

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	CRIMINAL ACTION
	:	NO. 08-495
v.	:	
	:	CIVIL ACTION
TROY HOLMES	:	NO. 14-2051

MEMORANDUM

Bartle, J.

July 24, 2014

Before the court is the motion of defendant Troy Holmes ("Holmes") to vacate, set aside, or correct his sentence under 28 U.S.C. § 2255.

Holmes was found guilty by a jury on December 5, 2008 of: conspiracy to commit an offense against the United States, in violation of 18 U.S.C. § 371 (Count One); carjacking and aiding and abetting, in violation of 18 U.S.C. §§ 2119 and 2 (Count Two); and possession of a firearm in furtherance of a crime of violence, in violation of 18 U.S.C. § 924(c) (Count Three).

Holmes was sentenced on September 21, 2009. The court found that the combined adjusted offense level under the sentencing guidelines was level 29. The court also determined that Holmes was a career offender and therefore had a criminal history category of VI. The sentencing guidelines prescribed a term of imprisonment ranging from 360 months to life. Holmes received a lesser sentence of 300 months' imprisonment and a five-year term of supervised release. The sentence included 216

months' imprisonment on Counts One and Two, to run concurrently, and 84 months' imprisonment on Count Three, to run consecutively to his sentence on Counts One and Two.

Holmes appealed to the United States Court of Appeals for the Third Circuit. The court rejected all of Holmes' arguments and affirmed his conviction and sentence. United States v. Holmes, 2010 U.S. App. LEXIS 15222 (3d Cir. July 23, 2010).

Holmes bases his § 2255 motion on three grounds: first, that the court erred in sentencing him above the 60-month maximum term for Count One and above the 180-month maximum term for Count Two; second, that the court erred in increasing his minimum sentence on Count Three based on a judicial finding that Holmes brandished a firearm during the commission of the carjacking; and third, that he was denied the effective assistance of counsel guaranteed by the Fifth and Sixth Amendments to the United States Constitution because neither his trial counsel nor his sentencing counsel raised the foregoing arguments.

I.

The underlying facts, in the light most favorable to the government, are as follows. On July 29, 2007, at approximately 2:30 a.m., Issa Uttara ("Uttara") parked his car, a Lexus GS-200, on Sixth Street in Philadelphia. Uttara's girlfriend, Jelene Radulovic ("Radulovic") was a passenger. They planned to go to the Palmer Social Club, located at the

intersection of Sixth and Spring Garden Streets. Uttara and Radulovic exited the car and began walking toward the Club when a man yelled "Yo" from behind them. Uttara turned around and saw Milton Brown ("Brown") pointing a gun in his face. Holmes was standing next to Brown. Uttara later reported that he was three feet away from Brown and Holmes in that moment and could see the front of Holmes' face.

Over the next minute, Brown continued to point the gun at Uttara and demanded money, car keys, a cell phone, and a phone card. Complying with Brown's demands, Uttara placed the items on the sidewalk and Radulovic did likewise with her purse. Holmes stood next to Brown during the robbery, though he never spoke or attempted to help the victims. Brown then told Uttara and Radulovic to "get out of here." Brown and Holmes fled in Uttara's car.

Uttara ran up Sixth Street, yelled "call the police," and jumped into a police car that was parked outside the Palmer Social Club. Philadelphia Police Officers Brian Lauf and Michael Jachimski were seated in the car. The officers drove down Sixth Street in pursuit and confronted Brown and Holmes in Uttara's Lexus stopped at an intersection. Brown pointed his gun at the officers and hastened through several red lights as he tried to evade the police officers. Eventually the Lexus crashed into a limousine and Brown and Holmes fled on foot. The officers arrested Holmes on Sixth Street after a chase. Uttara identified him at the scene.

II.

Holmes first argues that the court erred in sentencing him above the 60-month maximum term for Count One and above the 180-month maximum term for Count Two when it sentenced him concurrently to 216 months on both counts. Neither issue was raised on direct appeal. The government has chosen not to invoke the statute of limitations on this claim. See 28 U.S.C. § 2255(f). The government concedes the error but maintains that it was harmless because the court could have and would have imposed the same total sentence even if the error had been brought to our attention during Holmes' sentencing. For example, the court could have imposed the entire 300-month sentence on Count Three, because 18 U.S.C. § 924(c) allows a sentence up to life imprisonment.

