

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellee	:	
	:	
v.	:	
	:	
CODY R. GOOD,	:	
	:	
Appellant	:	No. 715 WDA 2012

Appeal from the Judgment of Sentence entered on April 12, 2012
in the Court of Common Pleas of McKean County,
Criminal Division, No. CP-42-CR-0000038-2011

BEFORE: MUSMANNO, WECHT and COLVILLE*, JJ.

MEMORANDUM BY MUSMANNO, J.:

Filed: March 18, 2013

Cody R. Good ("Good") appeals from the judgment of sentence entered after he pled guilty to two counts of aggravated indecent assault, 18 Pa.C.S.A. § 3125(a)(8). We vacate the judgment of sentence and remand for resentencing.

Pertinent to the sentence currently under review, in December 2009, Good was convicted of one count of possession of child pornography, 18 Pa.C.S.A. § 6312(d)(1).¹ The trial court sentenced Good to serve seven and one-half to twenty-three months in the McKean County Jail, followed by four years of probation. Less than two months after Good's release from jail, Good engaged in sexual intercourse with a fourteen-year-old girl. Good was arrested and charged with various sex offenses.

¹ Good's conviction of this offense required him to register as a sex offender under the provisions of Megan's Law. **See** 42 Pa.C.S.A. § 9795.1.

*Retired Senior Judge assigned to the Superior Court.

Subsequently, Good entered into a negotiated plea agreement (“the Plea Agreement”) with the Commonwealth, wherein Good agreed to plead guilty to two counts of aggravated indecent assault. Notably, as part of the Plea Agreement, the Commonwealth expressly stated that it would not seek imposition of the 25-year mandatory minimum sentence set forth in section 9718.2 of the Sentencing Code. **See** Plea Agreement, 3/12/12, at 1 (providing that “[t]he Commonwealth is not seeking any additional mandatory sentencing provisions outlined by 42 Pa.C.S[.A.] § 9718.2[.]”).

Section 9718.2 is a recidivist sentencing statute that sets forth a mandatory minimum prison term of 25 years where, as here, the defendant is convicted of one of the numerous sex offenses under 42 Pa.C.S.A. § 9795.1 that require registration with the State Police (hereinafter “Megan’s Law offense”), and the defendant had previously been convicted of a Megan’s Law offense. Specifically, section 9718.2 provides, in relevant part, as follows:

(a) Mandatory sentence.

(1) Any person who is convicted in any court of this Commonwealth of an offense set forth in section 9795.1(a) or (b) (relating to registration) shall, if at the time of the commission of the current offense the person had previously been convicted of an offense set forth in section 9795.1(a) or (b) or an equivalent crime under the laws of this Commonwealth in effect at the time of the commission of that offense or an equivalent crime in another jurisdiction, be sentenced to a minimum sentence of at least 25 years of total confinement, notwithstanding any other provision of this title or other statute to the contrary.

...

42 Pa.C.S.A. § 9718.2(a)(1). Significantly, however, section 9718.2 further provides, in pertinent part, as follows:

(c) Proof of sentencing. -- The provisions of this section shall not be an element of the crime, and notice thereof to the defendant shall not be required prior to conviction, but reasonable notice of the Commonwealth's intention to proceed under this section shall be provided after conviction and before sentencing. ...

Id. § 9718.2(c).

At a hearing on March 12, 2012, Good entered a guilty plea, pursuant to the Plea Agreement, before the Honorable John H. Pavlock. Prior to accepting Good's plea, however, Judge Pavlock advised Good that, in the court's opinion, the 25-year mandatory minimum sentence under section 9718.2 would apply, *notwithstanding* the Commonwealth's stated intention not to seek imposition of the mandatory sentence. **See** N.T., 3/12/12, at 11-12. In response to Judge Pavlock's assertion in this regard, Good's guilty plea counsel stated that (1) counsel had informed Good of counsel's belief that Judge Pavlock's opinion as to the applicability of section 9718.2 was incorrect; and (2) if the trial court thereafter decided to impose the mandatory minimum sentence, that Good intended to appeal. ***Id.*** at 13. The trial court then accepted Good's open guilty plea to the above-mentioned charges and scheduled a sentencing hearing. ***Id.*** at 24-25.

