

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,

Appellee

v.

RASHAE ALLEN,

Appellant

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 319 WDA 2012

Appeal from the Judgment of Sentence of November 4, 2011,
in the Court of Common Pleas of Allegheny County,
Criminal Division at No. CP-02-CR-0008713-2010

BEFORE: BOWES, LAZARUS and COLVILLE*, JJ.

MEMORANDUM BY COLVILLE, J.:

Filed: March 12, 2013

This case is a direct appeal from judgment of sentence. The issue is whether the sentencing court erred by determining that, because Appellant was sentenced to a mandatory minimum term of imprisonment for drug trafficking under 18 Pa.C.S.A. § 7508(a)(7)(i), she was ineligible for motivational boot camp.¹ Finding the court erred, we vacate the sentence and remand for resentencing.

Appellant was convicted of delivering a controlled substance (1.10 grams of heroin), possession of a controlled substance with intent to deliver it ("PWID"), two counts of possession of a controlled substance, and

* Retired Senior Judge assigned to the Superior Court.

¹ **See** 61 Pa.C.S.A. §§ 3901-09 (setting forth boot-camp provisions).

conspiracy. Her conviction for delivery made her subject to a mandatory minimum term of two years in prison under 18 Pa.C.S.A. § 7508(a)(7)(i). Accordingly, in November 2011, the court sentenced Appellant to incarceration of not less than two years and not more than four years on the delivery count. The court also imposed a consecutive probationary period thereon. The court placed no further penalty on the counts of PWID, possession and conspiracy.

In post-sentence motions, Appellant asked the court to reconsider her sentence and, specifically, to find her eligible for boot camp. The court denied Appellant's request. In so doing, the court noted that 18 Pa.C.S.A. § 7508(a) sets forth certain mandatory minimum terms and that Section 7508(a) states that it shall apply "[n]otwithstanding any other provisions of this or any other act" 18 Pa.C.S.A. § 7508(a). Finding that successful completion of boot camp would lead to parole before the expiration of Appellant's mandatory minimum term, *see* 61 Pa.C.S.A. § 3903 (discussing six-month length of boot camp) and § 3907 (discussing parole upon completion of boot camp), the court reasoned that Section 7508(a) rendered Appellant boot-camp ineligible.

Appellant then filed this appeal contending the sentencing court's decision was legal error. Appellant argues the court, while required to impose the minimum term dictated by 18 Pa.C.S.A. § 7508(a)(7)(i), also had the authority to designate Appellant eligible for participation in boot

camp under 61 Pa.C.S.A. § 3904(b). For the following reasons, we find Appellant is correct.

The issue before us is a question of the proper interpretation, and interplay, of various statutes. As such, our standard of review is *de novo*. ***Commonwealth v. Alvarez-Herrera***, 35 A.3d 1216, 1217 (Pa. Super. 2011). We keep in mind that the purpose of all statutory interpretation is to determine and follow the intent of the Legislature. 1 Pa.C.S.A. § 1921(a). When the words of a statute are clear, we will not disregard them. ***Id.*** § 1922(b). Additionally, we presume the Legislature did not intend an absurd result. ***Id.*** § 1922(b)(1).

The provision under which Appellant was sentenced is as follows:

§ 7508. Drug trafficking sentencing and penalties

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

(7) 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 heroin shall, upon conviction, be sentenced as set forth in this paragraph:

(i) when the aggregate weight of the compound or mixture containing the heroin involved is at least 1.0 gram but less than 5.0 grams the sentence shall be a **mandatory minimum term of two years in prison** and a fine of \$5,000 or such larger

amount as is sufficient to exhaust the assets utilized in and the proceeds from the illegal activity; . . .

18 Pa.C.S.A. § 7508(a)(7)(i) (emphasis added).

While Subsection (a)(7)(i) is the only part of Section 7508(a) reproduced here, it is important to keep in mind that, in full, Section 7508(a) sets forth a total of eighteen numbered and/or lettered subsections mandating various minimum terms of incarceration for differing drug offenses.² *See id.* § 7508(a).

A provision in the boot-camp statutes describes the boot-camp program in this way:

A program in which **eligible inmates participate for a period of six months** in a humane program for motivational boot camp programs which shall provide for rigorous physical activity, intensive regimentation and discipline, work on public projects, substance abuse treatment services licensed by the Department of Health, continuing education, vocational training, prerelease counseling and community corrections aftercare.

