**NON-PRECEDENTIAL DECISION – SEE SUPERIOR COURT I.O.P. 65.37**

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| COMMONWEALTH OF PENNSYLVANIA | : | IN THE SUPERIOR COURT OF PENNSYLVANIA |
| v. | : | |
| DAVITA BOYD, | : | No. 235 EDA 2013 |
| Appellant | : | |

Appeal from the Judgment of Sentence, December 27, 2012,
in the Court of Common Pleas of Montgomery County
Criminal Division at No. CP-46-CR-0006405-2011

BEFORE: FORD ELLIOTT, P.J.E., LAZARUS AND WECHT, JJ.

MEMORANDUM BY FORD ELLIOTT, P.J.E.: **FILED JUNE 23, 2014**

Following a jury trial in the Court of Common Pleas of Montgomery County, Davita Boyd was convicted of possession of a controlled substance (heroin) with intent to deliver, possession of a controlled substance with intent to deliver (cocaine), and two counts of criminal conspiracy. Thereafter, the trial court imposed a 5 to 10-year mandatory minimum sentence, as it found the Commonwealth proved by a preponderance of the evidence that appellant possessed a firearm in close proximity to a controlled substance, and a concurrent term of 10 years' probation for conspiracy. We affirm in part and remand this case for re-sentencing.

A brief recitation of the facts and procedural history follow. On August 10, 2011, Corporals Nicholas Dumas and David Stowell of the Norristown police department arranged a controlled buy of heroin using a

confidential informant ("CI"). (Notes of testimony, 7/31/12 at 22-23.) While Corporal Dumas searched the informant and provided him with $40 in pre-recorded buy money, Corporal Stowell took an elevated surveillance position and began to watch the target residence of 127 West Airy Street. (***Id.*** at 45.)

Corporal Dumas circled the block in an undercover police vehicle. From approximately 15 feet away, he observed appellant, who was wearing a distinctive purple shirt with donkeys on it, meet with the CI. (***Id.*** at 24.) Corporal Dumas, however, did not witness an exchange between the two from his vantage point. Corporal Dumas then proceeded back to the location where he was to meet up with the CI.

Corporal Stowell testified that he observed appellant exit the house numerous times on the date in question. (***Id.*** at 47.) Corporal Stowell observed the CI walk to the northwest corner of Norris and Airy Streets where he stopped and used his cell phone. (***Id.*** at 48.) According to Corporal Stowell, the CI then walked toward a location across from the residence where appellant had been standing underneath a tree. (***Id.***) From Corporal Stowell's vantage point, he was not able to see the CI or appellant for approximately ten seconds. The CI then returned across Airy Street into the corporal's view. (***Id.*** at 48-49.) Thereafter, Corporal Stowell observed the CI walk south on Cherry Street and return to Corporal Dumas' car. (***Id.*** at 49.)

The CI gave Corporal Dumas a bag containing heroin stamped "WAY TO GO," and it was determined that he no longer had the recorded bills. (***Id.*** at 25-26.) No other persons were observed meeting with appellant or the CI, and the CI did not have an opportunity to obtain drugs from any other source.[1]

Approximately a week after appellant's sale of heroin to the CI, the police also witnessed one uncontrolled and one controlled buy of drugs from Hykeem Boyd ("Hykeem"), appellant's brother, out of the same residence. The heroin purchased in the controlled buy from Hykeem, was also packaged in bags containing paper stamped "WAY TO GO." (***Id.*** at 38-40.)

Within 48 hours of the controlled buy from Hykeem, and eight days after the controlled buy from appellant, the Norristown police executed a search warrant at 127 West Airy Street, Apartment 2. The residence was a second and third floor apartment, reached via stairs from a first floor foyer. (***Id.*** at 55-56.) The second floor had a small kitchen, bathroom, living room, and bedroom. The third floor consisted of two bedrooms, which were completely empty. (***Id.*** at 56.)

Eric Williams and Hykeem were present in the apartment; when the officers announced themselves, they attempted to flee out an upstairs window. Appellant stood across the street talking to neighbors and made no effort to flee while the warrant was being executed. (***Id.*** at 57, 67.)

[1] Appellant was not charged with this incident.

Hykeem was apprehended. (***Id.***) Williams re-entered the apartment through a window into the kitchen and was apprehended with 23 packets of crack cocaine at his feet. (***Id.***)

In addition to the cocaine found at Williams' feet, the search of the residence revealed mail addressed to both Hykeem and appellant. Additionally, the officers recovered 40 bags of heroin stamped "WAY TO GO" in the kitchen cabinets, two large bags each containing approximately 50 bags of crack cocaine under a furnace in the living room, a box containing approximately $1,400 in cash on the living room table, several cell phones, and a firearm which had been stashed under a furnace in the living room. (***Id.*** at 57-60.)

