

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA	: NO. 00-11,108
	:
	:
vs.	: CRIMINAL DIVISION
	: Post-Sentence Motion
MUHAMMAD A. CANNON,	:
Defendant	:

OPINION AND ORDER

Defendant pled guilty to one (1) count of robbery and one (1) count of conspiracy on January 16, 2001. At that time the Commonwealth notified Defendant they intended to seek the mandatory minimum sentence under 42 Pa. C.S.A. Section 9712, sentences for offenses committed with a firearm. Defendant was sentenced on April 4, 2001 to concurrent sentences of 5 to 10 years in a state institution. On April 11, 2001 Defendant filed the instant motion for post-sentence relief, in which he contends the Court erred in applying the mandatory sentence.

Section 9712 provides that any person who is convicted of a crime of violence (not an issue in this case), shall, “if the person visibly possessed a firearm or a replica of a firearm, ... 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 (5) years of total confinement notwithstanding any other provision of this title or other statute to the contrary. ...” 42 Pa.C.S.A. Section 9712.

In the instant matter, Defendant’s role in the robbery/conspiracy was that of the get- a-way car driver. Defendant argues that he cannot be sentenced under the mandatory minimum provision as there was no evidence that he had knowledge that his accomplice visibly possessed a firearm during the robbery. After a review of the applicable case law, the Court is constrained to agree.

In Commonwealth v Smith, 563 A.2d 905 (Pa.Super. 1989), the Court stated:

Before the trial court can apply this section to an unarmed accomplice, it must find that the Commonwealth has established by a preponderance of the evidence that “the unarmed accomplice had knowledge that the firearm was visibly possessed by his co-felon in the commission of the crime.”

Commonwealth v Smith, at 907, quoting Commonwealth v Williams, 509 A.2d 1292, 1295 (Pa. Super. 1986). In Commonwealth v Chiari, 741 A.2d 770 (Pa. Super. 1999), the Court found the section applicable where the evidence was clear that the defendant there knew his co-felon possessed a firearm and also knew the co-felon used the weapon to threaten the victims. In Smith the Court found the section inapplicable based upon a failure of the evidence to demonstrate that Mr. Smith, also a get-a-way car driver, knew that his accomplice visibly possessed a gun during the robbery in that case.

In the instant matter, although the evidence showed that Defendant along with three (3) others had been passing a weapon around and discussing the proposed robbery of a jewelry store prior to the robbery, and although the evidence showed that the gun was taken in the car and that Defendant knew the gun was in the car and that the stick-up man took the gun into the jewelry store, there was no evidence to show that Defendant knew that the stick-up man visibly possessed the gun during the robbery. Accordingly, the mandatory minimum sentence cannot be applied in this case.

ORDER

AND NOW, this day of June, 2001, for the foregoing reasons, this Court’s sentencing Order of April 4, 2001 is hereby vacated. Re-sentencing is hereby scheduled for July 5, 2001 at 3:30 p.m. in Court Room #5.

By the Court,

Dudley N. Anderson, Judge

cc: DA
PD
Gary Weber, Esq.
Hon. Dudley N. Anderson