

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellant	:	
	:	
v.	:	
	:	
HAKIM HANDY,	:	
	:	
Appellee	:	No. 1980 MDA 2012

Appeal from the Order Entered November 2, 2012
In the Court of Common Pleas of Lycoming County
Criminal Division No(s).: CP-41-CR-0001410-2011

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

CONCURRING MEMORANDUM BY BOWES, J.: **FILED DECEMBER 20, 2013**

I agree with the Commonwealth’s argument that boot camp eligibility was not expressly made part of the plea agreement and therefore it was improper for the trial court to make it part of its sentence where the Commonwealth objected to its inclusion. **See Commonwealth v. Parsons**, 969 A.2d 1259 (Pa.Super. 2009). Accordingly, in reversing, I would not *sua sponte* raise and address an argument not forwarded or addressed below or on appeal.

Presumably, the learned majority raises the position on which it affords the Commonwealth relief because the question implicates the legality

* Former Justice specially assigned to the Superior Court.

of Appellee's sentence. Indeed, although not mentioning the phrases "illegal sentence" or "legality of sentence," it cites to case law relating to such questions and opines that the trial court did not have statutory authority to find Appellee eligible for boot camp. **See** Majority Memorandum at 7 (citing **Commonwealth v. Boyd**, 2013 WL 4082626 (Pa.Super. 2013)).

The question of what exactly is an illegal sentence has given this Court and our Supreme Court some difficulty. **See e.g. Commonwealth v. Foster**, 17 A.3d 332 (Pa. 2011) (OAJC). In the absence of full briefing or existing controlling precedent, I would be more circumspect in granting relief based on a purported illegal sentence. Here, Appellee's sentence did not involve a court lacking jurisdiction, a mandatory minimum, the failure to grant appropriate credit for time served, exceed the lawful maximum, violate the minimum-maximum requirement, nor did it implicate merger, double jeopardy, the prohibition against cruel and unusual punishment, or the Recidivism Risk Reduction Incentive ("RRRI") program.¹ All of these claims have been held to raise illegal sentencing questions.

¹ The author of this memorandum has expressed disagreement with the conclusion that RRRI eligibility automatically equates to a legality of sentence question. **Commonwealth v. Gonzalez**, 10 A.3d 1260, 1264 (Pa.Super. 2010) (Bowes, J. dissenting). The rationale for concluding that RRRI eligibility is an illegal sentencing issue rests on the grounds that the RRRI statute declares that a court "shall" determine eligibility. **Commonwealth v. Robinson**, 7 A.3d 868, 871 n.2 (Pa.Super. 2010). Similar use of the word "shall," nonetheless, appears in discussing a trial court's obligation to consider the sentencing guidelines as well as state the

The question of whether the trial court's assertion that Appellee was eligible for boot camp renders his sentence illegal, even though he is not apparently eligible, is interesting. Furthermore, I acknowledge that there is support in general pronouncements from both this Court and our Supreme Court for finding the majority's position as implicating the legality of Appellee's sentence. In this respect, the sentencing court was without power to deem Appellee eligible if he did not fit within the definition of an eligible offender. Of course, this would not mean that a defendant can raise on appeal for the first time a challenge to a trial court's discretionary determination that the defendant was ineligible for boot camp.

Careful consideration should be paid to determining when a claim pertains to an illegal sentence or if it is more accurately considered a waivable issue that presents a legal question. **See Commonwealth v. Archer**, 722 A.2d 203 (Pa.Super. 1998) (*en banc*); **see also Foster, supra** at 350 (Pa. 2011) (OAJC) (Castille, C.J. concurring) (discussing that discretionary sentencing and illegal sentencing dichotomy is incomplete and

reasons for the sentence imposed, **see** 42 Pa.C.S. § 9721, which are not considered legality of sentence concerns. Succinctly put, the use of the word "shall" in a sentencing statute is far from dispositive of whether a claim relates to an illegal sentence. **See Commonwealth v. Schutzues**, 54 A.3d 86 (Pa.Super. 2012); **Commonwealth v. Cappellini**, 690 A.2d 1220, 1228 (Pa.Super. 1997) (despite 42 Pa.C.S. § 9721(b) providing, "the court shall make as a part of the record, and disclose in open court at the time of sentencing, a statement of the reason or reasons for the sentence imposed," we concluded that a claim that the court did not provide its reasons for sentencing constituted a discretionary sentencing claim).

a third category of sentencing issues can exist). The Commonwealth can statutorily waive boot camp ineligibility, 61 Pa.C.S. 3904(d), and boot camp eligibility, unlike mandatory minimum statutes,² does not restrict the court's authority in imposing a minimum sentence, but affects the parole ramifications of the minimum sentence. **See** 61 Pa.C.S. § 3907 ("Upon certification by the department of the inmate's successful completion of the program, the Pennsylvania Board of Probation and Parole shall immediately release the inmate on parole, notwithstanding any minimum sentence imposed in the case.").

However, since there is no reason to address the issue under a legality of sentence construct, I would simply utilize the existing arguments by the Commonwealth and save for an appropriate case a more thorough analysis of the legality of sentence paradigm implicated herein.

² Many mandatory minimum statutes in Pennsylvania have been rendered unconstitutional by ***Alleyn v. United States***, 133 S.Ct. 2151 (2013).