NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA, Appellee v. DAVID SNYDER, Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 503 WDA 2012

Appeal from the Judgment of Sentence of February 17, 2012
In the Court of Common Pleas of Potter County
Criminal Division at No(s): CP-53-CR-00000020-2011

BEFORE: BENDER, GANTMAN AND OLSON, JJ.

MEMORANDUM BY OLSON, J.: **FILED AUGUST 28, 2013**

Appellant, David Snyder, appeals from the judgment of sentence entered on February 17, 2012, following his jury trial convictions for two counts of possession with intent to deliver a controlled substance (PWID), four counts of delivery of a controlled substance, two counts of criminal conspiracy, and one count of dealing in proceeds of unlawful activities.[1] Upon careful consideration, we affirm.

The trial court summarized the facts of this case as follows:

> During the preliminary hearing, the Commonwealth provided evidence establishing that an undercover state police officer made purchases of various quantities of drugs from Dustin Hurlburt and that Mr. Hurlburt and others were

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[1] 35 P.S. § 780-113(a)(30) (PWID and delivery), 18 Pa.C.S.A. 903 (criminal conspiracy), and 18 Pa.C.S.A. 5111 (a)(1) (dealing in proceeds of unlawful activity), respectively.

supplied with drugs by [Appellant] and that these individuals then distributed the drugs in Potter County. The Commonwealth provided further testimony from Jorge Stuart as well as other witnesses to support the allegation that [Appellant] was involved in a conspiracy to distribute cocaine in Potter County between December 2005 and November 2008.

Specifically, undercover Pennsylvania State Trooper, Nicholas J. Madigan, testified that on December 15, 2005, January 11, 2006, February 20, 2006, and April 21, 2006 he purchased cocaine from [c]o-defendant Dustin Hurlburt in Ulysses, Potter County, Pennsylvania. Dustin Hurlburt also testified and confirmed that he did, in fact, ma[k]e four sales of cocaine to Trooper Madigan and that the drugs were obtained from [Appellant]. Dustin Hurlburt also testified that [Appellant] was aware that Mr. Hurlburt was selling the cocaine and that he purchased cocaine from [Appellant] approximately 60 times. Mr. Hurlburt further testified that two other dealers were receiving cocaine from [Appellant] and were likewise selling it in Potter County. Mr. Hurlburt accompanied [Appellant] to New Jersey on two to three occasions to pick up the drugs from [Appellant's] supplier, Jorge Stuart.

Eric Luce testified that he accompanied [Appellant] to New Jersey or went alone on behalf of [Appellant] approximately 75 to 100 times to retrieve cocaine from the distributor in New Jersey. When the cocaine was brought back to [Appellant's] home [in Whitesville, New York], he would weigh and distribute the drugs. Mr. Luce lived primarily in Genesee, Potter County, Pennsylvania and would often receive an ounce of cocaine for making the trip to New Jersey. Subsequently, Luce would use or sell the cocaine. Mr. Luce testified that approximately 10-15 individuals were distributing drugs obtained from [Appellant]. Mr. Luce recounts car trips to New Jersey to retrieve the drugs would necessitate driving through Tioga County, Pennsylvania which is adjacent to Potter County.

Co-defendant Jorge Stuart testified that [Appellant] or his associates came to pick up drugs supplied by him in New Jersey once per month from 2002 until 2009. Mr. Stuart further testified that [Appellant] told him that he was selling

> drugs "up here." As to Mr. Stuart's reference to "up here," the [trial c]ourt notes the preliminary hearing took place at the Magisterial District Judge Delores Bristol's office in Galeston, Potter County, Pennsylvania.

Trial Court Opinion, 7/7/2011, at 1-3 (footnotes omitted).

