IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH	:	No. CR-1620-2011
	:	
vs.	:	
	:	
CORY DERR,	:	
Defendant	:	Motion to Amend Information

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COMMONWEALTH	:	No. CR-1217-2013
	:	
vs.	:	
	:	
SHAREAF WILLIAMS	:	Motion to Amend Information

OPINION AND ORDER

Before the court are two separate motions by the Commonwealth to amend the Information in the above-captioned matters.

In Derr, the motion was filed on January 9, 2014 and requests that the court permit the Commonwealth to amend the Information to add the respective weights of the controlled substances at issue. In Williams, the motion was filed on January 16, 2014 and requests that the court permit the Commonwealth to amend the Information to add the respective distances between the alleged transactions and a school zone. Subsequent to the filing of said motions, oral argument was held before the court.

In both cases, the Commonwealth seeks the amendments in order to be in compliance with the mandates of the recent United States Supreme Court's decision in Alleyne v. United States, 133 S. Ct. 2151 (2013).

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.

In Derr, the Commonwealth seeks to add to the Information the respective weights of the cocaine in order that it may submit to the jurors the "elements" that would implicate the mandatory minimum, pursuant to 18 Pa. C.S.A. § 7508 (a) (3) (i).

In Williams, the Commonwealth seeks to add to the Information the distance between the transactions and a school zone, in order that it may submit to the jurors these "elements" that would implicate the mandatory minimum pursuant to 18 Pa. C.S.A. §6317.

In neither case does the defendant argue that the amendment would not be permissible if the Commonwealth's Motion were analyzed under the factors set forth in Commonwealth v. v. Sinclair, 897 A.2d 1218, 1223 (Pa. Super. 2006). To the contrary, Defendant in each case limits his argument to the claim that the mandatory minimum statute at issue is unconstitutional in light of Alleyne.

In addressing the constitutionality of the mandatory minimum statutes at issue in previous cases, the court has deferred a decision on the issue. In Commonwealth v. Jason Cobb, 1343-2012 (October 1, 2013), for example, the court noted that [the]

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

The court further noted that it:

> 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.

Subsequent to these decisions, several factors have been brought to the court's attention which now causes the court to rethink the propriety of deferring a decision on the constitutional issue.

First, a few Superior Court panels, arguably in dicta, have referenced the apparent unconstitutionality of certain mandatory minimum sentencing statutes in Pennsylvania in light of Alleyne. See Commonwealth v. Watley, 81 A.3d 108, ___ n.2 (Pa. Super. 2013); Commonwealth v. Munday,78 A.3d 661 (Pa. Super. 2013). Second, a recent Common Pleas decision out of Chester County declared 18 Pa. C.S. § 6317 unconstitutional. Commonwealth v. Kyle Hopkins**,** CR-1260-13 (Chester County, December 17, 2013).

Moreover, the cases in this jurisdiction involving disputed mandatory minimums have stalled from a procedural standpoint. They appear not to be headed for trial, creating more of a backlog, while awaiting some direction from the Appellate Courts.

In conjunction with this, defense counsel argues, and the Commonwealth concedes, that plea negotiations no longer are effective. The Commonwealth maintains that the mandatory minimums are valid and negotiates under such a premise. Defense counsel

maintains the opposite and acts accordingly. The inability to negotiate plea agreements, in light of the uncertainty of the constitutionality of the mandatory minimums, is patently unfair to the litigants and the system. The plea bargain is a valuable implement in our criminal justice system. Commonwealth v. Herbert, 2014 PA Super 18 (February 5, 2014), citing Commonwealth v. Anderson, 995 A.2d 1184, 1190-1191 (Pa. Super. 2010), appeal denied, 9 A.3d 626 (Pa. 2010). It is an essential component of the administration of justice and its practice is regarded favorably. Id.

While the court is aware of its obligation to avoid any premature adjudication, it is evident that the issue is fit for judicial decision and withholding court consideration would present an undue hardship to the parties. Accordingly, the court will address the constitutionality of the mandatory sentencing provisions set forth in 18 Pa. C.S. § 6317 (related to drug-free school zones) and 18 Pa. C.S. § 7508 (related to drug trafficking sentencing and penalties).