61 Pa.C.S.A. § 3903 (emphasis added).

Section 3903 provides a definition for the term “eligible inmate” and, in the course of doing so, excludes inmates serving certain mandatory drug-

² In fact, while there are eighteen such subsections, there are more than eighteen mandatory minimum terms because most of the subsections specify multiple minimum terms associated with differing offenses and/or the defendant’s prior record. *See id.* For the sake of simplicity, it will suffice to recognize that eighteen subsections of Section 7508(a) mandate minimum terms.

trafficking sentences and/or sentences for various particular offenses. **See** *id.* The relevant portion of the definition is:

“Eligible inmate.” A person sentenced to a term of confinement under the jurisdiction of the Department of Corrections who is serving a term of confinement, the minimum of which is not more than two years and the maximum of which is five years or less, The term shall not include . . . any inmate with a current conviction or a prior conviction within the past ten years for any of the following offenses:

**18 Pa.C.S. § 7508(a)(1)(iii), (2)(iii), (3)(iii) or (4)(iii)
(relating to drug trafficking sentencing and penalties).**

61 Pa.C.S.A. § 3903 (emphasis added).

As the foregoing quotation shows, 61 Pa.C.S.A. § 3903 specifically renders a defendant ineligible for boot camp if the defendant is subject to any one of four provisions relating to mandatory minimum terms for drug trafficking—specifically, 18 Pa.C.S.A. § 7508(a)(1)(iii), (2)(iii), (3)(iii), or (4)(iii). While excluding those four mandatory minimum provisions from boot camp, Section 3903 does not exclude the remaining fourteen mandatory minimum provisions of Section 7508(a). Most relevant to this case, Section 3903 does not list 18 Pa.C.S.A. § 7508(a)(7)(i), the subsection under which Appellant was sentenced, as a sentencing provision that renders an inmate ineligible for boot camp. In short, the language of 61 Pa.C.S.A. § 3903 is clear: Some drug-trafficking mandatory minimum terms are boot-camp ineligible; some are not. Appellant’s mandatory minimum term is not ineligible.

We emphasize our earlier observation that 18 Pa.C.S.A. § 7508(a) contains eighteen subsections detailing mandatory minimum terms. It would be illogical to conclude that the Legislature, having specified four of those subsections as ineligible for boot camp, would have then failed to specify the remaining fourteen subsections as ineligible if, in fact, the Legislature had intended all the subsections to be ineligible. Indeed, the Legislature's decision to designate Subsections 7508(a)(1)(iii), (2)(iii), (3)(iii), and (4)(iii) as ineligible for boot camp while not designating the remaining subsections as ineligible persuades us the Legislature intended that those remaining subsections would be boot-camp eligible. **See *Commonwealth v. Hansley***, 994 A.2d 1150, 1157 n.3 (Pa. Super. 2010), *aff'd*, 47 A.3d 1180 (Pa. 2012) (discussing the inference that, where a statute designates certain items, omissions from the designated list are to be understood as being excluded from the list). If the Legislature intended to make all the mandatory minimum terms under Section 7508(a) ineligible, it would not have listed only four of them as ineligible while omitting the remaining fourteen from the ineligible list.

In short, a sentence imposed under 18 Pa.C.S.A. § 7508(a)(7)(i) is not designated as boot-camp ineligible by 61 Pa.C.S.A. § 3903. We therefore conclude the Legislature intended a sentence under 18 Pa.C.S.A. § 7508(a)(7)(i) to be eligible for boot camp. To conclude otherwise would be to ignore the clear language of Section 3903 and to assume the Legislature acted absurdly. We will not do so.

We note that, in *Commonwealth v. Hansley*, 47 A.3d 1180 (Pa. 2012), the Pennsylvania Supreme Court employed reasoning similar to that which we have employed here. In *Hansley*, the court considered whether the appellant was ineligible for the Recidivism Risk Reduction Incentive Act (“RRRI Act”)³ because he was subject to mandatory minimum penalties of imprisonment for drug trafficking under 18 Pa.C.S.A. § 6317 (setting forth sentences for offenses in drug-free zones) and § 7508(a)(3)(ii). The court noted that the RRRI Act, when defining the term “eligible offender” in 61 Pa.C.S.A. § 4503, designated several mandatory minimum terms from 18 Pa.C.S.A. § 7508(a) as ineligible for RRRI but did not designate as RRRI ineligible the particular mandatory term from Section 7508(a) under which the appellant had been sentenced. *Hansley*, 47 A.3d at 1188. The court ultimately concluded that the mandatory minimum penalty in question in

³ The RRRI Act permits particular defendants who complete certain rehabilitative programs to be eligible for reduced sentences. *See* 61 Pa.C.S.A. § 4501-12. When a court imposes a sentence of incarceration, the court thereafter must determine if the defendant is RRRI eligible consistent with various provisions of the RRRI Act. *Id.* §§ 4503, 4505(a). If the defendant is eligible, the court then imposes an RRRI minimum term—a minimum term distinct from, and shorter than, the minimum and maximum terms the court already imposed as part of its initial sentence. *Id.* § 4505(c)(1), (2). While the defendant is not guaranteed parole upon successful completion of the RRRI minimum term, the defendant may well be paroled at that time if the Pennsylvania Board of Probation and Parole determines the defendant satisfies various other parole criteria. *Id.* § 4506(a).

that case, having not been listed as ineligible in the RRRI Act, was eligible.⁴ *Id.* at 1188-89.

