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STATE OF CONNECTICUT *v.* NEMIAH ALLAN
(SC 19880)

Palmer, McDonald, Robinson, D'Auria, Mullins and Kahn, Js.*

Syllabus

The defendant, who was convicted of conspiracy to sell narcotics by a person who is not drug dependent and interfering with an officer, appealed from the trial court's denial of his motion to correct an illegal sentence. In that motion, the defendant claimed that his sentence had been imposed in violation of *Apprendi v. New Jersey* (530 U.S. 466) and *Allelyne v. United States* (570 U.S. 99), because the fact of drug dependency, which triggered a mandatory minimum sentence pursuant to the statute ([Rev. to 2009] § 21a-278) under which he was convicted, had neither been admitted by the defendant nor found by the jury. The trial court concluded that the defendant's arguments were foreclosed by *State v. Ray* (290 Conn. 602). On appeal, the defendant claimed, inter alia, that this court should overrule *Ray* and that the statutory scheme governing narcotics offenses violates the separation of powers clause in the Connecticut constitution. In addition, the state contended that the trial court lacked subject matter jurisdiction over the defendant's motion to correct. *Held* that the trial court properly denied the defendant's motion to correct; this court, having addressed the same jurisdictional and substantive claims in the companion case of *State v. Evans* (329 Conn.), adopted the reasoning and conclusion of that decision for the purposes of the present case.

Argued December 18, 2017—officially released August 21, 2018

Procedural History

Substitute information charging the defendant with the crimes of sale of narcotics by a person who is not drug dependent, sale of narcotics within 1500 feet of a school, possession of narcotics, conspiracy to sell narcotics by a person who is not drug dependent and interfering with an officer, brought to the Superior Court in the judicial district of New Haven, geographical area number seven, and tried to the jury before *B. Fischer, J.*; verdict and judgment of guilty of conspiracy to sell narcotics by a person who is not drug dependent and interfering with an officer, from which the defendant appealed to the Appellate Court, *DiPentima, C. J.*, and *Bear and Pellegrino, Js.*, which affirmed the trial court's judgment; thereafter, the court, *S. Moore, J.*, denied the defendant's motion to correct an illegal sentence, and the defendant appealed. *Affirmed.*

Temmy Ann Miller, assigned counsel, with whom was *Owen Firestone*, assigned counsel, for the appellant (defendant).

Rocco A. Chiarenza, assistant state's attorney, with whom, on the brief, were *Patrick J. Griffin*, state's attorney, and *James Dinnan*, senior assistant state's attorney, for the appellee (state).

Opinion

ROBINSON, J. This appeal is the companion case to *State v. Evans*, 329 Conn. , A.3d (2018), which we also decide today. The defendant, Nemiah Allan,¹ appeals² from the judgment of the trial court denying his motion to correct an illegal sentence. On appeal, the defendant claims that we should overrule *State v. Ray*, 290 Conn. 602, 966 A.2d 148 (2009), in which we interpreted General Statutes (Rev. to 2009) § 21a-278 (b)³ to render drug dependency an affirmative defense to be proven by the defendant because (1) it is no longer good law in light of the subsequent decision of the United States Supreme Court in *Alleyne v. United States*, 570 U.S. 99, 133 S. Ct. 2151, 186 L. Ed. 2d 314 (2013), and (2) it was wrongly decided as a matter of statutory interpretation. The defendant also argues that the narcotics statutory scheme, which gives the prosecutor the sole authority to decide whether to proceed under § 21a-278 (b), rather than the otherwise identical General Statutes (Rev. to 2009) § 21a-277 (a),⁴ violates the separation of powers established by article second of the Connecticut constitution, as amended by article eighteen of the amendments. The state contends to the contrary, and also argues that the trial court lacked subject matter jurisdiction over the defendant's motion to correct because that motion failed to raise a colorable claim challenging his sentence. Although we conclude that the trial court had subject matter jurisdiction over the defendant's motion to correct, we disagree with the merits of the defendant's claims. Accordingly, we affirm the judgment of the trial court denying the defendant's motion to correct an illegal sentence.

The record reveals the following undisputed facts and procedural history. Following a jury trial, the defendant was convicted of conspiracy to sell narcotics in violation of § 21a-278 (b) and General Statutes § 53a-48, and interfering with a police officer in violation of General Statutes § 53a-167a (a).⁵ No evidence concerning the defendant's drug dependency was presented at trial by the state or the defendant, and the trial court did not instruct the jury with respect to drug dependency. At sentencing, the court considered the defendant's history of narcotics convictions, and defense counsel argued that the defendant was not a career criminal but, rather, a career addict as a result of a painkiller addiction following a neck injury suffered in an automobile accident. The trial court, *B. Fischer, J.*, sentenced the defendant to a total effective sentence of twelve years imprisonment, followed by five years of special parole, to be served concurrently with a sentence that the defendant was serving for violation of probation. His conviction was subsequently affirmed on appeal. See *State v. Allan*, 131 Conn. App. 433, 443, 27 A.3d 19 (2011), *aff'd*, 311 Conn. 1. 83 A.3d 326 (2014).

