[J-16-2011]
IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

CASTILLE, C.J., SAYLOR, EAKIN, BAER, TODD, McCAFFERY, ORIE MELVIN, JJ.

COMMONWEALTH OF PENNSYLVANIA,	:	No. 7 EAP 2009
	:	
Appellant	:	Appeal from the Judgment of the Superior
	:	Court entered on October 22, 2008 at No.
	:	3450 EDA 2006 Vacating and Remanding
v.	:	the Judgment of Sentence entered on
	:	November 30, 2006 in the Court of
	:	Common Pleas, Philadelphia County,
	:	Criminal Division, at No. CP-51-CR-
OLIVER FOSTER,	:	0109521-2006.
	:	
Appellee	:	ARGUED: October 20, 2009
	:	RE-SUBMITTED: January 18, 2011

OPINION ANNOUNCING THE JUDGMENT OF THE COURT

MR. JUSTICE BAER **DECIDED: March 29, 2011**

In Commonwealth v. Dickson, 918 A.2d 95 (Pa. 2007), this Court determined that Section 9712(a) of the Judicial Code, which directs imposition of a mandatory minimum sentence of not less than five years of imprisonment upon any person convicted of an enumerated violent crime while in visible possession of a firearm, did not apply to any "unarmed co-conspirators." In this case, we are called to decide whether a "Dickson challenge" by an unarmed co-conspirator implicates the legality of the unarmed co-conspirator's sentence for purposes of issue preservation and waiver.[1] The Superior Court

[1] In Dickson, we did not need to reach the issue presented here because we found the sentencing challenge presented there was preserved properly. Regardless, and as is (continued…)

below determined that such a challenge implicates the legality of the sentence; thus, the Superior Court concluded that "Dickson challenges" cannot be waived based on a defendant's failure to raise them in post-sentence motions, or, likewise, for a defendant's failure to file a statement of reasons relied upon for allowance of appeal pursuant to Pa. R.A.P. 2119(f). See supra note 1. For the reasons that follow, we affirm.

The factual and procedural background of this case is undisputed. On the evening of January 6, 2006, the victim, Roger Snyder, was home in his apartment in Philadelphia. Mr. Snyder and Oliver Foster (Appellee) had been acquaintances for approximately three years. At approximately 8:40 p.m. on the evening in question, Appellee and a second man known only as Darryl arrived at Mr. Snyder's residence. As was his custom, Appellee knocked on Mr. Snyder's window to gain access to the inside of the apartment. When Mr. Snyder opened the door to allow Appellee inside, Darryl, who had been hidden from view, followed Appellee into the apartment. Darryl then approached Mr. Snyder and said, "Come on, let's go. We're going to the ATM machine." Notes of Testimony (N.T.), Oct. 11, 2006, at 19. Darryl then lifted the front of his jacket to reveal an automatic firearm in his waistband.

The three men then walked to an ATM machine. Darryl withdrew $400 (in two different transactions of $100 and $300, respectively) from Mr. Snyder's bank account. Immediately thereafter, Darryl's brother arrived in a silver SUV, and Darryl entered the vehicle, leaving the scene. Appellee did not follow Darryl, but instead walked a short distance with Mr. Snyder, before suddenly fleeing the area on foot.

(…continued)
well-settled in Pennsylvania, sentencing challenges generally must be preserved through the filing of post-sentence motions and a concise statement of the reasons relied upon for allowance of appeal in the principal brief to the Superior Court pursuant to Pa. R.A.P. 2119(f). A challenge to the legality of sentence, however, need not be preserved and is never waivable. In re M.W., 725 A.2d 729 (Pa. 1999).

Philadelphia Police Detective Sarah Valentino was assigned to investigate the robbery, and arrested Appellee on January 16, 2006. After his arrest, Appellee voluntarily told Detective Valentino that he took a man known as "D" to Mr. Snyder's apartment. Apparently, Appellee owed "D" money, and, coincidentally, Mr. Snyder owed Appellee money. Accordingly to Appellee, upon entering the home, "D" showed Mr. Snyder the firearm, looked through Mr. Snyder's wallet, and then the three men left the apartment for an ATM machine. After "D" withdrew the $400, he entered the silver SUV and fled the area. No evidence, however, suggested that Appellee himself visibly possessed a firearm.

Based upon Mr. Snyder's account of the events in question, as well as Appellee's admissions, Detective Valentino charged Appellee with robbery, conspiracy, two counts of theft, possession of an instrument of crime (PIC), reckless endangerment, terroristic threats, carrying an unlicensed firearm, and carrying a firearm on a public street in Philadelphia.[2] Appellee elected to proceed via a nonjury trial, which commenced on October 11, 2006. At the conclusion of trial, the trial court convicted Appellee of robbery, conspiracy, theft, and PIC, and acquitted him of the remaining charges.

Prior to sentencing, the Commonwealth invoked the mandatory minimum sentencing provision of 42 Pa.C.S. § 9712(a), which provides,

> Except as provided under section 9716 (relating to two or more mandatory minimum sentences applicable), any person who is convicted in any court of this Commonwealth of a crime of violence as defined in section 9714(g) (relating to sentences for second and subsequent offenses), shall, if the person visibly possessed a firearm or a replica of a firearm, whether or not the firearm or replica was loaded or functional, that placed the victim in reasonable fear of death or serious bodily injury, 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

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[2] 18 Pa.C.S. §§ 3701, 903, 3901, 907, 2705, 2706, 6106, 6108, respectively.