In addressing this constitutionality issue, this court sua sponte presented the issue to the court en banc. President Judge Nancy L. Butts compiled the various arguments previously presented to the court. In order to ensure uniformity in this jurisdiction, all members of the court en banc concur in this opinion as evidenced by their signatures below.

For purposes of this opinion, the court will utilize the drug-free school zone statute, but the same rationale would apply to the drug trafficking provision as well.

18 Pa. C.S. §6317 states:

§6317 **Drug-free school zones**

(a) General rule.—A person 18 years of age or older who is convicted in any court of this Commonwealth of a violation of section 13(a)(14) or (30) of the act of April 14, 1972 (P.L. 233, No. 64), known as The Controlled Substance, Drug, Device and Cosmetic Act, shall, if the delivery or possession with intent to deliver of the controlled substance occurred within 1,000 feet of the real property on which is located a public, private or parochial school or a college or university or within 250 feet of the real property on which is located a recreation center or playground or on a school bus, be sentenced to a minimum sentence of at least two years of total confinement, notwithstanding any other provision of this title, The Controlled Substance, Drug, Device and Cosmetic Act or other statute to the contrary. The maximum term of imprisonment shall be four years for any offense:

(1) subject to this section; and

(2) for which The Controlled Substance, Drug, Device and Cosmetic Act provides for a maximum term of imprisonment of less than four years.

If the sentencing court finds that the delivery or possession with intent to deliver was to an individual under 18 years of age, then this section shall not be applicable and the offense shall be subject to section 6314 (relating to sentencing and penalties for trafficking drugs to minors).

(b) Proof at sentencing.—The provisions of this section shall not be an element of the crime. Notice of the applicability of this section to the defendant shall not be required prior to conviction, but reasonable notice of the Commonwealth's intention to proceed under this section shall be provided after conviction and before sentencing. The applicability of this section shall be determined at sentencing. The court shall consider evidence presented at trial, shall afford the Commonwealth and the defendant an opportunity to present necessary additional evidence and shall determine by a preponderance of the evidence if this section is applicable.

(c) Authority of court in sentencing.—There shall be no authority for a court to impose on a defendant to which this section is applicable a lesser sentence than provided for in subsection (a), to place the defendant on probation or to suspend sentence. Nothing in this section shall prevent the sentencing court from imposing a sentence greater than that provided in this section. Sentencing guidelines promulgated by the Pennsylvania Commission on Sentencing shall not supersede the mandatory sentences provided in this section. Disposition under section 17 or 18 of The Controlled Substance, Drug, Device and Cosmetic Act shall not be

> available to a defendant to which this section applies.
> **(d) Appeal by Commonwealth.—**If a sentencing court refuses 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 imposition of a sentence in accordance with this section if it finds that the sentence was imposed in violation of this section.

Defendants contend that the provisions of subparagraph (b) render the entire statute unconstitutional in light of the United States Supreme Court's decision in Alleyne v. United States, 133 S.Ct. 2151 (2013).

The standard for evaluating a constitutional claim is exacting. "A statute will be found unconstitutional only if it 'clearly, palpably and plainly' violates constitutional rights. Under well-settled principles of law, there is a strong presumption that legislative enactments do not violate the constitution. Further, there is a heavy burden of persuasion upon one who questions the constitutionality of an Act." Commonwealth v. McPherson, 752 A.2d 384, 388 (Pa. 2000).

In Alleyne, the defendant asserted that raising his minimum sentence based on a sentencing judge's finding that he brandished a firearm violated his Sixth Amendment right to a jury trial. Although the United States Supreme Court had previously rejected a similar claim in United States v. Harris, 536 U.S. 545 (2002), the Court overruled Harris and held that "[a]ny fact that, by law, increases the penalty for a crime is an 'element' that must be submitted to the jury and found beyond a reasonable doubt. Mandatory minimum sentences increase the penalty for a crime. It follows, then, that any fact that increases the mandatory minimum is an 'element' that must be submitted to the jury." 133 S.Ct. at 2155 (citation

omitted).

In Commonwealth v. Munday, 78 A.3d 661 (Pa. Super. 2013), the Pennsylvania Superior Court found that the imposition of the firearm mandatory, when the burden of proof was a preponderance of the evidence, was unconstitutional under Alleyne, but it declined to address, sua sponte, whether 42 Pa.C.S. §9712.1was facially invalid in light of Alleyne.

