

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA

Appellee

v.

RANDY ALLEN ROBERTSON

Appellant

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 1160 MDA 2013

Appeal from the PCRA Order June 17, 2013
In the Court of Common Pleas of Berks County
Criminal Division at No(s): CP-06-CR-0003256-2009

COMMONWEALTH OF PENNSYLVANIA

Appellee

v.

RANDY ROBERTSON

Appellant

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 1161 MDA 2013

Appeal from the PCRA Order June 17, 2013
In the Court of Common Pleas of Berks County
Criminal Division at No(s): CP-06-CR-0000438-2011

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

MEMORANDUM BY OTT, J.:

FILED JUNE 10, 2014

Randy Allen Robertson, *pro se*,¹ brings this consolidated appeal from the orders entered June 17, 2013, in the Court of Common Pleas of Berks

¹ On May 17, 2013, the PCRA court granted appointed counsel's motion for leave to withdraw after counsel filed a no-merit letter and application to
(Footnote Continued Next Page)

County, dismissing, without a hearing, his petitions seeking relief under the Post Conviction Relief Act (PCRA), 42 Pa.C.S. § 9541 *et seq.* Robertson claims (1) trial counsel was ineffective for not requesting an updated presentence investigation (PSI) report, and (2) the trial court erred by imposing an illegal sentence when it failed to identify him as eligible for a reduced sentence pursuant to the Recidivism Risk Reduction Incentive Act ("RRRI" or "the Act"). Based upon the following, we reverse the PCRA court's order denying PCRA relief, vacate the judgment of sentence, and remand for a sentencing hearing to determine whether Robertson qualifies for an RRRI sentence.

The PCRA court has aptly summarized the facts and procedural history underlying this appeal:

On May 19, 2011, [Robertson] entered into an open guilty plea on two (2) dockets. On Docket 3256-2009, [Robertson] pled guilty to one (1) count of Possession with Intent to Deliver a Controlled Substance (hereinafter "PWID").¹ In exchange for [Robertson's] agreement to plead guilty, the Commonwealth agreed to dismiss two (2) counts of Possession of a Controlled Substance² and one (1) count of Possession of Drug Paraphernalia.³ On Docket 438-2011, Defendant pled guilty to one (1) count of Corrupt Organizations,⁴ one (1) count of PWID,⁵ one (1) count of Conspiracy to Commit PWID,⁶ and one (1) count of Criminal Use of a Communication Facility.⁷ In exchange for this guilty plea, the Commonwealth agreed to dismiss the remaining eight (8) counts of the Information.

(Footnote Continued) _____

withdraw pursuant to ***Commonwealth v. Turner***, 544 A.2d 927 (Pa. 1988) and ***Commonwealth v. Finley***, 550 A.2d 213 (Pa. Super. 1988).

¹ 35 P.S. § 780-113(a)(30).

² 35 P.S. § 780-113(a)(16).

³ 35 P.S. § 780-113(a)(32).

⁴ 18 PA. CONS. STAT. § 911(b)(3).

⁵ 35 P.S. § 780-113(a)(30).

⁶ 18 PA. CONS. STAT. § 903(a)(2).

⁷ 18 PA. CONS. STAT. § 7512(a).

On that same date, [Robertson] was sentenced to serve no less than five (5) to no more than ten (10) years under Docket 3256-2009 with a credit of sixty three (63) days of time served. The Court ordered that this sentence be served concurrently with the sentence imposed on count five (5) of Docket 438-2011. On Docket 438-2011, [Robertson] was sentenced to serve no less than ten (10) to no more than twenty (20) years with a credit of one hundred and ninety seven (197) days of time served on count five (5), the PWID charge. On the remaining counts, [Robertson] was sentenced to serve no less twenty seven (27) months to no more than twenty (20) years on the Corrupt Organizations charge, no less than twenty seven (27) months to no more than seven (7) years on the Conspiracy to Commit PWID charge and no less than one (1) to no more than seven (7) years on the Criminal Use of a Communication Facility charge. All of the sentences imposed under docket 438-2011 were ordered to be served concurrently with the sentence imposed under docket 3256-2009. In total, the [Robertson] was sentenced to serve no less than ten (10) to no more than twenty (20) years in a state correctional institution. [Robertson] was represented at his guilty plea and sentencing hearing by Robert Kirwan, Esquire (hereinafter "trial counsel"). No post-sentence motions or appeals were filed.