> statute to the contrary. Such persons shall not be eligible for parole, probation, work release or furlough.[3]

A sentencing hearing was subsequently held on November 30, 2006. Appellee had no prior convictions, and the sentencing guidelines suggested twenty-two to thirty-six months of minimum incarceration, plus or minus twelve months. As robbery is a felony of the first degree, the most Appellee could have been sentenced to serve was twenty years of incarceration. 18 Pa.C.S. § 1103(1). At the hearing, defense counsel, the prosecuting attorney, and the trial court all acknowledged that, under the accepted reading of Section 9712(a) at the time of sentencing, imposition of a minimum term of imprisonment of five years was mandatory, based upon Appellee's conviction for robbery, and Darryl's possession of a firearm.[4] See e.g., N.T., Nov. 30, 2006, at 4 ("THE COURT: It is a five-year mandatory."). Accordingly, the court sentenced Appellee to a term of imprisonment of five to ten years. Appellee then filed post-sentence motions and, subsequently, a timely notice of appeal to the Superior Court; neither of these, however, were related to sentencing issues.

Approximately four months after the court imposed sentence, this Court issued its decision in Dickson, supra p. 1, in which we held that the Section 9712(a) mandatory minimum does not apply to so-called "unarmed co-conspirators." Being an unarmed co-conspirator, Appellee immediately petitioned the Superior Court for leave to file a motion for modification of sentence *nunc pro tunc* in the trial court.[5] The Superior Court denied the

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[3] Robbery falls within the category of enumerated crimes of violence, as defined by 42 Pa.C.S. § 9714(g).

[4] While all parties agreed that the mandatory minimum applied, the parties also did not, and currently do not, dispute that Appellee never visibly possessed a firearm.

[5] It is evident from the record that this petition for leave of court was Appellee's first opportunity to raise application of Dickson to his sentence.

motion, but specified that such denial was without prejudice to raise a challenge under Dickson on direct appeal. Upon order by the trial court, Appellee then filed a timely statement of matters complained of on appeal pursuant to Pa. R.A.P. 1925(b), in which he included a request for relief under Dickson. The trial court, in its Pa. R.A.P. 1925(a) opinion concluded that Appellee's "Dickson challenge" was without merit, and the imposed sentence was proper, under the law at the time of its imposition.

As explicitly permitted by the Superior Court, Appellee raised his "Dickson challenge" as part of his merits argument in his direct appeal. See Commonwealth v. Foster, 960 A.2d 160 (Pa. Super. 2008). Before reaching those merits, however, the Superior Court determined that it was required first to analyze whether Appellee's challenge was properly before it, as Appellee had failed to file post-sentence motions concerning his "Dickson challenge" with the trial court. See Commonwealth v. Shugars, 895 A.2d 1270 (Pa. Super. 2006) (averments of sentencing error are generally waived if not raised, in the first instance, in a motion before the sentencing court). Moreover, Appellee apparently did not set forth a statement of reasons relied upon for allowance of appeal in his principal brief to the Superior Court pursuant to Pa. R.A.P. 2119(f). See Commonwealth v. Tuladziecki, 522 A.2d 17 (Pa. 1987) (holding that failure to file a Rule 2119(f)[6] statement generally constitutes waiver of all discretionary sentencing issues). However, the court also considered this Commonwealth's longstanding jurisprudence that a challenge to the legality of one's sentence can never be waived. See e.g. Dickson, 918 A.2d at 99. Thus, if

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[6] Pennsylvania Rule of Appellate Procedure 2119(f) provides,

> An appellant who challenges the discretionary aspects of a sentence in a criminal matter shall set forth in his brief a concise statement of the reasons relied upon for allowance of appeal with respect to the discretionary aspects of a sentence. The statement shall immediately precede the argument on the merits with respect to the discretionary aspects of sentence.

Appellee's "Dickson challenge" implicated the legality of his sentence, Appellee's failure to file post-sentence motions or a Rule 2119(f) statement would be of no moment. Id.

The panel first analyzed the scenarios which this Court has found "unequivocally relate to the legality of sentence." Foster, 960 A.2d at 164. First, any claim, which asserts a sentence exceeds the lawful maximum, implicates the legality of the sentence. See e.g. Commonwealth v. Shiffler, 879 A.2d 185 (Pa. 2005).[7] Related to this first instance, the panel recognized that any challenge premised upon the United States Supreme Court's holding in Apprendi v. New Jersey[8] involves a sentence's legality:

> In the Apprendi setting, a defendant asserts that the maximum sentence to which he was subject was unconstitutionally increased based upon the existence of a fact that should have been submitted to a jury rather than determined by the sentencing court. Thus, if a defendant were to prevail on an Apprendi violation, he would have been sentenced in excess of the sentence that should otherwise have been imposed within constitutional parameters.

Foster, 960 A.2d at 165 (citing Commonwealth v. Aponte, 855 A.2d 800 (Pa. 2004) (Castille, J. (now, C.J.), concurring)).

