NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA, Appellee v. ARTHUR JAMES BROWN, Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 1558 EDA 2013

Appeal from the Judgment of Sentence November 21, 2012
In the Court of Common Pleas of Bucks County
Criminal Division at No(s): CP-09-CR-0004348-2012

BEFORE: BOWES, PANELLA, and FITZGERALD,* JJ.

MEMORANDUM BY BOWES, J.: **FILED DECEMBER 24, 2013**

Arthur James Brown appeals from the judgment of sentence of five to ten years incarceration imposed by the trial court due to a mandatory minimum sentencing statute after a jury found Appellant guilty of possession with intent to deliver ("PWID") cocaine, possession of cocaine, possession of drug paraphernalia, and criminal use of a communication facility. We affirm.

The trial court carefully delineated the factual background in this case as follows.

> Brown's conviction arises from a drug transaction which occurred on May 14, 2012. Robert Kuronya ("Kuronya") was acting as a confidential informant for the Bristol Borough Police Department on that date. N.T. 10/1/2012, p. 80. Kuronya testified that he was previously arrested by Bristol Borough Police Department for selling cocaine in a school zone. N.T. 10/1/2012, p. 79, 93.

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* Former Justice specially assigned to the Superior Court.

After his arrest, Kuronya agreed to assist Bristol Borough Police Department with drug investigations. N.T. 10/1/2012, 79. Kuronya knew Brown because the two had worked together for several years. N.T. 10/1/2012, p. 79.

Kuronya testified that Detective Hanks from the Bucks County Detectives Division of the District Attorney's Office asked Kuronya to cooperate in an investigation of Brown. N.T. 10/1/2012, p. 80-81. Kuronya spoke on the telephone with Brown after a meeting at the District Attorney's office in Doylestown, Bucks County. N.T. 10/1/2012, p. 81-82. Kuronya testified that his phone call with Brown was recorded. N.T. 10/1/2012, p. 83. Kuronya knew that he was speaking to Brown during that phone conversation because Brown's phone number was saved in his cell phone. N.T. 10/1/2012, p. 84. Kuronya told Brown that he "was going to need some soon", referring to cocaine. N.T. 10/1/201 2, 83. A few days later, Brown and Kuronya spoke on the phone again while Kuronya was with Detective Hanks and Bristol Borough Police Officer Soto. N.T. 10/1/2012, p. 85-86. That phone call was also recorded. N.T. 10/1/2012, p. 86.

Kuronya testified that he arranged a meeting with Brown over the telephone. N.T. 10/1/2012, p. 86-87. Kuronya met Brown in a parking lot in Bristol, Bucks County. N.T. 10/1/2012, p. 87. At that time, Kuronya paid Brown with $1,200 cash which had been provided to him previously by the police officers involved in the investigation. N.T. 10/1/2012, p. 87. The $1,200 provided to Kuronya by police was pre-recorded buy money. N.T. 10/2/2012, p. 19. That money was copied on a photocopy machine prior to the transaction. N.T. 10/2/2012, p. 19. Copies of the bills are then retained by the police. N.T. 10/2/2012, p. 19. After providing Brown with the money, Kuronya returned to a Wal-mart parking lot where Detective Hanks and the other law enforcement officers were waiting. N.T. 10/1/2012, p. 88.

After a few hours passed, Brown and Kuronya spoke on the telephone to set up another meeting. N.T. 10/1/2012, p. 88. Kuronya testified that Brown handed him the cocaine during the second meeting. N.T. 10/1/2012, p. 89. Kuronya placed the bag of cocaine in the console of his vehicle and left. N.T. 10/1/2012, p. 89. After Kuronya traveled approximately a quarter mile, Officer Soto called him and instructed him to pull off of the road. N.T. 10/1/2012, p. 90. Officer Soto removed the cocaine from

Kuronya's possession. N.T. 10/1/2012, p. 90. Kuronya also testified that Officer Soto had observed both meetings between Brown and Kuronya from an unmarked vehicle. N.T. 10/1/2012, p. 91-92.

