NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA Appellee v. JOSE ANTONIO VALDES Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 1101 MDA 2013

Appeal from the Judgment of Sentence May 2, 2013
In the Court of Common Pleas of Perry County
Criminal Division at No(s): CP-50-CR-0000244-2012

BEFORE: GANTMAN, P.J., OTT, J., and MUSMANNO, J.

MEMORANDUM BY OTT, J.: **FILED JULY 14, 2014**

Jose Antonio Valdes appeals from the judgment of sentence imposed on May 2, 2013 in the Court of Common Pleas of Perry County. A jury found Valdes guilty of two counts each, robbery threat of serious bodily injury, robbery taking property by force, terroristic threats, unlawful restraint, and simple assault, and three counts of theft by unlawful taking.[1] Valdes received an aggregate sentence of 10 to 20 years' incarceration. Valdes filed two post-sentence motions, one for reconsideration of sentence, and the other for a new trial, claiming the verdict was against the weight of the evidence. Both motions were denied on May 20, 2013. Subsequently, Valdes filed this timely appeal, raising eight issues. He claims two

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[1] 18 Pa.C.S. §§ 3701(a)(1)(ii), 3701(a)(1)(v), 2706(a)(1), 3902(a)(1), 2701(a)(3) and 3921(a), respectively.

evidentiary errors, three challenges to the weight of evidence, and challenges to three aspects of the mandatory minimum sentence imposed for his use of a gun during the crime. After a thorough review of the submissions by the parties, relevant law, and the certified record, we conclude that the mandatory minimum sentence was improperly imposed. Accordingly, we vacate the judgment of sentence and remand for resentencing.

The evidence presented at trial, and viewed in the light most favorable to the Commonwealth as verdict winner, is as follows:

At approximately 8:15 a.m., March 9, 2012, Charlotte Schlosman and Mindy Group were working in the Dollar General Store in Marysville, Pennsylvania. N.T. Trial, 3/28/2013, at 19-20. The first customer of the day, a man later identified as Valdes, entered the store and purchased a drink. ***Id***. at 23-24, 55. Schlosman recognized Valdes from his having shopped in the store on prior occasions. ***Id***. at 24. After buying the drink, Valdes left the counter area and walked to the door. ***Id***. at 56. Valdes returned to the checkout counter area, pulled out what appeared to be a black semiautomatic handgun,[2] and told Group he wanted the money out of the register. ***Id***. at 57. The two women had a difficult time opening the

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[2] A BB gun that looked like a semiautomatic handgun was found by the police in the dumpster behind the store. Although the Commonwealth introduced the BB gun into evidence, it was not positively identified as Valdes's gun.

cash drawer due to their nerves. ***Id***. at 26, 57. Eventually, Schlosman, the assistant manager, used her key to open the register. ***Id***. at 26. After taking the money, Valdes ordered the two women into the back of the store. ***Id***. at 28. He repeatedly asked for the combination to the safe. ***Id***. at 27-28.[3] Valdes attempted to tape each woman's hands behind her back, but could not because he could not find the beginning of the tape. ***Id***. at 31. Eventually, Valdes broke the store phone and took each woman's cell phone and keys and left. ***Id***. at 31-32.

Valdes's first two arguments address evidentiary issues. "Our standard of review relative to the admission of evidence is for an abuse of discretion." ***Commonwealth v. Wantz***, 84 A.3d 324, 336 (Pa. Super. 2014) (citation omitted).

First, Valdes claims the trial court erred in denying his motion to authenticate the photograph used by the police in the photo array that was shown to the victims. Valdes claims the photograph, purported to be of him, was supplied to the police from Florida. That photograph might have been either a "mug shot" or from his driver's license.[4] "Photos will only be admitted if a proper foundation is laid. This can be done by having a witness

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[3] The safe was in the front of the store. ***Id***. at 28. Valdes was not able to open the safe. ***Id***. at 30.