Following the preliminary hearing, the aforementioned charges were bound over to the Potter County Court of Common Pleas. On April 4, 2011, Appellant filed an omnibus pretrial motion to quash the criminal information arguing the Commonwealth failed to make a *prima facie* showing that Appellant delivered or possessed a controlled substance or otherwise engaged in criminal conduct or conducted an unlawful financial transaction within the Commonwealth, specifically Potter County. Thus, Appellant argued that the trial court lacked subject matter jurisdiction to hear the criminal matters at issue. The trial court heard argument on the motion on May 2, 2011. In an opinion and order filed on July 7, 2011, the trial court denied relief. The trial court determined that "there existed an implicit conspiracy between [Appellant], Mr. Hurlburt and others to distribute cocaine in Potter County." ***Id.*** at 6. Thus, the trial court opined "[Appellant] is vicariously liable as a coconspirator for the actions of Mr. Hurlburt or others." ***Id.***

On May 5, 2011, the trial court granted Appellant's motion to continue jury selection. The trial court scheduled jury selection to begin on September 1, 2011. On August 4, 2011, Appellant filed a petition for immediate release upon nominal bail pursuant to Pa.R.Crim.P. 600(c). The trial court held a hearing on August 17, 2011 and denied relief in an opinion

and order filed on August 24, 2011. The trial court concluded that the period from the date Appellant filed his omnibus pretrial motion, April 4, 2011, through the date of jury selection on September, 1, 2011, was attributable to Appellant and, therefore, excludable in determining the right to release on nominal bail.

A two-day jury trial commenced on October 17, 2011. The jury convicted Appellant of the nine aforementioned criminal counts. On November 30, 2011, the trial court sentenced Appellant to an aggregate term of imprisonment of 34 to 68 years. Appellant filed a timely post-sentence motion requesting reconsideration of his sentence. On February 17, 2012, the trial court modified Appellant's sentence to an aggregate term of 27 to 54 years of incarceration. This timely appeal followed.[2]

On appeal, Appellant presents the following issues[3] for our review:

> I. Whether the trial court erred and/or committed an abuse of discretion when it denied [Appellant's] motion for judgment of acquittal as to each count of the information.

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[2] Appellant filed a notice of appeal on March 13, 2012. On the same day, the trial court ordered Appellant to file a concise statement of errors complained of on appeal pursuant to Pa.R.A.P. 1925(b). Appellant complied timely on April 2, 2012. The trial court issued an opinion pursuant to Pa.R.A.P. 1925(a) on September 21, 2012. In that opinion, the trial court relies upon its prior opinions filed on July 7, 2011 and August 24, 2011 in examining Appellant's first and third issues on appeal.

[3] We have reordered Appellant's issues for ease of discussion.

> II. Whether the Commonwealth's evidence at the preliminary hearing was sufficient to establish a prima facie case that the substantive crimes alleged in the complaint occurred within the territorial boundaries of the Commonwealth of Pennsylvania so as to confer subject matter jurisdiction within the Court of Common Pleas of Potter County.
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> III. Whether the trial court erred and/or committed an abuse of discretion when it denied [Appellant's] motion for nominal bail.
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> IV. With respect to Counts I, II, III, IV, V, VI, and VIII of the information whether the sentencing court committed an error of law and/or abused its discretion in imposing the mandatory minimum sentences pursuant to 18 Pa.C.S.A. § 7508(a)(3) and (7)(iii).

Appellant's Brief at 6 (complete capitalization omitted).

In his first issue presented, Appellant contends the trial court erred in not granting his oral motion for acquittal because the Commonwealth did not present evidence that Appellant sold, delivered, or possessed narcotics in Potter County, Pennsylvania. ***Id.*** at 27. He asserts, "every transaction involving the sale and/or possession of heroin occurred within New York State." ***Id.*** at 30. Moreover, Appellant claims "[t]here is no evidence of an agreement between [Appellant] and any of the individuals named … from which a jury could reasonably conclude that a conspiracy existed for the distribution of heroin within the territorial boundaries of Potter County." ***Id.*** at 32. Appellant argues that "[t]he witnesses testified that they made purchases in unknown quantities, at uncertain times for their personal consumption." ***Id.***

Our standard of review is as follows:

> A motion for judgment of acquittal challenges the sufficiency of the evidence to sustain a conviction on a particular charge, and is granted only in cases in which the Commonwealth has failed to carry its burden regarding that charge.
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> The standard we apply in reviewing the sufficiency of the evidence is whether viewing all the evidence admitted at trial in the light most favorable to the verdict winner, there is sufficient evidence to enable the fact-finder to find every element of the crime beyond a reasonable doubt. In applying the above test, we may not weigh the evidence and substitute our judgment for the fact-finder. In addition, we note that the facts and circumstances established by the Commonwealth need not preclude every possibility of innocence. Any doubts regarding a defendant's guilt may be resolved by the fact-finder unless the evidence is so weak and inconclusive that as a matter of law no probability of fact may be drawn from the combined circumstances. The Commonwealth may sustain its burden of proving every element of the crime beyond a reasonable doubt by means of wholly circumstantial evidence. Moreover, in applying the above test, the entire record must be evaluated and all evidence actually received must be considered. Finally, the trier of fact while passing upon the credibility of witnesses and the weight of the evidence produced, is free to believe all, part or none of the evidence.