[Robertson] filed his *pro se* MOTION FOR POST CONVICTION COLLATERAL RELIEF (hereinafter "PCRA petition") on May 11, 2012. Osmer Deming, Esquire, was appointed to represent [Robertson] on May 23, 2012, regarding the disposition of his PCRA petition. Attorney Deming was directed by this Court to file, after careful review of the record and the PCRA petition, either an amended PCRA petition, pursuant to Pennsylvania Rule of Criminal Procedure 905, detailing [Robertson's] eligibility for

relief or a “No-Merit” Letter, pursuant to **Commonwealth v. Turner**, 544 A.2d 927 (Pa. 1988) and **Commonwealth v. Finley**, 550 A.2d 213 (Pa. Super. 1988), detailing the reasons why this Court should allow him to withdraw as counsel.

PCRA counsel reviewed the entire official record, corresponded with [Robertson] and researched relevant and applicable law. Based upon that review, on April 29, 2013, PCRA counsel filed a “No-Merit” Letter, pursuant to **Turner** and **Finley**, requesting leave to withdraw as counsel. In the “No-Merit” Letter, counsel expressed that, in his professional judgment, there are no genuine issues of material fact that [Robertson] can raise to show that his claims have any arguable merit.

PCRA Memorandum Opinion, 8/20/2013, at 3–5.

The PCRA court concluded, after its independent review that Robertson’s PCRA petitions were “lacking in merit and no purpose would be served by any further proceedings in this matter.” **Id.** at 5. The PCRA court issued a Pa.R.Crim.P. 907(1) notice of intent to dismiss the petitions, granted counsel leave to withdraw, and ultimately dismissed the petitions without a hearing. This timely appeal followed.²

² The PCRA court, by order dated July 8, 2013, and served by certified mail on July 9, 2013, directed Robertson to file a concise statement of errors complained of on appeal within 21 days, pursuant to Pa.R.A.P. 1925(b). **See** Order, 7/8/2013; Proof of Service, 7/8/2013. **See also** Pa.R.Crim.P. 114. Robertson’s *pro se* concise statement, which was hand-dated July 24, 2013, was docketed on July 31, 2013. Therefore, although there is no evidence showing when Robertson mailed his concise statement from prison, it may be inferred that the statement was mailed, at the latest, by July 30, 2013 — within the 21-day time period from July 9, 2013. **See Commonwealth v. Robinson**, 12 A.2d 477, 479 n.2 (Pa. Super. 2011) (“Under the ‘prisoner mailbox rule,’ we deem the [document] as filed on the date Appellant presented it to prison authorities for mailing.”). Accordingly, we deem Robertson’s concise statement as timely filed.

Our standard of review of an order denying PCRA relief is well-established: “We review an order of the PCRA court to determine whether the record supports the findings of the PCRA court and whether its rulings are free from legal error.” ***Commonwealth v. Michaud***, 70 A.3d 862, 867 (Pa. Super. 2013) (citation omitted).

Preliminarily, we note that relevant to both issues raised in this appeal is the mandatory sentencing provision set forth at 18 Pa.C.S. § 7508(a)(3)(ii). At the sentencing hearing, the trial court applied Section 7508(a)(3)(ii) to Docket No. 3256-2009, Count 1 (PWID — 50 < 100 grams cocaine; second or subsequent offense), and to Docket No. 438-2011, Count 5 (PWID — 10 < 50 grams cocaine; second or subsequent offense). **See** Sentencing Guideline Forms, 5/26/2011, at Docket Nos. 3256-2009 and 438-2011, respectively. **See also** N.T., 5/19/2011, at 34–36.