[4] The trial court cites the information of the source of the photo as from Valdes's motion *in limine*. The motion, in turn, cites to a letter from the Commonwealth. That letter is not part of the certified record.

testify that the pictures accurately and fairly depict what they purport to show." ***Commonwealth v. Schwartz***, 615 A.2d 350, 357 (Pa. Super. 1992) (citation omitted). There is nothing in the certified record to indicate that the photograph, purportedly obtained from Florida, was actually a photograph of Valdes. However, Valdes has not demonstrated that he suffered any prejudice from the failure to authenticate the Florida photograph. Our review of the notes of testimony of the trial indicates that the photograph was never introduced into evidence, nor was the photograph shown to the jury. The only possible reference to the photograph is found during the cross-examination of Mindy Group. She testified that she was shown various photographs and was asked if she could identify the robber among them. She could not. ***See*** N.T. Trial, 3/28/13, at 64. Because the jury never saw the photograph and there is no evidence of record that the photograph was used to identify Valdes, he has not demonstrated he suffered any prejudice regarding the photograph. Therefore, the failure to authenticate the photograph was, at most, harmless error[5] and Valdes is not entitled to relief.

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[5] "An error will be deemed harmless where the appellate court concludes beyond a reasonable doubt that the error could not have contributed to the verdict. If there is a reasonable probability that the error may have contributed to the verdict, it is not harmless. In reaching that conclusion, the reviewing court will find an error harmless where the uncontradicted evidence of guilt is so overwhelming, so that by comparison the error is insignificant." ***Commonwealth v. Kuder***, 62 A.3d 1038, 1052 (Pa. Super. 2013).

Next, Valdes claims the trial court erred in denying his motion to exclude fingerprint evidence on the basis that the Commonwealth was dilatory in processing the evidence and in failing to turn over the evidence until the eve of trial.

Once again, Valdes is unable to demonstrate prejudice, and so is not entitled to relief. Essentially, Valdes is arguing that the Commonwealth took a roll of packing tape from the crime scene that the robber attempted to use. However, the Commonwealth did not submit the roll of packing tape for forensic analysis until a few weeks before trial was scheduled to start and did not turn over the forensic report, identifying a fingerprint on the tape as Valdes's left thumb print, until mere days before trial.

It is undisputed that Valdes did not receive the forensic report until the eve of trial and that the report identified a fingerprint taken from the roll of tape as being one from Valdes. However, in light of the totality of the evidence, we cannot conclude that Valdes suffered any prejudice from the late disclosure of the fingerprint evidence.

Both victims identified Valdes as the perpetrator while testifying in court. The evidence demonstrated that both victims had ample opportunity to see Valdes. Schlosman testified she had seen Valdes before, identifying him as a person who had shopped at the store on prior occasions. A copy of the video surveillance from the store was shown to the jury, and while the perpetrator's face is seen on camera only a few times, he is seen for almost the entire eight minutes of the video. The jurors were able to see, for

themselves, whether Valdes matched the video. Given the testimony of the victims, the fact that the surveillance video demonstrated that the victims had ample opportunity to see the perpetrator up close, and the fact that the jurors saw the video surveillance and Valdes for themselves, we must conclude that admission of the fingerprint evidence was harmless error.

In his next class of claims, Valdes argues the weight of the evidence does not support his identification as the robber, or that he possessed a gun, and, because the fingerprint expert was newly employed, she was not worthy of belief.

Initially, we note "[t]o properly be preserved, a weight of the evidence claim must be raised in a motion prior to sentencing, in an oral motion at sentencing, or a post-sentence motion." ***Commonwealth v. Antidormi***, 84 A.3d 736, 758 n.19 (Pa. Super. 2014) (citation omitted). Here, the first two claims were properly preserved in the post-sentence motion. However, the third issue was not. Therefore, the claim regarding the lack of expertise of the fingerprint expert was waived.[6]

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[6] Although Valdes preserved his issues as claims against the weight of the evidence, he argues them in his brief as claims against the sufficiency of the evidence. A claim that the evidence is insufficient because some aspect is unworthy of belief is not a proper sufficiency of the evidence claim. ***See Commonwealth v. Brown***, 53 A.3d 1139 (Pa. 2012). However, because the claims were properly preserved as to the weight of the evidence, we will address the merits of the two properly preserved claims as weight of the evidence challenges.

Our standard of review for a weight of the evidence claim is well settled.