Second, the panel found that this Court has concluded that a challenge by the Commonwealth that the sentencing court improperly refused to impose a mandatory minimum sentence or fine implicated the legality of a defendant's sentence, and thus was also nonwaivable. Indeed, on two occasions, Commonwealth v. Vasquez, 744 A.2d 1280 (Pa. 2000), and Commonwealth v. Smith, 598 A.2d 268 (Pa. 1991), this Court found that, pursuant to explicit statutory authority, the Commonwealth has an unfettered right to appeal

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[7] In Shiffler, we examined the appropriateness of a mandatory sentence under the Pennsylvania three strikes law. In holding that imposition of the mandatory sentence was improper, we also found the sentence as a whole illegal, because the mandatory sentence exceeded what the defendant could have otherwise received for the crime committed.

[8] 530 U.S. 466 (2000).

a sentencing court's failure to apply mandatory minimum sentences. For example, in Vasquez, the Commonwealth had sought a mandatory fine against a defendant for possession of a controlled substance with intent to deliver. Although the Commonwealth provided the required notice of intent to seek the mandatory fine with the trial court and defendant, the trial court, at sentencing, failed to impose the fine.[9] The Commonwealth failed to preserve the issue through a timely lodged objection or post-sentence motion. On appeal, the defendant argued that the mandatory fine could no longer be imposed because the Commonwealth had waived any contentions in this regard by failing to object or file a post-sentence motion. This Court unanimously disagreed, finding "because the initial sentence lacked the mandatory fine, it was illegal from its inception and always susceptible to correction." Vasquez, 744 A.2d at 1284.[10] Thus, the Commonwealth's sentencing challenge was nonwaivable.

Third, the panel found that averments relating to merger or double jeopardy also implicate the legality of the sentence, as in these instances a question is raised concerning whether the imposed punishment is greater than that which the General Assembly

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[9] Pursuant to 18 Pa.C.S. § 7508(a)(2)(i), Vasquez was subject to a mandatory fine of $5,000 for possession with intent to deliver at least 2.0 but less than 10.0 grams of a Schedule I or Schedule II narcotic, as defined by the Controlled Substance, Drug, Device and Cosmetic Act, 35 P.S. § 780-101, *et seq*.

[10] In Smith, we found a trial court's error in failing to impose a mandatory minimum sentence under 42 Pa.C.S. § 9714(a) and (b) for second-time violent offenders implicated a sentence's legality in light of explicit statutory authority contained within Section 9714, granting the Commonwealth a right to appeal:

> If a sentencing court shall refuse to apply this section where applicable, the Commonwealth shall have the right to appellate review of the action of the sentencing court. The appellate court shall vacate the sentence and remand the case to the sentencing court for the imposition of a sentence in accordance with this section if it finds that the sentence was imposed in violation of this section.

42 Pa.C.S. § 9714(f).

intended. Commonwealth v. Andrews, 768 A.2d 309, 313 (Pa. 2001). These three classes of cases aside, the panel determined that the instant appeal concerned the applicability of a fourth and wholly distinct category: a defendant's appeal of the imposition of a mandatory minimum sentence that is neither greater than a statutory maximum, nor less than a prescribed minimum.

With this in mind, the Superior Court then reviewed our decision in In re M.W., 725 A.2d 729 (Pa. 1999). There, a juvenile, who had been adjudicated delinquent pursuant to a plea agreement, challenged the juvenile court's authority to impose a restitution order arguing that the Commonwealth had failed to attribute property damage to him. On appeal to this Court, the Commonwealth averred that the juvenile had waived any such challenge because he failed to file a Rule 2119(f) statement with the Superior Court. We disagreed, holding that "the issue presented in this case centers upon the juvenile court's statutory authority to order restitution; thus, it implicates the legality of the dispositional order." Id. at 731. Accordingly, the juvenile was not required to submit a Rule 2119(f) statement to the Superior Court in order to preserve the issue for our consideration. Id.

The panel then turned to its own caselaw concerning legality of sentences. Specifically, the court cited, among other decisions, to three recent cases, Commonwealth v. Harley, 924 A.2d 1273 (Pa. Super. 2007) (unsuccessful challenge to the imposition of a mandatory minimum sentence for possession with intent to deliver 10.2 grams of crack cocaine), appeal granted on other grounds 934 A.2d 1149 (Pa. 2007), and dismissed as improvidently granted 967 A.2d 376 (Pa. 2008); Commonwealth v. Johnson, 920 A.2d 873 (Pa. Super. 2007) (unsuccessful challenge to the imposition of a mandatory minimum sentence for possession with intent to deliver 1.9 grams of heroin), appeal granted on other

grounds 979 A.2d 842 (Pa. 2009);[11] and Commonwealth v. Littlehales, 915 A.2d 662 (Pa. Super. 2007) (finding that legality of a sentence is not implicated when a statute permits courts, in their discretion, to impose a minimum sentence). These three cases, among others from the Superior Court, all unequivocally state that a defendant's challenge to the imposition of a mandatory minimum sentence (the "fourth" category that we are currently considering) implicates the legality of that sentence, "because, by statute, courts have no authority to avoid imposing the mandatory minimum, assuming certain factual predicates apply." Johnson, 920 A.2d at 880 (quoting Littlehales, 915 A.2d at 664) (emphasis added).