Pursuant to Practice Book § 43-22, the defendant filed

a motion to correct an illegal sentence, claiming, *inter alia*, that his sentence had been imposed in violation of *Alleyne v. United States*, *supra*, 570 U.S. 99, and *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), because the fact of drug dependency, which triggered the mandatory minimum sentence under § 21a-278 (b), was not admitted by the defendant or found by the fact-finder. The trial court, *S. Moore, J.*, denied the defendant's motion, concluding that *Alleyne* and *Apprendi* did not control because of this court's interpretation of § 21a-278 (b) in, among other cases, *State v. Ray*, *supra*, 290 Conn. 602, which held that drug dependency is an affirmative defense to be proven by the defendant, rather than an element of the offense to be proven by the state. The trial court denied the defendant's subsequent motion for reconsideration and rendered judgment denying the motion to correct an illegal sentence. This appeal followed.

The jurisdictional issues raised by the parties and the merits of the underlying arguments presented in this appeal are identical to those considered in *State v. Evans*, *supra*, 329 Conn. , which we also decide today. We conclude that our examination of these same issues in *Evans* thoroughly resolves the claims in the present appeal and that there is nothing in this case that would mandate a different result. Accordingly, we adopt the reasoning and conclusions of that opinion herein. See, e.g., *State v. Drakes*, 321 Conn. 857, 864, 146 A.3d 21, cert. denied, U.S. , 137 S. Ct. 321, 196 L. Ed. 2d 234 (2016). We, therefore, conclude that the trial court properly denied the defendant's motion to correct an illegal sentence.

The judgment is affirmed.

In this opinion the other justices concurred.

* The listing of justices reflects their seniority status on this court as of the date of oral argument.

¹ We note that the defendant's name has been spelled inconsistently in various court documents in this case, including in the briefs in the present appeal. We use the spelling that is consistent with the operative information and a previous Appellate Court decision concerning the defendant. See *State v. Allan*, 131 Conn. App. 433, 27 A.3d 19 (2011), *aff'd*, 311 Conn. 1. 83 A.3d 326 (2014).

² The defendant appealed from the judgment of the trial court to the Appellate Court, and we granted his motion to transfer the appeal to this court pursuant to General Statutes § 51-199 (c) and Practice Book § 65-2.

³ General Statutes (Rev. to 2009) § 21a-278 (b) provides: "Any person who manufactures, distributes, sells, prescribes, dispenses, compounds, transports with the intent to sell or dispense, possesses with the intent to sell or dispense, offers, gives or administers to another person any narcotic substance, hallucinogenic substance other than marijuana, amphetamine-type substance, or one kilogram or more of a cannabis-type substance, except as authorized in this chapter, and who is not, at the time of such action, a drug-dependent person, for a first offense shall be imprisoned not less than five years or more than twenty years; and for each subsequent offense shall be imprisoned not less than ten years or more than twenty-five years. The execution of the mandatory minimum sentence imposed by the provisions of this subsection shall not be suspended, except the court may suspend the execution of such mandatory minimum sentence if at the time of the commission of the offense (1) such person was under the age of eighteen years, or (2) such person's mental capacity was significantly impaired, but not so impaired as to constitute a defense to prosecution."

We note that the legislature has recently made certain clarifying, non-substantive changes to § 21a-278. See Public Acts 2017, No. 17-17, § 2; see also *State v. Evans*, supra, 329 Conn. . For the sake of convenience, all references to § 21a-278 in this opinion are to the 2009 revision of the statute.

⁴ General Statutes (Rev. to 2009) § 21a-277 (a) provides: “Any person who manufactures, distributes, sells, prescribes, dispenses, compounds, transports with the intent to sell or dispense, possesses with the intent to sell or dispense, offers, gives or administers to another person any controlled substance which is a hallucinogenic substance other than marijuana, or a narcotic substance, except as authorized in this chapter, for a first offense, shall be imprisoned not more than fifteen years and may be fined not more than fifty thousand dollars or be both fined and imprisoned; and for a second offense shall be imprisoned not more than thirty years and may be fined not more than one hundred thousand dollars, or be both fined and imprisoned; and for each subsequent offense, shall be imprisoned not more than thirty years and may be fined not more than two hundred fifty thousand dollars, or be both fined and imprisoned.”

We note that the legislature has recently made certain clarifying, non-substantive changes to § 21a-277. See Public Acts 2017, No. 17-17, § 1; see also *State v. Evans*, supra, 329 Conn. .

⁵ The state also charged the defendant with sale of narcotics by a person who is not drug-dependent in violation of § 21a-278 (b), sale of narcotics within 1500 feet of a school in violation of General Statutes (Rev. to 2009) § 21a-278a (b), and possession of narcotics in violation of General Statutes (Rev. to 2009) § 21a-279 (a). The jury found the defendant not guilty of these offenses.
