MANDATORY MINIMUM SENTENCES

42 Pa.C.S.A. § 9712 42 Pa.C.S.A. § 9712.1

Com. v. Hanson, 623 Pa. 388 (Pa. 2013), Com. v. Valentine, 101 A.3d 801 (Pa. Super. 2017)

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Introduction

A mandatory minimum sentence requires the court, by law, to give a person convicted of a certain offense a minimum prison term. In the past, the most common crimes that have had mandatory minimum sentences, in PA, are driving under the influence (DUI), drug offenses involving possession with the intent to deliver (PWID), offenses committed with firearms, and certain drug offenses committed with firearms. This paper will specifically mention two previously common mandatory minimum statutes, *42 Pa.C.S.A. § 9712* and *42 Pa.C.S.A. § 9712.1*. Section (a) of Sentences for certain drug offenses committed with firearms, which is mentioned in the case below, *Commonwealth v. Hanson,* requires that the minimum sentence of five years of total confinement be imposed if a person or their accomplice is in possession of a firearm, while in close proximity to the controlled substance at the time of the offense.[1]Statute *42 Pa.C.S.A. § 9712,* under section a, states that any person convicted of a violent crime in PA in which their possession of a firearm placed the victim in fear of death or serious bodily injury, during the offense, should be sentenced to a minimum of five years of total confinement and withheld from any release programs. Mandatory minimum statutes affect the criminal justice system and sentencing processes in many ways. In these cases, the offender is given a mandatory minimum sentence of confinement, as no mitigating circumstances can be considered. On the contrary, judges may consider aggravating circumstances to go above the mandatory minimum sentences proclaimed in provisions. Mandatory minimums take away complete discretion from the judge, thus shifting most discretion to the prosecutor. Nothing else matters but the offenders' culpability.

1 *42 Pa.C.S.A. § 9712.1*

Observation & Review

Commonwealth v. Jose R. Valentine

Appellant, Jose R. Valentine, affirms the judgment of his sentence following his conviction of robbery to be insufficient based on the Court of Common Pleas assessment of evidence and use of mandatory minimum sentencing. He appears in front of the Superior Court to appeal the judgment of his sentence, thus claiming that he should be resentenced. In the case, the appellant brought upon the court several issues to review. The first issue questions the credibility of the evidence used by the trial court. The appellant believes that the Commonwealth's claims that he threatened and intentionally inflicted fear of serious injury while robbing the victim, Renee Gibs, was not adequately supported by their presented evidence, thus did not prove his culpability indubitably. More importantly, the appellant brought upon concerns regarding the use of mandatory minimum sentencing provisions by the Court of Common pleas in his conviction. He appeals these minimum sentencing provisions, as they were confirmed to be unconstitutional and illegal following the Supreme Court decision of *Alleyne v. United States*.[2] Although the court's arguments against the appellant's appeals address various supporting claims about the surety of evidence, this paper specifically underlines the use of mandatory minimum sentencing provisions. The Superior Court's arguments concur with the trial court, therefore stating that the appellant's possession of a firearm would have "placed the victim in fear of immediate serious bodily injury." According to Sentences for offenses committed with firearms provision, a mandatory sentence is applicable in the case of any person who is convicted in any court of the Commonwealth of a violent crime that used a firearm, even a replica firearm, that caused an immediate fear of death or serious injury, to the victim, during

2 Alleyne. v. United States, 570 U.S. 99 (2013)

the offense.[3] The arguments of the Superior Court also included justification for the use of mandatory sentencing by the trial court on the basis of provision, *42 Pa.C.S.A. § 9713,* which requires a minimum sentence of five years total confinement due to the appellant's involvement in the robbery that occurred near public transportation. However, their argument opens consideration for the illegal application of mandatory minimum sentencing by the trial courts. They address the worthiness of the appellant's illegal sentence claims, on account of their rulings in *Commonwealth v. Watley and Commonwealth v. Newman,* which render the automatic increase of his sentence, based off 42 *Pa.C.S.A. § 9712,* illegal.[4] In the conclusion of their arguments, the Superior Court, exclaims their inability to overstep the U.S. Supreme Court's rulings in *Alleyne v. United States* which rule mandatory minimum sentencing provisions, *42 Pa.C.S.A. § 9712 and 42 Pa.C.S.A. § 9713,* unconstitutional entirely. For that reason, the courts held that in the case of *Commonwealth v. Jose R. Valentine* the use of mandatory minimum sentencing statutes was unconstitutional, thus the appellant's sentence is annulled, and a re-imposition of a sentence should occur that aligns with their opinions of the case.

Commonwealth v. Carl P. Hanson

The case of *Commonwealth of Pennsylvania v. Carl P. Hanson* called attention to questions about the legality of five-year mandatory minimum sentences, specifically regarding the sections of provisions that pertain to offenses of possession of a controlled substance with the intent to deliver, while in possession or control of a firearm.[5] Carl Hanson appears in front of the Supreme Court of Pennsylvania to appeal the denial of his post-sentence motion in which he challenges

3 42 Pa.C.S.A. § 9712

4 Com. v. Valentine, 101 A.3d 801 (Pa. Super. 2017)

5 Com. v. Hanson, 623 Pa. 388 (Pa. 2013)

the use of a mandatory minimum sentence, due to the circumstances of his case. After his arrest, Hanson was charged with simple possession, possession of drug paraphernalia, and possession of an instrument of crime. His appeal concerns the commonwealth's attempted imposition of mandatory minimum sentencing, based on *42 Pa.C.S.A. § 9712(a),* despite the uncertainty in evidence that linked him to the firearm found on the second floor of the building in which he was arrested. The arguments brought to the court question the judgment of the sentence based on the interpretation of "close proximity" and "control" as they apply to the firearm and the drugs that the police claim was in his possession. Hanson argues that according to *42 Pa.C.S.A. § 9712, he* must have direct physical access and possession of the firearm to conclude that there is a connection between the firearm and the paraphernalia offense, therefore mandatory minimum sentence provisions should not apply to his case. The Supreme Court's arguments concur with Hanson, in which they state that there is unclarity in the use of "close proximity" in Section 9712.1(a). Their opinions affirm that all cases and circumstances should be analyzed individually, thus the Superior Court should not interpret "close proximity" in a broad manner across cases. The Supreme Court's arguments support the illegal nature behind judgment of sentence in this case, because of the connection between the unclarity of language in mandatory minimum sentence provisions and the imposed sentence by the intermediate and common pleas courts. On the other hand, Justice Eakin filed a dissenting opinion on this appeal stating that the evidence, in this case, is adequate to apply the mandatory minimum sentence statute because the evidence alone proposes a connection between the firearm found and Hanson's drug crime. He does not find the unclarity of "close proximity" to be enough to exclude Carl Hanson from receiving a mandatory minimum sentence, as this unclarity should not be the only factor relevant to this case. Ultimately, the Supreme Court decided that the judgment of sentence by lower

courts was incorrect, thus vacating the original sentence that relied on mandatory minimum sentence statutes. From my understanding, this ruling is justified by their improper interpretation of "close proximity" and "physical possession or control" of the firearm that led to the utilization of mandatory minimum sentencing statutes.

Social Events

In recent years, Kim Kardashian has used her platform to both raise awareness and increase deliberation for criminal justice reform. She has dedicated time deliberating with governors, white house executives, and past presidents to end tough on crime standards within our criminal justice system. Recently, she has brought attention to the case of Rogel Aguilera-Mederos, a truck driver sentenced to 110 years for a fatal car crash in 2019, which started an impactful social movement to end the use of mandatory minimum sentencing. Rogel Mederos' case is a prime example of how mandatory minimum statutes prevent the assessment of mitigating factors, as his brakes failed, and he lost control of the car. Kim Kardashian has partnered with several organizations like the Innocence Project, Families Against Mandatory Minimums, and the Wrongful Conviction podcast to highlight the system implications and ethicality of mandatory minimum sentencing laws. While doing so, she has encouraged more than 5 million people to sign the petition on Change.org to urge the governor of Colorado to commute Rogel Mederos' sentence. Under an Instagram post highlighting Rogel Mederos sentence and case, Kim Kardashian expresses that "mandatory minimums take away judicial discretion and need to end."

FAMM, Families Against Mandatory Minimums, is a social advocacy organization that challenges harsh sentences and unfair sentencing statutes, specifically mandatory minimums,

within our criminal justice system. This organization advocates for families and individuals affected by the uniformity of U.S. sentencing processes. FAMM's staff and board uses the stories of impacted individuals to demonstrate an urgent need for change in our sentencing provisions to lobbyist, policy makers, and governmental officials. Since FAMM's founding in 1991, they have contributed greatly to sentencing reform in our criminal justice system. Because of their advocacy, hundreds of thousands of Americans have been sentenced fairer. FAMM's advocacy and political efforts have resulted in repeals and reforms of drug mandatory minimum sentences in several states like Michigan, Massachusetts, Florida, and Pennsylvania.[6] FAMM has also had a huge impact in major federal cases that returned sentencing authority to judges. FAMM's website states, "we advocate individualized sentences. All sentences should be tailored to unique facts and circumstances of each offense and individual," thus expanding efforts to eradicate mandatory sentencing statutes.

Conclusion

The case of *Commonwealth v. Valentine's* holdings and opinions have been declined to extend by Commonwealth v. Garnett, as the Superior Court of Pennsylvania ruled that the holdings of *Com. v. Valentine* do not apply to this particular case because they did not use conflicting language when determining the guilt of the appellant, Garnett.[7] In comparison, the holdings of *Commonwealth v. Hanson* have extended language amends in the mandatory minimum sentencing provisions on state law grounds. Kim Kardashian's social media

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6 *Famm's history and accomplishments.* FAMM. (2021, September 16). Retrieved February 20, 2022, from https://famm.org/about-us/famms-history/

7 326 A.2d 335 (Pa. 1974)

movements continue to shine a light on the unethical nature of mandatory minimum sentence statutes. Her social movement toward ending mandatory minimums has made an incredible impact on criminal justice reform and has influenced important conversations about sentencing laws at both federal and state government levels. Because of Kim Kardashian's advocacy, the Colorado governor, Jared Polis, has reduced Rogel Mederos' sentence from 110 years to 10 years with eligibility for parole in five years. FAMM has made lasting impacts on the criminal justice system through its support for sentencing reform and prison reform at the federal and state level. For example, In Maryland, The Justice Reinvestment Act is a bill supported by FAMM which allowed judges to depart from mandatory minimum in any drug case in which the court thought the minimum was not needed to protect public safety."[8] FAMM continues to push individuals to take action by contacting lawmakers to end mandatory minimums today. In our lectures, we discussed the importance of prior record scores and their primary role in the sentencing process, however when offenses require mandatory minimums, the offender's criminal history/ prior record score has no merit. Mandatory minimum sentences are not advisory guidelines like the matrix used in class, but instead, they are strict statutory sentencing guidelines. According to the American Civil Liberties Union of Pennsylvania, Pennsylvania has been without mandatory minimum sentences for the last two years, following the decision of the U.S. Supreme Court that ruled these statutes both illegal and constitutional. [9]

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8 *Our work*. FAMM. (2021, June 7). Retrieved February 20, 2022, from https://famm.org/our-work/

9 American Civil Liberties Union of Pennsylvania . (n.d.). Overview | Mandatory Minimum Sentences.

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42 Pa.C.S.A. § 9712

42 Pa.C.S.A. § 9712.1

Com. v. Hanson, 623 Pa. 388 (Pa. 2013)

Com. v. Valentine, 101 A.3d 801 (Pa. Super. 2017)

623 Pa. 388
Supreme Court of Pennsylvania.

COMMONWEALTH of Pennsylvania, Appellee
v.
Carl P. HANSON, Appellant.

Argued May 8, 2012.
|
Decided Dec. 27, 2013.

Synopsis

Background: Defendant was convicted, on open plea of guilty before the Court of Common Pleas, Philadelphia County, No. CP–51–CR–0011477–2007, Leslie Fleisher, J., of possession of a controlled substance with intent to deliver (PWID), and received mandatory minimum sentence enhanced for possession of firearm. Following denial of his post-sentence motions challenging sentence, defendant appealed. The Superior Court, No. 3225 EDA 2008, affirmed. Defendant petitioned for allocatur. Allocatur was granted.

Holdings: The Supreme Court, No. 55 EAP 2011, Saylor, J., held that:

[1] for purposes of imposition of mandatory minimum sentence for PWID based upon firearm possession, "physical possession or control" means the knowing exercise of power over a weapon;

[2] mandatory minimum sentencing statute does not create a presumption of physical possession or control arising from proximity but detached from a defendant's mental state;

[3] statutory term "close proximity," as utilized in mandatory minimum sentencing statute, is not to be interpreted expansively, in light of the ambiguity of the statute and the rule of lenity, disapproving *Commonwealth v. Sanes*, 955 A.2d 369, *Commonwealth v. Zortman*, 985 A.2d 238, *Commonwealth v. Gutierrez*, 969 A.2d 584;

[4] theory of strict liability was inapplicable to support imposition of mandatory minimum sentence based upon firearm possession, disapproving *Commonwealth v. Stein*, 39 A.3d 365; and

[5] it declined to consider alternative justifications for imposition of mandatory minimum sentence.

Reversed and remanded.

Eakin, J., dissented with opinion.

West Headnotes (15)

[1] Sentencing and Punishment Possession and carrying

350H Sentencing and Punishment
350HI Punishment in General
350HI(D) Factors Related to Offense
350Hk76 Weapons
350Hk79 Possession and carrying

Four sets of statutory circumstances under which a defendant may be deemed to be in physical possession or control of a firearm for purposes of the imposition of a mandatory minimum sentence are illustrative of what the legislature meant by "physical possession or control," rather than additional elements required to be proved separately and independently from physical possession or control. 42 Pa.C.S.A. § 9712.1(a).

