA relief.

Order affirmed.

COMMONWEALTH OF PENNSYLVANIA	:	IN THE COURT OF COMMON PLEAS OF BERKS COUNTY, PENNSYLVANIA
	:	
v.	:	CRIMINAL DIVISION
	:	
SABINO HERNANDEZ, JR. Defendant	:	No. <u>467-2010</u> KELLER, Judge

SKL
MEMORANDUM OPINION, S.D. Keller, J. August 6, 2012

PROCEDURAL HISTORY

On August 19, 2010, Defendant pled guilty to one (1) count of Possession with Intent to Deliver a Controlled Substance¹. At the plea hearing, the Defendant was represented by Paul S. Missan, Esquire. On that same date, the Defendant was sentenced to serve no less than five (5) years to no more five (5) years to commence on September 17, 2010, with a credit of fifteen (15) days of time served. This sentence was based on the application of the mandatory minimum sentence found in 42 PA. CONS. STAT. § 9712.1.

Defendant filed a *pro se* Motion for Post Conviction Collateral Relief on February 7, 2011. On February 10, 2011, this Court appointed Lara Glenn Hoffert, Esquire, to represent the Defendant in his post-conviction proceedings and directed Defendant to file an Amended Post Conviction Collateral Relief Motion within sixty (60) days. After extensions of the time in which to file the Defendant's amended motion were granted, the Defendant timely filed an AMENDED PETITION FOR RELIEF UNDER THE POST CONVICTION RELIEF ACT (hereinafter "Amended PCRA Petition") on January 24, 2012. An order was entered by this Court on February 2, 2012, directing the Commonwealth to show why the Defendant's Amended PCRA Petition should not be

¹ 35 P.S. § 780-113(a)(30).

granted. The Commonwealth answered on March 1, 2012. A Post Conviction Relief Act (hereinafter "PCRA") hearing was held May 8, 2012. At this hearing, Melissa J. Noyes, Esquire, appeared for the Commonwealth and Defendant was represented by Lara Glenn Hoffert, Esquire. At the conclusion of the PCRA hearing, the Court granted counsels' oral requests for additional time to file supplemental pleadings. The Commonwealth filed a Memorandum in Opposition to the Petitioner's Request for PCRA Relief on May 21, 2012. The Defendant did not file a supplemental motion. On June 4, 2012, the Court denied the Defendant's Amended PCRA Petition.

On June 28, 2012, Defendant filed his Notice of Appeal of this Court's Order denying his Amended PCRA Petition. On July 3, 2012, this Court ordered the Defendant to file within twenty-one (21) days a Concise Statement of the Errors Complained of on Appeal, pursuant to Pennsylvania Rule of Appellate Procedure 1925(b), which the Defendant timely did on July 19, 2012. The following error is complained of on appeal:

1. Whether the PCRA Court erred in denying Appellant's Post Conviction Relief Act Petition seeking relief in the form of a new sentencing hearing and appropriate resentencing where the Sentencing Court imposed an illegal sentence upon Appellant as insufficient evidence was presented to establish by a preponderance that 42 Pa.C.S.A. § 9712 was applicable?

DISCUSSION

To be eligible for relief under the PCRA, a defendant must plead and prove by a preponderance of the evidence, among other things:

- (2) That [his or her] conviction or sentence resulted from one or more of the following:
 - (i) A violation of the Constitution of this Commonwealth or the Constitution or laws of the United States which, in the circumstances of the particular case, so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place.

- (ii) Ineffective assistance of counsel which, in the circumstances of the particular case, so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place.
- (iii) A plea of guilty unlawfully induced where the circumstances make it likely that the inducement caused the petitioner to plead guilty and the petitioner is innocent.
- (iv) The improper obstruction by government officials of the petitioner's right of appeal where a meritorious appealable issue existed and was properly preserved in the trial court.
- (vi) The unavailability at the time of trial of exculpatory evidence that has subsequently become available and would have changed the outcome of the trial if it had been introduced.
- (vii) The imposition of a sentence greater than the lawful maximum.
- (viii) A proceeding in a tribunal without jurisdiction.