Detective Hanks corroborated Kuronya's testimony and elaborated on the investigation. Bristol Borough Police asked Detective Hanks to record Kuronya and Brown in a series of phone calls as Kuronya negotiated to purchase one ounce of cocaine from Brown. N.T. 10/1/2012, p. 101-04. Detective Hanks stated that he met Kuronya on May 10, 2012, at the District Attorney's Office, N.T. 10/1/2012, p. 103. The parties left the District Attorney's Office, and made the first phone call to Brown from the parking garage for the Bucks County Courthouse. N.T. 10/1/2012, p. 104. The phone call was recorded with a digital recorder, and was played at trial. N.T. 10/1/2012, p. 106.

The following Sunday, another phone call was placed to Brown from the Bucks County Detectives Office in Levittown, Bucks County. N.T. 10/1/2012, p. 106. Again, the phone call was recorded. N.T. 10/1/2012, p. 107. The recording of the second phone call was also played at trial. N.T. 10/1/2012, p. 107. The following day, May 14, 2012, Kuronya placed another call to Brown from the Levittown office to confirm the meeting place and time. N.T. 10/1/2012, p. 108. Again this call was recorded in the same manner as the previous phone calls. N.T. 10/1/2012, p.108.

Kuronya, Detective Hanks and the police officers then went to a Wal-mart parking lot which had been established as a neutral meeting location. N.T. 10/1/2012, p. 88, 109. At that location, Detective Hanks placed a small digital video camera on Kuronya's shirt. N.T. 10/1/2012, p. 109. The camera is designed to look like a button on the shirt. N.T. 10/1/2012, p.109. Detective Hanks also placed a voice recorder without video capability on Kuronya's person. N.T. 10/1/2012, p. 109.

Once the recording devices were activated, Kuronya drove to his meeting with Brown. N.T. 10/1/2012, p. 110. When Kuronya returned to the Wal-mart parking lot after the meeting, the recording devices were retrieved and Detective Hanks immediately downloaded the recordings onto his laptop to check the quality of the audio and video. N.T. 10/1/2012, p. 111. The

parties then waited at that location before placing another recorded telephone call to Brown. N.T. 10/1/2012, p. 111-12. The telephone conversation was recorded in the same manner as the prior conversations and was played at the trial. N.T. 10/1/2012, p. 112.

During the time prior to the last phone call, Detective Hanks, members of the Bristol Borough Police Department, and Kuronya all waited together. N.T. 10/1/2012, p. 113. Kuronya was never left alone and was always escorted by law enforcement officers. N.T. 10/1/2012, p. 113. After the final contact was made with Brown, Detective Hanks placed a video camera on the sun visor of the driver's side of Kuronya's vehicle, in an effort to get a complete shot of the transaction. N.T. 10/1/2012 p. 114. However, the camera slipped down between the times Kuronya left the officers and when he met Brown. N. T 10/1/2012, p. 114. A backup audio recorder was also installed. N.T. 10/1/2012, p. 114.

Officer Soto from the Bristol Borough Police Department also testified regarding his involvement in the investigation. Officer Soto spoke with Kuronya shortly after Kuronya agreed to cooperate with police. N.T. 10/2/2012, p. 4-6. At that time, Brown became a target of investigation. N.T. 10/2/2012, p. 6. Officer Soto testified that on the date of the transaction he performed a search of Kuronya's person, including a pat down search, to ensure that he didn't have any personal money, drugs, or weapons with him. N.T. 10/2/2012, p. 9. Officer Soto also performed a detailed search of Kuronya's vehicle. N.T. 10/2/2012, p. 9. No drugs, money or illegal contraband was found on Kuronya's person or vehicle. N.T. 10/2/2012, p. 9-10.

Officer Soto and another Bristol Borough Police Officer, Officer Lepore, followed Kuronya from the Wal-mart parking lot to the location where the money exchange took place. N.T. 10/2/2012, p. 10. Officer Soto testified that he was about one or two car lengths away from Kuronya's vehicle during the drive and parked approximately 20 spaces away from him in the parking lot. N.T. 10/2/2012, p. 10. Kuronya was never out of Officer Soto's sight. N.T. 10/2/2012, p. 10. The meeting took place in broad daylight with no obstructions blocking the view. N.T. 10/2/2012, p. 11. Officer Soto identified Brown as the individual he saw meeting with Kuronya. N.T. 10/2/2012, p. 11. Officer Soto saw Kuronya hand Brown "an item" but could not

tell what it was from the distance. N.T. 10/2/2012, p. 12. After the interaction, Kuronya drove back to the Wal-mart parking lot. N.T. 10/2/2012, p. 12.