> A motion for a new trial based on a claim that the verdict is against the weight of the evidence is addressed to the discretion of the trial court. A new trial should not be granted because of a mere conflict in the testimony or because the judge on the same facts would have arrived at a different conclusion. Rather, "the role of the trial judge is to determine that '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.'" It has often been stated that "a new trial should be awarded when the jury's verdict is so contrary to the evidence as to shock one's sense of justice and the award of a new trial is imperative so that right may be given another opportunity to prevail."
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> An appellate court's standard of review when presented with a weight of the evidence claim is distinct from the standard of review applied by the trial court:
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> > 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. Because the trial judge has had the opportunity to hear and see the evidence presented, an appellate court will give the gravest consideration to the findings and reasons advanced by the trial judge when reviewing a trial court's determination that the verdict is against the weight of the evidence. One 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[.]

Id. (citations omitted).

Finally,

> [t]he weight of the evidence is exclusively for the finder of fact who is free to believe all, part, or none of the evidence and to determine the credibility of the witnesses. An appellate court cannot substitute its judgment for that of the finder of fact.

> Thus, we may only reverse the jury's verdict if it is so contrary to the evidence as to shock one's sense of justice.

Commonwealth v. Gooding, 818 A.2d 546, 551 (Pa. Super. 2003), appeal denied, 835 A.2d 709 (Pa. 2003).

First, Valdes argues because there was vague and contradictory testimony regarding his identification as the robber, his identity as the perpetrator was against the weight of the evidence. This argument is unavailing.

Valdes claims that one of the clerks had difficulty identifying him in the surveillance video because it was blurry and was unsure about what clothing the robber was wearing. The second clerk did not identify Valdes from a photo array and at trial claimed difficulty in remembering details due to the stress of the robbery. However, the mere existence of contradictory evidence about a relevant fact does not render the verdict against the weight of the evidence. ***See Antidormi***, ***supra***. Therefore, the fact that the witnesses may have been unsure about certain aspects of the perpetrator's appearance does not necessarily mean their identifications of Valdes must be rejected. Particularly when, as here, the jurors saw the surveillance video. The trial court did not abuse its discretion in denying this aspect of Valdes's appeal.

Next, Valdes claims the determination he possessed a gun was against the weight of the evidence. The jury was not asked to determine whether Valdes possessed a handgun. There were no weapons charges brought

against Valdes and he was not charged with possession of an instrument of a crime. The trial judge did not make any reference to possession of any weapon, generally, or a handgun, specifically, in the jury instructions. Because the jury was not asked to determine if Valdes possessed a handgun, and did not make that determination, the non-determination cannot be against the weight of the evidence.

Finally, regarding the weight of the evidence claims, Valdes argues that because the fingerprint expert was relatively new on the job, and given the subjective nature of fingerprint analysis, her testimony was incredible. However, Valdes never objected at trial to the expert's qualifications and, as noted above, he did not raise this issue in his post-sentence motion. Therefore, the issue is waived.

Valdes's final claims address the alleged impropriety of imposing the mandatory minimum sentence, pursuant to 42 Pa.C.S. § 9712. In relevant part, section 9712 states:

> **(a) Mandatory sentence.--**Except as provided under section 9716 (relating to two or more mandatory minimum sentences applicable), any person who is convicted in any court of this Commonwealth of a crime of violence as defined in section 9714(g) (relating to sentences for second and subsequent offenses), shall, if the person visibly possessed a firearm or a replica of a firearm, whether or not the firearm or replica was loaded or functional, that placed the victim in reasonable fear of death or serious bodily injury, during the commission of the offense, be sentenced to a minimum sentence of at least five years of total confinement notwithstanding any other provision of this title or other statute to the contrary. Such persons shall not be eligible for parole, probation, work release or furlough.

> **(b) 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.C.S. § 9712(a), (b).

Therefore, at the time Valdes was sentenced, the Commonwealth was required to prove by a preponderance of the evidence that the defendant visibly possessed a gun during the crime and that the victims of the crime were placed in reasonable fear of death or serious bodily injury.

However, on June 17, 2013, in ***Alleyne v. United States***, 133 S.Ct. 2151, 2155 (2013), the United States Supreme Court held that any facts leading to an increase in a mandatory minimum sentence are elements of the crime and must be presented to a jury and proven beyond a reasonable doubt.