Commonwealth v. Hutchinson, 947 A.2d 800, 805-806 (Pa. Super. 2008) (emphasis in original omitted).

"To prove a defendant guilty of possession of a controlled substance and possession with the intent to deliver a controlled substance, the Commonwealth was required to prove beyond a reasonable doubt that Appell[ant] possessed a controlled substance and that he did so with the intent to deliver that substance to another person." ***Id.*** at 806. "Where, as herein, the contraband is not found on the accused's person, the Commonwealth must demonstrate he had constructive possession of the

same, or that the individual had the ability and intent to exercise control or dominion over the substance." ***Id.***

Pursuant to 18 Pa.C.S.A. § 5111 (dealing with proceeds of unlawful activity), "[a] person commits a felony of the first degree if the person knowing that the property involved in a financial transaction represents the proceeds of unlawful activity, conducts a financial transaction which involves the proceeds of unlawful activity … [w]ith the intent to promote the carrying on of the unlawful activity." ***Commonwealth v. Barnhart***, 722 A.2d 1093, 1095 (Pa. Super. 1998).

To convict for criminal conspiracy,

> the evidence must establish that the defendant entered an agreement with another person to commit or aid in the commission of an unlawful act, that the conspirators acted with a shared criminal intent, and that an overt act was done in furtherance of the conspiracy. An explicit or formal agreement to commit crimes can seldom, if ever, be proved and it need not be, for proof of a criminal partnership is almost invariably extracted from the circumstances that attend its activities. An agreement sufficient to establish a conspiracy can be inferred from a variety of circumstances including, but not limited to, the relation between the parties, knowledge of and participation in the crime, and the circumstances and conduct of the parties surrounding the criminal episode.
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> Once a conspiracy is established, the actions of each co-conspirator may be imputed to the other conspirators. In this regard, the law in Pennsylvania is settled that each conspirator is criminally responsible for the actions of his co-conspirator, provided that the actions are accomplished in furtherance of the common design. Furthermore,
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> > Where the existence of a conspiracy is established, the law imposes upon a conspirator full responsibility

> for the natural and probable consequences of acts committed by his fellow conspirator or conspirators if such acts are done in pursuance of the common design or purpose of the conspiracy. Such responsibility attaches even though such conspirator was not physically present when the acts were committed by his fellow conspirator or conspirators[.]

Commonwealth v. Geiger, 944 A.2d 85, 90-91 (Pa. Super. 2008) (internal citations, quotations, and brackets omitted).

Here, in denying Appellant's motion for acquittal, the trial court opined:

> The charges [Appellant] was convicted [of] are based on his distribution of [narcotics] to Dustin Hurlburt, Gabriel Barber, Adam Johnson, Gregory Lampman, Wayne Hess, Kenneth Davenport, and Ryan Schrader. These co-conspirators testified that they sold the cocaine and heroin they received from [Appellant] in Potter County. Because [Appellant] sold cocaine to these co-conspirators with the knowledge that they would distribute the cocaine in Potter County, there existed an implicit conspiracy between [Appellant] and the named co-conspirators to distribute cocaine and heroin in Potter County. As a result of this alleged conspiracy, … [Appellant] is vicariously liable as a co-conspirator for the actions of Dustin Hurlburt, Gabriel Barber, Adam Johnson, Gregory Lampman, Wayne Hess, Kenneth Davenport, and Ryan Schrader in Potter County.
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> However, even if [Appellant] was not charged with conspiracy, the evidence indicated … that [Appellant] personally traveled into Potter County to deliver drugs.

Trial Court Opinion, 9/21/2012, at 7.

