

FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
COURT OF COMMON PLEAS, CRIMINAL TRIAL DIVISION

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| COMMONWEALTH OF PENNSYLVANIA | : | |
| | : | |
| v. | : | CP-51-CR-0000780-2013 |
| | : | |
| PRESTON HUNT | : | |
| | : | |

OPINION

STATEMENT OF THE CASE

The Commonwealth is appealing the Court’s order of March 4, 2014 granting Defendant’s motion to bar application of the mandatory minimum pursuant to 42 Pa.C.S. § 9712.1. The Commonwealth complains that the Court should have found the unconstitutional portions of the statute severable from the constitutional portions, rather than barring application of the statute in its entirety. This complaint is without merit.

PROCEDURAL HISTORY

On December 19, 2012, Defendant was arrested and charged with various drug related offenses including inter alia Possession with Intent to Deliver pursuant to 35 P.S. § 780-113(a)(30) and Possession of a Firearm Prohibited pursuant to 18 Pa.C.S.A. § 6105(a)(1). On February 21, 2014, Defendant filed his “Motion to Bar Application of Mandatory Minimum Sentence.” The Court heard argument on Defendant’s motion on March 4, 2014, and after considering the arguments of counsel, decided to grant said motion. On March 5, 2014, the Court again heard argument and denied the Commonwealth’s motion for reconsideration.

The Commonwealth filed the instant appeal on April 2, 2014. Also on April 2, 2014 the Commonwealth filed its Statement of Errors Complained of on Appeal pursuant to Pa.R.A.P. 1925(b), stating that it intends to raise the following issue on appeal:

“Did the lower court err in declaring 42 Pa.C.S. § 9712.1 unconstitutional on its face instead of severing the unconstitutional provisions pursuant to 1 Pa.C.S. § 1925?”

TIMELINESS OF APPEAL

At the outset the Court must note that the Commonwealth’s appeal in this case is premature. Under Pa.R.A.P. 311 the Commonwealth has the right to take an appeal “from an order that does not end the entire case where the Commonwealth certifies in the notice of appeal that the order will **terminate or substantially handicap** the prosecution.” (**emphasis added**). The Court’s decision to bar the application of the mandatory minimum will neither terminate nor handicap the Commonwealth’s prosecution of its case against Defendant. The only consequence of the Court’s decision is that in the event that Defendant is found guilty he will be sentenced in accordance with the normal statutory range, at which time the Commonwealth will have the right to appeal pursuant to 9712.1(e).¹

¹ Section 9712.1(e) provides: “If a sentencing court refuses to apply this section where applicable, the Commonwealth shall have the right to appellate review of the action of the sentencing court. The appellate court shall vacate the sentence and remand the case to the sentencing court for imposition of a sentence in accordance with this section if it finds that the sentence was imposed in violation of this section.”

DISCUSSION OF THE ISSUE RAISED

I. IT WAS PROPER FOR THE COURT TO GRANT DEFENDANT’S MOTION TO BAR APPLICATION OF THE MANDATORY MINIMUM UNDER 1 Pa.C.S. § 1925

The Commonwealth complains, in essence, that it was an error for the Court to grant Defendant’s motion to bar the application of the mandatory minimum. This complaint is without merit.

42 Pa.C.S. § 9712.1(a) provides in pertinent part that any individual who is convicted of violating 35 P.S. § 780-113(a)(30) shall receive a minimum sentence of five years confinement if at the time of the offense “the person or the person's accomplice is in physical possession or control of a firearm...” Section 9712.1(c) further provides that:

(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.

In June of 2013 the Supreme Court of the United States announced its judgment in *Alleyne v. United States*, ___ U.S. ___, 133 S.Ct. 2151, 186 L.Ed.2d 314, a case concerning the application of a federal mandatory minimum statute. The Court in *Alleyne* held that any fact that triggers an increase in the mandatory minimum sentence for a crime is necessarily an element of the offense. 133 S.Ct. at 2163-2164 The Court reasoned that “the core crime and the fact triggering the

mandatory minimum sentence together constitute a new, aggravated crime” and consequently that the Sixth Amendment requires that every element of the crime, including any fact that triggers the mandatory minimum, must be alleged in the charging document, submitted to a jury, and found beyond a reasonable doubt. *Id.* at 2160-2164.

