

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH

: No. CR-499-2010

vs.

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: **Opinion and Order PCRA**

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;<sup>1</sup> two counts of receiving stolen property;<sup>2</sup> three counts of possession with intent to deliver a controlled substance (PWID);<sup>3</sup> three counts of possession of a controlled substance;<sup>4</sup> and two counts of possession of drug paraphernalia.<sup>5</sup>

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

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<sup>1</sup> 18 Pa.C.S. §6105.

<sup>2</sup> 18 Pa.C.S. §3925.

<sup>3</sup> 35 P.S. §780-113(a)(30).

<sup>4</sup> 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 firearms 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.<sup>6</sup> Coleman filed a petition for allowance of appeal, which the Pennsylvania Supreme Court denied on April 28, 2014.<sup>7</sup>

Coleman filed a timely pro se PCRA petition. Counsel was appointed and given an opportunity to amend the pro se petition or file a no merit letter. Counsel amended Coleman's petition. The issues asserted in the amended petition related solely to the imposition of mandatory sentences for the weights of the controlled substances possessed with intent to deliver and for the possession of a firearm in close proximity to the controlled

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<sup>5</sup> 35 P.S. §780-113(a)(32).

<sup>6</sup> 1602 MDA 2012.

<sup>7</sup> 868 MAL 2013.

substances, which have been ruled unconstitutional.

While the amended PCRA petition was pending, the appellate courts issued decisions in *Commonwealth v. Hopkins*, 117 A.3d 247 (Pa. 2015) and *Commonwealth v. Riggle*, 119 A.3d 1058 (Pa. Super. 2015). The court gave counsel an opportunity to further amend Coleman's PCRA petition in light of these decisions.

PCRA counsel filed a second amended petition which expounded upon Coleman's claims that his sentence was illegal pursuant to *Alleyne v. United States*, 133 S.Ct. 2151 (U.S. 2013). The second amended petition asserted two related claims: (1) Coleman's sentence was illegal and he was entitled to be resentenced without the imposition of the mandatories because his case was on appeal when *Alleyne* was decided; and (2) counsel was ineffective for failing to assert a claim that Coleman's sentence was illegal pursuant to *Alleyne* while his case was on direct appeal either by filing a petition for reargument or reconsideration before the Pennsylvania Superior Court or by asserting such a claim in the petition for allowance of appeal that was filed with the Pennsylvania Supreme Court.

The court granted an evidentiary hearing on the second amended petition to create a record regarding his ineffective assistance of counsel claim. This hearing was held on November 3, 2015.

Nicole Spring, Coleman's trial and appellate counsel, testified at the hearing. The *Alleyne* decision was rendered on June 17, 2013. Ms. Spring testified that she became aware of the *Alleyne* decision sometime in July 2013. Coleman's appeal and concise statement were filed before *Alleyne* was decided, but the Superior Court did not issue its

decision denying Coleman's appeal until October 8, 2013. Ms. Spring admitted that she did not file a petition to add this issue to Coleman's appeal or file a petition for reargument to raise *Alleyne* before the Superior Court. She also admitted that she did not include a claim that Coleman's sentence was illegal pursuant to *Alleyne* in her petition for allowance of appeal to the Pennsylvania Supreme Court. She had no strategic reason for not doing so. She said she should have pursued it, because these types of issues with mandatory sentencing are her "pet issues." She candidly acknowledged that "she just didn't think about it" in this case. She also has never looked at an *Alleyne* issue as harmless error. In fact, she specifically stated that she never would put *Alleyne* and harmless error "in the same cogent thought."

On cross-examination, Ms. Spring testified that she stipulated to the lab reports that contained the weight of the drugs, because the quantity of drugs did not relate to the defense that the drugs were not Coleman's and he did not possess them. If *Alleyne* had been decided at the time of trial, she still would have stipulated to the quantity of drugs involved in this case. She could not recall whether the firearm was found in the same cabinet as some of the drugs. There were two firearms in this case - one that Coleman was found guilty of possessing and the other that he was not. Ms. Spring knew she raised an issue whether the firearm was in close proximity to the drugs, but she did not recall if that issue was raised with respect to both the heroin and cocaine or just one of them.

