

**NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37**

COMMONWEALTH OF PENNSYLVANIA,

Appellant

v.

DREAMA MARIE STOTELMYER,

Appellee

IN THE SUPERIOR COURT OF  
PENNSYLVANIA

No. 566 MDA 2012

Appeal from the Judgment of Sentence October 12, 2011  
In the Court of Common Pleas of Franklin County  
Criminal Division at No(s): CP-28-CR-0000410-2011

BEFORE: BOWES, SHOGAN, and PLATT,\* JJ.

MEMORANDUM BY BOWES, J.:

Filed: March 19, 2013

The Commonwealth<sup>1</sup> has filed this appeal from the judgment of sentence of county intermediate punishment imposed after Appellee, Dreama M. Stotelmyer, pled guilty to one count of possession of a controlled substance with intent to deliver—marijuana. The Commonwealth maintains that the court erred in failing to apply the mandatory minimum sentence of one-year incarceration that was applicable herein due to the fact that Appellee possessed more than two pounds of marijuana. We reject the

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\* Retired Senior Judge assigned to the Superior Court.

<sup>1</sup> The Commonwealth failed to file a reproduced record, and also neglected to attach a copy of the trial court opinion to its brief.

Commonwealth's challenge to the legality of the present sentence and affirm.

On November 19, 2010, the Pennsylvania State Police executed a search warrant at Appellee's residence, which was supported by information supplied by a member of Appellee's family, and recovered over two and one-half pounds of marijuana. On March 25, 2011, Appellee entered an open guilty plea to a single count of PWID, and the Commonwealth *nol prossed* a charge of possession of drug paraphernalia. After entry of the plea, the Commonwealth entered notice of its intent to seek application of the mandatory one-year sentence of incarceration imposed by 18 Pa.C.S. § 7508:

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

(1) A person who is 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 controlled substance is marijuana shall, upon conviction, be sentenced to a mandatory minimum term of imprisonment and a fine as set forth in this subsection:

(i) when the amount of marijuana involved is at least two pounds, but less than ten pounds, or at least ten live plants but less than 21 live plants; one year 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. § 7508(a)(1)(i).

Following a hearing, the trial court agreed that the Commonwealth established that Appellee possessed over two but less than ten pounds of marijuana, but it imposed a term of county intermediate punishment, as follows:

The defendant shall be placed on Intermediate Punishment for a period of 36 months, the first portion of which is to be served in Restrictive Intermediate Punishment, 42 Pa.C.S.A. 9763(b), as follows:

6 months Work Release Franklin County Jail

6 months Electronic Monitoring

. . . .

Following completion of the Restrictive Intermediate Punishment (RIP) portion of the sentence, the defendant must comply with standard supervision in accordance with 39<sup>th</sup> Jud. Dist. C.R. No. 39-708 for the balance of the sentence.

Sentencing Order, 10/12/11, at 1.

In this appeal, the Commonwealth presents a single contention:

1. Whether the trial court erred as a matter of law in failing to apply the mandatory minimum sentence as required under 18 Pa.C.S.A. § 7508(c) when the Commonwealth proved by a preponderance of the evidence at an evidentiary hearing that the mandatory minimum sentence based on the weight of the controlled substance would apply.

Commonwealth's brief at 4.

The Commonwealth's sole position is that county intermediate punishment is excluded as a permissible sentence herein because Appellee was subject to the mandatory minimum sentence outlined in 18 Pa.C.S.

§ 7508. Specifically, it claims that the court was not allowed to impose the sentence of county intermediate punishment because the sentence was “in direct contradiction to 18 Pa.C.S.A. § 7508.” Appellant’s brief at 11. An allegation implicating the sentencing court’s application of a mandatory minimum sentence relates to the sentence’s legality. ***Commonwealth v. Foster***, 960 A.2d 160 (Pa.Super. 2008), *affirmed by an equally divided court*, 17 A.3d 332 (Pa. 2011). “Issues relating to the legality of a sentence are questions of law, as are claims raising a court’s interpretation of a statute. Our standard of review over such questions is *de novo* and our scope of review is plenary.” ***Commonwealth v. Hawkins***, 45 A.3d 1123, 1130 (Pa.Super. 2012).