Based upon our standard of review, in viewing the evidence in the light most favorable to the Commonwealth as verdict winner, we discern no abuse of discretion in denying Appellant's motion for acquittal. Upon review of the certified record, several co-defendants testified that they purchased

narcotics from Appellant at his residence in Ulysses, Potter County, Pennsylvania. N.T., 10/17/2011, at 58, 111; N.T., 10/18/2011, at 144. Gabriel Barber testified that Appellant would come to Barber's home in Ulysses, Potter County, Pennsylvania and sell him cocaine. ***Id.*** at 58-60. Donna Lynn Gibble testified that Appellant delivered cocaine to her at her home in Ulysses, Potter County, Pennsylvania. ***Id.*** at 94, 99-100, 107-108. Gregory Lampman testified that Appellant delivered narcotics to Lampman's home in Ulysses, Potter County, Pennsylvania. ***Id.*** at 122-125, 130. Richard Pratt confirmed that Appellant delivered narcotics to Lampman's Ulysses residence. N.T., 10/18/2011, at 31. Appellant eventually moved to New York, where the co-defendants continued to purchase narcotics from Appellant. Eric Luce testified that he purchased 30 grams of heroin from Appellant over a number of years. N.T., 10/17/2011, at 84-85. Moreover, there was testimony that Appellant was aware that his co-defendants purchased narcotics from him and then, in turn, sold the drugs in Potter County. N.T., 10/17/2011, at 61, 112, 114, 124; N.T., 10/18/2011, at 18. Most of these witnesses testified that these transactions were ongoing over the course of several years. Numerous witnesses also testified that they traveled with Appellant to New Jersey to purchase larger quantities of narcotics for further distribution.

Based upon the foregoing, the Commonwealth proved Appellant was part of a narcotics distribution conspiracy spanning into Potter County, Pennsylvania. The evidence revealed that Appellant controlled the narcotics

and delivered them for eventual sale and that the proceeds from the sale of narcotics were used to further the criminal enterprise. As such, there was sufficient evidence to support all of Appellant's convictions. Accordingly, Appellant's first issue lacks merit.

In his next issue presented, Appellant contends that the Commonwealth failed to establish a *prima facie* case that the crimes occurred in Potter County in order to establish subject matter jurisdiction there. However, as previously determined, the Commonwealth provided evidence at trial, beyond a reasonable doubt, that Appellant engaged in a conspiracy to sell narcotics in Potter County. Having already determined that there was sufficient evidence to support Appellant's convictions, Appellant's subject matter jurisdiction issue is moot. ***See Commonwealth v. Lee***, 662 A.2d 645 (Pa. 1995) (Defendant's adjudication of guilt rendered moot any allegation that Commonwealth failed to establish *prima facie* case of homicide at defendant's preliminary hearing; assuming *arguendo* that the presiding judge should have recused himself from the preliminary hearing, the jury's guilty verdict rendered harmless any allegation of impropriety); ***see also Commonwealth v. McCullough***, 461 A.2d 1229 (Pa. 1983) (That the Commonwealth did not establish a *prima facie* case of robbery at the defendant's preliminary hearing was immaterial where the Commonwealth met its burden of proving the underlying offense at trial beyond a reasonable doubt). Thus, Appellant is not entitled to relief on his second claim.

In his third issue presented, Appellant argues that the trial court erred in denying his motion for immediate release upon nominal bail. Appellant's Brief at 23-26. He contends that the time period granted to continue jury selection was attributable to Appellant, and therefore excludable time, pursuant to Pa.R.Crim.P. 600(c). ***Id.*** at 23. More specifically, Appellant asserts that while he requested a continuance for jury selection, he only agreed to exclude the time pending the trial court's decision on his pretrial motion to quash. ***Id.***

As our Supreme Court has recognized:

> Initially, we acknowledge that Appellant's case is technically moot because he is no longer in pretrial detention subject to Rule 600, but rather, is now serving his sentence following conviction. Generally, a case will be dismissed if at any stage of the judicial process it is rendered moot. However, under a well recognized exception to the mootness doctrine, this Court will decide technically moot issues on the merits where they are of a recurring nature yet capable of repeatedly evading review, and involve issues of important public interest.
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> The instant appeal presents an issue of public importance that this Court has yet to address, regarding whether an accused who is incarcerated for more than 180 days is entitled to unconditional release pursuant to Rule 600(E). Moreover, the issue is likely to recur anytime an accused is subjected to pretrial bail conditions after being incarcerated for more than 180 days. However, it is likely to evade review because the Commonwealth must bring all criminal cases, like this one, to trial within 365 days or face a defense motion for dismissal with prejudice. It would be a rare case where a defendant could petition for relief under Rule 600(E) after 180 days of incarceration, have it addressed by the trial court, and petition for review to the Superior Court and this Court before the underlying criminal

> case is brought to trial or the expiration of Rule 600(G)'s 365 days, requiring dismissal with prejudice.

Commonwealth v. Sloan, 907 A.2d 460, 464-465 (Pa. 2006) (internal citations omitted).

Hence, although technically moot, we will examine Appellant's issue on appeal. "Our standard of review in evaluating a Rule 600 claim is whether the trial court abused its discretion." ***Commonwealth v. Brock***, 61 A.3d 1015, 1017 (Pa. 2013). The relevant provisions of Rule 600 are as follows:

> (B) Pretrial Incarceration
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> Except in cases in which the defendant is not entitled to release on bail as provided by law, no defendant shall be held in pretrial incarceration in excess of
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> (1) 180 days from the date on which the complaint is filed;
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> * * *
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> (C) Computation of Time
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> * * *
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> (2) For purposes of paragraph (B), only periods of delay caused by the defendant shall be excluded from the computation of the length of time of any pretrial incarceration. Any other periods of delay shall be included in the computation.
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> (3)(a) When a judge or issuing authority grants or denies a continuance:
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> (i) the issuing authority shall record the identity of the party requesting the continuance and the reasons for granting or denying the continuance; and
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> (ii) the judge shall record the identity of the party requesting the

> continuance and the reasons for granting or denying the continuance. The judge also shall record to which party the period of delay caused by the continuance shall be attributed, and whether the time will be included in or excluded from the computation of the time within which trial must commence in accordance with this rule.

Pa.R.Crim.P. 600.

In this case, the Commonwealth filed a criminal complaint against Appellant on November 5, 2010. Police arrested Appellant and incarcerated him on November 10, 2010.[4] The trial court scheduled jury selection for May 5, 2011. Appellant filed a pretrial omnibus motion to quash on April 1, 2011. Appellant subsequently filed a motion to continue jury selection. The motion is dated May 4, 2011, but was not docketed and filed by the trial court until June 21, 2011. The entirety of that motion states as follows:

MOTION TO CONTINUE JURY SELECTION

1. Moving party is the above-captioned defendant [David Snyder].

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[4] We acknowledge that period between the filing of the written complaint and Appellant's arrest is considered excusable time under Pa.R.Crim.P. 600(c), provided that Appellant could not be apprehended because his whereabouts were unknown and could not be determined by the Commonwealth's due diligence. ***See Commonwealth v. Hunt***, 858 A.2d 1234, 1241 (Pa. Super. 2004). Neither party contests the delay or argues it in the Rule 600 computation. However, this period is immaterial and our analysis remains unchanged regardless of the five-day delay between the filing of the criminal complaint and Appellant's arrest.

2. Jury selection in the above-captioned case is scheduled for May 5, 2011.

3. By agreement of counsel and in the presence of the Court, jury selection has been continued pending your Honorable Court's decision on the Defendant's Motion to Quash.

4. As agreed, all time for Rule 600 purposes shall run against the Defendant.

WHEREFORE, Defendant respectfully moves your Honorable Court continue jury selection until the next jury term.

Motion to Continue Jury Selection, 6/21/2011. On June 21, 2011, the trial court granted Appellant's continuance and rescheduled jury selection for September 1, 2011. On July 7, 2011, the trial court entered an order denying relief on Appellant's pretrial motion to quash.

