**NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37**

| COMMONWEALTH OF PENNSYLVANIA | : | IN THE SUPERIOR COURT OF PENNSYLVANIA |
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| v. | : | |
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| JUSTIN TIMOTHY STACKHOUSE, | : | No. 338 WDA 2012 |
| | : | |
| Appellant | : | |

Appeal from the Judgment of Sentence, January 26, 2012,
in the Court of Common Pleas of Butler County
Criminal Division at No. CP-10-CR-0000959-2011

BEFORE: FORD ELLIOTT, P.J.E., BOWES AND DONOHUE, JJ.

MEMORANDUM BY FORD ELLIOTT, P.J.E.: Filed: March 19, 2013

Justin Timothy Stackhouse appeals the judgment of sentence entered January 26, 2012 in the Court of Common Pleas of Butler County. We affirm.

A brief recitation of the facts, related to the issues raised, and procedural history follows. The Pennsylvania State Police had received information that appellant and several other individuals had been purchasing large amounts of pseudoephedrine at various pharmacies. After investigating the matter, members of the Pennsylvania State Police went to appellant's residence at 132 Cherry Valley Road in Butler County to conduct what they termed a "knock and talk" on May 20, 2011. They wanted to speak with the occupants of the residence about suspected manufacturing of methamphetamine and appellant's outstanding warrants from Florida.

The officers proceeded to walk up the driveway to the house where they observed two fans located in the basement stairwell pointing outward acting as a form of an exhaust system. As the troopers continued to the backdoor, they saw a burnt "blister pack," which is packaging for pseudoephedrine, and a piece of surgical tubing near the steps leading to the back porch. (Notes of testimony, 12/12/11 (afternoon) at 45-47.) The troopers believed these items were all indicia of a methamphetamine lab. (***Id.*** at 48.)

When the officers knocked on the door, appellant's girlfriend, Robyn Tuttle ("Tuttle"), answered. (***Id.*** at 49.) The troopers, who were not in uniform, identified themselves and asked her to get appellant to come outside. Appellant "[c]ame out, swore at us a little bit, ran back in, and eventually we got him out of the house to talk to him." (***Id.*** at 50.) Tuttle's father and Tuttle's five-year-old son were also in the residence at the time. (***Id.***) Appellant was handcuffed and placed on the ground as he was acting very "unruly" and "wild." (***Id.*** at 51, 54.) After consulting privately with appellant, Tuttle gave the officers permission to search the residence and signed the consent form. The troopers agreed that appellant was permitted to walk through the residence during the search. (***Id.*** at 55-56, 59.) Appellant took the officers through the house and while in his bedroom, pointed out a black box where he kept items he used for taking drugs. (***Id.*** at 61.) Additionally, several gallon-sized freezer bags were recovered

containing meth oil; essentially a combination of Coleman fuel and methamphetamine, which was one step away from being converted into usable methamphetamine. Appellant was arrested and charged with various offenses.

On July 26, 2011, appellant filed an omnibus pre-trial motion challenging the legality of the search. The motion was denied on September 2, 2011. Following a jury trial, appellant was convicted of unlawful manufacturing of methamphetamine child under 18 years of age present, possession of methamphetamine precursors with intent to manufacture methamphetamine, possession with intent to manufacture a controlled substance of 100 grams or more, possession of a controlled substance, and possession of drug paraphernalia; he was found not guilty of endangering the welfare of a child. The Commonwealth sought the application of the minimum sentencing guidelines as set forth by 18 Pa.C.S.A. § 7508(a)(4)(iii) as appellant was a subsequent offender[1] and the weight of the mixture recovered was 800 grams. (Docket #44.) Appellant was sentenced on January 26, 2012; with regard to his conviction for unlawful manufacturing of methamphetamine appellant was sentenced to 35 to 70 months' incarceration to be served concurrently with his sentence of 96 to 240 months for possession with intent to manufacture

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[1] Appellant's first conviction was in Florida for unlawful delivery of methamphetamine within 1,000 feet of a school.

methamphetamine in excess of 100 grams. No further penalties were imposed on the remaining charges.

On February 1, 2012, the trial court appointed new counsel, Kenneth R. Harris, Jr., Esq., who filed a timely notice of appeal on February 23, 2012. (Docket #48, 50.) 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. Herein, the following issues have been presented for our review:

> I. THE TRIAL COURT ERRED IN ITS DENIAL OF THE APPELLANT'S MOTION TO SUPPRESS EVIDENCE OBTAINED AS A RESULT OF AN UNCONSTITUTIONAL SEARCH OF THE APPELLANT'S RESIDENCE, SAID SEARCH WAS BASED ON INVALID CONSENT, FOLLOWING AN UNLAWFUL DETENTION OF [APPELLANT].
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> [II.] THAT 18 Pa.C.S.A. §7508(a)(4) VIOLATES THE EQUAL PROTECTION CLAUSES OF THE UNITED STATES AND PENNSYLVANIA CONSTITUTIONS, AS IT IS OVERLY BROAD AND UNFAIRLY PUNISHES THOSE WHO POSSESS A LARGE QUANTITY OF AN UNCONSUMABLE [SIC] COMPOUND WITHIN WHICH THERE IS A SMALL AMOUNT OF METHAMPHETAMINE THE SAME AS THOSE WITH A LARGE QUANTITY OF FINISHED, CONSUMABLE METHAMPHETAMINE.