Section 9721(a) of title 42 governs sentencing in general and provides:

In determining the sentence to be imposed the court shall, except as provided in subsection (a.1), consider and select one or more of the following alternatives, and may impose them consecutively or concurrently:

- (1) An order of probation.
- (2) A determination of guilt without further penalty.
- (3) Partial confinement.
- (4) Total confinement.
- (5) A fine.
- (6) County intermediate punishment.
- (7) State intermediate punishment.

42 Pa.C.S. § 9721(a).

There is an exception outlined in 42 Pa.C.S. § 9721(a.1) to the court's ability to choose among the sentencing alternatives outlined in § 9721(a). Section 9721(a.1) states: "Unless specifically authorized under section 9763 (relating to a sentence of county intermediate punishment), . . . subsection (a) shall not apply where a mandatory minimum sentence is otherwise provided by law." Herein, the sentence constituted county intermediate punishment imposed pursuant to § 9763.<sup>2</sup> The Commonwealth maintains,

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<sup>2</sup> Additionally, the sentencing court's imposition of work-release jail terms and house monitoring is authorized punishment under county intermediate punishment guidelines:

- (a) **General rule.**--In imposing a sentence of county intermediate punishment, the court shall specify at the time of sentencing the length of the term for which the defendant is to be in a county intermediate punishment program established under Chapter 98 (relating to county intermediate punishment) or a combination of county intermediate punishment programs. The term may not exceed the maximum term for which the defendant could be confined and the program to which the defendant is sentenced. **The court may order a defendant to serve a portion of the sentence under section 9755 (relating to sentence of partial confinement) or 9756 (relating to sentence of total confinement) and to serve a portion in a county intermediate punishment program or a combination of county intermediate punishment programs.**
  
- (b) **Conditions generally.**--The court may attach any of the following conditions upon the defendant as it deems necessary:

. . . . .

*(Footnote Continued Next Page)*

“Excluded from intermediate punishment is a person subject to a mandatory minimum sentence. 42 Pa.C.S.A. 9721 (a.1).” Appellant’s brief at 13. Meanwhile, the statute expressly indicates that county intermediate punishment can be imposed, when authorized under § 9763, even though a mandatory minimum sentence is invoked.

The Commonwealth’s position that a sentence of county intermediate punishment cannot be imposed where there is an applicable mandatory

*(Footnote Continued)* \_\_\_\_\_

(17) To be subject to electronic monitoring.

42 Pa.C.S. § 9763 (emphasis added).

Section 9755 (relating to a sentence of partial confinement) authorizes incarceration with work release privileges:

**(a) General rule.--**In imposing a sentence involving partial confinement the court shall specify at the time of sentencing the length of the term during which the defendant is to be partially confined, which term may not exceed the maximum term for which he could be totally confined, and whether the confinement shall commence in a correctional or other appropriate institution.

**(b) Minimum sentence.--**The court shall impose a minimum sentence of partial confinement which shall not exceed one-half of the maximum sentence imposed.

**(c) Purpose for partial release.--**The court may in its order grant the defendant the privilege of leaving the institution during necessary and reasonable hours for any of the following purposes:

(1) To work at his employment.

42 Pa.C.S. § 9755. Unquestionably, the sentence, as imposed, is a permissible form of county intermediate punishment.

minimum sentence is also contrary to precedent from this Court. In ***Commonwealth v. Williams***, 941 A.2d 14 (Pa.Super. 2008) (*en banc*), we addressed the precise issue presented herein, *i.e.*, whether intermediate punishment can be imposed on an offender who is eligible for intermediate punishment but who is also subject to a mandatory minimum sentence. Specifically, we analyzed in that decision “whether the [sentencing court] has the statutory authority to impose a sentence under the Intermediate Punishment Program (“IPP”), in light of the mandatory sentencing provisions of the DUI statute, which call for a fixed term of imprisonment.” ***Id.*** at 18.

In ***Williams***, the defendant refused to submit to a blood alcohol test after being suspected of driving under the influence. She was convicted of DUI—incapable of safe driving, and the offense was her second DUI. Accordingly, she was subject to a mandatory minimum sentence under the DUI provisions, but she was sentenced to county intermediate punishment consisting of house arrest with electronic monitoring, work release privileges, and drug and alcohol testing. Probation was imposed consecutively to the house arrest. The sentence did not conform to the applicable mandatory minimum.