Once the second meeting between Brown and Kuronya was arranged, Officer Soto again followed Kuronya to the parking lot where the drugs were exchanged. N.T. 10/2/2012, p. 13-14. Officer Soto explained that he did not search Kuronya again because he had been with Kuronya during the entire period of time between the two meetings. N.T. 10/2/2012, p. 13. After Kuronya parked his vehicle for the second meeting, Officer Soto also parked approximately 30 feet away. N.T. 10/2/2012, p. 15. It was still daylight and Officer Soto had a clear view of Kuronya's driver's side window from his parking spot. N.T. 10/2/2012, p. 16. Officer Soto testified that Brown arrived at the second meeting location in a white car. N.T. 10/2/2012, p. 16-17.

Officer Soto watched Brown exit his vehicle and approach Kuronya's driver's side window. N.T. 10/2/2012, p. 17. Brown leaned into the window, which Officer Soto described as a common method of completing a "hand-to-hand transaction." N.T. 10/2/2012, p. 17. Officer Soto could not see Brown's hands at that time. N.T. 10/2/2012, p. 17. Brown then reentered the white car and drove away. N.T. 10/2/2012, p. 17. Kuronya drove in the opposite direction. N.T. 10/2/2012, p. 17. Officer Soto followed Kuronya's vehicle for approximately a quarter mile, then called Kuronya and asked him to pull over. N.T. 10/2/2012, p. 17. Kuronya complied and Officer Soto retrieved a sandwich bag containing a white rock-like substance. N.T. 10/2/2012, p. 18. The substance was sent to the Bucks County Crime Laboratory for analysis. N.T. 10/2/2012, p. 18. The laboratory report confirmed that the substance was cocaine. N.T. 10/2/2012, p. 23.

Officer Lepore testified that on May 14, 2012, he was stationed in a marked police car just outside the parking lot where the second meeting between Kuronya and Brown occurred. N.T. 10/2/2012, p. 42. Officer Lepore's duty was to wait for a radio transmission from Officer Soto and to conduct a traffic stop on Brown after the transaction had been completed. N.T. 10/2/2012, p. 43. Officer Soto radioed to the police officers after the interaction between Brown and Kuronya had ended. N.T. 10/2/2012, p. 21. The police officers waiting outside the

> parking lot conducted a traffic stop and took Brown into custody. N.T. 10/2/2012, p. 44. Brown was searched incident to his arrest and Officer Lepore recovered a plastic bag containing a white, rock-like substance and four $20 bills. N.T. 10/2/2012, p. 44. The white substance was determined to be cocaine. N.T. 10/2/2012, p. 55. The four bills were identified by their serial numbers as being the pre-recorded buy money. N.T. 10/2/2012, p. 46.

Trial Court Opinion, 6/17/13, 1-6.

The amount of cocaine discovered on Appellant was five grams. In addition, the amount of cocaine recovered from Kuronya after his drug transaction with Appellant was 27.7 grams. The Commonwealth presented this evidence to a jury and the jury found Appellant guilty of the aforementioned charges. The court sentenced Appellant on November 21, 2012, imposing a mandatory minimum sentence pursuant to 18 Pa.C.S. § 7508(a)(2)(ii). Appellant filed a post-sentence motion on November 30, 2012, raising a weight of the evidence claim as well as requesting sentencing modification. The court granted a thirty-day extension to decide the motion on March 11, 2013. On April 18, 2013, via an order dated April 16, 2013, Appellant's post-sentence motion was denied by operation of law.

Appellant timely appealed. The trial court directed Appellant to file and serve a Pa.R.A.P. 1925(b) concise statement of errors complained of on appeal. Appellant complied, and the court authored its Pa.R.A.P. 1925(a) opinion. The matter is now ready for this Court's consideration. Appellant raises one issue for our review, "Was Appellant's conviction against the weight of the evidence because the evidence presented by the

Commonwealth did not support a verdict of guilty to the crimes of delivery of a controlled substance, criminal use of a communication facility and possession of drug paraphernalia?" Appellant's brief at 4.

