

# 2020 Bucks County Bar Association- Criminal Law CLE

COMMONWEALTH VS. CHICKIN, \_\_\_ A.3d \_\_\_, 2020 WL2552803,

-Broad holding: The superior court found that a provision of §3806(a) of the Motor Vehicle Code, which statutorily equates a defendant's prior acceptance of an accelerated rehabilitative disposition in a driving under the influence case to be a prior "conviction" for purposes of a mandatory minimum sentence under §3804, to be unconstitutional.

The Pennsylvania Superior Court, recently heard two similarly situated matters: *Commonwealth v. Chichkin* and *Commonwealth v. Roche*. Both defendants challenged the sentences received for a second offense" within a ten year look back period. Both defendants had previously successfully completed the ARD program (diversionary program for first time offenders). It was argued at sentencing that ARD could not be considered a "prior offense" under Pennsylvania's DUI statute. Their argument centered around the fact that completion of the ARD program does not constitute a conviction. Once an individual completes the ARD requirements the criminal charges are dismissed.

On appeal, the Superior Court agreed with the defendants and held that it was unconstitutional for the Commonwealth to use a defendant's past acceptance and completion of ARD as a prior conviction, as no conviction has occurred.

The Chichkin court concluded that it violated both procedural and substantive due process to treat a prior acceptance of ARD as a prior "offense" (as defined by 75 Pa.C.S. §3806) under §3804 for mandatory sentencing purposes.

## 1. Sentencing

So how are the Bucks County Judges handling DUI pleas when a defendant has a prior DUI/ARD within 10 years?

Accordingly, that portion of 75 Pa.C.S. §3806(a), which statutorily equates a prior acceptance of ARD to a prior conviction for purposes of subjecting a defendant to a mandatory minimum sentence under Section 3804, is unconstitutional. Thus, we are constrained to vacate Appellant's sentences for DUI, and remand for resentencing as first-time DUI offenders.

Id. at \*8 (footnote omitted).

Defense attorneys are arguing that the Superior Court decision clearly stated that both matters were remanded for resentencing. Therefore, if the mandatory sentencing statute, §3804, was still viable, the Superior Court would not have remanded the two cases for resentencing as first-time offenders. Instead, the relief, in line with the argument now advocated by prosecutors, would have been a remand to give the Commonwealth an opportunity to prove, beyond a reasonable doubt that the defendant committed the underlying offense and advocate for the vacated second offense mandatory sentences to be imposed.

Could the Superior Court legally hold that the mandatory sentencing statute, §3804, or increased grading under §3803, could be imposed based on proof “Beyond a Reasonable Doubt” of the underlying offense without judicial re-writing of the governing statutes?

Section 3804 provides for mandatory penalties throughout if the defendant’s “offense” is a “second offense” or a “third or subsequent offense.” Likewise, Section 3803 provides for increased grading for individuals with “prior offenses.” In turn, Section 3806 provides the definition of what a “prior offense” is under these DUI sentencing statutes. Convictions and other specified dispositions, including an “acceptance of Accelerated Rehabilitative Disposition” are denominated “prior offenses” in Section 3806.

These statutes are plain and unambiguous in designating the dispositions that are a “prior offense,” therefore the terms of the statutes cannot be disregarded by the Court to pursue its alleged spirit. E.g., Commonwealth v. Foster, 214 A.3d 1240, 1247 (Pa. 2019). The Commonwealth’s proof BRD of the underlying DUI offense when there is an acceptance of ARD does not create a “disposition” under Section 3806 (i.e., a “prior offense” under Section 3806) thereby making someone a repeat offender.

A court would in effect have to add to the specific listed dispositions of Section 3806 the following: “or proof of a prior commission of a DUI, that was the subject of an ARD, beyond a reasonable doubt.” The Pennsylvania Supreme Court never permits such judicial re-writing, with additions to statutory language. E.g., In re Fortieth Statewide Investigating Grand Jury, 197 A.3d 712, 721 (Pa. 2018) (“our Court may not usurp the province of the Legislature by rewriting the Act to add hearing and evidentiary requirements”.); Robinson TP. v. Commonwealth, 147 A.3d 536, 583 (Pa. 2016) (Court refuses “to add language to the statute” because “not our Court’s role under tripartite system of governance to rewrite a statute.”)