It is apparent that § 9712.1(c) does not satisfy the requirements set forth in *Alleyne*. The statute provides that “Provisions of this section shall **not** be an element of the crime” whereas *Alleyne* dictates that any triggering fact must be treated as an element. (**emphasis added**). The statute further mandates that the court, rather than the jury, shall decide if the triggering fact has been proved, and that the standard of proof is a preponderance of the evidence. *Alleyne* requires a jury find the triggering fact beyond a reasonable doubt. A defendant is also entitled to no notice of the Commonwealth’s intent to proceed under § 9712.1 prior to sentencing, whereas *Alleyne* held that notice is required.

The appellate courts of this Commonwealth have had occasion to consider the effect of *Alleyne* on § 9712.1 in several cases. In *Commonwealth v. Munday* our Superior Court permitted the appellant, who had been convicted in a non-jury trial and sentenced pursuant to § 9712.1 prior to the *Alleyne*, to raise the issue of whether his sentence was illegal as a result of that decision. 78 A.3d 661 (2013) The Superior Court chose not to address the issue of whether § 9712.1 was facially invalid but held that the appellant’s sentence could not stand because the fact finder had determined the applicability of the mandatory minimum by a mere preponderance of the evidence. *Id.* at 665-666. In *Commonwealth v. Watley* the Superior Court again considered the legality of a pre-*Alleyne* sentence pursuant to § 9712.1’s mandatory minimum. 81 A.3d 108 The Court stated that § 9712.1 was “no longer constitutionally sound in light of *Alleyne*...”, 81 A.3d at 112 n.2., but nonetheless did not reverse the appellant’s sentence. The

Court held that because appellant had also been convicted of two firearms offenses, and essentially had not disputed the presence of the gun at the time of the offense, that all of the facts necessary to trigger the mandatory minimum had been found beyond a reasonable doubt by the jury and thus the sentence did not violate *Alleynes*. 81 A.3d at 118-121 Finally, in *Commonwealth v. Hanson*, the Pennsylvania Supreme Court, in a case otherwise concerned with the correct construction of the phrases “possession or control of a firearm” in § 9712.1(a), took note of *Alleynes* but chose not discuss it in length “[i]n the absence of developed arguments concerning whether and to what extent the new federal constitutional overlay should apply...” 82 A.3d 1023, 1039-1040 n.25. (2013) In remanding the case to the trial court for resentencing in conformity with its decision, the Supreme Court simply noted that its ruling did not “foreclose that the Common Pleas Court may undertake traditional, individualized sentencing, based on *Alleynes*.” *Id.* at 1040

It is clear from the foregoing that a trial court can no longer sentence a defendant to the mandatory minimum of § 9712.1(a) in strict compliance with the dictates of § 9712.1(c) and avoid running afoul of the Constitution. But a distinct issue arises where, as in the instant matter, the Commonwealth has signaled its intention to seek the mandatory minimum provided for in § 9712.1(a) while following a procedure designed to satisfy the requirements of *Alleynes*. This would require the Court to find that § 9712.1(c) can be severed from the remainder of the statute.

There is a presumption of severability in Pennsylvania embodied in 1 Pa.C.S.A. § 1925, which provides in part that the “provisions of every statute shall be severable.” However, § 1925 goes on to say that severability will not apply where a court finds “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 if the court finds “the remaining valid provisions, standing alone, are incomplete and are incapable of being executed in accordance with the legislative intent.” In other words, in determining the severability of a statute “the legislative intent is of primary significance.” *Saulsbury v. Bethlehem Steel Co.*, 413 Pa. 316, 321, 196 A.2d 664, 667 (1964)

In the instant matter the Court finds that § 9712.1(c) is not severable from the remainder of the statute. Implicit in the Commonwealth’s argument for severance is the premise that § 9712.1(a) can be interpreted in such a way that is consistent with *Alleynes*. This means that the phrase “physical possession or control of a firearm” must be interpreted as describing in the words of *Alleynes* an element of a “new, aggravated crime” created by the combination of the mandatory minimum and the underlying drug offense. *Alleynes*, 133 S.Ct. at 2161 But § 9712.1(c) explicitly states that the triggering facts in § 9712.1(a) “shall not be an element of the crime.”