Appellant moved for immediate release on nominal bail on August 4, 2011. In denying that motion, the trial court found the time between the filing of the pretrial motion to quash (April 1, 2011) and the rescheduled date of jury selection (September 1, 2011) was excludable time for Rule 600 calculations. We discern no abuse of discretion. Appellant concedes that the time from the filing of the pretrial motion to quash until the trial court ruled on that motion is excludable for Rule 600 purposes.[5] ***See*** Appellant's Brief at 24-25. Appellant, however, argues that he only agreed to continue his case until the trial court ruled upon his pretrial motion to quash. The plain

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[5] Appellant claims that the date of the order controls, however, we are confined to using the date an order is officially docketed when computing time. ***See*** Pa.R.A.P. 108.

language of Appellant's motion for continuance as cited above, however, belies that claim. In his motion, Appellant specifically requested that the trial court continue jury selection "until the next jury term" and "agreed, all time for Rule 600 purposes shall run against" him. It would be a near impracticality for the trial court to rule on the pretrial motion and then immediately reschedule jury selection to correspond seamlessly with Appellant's construction of the motion for continuance. Regardless, Appellant requested the continuance until the next jury term and cannot now cry foul when the trial court did exactly what Appellant asked of it.

Here, the Commonwealth filed a criminal complaint against Appellant on November 4, 2010. Appellant filed his motion for immediate release upon nominal bail on August 4, 2011. However, as we previously determined all of the time between the filing of the pretrial motion on April 1, 2011 through September 1, 2011 was attributed to Appellant and, thus excludable. Hence, only 148 days had elapsed from November 4, 2010 through April 1, 2011 and, therefore, there was no violation of Rule 600. Accordingly, Appellant's third issue is without merit.

Finally, Appellant argues that the trial court erroneously and illegally applied mandatory minimum sentences based upon the weight of the narcotics at issue. ***See*** Appellant's Brief at 33-35. Appellant suggests that his sentences for counts one through four of the bill of criminal information represent the four individual sales of cocaine to the investigating undercover police officer in this matter. ***Id.*** at 34. Appellant posits that the trial court

aggregated the amount of the drugs involved in those four transactions, and added additional quantities based upon other testimony presented at trial, to reach the minimum weight required under 18 Pa.C.S.A. § 7508(a)(3)(iii) and impose a mandatory sentence on count five of the criminal information. ***Id.*** Appellant argues that the trial court erred because: (1) there was no direct evidence of the weight of the narcotics involved, and (2) count five encompassed the other four deliveries and should have merged for sentencing. ***Id.*** at 34-35. Appellant also claims that the trial court erred in imposing a mandatory minimum sentence on count 6, regarding the sale of heroin because "the Commonwealth never sought to introduce into evidence heroin, lab reports, estimates of quantities or any physical evidence regarding or involving [Appellant's] alleged heroin distribution in Potter County." ***Id.*** at 35.

Initially, we note that aside from generally citing the statutes providing for mandatory minimum sentences, Appellant has not cited any additional legal authority for his propositions. ***See*** Pa.R.A.P. 2119. For this reason alone, we could find this issue waived. ***Id.*** Nevertheless, we shall reach the merits of Appellant's claim because it implicates the legality of Appellant's sentence and this constitutes an issue that generally cannot be waived. ***See Commonwealth v. Foster***, 960 A.2d 160, 168 (Pa. Super. 2008) (Application of a mandatory minimum sentence is a non-waivable challenge to the legality of a sentence).

"The scope and standard of review applied to determine the legality of a sentence are well established." ***Commonwealth v. Hopkins***, 67 A.3d 817, 821 (Pa. Super. 2013) (internal citation omitted). "If no statutory authorization exists for a particular sentence, that sentence is illegal and subject to correction." ***Id.*** "An illegal sentence must be vacated." ***Id.*** "In evaluating a trial court's application of a statute, our standard of review is plenary and is limited to determining whether the trial court committed an error of law." ***Id.***

Appellant first challenges the imposition of the mandatory minimum sentence imposed on count five of the criminal information pursuant to 18 Pa.C.S.A. § 7508(a)(3)(iii), which provides as follows:

> (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:
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> * * *
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> (iii) when the aggregate weight of the compound or mixture of the substance involved is at least 100 grams; four years in prison and a fine of $25,000 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: seven 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)(3)(iii).