Prior to sentencing, the trial court issued an Order stating that "the applicable twenty[-]five year mandatory minimum set forth in [section] 9718.2 will be imposed by the [c]ourt at the time of sentence." Order,

4/3/12. At the sentencing hearing on April 12, 2012, the Assistant District Attorney again told the court that the Commonwealth was not requesting the court to impose the mandatory minimum sentence under section 9718.2. **See** N.T., 4/12/12, at 8. The Assistant District Attorney requested that the court impose the statutory maximum sentence applicable to a conviction of aggravated indecent assault, ten to twenty years in prison. **Id.** In response, the trial court reasserted its opinion that it was statutorily required to impose the mandatory minimum sentence pursuant to section 9718.2. **Id.** at 11-12. Accordingly, the trial court sentenced Good to serve 25 to 50 years in prison on each of his convictions of aggravated indecent assault and ordered these sentences to run concurrently. **Id.** at 12-13. Good timely filed a Notice of appeal.

On appeal, Good raises the following issues for our review:

1. Did the lower court impose an illegal sentence on [Good]?
2. Absent the Commonwealth's Notice of intention to proceed under the mandatory sentencing provisions of 42 Pa.C.S.A. [§] 9718.2, did the lower court have the authority to impose a mandatory sentence?

Brief for Appellant at 5 (capitalization omitted).

The issue presented in this case is whether the sentencing court was permitted, in the absence of the Commonwealth's notice of intent to proceed under the mandatory minimum sentencing provision in section 9718.2, to sentence Good to the 25-year mandatory minimum sentence under that section. Accordingly, we are presented with a question of law for which our

scope of review is plenary, and our standard of review is *de novo*. ***Commonwealth v. Mazzetti***, 44 A.3d 58, 63 (Pa. 2012).

Initially, we note that the Commonwealth agrees with Good that the trial court committed an error of law in imposing a mandatory minimum sentence under section 9718.2 where the Commonwealth had expressly stated that it was not requesting the mandatory minimum sentence. **See** Brief for the Commonwealth at 4-6. Both the Commonwealth and Good contend that the issue at bar was resolved by the Pennsylvania Supreme Court in ***Commonwealth v. Pittman***, 528 A.2d 138 (Pa. 1987). **See** Brief for the Commonwealth at 4-5; Brief for Appellant at 10-13. We agree.

The issue presented in ***Pittman*** was whether a five-year minimum sentence must be imposed pursuant to the mandatory minimum sentence provision of section 9712 of the Sentencing Code whenever an enumerated felony is committed with a firearm, or whether section 9712 is applicable only when the Commonwealth gives notice of its intent to proceed under that section. ***Pittman***, 528 A.2d at 140. The ***Pittman*** Court noted that section 9712 provides, in relevant part, as follows:

§ 9712, Sentences for offenses committed with firearms

(a) Mandatory sentence. -- Any person who is convicted in any court of this Commonwealth of murder of the third degree, voluntary manslaughter, rape, involuntary deviate sexual intercourse, robbery as defined in 18 Pa.C.S. § 3701(a)(1)(i), (ii) or (iii) (relating to robbery), aggravated assault as defined in 18 Pa.C.S. § 2702(a)(1) (relating to aggravated assault) or kidnapping, or who is convicted of attempt to commit any of these crimes, shall, if the person visibly possessed a firearm during the commission of the offense, be sentenced to a

minimum sentence of at least five years of total confinement notwithstanding any other provision of this title or other statute to the contrary.

(b) Proof at sentencing. -- Provisions of this section shall not be an element of the crime and *notice thereof to the defendant shall not be required prior to conviction, but reasonable notice of the Commonwealth's intention to proceed under this section shall be provided after conviction and before sentencing.* The applicability of this section shall be determined at sentencing. The court shall consider any evidence presented at trial and shall afford the Commonwealth and the defendant an opportunity to present any necessary additional evidence and shall determine, by a preponderance of the evidence, if this section is applicable.

42 Pa.C.S.A. § 9712.

Pittman, 528 A.2d at 141 (emphasis in original; footnote omitted).

The defendant in ***Pittman*** pled guilty to robbery, one of the enumerated crimes in section 9712(a). ***Id.*** at 140. Since the defendant had visibly possessed a firearm during the commission of the offense, the five-year mandatory minimum sentence provided under section 9712 was applicable. ***Id.*** However, pursuant to a negotiated guilty plea agreement, the Commonwealth did not give notice that it intended to proceed under section 9712. ***Id.*** Moreover, at the original sentencing hearing, the Commonwealth expressly stated that it did not intend to proceed under section 9712. ***Id.*** Nevertheless, the trial court (1) notified the defendant that section 9712 was applicable to his case; and (2) subsequently imposed the mandatory minimum sentence under section 9712 based upon the court's belief that the statute required that the defendant be sentenced to at least five years in prison, regardless of whether the Commonwealth requests

that the mandatory minimum sentencing provision be invoked. *Id.* at 140-41.