As a result of the search, all three were arrested and each charged with possession of cocaine and heroin, intent to deliver, conspiracy, and other related charges. Prior to appellant's trial, the Commonwealth filed a motion ***in limine*** seeking to admit evidence of the controlled buy, despite the fact that she was not charged with delivery. This motion was heard in conjunction with appellant's motion to disclose the identity of the CI. Thereafter, the court granted the Commonwealth's motion and denied the defense motion.

A jury trial commenced and the parties stipulated that whoever possessed the drugs found in the house did so with the intent to deliver them. As a result of the stipulation, the Commonwealth did not introduce

evidence that a firearm had been found under the furnace. Subsequently, appellant was convicted of the above-stated offenses.

On December 27, 2012, the Commonwealth filed its notice of intent to seek the mandatory minimum sentence of 5 to 10 years for drug offenses committed with firearms pursuant to 42 Pa.C.S.A. § 9712.1. At the sentencing hearing, the Commonwealth presented evidence that the gun was found within two to three feet of the cocaine and within 15 to 20 feet of the heroin. On the controlled substances charges, appellant was sentenced to concurrent mandatory minimum terms of 5 to 10 years' imprisonment and a concurrent term of 10 years' probation for conspiracy.

On January 15, 2013, appellant filed a timely notice of appeal. (Docket #42.) Appellant complied with the trial court's order to file a concise statement of errors complained of on appeal within 21 days pursuant to Pa.R.A.P., Rule 1925(b), 42 Pa.C.S.A.; and the trial court has filed an opinion. The following issues have been presented for our review:

> [1.] WHETHER THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT DENIED APPELLANT'S MOTION TO COMPEL THE COMMONWEALTH TO REVEAL THE IDENTITY OF THE [C.I.], ESPECIALLY WHEN IT GRANTED THE COMMONWEALTH'S MOTION ***IN LIMINE*** TO PRESENT EVIDENCE OF APPELLANT'S ALLEGED DRUG SALE TO THAT INFORMANT[?]
>
> [2.] WHETHER SECTION 9712.1 OF THE JUDICIAL CODE IS UNCONSTITUTIONAL ON ITS FACE BASED UPON THE UNITED STATES SUPREME COURT DECISION IN ***ALLEYNE V. UNITED STATES*** [?]

> [3.] WHETHER THE APPELLANT'S SENTENCE PURSUANT TO PENNSYLVANIA'S MANDATORY MINIMUM SENTENCE FOR DRUG OFFENSES COMMITTED WITH FIREARMS IS AN ILLEGAL SENTENCE WHERE THE FACTS PREDICATING SUCH A SENTENCE WERE NOT SUBMITTED TO THE JURY FOR PROOF BEYOND A REASONABLE DOUBT BUT WERE INSTEAD PRESENTED TO THE COURT AT SENTENCING[?]

Appellant's brief at 4.[2]

We begin by addressing appellant's argument concerning whether the court erred in denying her request that the identity of the CI used in the controlled buy be disclosed. No relief is due.

When reviewing the denial of a motion to disclose the identity of a CI, our standard of review is "to determine whether the trial court abused its discretion in denying appellant's request for discovery." ***Commonwealth v. Belenky***, 777 A.2d 483, 487 (Pa.Super. 2001), citing ***Commonwealth v. Roebuck***, 681 A.2d 1279, 1282 (Pa. 1996).

The ability to compel disclosure of the identity of a confidential informant flows from the right to discovery contained in the Rules of Criminal Procedure. Pa.R.Crim.P., Rule 573(B)(2)(a)(i), 42 Pa.C.S.A. A defendant has a qualified right to discovery of the names of eyewitnesses.

[2] Additional issues contained in her Rule 1925(b) statement have not been presented by appellant to our court in her brief; hence, we deem them to have been abandoned.

However, when the eyewitness is a confidential informant, police departments have a well-placed reluctance to disclose the identity of such eyewitnesses and, in fact, a recognized privilege to refuse disclosure of the identity of informants. The privilege is not absolute, however, and must give way under appropriate circumstances.

In ***Commonwealth v. Baker***, 946 A.2d 691 (Pa.Super. 2008), we reviewed the following principles regarding disclosure of confidential informants.

> [A] defendant seeking production of a confidential informant at a suppression hearing must show that production is material to his defense, reasonable, and in the interest of justice. By this we mean that the defendant must demonstrate some good faith basis in fact to believe that a police officer-affiant willfully has included misstatements of facts in an affidavit of probable cause which misrepresents either the existence of the informant or the information conveyed by the informant; that without the informant's information there would not have been probable cause; and that production of the informant is the only way in which the defendant can substantiate this claim.