Perhaps most significantly, the Chichkin court, in finding an Alleyne violation, noted that “[a]pplying the mandate of Alleyne, the Courts of this Commonwealth have concluded that many of our mandatory minimum statutes are unconstitutional,” citing Commonwealth v. Hopkins, 117 A.3d 247 (Pa. 2015), and other cases. Chichkin, at \*4. See Hopkins, 117 A.3d at 262 (Court “will not judicially usurp the legislative function and rewrite” this mandatory minimum statute, therefore it is unenforceable).

The Chichkin opinion could be more clearly written at the end when it notes that “if the Commonwealth seeks to enhance a defendant’s DUI sentence based upon that defendant’s prior acceptance of ARD, it must prove beyond a reasonable doubt, that the defendant actually committed the prior DUI offense.” Chichkin at \*10 (footnote omitted).

## **2. Retroactivity and Chichkin.**

Chichkin addresses the constitutionality of mandatory minimum sentences, therefore a non-waivable illegal sentencing claim is presented. E.g., Commonwealth v. Monarch, 200 A.3d 51 (Pa. 2019). If the defendant pled guilty, that should not be a barrier to raising this illegal sentencing claim. See, e.g., Commonwealth v. Rivera, 154 A.3d 370, 381 (Pa. Super. 2017) (en banc).

‘Non-waivable’ means the claims can be raised for the first time while a case is pending on direct appeal. The appellate court can and should even rule in accordance with Chichkin sua sponte. Id. See supra, 1.

For those cases where a direct appeal was not final at the time that Chichkin was decided, the defendant could raise the Alleyne holding in Chichkin in a timely filed PCRA petition. Commonwealth v. DiMatteo, 177 A.3d 182 (Pa. 2018). However, if the defendant’s direct appeal was concluded before the Chichkin decision, he may be barred from raising an Alleyne claim in a PCRA petition because Alleyne is a procedural rights decision. Commonwealth v. Washington, 142 A.3d 810 (Pa. 2016).

However, there is a possible claim that the substantive due process holding of Chichkin can be raised in a PCRA petition for a defendant who meets the PCRA custody requirement, regardless of the procedural posture of the case. That substantive holding excludes from the ambit of the mandatory sentencing statutes the class of people who have previously accepted ARD because there is no proof of culpable conduct. Chichkin at \*8 - \*10. “Substantive rules are those that decriminalize conduct or prohibit punishment against a class of persons.” Commonwealth v. Washington, supra, 142 A.3d at 813. States are constitutionally required to give full retroactive effect to such new substantive constitutional rulings regardless of when the defendant’s conviction became final. Montgomery v. Louisiana, 136 S.Ct. 718, 729 (2016). See, e.g., Commonwealth v. Rivera-Figueroa, 174 A.3d 674 (Pa. Super. 2017).

### **3. Notice Requirements, Jury Trials, And Severance**

If the interpretation, as summarized herein, of Chichkin prevails, the statutes could be unenforceable. As such, there could be no permissible basis for the District Attorney to include any allegations about prior ARD acceptance, or alleged underlying conduct, in the charging document. Can the prior offense conduct only be raised at sentencing? At trial? Is unfairly prejudicial to put such an allegation in the charging document?

As a result, the following is relevant only if it is held that the Commonwealth may seek enhanced grading and mandatory penalties upon proof beyond a reasonable doubt of the commission of a prior DUI.

- Notice – In addition to proof BRD, there is another constitutional requirement under Alleyne when a mandatory minimum sentence is pursued. Alleyne held that the “factual determination [triggering a mandatory sentence] must be specifically alleged in the charging document,” because it is an element of the aggravated offense. Commonwealth v. Hopkins, supra, 117 A.3d at 257. Thus, in this context, the charging document must contain particulars of the alleged conduct underlying the ARD acceptance that forms the basis of the recidivist charge. See, e.g., Commonwealth v. Gibson, 668 A.2d 553, 555-56 (Pa. Super. 1995).