We concluded therein that, despite the fact that a mandatory minimum sentence applied in the matter, the sentencing court was permitted to impose a sentence of intermediate punishment. We noted that the defendant was an eligible offender under county intermediate punishment

guidelines and that, in adopting county intermediate punishment, “the Legislature's intent was to give judges another sentencing option which would lie between probation and incarceration with respect to sentencing severity; to provide a more appropriate form of punishment/treatment for certain types of non-violent offenders; to make the offender more accountable to the community; and to help reduce the county jail overcrowding problem while maintaining public safety.” *Id.* at 24 (citation omitted). We held that, notwithstanding the mandatory minimum sentences outlined for DUI, 42 Pa.C.S. § 9763 permits a defendant to be sentenced to county intermediate punishment.

In addition to the express holding of *Williams*, our Supreme Court has noted that § 9721(a.1) permits the imposition of intermediate punishment despite the fact that there is a pertinent mandatory minimum sentence of incarceration. *Commonwealth v. Mazzetti*, 44 A.3d 58, 66-67 (Pa. 2012) (“[S]ection 9721 (a.1) acknowledges that 42 Pa.C.S. § 9763 authorizes the trial court to impose a sentence of county intermediate punishment even if there is an applicable mandatory minimum.”); *see also Commonwealth v. Sarapa*, 13 A.3d 961 (Pa.Super. 2011) (county could not restrict eligibility for county intermediate punishment so as to eliminate that punishment as an option for DUI offenders who were otherwise eligible for participation in county intermediate punishment under the standards outlined in applicable statute).



There is another situation where the trial court is not required to impose a mandatory minimum sentence of incarceration and has another sentencing alternative available to it. In *Commonwealth v. Hansley*, 47 A.3d 1180 (Pa. 2012), our Supreme Court ruled that the Recidivist Risk Reduction Incentive (“RRRI”) Act, 61 Pa.C.S. §§ 4501, *et seq.*, which makes some offenders eligible for release on parole prior to expiration of their minimum term of imprisonment, applies even when a defendant is subject to a mandatory minimum sentence. Therein, at issue was the specific provision that the Commonwealth invokes herein, 18 Pa.C.S. § 7508. The defendant in *Hansley* pled guilty to two drug trafficking offenses, one of which subjected him to a mandatory minimum sentence of three years imprisonment under § 7508 due to the weight of drugs involved. Section 7508(c)<sup>3</sup> specifically prohibits a court from imposing a lesser sentence or permitting parole prior to expiration of the minimum.

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<sup>3</sup> That section states:

**(c) Mandatory sentencing.**--There shall be no authority in any court to impose on an offender to which this section is applicable a lesser sentence than provided for herein or to place the offender on probation, parole, work release or prerelease or to suspend sentence. Nothing in this section shall prevent the sentencing court from imposing a sentence greater than provided herein. Sentencing guidelines promulgated by the Pennsylvania Commission on Sentencing shall not supersede the mandatory sentences provided herein. Disposition under section 17 or 18 of The Controlled Substance, Drug, Device and  
(Footnote Continued Next Page)

The trial court in *Hansley* imposed the three-year mandatory minimum, but made the defendant eligible for parole under the RRRI program after twenty-seven months of serving his three-year minimum sentence. The Commonwealth objected and asserted that the defendant could not be made RRRI eligible because the mandatory minimum applicable under § 7508 superseded the provisions of the RRRI Act. “Applying principles of statutory construction,” the Supreme Court had “no hesitation in concluding that the RRRI Act is applicable to the mandatory minimum penalties imposed pursuant to Section . . . 7508.” *Id.* at 1188.

Our Supreme Court observed that the RRRI Act’s definition of eligible offenders includes various eligibility requirements and those mandates operate to exclude many crimes, none of which involves drug trafficking offenders under § 7508. Since the defendant therein was eligible for RRRI and since the RRRI Act was adopted many years after the mandatory minimum sentencing provision in question, the Supreme Court concluded that the RRRI Act should apply to all eligible offenders.