[2] Sentencing and Punishment Possession and carrying

350H Sentencing and Punishment
350HI Punishment in General
350HI(D) Factors Related to Offense
350Hk76 Weapons
350Hk79 Possession and carrying

Imposition of a mandatory minimum sentence for "physical possession or control" of a firearm in connection with possession of a controlled substance with intent to deliver (PWID) requires proof of actual or constructive exercise of power over the firearm. 42 Pa.C.S.A. § 9712.1(a).

4 Cases that cite this headnote

[3] Sentencing and Punishment Possession and carrying

350H Sentencing and Punishment
350HI Punishment in General
350HI(D) Factors Related to Offense
350Hk76 Weapons
350Hk79 Possession and carrying

For purposes of the imposition of a mandatory minimum sentence for possession of a controlled substance with intent to deliver (PWID) based upon possession of a firearm, consistent with the rule of lenity, "physical possession or control" has an overt scienter requirement of knowing possession. 42 Pa.C.S.A. § 9712.1(a).

[4] **Sentencing and Punishment** Possession and carrying

350H Sentencing and Punishment
350HI Punishment in General
350HI(D) Factors Related to Offense
350Hk76 Weapons
350Hk79 Possession and carrying

For purposes of the imposition of a mandatory minimum sentence for possession of a controlled substance with intent to deliver (PWID) based upon possession of a firearm, "physical possession or control" means the knowing exercise of power over a weapon, which may be proven through evidence of a direct, physical association between the defendant and the weapon or evidence of constructive control. 42 Pa.C.S.A. § 9712.1(a).

7 Cases that cite this headnote

[5] **Sentencing and Punishment** Possession and carrying

350H Sentencing and Punishment
350HI Punishment in General
350HI(D) Factors Related to Offense
350Hk76 Weapons
350Hk79 Possession and carrying

Proof of one or more of the statutorily identified sets of circumstances relevant to the imposition of a mandatory minimum sentence following a conviction of possession of a controlled substance with intent to deliver (PWID) based upon firearm possession is not necessarily sufficient to establish "physical possession or control" of the firearm independent of the requirements for physical possession or control; rather, the examples incorporate concepts of exclusive, joint, and constructive control into the mandatory minimum statute. 42 Pa.C.S.A. § 9712.1(a).

3 Cases that cite this headnote

[6] **Sentencing and Punishment** Possession and carrying

350H Sentencing and Punishment
350HI Punishment in General
350HI(D) Factors Related to Offense
350Hk76 Weapons
350Hk79 Possession and carrying

Statutorily identified circumstances relevant to the imposition of a mandatory minimum sentence following a conviction of possession of a controlled substance with intent to deliver (PWID) based upon firearm possession, namely, visibility, concealment about the person or the person's accomplice or within the actor's or accomplice's reach, and close proximity to the controlled substance, are not exclusive. 42 Pa.C.S.A. § 9712.1(a).

1 Cases that cite this headnote

[7] **Sentencing and Punishment** Possession and carrying

350H Sentencing and Punishment
350HI Punishment in General
350HI(D) Factors Related to Offense
350Hk76 Weapons
350Hk79 Possession and carrying

Scienter-related aspects of "physical possession or control" extend to the statutorily identified sets of circumstances relevant to the imposition of a mandatory minimum sentence following a conviction of possession of a controlled substance with intent to deliver (PWID) based upon firearm possession; on the other hand, where the circumstances at hand align with one of those examples, although such confluence does not in and of itself suffice to raise a sufficient inference concerning scienter, such alignment may combine with other proofs to establish the necessary mental state. 42 Pa.C.S.A. § 9712.1(a).

[8] **Sentencing and Punishment** Possession and carrying

350H Sentencing and Punishment
350HI Punishment in General
350HI(D) Factors Related to Offense
350Hk76 Weapons
350Hk79 Possession and carrying

Determination of whether a firearm was found in close proximity to illegal drugs, for purposes of the imposition of a mandatory minimum sentence following a conviction of possession of a controlled substance with intent to deliver (PWID) based upon firearm possession, by its nature, requires a case-by-case assessment and should be adjudged according to the totality of the circumstances. 42 Pa.C.S.A. § 9712.1(a).

3 Cases that cite this headnote

[9] **Sentencing and Punishment** Possession and carrying

350H Sentencing and Punishment
350HI Punishment in General
350HI(D) Factors Related to Offense
350Hk76 Weapons
350Hk79 Possession and carrying

For purposes of determining whether a firearm was found in close proximity to illegal drugs, in connection with the imposition of a mandatory minimum sentence following a conviction of possession of a controlled substance with intent to deliver (PWID) based upon firearm possession, the farther removed the firearm and the illegal drugs are in location, the greater the necessity for the Commonwealth to produce other evidence to establish the defendant's constructive control of the firearm. 42 Pa.C.S.A. § 9712.1(a).

5 Cases that cite this headnote

[10] **Sentencing and Punishment** Presumptions

350H Sentencing and Punishment
350HII Sentencing Proceedings in General
350HII(F) Evidence
350Hk305 Presumptions

Statute governing the imposition of a mandatory minimum sentence following a conviction of possession of a controlled substance with intent to deliver (PWID) based upon firearm possession does not create a presumption of physical possession or control arising from proximity but detached from the defendant's mental state. 42 Pa.C.S.A. § 9712.1(a).

[11] **Sentencing and Punishment** Possession and carrying

350H Sentencing and Punishment
350HI Punishment in General
350HI(D) Factors Related to Offense
350Hk76 Weapons
350Hk79 Possession and carrying

Statutory term "close proximity," as utilized in the statute governing the imposition of a mandatory minimum sentence following a conviction of possession of a controlled substance with intent to deliver (PWID) based upon firearm possession, is not to be interpreted expansively, in light of the ambiguity of the statute and the rule of lenity; disapproving *Commonwealth v. Sanes*, 955 A.2d 369, *Commonwealth v. Zortman*, 985 A.2d 238, *Commonwealth v. Gutierrez*, 969 A.2d 584. 42 Pa.C.S.A. § 9712.1(a).

3 Cases that cite this headnote

[12] **Sentencing and Punishment** Possession and carrying

350H Sentencing and Punishment
350HI Punishment in General
350HI(D) Factors Related to Offense
350Hk76 Weapons
350Hk79 Possession and carrying

Theory of strict liability was inapplicable, at sentencing on charge of possession of a controlled substance with intent to deliver (PWID), to support imposition of mandatory minimum sentence based upon firearm possession; disapproving *Commonwealth v. Stein*, 39 A.3d 365. 42 Pa.C.S.A. § 9712.1(a).

3 Cases that cite this headnote

[13] **Criminal Law** Sentencing

110 Criminal Law

110XXIV Review
110XXIV(L) Scope of Review in General
110XXIV(L)8 Sentencing
110k1134.75 In general

Supreme court declined to consider alternative justifications for imposition of mandatory minimum sentence on basis of firearm possession, following defendant's plea of guilty to possession of a controlled substance with intent to deliver (PWID), where Commonwealth failed to establish proximity between drugs and firearm sufficient to raise inference of constructive control and sentencing court improperly relied upon its incorrect belief that defendant had admitted to knowledge of firearm's presence. 42 Pa.C.S.A. § 9712.1(a).

1 Cases that cite this headnote

[14] Sentencing and Punishment Sufficiency

350H Sentencing and Punishment
350HII Sentencing Proceedings in General
350HII(F) Evidence
350Hk323 Sufficiency

Commonwealth failed to establish, in sentencing proceeding incident to plea of guilty to possession of a controlled substance with intent to deliver (PWID), that drugs and firearm were so very near to each other as to raise inference of constructive control which would serve, in and of itself, to support application of mandatory minimum sentence; evidence established only that drugs, to possession of which defendant admitted, and firearm, to possession of which defendant did not admit, were found in separate rooms on same floor of same residence, separated by walls and an unknown distance. 42 Pa.C.S.A. § 9712.1(a).

2 Cases that cite this headnote

[15] Sentencing and Punishment Construction

350H Sentencing and Punishment
350HI Punishment in General
350HI(A) In General
350Hk5 Constitutional, Statutory, and Regulatory Provisions
350Hk11 Construction

Where there is doubt in the application of a mandatory sentencing statute, the rule of lenity favors traditional, individualized sentencing based on the defendant's offenses, record, and particular circumstances.

1 Cases that cite this headnote

Attorneys and Law Firms

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CASTILLE, C.J., SAYLOR, EAKIN, BAER, TODD, McCAFFERY, ORIE MELVIN, JJ.

OPINION

Justice SAYLOR.[1]

*393 This appeal centrally presents questions of statutory construction pertaining to the five-year mandatory minimum sentence attaching to the offense of possession of a controlled substance with intent to deliver ("PWID"), *see* 35 P.S. § 780–113(a)(30), while in possession or control of a firearm. *See* 42 Pa.C.S. § 9712.1(a).

I. Preliminary Overview

Section 9712.1(a) of the Sentencing Code provides:

> **(a) Mandatory sentence.**—Any person who is convicted of [PWID], when at the time of the offense the person or the person's accomplice is in *physical possession* **1027 *or control of a firearm,* whether visible, concealed about the person or the person's accomplice or within the actor's or accomplice's reach or *in close proximity to the controlled substance,* shall likewise be sentenced to a minimum sentence of at least five years of total confinement.

42 Pa.C.S. § 9712.1(a) (emphasis added).

The appropriate understanding of this provision is a subject of disharmony among recent decisions of the Superior Court. For example, in *Commonwealth v. Stein,* 39 A.3d 365 (Pa.Super.2012), one panel of the intermediate court indicated that Section 9712.1(a) "merely requires that there be a firearm on or near a person involved in the commission of the crime or in close proximity to the drugs in question." *Id.* at 369 (citing *Commonwealth v. Sanes,* 955 A.2d 369, 377 (Pa.Super.2008)). However, in a substantially contemporaneous opinion, an overlapping panel found that the mandatory minimum sentence prescribed by the statute is triggered only upon separate and independent findings of actual or constructive possession by the defendant of a firearm *and* of a close proximity as between the weapon and the controlled substance giving rise to the drug offense. *See Commonwealth v. Person,* 39 A.3d 302, 305 (Pa.Super.2012) (also citing *Sanes,* 955 A.2d at 374).

***394** Presently, we consider the meaning of the terms "control of a firearm" and "close proximity," as they are employed in Section 9712.1(a), including the interrelationship between "control" and the concept of constructive possession as it appears in several of the Superior Court's decisions. We also address the divergence among the Superior Court's decisions concerning whether and to what extent "close proximity" establishes, implies, or is essentially independent of "control." *See Commonwealth v. Hanson,* 611 Pa. 616, 29 A.3d 366 (2011) (*per curiam*).

II. Background and Arguments

On June 7, 2007, an undercover narcotics officer met with Appellant outside a two-story row house located on North Creighton Street, Philadelphia. There, the officer purchased several packets of crack cocaine from Appellant, who then entered the locked residence using a key.

The following day, officers observed Appellant repeatedly entering the Creighton Street house with the key. During surveillance, no one other than Appellant was seen entering or exiting the premises. Police then executed a search warrant at the property and arrested Appellant on the first floor. On his person, Appellant had some cash and the key he used for entry. A search of the second floor uncovered: (1) from the front bedroom, a cellular telephone, a small electronic scale, and various drug-related paraphernalia; (2) from the middle bedroom, a clear plastic baggie containing fourteen packets of crack cocaine; (3) from the only bathroom in the house, a clear plastic baggie containing PCP; and (4) from the rear bedroom, a handgun loaded with seven live rounds. *See* N.T., July 29, 2008, at 8–12. No drugs or paraphernalia were discovered in the rear bedroom which contained the firearm. *See id.* at 48.

Appellant was charged with PWID, simple possession, *see* 35 P.S. § 780–113(a)(16), possession of drug paraphernalia, *see id.* § 780–113(a)(32), and possession of an instrument of crime, namely, the handgun, *see* 18 Pa.C.S. § 907(a). At a pre-trial conference, Appellant argued that the charge of possession of ***395** an instrument of crime should be quashed, "given [the] lack of nexus between [Appellant] and that weapon and someone else's room." N.T., Jan. 22, 2008, at 2. Over opposition by the ****1028** Commonwealth, a common pleas judge quashed the charge, without explaining the reasoning underlying such ruling. *See id.* at 3.

Subsequently, before a different judge, Appellant entered an open plea of guilty to PWID.[2] In the course of the plea proceedings, the Commonwealth related the material facts as indicated above, and Appellant affirmed them. *See* N.T., July 29, 2008, at 8–12. Of material significance to the common pleas court's treatment of the mandatory-minimum issue, the Commonwealth asserted that such plea subsumed an admission to possession of all of the drugs, including those located on the second floor of the Creighton Street residence. *See* N.T., July 29, 2008, at 50. Although there does not appear to be any affirmative, record-based accession by Appellant on this point, no contrary representation or objection was advanced on his behalf.[3]

The plea colloquy segued into a sentencing proceeding, in which the Commonwealth pursued imposition of the mandatory minimum sentence under Section 9712.1(a), and the court questioned Appellant and commented concerning his responses. During the course of the proceeding, Appellant indicated that he did not own the Creighton Street property, but he had been given the key by the owner's son, a person who Appellant said he knew only as "K." *See* N.T., July 29, 2008, at 23, 26–27. Appellant also stated that, to the best of his knowledge, no other person had a key to the house, *see id.,* and he was the only person selling drugs from that location, *see id.* at 45. According to Appellant, he was unaware of the firearm's presence in the house, *see id.* at 60–61, and he never ventured onto the second floor, *see id.* at 32.

***396** At one point, the presiding judge remarked that the Commonwealth had not developed much detail concerning the closeness in proximity of the handgun and the drugs.[4] In

response, the prosecutor asked whether the court wished to hear from police witnesses, to which the judge responded that she did not. *See id.* at 47–48.