Appellant's sole issue on appeal is a challenge to the weight of the evidence. "[A] weight of the evidence claim must be preserved either in a post-sentence motion, by a written motion before sentencing, or orally prior to sentencing." ***Commonwealth v. Lofton***, 57 A.3d 1270, 1273 (Pa.Super. 2012) (citing Pa.R.Crim.P. 607; ***Commonwealth v. Priest***, 18 A.3d 1235, 1239 (Pa.Super. 2011)). Further, the "[f]ailure to properly preserve the claim will result in waiver, even if the trial court addresses the issue in its opinion." ***Id***.

"Appellate review of a weight claim *is a review of the exercise of discretion, not of the underlying question of whether the verdict is against the weight of the evidence.*" ***Commonwealth v. Clay***, 64 A.3d 1049, 1055 (Pa. 2013) (italics in original). Accordingly, "[o]ne of the least assailable reasons for granting or denying a new trial is the lower court's conviction that the verdict was or was not against the weight of the evidence and that a new trial should be granted in the interest of justice." ***Id***.

A trial judge should not grant a new trial due to "a mere conflict in the testimony or because the judge on the same facts would have arrived at a different conclusion." ***Id***. Instead, the trial court is to examine whether "'notwithstanding all the facts, certain facts are so clearly of greater weight that to ignore them or to give them equal weight with all the facts is to deny

justice.'" ***Id***. Only where the jury verdict "is so contrary to the evidence as to shock one's sense of justice" should a trial court afford a defendant a new trial. ***Id***.

Appellant properly preserved the issue in question by setting it forth in his post-sentence motion. He now argues that the verdict was against the weight of the evidence because the testimony of the CI, Kuronya, was inherently unreliable due to his status as a CI. Appellant's entire argument hinges on an attack on the credibility of Kuronya. He also contends that Kuronya had multiple opportunities to procure the cocaine in question from another source.

Appellant is entitled to no relief. We do not re-weigh credibility determinations made by a fact-finder on appeal. Here, the jury was free to credit the testimony of Kuryona. This is not a case where Kuroyna's testimony was so inherently unreliable or contradictory that the verdict was mere conjecture or unsupported by additional evidence. ***See Lofton***, ***supra***.

Having addressed Appellant's weight claim, we briefly address a legality of sentence issue concerning imposition of the mandatory minimum sentence in this matter. This Court has determined that mandatory minimum sentences pertain to the legality of a defendant's sentence, which are unwaivable claims. Following Appellant's conviction and sentence, the United States Supreme Court in ***Alleyne v. United States***, 133 S.Ct. 2151 (2013), held that the defendant's jury trial rights were infringed where the

federal court applied a federal mandatory minimum statute for brandishing a firearm where the fact of brandishing was not presented to the jury or established beyond a reasonable doubt. The ***Alleyne*** decision expressly overturned ***Harris v. United States***, 536 U.S. 545 (2002), a decision that had upheld a challenge to ***McMillan v. Pennsylvania***, 477 U.S. 79 (1986), following ***Apprendi v. New Jersey***, 530 U.S. 466 (2000).

According to ***Alleyne***, a fact that increases the sentencing floor is an element of the crime that must be submitted to a fact-finder and proven beyond a reasonable doubt. The ***Alleyne*** decision, therefore, renders certain Pennsylvania mandatory minimum sentencing statutes that do not pertain to prior convictions[1] constitutionally infirm insofar as they permit a judge to automatically increase a defendant's sentence based on a

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[1] The constitutionality of statutes permitting prior convictions to automatically increase a defendant's sentence beyond the statutory maximum absent a fact-finder's beyond-a-reasonable-doubt finding has been called in question based on a similar rationale discussed in ***Alleyne v. United States***, 133 S.Ct. 2151 (2013). ***See Apprendi v. New Jersey***, 530 U.S. 466 (2000) (Thomas, J. concurring); ***Harris v. United States***, 536 U.S. 545 (2002) (Thomas, J. dissenting); ***Almendarez-Torres v. United States***, 523 U.S. 224 (1998) (Scalia, J. dissenting) (opining that where prior convictions result in a sentence that otherwise exceeds the statutory maximum a jury determination of the prior convictions is required); ***but see Commonwealth v. Aponte***, 855 A.2d 800 (Pa. 2004). The precise issue has yet to be reconsidered by the United States Supreme Court following ***Apprendi***. ***See Alleyne***, ***supra*** at 2160 n.1.