Recognizing these holdings as panel decisions, the Superior Court looked to a recent *en banc* decision of that tribunal, Commonwealth v. Robinson, 931 A.2d 15 (Pa. Super. 2007) (*en banc*). There, the Superior Court was faced with deciding whether a trial court's alleged vindictiveness or bias in sentencing implicated the legality of the sentence, such that preservation of the issue was not required. In finding that a "vindictiveness" claim did not concern the legality of the imposed sentence, the Robinson Court suggested that illegal sentences only exist in a "narrow class" of cases: excessive sentences, Apprendi challenges, and merger/double jeopardy scenarios, because "[T]hese claims implicate the fundamental legal authority of the court to impose the sentence that it did." Id. at 21. The panel in the instant case found the "narrow class" language of Robinson imprecise and unhelpful, however, because factually, the Robinson Court did not need to examine precedent from both this Court and the Superior Court concerning the legality of mandatory minimum sentences. Cf. e.g. In re M.W.; Harley.

[11] Both Harley and Johnson examined the viability of what is known as the "extrapolation method" of measuring the weight of controlled substances. While the question of the appropriateness of this method remains an open question pending disposition of Johnson in this Court, the fact remains that the Superior Court in those cases examined the challenges as one implicating the legality of a mandatory minimum sentence.

Based upon this jurisprudence and the fact that the trial court lacked authority to impose a sentence less than the five year mandatory minimum at the time it rendered sentence, the Superior Court determined that the improper imposition of the Section 9712(a) mandatory minimum sentence implicated the legality of Appellee's sentence. Accordingly, because the evidence presented at trial supported Appellee's "Dickson challenge," in that there was nothing upon which to base a finding that Appellee visibly possessed a firearm, the court held that the sentence imposed was without legal authority, vacated it, and remanded for resentencing.

Judge Shogan filed a dissenting opinion, noting that "the classic formulation of an illegal sentence, as established by our Supreme Court, is one that exceeds the statutory limits." Foster, 960 A.2d at 172 (Shogan, J., dissenting) (citing e.g. Commonwealth v. Bradley, 834 A.2d 1127, 1131 (Pa. 2003)). From this general statement, the dissent premised its argument on the failure of the Robinson court to include explicitly cases, such as the one presented at bar, which concern mandatory minimum sentences, within the "relatively small class of cases" to which legality of sentence principles applies. The dissent then buttressed its argument by noting the refusal of this Court in Dickson (decided post-Robinson) to state specifically that challenges concerning mandatory minimum sentences implicate legality of the sentence, but see supra note 1.

For this reason, the dissent found inapposite the various Superior Court cases such as Harley, supra pp. 8-9, which had considered a defendant's appeal concerning a mandatory minimum to implicate legality of the sentence, because those decisions pre-dated Dickson. In the dissent's view, our failure in Dickson to include the imposition of a mandatory minimum within the "narrow class of cases" recognized by the Robinson court, foreclosed any use of pre-Dickson rationale. Finally, the dissent found unavailing cases such as Vasquez and Smith, supra pp. 6-7, where the Commonwealth had successfully appealed the failure to impose a mandatory minimum sentence, because those cases

involved an explicitly permitted statutory right of the Commonwealth to appeal a sentencing court's failure to impose a mandatory minimum, a right not granted by the legislature to defendants.[12]

Former Justice (now Senior Judge) Fitzgerald concurred in full with the majority opinion, but wrote separately to address the points raised in the dissent. While recognizing the accuracy of the dissent's contention that almost all illegal sentence cases concern penalties that exceed the statutory maximum, the concurrence noted that those cases by no means foreclosed other legality of sentence claims. Rather, in the concurrence's view, the Superior Court's *en banc* Robinson decision specifically left the door open to other legality of sentence claims, by stating,

> [The Superior Court has] established the principle that the term "illegal sentence" is a term of art that our Courts apply narrowly, to a relatively small class of cases. This class of cases includes: (1) claims that the sentence fell "outside of the legal parameters prescribed by the applicable statute"; (2) claims involving merger/double jeopardy; and (3) claims implicating the rule in [Apprendi]. These claims implicate the fundamental legal authority of the court to impose the sentence that it did.

Robinson, 931 A.2d at 21 (emphasis added), cited in Foster, 960 A.2d at 169 (Fitzgerald, III, J., concurring). The concurrence viewed this language as recognizing that other situations may exist outside of the "narrow class," in which sentencing challenges implicate legality. It then found this appeal to be such a circumstance: "I cannot conclude that when a court believes it has no discretion [but] to impose a particular sentence, we must nonetheless consider it an issue of the discretionary aspects of that sentence." Foster, 960 A.2d at 170 (Fitzgerald, III, J., concurring).

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[12] See e.g. note 10, supra.

On appeal to this Court, the Commonwealth does not challenge the impropriety of Appellee's sentence when viewed in accord with the Dickson decision. Reply Brief of Commonwealth at 4 n.2. Rather, the Commonwealth merely contends that the "Dickson challenge" should not have been sustained in the first instance, because Appellee's sentence involved solely discretionary aspects, was therefore waivable and, in fact, was waived by Appellee's failure to raise the instant challenge in his post-sentence motions or a Rule 2119(f) statement to the Superior Court.[13]

In support of its discretionary aspects/waiver argument, the Commonwealth points to statements by this Court on various occasions that "[A]s long as the sentence is within the statutory limit, it is legal." Commonwealth v. Miller, 664 A.2d 1310, 1325 (Pa. 1995); see also Bradley, supra p.10. Thus, in the Commonwealth's view, because Appellee's sentence is within the statutory maximum (here, twenty years), it is necessarily legal and any challenges thereto had to have been preserved below. With this general proposition in mind, the Commonwealth then focuses on cases from this Court where we stated that claims of legality of a sentence center upon the "authority" of the sentencing court to impose a sentence or fine. For example, in Vasquez, supra pp.6-7, we accepted for adjudication a Commonwealth appeal in light of a sentencing court's failure to impose a mandatory fine, because the sentencing court lacked the "authority" not to impose the fine. Similarly, in In re M.W., supra p.8, we vacated a dispositional order for a juvenile because the order included an obligation to make restitution, which the juvenile court had no "authority" to impose, in light of the Commonwealth's failure to prove the juvenile caused any property damage.