Section 7508 states, in relevant part:

(a) *General rule.* --Notwithstanding any other provisions of this or any other act to the contrary, the following provisions shall apply:

(3) 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 is coca leaves or is any salt, compound, derivative or preparation of coca leaves or is any salt, compound, derivative or preparation which is chemically equivalent or identical with any of these substances or is any mixture containing any of these substances except decocainized coca leaves or extracts of coca leaves which (extracts) do not contain cocaine or ecgonine shall, upon

conviction, be sentenced to a mandatory minimum term of imprisonment and a fine as set forth in this subsection:

...

(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[.]

(a.1) Previous conviction.—For purposes of this section, it shall be deemed that a defendant has been convicted of another drug trafficking offense when the defendant has been convicted of another offense under section 13(a)(14), (30) or (37) of The Controlled Substance, Drug, Device and Cosmetic Act, or of a similar offense under any statute of any state or the United States, whether or not judgment of sentence has been imposed concerning that offense.

18 Pa.C.S. § 7508(a)(3)(ii), (a.1).

Robertson first contends that trial counsel was ineffective in failing to request an updated PSI report. In reviewing this claim, we are mindful that “[t]o succeed on a claim that counsel was ineffective, Appellant must demonstrate that: (1) the claim is of arguable merit; (2) counsel had no reasonable strategic basis for his or her action or inaction; and (3) counsel’s ineffectiveness prejudiced him. *Michaud, supra* at 867 (citation omitted).

Here, Robertson argues that counsel was ineffective in failing to request an updated PSI because the PSI used at sentencing contained

“incorrect information.” Robertson’s Brief at 8. In this regard, Robertson argues his 2004 PWID conviction involving .09 grams of cocaine³ — reflected in the PSI report — was erroneously used to support the mandatory five-year sentences imposed pursuant to 18 Pa.C.S. § 7508(a)(3)(ii).⁴ According to Robertson, the mandatory five-year sentence set forth in Section 7508(a)(3)(ii) only applies where the previous conviction involved more than 2 grams of a controlled substance. Robertson’s argument, however, is unavailing. Nothing in the plain language of Section 7508 requires the Commonwealth to establish that the “previous conviction” entailed at least two grams of a controlled substance. **See** 18 Pa.C.S. § 7508(a)(3)(ii), (a.1), *supra*. **See also Commonwealth v. Polanco**, 616 A.2d 1372, 1373 n.1 (Pa. 1992) (stating under amended statute, Commonwealth need not establish that previous conviction involved at least 2 grams of controlled substance). Consequently, we reject Robertson’s allegations of ineffective assistance of counsel in connection with the PSI report.

Robertson next contends that the trial court imposed an illegal and excessive sentence by misapplying the RRRI statute and denying his request

³ Robertson also had prior convictions in 1996 and 1997 for PWID (marijuana). **See** N.T., 5/19/2011, at 19–20.

⁴ Robertson, in his *pro se* brief, mistakenly cites Section 7508(a)(2)(ii) as the mandatory sentencing provision at issue. **See** Robertson’s Brief at 9–11.

for a RRRI minimum sentence. Robertson's claim that he was entitled to an RRRI sentence implicates the legality of his sentence. ***Commonwealth v. Pardo***, 35 A.3d 1222, 1230 (Pa. Super. 2011), *appeal denied*, 50 A.3d 125 (Pa. 2012) ("This Court has previously held that when a defendant challenges a trial court's disqualification of his entry into the RRRI program, the issue is one of legality of the sentence and is non-waivable."). ***See Commonwealth v. Tobin***, ___ A.3d ___, ___ [2014 PA Super 61] (Pa. Super. 2014) ("[A] defendant's challenge relative to the failure to apply a RRRI minimum [is] a non-waivable illegal sentencing claim."); ***Commonwealth v. Robinson***, 7 A.3d 868, 871 (Pa. Super. 2010) ("[W]here the trial court fails to make a statutorily required determination regarding a defendant's eligibility for an RRRI minimum sentence as required, the sentence is illegal."). ***See also Commonwealth v. Jackson***, 30 A.3d 516, 521 (Pa. Super. 2011), *appeal denied*, 47 A.3d 845 (Pa. 2012) (recognizing that legality of sentencing issues are cognizable under the PCRA). "[T]he determination as to whether the trial court imposed an illegal sentence is a question of law; our standard of review in cases dealing with questions of law is plenary." ***Commonwealth v. Main***, 6 A.3d 1026, 1028 (Pa. Super. 2010) (citations omitted).

