IN THE COURT OF COMMON PLEAS FOR
LYCOMING COUNTY, PENNSYLVANIA
CRIMINAL DIVISION

COMMONWEALTH	:	
	:	
v.	:	**No.: 99-10,182**
	:	
BRIAN WILLIAMS,	:	
Defendant	:	

OPINION IN SUPPORT OF ORDER IN COMPLIANCE WITH RULE 1925(A) OF THE RULES OF APPELLATE PROCEDURE

Defendant filed a 1925(b) Statement of Matters Complained of on Appeal in this case on December 19, 2002. In his Statement, he lists eight (8) separate grounds for requesting that his conviction be overturned. In summary, he asserts first that this Court erred in imposing a mandatory five year minimum sentence in his case because the Commonwealth failed to provide notice that it would seek the mandatory, as required by 42 Pa.C.S.A Section 9712. Second, he claims that since 42 Pa.C.S.A. Section 9712(a) requires the imposition of a five year mandatory minimum sentence in his case and also renders him ineligible for parole, the mandatory sentence is a violation of his constitutional rights as set forth in Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). He additionally claims that previous counsel were ineffective for failing to object to the imposition of a mandatory sentence on the two above grounds. Defendant then goes on in his remaining six assertions of error to claim that his previous counsel were ineffective for various reasons that he sets forth in his Statement.

The Defendant's first contention is that the Commonwealth failed to meet the notice requirements of 42 Pa.C.S.A. Section 9712. Defendant alleges that the Commonwealth provided the notice contemplated under that section at the time of sentencing, rather than prior to sentencing as required by the statute and that therefore his counsel was ineffective for failing to object to the imposition of a mandatory sentence. Therefore the Court erred in imposing such a sentence. Defendant's allegation is factually incorrect. The Court file, of which this Court will take judicial notice, reveals that Defendant was convicted on August 11, 1999 following a jury trial. On that same date, this Court notified Defendant that his sentencing would take place on September 27, 1999 and included that information in the Order issued regarding the jury verdict. The Commonwealth filed its written Notice of Intent to Seek Mandatory Sentence on September 14, 1999. Defendant's sentencing was later continued at his request and rescheduled for November 9, 1999, the date on which he was ultimately sentenced. It is clear from the record in this case that Defendant's assertion that the Commonwealth failed to comply with the notice requirements of 42 Pa.C.S.A. Section 9712 is factually incorrect, and he is therefore entitled to no relief on this basis.

Defendant next contends that under Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), that this Court erred in imposing a mandatory minimum sentence under 42 Pa.C.S.A. Section 9712(a), and also that his attorney at the time of his sentencing was ineffective for not objecting to the imposition of a mandatory sentence. His allegation cannot be supported. The 1986 case of McMillan v. Pennsylvania, 477 U.S. 79, 91 L.Ed.2d 67, 106 S.Ct. 2411

(1986) specifically addresses the constitutionality of this precise statute. In that case, the United States Supreme Court held that "Section 9712 neither alters the maximum penalty for the crime committed nor creates a separate offense calling for a separate penalty; it operates solely to limit the sentencing court's discretion in selecting a penalty within the range already available to it without the special finding of visible possession of a firearm." Id. The Court then went on to conclude that "the Pennsylvania statute did not run afoul of our previous admonitions against relieving the State of its burden of proving guilt, or tailoring the mere form of a criminal state solely to avoid (In re) *Winship*'s (397 U.S.358, 25 L.Ed.2d 368, 90 S.Ct. 1068 (1970)) strictures." Apprendi, supra., at 486, 2360, 452, discussing the holding in McMillan, supra. (italics in the original). The McMillan case is discussed in the Apprendi decision relied upon by Defendant. The Apprendi court specifically noted that "(w)e do not overrule *McMillan*. We limit its holding to cases that do not involve the imposition of a sentence more severe than the statutory maximum for the offense established by the jury's verdict – a limitation identified in the *McMillan* opinion itself." Id. at footnote 13. Defendant's second issue complained of on appeal is without merit.

In his next six issues complained of on appeal, Defendant produces a litany of perceived errors and failures of his various attorneys which he claims amount to ineffective assistance of counsel. The record in this case is devoid of any information concerning these issues, and this Court therefore has no ability to address them. Additionally, the Supreme Court in Commonwealth v. Grant, 813 A.2d 726, (Pa. 2002) recently held that, "as a general rule, a petitioner should wait to

raise claims of ineffective assistance of trial counsel until collateral review." Since the issuance of that decision, the Superior Court has consistently followed that rule. See Commonwealth v. Rosendary, 818 A.2d 526 (Pa.Super. 2003), Commonwealth v. Robinson, 817 A.2d 1153 (Pa.Super., 2003), Commonwealth v.Carmichael, 818 A.2d 508 (Pa.Super. 2003). Therefore, this Court declines to address Defendant's ineffective assistance of counsel claims.

By the Court,

_____ J.
Nancy L. Butts, Judge

xc: DA
Eric Linhardt, Esquire
Gary Weber, Esquire
Hon. Nancy L. Butts
Diane L.Turner, Esquire