Ultimately, the common pleas court imposed the mandatory minimum per Section 9712.1(a). The court concluded that the provision applied, since Appellant admitted he was the only individual selling drugs from the residence. In the court's judgment, such admission, as well as Appellant's deemed concession of his guilt relative to possession of the drugs found on the second floor, rendered all of the items recovered from the house—including the handgun—within Appellant's physical possession or control.[5] The court recognized the potential tension between this conclusion and the previous quashal of the possessory weapons offense, but it declined to attribute any relevance to such dismissal.[6]

**1029 Appellant filed post-sentence motions challenging the imposition of the mandatory minimum sentence and maintaining that: he was not in physical possession or control of the firearm; the firearm was not in close proximity to the controlled substances; and he did not have the requisite *mens rea* for purposes of Section 9712.1(a).

*397 In its denial of relief, the common pleas court's treatment loosely paralleled the requirements discerned by the Superior Court of actual or constructive possession and of close proximity of contraband and weapon. *See Person,* 39 A.3d at 305; *Sanes,* 955 A.2d at 374. However, as to constructive possession, the court merely defined the term, consistent with its use in *Sanes,* as encompassing the ability to exercise conscious control or dominion and the intent to exercise that control, which may be inferred from the totality of the circumstances. *See Commonwealth v. Hanson,* No. CP–51–CR–0011477–2007, slip op. at 4 (C.P.Philadelphia, Oct. 30, 2009) (citing *Sanes,* 955 A.2d at 373). The court, however, did not provide a separate legal analysis concerning constructive possession and close proximity as the *Sanes* panel indicated was necessary, but rather, proceeded to conflate the two inquires. In this regard, the court's analysis proceeded as follows:

> A recent decision by the Pennsylvania Superior Court reversed the trial court and held that drugs were in "close proximity" to the gun and invoked the mandatory minimum sentence enhancement required under § 9712.1. The facts of that case were the drugs were found in a kitchen area, and a non-working firearm was found under a bed in a bedroom. In reversing the trial court, the Superior Court stressed that because the Defendant pled guilty and did not object to the prosecution's recitation of facts, he could not then assert he had no knowledge or possession of those drugs.[7] *Commonwealth v. Zortman,* [985 A.2d 238, 239–40, 243 (Pa.Super.2009), *aff'd on other grounds,* 611 Pa. 22, 23 A.3d 519 (2011)].[8]
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> *398 Defendant herein pled guilty to all the facts including that he had knowledge of the drugs and the firearm on the second floor....[9] Defendant cannot now after sentencing allege the Commonwealth failed to prove the imputed *mens rea* with regard to the proximity of the firearm to the narcotics as it is moot. [10]

**1030 *Hanson,* No. CP–51–CR–0011477–2007, *slip op.* at 4–5.

On appeal, the Superior Court affirmed the judgment of sentence in a memorandum opinion. *See Commonwealth v. Hanson,* No. 3225 EDA 2008, 6 A.3d 562 (Pa.Super. July 15, 2010) (table). The panel did not, however, apply the earlier construction of Section 9712.1(a), which would require a showing of at least constructive possession and close proximity to support mandatory sentencing. *See Sanes,* 955 A.2d at 374; *accord Person,* 39 A.3d at 305. Rather, the panel took the position that close proximity was merely a means of establishing control, and that Section 9712.1(a) was a strict-liability provision which does not require any particular *mens rea. See Hanson,* No. 3225 EDA 2008, slip op. at 8 ("[T]o prove appellant was 'in control of a firearm,' the Commonwealth need only demonstrate that the firearm was in 'close proximity to the controlled substance.' ").[11] The panel also relied upon *Zortman* for the proposition that close proximity may be *399 established even where drugs and a weapon may be found in separate rooms within a structure. *See id.* at 8 (citing *Zortman,* 985 A.2d at 244). We allowed appeal to address this reasoning, and for the reasons indicated above.

Presently, Appellant advances a position which is consistent (at least on one plane) with the understanding, reflected in several published Superior Court decisions, that "control of a firearm" (or constructive possession per the intermediate court's treatment under the *Sanes* line) and "close proximity" are separate and independent requirements of Section 9712.1(a).[12] However, whereas some intermediate-court

decisions attribute a *mens rea* to only one of these prongs (constructive possession), *see, e.g., Sanes,* 955 A.2d at 373, Appellant argues that knowledge elements should attend both control and proximity, in light of the severe consequences of the statute in terms of its evisceration of sentencing-court discretion. Along these lines, Appellant regards Section 9712.1(a) as an "offense for *mens rea* purposes," since it operates to greatly diminish the common pleas courts' sentencing discretion to offenders' substantial detriment. Brief for Appellant at 11.

Further, Appellant advocates a narrow construction of both "control of a firearm" and "close proximity," consistent with the rule of lenity applicable to laws imposing penal sanctions. *See* 1 Pa.C.S. § 1928(b)(1) (requiring strict construction of penal statutes); *accord Commonwealth v. Booth,* 564 Pa. 228, 234, 766 A.2d 843, 846 (2001) (explaining that, "where doubt exists concerning the proper scope of a penal statute, it is the accused who should receive the benefit of such doubt"). In terms of control, Appellant envisions a requirement that a defendant "knowingly have an immediate and direct physical accessibility to the firearm with the ready capability of obtaining physical possession." Brief for Appellant at 18–19; *see* ***400** ****1031** *also id.* at 19 (" 'Control' requires much more than availability in some passive or constructive sense."). The knowledge requirement should pertain, Appellant explains, because control presupposes knowledge, as the courts have recognized in other settings. *See id.* at 25 (citing, *inter alia, Commonwealth v. Rambo,* 488 Pa. 334, 337–39, 412 A.2d 535, 537–38 (1980) (explaining, in the context of an element of a criminal offense, that possession encompasses an exercise of conscious dominion or control); *Commonwealth v. Armstead,* 452 Pa. 49, 51, 305 A.2d 1, 2 (1973) (defining possession of a firearm in terms of "the power of control over the weapon and the intention to exercise this control") (citation omitted)).

In challenging the intermediate-court panel's vision of Section 9712.1(a) as embodying a strict-liability regime centered on proximity alone (and thus requiring no independent assessment of control), Appellant offers several examples to illustrate unreasonableness in such approach:

> [C]onsider a solitary unarmed street level drug dealer who is holding marijuana and sells a packet to an undercover and armed police officer. The marijuana in the possession of the drug dealer would be in "close proximity" to the firearm of the police officer.... A non-police example would be a drug trafficker who takes a taxi cab to deliver his goods, and, for self-defense, the taxi cab driver has a firearm in a paper bag on the front seat of the cab.

Brief for Appellant at 15. Such asserted unreasonableness, Appellant posits, serves as a strong indication that the General Assembly did not intend the interpretation. *See generally* 1 Pa.C.S. § 1922(1) (embodying the presumption, in statutory interpretation, that the Legislature does not intend a result that is "absurd, impossible of execution or unreasonable").

Furthermore, although Appellant's arguments parallel *Sanes'* construction in recognizing dual requirements within Section 9712.1(a), Appellant strongly criticizes the court's effective substitution of "constructive possession" for "control." According to Appellant:

> ***401** Constructive possession would encompass an offender selling drugs on the street while having a gun visibly resting on his bed at home, miles—or hundreds of miles—removed. Section 9712.1 is not directed at such constructive possession, nor at any non-immediate control.

Brief for Appellant at 19.

As to the "close proximity" requirement, invoking the rule of lenity, Appellant urges that the firearm and the controlled substance must be "very near or immediately adjoining each other such that, by virtue of their mere locations, the former is part and parcel of trafficking the latter." *Id.* at 26; *see also id.* at 35 (restating this definition and stressing that it "must be construed in light of the purpose of the statute—a deterrence to use of firearms in drug dealing activity"); *id.* at 10 (discussing "close proximity" in terms of an "intimate association"). Here, once again, Appellant strongly criticizes the *Sanes* decision's approach and rationale.

In this respect, Appellant develops that the *Sanes* panel adopted a broad approach to "close proximity," borrowed from caselaw under the Forfeiture Act, 42 Pa.C.S. §§ 6801–6802. *See Sanes,* 955 A.2d at 374–75; *see also Zortman,* 985 A.2d at 244 (acknowledging that the Superior Court gave "close proximity" "an expansive meaning" in *Sanes*). Appellant explains, however, that Section 9712.1(a) and the Forfeiture Act address different concerns, ascribe different operational roles to "close ****1032** proximity,"[13] and yield very different consequences, particularly in that Section 9712.1(a) is a penal statute which is to be strictly construed. *See* 1 Pa.C.S. § 1928(b)(1).[14]

***402** Appellant does recognize that "close proximity" is a relative term.[15] Nevertheless, he repeatedly and roundly

criticizes the Superior Court's adoption of an expansive interpretation, given that such an approach is irreconcilable with the rule of lenity.

Applying his narrow construction of Section 9712.1(a) to his own circumstances, Appellant contends that the Commonwealth failed to demonstrate that he had control of the handgun found on the second floor of the Creighton Street premises, because the firearm was not immediately and directly accessible to him. *See* Brief for Appellant at 34. Appellant asserts that there was no indication that he had ever been on the second floor of the residence, let alone in the bedroom in which the handgun was discovered. Appellant also argues that any admission of guilt relative to possession of drugs found on the second floor associated with his plea does not advance the Commonwealth's case, since the plea did not involve the firearm, and the drugs were not located in the same room as the handgun. *See id.* Additionally, Appellant highlights that nothing in the record reveals the distance between the upstairs rooms, the linear footage between the drugs and the gun, or where in each room the items were discovered. According to Appellant, "[t]he fact that a firearm is located somewhere within a room that is on the same floor as two other rooms containing drugs is insufficient to establish 'close proximity.' " *Id.* at 35. Thus, Appellant concludes—since in his view the Commonwealth established neither that he controlled the firearm nor that it was in close proximity to ***403** the controlled substances—Section 9712.1(a) should not have been interposed to restrict the common pleas court's sentencing discretion.

The Commonwealth, from the outset, rejects Appellant's definitions of control and close proximity. It is the Commonwealth's position that the statutory phrase "control of a firearm" simply signifies the ability to "exercise power or influence over" the weapon. *See* Brief for Appellee at 12 ****1033** (quoting *Commonwealth v. Diodoro,* 601 Pa. 6, 17, 970 A.2d 1100, 1107 (2009) (citation omitted)). With regard to constructive possession, the Commonwealth takes the position this is simply one clear manifestation of control. *See id.* at 15 ("A drug dealer who constructively possesses a firearm, *i.e.,* a narcotics pusher who has both the power to control the gun as well as the intent to exercise that control, is squarely within the ambit of the statute."). Under the Commonwealth's construction, the text of Section 9712.1(a) "simply requires that 'at the time of the offense' the defendant possess or control a firearm, not that the offense be effectuated through the possession or control of a firearm," as Appellant would have it. *Id.* at 16.[16]

In tension with the intermediate-court panel's perspective that Section 9712.1(a) embodies a form of strict liability, however, the Commonwealth agrees with Appellant that the "control" element "necessarily subsumes knowledge of the item controlled." *Id.* at 21. The Commonwealth, however, opposes a distinct inquiry into the defendant's knowledge, as it views this as merely a "redundant evidentiary burden." *Id.* at 21.

As to "close proximity," the Commonwealth favors "a commonsense, case-by-case determination to be made based on the totality of the circumstances." *Id.* at 10; *see also id.* at 26. In this regard, the Commonwealth supports the Superior Court's adoption of rationale from decisions under the Forfeiture ***404** Act. *See id.* at 26–27. Indeed, the Commonwealth believes the Legislature relied on the developed understanding of the in-close-proximity terminology when it inserted the language into Section 9712. 1(a). *See id.* at 10 ("At the time the Legislature enacted section 9712.1, the term "in close proximity" had acquired a particular meaning in the law. Numerous cases had held that whether objects were in close proximity was a commonsense, case-by-case determination to be made based on the totality of the circumstances, not merely by reference to the particular distance between the objects."); *see also id.* at 27–28 (citing, *inter alia, Commonwealth v. Giffin,* 407 Pa.Super. 15, 595 A.2d 101, 105 (1991) (finding that money and contraband located in different rooms were nevertheless in close proximity for purpose of forfeiture)). Along these lines, the Commonwealth favors the "expansive interpretation" of "close proximity," which has been applied by the Superior Court. Brief for Appellee at 28 n.5; *accord Zortman,* 985 A.2d at 244; *Commonwealth v. Gutierrez,* 969 A.2d 584, 593 (Pa.Super.2009) (observing that, in *Sanes,* "[w]e gave ['in close proximity'] a very expansive meaning").

Moreover, the Commonwealth highlights that direct and immediate accessibility of a firearm is not necessary for the instrumentality to be used in furtherance of drug-related activity. Rather, the Commonwealth explains, "where a drug dealer has positioned his firearm near his drug stash so that it will be readily available to protect his supply, he is using the gun just as surely as the dealer who has stuffed his weapon in his waistband or has placed it right next to him." Brief for Appellee at 16; *see also id.* at 13 ("Had the General Assembly intended to limit 'control' to only 'immediate and direct physical' control 'with the ready capability of obtaining

**1034 physical possession', it would have included such language in the statute.").

The Commonwealth also reasons that, simply because Section 9712.1(a) is a penal statute, it does not necessarily follow that the in-close-proximity language must be given its narrowest possible meaning. *See id.* at 29 (quoting *Commonwealth v. Wooten,* 519 Pa. 45, 53, 545 A.2d 876, 880 (1988) ("While *405 strict construction of penal statutes is required, ... courts are not required to give words of a criminal statute their narrowest meaning or disregard evident legislative intent.")). Indeed, according to the Commonwealth, implementation of Appellant's narrow interpretation of the provision would undermine the Legislature's essential aim to reduce drug-related gun violence, since it would permit drug traffickers to escape the mandatory minimum sentence by simply positioning their firearms in a readily accessible location just outside of the boundaries of a narrowly-defined proximity. *See id.* at 31.