Section 5G1.2(e) of the United States Sentencing Guidelines recommends apportioning the sentence among the different counts:

In a case in which subsection (c) of § 4B1.1 (Career Offender) applies, to the extent possible, the total punishment is to be apportioned among the counts of conviction, except that (1) the sentence to be imposed on a count requiring a minimum term of imprisonment shall be at least the minimum required by statute; and (2) the sentence to be imposed on the 18 U.S.C. § 924(c) or § 929(a) count shall be imposed to run consecutively to any other count.

The government points to § 5G1.2(d) of the United States Sentencing Guidelines, which states,

If the sentence imposed on the count carrying the highest statutory maximum is less than the total punishment, then the sentence imposed on one or more of the other counts shall run consecutively, but only to the extent necessary to produce a combined sentence equal to the total punishment. In all other respects, sentences on all counts shall run concurrently, except to the extent otherwise required by law.

Even with an apportionment among all three counts, the court, for example, could have imposed a term of 26 months on Count One, a term of 180 months on Count Two, and a term of 84 months on Count Three, all to run consecutively, to reach the 300-month sentence imposed.

To succeed on a collateral challenge to his sentence, a petitioner must show "a good deal more than would be sufficient on a direct appeal from his sentence." United States v. Pollard, 959 F.2d 1020 (D.C. Cir. 1992). An error of law or fact does not provide a sufficient basis for collateral relief unless the error "constituted a fundamental defect which inherently results in a complete miscarriage of justice." Hill v. United States, 368 U.S. 424, 428 (1962). Had the error been called to the court's attention, it would still have imposed the same total sentence, but would simply have apportioned the time differently among the three counts so that the maximum on any count would not have been exceeded. Holmes was convicted of serious crimes and had a lengthy history of criminal activity, including crimes of violence. Regardless of the present apportionment, the total sentence, which was below the advisory guideline sentence, was

proper and cannot be considered a "complete miscarriage of justice."

III.

Holmes' second ground for collateral relief is his claim that the court erred in increasing his mandatory minimum sentence on Count Three from 5 years to 7 years based on a judicial finding that Holmes brandished a firearm during the commission of the carjacking. Defendant was charged in that count with a violation of 18 U.S.C. § 924(c)(1). It provides:

(A) Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence of drug trafficking crime... for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime-

(i) be sentenced to a term of imprisonment of not less than 5 years;

(ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years...

As Holmes asserts, the court sentenced him to seven years on Count Three. There is no doubt that the firearm was brandished by Brown during the commission of the carjacking and that Holmes, as a conspirator and aider and abettor, is also responsible even though he himself did not brandish it. U.S. Sentencing Guidelines Manual § 1B1.3(a)(1)(A) and (B) (2014).

Holmes instead maintains that the increase in his sentence violates the holding of Alleyne v. United States, 133 S.

Ct. 2131 (2013), which, in his view, should be applied to his sentence retroactively. In Alleyne, the Supreme Court, overturning its 2002 decision in Harris v. United States, 536 U.S. 545, held that any fact, other than a prior conviction, which increases a statutory mandatory minimum sentence must be proven to a jury beyond a reasonable doubt or admitted by the defendant. Previously, in Harris, the Court had ruled that any factor increasing a defendant's mandatory minimum sentence may be determined by the judge. Id. at 565. Thus after Alleyne, the jury and not the court must decide the issue of brandishing.

Holmes was sentenced in 2009. His sentence became final in 2010, several years before Alleyne was handed down. It is a bedrock principle that "new rules should always be applied retroactively to cases on direct review, but that generally they should not be applied retroactively to criminal cases on collateral review." Teague v. Lane, 489 U.S. 288, 303 (1989). A "new rule" is defined as one that was not "dictated by precedent existing at the time the defendant's conviction became final." Id. at 301. If a "reasonable jurist" would not have felt compelled to adopt the rule stated in Alleyne prior to the issuance of that decision in 2013, then the rule stated by Alleyne is a "new rule." See O'Dell v. Netherland, 521 U.S. 151, 164 (1997). We agree with the government that Alleyne adopted a "new rule." Prior to its adoption, the controlling precedent was set forth in Harris, which compelled courts to follow an opposite rule as the one set forth in Alleyne. At least two courts have

held that Alleyne states a "new rule" for the purpose of collateral review. See Simpson v. United States, 721 F.3d 875 (7th Cir. 2013); In re Payne, 733 F.3d 1027 (10th Cir. 2013); see also United States v. Reyes, No. 11-6234, 2013 WL 4042508, *15 (E.D. Pa. Aug. 8, 2013).