As is apparent, the facts of the instant case resemble the relevant aspects of *Hansley*. Appellant's mandatory minimum term is not listed as ineligible for boot camp while other mandatory minimum terms are. By omission from the ineligible list, Appellant's sentence is an eligible one.⁵

⁴ We understand the Supreme Court, in *Hansley*, discussed multiple considerations leading to its conclusion that a mandatory minimum term under Section 7508(a)(3)(ii) did not make Hansley ineligible for RRRI participation. For example, the court discussed amendments to the Sentencing Code made contemporaneously with the passage of the RRRI Act and decided that those amendments, at least one of which specifically mentioned the RRRI, demonstrated a legislative intent to allow for the minimum terms provided by the RRRI Act, notwithstanding minimum terms imposed by other statutes. *See Hansley*, 47 A.3d at 1188-89. Plainly, as we are not seeking to interpret the RRRI, we are not confronted with the same contemporaneous amendments and/or all the same considerations as in *Hansley*. Nonetheless, we find *Hansley* provides guidance in the ways we cite herein.

⁵ Of course, our decision that Appellant's sentence is itself boot-camp eligible does not mean Appellant will necessarily be accepted into boot camp. While a defendant such as Appellant who is sentenced under Subsection 7508(a)(7)(i) is not statutorily ineligible, the sentencing court still has discretion to decide whether that particular defendant is inappropriate for boot-camp placement. 61 Pa.C.S.A. § 3904(b). Section 3904(b) does not set forth what facts are relevant to the exercise of the court's discretion, but that question is not now before us. Additionally, if the sentencing court designates a defendant as boot-camp eligible, the Pennsylvania Department of Corrections ("DOC"), through appropriate selection committee(s) and criteria, must then makes its own decision whether to accept that particular defendant. 61 Pa.C.S.A. §§ 3904(c), 3906.

While the foregoing discussion makes plain that the Legislature intended minimum terms under Section 7508(a)(7)(i) to be boot-camp eligible, it is also helpful to note the Supreme Court's comments in *Hansley* regarding the language from 18 Pa.C.S.A. § 7508(a) which states that "[n]otwithstanding any other" law, certain minimum terms must be imposed. The court found this particular language posed no impediment to applying the RRRI Act to Section 7508(a). *Hansley*, 47 A.3d at 1189. Thus, notwithstanding any other law, the sentencing court was required to comply with the mandatory language of Section 7508(a) by imposing the mandatory penalty under Section 7508(a)(3)(ii). *Hansley*, 47 A.3d at 1189. The sentencing court also needed to comply with the RRRI Act by imposing an RRRI minimum term. *Id.* Ultimately, then, the sentencing court did not impose an RRRI minimum term instead of the mandatory minimum term under Section 7508 but, rather, in addition to it. *Id.*

The same reasoning applies to this case. Section 7508(a) mandates that the sentencing court impose certain minimum terms of imprisonment notwithstanding any other law. Therefore, the instant sentencing court was required to impose, and did impose, the minimum term applicable to Appellant. However, the court then needed to determine if, under 61 Pa.C.S.A. § 3904(b), it would designate Appellant as eligible for boot camp.

We are quite aware that, if Appellant is designated by the sentencing court as being eligible for boot camp, and if she is accepted into the program by the DOC, and if she successfully completes the program, she will

apparently be paroled pursuant to 61 Pa.C.S.A. § 3907 before the expiration of the two-year minimum term imposed under 18 Pa.C.S.A. § 7508(a)(7)(i). The Commonwealth contends such parole would be illegal because the Legislature intended an inmate such as Appellant to serve the entirety of the minimum term under Subsection 7508(a)(7)(i). This contention is incorrect. What the Legislature intended was for sentencing courts to impose the minimum terms mandated under Section 7508(a)(7)(i) and then to determine whether the courts would designate the defendants as boot-camp eligible. Based on the interplay of 61 Pa.C.S.A. § 3903 and 18 Pa.C.S.A. § 7508(a), only some of the mandatory minimum terms from Section 7508(a) are boot-camp ineligible and, therefore, only some of the minimum terms imposed under that section will necessarily be served in their entirety. We assume the Legislature was aware of its own legislation and understood that, if an inmate is sentenced to one of the minimum terms not listed by the Legislature as ineligible under 61 Pa.C.S.A. § 3903, then that inmate, being boot-camp eligible, might be paroled before the minimum term expires.