In terms of the interrelationship between control and proximity, the Commonwealth initially rejects Appellant's position—and that reflected in the *Sanes* line of decisions—that control (termed constructive possession in those cases) should be viewed as a requirement separate and apart from close proximity. Rather, the Commonwealth argues, the statute simply offers a refinement of possession or control in the form of four alternative—albeit non-exclusive—sets of circumstances in which a defendant may be deemed to have such possession or control. *See* Brief for Appellee at 10 ("The plain language of section 9712.1 ... requires that proof that the firearm was visible, concealed about the defendant, within his reach, or in close proximity to the drugs, is sufficient to establish physical possession or control of the gun."). In this regard, the Commonwealth highlights that "possession or control" is conjoined, in Section 9712.1(a), with proximity (as well as several other alternative avenues for maintaining possession or control) by the word "whether," not "and." *See id.* ("Defendant's contention that the alternatives following the word 'whether' in the statute are additional requirements beyond 'physical possession or control' is untenable. The word 'whether' does not mean 'and.' ").

Although the Commonwealth regards close proximity as a means of establishing control, it recognizes there are circumstances in which drugs and a firearm may be closely proximate and yet Section 9712.1(a) will not pertain, such as the policeman and taxi-driver examples offered by Appellant. *See* Brief for Appellee at 24–25 ("The Commonwealth could not *406 proceed under section 9712.1 where the gun actually belonged to a police officer or cab driver, as these facts would negate the conclusion that the weapon was in the physical possession or control of the suspect."). Thus, at least in some portions of its argument, the Commonwealth does envision a residual role for assessment of "control," even where close proximity has been established.[17] In this regard, the Commonwealth's argument suggests, in **1035 substance, that close proximity creates a rebuttable presumption of control, similar to the operation of the Forfeiture Act, *see* 42 Pa.C.S. § 6801(a)(6)(ii), as well as one facet of the federal sentencing guidelines. *See* U.S. Sentencing Guidelines Manual § 2D1.1(b)(1), cmt. n.3 (2011) ("The enhancement should be applied if the weapon was present, unless it is clearly improbable that the weapon was connected with the offense."); *see, e.g., United States v. Darwich,* 337 F.3d 645, 665 (6th Cir.2003).

In Appellant's particular circumstances, the Commonwealth argues that he was plainly in control of the firearm found on the second floor of the Creighton Street property, given that: Appellant possessed the only key to the residence; he was the only person observed entering or exiting the house on the date that the gun was seized and the only person inside the residence at that time; the firearm was on the same floor of the house as the drugs that Appellant had admitted to possessing; and drugs were found inside of the only bathroom in the house. The Commonwealth also notes that control is not dependent upon ownership of the property. *See id.* at 35 (quoting *Commonwealth v. Tizer,* 525 Pa. 315, 320, 580 A.2d 305, 307 (1990) ("One need not own premises to actively or *407 constructively participate in criminal enterprises therein.")). The Commonwealth concludes that, viewing the proofs in the light most favorable to it, *see id.* at 39 (citing *Commonwealth v. Meals,* 590 Pa. 110, 119, 912 A.2d 213, 218 (2006)), the evidence sufficiently demonstrated that the firearm located in one bedroom was, more likely than not, in close proximity to the drugs discovered in two other rooms on the same floor of the residence. Thus, it is the Commonwealth's ultimate position that Appellant was in control of the firearm for purposes of Section 9712.1(a).

In a post-submission communication, to bolster his position that Section 9712(a) must be regarded as an "offense" for *mens rea* purposes, Appellant highlights the United States Supreme Court's recent decision in *Alleyne v. United States,* 570 U.S. ——, 133 S.Ct. 2151, 186 L.Ed.2d 314 (2013) (overruling previous precedent to hold that any fact which

increases a mandatory minimum sentence must be treated as an element of the crime to be submitted to a jury).

III. Discussion[18]

A. Control of a Firearm

The litigants' arguments concerning the appropriate understanding of "physical possession or control" offer a highly incisive approach to the subject which parses physical possession from control and diverges as to just how strict should be the interpretation of the "control" aspect. It is well recognized, however, that possession and control are closely related; indeed, possession is frequently defined in terms of control. ***408** *See, e.g., Commonwealth v. Macolino,* 503 Pa. 201, 206, 469 A.2d 132, 134 (1983) (defining "constructive possession" as "the ability to exercise a conscious ****1036** dominion over the illegal substance: the power to control the contraband and the intent to exercise that control."); *cf. State v. Casey,* 346 Or. 54, 203 P.3d 202, 204 (2009) (explaining that "[o]wnership, possession, custody, and control are related and often overlapping concepts."). Notably, the Legislature frequently uses a series of interrelated terms inclusively to capture its intent for individuals to bear responsibility for their knowing intentions and conduct relative to illicit substances or, as here, dangerous weapons with which they may associate such contraband. *See, e.g.,* 35 P.S. § 780–113(a)(8) (prohibiting "[s]elling, dispensing, disposing of or causing to be sold, dispensed or disposed of, or keeping in possession, control or custody, or concealing" controlled substances and other enumerated items, under prescribed circumstances).

[1] Here, we do not see the benefit of strictly parsing "possession" from "control" in the first instance. Rather, in line with the Commonwealth's argument, we regard the four sets of circumstances delineated in Section 9712.1(a) ("whether visible, concealed about the person or the person's accomplice or within the actor's or accomplice's reach or in close proximity to the controlled substance") as illustrative of what the Legislature meant by "physical possession or control." Plainly, the Assembly contemplated more than just physical possession or physical control, since the example involving an accomplice signifies joint control, and the in-close-proximity scenario encompasses constructive control. *Accord* Brief for Appellee at 13 (asserting that "the statute makes it patently clear that a defendant can be in control of a firearm that is *not* about his person or within his reach, and thus is *not* immediately and directly physically accessible to him." (emphasis in original)).

In this regard, we also differ with Appellant's position that the identified sets of circumstances should be considered separately and independently from the overarching concept of "physical possession or control" with which they are conjoined.

[2] ***409** For the above reasons, it is clear enough that, in prescribing a mandatory minimum sentence for "physical possession or control" of a firearm in connection with PWID, the Legislature intended to address the actual or constructive exercise of power over a weapon, as the Commonwealth contends. The requirement favored by Appellant—immediate and direct physical accessibility to the firearm—is in tension with the guidance provided on the statute's face.

[3] We do agree with Appellant, however, that an overt scienter requirement of "knowing" should attend the definition. While it is possible to exercise a substantial degree of "control" without knowledge (as, for example, a weapon might surreptitiously be slipped into a bag carried by the defendant), the longstanding understanding of constructive possession and/or constructive control incorporates a scienter requirement. *See, e.g., Macolino,* 503 Pa. at 206, 469 A.2d at 134. Consistent with the rule of lenity, we find that such requisite should pertain in the context of mandatory sentencing as well. Indeed, both parties agree that a requirement of "knowing" control is appropriate; our main difference with the Commonwealth's position on this point lies in its assertion that there is no need to make the scienter requirement overt.

[4] Accordingly, we hold that, for purposes of Section 9712.1(a), "physical possession or control" means the knowing exercise of power over a weapon, which may be proven through evidence of a direct, physical association between the defendant ****1037** and the weapon or evidence of constructive control. Constructive control, in this setting, an analogue to constructive possession, entails the ability to exercise a conscious dominion and the intent to do so. *Cf. Macolino,* 503 Pa. at 206, 469 A.2d at 134.[19]

***410** B. The Statutory Examples

[5] **[6]** As explained, the delineated sets of circumstances within Section 9712.1(a) ("whether visible, concealed about the person or the person's accomplice or within the actor's or accomplice's reach or in close proximity to the controlled substance") serve as examples of circumstances in which a

finding of "physical possession or control" may be warranted. Contrary to the Commonwealth's perspective, however, we do not regard proof of the identified sets of circumstances as necessarily sufficient to establish "physical possession or control," independent of the requirements for the latter. In this regard, the statute's transition to the examples is too casual and ambiguous, and the examples themselves are too tersely stated, to establish a self-sufficient role. Rather, we regard the examples as serving primarily to convey the Legislature's desire to incorporate concepts of exclusive, joint, and constructive control into Section 9712.1(a). For similar reasons, we also do not believe that the list of examples is intended to be an exclusive one.

[7] A material consequence of this conclusion is that the scienter-related aspects of "physical possession or control" do extend to the examples delineated in Section 9712.1(a). On the other hand, where the circumstances at hand align with one of those examples, although such confluence does not in and of itself suffice to raise a sufficient inference concerning scienter, such alignment may combine with other proofs to establish the necessary mental state.

In terms of the Superior Court's reference to constructive possession, *see, e.g., Sanes,* 955 A.2d at 374, given the essential overlap between this concept and constructive control, the intermediate court's treatment is not wholly inapt. Nevertheless, since Section 9712.1(a) employs the modifier "physical" in connection with "possession," it would be preferable if the intermediate court were to speak in terms of constructive control instead of constructive possession.

***411 C. In Close Proximity**

This brings us to the use, in Section 9712.1(a), of the term "in close proximity." The General Assembly apparently selected the language in light of the common recognition that "[t]he seizure of a firearm in close proximity to illegal drugs is considered powerful support for the inference that the firearm was used in connection with the drug trafficking operation." *United States v. Markovitch,* 442 F.3d 1029, 1032 (7th Cir.2006) (citation omitted).[20] A main difficulty with the phrase lies in determining how close, within the Legislature's contemplation, is close ****1038** enough. As other courts have recognized, there is an inherent imprecision. *See, e.g., People v. $111,900, U.S.C.,* 366 Ill.App.3d 21, 303 Ill.Dec. 626, 851 N.E.2d 813, 822 (2006) ("Close proximity should not, and cannot, rationally be defined in precise terms."); *cf. Sanes,* 955 A.2d at 370 (observing that " 'close proximity' does not easily lend itself to precise definition").

[8] **[9]** In general terms, we agree with those jurisdictions which have defined "in close proximity" as "very near." *Limon v. State,* 285 Ark. 166, 685 S.W.2d 515, 516 (1985); *Jones v. State ex rel. Mississippi Dep't of Pub. Safety,* 607 So.2d 23, 29–30 (Miss.1992). That said, the same jurisdictions also have recognized that the determination, by its nature, requires a case-by-case assessment and should be adjudged according to the totality of the circumstances. *See, e.g., id.* Obviously, the closer a firearm is found to contraband, the stronger the inference of their association. Therefore, given our reasoning above, the farther removed these elements are in location, the greater the necessity for the Commonwealth to produce other evidence to establish constructive control.[21]

[10] ***412** Nevertheless, the Commonwealth's vision of an essential presumption arising from proximity but detached from the defendant's mental state is not supported by the statute. The General Assembly's knowledge of how to create such a presumption is exemplified by the Forfeiture Act. *See* 42 Pa.C.S. § 6801(a)(6)(ii) ("Such money ... found in close proximity to controlled substances possessed in violation of The Controlled Substance, Drug, Device and Cosmetic Act shall be rebuttably presumed to be proceeds derived from the selling of a controlled substance[.]").

In all events, to secure the mandatory minimum sentence under Section 9712.1(a), the Commonwealth must establish "physical possession or control" of the subject firearm. Although an inference concerning the necessary scienter may arise from close proximity which, depending on the circumstances, may be strong enough in and of itself to satisfy the Commonwealth's burden of proof by a preponderance of the evidence, we do not find it useful to couch such an inference in terms of a presumption.

[11] Finally, while courts considering close proximity for purposes of Section 9712.1(a) should not be unduly restrictive, we agree with Appellant that the Superior Court should not be applying an "expansive" approach, in light of the rule of lenity. Thus, we disapprove of this aspect of *Sanes* and its progeny.[22]

D. The Superior Court's Disposition

[12] The last question presented in our allocatur grant concerns the correctness of the Superior Court's determination that ****1039** Section 9712.1(a) was applicable. *See* ***413** *Hanson,* 611 Pa. at 616, 29 A.3d at 367. Since the intermediate court implemented a theory of strict liability, *see Hanson,* No. 3225 EDA 2008, *slip op.* at 8, which is inconsistent with our construction of Section 9712.1(a), its decision was not correct.[23]

[13] **[14]** Further, for several reasons, we decline to proceed further to consider whether the same result should obtain for alternative reasons. *See, e.g., McAdoo Borough v. PLRB,* 506 Pa. 422, 428 n. 5, 485 A.2d 761, 764 n. 5 (1984). First, it is our considered opinion that the Commonwealth did not prove that the drugs and contraband found at the Creighton Street property, separated by walls and an unknown distance, were so "very near" to each other as to raise an inference of constructive control which would serve, in and of itself, to support application of the mandatory minimum sentence.[24] Second, we realize that there is other evidence to suggest constructive control on the part of Appellant, which includes evidence of his exclusive control of the entire premises throughout at least a finite time period, and his concession to criminal liability for possession of drugs located on the second floor of the Creighton Street residence. However, the sentencing court's reference to such factors is cryptic, and its opinion repeatedly circles back to its perception of the facts, which includes an erroneous attribution to Appellant of a concession to knowledge of the handgun's presence on the premises that he simply never made. *See supra* note 9.

[15] Additionally, the effort to sort through a series of incomplete and, at times, incorrect dispositions by the intermediate and common pleas courts in order to facilitate a final ***414** resolution is the sort of endeavor which often divides this Court. Moreover, where there is doubt in the application of a mandatory sentencing statute, the rule of lenity does favor traditional, individualized sentencing based on the defendant's offenses, record, and particular circumstances. Significantly, upon proper justification, a court undertaking individualized sentencing often may impose an equivalent sentence in any event, the only difference being the discretionary aspect. We do not see that individualized sentencing in close cases—in view of the Legislature's employment of indeterminate concepts in a mandatory sentencing statute—will detract materially from implementation of the legislative efforts to deter the use of weapons in drug-selling ventures.