The Commonwealth’s position further implies that § 9712.1(a) must be read to permit a procedure whereby the defendant would be given notice of the Commonwealth’s intent to seek the mandatory minimum prior to trial² and the question would be submitted to the jury with the instruction that they must find the triggering fact beyond a reasonable doubt. The Commonwealth has proposed accomplishing this by submitting a special interrogatory to the jury where they can indicate whether or not they have found the triggering fact beyond a reasonable doubt. (N.T. 3/5/2014) But this is not the procedure the legislature provided for in § 9712.1(c), which directed the trial court to determine the applicability of the statute by a preponderance of the evidence.

² The Court notes that the Information filed in this case did alert Defendant to the Commonwealth’s intent to proceed under 42 Pa.C.S. § 9712.1, even though the statute did not require this. *See* § 9712.1(a).

As 1 Pa.C.S.A. § 1925 indicates, severability is not appropriate if “it cannot be presumed the General Assembly would have enacted the remaining valid provisions without the void one.” § 9712.1(a) can only stand if the procedure provided by the General Assembly is discarded and another substituted in its place. The Court cannot *presume* that the legislature would enact § 9712.1(a) on terms that are drastically different from the current statute.

There is an additional reason that the Court cannot accede to the Commonwealth’s request to apply § 9712.1(a) in accordance with its proposed procedure. Namely, the Court believes that it does not have the power to implement this or any other new procedure in the absence of any rule or law authorizing it. Even if the Court were to conclude that the legislature intended § 9712.1(a) and § 9712.1(c) to be severable, and *would have* approved of the alternate scheme the Commonwealth proposes in the event that the procedures of § 9712.1(c) were held invalid, and further found that this proposed scheme would be satisfactory under *Alleynes*, the Court would still be left without a rule to follow. Our Pennsylvania Supreme Court has said that “Where a legislative scheme is determined to have run afoul of constitutional mandate, it is not the role of this Court to design an alternative scheme which may pass constitutional muster.” *Heller v. Frankston*, 504 Pa. 528, 537, 475 A.2d 1291, 1296 (1984) (**citations omitted**) The prosecutor in the instant matter has essentially asked the Court to design an alternative scheme.

Furthermore, it is significant that the Court in *Alleynes* held that a mandatory minimum sentence, in conjunction with the core offense, creates in effect “a new, aggravated crime.” 133 S.Ct. at 2161 It is the sole prerogative of the legislature to define crimes. Pa. Const. art. II, § 1 “The legislative power of this Commonwealth shall be vested in a General Assembly, which shall consist of a Senate and a House of Representatives” The legislature in 18 Pa.C.S.A. § 107 provided that "No conduct constitutes a crime unless it is a crime under this title or another

statute of this Commonwealth." But, if the Court accepts the Commonwealth's proposal to interpret the statute as *Alleyn* requires, then the Court would in effect be creating a new crime where there had previously been only a sentencing provision.³ The Court is not authorized to do this.

CONCLUSION

The Court finds that it was proper to bar the application of the mandatory minimum in the instant matter. When *Alleyn* is applied to the Pennsylvania statute it creates a fundamental constitutional issue of separation of powers. The Court does not have the authority to act as the prosecutor is advocating. Instead, it is now up to our state legislature to act on behalf of the prosecutor if it so chooses.

BY THE COURT:

April 17, 2014

HON. CHARLES J. CUNNINGHAM, III J.

³ This state constitutional issue came to the Court's attention as a result of reading the cogent opinion by the Honorable William J. Furber Jr., President Judge of the Montgomery County Court of Common Pleas that addressed the issue of the continuing viability of 42 Pa.C.S. § 9712.1. See "ORDER SUR THE COMMONWEALTH'S MOTIONS TO AMEND BILLS OF INFORMATION", *Commonwealth v. Brockington* (Montgomery No. 9311-12, March 21, 2014).