42 PA. CON. STAT. § 9543(a)(2). Defendant argues that he is eligible relief because this Court imposed an illegal sentence on him, which resulted in violations of the United States and Pennsylvania constitutions as well as the imposition of a sentence greater than the lawful maximum. *See* 42 PA. CON. STAT. § 9543(a)(2)(i), (vii).

The resolution of the Defendant's alleged error on appeal concerns the application of the mandatory minimum sentence found in 42 PA. CON. STAT. § 9712.1. The relevant statutory language is as follows:

(a) Mandatory sentence.--Any person who is convicted of a violation of section 13(a)(30) of the act of April 14, 1972 (P.L. 233, No. 64), known as The Controlled Substance, Drug, Device and Cosmetic Act, when at the time of the offense the person or the person's accomplice is in physical possession or control of a firearm, whether visible, concealed about the person or the person's accomplice or within the actor's or accomplice's reach or in close proximity to the controlled substance, shall likewise be

sentenced to a minimum sentence of at least five years of total confinement.

(c) Proof at sentencing.--Provisions of this section shall not be an element of the crime, and notice thereof 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 any evidence presented at trial and shall afford the Commonwealth and the defendant an opportunity to present any necessary additional evidence and shall determine, by a preponderance of the evidence, if this section is applicable.

42 PA. CON. STAT. § 9712.1. This Court was required to impose a five (5) year sentence where the Commonwealth demonstrated, by a preponderance of the evidence at sentencing, that the Defendant, who pled guilty to Possession with Intent to Deliver, a violation of the Controlled Substance Act, was at the time of the offense in possession of a firearm and the firearm was in close proximity to the controlled substance.

The Defendant, in his Concise Statement, contends that there was insufficient evidence presented by the Commonwealth at his sentencing hearing to establish, by a preponderance of the evidence, that the mandatory minimum sentence found in § 9712.1 applied. The record reveals the following discussion concerning the application of § 9712.1 at Defendant's sentencing hearing:

The Court:

All right. Could I have the facts in the Hernandez matter?

Ms. Michetti:

Yes. Mr. Hernandez, by pleading guilty, do you admit that on or about January 21st of 2010, you did possess marijuana and you possessed that marijuana with the intent to deliver it? On that day the Reading Police did a search of your house, and when they searched your house they found the marijuana as well as an automatic handgun which was located under the cushion of a chair?

Your Honor, the reason I put those facts on the record is because we're seeking a drug mandatory – a gun drug mandatory in this case, which is a flat five year sentence.

The Court: Mr. Hernandez, do you understand the nature of this charge, the possession with intent to deliver marijuana?

Sabino Hernandez, Jr.: Yes.

The Court: Do you have anything you want to add or correct about those facts?

Sabino Hernandez, Jr.: No.

The Court: Are you pleading guilty to this offense because you committed it?

Sabino Hernandez, Jr.: Yes.

(Notes of Testimony, hereinafter N.T., 8/19/10, at 5-6).

First, the Court notes that “before imposing a mandatory minimum sentence, a sentencing court must determine whether the offense for which the defendant was convicted falls within the parameters of the sentencing scheme. This requires a separate determination by the sentencing court.” *Commonwealth v. Carroll*, 651 A.2d 171, 173 (Pa. Super. 1994). While the evidence presented by the Commonwealth at the Defendant’s sentencing hearing, as illustrated above, regarding the application of the mandatory minimum sentence of § 9712.1 is in no way extensive, this Court found, by a preponderance of the evidence, that the Defendant possessed a firearm and that the firearm was in “close proximity” to the controlled substance. This finding is demonstrated by the Court’s application at sentencing of the § 9712.1 mandatory

minimum sentence. In reviewing this finding, the Superior Court of Pennsylvania must “accept the findings of fact of the sentencing court unless they are clearly erroneous.” *Commonwealth v. Myers*, 722 A.2d 649, 653 (Pa. 1998). As the Superior Court said in *Myers*, “this adopts a standard which affords due deference to the fact finding function of the trial court.” *Id.* This Court believes that its finding that the Defendant possessed a firearm and that the firearm was in close proximity to the controlled substance was not clearly erroneous, because the Commonwealth presented sufficient evidence that the § 9712.1 mandatory minimum sentence should apply.