In order to be entitled to a RRRI sentence, a defendant must meet the definition of "eligible offender," codified at 61 Pa.C.S. § 4503. An "eligible offender" is defined as follows:

A defendant or inmate convicted of a criminal offense who will be committed to the custody of the department and who meets all of the following eligibility requirements:

(1) Does not demonstrate a history of present or past violent behavior.

(2) Has not been subject to a sentence the calculation of which includes an enhancement for the use of a deadly weapon as defined under law or the sentencing guidelines promulgated by the Pennsylvania Commission on Sentencing or the attorney for the Commonwealth has not demonstrated that the defendant has been found guilty of or was convicted of an offense involving a deadly weapon or offense under 18 Pa.C.S. Ch. 61 (relating to firearms and other dangerous articles) or the equivalent offense under the laws of the United States or one of its territories or possessions, another state, the District of Columbia, the Commonwealth of Puerto Rico or a foreign nation.

(3) Has not been found guilty of or previously convicted of or adjudicated delinquent for or an attempt or conspiracy to commit a personal injury crime as defined under section 103 of the act of November 24, 1998 (P.L. 882, No. 111), known as the Crime Victims Act, or an equivalent offense under the laws of the United States or one of its territories or possessions, another state, the District of Columbia, the Commonwealth of Puerto Rico or a foreign nation.

(4) Has not been found guilty or previously convicted or adjudicated delinquent for violating any of the following provisions or an equivalent offense under the laws of the United States or one of its territories or possessions, another state, the District of Columbia, the Commonwealth of Puerto Rico or a foreign nation:

18 Pa.C.S. § 4302(a) (relating to incest).

18 Pa.C.S. § 5901 (relating to open lewdness).

18 Pa.C.S. Ch. 76 Subch. C (relating to Internet child pornography).

Received a criminal sentence pursuant to 42 Pa.C.S. § 9712.1 (relating to sentences for certain drug offenses committed with firearms).

Any offense for which registration is required under 42 Pa.C.S. Ch. 97 Subch. H (relating to registration of sexual offenders).

(5) Is not awaiting trial or sentencing for additional criminal charges, if a conviction or sentence on the additional charges would cause the defendant to become ineligible under this definition.

(6) Has not been found guilty or previously convicted of violating section 13(a)(14), (30) or (37) of the act of April 14, 1972 (P.L. 233, No. 64), known as The Controlled Substance, Drug, Device and Cosmetic Act, where the sentence was imposed pursuant to 18 Pa.C.S. § 7508(a)(1)(iii), (2)(iii), (3)(iii), (4)(iii), (7)(iii) or (8)(iii) (relating to drug trafficking sentencing and penalties).

61 Pa.C.S. § 4503 (footnotes omitted). Furthermore, the law is clear that if the defendant is an "eligible offender," the Act **requires** the sentencing court to impose an RRRI minimum sentence.⁵ 61 Pa.C.S. § 4505(c)(2). The statute grants the sentencing court discretion regarding the imposition of an RRRI minimum sentence for an eligible defendant **only if** the defendant

⁵ "The [RRRI] minimum shall be equal to three-fourths of the minimum sentence imposed when the minimum sentence is three years or less. The [RRRI] minimum shall be equal to five-sixths of the minimum sentence if the minimum sentence is greater than three years. For purposes of these calculations, partial days shall be rounded to the nearest whole day. In determining the [RRRI] minimum sentence, the aggregation provisions of 42 Pa.C.S. §§ 9757 (relating to consecutive sentences of total confinement for multiple offenses) and 9762(f) (relating to sentencing proceeding; place of confinement) shall apply." 61 Pa.C.S. § 4505(c)(2).

previously received two or more RRRI minimum sentences. 61 Pa.C.S. § 4505(c)(3).