Appellant's brief at 4.[2]

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[2] An additional issue contained in his Rule 1925(b) statement has not been presented by appellant to our court in his brief, hence, we deem it to have been abandoned. (***See*** docket #63.)

First, appellant challenges the denial of his motion to suppress. When reviewing a challenge to a trial court's denial of a suppression motion, our standard of review is as follows:

> Our standard of review in addressing a challenge to the denial of a suppression motion is limited to determining whether the suppression court's factual findings are supported by the record and whether the legal conclusions drawn from those facts are correct. Because the Commonwealth prevailed before the suppression court, we may consider only the evidence of the Commonwealth and so much of the evidence for the defense as remains uncontradicted when read in the context of the record as a whole. Where the suppression court's factual findings are supported by the record, we are bound by these findings and may reverse only if the court's legal conclusions are erroneous. Where, as here, the appeal of the determination of the suppression court turns on allegations of legal error, the suppression court's legal conclusions are not binding on an appellate court, whose duty it is to determine if the suppression court properly applied the law to the facts. Thus, the conclusions of law of the courts below are subject to our plenary review.

***Commonwealth v. Hoppert***, 39 A.3d 358, 361–362 (Pa.Super. 2012), ***appeal denied***, ___ Pa. ___, 57 A.3d 68 (2012), quoting ***Commonwealth v. Jones***, 605 Pa. 188, 198, 988 A.2d 649, 654-656 (2010).

Appellant contends that the trial court erred in failing to suppress the evidence found in his residence. Appellant argues that Tuttle's consent to search was not voluntary as it was obtained through coercive police conduct. (Appellant's brief at 11.) We agree with the Commonwealth that this claim is waived as it is being raised for the first time on appeal. After reviewing

the record, it is clear that appellant has not advanced the issue of the validity of Tuttle's consent to the search in the court below, thereby affording the trial court the opportunity to rule on it. Accordingly, the issue is waived. Pa.R.A.P. 302(a). Moreover, we find no error in the trial court's finding that the search was properly conducted based on Tuttle's consent. (***See*** Memorandum and Order of Court, Docket #22 at 4.)

Next, appellant asserts that Section 7508(a)(4)(iii) violates the equal protection clauses of the United States and Pennsylvania Constitutions. (Appellant's brief at 14.) We find this issue to be meritless.

Our standard of review for constitutional challenges to the validity of a statute is well settled:

> there is a strong presumption that legislative enactments are constitutional. For an act to be declared unconstitutional, appellant must prove that the act clearly, palpably and plainly violates the constitution. All doubts are to be resolved in favor of sustaining a statute; thus an appellant has the heavy burden of persuasion when challenging the constitutionality of a statute.

***Commonwealth v. Nguyen***, 834 A.2d 1205, 1208 (Pa.Super. 2003), ***appeal denied***, 578 Pa. 688, 849 A.2d 1204 (2004) (internal quotation marks and citations omitted).

Section 7508 applies to drug trafficking sentences and penalties. Subsection (a)(4) is applicable to persons whose convictions relate to the controlled substance methamphetamine. The various subparts of this subsection set forth penalties depending on the aggregate weight of the

compound and whether the defendant at the time of sentencing has been convicted of another drug trafficking offense.

Again, appellant was a subsequent offender and was convicted of possession with intent to manufacture methamphetamine in excess of 100 grams. The methamphetamine in his possession was suspended in Coleman fuel, which is a liquid. Expert testimony was presented that this liquid compound was essentially one step away from becoming usable, sellable methamphetamine. Appellant argues that the statute is overly broad and arbitrary; he claims it assesses greater punishments for possessing increased amounts of a "mixture containing methamphetamine when the mixture is not capable of being ingested as a controlled substance, and if continued to be processed would yield far smaller quantities of the actual usable drug." (Appellant's brief at 14, 17.) In other words, appellant contends that we should only consider the consumable finished product of the methamphetamine, not the product in process, for purposes of setting the mandatory minimum. We disagree.

The General Assembly, in enacting 18 Pa.C.S.A. § 7508, exhibited its awareness that methamphetamine is commonly possessed in a mixture as there is a continuing process to produce the drug; this awareness is plainly and unambiguously expressed in that statute.

