

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH : No. CR-1343-2012  
:   
vs. : CRIMINAL DIVISION  
:   
:   
JASON COBB, :   
Defendant :   
OPINION AND ORDER

This matter came before the Court on October 2, 2013 for a hearing and argument on the Commonwealth’s Motion to Amend Information. In its motion, the Commonwealth seeks to amend the Information to allege in Count 1 that the possession within intent to deliver heroin occurred within 250 feet of the real property on which is located a recreation center or playground.<sup>1</sup> The relevant facts follow.

Defendant was charged with possession with intent to deliver heroin, delivery of heroin, two counts of possession of heroin, possession of drug paraphernalia and driving while his operating privileges were suspended, as a result of incidents that occurred on June 28, 2012 and July 14, 2012.

On January 8, 2013, Defendant entered a guilty plea to possession with intent to deliver heroin, delivery of heroin and driving while his operating privileges were suspended. Sentencing was deferred so that a hearing could be conducted to determine whether a school zone mandatory or enhancement should apply at sentencing. As part of the guilty plea, the

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<sup>1</sup> Paragraph 15 of the motion describes count 1 as delivery of cocaine. At the argument the Commonwealth noted that it had cut and pasted some of the language of this paragraph from a motion in another case and that paragraph 15 should indicate that the charge was possession with intent to deliver heroin, not delivery of cocaine.

parties had negotiated two different sentences- one if the school zone applied and the other if it did not. The hearing to determine the school zone issue and to sentence Defendant was scheduled for April 30, 2013, but Defendant failed to appear and a bench warrant was issued for his arrest.

Defendant was apprehended on the bench warrant on or about June 21, 2013. At that time, defense counsel was not contesting the applicability of the school zone, and a sentencing hearing was scheduled for July 30, 2013. At the time of sentencing, however, Defendant requested a continuance to withdraw his guilty plea. A hearing was held on August 8, 2013, and the Honorable Nancy L Butts granted Defendant's motion to withdraw, specifically finding that "Defendant would not have pled guilty if he knew that a jury could hear the issue of his school zone mandatory."

On September 24, 2013, the Commonwealth filed its motion to amend the Information. The Court held an argument on the motion on October 2, 2012.

Defense counsel opposed the Commonwealth's motion. Initially, defense counsel argued that the Court must take the view that there is no school zone mandatory until the Legislature re-writes 18 Pa.C.S. §6317. When the Court inquired why the issue regarding the constitutionality of the school zone mandatory was not premature and more appropriately addressed at or near the time of sentencing if the jury found that the offense occurred within 250 feet of a recreation center or playground, defense counsel changed tactics and argued that the Information could not be amended to allege this element because section 6317(b) states that the school zone mandatory is not an element of the crime and, by amending the Information and submitting the issue to the jury, the Commonwealth was making it an

element of the offense.<sup>2</sup>

The Court rejects defense counsel's argument that 18 Pa.C.S. §6317(b) precludes the Court from allowing the amendment or submitting the issue regarding the school zone mandatory to the jury. By virtue of the United States Supreme Court's decision in Alleyne v. United States, 133 S. Ct. 2151 (2013), a defendant has a Sixth Amendment right to have a jury determine beyond a reasonable doubt any fact that triggers a mandatory minimum sentence. Alleyne found that any fact that increases the penalty for a crime is an "element" that must be submitted to the jury. Mandatory minimum sentences increase the penalty for a crime. Therefore, any fact that triggers a mandatory minimum sentence must be submitted to a jury and found beyond a reasonable doubt. To the extent that subparagraph (b) is in conflict with Alleyne, the latter must prevail.

While a defendant can waive his Sixth Amendment right to a jury trial, Judge Butts permitted Defendant to withdraw his guilty plea in this case based on the specific finding that Defendant would not have pled guilty if he knew that a jury could hear the issue of his school zone mandatory. Therefore, it appears that Defendant wants to exercise his right to have a jury determine any fact that would implicate the school zone mandatory, and the Commonwealth is merely trying to comply with the dictates of Alleyne.

Defense counsel also contended that due to Alleyne there could be no school zone mandatory minimum sentence until the Legislature re-writes 18 Pa.C.S. §6317. The Court recognizes that there may be an argument that paragraph (b) is not severable from the remainder of section 6317, including paragraph (a) which requires a minimum sentence of at

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<sup>2</sup> Notably, defense counsel did not argue that Defendant would be prejudiced by the amendment or that the amendment would not be permissible if the Commonwealth's motion were analyzed under the factors set forth

least two years. That issue, however, need not be decided at this stage of the proceedings. If the jury does not find beyond a reasonable doubt that Defendant possessed heroin with the intent to deliver it within 250 feet of the property on which is located a recreation center or playground, any issue regarding the constitutionality of the remainder of the statute becomes moot.

The Court believes the interests of justice are best preserved by proceeding in this manner. Defendant is not harmed or prejudiced if the Commonwealth is permitted to amend the Information and submit the school zone issue to the jury. In fact, his Sixth Amendment right to a jury trial is protected. Furthermore, regardless of which way the Court would rule on the constitutionality of the remainder of the statute, this case proceeds to trial and, at most, it would be remanded for a new sentencing hearing if the Pennsylvania appellate courts did not agree with the Court's ruling on any constitutional challenge.

Accordingly, the following Order is entered:

**ORDER**

**AND NOW**, this \_\_\_ day of October 2013, the Court GRANTS the Commonwealth's Motion to Amend Information. Count 1, Possession With Intent to Deliver a Controlled Substance is amended to reflect that the possession with intent to deliver heroin occurred within 250 feet of the real property on which is located a recreation center or playground

Nothing in this order should be interpreted as ruling on the constitutionality of the school zone mandatory minimum sentence set forth in 18 Pa.C.S. §6317 or as precluding Defendant from raising such a challenge in a written motion if the jury finds in favor of the

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in Commonwealth v. Sinclair, 897 A.2d 1218, 1223 (Pa. Super. 2006).

Commonwealth.

By The Court,

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Marc F. Lovecchio, Judge

cc: Martin Wade, Esquire (ADA)  
Robert Cronin, Esquire (APD)  
Work file