In order for the mandatory minimum sentence of § 9712.1 to apply, the Commonwealth is required to prove two things. *Commonwealth v. Person*, 39 A.3d 302, 305 (Pa. Super. 2012). The Commonwealth must show both that the Defendant possessed a firearm and that he did so within close proximity to a controlled substance. *Id.* This Court found that the Commonwealth met its burden to establish both of these requirements by a preponderance of the evidence.

First, the Court concluded that the Defendant **constructively possessed** a firearm within the meaning of § 9712.1. In *Commonwealth v. Sanes*, 955 A.2d 369 (Pa. Super. 2008), the Superior Court of Pennsylvania described “constructive possession” as:

When contraband is not found on the defendant's person, the Commonwealth must establish constructive possession.... Constructive possession is the ability to exercise conscious control or dominion over the illegal substance and the intent to exercise that control. [T]wo actors may have joint control and equal access and thus both may constructively possess the contraband. The intent to exercise conscious dominion can be inferred from the totality of the circumstances.

Sanes, 955 A.2d at 373 (citations and internal quotation marks omitted). This standard was recently applied by the Superior Court in *Person*. *Person*, 39 A.3d at 306-07. This Court finds the discussion of constructive possession in *Person* helpful to determine that

the Commonwealth produced sufficient evidence at the Defendant's sentencing to prove, by a preponderance of the evidence, that Defendant possessed a firearm. In *Person*, the Superior Court held that there was **not** sufficient evidence for the trial court to conclude that the defendant possessed a gun because the Commonwealth did not present any evidence that the defendant resided at the residence from which the gun was recovered. *Id.* In addition, there was evidence that the defendant was not the only adult present in the residence from which the gun was recovered. *Id.* The facts which the Superior Court used in *Person* to establish that there was not sufficient evidence to show constructive possession of a gun are distinguishable from the instant case. At the sentencing hearing, the Commonwealth introduced evidence which demonstrated that the automatic handgun recovered was found in the Defendant's house. (N.T., 8/19/10, at 5). No evidence was provided by Defendant or his counsel to show that there any other adults that lived in this home nor was there any evidence that any other adults were present at the time that the gun was recovered by police. (N.T., 8/19/10). The Defendant was given the opportunity to add to or correct the facts provided by the Commonwealth and he chose not to. (N.T., 8/19/10, at 6). Therefore, as the gun recovered was found in the Defendant's home and there was no evidence that any other adult had access to the gun, this Court concludes that the Commonwealth presented sufficient evidence to establish that the Defendant constructively possessed the firearm.

Second, the Court also concluded that the gun recovered was in **close proximity** to the controlled substance within the meaning of § 9712.1. The Superior Court of Pennsylvania first discussed what constitutes close proximity for the purposes of applying the mandatory minimum sentence of § 9712.1 in 2008. *Commonwealth v.*

Sanes, 955 A.2d 369 (Pa. Super. 2008). Because there were no prior cases discussing ‘close proximity’ under § 9712.1, the Superior Court looked to cases interpreting the same phrase, ‘close proximity,’ under the Forfeiture Act. *Sanes*, 955 A.2d at 374-75 (discussing *Commonwealth v. Heater*, 899 A.2d 1126 (Pa. Super. 2006); *Commonwealth v. Giffin*, 595 A.2d 101 (Pa. Super. 1991)). A year later, the Superior Court further clarified the meaning of ‘close proximity’ within the context of § 9712.1.