The Commonwealth concedes that the portion of the statute that permits the sentencing judge to determine whether the mandatory applies by a preponderance of the evidence would be unconstitutional under Alleyne; however, it argues that the remainder of the statute, including the mandatory minimum sentence, is severable. The Commonwealth relies on the Statutory Construction Act and Commonwealth v. Belak, 825 A.2d 1252 (Pa. 2003). Defendants, relying on Commonwealth v. Williams, 733 A.2d 593 (Pa. 1999) and Heller v. Frankston, 475 A.2d 1291 (Pa. 1984), contend that the provisions of the mandatory sentencing statutes are not severable.

Section 1925 of the Statutory Construction Act governs severability and states:

> The provisions of every statute shall be severable. If any provision of any statute or the application thereof to any person or circumstance is held invalid, the remainder of the statute, and the application of such provision to other persons or circumstances, shall not be affected thereby, unless the court finds that the valid provisions of the statute are so essentially and inseparably connected with, and so depend upon, the void provision or application, that it cannot be presumed the General Assembly would have enacted the remaining valid provisions without the void one; or unless the court finds that the remaining valid provisions, standing alone, are incomplete and are incapable of being

executed in accordance with the legislative intent.

1 Pa. C.S. §1925.

According to the Commonwealth, if the subsection that sets forth the burden of proof and fact-finder is removed, the remaining sections are complete and capable of being executed in accordance with legislative intent. However, the Commonwealth also argues that the rule of law articulated by the Alleyne court can be used in combination with the surviving sections to make the statute fully functional. This, however, would amount to the court rewriting the statute by replacing the unconstitutional portion of the statute with the burden of proof and right to a jury trial required by Alleyne, which the court is not permitted to do.

In Heller, the Pennsylvania Supreme Court addressed the constitutionality of an attorney fee provision contained within section 604 of Health Care Services Malpractice Act. The Pennsylvania Supreme Court had previously held in Mattos v. Thompson, 491 Pa. 385, 421 A.2d 190 (1980), that the lengthy delays occasioned by the mandatory arbitration process created by the Act impermissibly burdened the right to a trial by jury; therefore it declared section 309, the mandatory arbitration provision, unconstitutional. Although the attorney fee limits were part of the arbitration procedures of the Act, the Attorney General sought to enforce them against attorneys who had settled a case without utilizing the arbitration process. The Attorney General argued that Mattos should be interpreted as allowing the arbitration panels to retain concurrent jurisdiction with the courts. In Heller, the Pennsylvania Supreme Court rejected the Attorney General's arguments and stated:

> Our holding in Mattos rendered invalid the only legislative grant of jurisdiction to the panels. The only body competent to confer a new jurisdictional predicate for the panels would have been the legislature. This the legislature has not done.
>
> Moreover, this argument would assume that this Court intended to provide an alternative for the scheme fashioned by the legislature. Where a legislative scheme is determined to have run afoul of constitutional mandate, it is not the role of this Court to design an alternative scheme which may pass constitutional muster.
>
> Under the position taken by the proponents of the post-Mattos viability of the arbitration system, we would have been required to substitute concurrent jurisdiction in the place of the exclusive jurisdiction provided by the legislature. This would have been an improper exercise of judicial authority.

Heller, 475 A.2d at 1296 (citations omitted). The Court also rejected any argument suggesting severability as "patently erroneous." Id. The Court stated, "While a statute may be partially valid and partially invalid, that can only occur where the provisions are distinct and not so interwoven as to be inseparable." Id. Since the panel did not have jurisdiction over the resolution of the claim itself, it obviously could not regulate counsel fees in such matters. Id.

In Commonwealth v. Williams, 557 Pa. 285, 733 A.2d 593 (1999) the Pennsylvania Supreme Court found that the sexually violent predator (SVP) provisions of Megan's Law I were unconstitutional. Under Megan's Law I, a sexual offender was presumed to be a sexually violent predator and he or she was required to rebut the presumption by clear and convincing evidence. At that time, the SVP designation not only subjected the offender to enhanced registration and notification provisions, but it also increased the maximum term of confinement to the offender's lifetime for a first conviction and provided for a mandatory sentence of life imprisonment for a conviction of a subsequent

sexually violent offense. The Pennsylvania Supreme Court found that placing the burden of proof on the defendant violated the procedural due process guarantees of the Fourteenth Amendment. The Court struck all of the provision of Megan's Law I pertaining to sexually violent predators and stated the following in a footnote:

> We are not unaware that the statutory notes following Section 9791 of the Act specify that the provisions of the Act are to be construed as severable; however, because we find that the procedure whereby one is determined to be a sexually violent predator is unconstitutional, we strike all of the provisions referring to this designation.