***Id.*** at 693, quoting ***Commonwealth v. Bonasorte***, 486 A.2d 1361, 1373-1374 (Pa.Super. 1984). "The defendant need not predict exactly what the informant will say, but he must demonstrate a reasonable probability the informant could give evidence that would exonerate him." ***Belenky***, 777 at 488.

"[I]f the only 'evidence' produced at the suppression hearing is a defendant's bald assertion (e.g. that the informant does not exist or that the

affiant misrepresented information conveyed by the informant), then the defendant failed to meet his threshold burden." ***Bonasorte***, ***supra*** at 1374. "More is necessary than a mere assertion by the defendant that such disclosure might be helpful in establishing a particular defense." ***Commonwealth v. Herron***, 380 A.2d 1228, 1230 (Pa. 1977). Only after the defendant has met this burden will the court weigh the defendant's proof against the government's need to withhold the CI's identity. ***See Bonasorte***, 486 A.2d at 1274.

Herein, the trial court concluded that appellant failed to meet the threshold burden. (Trial court opinion, 8/14/13 at 14.) Appellant did not demonstrate that disclosure was material and reasonable. Rather, appellant merely asserted that the CI's testimony would be helpful to the defense; such an assertion is insufficient. Appellant failed to make any showing that there was a "reasonable probability that the anonymous informer could give evidence that would exonerate [her]." ***Belenky***, ***supra***.

We find no abuse of discretion on the part of the trial court in rejecting appellant's bald assertion of need. Appellant filed a boilerplate pre-trial discovery motion seeking to have the CI's identity disclosed. (***See*** docket #27.) The written motion provided no basis for the request and neither disclosed appellant's anticipated defenses nor specified the particular evidence that appellant believed the CI might possess. At argument, appellant explained that she was entitled to have the CI's identity disclosed

because she claimed she was misidentified and there were no other non-police officer eyewitnesses. (Notes of testimony, 7/31/12 at 40.) At no point did appellant argue, claim, or present evidence supporting her proposition that she was innocent of the charges or that the CI possessed evidence that could potentially exonerate her. She failed to lay a foundation for any misidentification defense. Under these circumstances, the trial court was correct to conclude that appellant failed to satisfy her threshold burden.

We now turn to appellant's claim that the trial court erred in applying the mandatory minimum sentence pursuant to 42 Pa.C.S.A. § 9712.1 for her PWID conviction.

> Ordinarily, a challenge to the application of a mandatory minimum sentence is a non-waivable challenge to the legality of the sentence. This is so because, by statute, courts have no authority to avoid imposing the mandatory minimum, assuming certain factual predicates apply. Issues relating to the legality of a sentence are questions of law, as are claims contesting a court's application of a statute. Our scope of review in such matters is plenary.

***Commonwealth v. Harley***, 924 A.2d 1273, 1277-1278 (Pa.Super. 2007) (citations omitted).

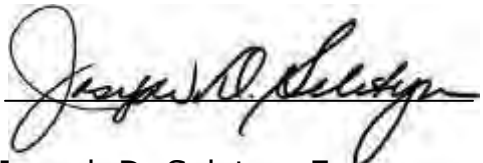
Appellant relies on the United States Supreme Court's recent decision in ***Alleyne v. United States***, ___ U.S. ___, 133 S.Ct. 2151 (2013), which held that any fact increasing a mandatory minimum sentence for a crime is considered an element of the crime to be submitted to the finder-of-fact and found beyond a reasonable doubt. This court has held that ***Alleyne*** applies

to mandatory minimum sentences imposed in Pennsylvania. ***See Commonwealth v. Munday***, 78 A.3d 661, 666 (Pa.Super. 2013).

Instantly, a jury convicted appellant of PWID and conspiracy. The jury made no determination as to whether appellant possessed or controlled a firearm at the time of her PWID offense, or whether a firearm was in close proximity to the drugs recovered. Rather, the sentencing court decided this point as a sentencing factor, based on a preponderance of the evidence standard, and ultimately imposed the mandatory minimum sentence. While at the time of sentencing in this matter, which preceded the decision in ***Alleyne***, the trial court acted in accordance with the law, such action cannot now withstand judicial scrutiny as it results in an illegal sentence. Accordingly, the judgment of sentence must be vacated and remanded for re-sentencing.[3]

Conviction affirmed. Judgment of sentence vacated and case remanded for resentencing. Jurisdiction relinquished.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 6/23/2014

[3] Appellant also raises a challenge to the constitutionality of Section 9712.1 in light of ***Alleyne***. This court recently observed that 42 Pa.C.S.A. §9712.1 is no longer constitutionally sound in light of Alleyne. ***Commonwealth v. Watley***, 81 A.3d 108, 112, n.2 (Pa.Super. 2013) (***en banc***).