In accordance with the dictates of § 9721(a.1), we therefore must determine whether § 9763 authorizes imposition of county intermediate punishment in this matter. In order to do so, we refer to the definition of  
(Footnote Continued) \_\_\_\_\_

Cosmetic Act shall not be available to a defendant to which this section applies.

18 Pa.C.S. § 7508(c).

eligible offender for purposes of the county intermediate punishment program. *Williams, supra*. That definition is contained in 42 Pa.C.S. § 9802, which provides in pertinent part:

**“Eligible offender.”** Subject to section 9721(a.1) (relating to sentencing generally), a person convicted of an offense who would otherwise be sentenced to a county correctional facility, who does not demonstrate a present or past pattern of violent behavior and who would otherwise be sentenced to partial confinement pursuant to section 9724 (relating to partial confinement) or total confinement pursuant to section 9725 (relating to total confinement). The term does not include an offender who has been convicted or adjudicated delinquent of a crime requiring registration under Subchapter H of Chapter 97 [FN1] (relating to registration of sexual offenders) or an offender with a current conviction or a prior conviction within the past ten years for any of the following offenses:

18 Pa.C.S. § 2502 (relating to murder).

18 Pa.C.S. § 2503 (relating to voluntary manslaughter).

18 Pa.C.S. § 2702 (relating to aggravated assault).

18 Pa.C.S. § 2703 (relating to assault by prisoner).

18 Pa.C.S. § 2704 (relating to assault by life prisoner).

18 Pa.C.S. § 2901(a) (relating to kidnapping).

18 Pa.C.S. § 3122.1(a)(1) (relating to statutory sexual assault).

18 Pa.C.S. § 3301 (relating to arson and related offenses).

18 Pa.C.S. § 3502 (relating to burglary) when graded as a felony of the first degree.

18 Pa.C.S. § 3701 (relating to robbery).

18 Pa.C.S. § 3923 (relating to theft by extortion).

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

18 Pa.C.S. § 5121 (relating to escape).

Herein, the Commonwealth does not in any respect challenge the fact that Appellee was eligible to participate in county intermediate punishment. A drug offense is not one of the enumerated crimes that would exclude Appellee from eligibility to participate in county intermediate punishment, and the Commonwealth makes no representation that she had a pattern of violent behavior. Under the guideline matrix, with a prior record score of zero and an offense gravity score of five, Appellee would have received a sentence of county imprisonment. The Commonwealth thus fails to establish that § 9763 did not authorize the sentence in question.

The Commonwealth's sole allegation on appeal, that § 7508 requires the imposition of a mandatory sentence despite application of § 9763, cannot be sustained. Under reasoning contained in the *en banc* decision in **Williams**, the sentencing court was authorized to impose a sentence of county intermediate punishment on an eligible offender, even though a mandatory minimum applied.

The Commonwealth relies upon **Commonwealth v. Griffin**, 950 A.2d 324, 324 (Pa.Super. 2008), but that case is distinguishable since the trial court therein imposed a sentence of "house arrest with home monitoring" rather than an applicable mandatory minimum sentence of imprisonment.

In this case, the court sentenced Appellee to county intermediate punishment, which is expressly permissible under the *en banc* decision in **Williams**. To the extent that **Griffin** suggests that § 9721(a.1) prohibits county intermediate punishment from being imposed when there is a mandatory minimum sentence of incarceration in play, *see id.* at 326, that suggestion has been overridden by our Supreme Court's clear pronouncement in **Mazzetti**, and is directly contrary to the *en banc* decision in **Williams** as well as the explicit language of § 9721(a.1). The Commonwealth's reliance upon **Commonwealth v. Kriston**, 588 A.2d 898 (Pa. 1991), is also misguided as it was decided before the 2000 enactment of intermediate punishment as a sentencing option.

Under applicable precedent, if a person is statutorily eligible for county intermediate punishment, a county intermediate sentence may be imposed, even when a mandatory minimum sentence is applicable. The Commonwealth has failed to allege, to any extent, that Appellee was not an eligible offender under the definition of an eligible offender for purposes of county intermediate punishment. Hence, we reject the allegation that the Commonwealth raises on appeal.

Judgment of sentence affirmed.