Although Valdes did not challenge the imposition of the mandatory minimum sentence based on ***Alleyne*** in the court below, he did raise the issue before our court. Based upon the reasoning of our Court in ***Commonwealth v. Watley***, 81 A.3d 108 (Pa. Super. 2013) (*en banc*), we

will address the merits of the claim.[7] The ***Watley*** decision stated in relevant part:

> Ordinarily, new rulings pertaining to cases on direct appeal are entitled to retroactive effect so long as the applicable issue is preserved. ***Commonwealth v. Lofton***, 57 A.3d 1270, 1276 (Pa. Super. 2012).[5] Appellant did not preserve any challenge to his mandatory minimum sentence, his jury trial rights, or the constitutionality of § 9712.1, likely because similar challenges had been rejected based on prior United States Supreme Court decisions. The constitutionality of a statute can be waived. ***See Commonwealth v. Hartz***, 367 Pa. Super. 267, 532 A.2d 1139, 1142-1143 (1987) (*en banc*) (Cirillo, P.J. concurring) (collecting cases); ***see also Commonwealth v. Bavusa***, 574 Pa. 620, 832 A.2d 1042 (2003); ***Commonwealth v. Wallace***, 368 Pa. Super. 255, 533 A.2d 1051 (1987).
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> [5] We note that there is a fundamental difference between retroactivity analysis during a direct appeal and cases on collateral review. In the context of federal *habeas* review, the United States Supreme Court has stated, "an old rule applies both on direct and collateral review, but a new rule is generally applicable only to cases that are still on direct review." A new rule applies retroactively in a collateral proceeding only if (1) the rule is substantive or (2) the rule is a " 'watershed rule of criminal procedure' implicating the fundamental fairness and accuracy of the criminal proceeding." ***Whorton v. Bockting***, 549 U.S. 406, 416, 127 S.Ct. 1173, 167 L.Ed.2d 1 (2007) (internal citations omitted); ***see also Danforth v. Minnesota***, 522 U.S. 264, 128 S.Ct. 1029, 169 L.Ed.2d 859 (2008).

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[7] ***Watley*** involved the imposition of the mandatory minimum sentence found at 42 Pa.C.S. § 9712.1. This section specifically addresses the possession of firearms in drug related crimes as opposed to section 9712, which addresses possession of firearms in crimes of violence. This difference does not affect our analysis.

Nonetheless, while we are cognizant that ***Alleyne*** was a Sixth Amendment jury trial rights case, it necessarily implicated Pennsylvania's legality of sentencing construct since it held that it is improper to sentence a person to a mandatory minimum sentence absent a jury's finding of facts that support the mandatory sentence.[6] Application of a mandatory minimum sentence gives rise to illegal sentence concerns, even where the sentence is within the statutory limits. ***See Commonwealth v. Foste****r*, 960 A.2d 160 (Pa. Super. 2008), *affirmed,* 609 Pa. 502, 17 A.3d 332 (2011) (OAJC); ***Hopkins***, ***supra*** at 821. Legality of sentence questions are not waivable and may be raised *sua sponte* by this Court. ***See Hopkins***, ***supra***; ***Commonwealth v. Infante***, 63 A.3d 358 (Pa. Super. 2013).

> [6] The majority in ***Alleyne v. United States***, --- U.S. ----, 133 S.Ct. 2151, 186 L.Ed.2d 314 (2013) rejected the contention of Chief Justice Roberts in his dissent that a defendant's jury rights were not violated because the defendant could have been sentenced to the same period of incarceration absent a jury finding of the facts triggering the mandatory.

This Court is aware of the issue preservation and retroactivity concerns, relative to broadening legality of sentence questions beyond sentences that exceed the statutory maximum and merger, expressed by Chief Justice Castille in his concurring opinions in ***Foster***, 609 Pa. 502, 17 A.3d 332 (Castille, C.J. concurring), ***Commonwealth v. Roney***, 581 Pa. 587, 866 A.2d 351, 362-365 (2005) (Castille, J. concurring), and ***Commonwealth v. Aponte***, 579 Pa. 246, 855 A.2d 800, 812-816 (Castille, J. concurring). Moreover, aside from the inherent complexities with retroactivity and illegal sentence issues, we acknowledge that both currently and in the past, Pennsylvania courts have struggled with the concept of illegal sentences. Most notably, this Court has grappled with the illegal sentencing doctrine as jurisprudence on such issues as constitutional sentencing challenges and the difference between legal sentencing questions and an illegal sentence have emerged. ***See Foster***, 960 A.2d at 164 (*citing* ***Commonwealth v. Dickson***, 591 Pa. 364, 918 A.2d 95, 99 (2007)); ***Commonwealth v. Archer***, 722 A.2d 203 (Pa. Super. 1998) (*en banc*) (distinguishing between a legal question involving sentencing and an illegal sentencing claim); ***Hartz***, ***supra***.