733A.3d at 608 n.18.

As aptly demonstrated by Heller and Williams, when a provision of a statute infringes on the right to a jury trial or violates a defendant's due process rights by utilizing an improper burden of proof, all the provisions of the statute relating to that scheme or factual determination are rendered unconstitutional. The courts do not rewrite the statute to provide the right to a jury trial or the correct burden of proof, as that is the exclusive province of the legislature.

The Commonwealth urges this court to find the provisions severable based on Commonwealth v. Belak, 573 Pa. 414, 825 A.2d 1252 (2003).

In Belak, the Pennsylvania Supreme Court addressed the mandatory minimum sentencing statute for individuals who had prior convictions for crimes of violence found in 42 Pa.C.S. §9714 as that statute existed in 1998. Section 9714 (a)(1) provided the mandatory sentences for a person who only had one prior conviction for a crime of violence. If the individual did not rebut the presumption that he or she was a high-risk dangerous offender, a

ten year mandatory minimum sentence applied; whereas if the individual rebutted the presumption, a five year mandatory minimum applied. Paragraph (a)(2) provided a mandatory minimum sentence of at least 25 years for a person with two or more previous convictions for crimes of violence that did not contain any reference to the high-risk dangerous offender presumption. The sentencing court found Belak had not rebutted the presumption that he was a high-risk dangerous offender and it sentenced him to a 25 year minimum sentence. Belak appealed, claiming section 9714 was unconstitutional because it placed the burden on the defendant to rebut the presumption that he was a high-risk dangerous offender.

While Belak's case was on appeal, the Pennsylvania Supreme Court decided Commonwealth v. Butler, 563 Pa. 3234, 760 A.2d 384 (2000), which held that section 9714(a)(1) violated a defendant's due process rights by placing the burden on him to rebut the presumption he was a high-risk dangerous offender. The Superior Court initially rejected Belak's claims, but it subsequently withdrew its opinion and vacated Belak's sentence following Butler. The Commonwealth appealed, contending Belak was sentenced under 9714 (a)(2) which placed no presumption on the defendant. The Pennsylvania Supreme Court agreed and held that section (a)(2) was independent of and separable from the invalid section 9714(a)(1). In so holding, the Court noted that, following its decision in Butler, the legislature removed the invalid presumption from section 9714(a)(1) but reenacted section 9714(a)(2) verbatim.

Belak is clearly distinguishable. In Belak, the Court did not delete the

burden of proof provided in the statute by the legislature and replace it with one that would pass constitutional muster to salvage the high-risk dangerous offender designation. Instead, there were two separate designations that could result in the imposition of a mandatory sentence – one which depended on the high-risk dangerous offender designation and the other which depended solely on the number of prior convictions for crimes of violence. The latter was separable, because it was completely independent of the presumption that the offender was a high-risk dangerous offender.

Here, the mandatory minimum sentence is not separable from the burden of proof provisions of section 6317(b) and 7508(b). Since the procedure for determining the location where the drugs were delivered or possessed with the intent deliver and the procedure for determining the quantity of drugs delivered or possessed with the intent to deliver are unconstitutional under Alleyne, all the provisions relating to those determinations, including the mandatory minimum sentence, are also unconstitutional.