Finally, prior to the United States Supreme Court's *Alleyne* decision, issued in June of this year, state legislatures were free to delegate fact-finding authority to sentencing judges relative to mandatory minimum sentences. *See McMillan v. Pennsylvania,* 477 U.S. 79, 87–88, 106 S.Ct. 2411, 2417, 91 L.Ed.2d 67 (1986) (holding that the Commonwealth could treat visible possession of a firearm as merely a sentencing factor rather than an ****1040** offense element for purposes of a mandatory minimum sentencing statute, where the relevant statute did not increase the mandatory maximum); *Harris v. United States,* 536 U.S. 545, 568–69, 122 S.Ct. 2406, 2420, 153 L.Ed.2d 524 (2002) (plurality) (reaffirming *McMillan* and rejecting a constitutional challenge to a similar federal mandatory minimum sentencing provision). However, as Appellant has advised, *Alleyne* overruled those decisions on this salient point. *See Alleyne,* 570 U.S. at ——, 133 S.Ct. at 2163.

Based upon the above series of considerations, we will remand the matter for resentencing, with the admonition that imposition of the mandatory sentence under Section 9712.1(a)—based on a correct legal analysis and supported findings—is not foreclosed. Should the court, however, determine that the Commonwealth has not established, by a preponderance of the evidence, that Appellant was in constructive control of the firearm—subsuming supported findings relative to the aspects of scienter which we have delineated—the court ***415** should implement individualized sentencing, per the usual practices. Furthermore, to the degree to which Appellant may attain recourse to the new *Alleyne* regime consistent with the developed principles of issue presentation and preservation and/or their exceptions, we also do not foreclose that the common pleas court may undertake traditional, individualized sentencing, based on *Alleyne.*[25]

The order of the Superior Court is reversed, and the matter is remanded, via the intermediate court, to the common pleas court for resentencing, consistent with this opinion.

Former Justice ORIE MELVIN did not participate in the decision of this case.

Chief Justice CASTILLE, Justices BAER, TODD and McCAFFERY join the opinion.

Justice EAKIN files a dissenting opinion.

Justice EAKIN, dissenting.

The imprecise wording of this statute muddies the legislature's purpose, but I read § 9712.1(a) to require a finding of "physical possession or control" of the firearm, under one of the four enumerated circumstances. The concept of "physical possession or control" is not new or unusual, and the evidence here is sufficient to establish that portion of the proof. It is not just possession of a firearm that triggers the added penalty, however—the crime after all is a drug crime, not a firearm crime. It is undoubtedly proof of a connection, beyond possession or control, between the possessed firearm and the drug crime that makes the statute applicable, a connection established by one of the enumerated circumstances.

The applicable circumstance here is "close proximity," a redundant and tautologically imprecise measurement. If the legislature recognized that the connection between firearms ***416** and drugs is not established by specific linear measure, such imprecision is understandable. The legislature could easily have said "ten feet" or "20 yards," but it did not—ten feet might show a disconnect in one situation, while 20 yards might be quite proximate in another. The proof required is enough to allow a reasonable fact-finder to say this ****1041** firearm was in close proximity to these drugs.

As the facts of each case affect that determination, I would not attempt to further define the phrase as does the majority, and I respectfully cannot agree with reading "close proximity" to necessarily mean "very near." *See* Majority Op., at 1038. Neither do I agree with the attendant disapproval of *Commonwealth v. Sanes,* 955 A.2d 369, 377 (Pa.Super.2008), and its progeny. *See* Majority Op., at 1038–39. I would instead attach a general, totality of the circumstances analysis to the "close proximity" inquiry, which would allow trial courts to consider all factors made relevant by the circumstances, rather than deeming some unspecified but insufficient linear distance to preclude further consideration.

Actual distance is of course relevant, but it should not be preclusive of other factors that maybe more relevant in a given case. In cosmic terms, we may say the earth is very near the moon. In a large warehouse processing mass quantities of drugs, an arsenal of firearms used by the dealers but stored in a locker one hundred yards away may be closely proximate, while a matter of a few yards in a house with many occupants might disconnect a firearm from the drugs under the circumstances. If a person from out-of-town phoned appellant from half a mile away to confirm he was on the way to make a buy, could he say he was very near? If he asked if appellant had a firearm, appellant could honestly answer that he did, and it was very near. The concept of nearness depends on the situation, and I find the words in the statute reflect the need for such flexibility. For analytical purposes, the issue is not determined by physical distance alone.

In the present case, I find the evidence of record regarding the specifics of the residence and location of the drugs and firearm, coupled with other evidence of appellant's exclusive ***417** use of the residence to sell drugs and admission to possessing all the drugs located therein, sufficient to find control and close proximity. Thus, I would affirm and not remand; however, understanding that remand has been ordered, I believe the directed inquiry should be whether the drugs and the firearm were in "close proximity," not whether "[a]ppellant was in constructive control of the firearm[.]" *Id.,* at 1040.

For the above reasons, I respectfully dissent.

All Citations

623 Pa. 388, 82 A.3d 1023

Footnotes

1 This matter was reassigned to this author.

2 The remaining charges were nolle prossed.

3 In any event, Appellant concedes in his present brief that "he did plead guilty to possessing drugs located within the second floor rooms." Brief for Appellant at 34.

4 For instance, there is no indication on the record where the drugs and firearm were situated within the respective rooms and whether they were visible or concealed.

5 *See* N.T., July 29, 2008, at 45 ("[A]ll I hear is I was the only one dealing drugs out of that house. Okay. Then everything in that house is now contributable [sic] to him as far as I'm concerned, whether my colleague quashes [the weapons charge] or not."); *accord id.* at 61 ("When he pleads to knowledge and possession of all the drugs, in all the rooms, do

you want me to take one room, and say that one room, he never went in that one room, and never knew? I'm not buying it. I mean, it's ridiculous.").

6 *See* N.T., July 29, 2008, at 22 ("Don't even perceive to look into the brain of another individual, let alone another judge. He chose to do whatever he did for whatever reason. That is no longer an issue. You're before me. Don't ever try to think of what [another judge] thinks.").

7 Presumably, the court meant to discuss possession of "the firearm," not "those drugs," since the handgun was the relevant subject in *Zortman.*

8 In point of fact, in *Zortman*—consistent with the distinction some Superior Court panels otherwise have been making between possession (actual or constructive) and close proximity—the panel discussed the defendant's concessions to ownership and access to the firearm before, and entirely separate from, its analysis of proximity. Indeed, the treatment of the proximity requirement in *Zortman* focuses solely on locational concerns. *See Zortman,* 985 A.2d at 244.

9 Again, it bears mention, contrary to the common pleas court's assertion, that Appellant consistently denied knowledge of the firearm on the second floor of the Creighton Street property. The court's explanation in this regard appears to entail a very loose (continued ...) extrapolation from its reasoning that, since Appellant conceded that, to his knowledge at least, he was the only person selling drugs from the property, "everything in that house is now contributable [sic] to him." N.T., July 29, 2008, at 45.

10 Under the Superior Court construction of Section 9712.1 deriving from *Sanes,* the *mens rea* is associated with constructive possession, not proximity. *See, e.g., Zortman,* 985 A.2d at 244 (analyzing close proximity without reference to *mens rea*); *Sanes,* 955 A.2d at 373 (discussing constructive possession as subsuming "the intent to exercise ... control"). The common pleas court's displacement of the *mens rea* element into the proximity assessment appears to represent another manifestation of its conflation of constructive possession and proximity considerations.

11 In this regard, the panel's decision is more consistent with *Stein,* 39 A.3d at 369, than with *Sanes,* 955 A.2d at 377.

12 *See, e.g.,* Brief for Appellant at 13 ("Section 9712.1 always requires that the offender (or accomplice) be in physical possession or control of the firearm, and then lists four additional circumstances in the 'whether' proviso—one of which must *also* be satisfied." (emphasis in original)); *id.* at 10 ("Each of these elements is different—neither is a subset of the other.").

13 Appellant develops that, in the Forfeiture Act, "close proximity" merely triggers a rebuttable presumption as to the substantive element of drug derivation of money found in proximity to contraband. *See* 42 Pa.C.S. § 6801(a)(6)(ii). On the other hand, Appellant asserts, in Section 9712.1 " 'close proximity' ... is the substantive element itself—if the firearm and drugs are in close proximity, that element of Section 9712.1 is irrebuttally [sic] established." Brief for Appellant at 28.

14 Throughout the course of his arguments, Appellant invokes various other principles of statutory construction, including the axiom disfavoring surplusage (in connection with his argument that control and close proximity must be considered separately), *see* Brief for Appellant at 17, 21; the practice of considering, as an aid in construction, the title of the statute (here, "Sentences for certain drug offenses committed *with* firearms," 42 Pa.C.S. § 9712.1 (emphasis added)), *see* 1 Pa.C.S. § 1924; and the maxim of *noscitur a sociis,* which posits that the meaning of a word may be informed by accompanying words, *see, e.g., Mountain Village v. Board of Supervisors,* 582 Pa. 605, 618, 874 A.2d 1, 8–9 (2005). In this last respect, Appellant suggests that the word "control" must be regarded as "distinct from, but informed by and comparable to" the adjacent term "physical possession." Brief for Appellant at 21.

15 He explains, for example:

> It can be said, in some sense, that Philadelphia, Pa., and Camden, N.J., are in close proximity to each other because they are only separated by the ½ mile wide Delaware River.

Brief for Appellant at 28.

16 Thus, with respect to the title of Section 9712.1 ("Sentences for certain drug offenses committed *with* firearms," 42 Pa.C.S. § 9712.1 (emphasis added)), the Commonwealth asserts that the Legislature's use of the word "with" "indicates nothing more than the possession or control of the firearm must be contemporaneous with the drug dealing." Brief for Appellee at 16; *accord Stein,* 39 A.3d at 369.

17 The Commonwealth elaborates:

> [U]nder the hypothetical scenarios imagined by the defendant, the offender would be free to adduce evidence at sentencing that the gun was not his, and the court would be free to determine that the statute did not apply. Simply because close proximity between the firearm and the drugs is sufficient to support the inference that the defendant is in physical possession or control of the gun, does not mean that the sentencing court is obliged to draw this inference when confronted with compelling evidence that the gun in fact did not belong to the defendant but rather a third party unaffiliated with him or his drug trafficking.

Brief for Appellee at 25.

18 To the extent that our undertaking, below, involves statutory construction, our review is plenary. *See, e.g., Six L's Packing Co. v. W.C.A.B. (Williamson),* 615 Pa. 615, 628–30, 44 A.3d 1148, 1157 (2012). We observe, nonetheless, that application of Section 9712.1(a)'s requirements to particular controversies entails resolution of mixed questions of law and fact, as to which a degree of deference is due to the judgment of the court of original jurisdiction. *See Gentex Corp. v. W.C.A.B. (Morack),* 611 Pa. 38, —— n. 10, 23 A.3d 528, 534 n. 10 (2011). In terms of the salient facts, we defer to factual findings and credibility determinations made by courts of original jurisdiction, so long as they are supported by the record. *See Commonwealth v. Myers,* 554 Pa. 569, 576, 722 A.2d 649, 652 (1998).

19 The aspects of scienter reflected in the above definitions address the police-officer and taxi-cab examples offered by Appellant. In either scenario as developed by Appellant, there has been no manifestation of an intent to exercise control over the weapon; therefore, in neither scenario should the defendant be at risk of exposure to a mandatory sentence under Section 9712.1(a), absent additional factual circumstances implicating the necessary *mens rea.*

20 Although the above quotation goes to the association between the firearm and drug trafficking, an overlapping inference pertains to establish the defendant's connection with the weapon, in light of proven association with the nearby contraband.

21 On this topic, we differ with Appellant's opposition to discernment of some guidance from decisions addressing close proximity under the Forfeiture Act. To the degree Appellant's argument is premised on the requirement of strict construction in the penal context, we observe that the same is required in the forfeiture setting, *see, e.g., Commonwealth v. $2,523.48 U.S. Currency,* 538 Pa. 551, 556–57, 649 A.2d 658, 660–61 (1994), as the law disfavors forfeitures, *see Schwartz v. Rockey,* 593 Pa. 536, 556, 932 A.2d 885, 897–98 (2007).

22 The dissenting opinion appears to recognize that Section 9712.1(a) is ambiguous; however, it offers no account for role of the application of the rule of lenity in such circumstances. *See* 1 Pa.C.S. § 1928(b)(1) (requiring strict construction of penal statutes); *accord Booth,* 564 Pa. at 234, 766 A.2d at 846 (explaining that, "where doubt exists concerning the proper scope of a penal statute, it is the accused who should receive the benefit of such doubt").

23 The application of strict liability in *Stein,* 39 A.3d at 369, is also disapproved.

24 In this regard, we reiterate that the established facts concerning the locations of the drugs and the handgun are general in nature, *see supra* note 4, as the police officers involved in the search of the Creighton Street residence did not testify as to the details. With reference to the prosecutor's inquiry to the presiding judge whether she wished to hear from those officers, we observe that Section 9712.1(c) requires the court to permit reasonable development of an evidentiary record by both the Commonwealth and the defendant. 42 Pa.C.S. § 9712.1(c). It is not the sentencing court's function to advise the prosecutor as to what evidence should be adduced to make the Commonwealth's case.

25 Again, this matter was raised and briefed under a scheme controlled by now-overruled United States Supreme Court decisions. In the absence of developed arguments concerning whether and to what extent the new federal constitutional overlay should apply to this case, we decline to apply *Alleyne* outright at this juncture.

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101 A.3d 801
Superior Court of Pennsylvania.

COMMONWEALTH of Pennsylvania, Appellee
v.
Jose R. VALENTINE, Appellant.

Submitted Aug. 4, 2014.
|
Filed Oct. 3, 2014.