> We do not, however, read the majority opinions in ***Aponte*** or ***Roney*** as mandating that all constitutional cases implicating sentencing raise legality of sentence concerns. ***See Commonwealth v. Jacobs***, 900 A.2d 368, 373 n.6 (Pa. Super. 2006) (*en banc*). Rather, it is only the narrow class of cases already considered to implicate illegal sentences such as double jeopardy, ***Apprendi*** challenges,[7] mandatory minimum sentencing, and other traditional illegal sentencing claims pertaining to sentences that exceed the statutory maximum, which are not subject to traditional issue preservation. ***See also Wallace***, ***supra*** (finding that labeling a sentencing challenge as constitutional does not automatically transform it into a non-waivable illegal sentencing claim). Since this Court may *sua sponte* address a sentence based on its illegality, and, based on existing precedent, an ***Alleyne*** claim can present a legality of sentence issue, we address Appellant's mandatory minimum sentence.[8]
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> > [7] ***Apprendi*** issues have been viewed as raising an illegal sentence question because it involves sentencing a defendant in excess of the statutory maximum, the classic illegal sentence paradigm, based on facts not presented to and/or determined by a jury.
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> > [8] We are cognizant that Appellant has not attempted to contest his sentence on appeal, contrary to those cases in which we have discussed mandatory minimums and legality of sentence matters.

Commonwealth v. Watley, 81 A.3d at 117-18.

Here, Valdes points out that whether he possessed a gun is an element of the crime and must be determined by the jury. He once again argues that the evidence presented at trial does not support a determination, beyond a reasonable doubt, that he possessed a handgun. As we indicated above, the jury was never asked to determine any facts regarding Valdes's possession of a gun. In her Pa.R.A.P. 1925(a) opinion, the trial judge noted

only that she had found by a fair preponderance of the evidence that Valdes possessed a gun. Accordingly, there has been no determination, anywhere within the certified record, beyond a reasonable doubt, that Valdes both possessed a firearm and that the possession of the firearm placed the victims in reasonable fear of death or serious bodily injury.

In ***Watley***, even though the jury was not specifically asked to address the issue of possession of a weapon for purposes of imposition of Section 9712.1, a panel of our court determined that the imposition of the mandatory minimum was still proper because the jury had convicted Watley of a firearms offense. Therefore, the facts supporting the imposition of the mandatory minimum had been submitted to the jury and proven beyond a reasonable doubt. No such similar determination is found herein. Although Valdes was convicted on the charge of robbery, placing the victim in fear of serious bodily injury, ***see*** 18 Pa.C.S. 3701(a)(1)(ii), the instructions given to the jury made no mention that the fear must be based on a determination that Valdes possessed a gun. Specifically, the trial court stated,

> [THE COURT:] The Defendant has been charged with robbery. To find the Defendant guilty of the offense you must find the following two elements have been proven beyond a reasonable doubt.
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> First, that the Defendant threatened the victim with serious bodily injury or intentionally put the victim in fear of immediate serious bodily injury.
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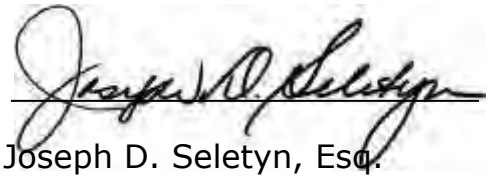
> Second, that the defendant did this during the course of committing a theft.

N.T. Trial, 3/28/2013, at 155. Furthermore, that determination of whether Valdes possessed a firearm is not ours, as an appellate court, to make or infer.

Accordingly, we affirm Valdes's convictions, but because the facts underlying the imposition of the Section 9712 mandatory minimum sentence were not determined by the jury beyond a reasonable doubt, we vacate the judgment of sentence and remand for resentencing.[8]

Judgment of sentence vacated; case remanded for resentencing. Jurisdiction relinquished.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 7/14/2014

[8] Because of our resolution of this issue, we need not address Valdes's remaining claims regarding the imposition of the mandatory minimum sentence.