On appeal, our Supreme Court in *Pittman* disagreed with the trial court's interpretation of section 9712, stating as follows:

According to subsection (b) [of section 9712], "reasonable notice of the *Commonwealth's intention to proceed under this section* shall be provided after conviction and before sentencing." [42 Pa.C.S.A. § 9712(b) (emphasis added).] If the Commonwealth had no option but to request imposition of a minimum sentence of five years in every case in which a firearm was used, presumably the statute would not have referred to the Commonwealth's "intention to proceed" under the section. Moreover, in the case at bar, even if it is assumed, *arguendo*, that the court, not the Commonwealth, could provide notice of an intent to proceed under the act, it could not have provided notice of the *Commonwealth's* intent to proceed under the act, for the Commonwealth had no such intent, as it indicated at the sentencing hearing[.]

Pittman, 528 A.2d at 141-42 (emphasis in original). Accordingly, the Supreme Court held as follows:

[T]here is no mechanism in the law of this Commonwealth for a [trial] court to exercise the prosecutorial function. Therefore, the minimum sentencing provisions of Section 9712 may not be imposed absent notice of *the Commonwealth's intention to proceed* -- not the court's intention to proceed -- under the section, and it was error for the trial court to have applied the terms of Section 9712 without such notice.

Id. at 143 (emphasis in original).

The instant case and *Pittman* are closely analogous. In both cases, the mandatory minimum sentencing provisions were applicable. The defendants in both instances pleaded guilty, and the Commonwealth, pursuant to a plea agreement, did not file notice that it intended to proceed

under the mandatory sentencing provision. Here, as in **Pittman**, the sentencing court imposed the mandatory minimum sentence without the Commonwealth's notice of intent to proceed under the mandatory sentence provision. Moreover, the notice provisions of the separate statutes involved in this case and in **Pittman** are *identical*. The notice provision of section 9718.2, the statute involved in this case, provides as follows:

(c) Proof of sentencing. -- The provisions of this section shall not be an element of the crime, and *notice thereof to the defendant shall not be required prior to conviction, but reasonable notice of **the Commonwealth's intention to proceed under this section shall be provided after conviction and before sentencing.*** ...

42 Pa.C.S.A. § 9718.2(c) (emphasis added); **cf.** 42 Pa.C.S.A. § 9712(b) (the relevant provision in **Pittman**).

Based upon the foregoing, we find that **Pittman** is controlling and resolves the issue before us. Since the Commonwealth here never gave notice of its intent to proceed under section 9718.2, the trial court thus lacked the authority to impose the mandatory minimum sentence under section 9718.2 without such notice. **See Pittman**, 528 A.2d at 141-42, 143; **see also Commonwealth v. Biddle**, 601 A.2d 313, 316-17 (Pa. Super. 1991) (finding **Pittman** controlling where the mandatory sentence statute involved in the case *sub judice*, 18 Pa.C.S.A. § 7508, contained virtually identical language as the statute involved in **Pittman** regarding notice by the Commonwealth). Additionally, we note that this Court has instructed that

part and parcel of the Commonwealth's broad discretion to invoke the mandatory sentence is the discretion to refrain from invoking the mandatory minimum, a function of the Commonwealth's discretion often employed in the course of plea negotiations with criminal defendants. Indeed, a sentencing court has no discretion or authority to apply a mandatory minimum sentence when the Commonwealth did not give notice of intent to proceed under the applicable mandatory sentencing provision (consistent with the Commonwealth's promise to refrain from invoking the mandatory minimum as part of a plea bargain). In this sense, the prosecutor is truly the gatekeeper in determining whether a mandatory minimum sentence must be applied by a sentencing court.

Commonwealth v. Mebane, 58 A.3d 1243, 1249-50 (Pa. Super. 2012) (internal citation to ***Pittman*** omitted).

Finally, our review discloses that the legal authority relied upon by the trial court in the instant case in support of its interpretation of section 9718.2 is inapposite. Specifically, the trial court's reliance upon ***Commonwealth v. Heath***, 597 A.2d 1135 (Pa. 1991), is misplaced, as the ***Heath*** Court itself noted that the mandatory sentence statute at issue in that case, 42 Pa.C.S.A. § 9718 (governing sentences for offenses against infant persons), "contains *no notice requirement*." ***Heath***, 597 A.2d at 1136 (emphasis added). To the contrary, here, section 9718.2 contains a clear and unambiguous notice requirement. ***See*** 42 Pa.C.S.A. § 9718.2(c).

Accordingly, we vacate the illegal sentence imposed by the trial court and remand the matter for resentencing consistent with this Memorandum.

Judgment of sentence vacated; case remanded for resentencing; Superior Court jurisdiction relinquished.