Synopsis

Background: Defendant was convicted in the Court of Common Pleas, County of Delaware, Criminal Division, No. CP–23–CR–0001807–2013, Kelly, J., of robbery. Defendant appealed.

Holdings: The Superior Court, No. 3155 EDA 2013, Allen, J., held that:

[1] evidence was sufficient to establish defendant's identity;

[2] evidence was sufficient to establish that defendant placed victim in fear of serious bodily injury;

[3] trial court's use of verdict slip to allow factfinding by jury on factual predicates for **mandatory minimum sentence** did not cure unconstitutionality of **mandatory minimum sentencing** statutes; and

[4] **mandatory minimum sentencing** statutes were unconstitutional in their entirety in providing for factfinding by court rather than jury on factual predicates.

Vacated and remanded.

Fitzgerald, J., joined the opinion.

Gantman, P.J., filed a concurring opinion in which Allen and Fitzgerald, JJ., joined.

West Headnotes (20)

[1] **Sentencing and Punishment** Factors enhancing **sentence**

350H **Sentencing** and Punishment
350HII **Sentencing** Proceedings in General
350HII(F) Evidence
350Hk322 Degree of Proof
350Hk322.5 Factors enhancing **sentence**

Mandatory minimum sentencing statutes that do not pertain to prior convictions are constitutionally infirm insofar as they permit a judge to automatically increase a defendant's **sentence** based on a preponderance of the evidence standard. 18 Pa.C.S.A. §§ 6317(b), 7508(b); 42 Pa.C.S.A. §§ 9712(c), 9712.1(c), 9713(c), 9718(c), 9719(b).

37 Cases that cite this headnote

[2] **Criminal Law** Construction in favor of government, state, or prosecution

Criminal Law Reasonable doubt

110 Criminal Law
110XXIV Review
110XXIV(M) Presumptions
110k1144 Facts or Proceedings Not Shown by Record
110k1144.13 Sufficiency of Evidence
110k1144.13(2) Construction of Evidence
110k1144.13(3) Construction in favor of government, state, or prosecution
110 Criminal Law
110XXIV Review
110XXIV(P) Verdicts
110k1159 Conclusiveness of Verdict
110k1159.2 Weight of Evidence in General
110k1159.2(7) Reasonable doubt

The standard the Superior Court applies in reviewing the sufficiency of the evidence is whether, viewing all the evidence admitted at trial in the light most favorable to the verdict winner, there is sufficient evidence to enable the fact-finder to find every element of the crime beyond a reasonable doubt.

12 Cases that cite this headnote

[3] **Criminal Law** Weighing evidence

110 Criminal Law
110XXIV Review
110XXIV(P) Verdicts
110k1159 Conclusiveness of Verdict
110k1159.2 Weight of Evidence in General
110k1159.2(9) Weighing evidence

In applying the test to determine sufficiency of the evidence to support a conviction, the Superior Court may not weigh the evidence and substitute its judgment for the fact-finder.

1 Cases that cite this headnote

[4] **Criminal Law** Degree of proof

110 Criminal Law
110XVII Evidence
110XVII(V) Weight and Sufficiency
110k552 Circumstantial Evidence
110k552(3) Degree of proof

The facts and circumstances established by the Commonwealth need not preclude every possibility of a defendant's innocence.

6 Cases that cite this headnote

[5] **Criminal Law** Verdict unsupported by evidence or contrary to evidence

110 Criminal Law
110XXIV Review
110XXIV(P) Verdicts
110k1159 Conclusiveness of Verdict
110k1159.2 Weight of Evidence in General
110k1159.2(2) Verdict unsupported by evidence or contrary to evidence

Any doubts regarding a defendant's guilt may be resolved by the fact-finder unless the evidence is so weak and inconclusive that as a matter of law no probability of fact may be drawn from the combined circumstances.

[6] **Criminal Law** Circumstantial Evidence

110 Criminal Law
110XVII Evidence
110XVII(V) Weight and Sufficiency
110k552 Circumstantial Evidence
110k552(1) In general

The Commonwealth may sustain its burden of proving every element of the crime beyond a reasonable doubt by means of wholly circumstantial evidence.

4 Cases that cite this headnote

[7] **Criminal Law** Weight and sufficiency

110 Criminal Law
110XXIV Review
110XXIV(L) Scope of Review in General
110XXIV(L)2 Matters or Evidence Considered
110k1134.17 Evidence
110k1134.17(3) Weight and sufficiency

In applying the test to determine sufficiency of the evidence to support a conviction, the entire record must be evaluated and all evidence actually received must be considered.

1 Cases that cite this headnote

[8] **Criminal Law** Credibility of witnesses in general

110 Criminal Law
110XVII Evidence
110XVII(V) Weight and Sufficiency
110k553 Credibility of witnesses in general

The finder of fact, while passing upon the credibility of witnesses and the weight of the evidence produced, is free to believe all, part or none of the evidence.

15 Cases that cite this headnote

[9] **Criminal Law** Identity of Accused

110 Criminal Law
110XVII Evidence
110XVII(D) Facts in Issue and Relevance
110k339.5 Identity of Accused
110k339.6 In general

In determining whether a particular identification was reliable, the court should consider the opportunity of the witness to view the criminal at the time of the crime, the witness's degree of attention, the accuracy of his or her prior description of the criminal, the level of certainty demonstrated at the confrontation, and the time between the crime and the confrontation.

11 Cases that cite this headnote

[10] **Criminal Law** Identity of Accused

110 Criminal Law
110XVII Evidence
110XVII(D) Facts in Issue and Relevance
110k339.5 Identity of Accused
110k339.6 In general

In determining whether a particular identification was reliable, the opportunity of the witness to view the actor at the time of the crime is the key factor in the totality of the circumstances analysis.

8 Cases that cite this headnote

[11] **Criminal Law** Identity and characteristics of persons or things

110 Criminal Law
110XVII Evidence
110XVII(V) Weight and Sufficiency
110k566 Identity and characteristics of persons or things

Evidence of identification need not be positive and certain to sustain a conviction.

2 Cases that cite this headnote

[12] **Criminal Law** Identity and characteristics of persons or things

110 Criminal Law
110XVII Evidence
110XVII(V) Weight and Sufficiency
110k566 Identity and characteristics of persons or things

Although common items of clothing and general physical characteristics are usually insufficient to support a conviction, such evidence can be used as other circumstances to establish the identity of a perpetrator.

4 Cases that cite this headnote

[13] **Criminal Law** Weight and sufficiency

110 Criminal Law
110XXIV Review
110XXIV(L) Scope of Review in General
110XXIV(L)2 Matters or Evidence Considered
110k1134.17 Evidence
110k1134.17(3) Weight and sufficiency

Out-of-court identifications are relevant to appellate review of sufficiency of the evidence claims, particularly when they are given without hesitation shortly after the crime while memories were fresh; given additional evidentiary circumstances, any indefiniteness and uncertainty in the identification testimony goes to its weight.

11 Cases that cite this headnote

[14] **Robbery** Identity of accused

342 Robbery
342k24 Weight and Sufficiency of Evidence
342k24.40 Identity of accused

Evidence was sufficient to establish identity of defendant as assailant who robbed victim; victim testified she was able to see assailant's clothing and unconcealed portions of his face and eyes during commission of crime, only a short interval of time elapsed between robbery and victim's positive and unequivocal identification of defendant as wearing identical clothes assailant had been wearing, victim identified defendant as assailant at preliminary hearing and trial, victim's purse was found in dumpster at apartment complex where defendant resided, and victim testified that defendant had attempted to contact her through social media prior to robbery. 18 Pa.C.S.A. § 3701(a)(1)(ii).

1 Cases that cite this headnote

[15] **Robbery** Force and putting in fear

342 Robbery
342k24 Weight and Sufficiency of Evidence
342k24.50 Force and putting in fear

The evidence is sufficient to convict a defendant of robbery under statute prohibiting threatening another with or intentionally putting another in fear of immediate serious bodily injury if the evidence demonstrates aggressive actions that threatened the victim's safety; the court must focus on the nature of the threat posed by an assailant and whether he reasonably placed a victim in fear of immediate serious bodily injury. 18 Pa.C.S.A. §§ 2301, 3701(a)(1)(ii).

20 Cases that cite this headnote

[16] **Robbery** Putting in fear

342 Robbery
342k7 Putting in fear

When determining whether a victim of robbery has been placed in fear of serious bodily injury, the Superior Court uses an objective standard; therefore, the victim's subjective state of mind during the robbery is not dispositive. 18 Pa.C.S.A. §§ 2301, 3701(a)(1)(ii).

8 Cases that cite this headnote

[17] **Robbery** Force and putting in fear

342 Robbery
342k24 Weight and Sufficiency of Evidence
342k24.50 Force and putting in fear

Evidence was sufficient to establish that robbery defendant placed victim in fear of serious bodily injury; defendant appeared from outside victim's view while she was alone at a public transit bus stop and pointed a gun a few inches from her face, threatened to shoot her, and demanded she hand over her purse and cellular telephone, and victim testified that she was afraid, shocked, and nervous and did not know whether defendant would shoot her if she said the wrong thing. 18 Pa.C.S.A. §§ 2301, 3701(a)(1)(ii).

3 Cases that cite this headnote

[18] **Criminal Law** Right to jury determination

110 Criminal Law
110XXIV Review
110XXIV(E) Presentation and Reservation in Lower Court of Grounds of Review
110XXIV(E)1 In General
110k1042.3 **Sentencing** and Punishment
110k1042.3(3) Right to jury determination

Superior Court would address merits of robbery defendant's argument that he received an illegal **sentence** based upon **mandatory minimum sentencing** statutes that did not require submission to jury of facts which increased penalty to find beyond a reasonable doubt, even though defendant did not raise argument before trial court, where defendant's claim fell within narrow class of cases considered to implicate illegal **sentences**. 18 Pa.C.S.A. § 3701(a)(1)(ii); 42 Pa.C.S.A. §§ 9712, 9713.

46 Cases that cite this headnote

[19] **Jury** Statutory provisions

Sentencing and Punishment Factors enhancing **sentence**

230 Jury
230II Right to Trial by Jury
230k30 Denial or Infringement of Right
230k31.1 Statutory provisions
350H **Sentencing** and Punishment
350HII **Sentencing** Proceedings in General
350HII(F) Evidence
350Hk322 Degree of Proof
350Hk322.5 Factors enhancing **sentence**

Trial court's permitting jury, on verdict slip, to determine beyond a reasonable doubt the factual predicates of firearm possession and proximity of offense to public transportation, as required for **mandatory minimum sentencing** for robbery, was an impermissible legislative function that did not cure the unconstitutionality of the **mandatory minimum sentencing** statutes in delegating fact-finding authority to **sentencing** judge using a preponderance-of-evidence standard rather than to the jury. 18 Pa.C.S.A. §§ 2301, 3701(a)(1)(ii); 42 Pa.C.S.A. §§ 9712, 9713.

50 Cases that cite this headnote

[20] **Jury** Statutory provisions

Sentencing and Punishment Factors enhancing **sentence**

Statutes Criminal justice

230 Jury
230II Right to Trial by Jury
230k30 Denial or Infringement of Right
230k31.1 Statutory provisions
350H **Sentencing** and Punishment
350HII **Sentencing** Proceedings in General
350HII(F) Evidence
350Hk322 Degree of Proof
350Hk322.5 Factors enhancing **sentence**
361 Statutes
361VIII Validity

361k1532 Effect of Partial Invalidity; Severability
361k1535 Particular Statutes
361k1535(6) Criminal justice
Subsections of **mandatory minimum sentencing** statutes permitting a trial court to impose **mandatory minimum sentence** for robbery based on the court's finding, by a preponderance of evidence, of the factual predicates of possession of firearm and proximity of offense to public transportation, rather than based on a jury's finding of factual predicates under reasonable doubt standard as required by Constitution, was not severable from the remainder of statutes, and therefore the statutes in their entirety were unconstitutional. 18 Pa.C.S.A. §§ 2301, 3701(a)(1)(ii); 42 Pa.C.S.A. §§ 9712, 9713.

134 Cases that cite this headnote

West Codenotes

Held Unconstitutional
42 Pa.C.S.A. §§ 9712, 9713.

Recognized as Unconstitutional
18 Pa.C.S.A. §§ 6317(b), 7508(b); 42 Pa.C.S.A. §§ 9712.1(c), 9718(c), 9719(b).

Attorneys and Law Firms

***803** Patrick J. Connors, Public Defender, and Steven M. Papi, Public Defender, Media, for appellant.

Michelle P. Hutton, Assistant District Attorney, and John J. Whelan, Assistant District Attorney, Media, for Commonwealth, appellee.

BEFORE: GANTMAN, P.J., ALLEN, and FITZGERALD[*], JJ.

Opinion

OPINION BY ALLEN, J.:

Jose Valentine ("Appellant") appeals from the judgment of **sentence** imposed after a jury convicted him of robbery.[1] We vacate Appellant's judgment of **sentence** and remand for resentencing.