> (4) 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 methamphetamine or phencyclidine or

> is a salt, isomer or salt of an isomer of methamphetamine or phencyclidine <u>or is a mixture containing methamphetamine or phencyclidine,</u> containing a salt of methamphetamine or phencyclidine, containing an isomer of methamphetamine or phencyclidine, containing a salt of an isomer of methamphetamine or phencyclidine_shall, upon conviction, be sentenced to a mandatory minimum term of imprisonment and a fine as set forth in this subsection:
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> (iii) when the aggregate weight of the compound <u>or mixture containing the substance involved</u> is at least 100 grams; five years in prison and a fine of $50,000 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: eight years in prison and $50,000 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)(4)(iii) (emphasis added).

Case law has long settled that the weight of the entire mixture containing the controlled substance is the proper measurement of the weight of the controlled substance, not the weight of the "pure" controlled substance. ***Commonwealth v. Corporan***, 531 Pa. 348, 352, 613 A.2d 530, 532 (1992) ("the mandatory sentencing provision can be triggered by the weight of a mixture in which cocaine has been combined with a cutting agent"); ***Commonwealth v. Lisboy***, 573 A.2d 222, 224 (Pa.Super. 1990), ***affirmed***, 531 Pa. 355, 613 A.2d 533 (1992) (rejecting appellant's claim that the weight of the pure cocaine in the mixture, rather than the combined

weight of the cocaine and the adulterants such as cutting agents in the mixture, should determine whether the mandatory sentencing provision is applicable).

In ***Lisboy***, the supreme court explained:

> In 18 Pa.C.S. § 7508(a)(3), ***supra***, it is expressly stated that the mandatory minimum sentence shall apply "where the controlled substance is coca leaves or is any ... preparation of coca leaves ... or is any mixture containing any of these substances...." (Emphasis added). The legislature could not have been more clear in expressing that, for purposes of the sentencing statute, a preparation or mixture containing cocaine is to be counted as a "substance." This reflects the legislature's awareness that cocaine is commonly possessed and circulated in a mixture containing cocaine and adulterants which serve as cutting agents. Within the same statutory provision, at subparagraph (3)(ii), supra, reference to the weight of the "substance" must be taken as referring to the same substance, namely the pure cocaine or any preparation or mixture thereof. To conclude otherwise would be to accord the term "substance" two different definitions within the same statutory provision, a result which would be both unreasonable and unsupported by any language in the statute. See 1 Pa.C.S. § 1922(1) (legislature cannot be presumed to intend an absurd or unreasonable result).

***Id.*** at 351-352, 613 A.2d at 531. In other words, "[i]f the legislature had not intended to include preparations and mixtures containing cocaine as substances whose weights could trigger the mandatory sentencing provision, it would have made reference to the weight of the cocaine rather than the weight of the 'substance' as the triggering factor for imposition of a mandatory sentence." ***Id.*** at 352, 613 A.2d at 532. ***See Commonwealth***

***v. Perez***, 580 A.2d 781 (Pa.Super. 1990), ***appeal denied***, 531 Pa. 652, 613 A.2d 558 (1992) (weight of the mixture containing cocaine, rather than weight of the pure cocaine contained therein, triggers application of mandatory sentencing under 18 Pa.C.S.A. § 7508(a)(3)).

The same rationale is applicable to an analysis of the statute's provisions regarding the drug methamphetamine. Put simply, the Commonwealth need not prove the exact weight of the pure methamphetamine which might have resulted from the final process of "cooking," the methamphetamine, nor the ratio of the other agents involved for the mandatory provisions of the Sentencing Code to apply.

In ***Commonwealth v. Crowley***, 605 A.2d 1256 (Pa.Super. 1992), the court concluded that Section 7508 did not violate the due process clauses of the Pennsylvania and United States Constitutions. "Section 7508 was enacted to deal with an ever burgeoning area of criminal activity -- a drug epidemic, the effect of which pervades every aspect of our daily lives." ***Crowley***, ***supra*** at 1260. Likewise, this court in ***Commonwealth v. Eicher***, 605 A.2d 337 (Pa.Super. 1992), ***appeal denied***, 533 Pa. 598, 617 A.2d 1272 (1992), explained that Section 7508 bore a rational relationship to valid state objectives in that it was designed to "alleviate the ravages of drug trafficking and drug abuse in our society by subjecting convicted drug dealers to greater periods of confinement." ***Id.*** at 352. The ***Eicher*** court, noting that "the legislature imposed more severe penalties on those

individuals who were found to possess and/or deliver greater quantities of drugs," concluded "the legislature's scheme of imposing harsher penalties and longer periods of confinement on convicted drug dealers is rationally related to the laudable goal of attempting to put an end to the pernicious effects which drugs and the illicit drug trade have inflicted upon our society." ***Id.*** No relief is due.

Judgment of sentence affirmed.