There are two narrow exceptions to the bar against applying new rules on collateral review: first, a new rule should be applied if the rule places "certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe." Teague, 489 U.S. at 311. The first exception plainly does not apply. The new rule established in Alleyne does not place any type of individual conduct "beyond the power of the criminal law-making authority to prescribe."

Second, a new rule should be applied retroactively to cases on collateral review if it implicates fundamental fairness in a way that seriously affects the likelihood of an accurate conviction. Id. at 312-13. The second exception is "reserved for watershed rules of criminal procedure that not only improve the accuracy of trial, but also 'alter our understanding of the bedrock procedural elements' essential to the fairness of a proceeding." U.S. v. Swinton, 333 F.3d 481, 487 (3d Cir. 2003) (citing United States v. Smith, 497 U.S. 227, 242 (1990)). In the years since Teague, the Court has yet to identify any new "watershed rules." Alleyne is an extension of the "new rule" articulated in Apprendi v. New Jersey, 530 U.S. 466 (2000). Payne, 733 F.3d at 1029. The Supreme Court has held that

procedural rules like the one announced in Apprendi are not "watershed" rules demanding retroactive application. Schriro v. Summerlin, 542 U.S. 348, 358 (2002); see also DeStefano v. Woods, 392 U.S. 631 (1968).

In sum, we find that Alleyne does not apply retroactively to Holmes' sentencing. Holmes' mandatory minimum sentence was properly increased from five to seven years on the ground that he was responsible for the brandishing of a weapon during the commission of the carjacking.

IV.

Finally, Holmes sets forth a separate claim for constitutionally ineffective assistance of counsel. According to Holmes, his sentencing counsel failed to object to the sentencing calculation error under Counts One and Two and to the enhancement of his sentence under Count Two. Holmes claims that his trial attorney's erroneous legal advice as to the penalties he faced led to his rejection of the government's repeated plea offers.

The government asserts that this claim is time-barred. We agree. Holmes' conviction became final on November 1, 2010, the date on which his time to petition for certiorari from our Court of Appeals' judgment on direct appeal expired. Clay v. United States, 537 U.S. 522 (2003). "A 1-year period of limitation shall apply to a motion" filed under 28 U.S.C. § 2255. 28 U.S.C. § 2255(f). The "limitation period shall run from the latest of... the date on which the judgment of conviction becomes final." 28 U.S.C. § 2255(f)(1). Because Holmes' conviction

became final on November 1, 2010, he had until October 31, 2011 to file a § 2255 motion. He has not argued that the statute should be tolled. His filing of the motion on April 9, 2014 was out of time.

Nonetheless, even if the claim were not time-barred, we find that Holmes' ineffective assistance claim is meritless because the total length of the sentence Holmes received was proper under the relevant statutes. As the government notes, it would have been inaccurate for Holmes' trial counsel to tell him that he faced a lower sentence than the one he actually received. Indeed, Holmes could have been sentenced to up to life imprisonment. As such, Holmes was not misadvised and has suffered no prejudice. See Strickland v. Washington, 466 U.S. 668 (1984). In addition, Alleyne had not been decided when Holmes was sentenced in 2009 or when his case was on direct appeal. There is no duty on the part of defense counsel to anticipate changes in the law. See, e.g., United States v. Christian, No. 2-191, 2013 U.S. Dist. LEXIS 142924, *16 (W.D. Pa. Oct. 3, 2013) (citing United States v. Fields, 565 F.3d 290, 298 (5th Cir. 2009)).

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ORDER

AND NOW, this 24th day of July, 2014, for the reasons set forth in the accompanying Memorandum, it is hereby ORDERED that:

- (1) the motion of defendant Troy Holmes to vacate, set aside, or correct his sentence under 28 U.S.C. § 2255 (Doc. #95) is DENIED; and
- (2) no certificate of appealability is issued.

BY THE COURT:

/s/ Harvey Bartle III

J.