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[13] Whether Appellee's Dickson challenge implicates the legality of his sentence, such that it is nonwaivable, presents a pure question of law. Thus, our standard of review is *de novo*, and our scope of review is plenary. See e.g. Commonwealth v. Samuel, 961 A.2d 57 (Pa. 2008).

The Commonwealth then takes the "authority" language from these two cases, and applies it to this Court's decision in Commonwealth v. Walton, 397 A.2d 1179 (Pa. 1979). In Walton, the defendant was convicted of various crimes related to his discharge of a shotgun into a woman's face, permanently blinding her. At sentencing, the trial judge opted to attempt to rehabilitate the defendant, and thus sentenced him to a nineteen-year probationary term, on the condition that he pay the victim $25 per week during the probationary period. The sentencing court imposed the sentence pursuant to Section 5109 of the Penal Code of 1939, as codified, 18 P.S. § 5109. That section, however, had been repealed by the General Assembly's enactment of the Crimes Code of 1975.[14] No post-trial or post-sentence motions were filed challenging the sentence.

After conclusion of the trial court proceedings, the defendant appealed the sentence to the Superior Court, contending that the sentence was illegal because the trial court imposed it pursuant to the repealed Section 5109. The Superior Court agreed, and remanded. On discretionary appeal to this Court, the Commonwealth argued that, even if Section 5109 was repealed by the Crimes Code of 1975, the trial court still had the "authority" to impose the sentence under the Act of June 19, 1911, as amended, 19 P.S. § 1051, which authorized trial courts to place defendants on probation for definite periods of time upon terms and conditions, including the payment of money.[15] This Court agreed with the Commonwealth, even though the trial court did not invoke the 19 P.S. § 1051 sentencing provisions. In light of such "authority" under Section 1051, the trial court's

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[14] While there was no specific language in the 1975 Crimes Code that specifically repealed Section 5109 (which, assumedly, was why the Walton sentencing court employed that section), the Superior Court in Commonwealth v. Flashburg, 352 A.2d 185 (Pa. Super. 1975), and this Court during our review of Walton, found that the enactment of an entirely new statutory scheme for criminal conduct repealed all provisions of the 1939 Penal Code, of which 18 P.S. § 5109 was a part.

[15] This provision has since also been repealed, but was effective at the time of the defendant's sentencing.

judgment of sentence could not be found illegal, and thus the sentencing issues presented there were waived for the defendant's failure to file post-sentence motions in the trial court.

Based upon this rationale, the Commonwealth here contends that, regardless of the applicability of Section 9712(a) to Appellee's sentence, the trial court retained the general authority to sentence Appellee to a term of imprisonment of five to ten years pursuant to 18 Pa.C.S. § 1103(1) (providing for a maximum sentence of twenty years' imprisonment for first-degree felonies). Brief of the Commonwealth at 8 (citing In re M.W., 725 A.2d at 731). Thus, the Commonwealth argues that because the trial court retained the general statutory authority to sentence Appellee to five to ten years of imprisonment, Appellee necessarily waived his claim by failing to preserve it in a post-sentence motion, or by presenting it via a Rule 2119(f) statement.

Appellee counters the Commonwealth's argument by first rejecting the notion that a sentencing challenge implicates legality only in an "in excess of the statutory maximum" scenario. To that end, Appellee points to the various decisions of the Superior Court, see supra pp.8-9, which examine the appropriate application of a mandatory minimum sentence under the auspices of the sentence's legality. Appellee also cites to this Court's decision in Commonwealth v. Shaw, 744 A.2d 739 (Pa. 2000), discussed in full, infra, where we summarily stated that a challenge to the imposition of a mandatory minimum sentence aimed at repeat DUI offenders could not be waived, as it equated to a challenge to the legality of the sentence.

On the question, of whether a "Dickson challenge" implicates the legality of an imposed sentence, the Commonwealth is correct in so much as this Court has generally maintained that the typical illegal sentence is one which exceeds the statutory maximum. See Vasquez; Miller. Under this maxim, we have also found that Apprendi-based challenges implicate the legality of a sentence. See Aponte, 855 A.2d at 802 n.1. Notably, the parties herein do not dispute that Appellee's sentence falls within the statutory

maximum for first-degree robbery. Of course, we have also recognized the inverse of "excessive sentence" cases – where a court imposes sentence below that which is prescribed by statute. See Vasquez, supra. Minimums and maximums, however, are not the only benchmarks. Indeed, merger/double jeopardy cases concern legality of sentencing, even when the sentence at issue falls within prescribed minimum and maximum sentences. See Commonwealth v. Baldwin, 985 A.2d 830 (Pa. 2009).[16]