The Supreme Court again made an analogous observation in *Hansley* where, after finding the defendant eligible for RRRI, the court recognized “that the effect of the RRRI Act may be to reduce the total time in prison that an offender subject to a mandatory minimum sentence must serve.” *Hansley*, 47 A.3d at 1190. The court found that the Legislature intended that result. *Id.* Here, we likewise recognize the Legislature intended the result evidenced by the clear language of the statutes in question—

specifically, that those persons sentenced to mandatory minimum terms not listed as boot-camp ineligible might serve reduced time in prison through boot-camp participation.⁶

The instant sentencing court, in the course of finding it lacked authority to designate Appellant boot-camp eligible, also cited *Commonwealth v. Logan*, 590 A.2d 300, 301 (Pa. Super. 1991). In *Logan*, the defendant was subject to a mandatory minimum term of four years' incarceration under 18 Pa.C.S.A. § 7508(a)(3)(iii). The court, however, did not impose the sentence mandated by Subsection 7508(a)(3)(iii). Instead, the court sentenced the defendant to not less than

⁶ Our final observation regarding *Hansley* is as follows. While that opinion addressed the interplay between Section 7508(a) and the RRR Act, there is a passage specifically mentioning boot camp. Therein, the court stated, "[Defendant] analogizes the RRR Act to the motivational boot camp, 61 Pa.C.S.A. §§ 3901-3909, **which allows a judge to designate an offender as boot-camp eligible even when imposing a mandatory minimum sentence.**" *Hansley*, 47 A.3d at 1185 (emphasis added). Plainly, the first part of that passage merely reports that the defendant was making an analogy as part of his argument. However, the second, bolded part reads as if the Supreme Court, rather than just the defendant, was commenting that offenders with mandatory minimum terms remain boot-camp eligible. We understand some might contend the entire passage was meant simply to convey the defendant's analogy/argument. However, we think a more accurate reading reflects the Supreme Court's perspective on boot camp, not just the defendant's view. Obviously, if such is the Supreme Court's perspective, it would control and, of course, would yield the same result we have reached today. Nevertheless, we have not relied solely on that passage from *Hansley* because, as we have already indicated, the issue confronted by the *Hansley* court was whether the RRR Act applied to the defendant who had been sentenced to a mandatory minimum term. The issue before the *Hansley* court was not whether the boot camp statutes applied.

one and not more than three years' confinement in a county-run female offenders' program. That program involved alternative housing and work release. A panel of this Court found the sentencing court erred by imposing a minimum term shorter than that mandated by Subsection 7508(a)(3)(iii) and by committing the defendant to a county alternative housing/work release program rather than to state incarceration. **Logan**, 590 A.2d at 301-02.

The **Logan** case does not control the instant one. The present matter is not a case where Appellant will avoid the imposition of the mandatory term dictated by Subsection 7508(a)(7)(i). The sentencing court was required, and on remand will again be required, to impose a sentence with a minimum term of not less than two years' incarceration pursuant to Subsection 7508(a)(7)(i). Thereafter, keeping in mind that Appellant's mandatory term alone does not render her ineligible for boot camp, the sentencing court must otherwise proceed under 61 Pa.C.S.A. § 3904(b) to decide if, in its discretion, it will designate Appellant as eligible or ineligible for boot camp. The interaction of Section 7508(a) and the boot-camp provisions may well result in Appellant serving less than her minimum imposed under Subsection 7508(a)(7)(i), but such is what the Legislature intended.

Accordingly, we vacate the judgment of sentence and remand this case with instructions. On remand, the court shall impose the sentence mandated by 18 Pa.C.S.A. § 7508(a)(7)(i) and shall then consider whether

the court will designate Appellant as boot-camp eligible pursuant to 61 Pa.C.S.A. § 3904(b).⁷

Judgment of sentence vacated. Case remanded with instructions. Jurisdiction relinquished.

⁷ In closing, we note that, nearly a year after Appellant was sentenced, the Legislature put into effect an amendment to the Sentencing Code at 42 Pa.C.S.A. § 9721(a.1) indicating that, notwithstanding the applicability of a mandatory minimum term, an otherwise eligible defendant can, in fact, be sentenced to boot camp. **See** 42 Pa.C.S.A. § 9721(a.1)(2). This new provision did not control Appellant's sentencing.