***804** The pertinent facts and procedural history are as follows: On November 4, 2012, at approximately 6:05 a.m., the victim, Renee Gibbs, was alone, waiting for her SEPTA bus, at the intersection of Ninth and Lloyd Streets in Chester City, when she was approached from behind by Appellant, who pointed a handgun at her and demanded money. Trial Court Opinion, 4/9/14, at 9–10. Appellant was wearing a mask that partially obscured his face, and dark clothing. *Id.* at 10. Appellant threatened to shoot Ms. Gibbs, who surrendered her purse and cellular phone. *Id.* Appellant then fled and Ms. Gibbs went to her mother's house nearby and called the police. *Id.* Police officers responded promptly and Ms. Gibbs provided them with a description of her assailant. *Id.* Within twenty minutes, Appellant was apprehended at the intersection of Ninth and Pennell Streets, on the same block where the robbery occurred. *Id.* at 11–12. Ms. Gibbs was brought to the location where Appellant was apprehended and identified him as her assailant. *Id.*

[1] Appellant was arrested, and on April 10, 2013, the Commonwealth filed a criminal information charging Appellant with robbery, receiving stolen property, theft by unlawful taking, carrying a firearm without a license, possession of an instrument of crime, possession of a prohibited offensive weapon, and possession of a firearm by a minor. On July 30, 2013, the Commonwealth orally moved to amend the criminal information. N.T., 7/30/13, at 4. Appellant did not object and the trial court granted the Commonwealth's application to amend the criminal information to include the allegation that Appellant visibly possessed a firearm, for purposes of the **mandatory minimum sentencing** provisions of 42 Pa.C.S.A. § 9712, and to specify that the offenses were committed in or near public transportation for purposes of the **mandatory minimum sentencing** provisions of 42 Pa.C.S.A. § 9713.[2]

A jury trial commenced on July 30, 2013, at the conclusion of which the jury found Appellant guilty of robbery. Additionally the verdict slip presented to the jury the following questions, to which the jury returned a finding of "yes" as to both questions:

> Did the Defendant Jose R. Valentine, visibly possess a firearm, whether or not the firearm was loaded or functional, that placed [the victim] in reasonable fear of serious bodily injury during his commission of the above-described robbery offense?

> Did the Defendant Jose R. Valentine, in whole or in part, commit the above-described robbery offense at or near a ***805** Septa bus stop, or in the immediate vicinity of a Septa bus stop?

Verdict Slip, 7/31/13. Neither the Commonwealth nor Appellant objected to the verdict slip. *See* N.T., 7/31/13, at 3–4.

Following a **sentencing** hearing on October 3, 2013, the trial court determined that the **mandatory minimum sentencing** provisions of 42 Pa.C.S.A. §§ 9712 and 9713 were applicable to Appellant, and **sentenced** him to a term of imprisonment of five (5) to ten (10) years for robbery. Appellant filed a *pro se* motion for reconsideration on October 10, 2013. In response, the trial court convened a hearing on October 16, 2013, at which time Appellant's counsel moved to withdraw the post-**sentence** motion. The trial court granted counsel's application to withdraw the motion, and on October 16, 2013 entered an order memorializing the withdrawal of the post-**sentence** motion pursuant to Pa.R.Crim.P. 720(A)(2)(c). *See Commonwealth v. Claffey,* 80 A.3d 780, 783 (Pa.Super.2013) ("When post-**sentence** motions are withdrawn and the trial court enters an order memorializing the withdrawal, any direct appeal must be filed within thirty days of the order."); Pa.R.Crim.P. 720(A)(2)(c). Appellant filed a notice of appeal on November 14, 2013. Both Appellant and the trial court have complied with Pa.R.A.P. 1925.

Appellant presents two issues for our review:

> 1) Whether the evidence was insufficient to sustain the conviction for Robbery since [Appellant] was not identified as the culprit beyond a reasonable doubt, and because the Commonwealth failed to prove that [Appellant] threatened another person or intentionally put another person in fear of immediate serious bodily injury in the course of committing a theft?
>
> 2) Whether the **mandatory minimum sentence** imposed herein is illegal, and should be vacated, since the provisions that were applied were rendered unconstitutional?

Appellant's Brief at 5.

[2] [3] [4] [5] [6] [7] [8] In his first issue, Appellant asserts that the evidence was insufficient to support his robbery conviction. Appellant's Brief at 13–18. Our standard of review with regard to a sufficiency challenge is as follows:

> The standard we apply in reviewing the sufficiency of the evidence is whether viewing all the evidence admitted at trial in the light most favorable to the verdict winner, there is sufficient evidence to enable the fact-finder to find every element of the crime beyond a reasonable doubt. In applying [the above] test, we may not weigh the evidence and substitute our judgment for the fact-finder. In addition, we note that the facts and circumstances established by the Commonwealth need not preclude every possibility of innocence. Any doubts regarding a defendant's guilt may be resolved by the fact-finder unless the evidence is so weak and inconclusive that as a matter of law no probability of fact may be drawn from the combined circumstances. The Commonwealth may sustain its burden of proving every element of the crime beyond a reasonable doubt by means of wholly circumstantial evidence. Moreover, in applying the above test, the entire record must be evaluated and all evidence actually received must be considered. Finally, the [finder] of fact, while passing upon the credibility of witnesses and the weight of the evidence produced, is free to believe all, part or none of the evidence.

Commonwealth v. Devine, 26 A.3d 1139, 1145 (Pa.Super.2011).

***806 [9] [10] [11] [12] [13]** Appellant argues that the evidence was insufficient to support his robbery conviction because he was not identified as Ms. Gibbs' assailant beyond a reasonable doubt. *See* Appellant's Brief at 14–17. In determining whether a particular identification was reliable, the court "should consider the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of [his or her] prior description of the criminal, the level of certainty demonstrated at the confrontation, and the time between the crime and the confrontation. The opportunity of the witness to view the actor at the time of the crime is the key factor in the totality of the circumstances analysis." *Commonwealth v. Bruce,* 717 A.2d 1033, 1037 (Pa.Super.1998) (citations omitted).

> [E]vidence of identification need not be positive and certain to sustain a conviction. Although common items of clothing and general physical characteristics are usually insufficient to support a conviction, such evidence can be used as other circumstances to establish the identity of a perpetrator. Out-of-court identifications are relevant to our review of sufficiency of the evidence claims, particularly when they are given without hesitation shortly after the crime while memories were fresh. Given additional evidentiary circumstances, any indefiniteness

> and uncertainty in the identification testimony goes to its weight.

Commonwealth v. Orr, 38 A.3d 868, 874 (Pa.Super.2011).

[14] Here, Ms. Gibbs testified that during the commission of the crime, she was able to see her assailant's clothing, as well as the unconcealed portions of his face and eyes. N.T., 7/31/13, at 10–11. Moreover, only a short interval of time elapsed between the robbery and Ms. Gibbs' positive and unequivocal identification of Appellant as wearing the identical clothes her assailant had been wearing, and having the same build and ethnicity. *Id.* at 20–21. Additionally, Ms. Gibbs identified Appellant at the preliminary hearing and at trial as her assailant. *Id.* at 22. Furthermore, Ms. Gibbs' purse was found in the dumpster located at the apartment complex where Appellant resided, which was a short distance from where the robbery occurred. *Id.* at 49–52. Ms. Gibbs also provided testimony that Appellant had attempted to contact her through Facebook prior to the robbery. *Id.* at 24–25. Based on the foregoing, we agree with the trial court that the evidence was sufficient to establish Appellant's identity beyond a reasonable doubt. *See Orr, supra* (finding evidence sufficient to support appellants' conviction after review of the entire record and all the circumstantial evidence presented in the light most favorable to the Commonwealth as verdict winner, where the victim identified appellant immediately following the robbery based only on the clothing he was wearing and a similar red beard, and despite the victim being unable to positively identify appellant in a line-up, or in post-incident court proceedings; any subsequent indefiniteness and uncertainty in the identification testimony went to its weight which was properly for the jury to assess and which this Court declined to disturb on appeal).

[15] **[16]** Appellant additionally argues that the evidence was insufficient to sustain his robbery conviction because "the Commonwealth failed to prove that [Appellant] threatened another person or intentionally put another person in fear of immediate serious bodily injury in the course of committing a theft." Appellant's Brief at 13. Appellant is correct that to sustain his conviction for robbery (serious bodily injury), the Commonwealth was required to prove that in the course of committing a ***807** theft, Appellant "threaten[ed] another with or intentionally put ... [her] in fear of immediate serious bodily injury." 18 Pa.C.S.A. § 3701(a)(1)(ii). "The evidence is sufficient to convict a defendant of robbery under this section if the evidence demonstrates aggressive actions that threatened the victim's safety. The court must focus on the nature of the threat posed by an assailant and whether he reasonably placed a victim in fear of immediate serious bodily injury. Additionally, this Court has held that the threat need not be verbal." *Commonwealth v. Jannett,* 58 A.3d 818, 822 (Pa.Super.2012) (citations and internal quotations omitted). "Serious bodily injury" is defined as "[b]odily injury which creates a substantial risk of death or which causes serious, permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ." 18 Pa.C.S.A. § 2301. "When determining whether a victim has been placed in fear of serious bodily injury, this Court uses an objective standard; therefore, [the victim's] subjective state of mind during the robbery is not dispositive." *Commonwealth v. Kubis,* 978 A.2d 391, 398 (Pa.Super.2009) (concluding that the nature of appellant's threat to stab the victim was such that a reasonable person in the victim's position would fear for his life or safety even though no knife was physically produced during robbery).

[17] Again, viewing the evidence in the light most favorable to the Commonwealth as verdict winner, we agree with the trial court that the evidence was sufficient to establish that Appellant placed Ms. Gibbs in fear of serious bodily injury. The trial court explained:

> Ms. Gibbs at the time of the robbery was alone at the SEPTA transit stop during the morning hours. [Appellant] appeared from outside Ms. Gibbs' view, startling her and brandishing a firearm just a few inches from Ms. Gibbs' face. It was at gunpoint that [Appellant] demanded Ms. Gibbs hand over her purse and cellular phone. The gravity of [Appellant's] menacing threat was shown through Ms. Gibbs testifying that [Appellant] threatened that he was "going to fucking shoot [her]." There is certainly no doubt that Ms. Gibbs was intentionally placed "in fear of immediate serious bodily injury".

Trial Court Opinion, 4/9/14, at 19 (citations to notes of testimony omitted).

We agree with the trial court that Appellant's actions in pointing a gun at Ms. Gibbs and threatening to shoot her would have placed a reasonable person in fear of serious bodily injury, and that the evidence was sufficient to sustain Appellant's robbery conviction. In fact, Ms. Gibbs explicitly testified, "I was afraid. I was shocked. I was nervous. I couldn't believe what was going on.... [H]e had a gun in my face. I didn't know if I say the wrong thing would he get mad, would he shoot me ... I didn't know what he was going to do. I didn't know what the outcome of this was ... I was just afraid." N.T., 7/31/13, at 15. Appellant's claim that the evidence was insufficient to prove that he threatened Ms. Gibbs with or

intentionally put her in fear of immediate serious bodily injury is without merit.

In his second issue, Appellant argues that his **sentence** was illegal because the **mandatory minimum sentencing** provisions employed by the trial court were unconstitutional. Appellant's claim addresses the alleged illegality of imposing a **mandatory minimum sentence** pursuant to 42 Pa.C.S. §§ 9712 and 9713.

42 Pa.C.S.A. § 9712 provides:

> **(a) Mandatory sentence.**—Except as provided under section 9716 (relating to two or more **mandatory minimum sentences** applicable), any person ***808** who is convicted in any court of this Commonwealth of a crime of violence as defined in section 9714(g) (relating to **sentences** for second and subsequent offenses), shall, if the person visibly possessed a firearm or a replica of a firearm, whether or not the firearm or replica was loaded or functional, 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 years of total confinement notwithstanding any other provision of this title or other statute to the contrary. Such persons shall not be eligible for parole, probation, work release or furlough.
>
> **(b)** Proof at **sentencing**.—Provisions of this section shall not be an element of the crime and notice thereof 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 any evidence presented at trial and shall afford the Commonwealth and the defendant an opportunity to present any necessary additional evidence and shall determine, by a preponderance of the evidence, if this section is applicable.

42 Pa.C.S.A. § 9713 provides:

> **(a) Mandatory sentence.**—Except as provided under section 9716 (relating to two or more **mandatory minimum sentences** applicable), any person who is convicted in any court of this Commonwealth of a crime of violence as defined in section 9714(g) (relating to **sentences** for second and subsequent offenses), shall be **sentenced** to a **minimum sentence** of at least five years of total confinement if the crime occurs in or near public transportation as defined in subsection (b), notwithstanding any other provision of this title or other statute to the contrary.
>
> **(b) Site of commission of crime.**—For the purposes of subsection (a), a crime shall be deemed to have occurred in or near public transportation if it is committed in whole or in part in a vehicle, station, terminal, waiting area or other facility used by a person, firm, corporation, municipality, municipal authority or port authority in rendering passenger transportation services to the public or a segment of the public or if it is committed in whole or in part on steps, passageways or other areas leading to or from or in the immediate vicinity of such a public transportation vehicle, station, terminal, waiting area or other facility.
>
> **(c) Proof at sentencing.**—Provisions of this section shall not be an element of the crime and notice thereof 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 any evidence presented at trial and shall afford the Commonwealth and the defendant an opportunity to present any necessary additional evidence and shall determine, by a preponderance of the evidence, if this section is applicable.

[18] At the time Appellant was **sentenced**, pursuant to the **mandatory sentencing** ***809** provisions of § 9712, the Commonwealth was required to demonstrate to the trial court by a preponderance of the evidence that Appellant visibly possessed a gun and that the victim was placed in reasonable fear of death or serious bodily injury. For purposes of the **mandatory sentencing** provisions of § 9713, the Commonwealth was required to prove to the trial court by a preponderance of the evidence that the crime occurred in or near public transportation.

