

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH : No. CR-499-2010
:
vs. :
:
:
PAUL COLEMAN, :
Defendant :

OPINION AND ORDER

This matter came before the court on Defendant Paul Coleman’s Post Conviction Relief Act (PCRA) petition. The relevant facts follow.

Coleman was charged with the following offenses: two counts of persons not to possess firearms;¹ two counts of receiving stolen property;² three counts of possession with intent to deliver a controlled substance (PWID);³ three counts of possession of a controlled substance;⁴ and two counts of possession of drug paraphernalia.⁵

Coleman waived his right to a jury trial, and a non-jury trial was held on October 12 and 14, 2011. Coleman was convicted of Count 4 (PWID-heroin), Count 5 (possession-heroin), Count 6 (possession of drug paraphernalia), Count 7 (PWID-cocaine), Count 8 (possession-cocaine), Count 9 (possession of drug paraphernalia), Count 10 (persons not to possess firearms), and Count 12 (possession-marijuana). The court sentenced Coleman to an aggregate term of 13 to 25 years’ incarceration. The relevant portions of that sentence are as follows: at Count 4 (PWID-heroin), Coleman was given a sentence of 8 to 15 years’ incarceration; at Count 10 (persons not to possess firearms), Coleman was given a sentence

¹ 18 Pa.C.S. §6105.

² 18 Pa.C.S. §3925.

³ 35 P.S. §780-113(a)(30).

⁴ 35 P.S. §780-113(a)(16).

of 5 to 10 years' incarceration to be served consecutive to Count 4; and, at Count 7 (PWID-cocaine), Coleman was given a sentence of 10 to 10 years' incarceration to run concurrently with the sentences at Count 4 and Count 10. The sentence at Count 4 (PWID-heroin) included a 5 year mandatory for a firearm and a 3 year mandatory based on the amount of heroin possessed. 42 Pa.C.S. §9712.1(a); 18 Pa.C.S. §7508(a)(2)(i). The sentence at Count 7 (PWID-cocaine) included a 5 year mandatory sentence for a firearm and a 5 year mandatory sentence based on the amount of cocaine possessed. 42 Pa.C.S. §9712.1(a); 18 Pa.C.S. §7508(a)(3)(ii).

Coleman appealed his judgment of sentence on September 6, 2012.

Coleman's sole claim on appeal was that the evidence was insufficient to prove that he constructively possessed the drugs and guns located in his residence. The Pennsylvania Superior Court rejected this claim and affirmed Coleman's judgment of sentence in a memorandum opinion filed on October 9, 2013.⁶ Coleman filed a petition for allowance of appeal, which the Pennsylvania Supreme Court denied on April 28, 2014.⁷

On November 10, 2014, Coleman filed his *pro se* PCRA petition. The court appointed counsel to represent Coleman and gave counsel approximately 60 days to file either an amended PCRA petition or a no-merit letter pursuant to *Commonwealth v. Turner*, 544 A.2d 927 (Pa. 1988) and *Commonwealth v. Finley*, 550 A.2d 213 (Pa. Super. 1988)(en banc). Counsel filed an amended petition on January 12, 2015.

⁵ 35 P.S. §780-113(a)(32).

⁶ 1602 MDA 2012.

⁷ 868 MAL 2013.

The issue(s) asserted in the amended petition relate solely to the imposition of the mandatory sentences for drug weight and firearms located in close proximity to controlled substances which have been ruled unconstitutional in *Alleyne v. United States*, 133 S.Ct. 2151 (June 17, 2013) and *Commonwealth v. Derr*, CP-41-CR-1620-2011 (Lycoming County, Feb. 6, 2014)(en banc). The amended petition specifically contains the following heading immediately before paragraph 21 of the petition: “**PAUL COLEMAN’S CONSTITUTIONAL RIGHTS WERE VIOLATED BY IMPOSITION OF THE MANDATORY SENTENCING PROVISIONS FOR DRUG WEIGHT AND FIREARMS LOCATED PROXIMATE TO CONTROLLED SUBSTANCES WHICH HAVE BEEN RULED UNCONSTITUTIONAL BY THE UNITED STATES SUPREME COURT IN ALLEYNE V. UNITED STATES, 133 S.Ct. 2151, 186 L.Ed.2d 314 (U.S. 2013) AND THIS COURT IN COMMONWEALTH V. DERR, CP-CR-41-1620-2011 AND TRIAL COUNSEL PROVIDED INEFFECTIVE ASSISTANCE OF COUNSEL WHICH RESULTED IN PREJUDICE TO THE DEFENDANT BY FAILING TO RAISE ON APPEAL THE ISSUE OF THE CONSTITUTIONALITY OF THE MANDATORY PROVISIONS SET FORTH ABOVE.**”

This statement arguably alludes to multiple issues: (1) a violation of Defendant’s constitutional rights which undermined the fact-finding process related to the imposition of the mandatory sentence; (2) the imposition of an illegal sentence; (3) ineffective assistance of appellate counsel; and (4) the retroactivity of *Derr* and subsequent appellate cases regarding the non-severability of the mandatory minimum sentences from the procedural provisions that were rendered unconstitutional pursuant to *Alleyne*. Unfortunately,

most of these claims are not fully developed. For example, the petition contains statements regarding the standards for ineffective assistance of counsel claims, but does not state any facts regarding when certiorari was granted⁸ or the decision was issued in *Alleyne*, what counsel knew or effective counsel should have known regarding *Alleyne* and the constitutionality of the mandatory statutes, or what counsel could or should have done to raise the issue on appeal.