PCRA counsel argued that Coleman was entitled to relief as a matter of law under *Commonwealth v. Newman*, 99 A.3d 86 (Pa. Super. 2014), because the Superior Court found that *Alleyne* set forth a new constitutional rule, which is to be applied to all cases

pending on direct review. In the alternative, PCRA counsel argued that Ms. Spring was ineffective for failing to raise the *Alleyne* issue before the Superior Court or in her petition of allowance of appeal to the Pennsylvania Supreme Court. Since other litigants have raised *Alleyne* and obtained relief despite not including that issue in their concise statement on appeal, see *Newman*, supra and *Commonwealth v. Munday*, 778 A.3d 661 (Pa. Super. 2013), Coleman clearly was prejudiced by Ms. Spring's failure to raise this issue in a petition for reargument to the Pennsylvania Superior Court or in her petition for allowance of appeal to the Pennsylvania Supreme Court.

The Commonwealth conceded that this issue had arguable merit and Ms. Spring had no strategic basis for failing to raise the issue in the manner Coleman asserts she should have. The Commonwealth, however, argued that Coleman was not prejudiced. According to the Commonwealth, any error was harmless, because Coleman, through counsel, stipulated to the weights of the controlled substances and the firearm was discovered in the same cabinet as the controlled substances. The Commonwealth relied on *Commonwealth v. Watley*, 81 A.3d 108 (Pa. Super. 2013), *appeal denied*, 95 A.3d 277 (Pa. 2014).

After considering the testimony presented, the arguments of the attorneys, and the relevant case law, the court finds that Coleman is entitled to relief in the form of a new sentencing hearing.

Since Coleman's case was on direct appeal when *Alleyne* was decided, the court finds that he is entitled to the benefit of that decision. *Commonwealth v. Ruiz*, 2015 PA Super 275, 2015 Pa. Super. LEXIS 865 (Pa. Super. 12/30/2015); *Newman*, 99 A.3d at

90-91.

In the alternative, the court finds that Ms. Spring was ineffective for failing to raise *Alleyne* in a petition for reargument or the petition for allowance of appeal. In order to prevail on a claim of ineffective assistance of counsel, the petitioner must show that the claim is of arguable merit; counsel had no reasonable basis for her action or failure to act; and counsel's performance cause the petitioner prejudice. *Commonwealth v. Collins*, 957 A.2d 237, 244 (Pa. 2008). It is clear from the testimony presented that the claim was of arguable merit and Ms. Spring had no strategic reason for failing to raise it. In fact, the Commonwealth concedes such. The court also finds that Coleman was prejudiced. Coleman could not have received the sentence imposed without the mandatory minimum sentences for the weight of the controlled substance or possession of a firearm in close proximity to the controlled substances. Other litigants, who raised an *Alleyne* issue in the manner Coleman contends his counsel should have, obtained relief. Therefore, there is a reasonable probability that if Ms. Spring had raised this issue, Coleman also would have obtained relief.

Accordingly, the following order is entered:

**ORDER**

AND NOW, this \_\_\_ day of January 2016, the court GRANTS Coleman's PCRA petition to the extent it asserts his sentence was illegal. A new sentencing hearing is scheduled for **February 23, 2016 at 9:00 a.m. in courtroom #4** of the Lycoming County Courthouse. PCRA counsel shall either submit a transport order for Coleman to be present for this hearing or, if Coleman wishes to waive his presence in person, make arrangements for Coleman to participate via videoconferencing.

By The Court,

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Marc F. Lovecchio, Judge

cc: Kenneth Osokow, Esquire (ADA)  
Donald F. Martino, Esquire  
Paul Coleman, KM-0073  
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Work file