As noted above, however, the United States Supreme Court in *Alleyne v. United States,* —— U.S. ——, 133 S.Ct. 2151, 2155, 186 L.Ed.2d 314 (2013), held that any facts leading to an increase in a **mandatory minimum sentence** are elements of the crime and must be presented to a jury and proven beyond a reasonable doubt. In reliance on *Alleyne,* Appellant argues that the application of his **mandatory minimum sentence** was illegal. Although Appellant did not raise this claim before

the trial court, this Court in *Commonwealth v. Watley,* 81 A.3d 108, 118 (Pa.Super.2013) (*en banc*), addressing the *Alleyne* decision, observed that where "[a]pplication of a **mandatory minimum sentence** gives rise to illegal **sentence** concerns, even where the **sentence** is within the statutory limits[,] [such] [l]egality of **sentence** questions are not waivable." Because Appellant's claim falls within this "narrow class of cases ... considered to implicate illegal **sentences**," we address its merits. *Watley,* 81 A.3d at 118.[3]

In *Watley,* we explained that "[t]he *Alleyne* decision ... renders those Pennsylvania **mandatory minimum sentencing** statutes that do not pertain to prior convictions constitutionally infirm insofar as they permit a judge to automatically increase a defendant's **sentence** based on a preponderance of the evidence standard." *Watley,* 81 A.3d at 117 (holding that § 9712(c) and § 9713(c), *inter alia,* are unconstitutional). *See also Commonwealth v. Hanson,* —— Pa. ——, 82 A.3d 1023, 1039–1040 (2013) (prior to *Alleyne,* state legislatures were free to delegate fact-finding authority to **sentencing** judges relative to **mandatory minimum sentences**; however, *Alleyne* overruled those decisions on this salient point).

Appellant argues that pursuant to *Alleyne,* sections 9712 and 9713 are unconstitutional in their entirety and his **mandatory sentence** is therefore illegal. Appellant's Brief at 18–22. Appellant recognizes that in his case the Commonwealth amended the criminal information and the trial court attempted to cure the unconstitutional provisions of § 9712 and § 9713 by having the jury (rather than the trial court) decide on the verdict slip whether Appellant possessed a firearm and whether the robbery occurred in or near public transportation, beyond a reasonable doubt. *Id.* at 22. However, Appellant contends that such actions did not remedy the fundamental unconstitutionality of the statutes. Rather, Appellant asserts that the unconstitutional provisions of §§ 9712(c) and 9713(c) (requiring **sentencing** factors to be determined by the trial court by a preponderance of the evidence) are unseverable, and that the statutes at issue are unconstitutional in their entirety. Moreover, Appellant ***810** maintains that by asking the jury to decide whether the factual elements of § 9712 and § 9713 had been met, the trial court effectively rewrote § 9712 and § 9713 to comply with *Alleyne,* which constituted a legislative function that the judicial branch is not authorized to perform. *Id.*

In consideration of Appellant's claim, we find instructive our recent decision in *Commonwealth v. Newman,* 99 A.3d 86 (Pa.Super.2014) (*en banc*). In *Newman,* we reviewed the constitutionality of 42 Pa.C.S.A. § 9712.1, which enhances the **minimum sentence** where a firearm is found on a drug dealer, an accomplice, or in the vicinity of the contraband. The statute at issue in *Newman* provided:

> **42 Pa.C.S.A. § 9712.1. Sentences for certain drug offenses committed with firearms**
>
> **(a) Mandatory sentence.**—Any person who is convicted of a violation of section 13(a)(30) of the act of April 14, 1972 (P.L. 233, No. 64),[1] known as The Controlled Substance, Drug, Device and Cosmetic Act, when at the time of the offense the person or the person's accomplice is in physical possession or control of a firearm, whether visible, concealed about the person or the person's accomplice or within the actor's or accomplice's reach or in close proximity to the controlled substance, shall likewise be **sentenced** to a **minimum sentence** of at least five years of total confinement.
>
> * * *
>
> **(c) Proof at sentencing.**—... The applicability of this section shall be determined at **sentencing**. The court shall consider any evidence presented at trial and shall afford the Commonwealth and the defendant an opportunity to present any necessary additional evidence and shall determine, by a preponderance of the evidence, if this section is applicable.
>
> 42 Pa.C.S.A. § 9712.1

We explained in *Newman* that under *Alleyne,* the factual predicates for imposition of the § 9712.1 **mandatory minimum sentence** (i.e., that the firearm was found on a drug dealer, an accomplice or in the vicinity of the contraband) "must be pleaded in the indictment, and must be found by the jury beyond a reasonable doubt before the defendant may be subjected to an increase in the **minimum sentence**." *Newman* at 98. Concluding that the factual predicates for imposition of the **mandatory minimum sentence** had not been presented to a jury, we vacated the judgment of **sentence**.

Notably in *Newman,* we declined the Commonwealth's proposed remedy that we remand for a **sentencing** jury to determine beyond a reasonable doubt whether the Commonwealth had proven the factual predicates for § 9712.1. We explained:

> [T]he Commonwealth's assertion assumes that Subsection (a) of Section 9712.1, which sets the predicate for the **mandatory minimum sentence**, survives constitutional muster, and that only Subsection (c), which directs that the trial court shall determine the predicate of Subsection (a) by a preponderance of the evidence, fails. In other words, the Commonwealth is contending that we may sever and retain those parts of Section 9712.1 that are not constitutionally infirm.... We respectfully disagree.
>
> Pennsylvania law provides for the severing of statutes where one part of a statute is found unconstitutional:
>
> **§ 1925. Constitutional construction of statutes**
>
> ***811** 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.A. § 1925.
>
> We find that Subsections (a) and (c) of Section 9712.1 are essentially and inseparably connected. Following *Alleyne,* Subsection (a) must be regarded as the elements of the aggravated crime of possessing a firearm while trafficking drugs. If Subsection (a) is the predicate arm of Section 9712.1, then Subsection (c) is the "enforcement" arm. Without Subsection (c), there is no mechanism in place to determine whether the predicate of Subsection (a) has been met.
>
> The Commonwealth's suggestion that we remand for a **sentencing** jury would require this court to manufacture whole cloth a replacement enforcement mechanism for Section 9712.1; in other words, the Commonwealth is asking us to legislate. We recognize that in the prosecution of capital cases in Pennsylvania, there is a similar, bifurcated process where the jury first determines guilt in the trial proceeding (the guilt phase) and then weighs aggravating and mitigating factors in the **sentencing** proceeding (the penalty phase). However, this mechanism was created by the General Assembly and is enshrined in our statutes at 42 Pa.C.S.A. § 9711. We find that it is manifestly the province of the General Assembly to determine what new procedures must be created in order to impose **mandatory minimum sentences** in Pennsylvania following *Alleyne.* We cannot do so.

Newman at 101–02 (footnote omitted).

[19] Here, the trial court permitted the jury, on the verdict slip, to determine beyond a reasonable doubt whether Appellant possessed a firearm that placed the victim in fear of immediate serious bodily injury in the course of committing a theft for purposes of the **mandatory minimum sentencing** provisions of 42 Pa.C.S.A. § 9712(a), and whether the crime occurred in whole or in part at or near public transportation, for purposes of the **mandatory minimum sentencing** provisions of 42 Pa.C.S.A. § 9713(a). The jury responded "yes" to both questions. In presenting those questions to the jury, however, we conclude, in accordance with *Newman,* that the trial court performed an impermissible legislative function by creating a new procedure in an effort to impose the **mandatory minimum sentences** in compliance with *Alleyne.*

[20] The trial court erroneously presupposed that only Subsections (c) of both 9712 and 9713 (which permit a trial judge to enhance the **sentence** based on a preponderance of the evidence standard) were unconstitutional under *Alleyne,* and that Subsections (a) of 9712 and 9713 survived constitutional muster. By asking the jury to determine whether the factual prerequisites set forth in § 9712(a) and § 9713(a) had been met, the trial court effectively determined that the unconstitutional provisions of § 9712(c) and § 9713(c) were severable. Our decision in *Newman* however ***812** holds that the unconstitutional provisions of § 9712(c) and § 9713(c) are not severable but "essentially and inseparably connected" and that the statutes are therefore unconstitutional as a whole. *Id.* at 101–02. ("If Subsection (a) is the predicate arm ... then Subsection (c) is the enforcement arm. Without Subsection (c), there is no mechanism in place to determine whether the predicate of Subsection (a) has been met.").

Moreover, *Newman* makes clear that "it is manifestly the province of the General Assembly to determine what new procedures must be created in order to impose **mandatory minimum sentences** in Pennsylvania following *Alleyne.*" *Newman* at 102. Therefore, the trial court lacked the authority to allow the jury to determine the factual predicates of §§

9712 and 9713. *See Newman* at 102–03 (recognizing that several trial courts of this Commonwealth have found Section 9712.1 as a whole to be no longer workable without legislative guidance).

Because *Alleyne* and *Newman* render §§ 9712 and 9713 unconstitutional, we vacate the judgment of **sentence** and remand for the re-imposition of **sentence** without consideration of any **mandatory minimum sentence** as provided by §§ 9712 and 9713.[4]

Judgment of **sentence** vacated. Case remanded for re-imposition of **sentence** consistent with this Opinion. Jurisdiction relinquished.

Justice FITZGERALD joins the Opinion.

PJ GANTMAN files a Concurring Opinion in which Judge ALLEN and Justice FITZGERALD join.

***813** CONCURRING OPINION BY GANTMAN, P.J.:
I agree with the majority that sufficient evidence supported Appellant's robbery conviction. I am also compelled to agree that we must vacate the judgment of **sentence** and remand for re-**sentencing**, given the binding nature of this Court's recent *en banc* decision in *Commonwealth v. Newman,* 99 A.3d 86 (2014). The majority logically extends *Newman* to declare that 42 Pa.C.S.A. §§ 9712 and 9713 are likewise unconstitutional.

I write separately, however, to address an alternative available to the court upon re-**sentencing**. The **sentencing** court, perhaps, could apply a deadly weapon enhancement to Appellant's **sentence** without running afoul of *Newman. See Commonwealth v. Buterbaugh,* 91 A.3d 1247, 1270 n. 10 (Pa.Super.2014) (explaining that if **sentencing** enhancement applies, court is required to raise standard guideline range; however, court retains discretion to **sentence** outside guideline range; therefore, application of **sentencing** enhancement does not violate holding in *Alleyne v. United States,* ––U.S. ––––, 133 S.Ct. 2151, 186 L.Ed.2d 314 (2013)).

Thus, I accept the majority's ultimate decision to vacate the judgment of **sentence** and remand for re-**sentencing** without consideration of **mandatory minimums** set forth in Sections 9712 and 9713. Accordingly, I concur in the result.

Judge ALLEN joins this Concurring Opinion.

Justice FITZGERALD joins this Concurring Opinion.

All Citations

101 A.3d 801, 2014 PA Super 220

Footnotes

* Former Justice specially assigned to the Superior Court.

1 18 Pa.C.S.A. §§ 3701(a)(1)(ii).

2 In *Alleyne v. United States,* –– U.S. ––––, 133 S.Ct. 2151, 186 L.Ed.2d 314 (2013), the United States Supreme Court held:

> Any 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. *Alleyne,* 133 S.Ct. at 2155.
>
> The *Alleyne* decision ... renders those Pennsylvania **mandatory minimum sentencing** statutes that do not pertain to prior convictions constitutionally infirm insofar as they permit a judge to automatically increase a defendant's **sentence** based on a preponderance of the evidence standard.

Commonwealth v. Matteson, 96 A.3d 1064, 1066 (Pa.Super.2014); *see also Commonwealth v. Watley,* 81 A.3d 108, 117, n. 4 (Pa.Super.2013) (finding that the following statutes are unconstitutional pursuant to *Alleyne:* 42 Pa.C.S. § 9712(c); 42 Pa.C.S. § 9712.1(c); 42 Pa.C.S. § 9713(c); 42 Pa.C.S. § 9718(c); 42 Pa.C.S. § 9719(b); 18 Pa.C.S. § 7508(b); 18 Pa.C.S. § 6317(b)).

3 We are aware that our Supreme Court has accepted allowance of appeal on the issue of whether *Alleyne* relates to the legality of **sentence**, stating as the issue follows:

> Whether a challenge to a **sentence** pursuant to *Alleyne v. United States,* –– U.S. ––––, 133 S.Ct. 2151, 186 L.Ed.2d 314 (2013) implicates the legality of the **sentence** and is therefore non-waivable.

Commonwealth v. Johnson, —— Pa. ——, 93 A.3d 806 (2014).

4 We recognize that since the *Alleyne* decision, this Court has upheld **sentences** imposed under various **mandatory minimum sentencing** provisions rendered unconstitutional by the *Alleyne* decision. In such cases, despite the unconstitutionality of the statute in requiring a judicial determination of preponderance of the evidence, in circumstances where the facts necessary to establish application of the **mandatory minimum sentence** were determined by the jury beyond a reasonable doubt, we have upheld the **sentence**. *In Watley, supra,* (pertaining to § 9712.1) we held:

> [T]he uncontroverted evidence established that the firearm was ... in close proximity to the drugs and the jury determined beyond a reasonable doubt that Appellant possessed those firearms. Therefore, the facts necessary to establish application of the **mandatory minimum sentence** not only were essentially undisputed and overwhelming, they were determined by the jury. Since Appellant was convicted of PWID and unlawfully possessing two firearms ... the factual predicates for determining the **mandatory minimum** were proven to a jury beyond a reasonable doubt, and his **sentence** is not illegal.

Watley, 81 A.3d at 121. *See also Commonwealth v. Matteson,* 96 A.3d 1064 (Pa.Super.2014) (holding that even though 42 Pa.C.S.A. § 9718 was unconstitutional after *Alleyne,* the Sixth Amendment concerns of *Alleyne* were not implicated where the defendant was **sentenced** under the **mandatory minimum** provisions of 42 Pa.C.S.A. § 9718 for aggravated indecent assault of a child, since the jury received an instruction that it was required to find that the victim was less than 13 years of age and, in finding the defendant guilty of aggravated indecent assault of a child beyond a reasonable doubt, the jury specifically found, beyond a reasonable doubt, the element required to impose the **mandatory minimum sentence**).

Nevertheless, we adhere to our decision in *Newman* which concluded that the entirety of the **mandatory minimum sentencing** statute must be stricken as unconstitutional because "[w]ithout Subsection (c), there is no mechanism in place to determine whether the predicate of Subsection (a) has been met" and that it is for the legislature to create new **mandatory minimum sentencing** procedures in conformity with *Alleyne. See Newman* at 101, 105 (vacating the judgment of **sentence** and remanding for reimposition of **sentence** without consideration of § 9712.1.).