Moreover, to rewrite the statute in the manner argued by the Commonwealth would change the nature of the mandatory sentence from what the legislature intended. Pennsylvania law provides for three different types of sentencing mandatories or enhancements. First, there are sentencing enhancements, such as the deadly weapon enhancement, the youth enhancement, or the school enhancement. The court must raise the standard guideline range if it finds that the enhancement applies, but the court has the discretion to sentence outside of the guideline range. Second, there are, for lack of a better term, "discretionary" mandatories. The statute provides a mandatory minimum sentence, but

the mandatory only applies if the Commonwealth, in its sole discretion, invokes the mandatory by providing notice to the defendant after conviction but prior to sentencing. If the Commonwealth does not seek the mandatory sentence, the court cannot impose it, even if the facts of the case would support the imposition of the mandatory. Third, there are true mandatory sentences. In this category, if certain facts are admitted by a defendant in his guilty plea or found by the jury at trial, the court must impose a mandatory minimum sentence even if the Commonwealth does not request it. Examples of true mandatory sentences can be found in 42 Pa.C.S. §9717 (related to sentences for offenses against elderly persons) and 75 Pa.C.S. §3804 (related to the penalties for DUI).

Section 6317 and 7508, as written, each provide for a "discretionary" mandatory that is only applicable if the Commonwealth seeks it by providing notice after conviction and before sentencing. The notice provision, though, is inextricably interwoven with the burden of proof and judicial fact-finding of paragraph (b), which the Commonwealth concedes is unconstitutional following Alleyne. While striking paragraph (b) would delete the provisions that violate a defendant's Sixth Amendment right to a jury trial, it also would transform the statute from a "discretionary" mandatory to a true mandatory.

Defendants argue that instead of striking the notice, burden of proof and fact-finding provisions in section (b), the court could strike the provisions that make the sentences mandatory and make the minimum sentence advisory only, like the Supreme Court did with the Federal Sentencing Guidelines in United States v. Booker, 125 S.Ct. 738 (2005). This would transform the statute from a "discretionary" mandatory to a mere sentencing guideline

enhancement.

The court declines both parties' invitations to rewrite the statute to move the minimum sentencing provisions from the second category to either the first or third category of sentencing mandatories or enhancements, as such is solely within the province of the legislature.

As well, there are practical problems in connection with the mechanics of submitting the respective new "elements" to the jury. Defense counsel credibly argues that to submit the issue to the jurors would constitute a de facto rewriting of the statute by the Court.

The Honorable Judge David Bortner from Chester County referenced this issue in his Order of December 17, 2013. Specifically, he noted that while the Commonwealth argued that, in order to circumvent and cure the requirements of Alleyne, the court should add a special interrogatory to the verdict slip, "we cannot confidently conclude that the use of a verdict slip special interrogatory would be effective to remedy an unconstitutional statute. We observe that this is a matter for the Pennsylvania legislature to address."

Furthermore, heretofore the Pennsylvania Supreme Court has stated that there is no authority for special verdicts in criminal trials and proposals to utilize such have been almost universally condemned. Commonwealth v. Jacobs, 614 Pa. 664, 39 A.3d 977, 987 (2012); Commonwealth v. Samuel, 599 Pa. 166, 961 A.2d 57, 64 (2008).

The court is sympathetic to the Commonwealth's argument that the legislature structured this statute in the manner that it did, because it was relying upon prior Supreme

Court precedent such as Harris v. United States, 536 U.S. 545 (2002) and McMillan v. Pennsylvania, 477 U.S. 79 (1986). This court, however, cannot ignore either Alleyne, which renders the procedures set forth in section 6317(b) and 7508(b) unconstitutional, or Pennsylvania appellate court decisions like Heller and Williams, which hold that the procedures governing a scheme or determination are so interwoven with the scheme or designation that all of the provisions referring thereto must be stricken.

Accordingly, the court finds that section 6317 and section 7508 are unconstitutional and it cannot impose a mandatory sentence pursuant thereto unless or until the legislature rewrites the statutes. Therefore, the court will deny the Commonwealth's motion to amend the Information in these cases.

ORDER

AND NOW, this ____ day of February 2014, since the court finds that 18 Pa.C.S. §§6317 and 7508 are unconstitutional in light of Alleyne v. United States, 133 S.Ct. 2151 (2013), the court DENIES the Commonwealth's motion to amend the Information in the above-captioned cases.

By The Court,

_____
Marc F. Lovecchio, Judge

We concur:

_____
Nancy L. Butts, President Judge

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Dudley N. Anderson, Judge

_____
Richard A. Gray, Judge

_____
Joy Reynolds McCoy, Judge

cc: Nicole Ippolito, Esquire (ADA)
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Michael Rudinski, Esquire
Gary Weber, Lycoming Reporter
Work File