Consistent, then, with this Court's jurisprudence in this area of the law throughout the years, legality of sentence issues occur generally either: (1) when a trial court's traditional authority to use discretion in the act of sentencing is somehow affected, see e.g. In re M.W., 725 A.2d at 731 (holding that, when a sentencing issue "centers upon a court's statutory authority" to impose a sentence, rather than the "court's exercise of discretion in

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[16] In Baldwin, we were charged with the task of determining the proper framework in which to examine whether sentences merge, in light of a recent enactment by the General Assembly concerning merger of crimes. There, the defendant had been charged with violating two separate provisions of the Uniform Firearms Act: 18 Pa.C.S. § 6106 (carrying a firearm without a license), and 18 Pa.C.S. § 6108 (carrying firearms on the public streets of a first class city). The violation of Section 6106 constituted a felony of the third degree, with a maximum sentence of seven years. The Section 6108 violation constituted a misdemeanor of the first degree, with a maximum sentence of five years. Thus, the defendant could not serve more than twelve years in prison.

The sentencing court sentenced the defendant to three-and-one-half to seven years of imprisonment for violating Section 6106, and two to four years of imprisonment for violating Section 6108, with the sentences to run consecutively; thus making the aggregate sentence five-and-one-half to eleven years, clearly within the aggregated statutory maximum prison term of twelve years. Notwithstanding that the sentence did not exceed the statutory maximum, cf. Miller, we began our discussion of the legal issues in the case as follows: "[W]hether [Baldwin's] convictions merge for sentencing is a question implicating the legality of [Baldwin's] sentence." Baldwin, 985 A.2d at 833. Ultimately, we upheld the sentence imposed by the sentencing court, finding that the sentences did not merge. In other words, while, in the end, we found the sentence "legal," the overriding question of law, as presented, implicated the "legality of the sentence," despite the sentence not being outside the statutory maximum. Cf. Miller.

fashioning" the sentence, the issue raised implicates the legality of the sentence imposed); and/or (2) when the sentence imposed is patently inconsistent with the sentencing parameters set forth by the General Assembly. See e.g. Shiffler, 879 A.2d at 484 (sentence exceeding the statutory maximum intended by the General Assembly); Aponte, 855 A.2d at 802 n.1 (same, in the context of an Apprendi challenge); Andrews, 768 A.2d at 313 (challenge concerning merger or double jeopardy implicates the sentences contemplated by the General Assembly for violations of the Crimes Code). Our decision in Dickson touched on both of these circumstances. First, prior to Dickson, trial courts were required to apply a minimum sentence of five years of imprisonment to unarmed co-conspirators (such as Appellee), thus limiting their traditional sentencing authority. Second, our interpretation (or, perhaps better stated, application of the plain language) of Section 9712(a) in Dickson, revealed an intent by the General Assembly not to punish an unarmed co-conspirator as harshly as the person actually possessing a firearm.

Our decision in Commonwealth v. Shaw, 744 A.2d 739 (Pa. 2000), cited by Appellee, further illustrates this two-pronged approach. There, we examined whether a New York statute prohibiting driving while one's ability is impaired (DWAI), was equivalent to Pennsylvania's prohibition against driving under the influence (DUI), for purposes of a recidivist-based mandatory minimum sentence. The sentencing court found the New York DWAI statute equivalent to Pennsylvania's DUI statute, thus implicating the third-time mandatory minimum sentencing provisions of 75 Pa.C.S. § 3731(e)(1)(iii) (repealed) (mandating a sentence of not less than ninety days of imprisonment for persons with three DUI or DUI-equivalent convictions), rather than the second-time mandatory sentence provisions of subsection (e)(1)(ii) (repealed) (mandating a sentence of not less than thirty days of imprisonment for persons with two DUI or DUI-equivalent convictions). The sentencing court actually imposed a sentence above either mandatory minimum, but within

the available statutory maximums.[17] Shaw appealed, contending that the statutes were not equivalent, and thus only a mandatory minimum sentence for second-time offenders of thirty days was proper.

On appeal, our inquiry was guided by the sentencing court's interpretation of the mandatory minimum sentencing provisions for recidivist DUI offenders. Although the sentence imposed was below either of the relevant statutory maximums, the sentencing court believed itself bound by the mandatory minimum provision to sentence Shaw as a three-time offender. The sentencing court's belief in this regard led this Court at the outset of our analysis to state that the sentencing question raised by Shaw "implicate[d] the legality of his sentence, and not its discretionary aspects, since the sentencing court had no discretion in calculating the number of [Shaw's] prior DUI convictions for purposes of determining his mandatory minimum sentence . . . ." Shaw, 744 A.2d at 742. Put differently, we seemingly viewed the applicable statutes as infringing upon a sentencing court's inherent power to impose a lawful, but discretionary sentence.

While Shaw has been our only pronouncement on the question presented *sub judice*, the Superior Court on a number of occasions has opined that a defendant's challenge to the imposition of a mandatory minimum sentence, regardless of whether that challenge is ultimately successful on the merits, implicates the legality of that sentence. See Commonwealth v. Gibbs, 981 A.2d 274 (Pa. Super. 2009); Commonwealth v. Rush, 959 A.2d 945 (Pa. Super. 2008); Commonwealth v. Henderson, 938 A.2d 1063 (Pa. Super. 2007); Harley, supra; Johnson, supra; Littlehales, supra; Commonwealth v. Berry, 877 A.2d 479 (Pa. Super. 2005) (*en banc*); Commonwealth v. Wynn, 760 A.2d 40 (Pa. Super. 2000),

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[17] Were Shaw's DUI to constitute his third offense, the offense would have been graded as a first degree misdemeanor, carrying a statutory maximum term of imprisonment of five years. Conversely, a second DUI offense would have been graded as a second degree misdemeanor, with a statutory maximum of two years of imprisonment.

aff'd 786 A.2d 202 (Pa. 2001) (*per curiam*); Commonwealth v. Fogel, 741 A.2d 767 (Pa. Super. 1999).