The trial court rejected Appellant's argument that it imposed a mandatory minimum sentence under Section 7508(a)(3)(iii) based upon the four controlled purchases made by the undercover police officer from Dustin Hurlburt on December 15, 2005, January 11, 2006, February 20, 2006, and April 21, 2006. Trial Court Opinion, 9/21/2012, at 10-14. Instead, the trial court found that those transactions were the bases for imposition of sentence on counts one through four of the criminal information. ***Id.*** at 11-13. Ultimately, the trial court determined that while count five of the criminal information encompassed the same time period as the four aforementioned dates, there was "ample testimony on the record that between December of 2005 and November of 2009, [Appellant] had distributed far more than one hundred grams of cocaine" because there was testimony that "Gabriel Barber, Adam Johnson, Gregory Lampman, Wayne Hess, and Kenneth Davenport … had received a vast amount of cocaine from [Appellant] at his home initially at his Ulysses, Pennsylvania and subsequently in Whitesville, New York and then consumed and/or sold said drugs in Potter County." ***Id.*** at 14, 12.

Upon review of the certified record, we agree with the trial court's assessment. The Commonwealth presented evidence of hundreds of

individual transactions over the course of four years aside from the four transactions forming the factual predicate of Appellant's PWID convictions in counts one through four. The witnesses, separate and apart from the witnesses involved in the narcotics transactions at issue in one through four, testified to purchasing cocaine monthly in various increments ranging from one-eighth of an ounce to one-and-one-half ounces over the course of four years. ***Id.*** at 13. This Court has specifically held "that a mandatory minimum sentence, which is premised upon the weight of a possessed narcotic, may be imposed regardless of the fact that the drugs are not 'seen, seized, weighed or otherwise tested before their weight can be established.'" ***Commonwealth v. Rickabaugh***, 706 A.2d 826, 846-847 (Pa. Super. 1997) *citing* ***Commonwealth v. Myers****,* 681 A.2d 1348, 1353 (Pa. Super. 1996). "Rather, provided that sufficient circumstantial and/or corroborative evidence is introduced, the trial court may determine that the narcotics possessed and/or delivered weighed in excess of the statutory minimum." ***Id.*** Moreover, merger of the sentences for counts one through four with count five was not warranted. ***See Commonwealth v. Gatling***, 807 A.2d 890, 899 (Pa. 2002) (If the offenses stem from two different criminal acts, merger analysis is not required). As previously noted, the sentence imposed on count five encompassed separate criminal acts from counts one through four. Appellant is not entitled to relief on his claim that the trial court illegally sentenced him on count five.

Appellant makes a similar illegality of sentence argument with regard to the sentence imposed on count six. Count six encompassed a conviction for PWID heroin. Appellant contends that there was insufficient evidence to apply a mandatory minimum sentence pursuant to 18 Pa.C.S.A. § 7508(a)(7)(iii), because the Commonwealth failed to prove that Appellant delivered an aggregate weight of over 50 grams of heroin.

Section 7508(a)(7)(iii) provides:

> (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:
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> * * *
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> (iii) when the aggregate weight of the compound or mixture containing the heroin involved is 50 grams or greater: a mandatory minimum term of five years in prison and a fine of $25,000 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: a mandatory minimum term of seven 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)(7)(iii).

Here, the trial court concluded:

> During the trial, the Commonwealth presented the testimony of Eric Luce who relayed that within the relevant time frame, beginning in 2007 until his son was born in November of 2008, he had received approximately thirty grams of heroin over approximately forty to fifty transactions from [Appellant] at his home in Whitesville,

> New York for his own personal use. Also during the relevant time period, Adam Johnson testified that [Appellant] had provided him heroin to sell on several occasions and further observed a container of heroin he personally observed to weight forty-four grams. Furthermore, Kenneth Davenport testified in 2007 he received from [Appellant] on two dozen occasions one to two grams of heroin for his personal use.

Trial Court Opinion, 9/21/2012, at 14-15.

We discern no error of law in imposing a mandatory sentence on count six pursuant to Section 7508(a)(7)(iii). Here, the Commonwealth provided sufficient circumstantial evidence that Appellant sold over 50 grams of heroin and evidence of the actual aggregate weight of the heroin was not required. ***Rickabaugh***, 706 A.2d at 846-847. As such, Appellant's final issue lacks merit.

Judgment of sentence affirmed.

Judgment Entered.

Nicholas V. Cusatti

Deputy Prothonotary

Date: 8/28/2013