Commonwealth v. Zortman, 985 A.2d 238 (Pa. Super. 2009). In *Zortman*, a consensual search of the defendant’s home revealed the presence of marijuana in the defendant’s kitchen and in a briefcase in another room as well as a gun under the mattress in a bedroom. *Zortman*, 985 A.2d at 239. At sentencing, the prosecution argued that the mandatory minimum sentence of § 9712.1 should apply based defendant’s testimony at the trial of the man with whom the defendant lived with at the time of the consensual search. *Id.* The prosecutor summarized the defendant’s testimony at the other trial, and the defendant did not “refute [the] recitation of the pertinent facts.” *Id.* The defendant’s failure to object to the facts as they were placed on the record by the prosecution was important. *Id.* In the language of the Superior Court:

We repeat that [the defendant] neither contested nor objected to the Commonwealth’s recitation of the facts necessary to invoke § 9712.1. ... The [defendant] thereby allowed the court to determine the applicability of § 9712.1 based on what essentially were stipulated facts.

Zortman, 985 A.2d at 243-44. *Zortman* is also very important to the disposition of the instant case because of the Superior Court’s description of ‘close proximity’ under § 9712.1:

In *Sanes, supra*, we interpreted the meaning of “in close proximity” for purposes of application of § 9712.1. We gave that term an **expansive** meaning and held that a handgun found hidden in a closet was in close proximity to drugs located in the same room.

We applied Pennsylvania decisions determining the meaning of the term “in close proximity” in another statutory provision, the Forfeiture Act, 42 Pa.C.S. § 6801. . . . In *Commonwealth v. Giffin*, 407 Pa.Super. 15, 595 A.2d 101, 104 (1991), we concluded that cash located **in the same residence** was in close proximity to drugs found in another portion of the residence for purposes of the Forfeiture Act's presumption.

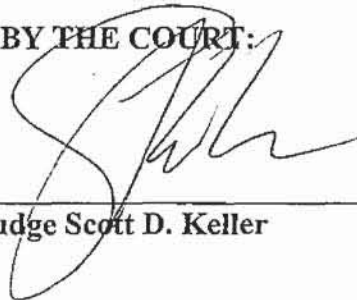
Zortman, 985 A.2d at 244. (emphasis added). In *Zortman*, the Superior Court concluded that the gun recovered under a mattress in the defendant's residence was in close proximity to marijuana found in the defendant's kitchen and in a briefcase in another room of the same residence. *Id.* There was no evidence introduced as to how close within the same residence the drugs were to the recovered gun. *Zortman*, 985 A.2d 238.

Based on the Superior Court's discussions in *Sanes* and *Zortman*, this Court concludes that there was sufficient evidence presented at the Defendant's sentencing hearing to conclude that the gun recovered from the Defendant's residence was in close proximity to the drugs also recovered from that same residence. Similar to *Zortman*, the prosecutor introduced a factual basis at the sentencing hearing regarding the application of the mandatory minimum sentence of § 9712.1. (N.T., 8/19/10, 5). When given the opportunity to correct or add to the facts described by the Commonwealth, the Defendant failed to make any indication that he disagreed with any of the facts or to add any other facts that might suggest that the mandatory minimum sentence of § 9712.1 should not apply. (N.T., 8/19/10, 6). Thus, in the words of the Superior Court in *Zortman*, the defendant “allowed the [C]ourt to determine the applicability of § 9712.1 based on what essentially were stipulated facts.” *Zortman*, 985 A.2d at 243-44. In addition, the facts that were presented were sufficient to warrant the application of the mandatory minimum sentence of § 9712.1 based on the Superior Court's interpretation of close proximity. As the Superior Court provided in *Zortman*, it has given close proximity an “expansive

meaning” and it compared close proximity under § 9712.1 to the use of the same phrase in *Giffin*, a case in which, under the Forfeiture Act, cash found in the “same residence” as drugs was in close proximity. *Id.* at 244. At the Defendant’s sentencing hearing, there was evidence presented by the Commonwealth that marijuana as well as an automatic handgun were both found in defendant’s house. (N.T., 8/19/10, 5). Based on the Superior Court’s expansive reading of the term ‘close proximity,’ this Court finds that those facts alone were sufficient to warrant the application of the mandatory minimum sentence § 9712.1.

Accordingly, for all of the foregoing reasons, and because we believe that the Defendant raises no issues of arguable merit, we respectfully request that his appeal be **DENIED.**

BY THE COURT:



Judge Scott D. Keller