preponderance of the evidence standard.[2] The court sentenced Appellant under 18 Pa.C.S. § 7508(a)(2)(ii). That statute reads in relevant part,

> (2) 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 classified in Schedule I or Schedule II under section 4 of that act and is a narcotic drug shall, upon conviction, be sentenced to a mandatory minimum term of imprisonment and a fine as set forth in this subsection:
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> (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)(2)(ii). In making this determination, the statute further provides,

> **(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 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

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[2] ***See e.g.***, 42 Pa.C.S. § 9712(c); 42 Pa.C.S. § 9712.1(c); 42 Pa.C.S. § 9713(c); 42 Pa.C.S. § 9718(c); 42 Pa.C.S. § 9719(b); 18 Pa.C.S. § 7508(b); 18 Pa.C.S. § 6317(b).

> evidence and shall determine, by a preponderance of the evidence, if this section is applicable.

18 Pa.C.S. § 7508(b). It is this section that runs afoul of ***Alleyne***. However, we do not find that ***Alleyne*** compels reversal. First, we are cognizant that ***Alleyne*** does not pertain to Appellant's prior conviction, ***see*** footnote 1, *supra*, which is one aspect of the sentencing statute in question. Nonetheless, ***Alleyne's*** rationale can apply to the amount of the drug involved.

In this respect, we find ***United States v. Cotton***, 535 U.S. 625 (2002), instructive and persuasive. In ***Cotton***, the United States Supreme Court declined to reverse several sentences based on an ***Apprendi*** claim that was raised for the first time on appeal, where ***Apprendi*** had not been filed at the time of sentencing. In ***Cotton***, a federal grand jury returned an indictment against multiple defendants for conspiracy to distribute and possess with intent to distribute cocaine and cocaine base. The original indictment specified the charge as involving five or more kilograms of cocaine and fifty grams or more of cocaine base. A subsequent superseding indictment, however, only alleged that there was a detectable amount of cocaine and cocaine base. The amount of cocaine and cocaine base triggered an increased statutory maximum.

A jury convicted the defendants, and the district court found, based on the evidence introduced at trial, that the increased statutory maximum was applicable. While the defendants' case was pending on appeal, the Supreme

Court decided ***Apprendi***. Thereafter, the defendants contended for the first time that their sentences were invalid because the drug quantity was not included in the indictment or submitted to the petit jury. A divided Fourth Circuit Court of Appeals vacated the sentences based on ***Apprendi***, concluding that the federal plain error doctrine applied and that a court is without jurisdiction to impose a sentence for an offense not charged in an indictment.

The High Court reversed, first finding that a defect in a federal indictment is not jurisdictional and opining that the evidence establishing the sentencing enhancement was overwhelming and essentially uncontroverted. The court found that no plain error existed and that sentencing the defendants based on facts not included in the indictment or presented to the petit jury was not improper. Although Pennsylvania law no longer has plain error review, illegal sentencing claims are one of the few remaining vestiges of that doctrine. ***See Foster***, 17 A.3d at 355 (Saylor, J. concurring).

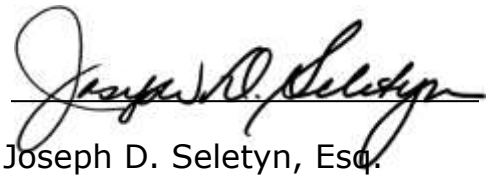
Like ***Cotton***, where ***Apprendi*** was decided after the defendants' sentences, the decision in ***Alleyne*** occurred after Appellant's sentence. Concomitantly, just as in ***Cotton***, the evidence herein, that the amount of cocaine met the requisite sentencing statute, was overwhelming and uncontradicted and the jury found Appellant guilty of possessing that cocaine. Thus, we find that Appellant is not entitled to sentencing relief

based on retroactive application of ***Alleyne***. ***See also Commonwealth v. Watley***, 2013 PA Super 303 (*en banc)*.

Judgment of sentence affirmed.

Justice Fitzgerald Concurs in the Result.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 12/24/2013