These issues are further complicated by recent appellate decisions regarding the mandatory statutes, *Alleyne*, and its retroactivity at the PCRA stage of proceedings. Although the court's decision in *Derr* is still on appeal before the Pennsylvania Supreme Court, in *Commonwealth v. Kyle Hopkins*, 2015 Pa. LEXIS 1282 (June 15, 2015) the Pennsylvania Supreme Court found that similar procedural provisions for a school zone mandatory minimum were unconstitutional and were not severable from the rest of the statute.

In *Commonwealth v. Larry Riggle*, 2015 PA Super 147 (July 7, 2015), the appellant maintained that his sentence was illegal under *Alleyne*. The Pennsylvania Superior Court held that *Alleyne* was not entitled to retroactive effect in that PCRA setting. In so holding, however, the Superior Court stated: "Although submission to a jury of certain facts may lead to more acquittals of the now 'aggravated crime,' it does not undermine the underlying conviction or sentence of the 'lesser crime.' This is because, in Pennsylvania, absent the jury finding the applicable facts, the defendant could receive the identical sentence

⁸ The United States Supreme Court granted certiorari in *Alleyne* on October 5, 2012 on the question of whether the "Court's decision in *Harris v. United States*, 536 U.S. 545 (2002), should be overruled."

for the ‘lesser crime.’” *Riggle*, 2015 PA Super 147, slip opn. at 13-14 (July 7, 2015).

Riggle, however, is arguably distinguishable in several respects. First, Coleman could not receive the identical sentence for the “lesser crime” on Count 4 (PWID-heroin) or Count 7 (PWID-cocaine) as a sentence of 8 to 15 years and 10 to 10 years, respectively, would violate the rule that the minimum cannot exceed one-half of the maximum. 42 Pa.C.S.A. §9756(b). These sentences were only lawful in this case due to section 9712.1(c).

Second, *Riggle*’s appeal was completed prior to even the grant of certiorari in *Alleynes*. Therefore, *Riggle* could not raise an ineffective assistance of counsel claim because counsel cannot be deemed ineffective for failing to predict a change in the law.

Commonwealth v. Gribble, 863 A.2d 455, 464 (Pa. 2004); see also *Commonwealth v. Hill*, 104 A.3d 1220, 1240 (Pa. 2014)(“review of counsel’s conduct cannot indulge ‘the distorting effects of hindsight,’ but instead, counsel’s performance must be judged in light of the circumstances as they would have appeared to counsel at the time.”); *Commonwealth v. Spatz*, 896 A.2d 1191, 1238 (Pa. 2006)(“it is well established that the effectiveness of counsel is examined under the standards existing at the time of performance.”). Here, however, the United States Supreme Court granted certiorari in *Alleynes* about a month after Coleman filed his notice of appeal and the *Alleynes* decision was issued about 3 ½ months before Coleman’s appeal was decided.

Third, the decision in *Riggle* arguably cuts both ways. The Commonwealth could potentially argue that *Riggle* forecloses any PCRA relief pursuant to *Alleynes* and its progeny. On the other hand, defense counsel could argue that *Riggle* establishes how

Defendant was prejudiced by his counsel's failure to raise *Alleyne* during his direct appeal. Such an argument also could be supported by *Commonwealth v. Munday*, 78 A.3d 661 (Pa. Super. 2013), a case in which appellate counsel was permitted to raise such a claim during oral argument despite the fact that appellant's counsel did not raise an illegal sentence claim in appellant's brief, because the *Alleyne* decision was rendered within days of the briefing deadline. Ironically, *Munday* was decided the day after Coleman's appeal and was authored by the same Superior Court Judge that authored the decision on Coleman's appeal. Shortly thereafter, the Superior Court began to *sua sponte* address illegal sentences pursuant to *Alleyne*. See *Commonwealth v. Watley*, 81 A.3d 108 (Pa. Super. 2013); *Commonwealth v. Thomspson*, 93 A.3d 478 (Pa. Super. 2014).

Finally, the decision in *Riggle* did not mention or consider what effect, if any, the Pennsylvania Supreme Court's decision in *Hopkins* or the Superior Court's own decision in *Commonwealth v. Newman*, 99 A.3d 86 (Pa. Super. 2014)(en banc) regarding non-severability would have on the retroactivity analysis. While *Alleyne* only declared the procedure in Pennsylvania's mandatory statutes unconstitutional, *Hopkins* and *Newman* found that the entire mandatory statute was unconstitutional because the procedural provisions were not severable from the rest of the statute. Perhaps it changes the retroactivity analysis in *Alleyne*, perhaps there is a separate argument that *Hopkins* and *Newman* should be applied retroactively, or perhaps PCRA petitioners are never entitled to relief on such a claim.

The court is not ruling on the merits of any potential claims that might be raised in light of *Riggle* and *Hopkins*. It is merely giving PCRA counsel an opportunity to

further amend Defendant's PCRA petition to raise such issues and giving the Commonwealth an opportunity to respond since a first PCRA petition, as a practical matter, is a defendant's only opportunity to challenge trial and appellate counsel's effectiveness. Further, the adversary nature of criminal proceedings does not relieve the judge of the obligation of raising on his initiative, at all appropriate times and in an appropriate manner, matters which may significantly provide a just determination of the proceedings. See ABA Standards for Criminal Justice: Special Functions of the Trial Judge, Standard 6-1.1(a)(3d ed. 2000).

ORDER

AND NOW, this ___ day of July 2015, the court gives PCRA counsel twenty (20) days within which to further amend Defendant's PCRA petition. A PCRA conference is scheduled for **August 14, 2015 at 2:00 p.m. in Courtroom #4 of the Lycoming County Courthouse.**

By The Court,

Marc F. Lovecchio, Judge

cc: Kenneth Osokow, Esquire (ADA)
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Work file