Indeed, in these circumstances, the Superior Court has concluded that a defendant's failure to: (1) raise a contemporaneous objection at the time of sentencing; (2) file a post-sentence motion; (3) include the sentencing issue in a Rule 1925(b) statement; or (4) file a Rule 2119(f) statement, is not fatal to the defendant's challenge to the mandatory minimum sentence, or any legality of sentencing claim for that matter, because the fundamental issue raised concerns the sentencing court's constitutional or statutory authority to act as it did. Berry, 877 A.2d at 483; see also Commonwealth v. Dixon, 997 A.2d 368 (Pa. Super. 2010) (failure to file a post-sentence motion not fatal to a defendant's claim that crimes should have merged for purposes of sentencing); Gibbs, 981 A.2d 274 (failure to include a challenge to a mandatory minimum in a Rule 1925(b) statement); Rush, 959 A.2d at 950 (Pa. Super. 2008) (challenge to imposition of a mandatory minimum would be addressed despite defendant's failure to raise the challenge in a post-sentence motion, as the challenge implicated the legality of the sentence); Henderson, 938 A.2d at 1066 n.1 (issue of imposition of a mandatory twenty-five year minimum sentence "was not raised in the trial court, in post-sentence motions, or in appellant's Rule 1925(b) statement. However, it goes to the legality of appellant's sentence, which cannot be waived."); Commonwealth v. Tustin, 888 A.2d 843 (Pa. Super. 2005) (failure to file a post-sentence motion does not result in waiver of a legality of sentencing claim on appeal); Commonwealth v. Kitchen, 814 A.2d 209 (Pa. Super. 2002) (same), aff'd 839 A.2d 184 (Pa. 2003) (*per curiam*); Commonwealth v. Dinoia, 801 A.2d 1254, 1257 (Pa. Super. 2002) (improper imposition of an order of restitution may be raised on direct appeal despite a defendant's failure to file a post-sentence motion in the trial court); Commonwealth v. Campbell, 505 A.2d 262, 265 (Pa. Super. 1986) (*en banc*) (plurality) ("question of legality of multiple sentences based on a

claim that the convictions should have merged for sentencing, is not waived for failure to raise it in the trial court.").[18]

Moreover, an extensive reading of Superior Court caselaw reveals that tribunal has been extremely cautious and narrow in its approach to sentencing legality, limiting its application of "nonwaivability" in sentencing cases to those where that authority to act is concerned. Berry, 877 A.2d at 483 ("Thus, our caselaw draws a careful distinction between truly "illegal" sentences, and sentences which may have been the product of some type of legal error. [Commonwealth v.] Archer, 722 A.2d [203, 209 (Pa. Super. 1998) (*en banc*)]. Archer and its progeny have established that the term "illegal sentence" is a term of art that our Courts apply narrowly, to a relatively small class of cases."); see also Robinson, 931 A.2d at 21 (defendant's claim that the trial court acted vindictively or with bias in sentencing, in violation of due process, did not implicate the legality of the defendant's sentence).

Our jurisprudence in this arena has been, and remains, equally narrow, and is only implicated when a sentencing court's inherent, discretionary authority to wield its statutorily prescribed sentencing powers is supplanted, abrogated, or otherwise limited, accord In re M.W., or the legislature's intent in fashioning a sentence has been potentially misapplied. Accord Baldwin; Andrews. In our view, there is little doubt that when a sentencing court has no alternative but to impose a certain minimum sentence, its authority to act has been infringed upon. Thus, under this Commonwealth's jurisprudence, any challenge thereunder

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[18] In concurrence, Mr. Chief Justice Castille views our decision today as redefining "illegal as non-discretionary, [thus disapproving] over twenty years of extensive Superior Court precedent," Concurring Slip Op. at 8 (Castille, CJ., concurring). Respectfully, these cases belie the concurrence's suggestion. Moreover, while the Superior Court has consistently used Section 9781 of the Sentencing Code, 42 Pa.C.S. § 9781 (providing for appellate review of discretionary and illegal sentences), as a point of reference for legality of sentencing issues, the formulation contained herein appropriately sharpens the focus within this area of the law.

must relate to a sentence's legality. Shaw, 744 A.2d at 742; In re M.W., 725 A.2d at 731; Berry, 877 A.2d at 483. Accordingly, we hold that where a sentencing court is required to impose a mandatory minimum sentence, and that mandatory minimum sentence affects a trial court's traditional sentencing authority or the General Assembly's intent in fashioning punishment for criminal conduct, a defendant's challenge thereto sounds in legality of sentence and is therefore nonwaivable.