At the sentencing hearing, Robertson's counsel requested the court to identify Robertson as eligible for the RRRI program, and the trial court denied the request, stating "[h]e's not eligible by statute." *Id.* at 34–35.

The PCRA judge, in his PCRA Order and Notice of Intent to Dismiss, opined:

As the record demonstrates, [Robertson] was **not** RRRI eligible. He pled guilty to two (2) counts of PWID, which are violations of section 13(a)(30) of the Controlled Substance, Drug, Device and Cosmetic Act, and he was sentenced pursuant to the mandatory minimum sentence found in 18 PA. CONS. STAT. § 7508. Therefore, [Robertson] was ineligible to participate in the RRRI program, as the Court reminded trial counsel at the guilty plea and sentencing hearing.

PCRA Memorandum Opinion, *supra* at 9 (emphasis in original). We disagree with the PCRA court's conclusion.

The Act provides that individuals are ineligible for RRRI if they have been found guilty or previously convicted "of violating section 13(a)(14), (30) or (37) of the act of April 14, 1972 (P.L. 233, No. 64), known as The Controlled Substance, Drug, Device and Cosmetic Act, **where the sentence was imposed pursuant to 18 Pa.C.S. § 7508(a)(1)(iii), 2(iii), 3(iii), 4(iii), 7(iii) or 8(iii)** (relating to drug trafficking and penalties)." 61 Pa.C.S. § 4503(6) (emphasis supplied). Here, Robertson's mandatory sentences were imposed pursuant to 18 Pa.C.S. **§ 7508(a)(3)(ii)**, and, therefore, he was not disqualified by reason of these sentences. ***See Commonwealth v.***

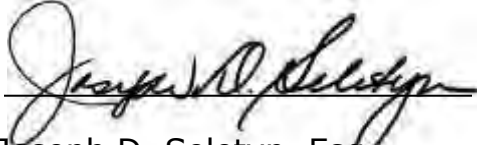
Hansley, 47 A.3d 1180, 1188–1189 (Pa. 2012) (“The RRRI eligibility provision ... did not exclude all drug offenders, or even all drug offenders subject to mandatory sentences.”); **see also Commonwealth v. Tobin, supra**.

Although there may be other factors that would preclude Robertson from receiving an RRRI sentence, it is the role of the sentencing court — not this Court or the PCRA court — to consider the eligibility factors for an RRRI sentence in the first instance. **Commonwealth v. Grundza**, 819 A.2d 66, 68 (Pa. Super. 2003); **see also Commonwealth v. Robinson, supra**, 7 A.3d at 871 (remanding for a determination of defendant’s eligibility for an RRRI sentence); **Commonwealth v. Main, supra**, 6 A.3d at 1030 (same). Therefore, we are compelled to remand this case for a sentencing hearing to determine whether Robertson qualifies for an RRRI sentence.

Accordingly, we reverse the PCRA court’s order dismissing Robertson’s PCRA petition, vacate the judgment of sentence, and remand this case for a sentencing hearing regarding Robertson’s RRRI eligibility, to be followed by resentencing. We also direct the court to appoint counsel to represent Robertson at the sentencing hearing.

Order reversed. Judgment of sentence vacated. Case remanded for proceedings consistent with this memorandum. Jurisdiction relinquished.

Judgment Entered.

A handwritten signature in black ink, appearing to read "Joseph D. Seletyn", written over a horizontal line.

Joseph D. Seletyn, Esq.
Prothonotary

Date: 6/10/2014