- Jury trial – Even though Alleyne protections usually include the right to a jury trial, that right likely does not apply to a DUI defendant unless the potential maximum exceeds 6 months. See, e.g., Commonwealth v. Langley, 145 A.3d 757 (Pa. Super. 2016).

- **Severance** – Because the prior DUI offense would ordinarily be inadmissible at a DUI trial as prejudicial propensity evidence under Pa.R.E. 404, there is a basis for a motion to sever the prior offense from the trial on the current offense. See, e.g., Commonwealth v. Jones, 858 A.2d 1198, 1206-08 (Pa. Super. 2004) (defendant has right to sever former ‘felon not to possess a firearm’ from other charges).

#### **4. Can a Prosecutor Deny a Defendant from ARD Because the Defendant Refuses to Admit Guilt?**

Whether a defendant should accept ARD where the prosecutor requires an admission of guilt, or refuse, and challenge that requirement, is a decision that must be made based upon the facts and circumstances of each individual case. This section discusses grounds for challenging the requirement now, and the next section discusses strong claims later against admissibility of an ARD acceptance admission of guilt in a subsequent DUI prosecution.

Commonwealth v. Lutz, 495 A.2d 928 (Pa. 1985), provides broad discretion to prosecutors to decide the governing factors to consider in whether to accept someone for ARD. There is an abuse of discretion only if individuals are rejected from admission into an ARD program for reasons patently unrelated to whether that person is appropriately viewed as a threat to public safety or unfit for rehabilitation. Id. at 310. “Lutz expressly recognizes, however, that the district attorney is not free to rely on ‘prohibited considerations’ when deciding whether to submit a case to ARD.” Commonwealth v. Benn, 675 A.2d 261, 263 (Pa. 1996) (consideration of factor contrary to governing statutes was an abuse of discretion).

Is forcing a defendant to admit guilt for use in a subsequent proceeding contrary to the Rules of Criminal Procedure governing ARD and the decisional law? See infra, 10-12. Is this determination related to a determination in accord with the principles of ARD (protection of society, rehabilitation etc).

Is there a potential due process claim? Is a prosecutor’s refusal to permit ARD absent an admission of guilt violates due process because of the appearance of vindictiveness in response to a defendant’s assertion of legal rights. See, e.g., Blackledge v. Perry, 417 U.S. 21, 27-29 (1974).

#### **5. Should Admitting Guilt When Accepting ARD Not Be Admissible to Prove a Prior Offense in a Subsequent DUI Prosecution.**

If a defendant does agree to admit guilt when accepting ARD, is this agreement enforceable if the defendant is prosecuted for a subsequent DUI? (Attached to this are the Bucks County District Attorneys ARD forms).

The only rights that a defendant historically waived was under the governing Rules related to a speedy trial. Pa.R.Crim.P. 312. Rule 313 provides that at the acceptance hearing the defendant “agrees to the terms set forth in Rule 312....” If the defendant violates the conditions of his ARD, in accord with the defendant’s limited waiver of only speedy trial rights in Rule 312, “the Commonwealth shall proceed on the charges as provided by law” (Rule 318 (c)), meaning a trial. The Rules and the cases applying the Rules proceed on the theory that the defendant is presumed innocent when he accepts ARD. See, e.g., Commonwealth Armstrong, 434 A.2d

1205, 1208 (Pa. 1981). Specifically, concerning the hearing when ARD is accepted, and statements made by the defendant at that hearing, Rule 313 (B) provides as follows:

No Statement presented by the defendant should be used against the defendant for any purpose in any criminal proceeding except a prosecution based on the falsity of the information or statement applied.

The language of the provision is mandatory and plain and unambiguous. Would a future use of an admission of guilt in a subsequent DUI prosecution constitute a violation of Rule 313 (B)?

**6. ARD For DUI Offenses May Not Be Eliminated in a County.**

Finally, there is a statutory requirement that every county have an ARD program for DUI offenses. 75 Pa.C.S. §1552. See Commonwealth v. Lutz, supra, 495 A.2d at 304. As a result, the discontinuation or suspension of an ARD program by a district attorney would violate this precedent.

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