Indeed, this lack of sentencing authority concerning the imposition of mandatory minimum sentences illustrates why the Commonwealth's argument pertaining to our decision in Walton, supra pp.12-14, is misplaced. As noted above, the Commonwealth contends that Walton stands for the proposition that sentences remain legal, and thus challenges to them must be preserved at all available stages, so long as a sentencing court retains some authority under any statutory framework to impose a desired sentence. Here, the Commonwealth contends such authority would be the statutory maximum provisions of 18 Pa.C.S. § 1103(1) (twenty-year maximum sentence for first-degree felonies), ignoring, however, that the distinction between Walton and Shaw, the aforementioned Superior Court cases, and, of course, this appeal, is the absence of a mandatory minimum sentence in Walton. To that end, while the Walton sentencing court retained authority to impose any minimum sentence it wished under 19 P.S. § 1051, the Shaw sentencing court, and, indeed, the sentencing court in this case, possessed no such authority. Rather, mandatory floors on the available sentences existed, abrogating the trial court's traditional authority to impose minimum sentences it believes appropriate. Accord In re M.W., 725 A.2d at 731 (holding that, when a sentencing issue "centers upon a court's statutory authority" to impose a sentence, rather than the "court's exercise of discretion in fashioning" the sentence, the issue raised implicates the legality of the sentence imposed).

Accordingly, because the trial court sentenced Appellee, in contradiction to a proper reading of Section 9712(a), to a mandatory term of imprisonment of no less than five

years,[19] and further because the court believed it possessed no authority to go below the Section 9712(a) mandatory minimum sentence, we find that Appellee's "Dickson challenge" implicated the legality of his sentence. Therefore, Appellee's failures to file post-sentence motions or a Rule 2119(f) statement[20] did not foreclose his ability to raise the unquestionably meritorious "Dickson challenge," for the first time, before the Superior Court.[21]

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[19] As noted, supra p. 4, the sentencing guidelines called for a minimum term of imprisonment of twenty-two to thirty-six months, plus or minus twelve months.

[20] Despite the analysis herein, we wholeheartedly believe that careful practitioners have filed, and indeed should continue to file, post-sentence motions and/or Rule 2119(f) statements for any sentencing claim, regardless of whether the challenge raises legality claims or not. Such belief does not change the fact, however, that failure of counsel to follow such prophylactic protocol in the narrow class of cases discussed herein will not be fatal to the sentencing challenge.

[21] The concurrence by the Chief Justice contends that the proper resolution of this appeal revolves around the retroactive application of the Dickson decision, rather than issues surrounding legality of sentencing. While retroactivity was not briefed or argued by the parties (indeed, the Commonwealth has conceded the applicability of Dickson to Appellee, assuming, of course, the challenge has not been waived for all the reasons discussed herein, see Reply Brief of Commonwealth at 4 n.2.), nor was it included within our grant of allocatur, the concurrence argues that we should decide the instant appeal because, *inter alia*, (1) Dickson overruled over twenty years of Superior Court precedent, which had applied Section 9712(a) to unarmed co-conspirators; and (2) Dickson involved this Court's initial interpretation of an enactment of the General Assembly.

We agree with the concurrence that the general rule in Pennsylvania is that this Court's initial interpretation of a statute becomes part of the statute itself, and thus relates back to the statute's date of enactment. See e.g. Commonwealth v. Williams, 936 A.2d 12, 22 (Pa. 2007). This notion is not clearly dispositive, however, because it does not speak to issue preservation. Indeed, Pennsylvania courts have adhered to the general principle that parties are only afforded retroactive application of a decision of this Court if the identical issue was properly raised and preserved "at all stages of adjudication up to and including direct appeal." Commonwealth v. Cabeza, 469 A.2d 146, 148 (Pa. 1983); see also Commonwealth v. Ardestani, 736 A.2d 552, 555 (Pa. 1999) (finding that a party is entitled to retroactive application of a decision on direct appeal where the issue involved was preserved at all stages of the litigation, including direct appeal). Moreover, while a decision (continued…)

The order of the Superior Court is affirmed.

Jurisdiction relinquished.

Madame Justice Todd and Mr. Justice McCaffery join the Opinion Announcing the Judgment of the Court.

Mr. Chief Justice Castille files a concurring opinion in which Madame Justice Orie Melvin joins.

Mr. Justice Saylor files a concurring opinion.

Mr. Justice Eakin files a concurring opinion in which Mr. Chief Justice Castille joins.

(…continued)
involving criminal law must be applied "to all criminal cases still pending on direct review," Schriro v. Summerlin, 542 U.S. 348 (2004), the defendant must have preserved the legal challenge in the trial court to be entitled to retroactive application of the new decision. Commonwealth v. Roney, 866 A.2d 351, 359 n.32 (Pa. 2005). Should, however, the relevant issue be one classified as "nonwaivable," (as we have determined here) concerns regarding issue preservation are not implicated. Id.

That said, we must respectfully, yet strenuously, note our concern with the concurrence's conclusion that "as the creator of this issue preservation/waiver doctrine, this Court is certainly empowered to modify or excuse it whenever greater jurisprudential values are at stake." Concurring Slip Op. at 12 (Castille, CJ., concurring). As noted throughout its opinion, the concurrence warns against ignoring principles of issue preservation, yet does just that by disregarding decisions such as Schriro and Roney in an effort to create an amorphous, yet equitable, decision based upon a "balancing of values" *vis-à-vis* retroactivity. Id. at 3. Contrarily, our holding today follows solid and established principles of law, affirms at least a decade of Superior Court jurisprudence by way of a thorough analysis, which heretofore this Court had not undertaken, and provides a definitive rule in this area of the law for both bench and bar.