

[J-257-1999]
IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	:	No. 122 M.D. Appeal Docket 1999
	:	
Appellant	:	Appeal from the Order of the Superior
	:	Court entered March 3, 1999 at No.
	:	1474PHL98 which affirmed in part and
v.	:	vacated in part the judgment of sentence
	:	imposed February 24, 1998 and
	:	remanded for resentencing to the Court of
EDDIE VASQUEZ,	:	Common Pleas of Monroe County,
	:	Criminal Division at No. 702CR97
Appellee	:	
	:	
	:	
	:	
	:	ARGUED: NOVEMBER 17, 1999
	:	

DISSENTING OPINION

MR. JUSTICE NIGRO

DECIDED: June 20, 2000

Because I disagree with the majority's conclusion that the enhancement provision of 18 Pa. C.S. § 7508(a)(3)(i) applies where a defendant's first and second convictions arise from a single arrest, I respectfully dissent.

The record indicates that Appellee sold cocaine to an undercover police officer on May 5, 1997, June 2, 1997 and June 16, 1997. Instead of arresting Appellee after any of these sales, the officer scheduled a fourth sale with Appellee and on June 25, 1997, he attested to these transactions in an affidavit of probable cause and requested an arrest warrant. On June 26, 1997, the officer purchased more cocaine from Appellee and Appellee was arrested for all four drug sales that day. Appellee subsequently pled

guilty to two counts on January 6, 1998.¹ As the majority notes, the trial court sentenced Appellee to one to two years on the first count (the June 16th sale) and then applied § 7508(a)(3)(i), which enhances a defendant's sentence if he has been convicted of another drug trafficking offense at the time of his sentencing, to the second count (the June 26th sale).

I cannot agree with the majority that the trial court properly applied § 7508(a)(3)(i) to the instant case since the "prior conviction" here was the charge arising from the sale on June 16th. Rather, I believe that since the officer opted not to arrest Appellee after the first three illicit sales, as he clearly could have done, the enhancement in § 7508(a)(3)(i) should not apply. In my view, the enhancement provision should apply only to those defendants who have already been given an opportunity to be rehabilitated, which Appellee was clearly never given in the instant case.

In finding that the enhancement provision is applicable here, the majority relies on this Court's decision in Commonwealth v. Williams, 539 Pa. 249, 652 A.2d 283. Williams, however, is readily distinguishable. In Williams, the defendant committed the first offense on November 2, 1988 and was arrested. Two and one-half years later, on May 21, 1991, the defendant committed a second offense and was again arrested. Though the defendant was ultimately convicted of both offenses on the same day as a result of fortuitous circumstances, he clearly had the opportunity to be rehabilitated since he was arrested on two separate occasions, two years apart. Thus, it made sense to apply the enhancement provision to that situation. The circumstances in the instant case are significantly different. Here, the officer bought cocaine from Appellee on four separate occasions, and only arrested him after the last transaction. Therefore,

¹ Appellee's sales for all four dates were included in the criminal complaint but pursuant to Appellee's plea agreement, he only pled guilty to the sales on June 16th and June 26th.

unlike in Williams, the police did not arrest Appellee after the first illicit sale, and consequently Appellee was never given the opportunity to be rehabilitated. Instead, after pleading guilty to both offenses on the same day, Appellee received the enhanced sentence. This outcome clearly undermines what I believe to be the purpose of § 7508(a)(3)(i).

Moreover, the majority opinion ignores the fact that after the first three sales (May 5th, June 2nd and June 16th), the police had sufficient probable cause to either (1) arrest Appellee during the commission of the crime or (2) obtain an arrest warrant for Appellee's immediate arrest. The police did neither. Instead, they set up another undercover buy, waited for Appellee to commit another crime, and only then did they arrest Appellee for the sales. While the majority holds that the enhancement provision is applicable to these circumstances, such a holding, in my view, risks endangering the public by allowing a known drug seller to continue selling drugs, thereby impacting the public at large. Moreover, this holding gives police the option of watching a person sell drugs numerous times before arresting the offender, solely for the purpose of making the enhancement provision applicable to the offender's sentence. This practice offers offenders no opportunity for rehabilitation and in effect, grants police the discretion to determine the length of an offender's sentence. Because I cannot agree that these were the intended consequences of § 7508(a)(3)(i), I must respectfully dissent.