

**NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37**

COMMONWEALTH OF PENNSYLVANIA

Appellee

v.

DOMENIQUE JAMES LEWIS

Appellant

IN THE SUPERIOR COURT OF  
PENNSYLVANIA

No. 1760 WDA 2012

Appeal from the Judgment of Sentence September 27, 2012  
In the Court of Common Pleas of Allegheny County  
Criminal Division at No(s): CP-02-CR-0007865-2012

BEFORE: GANTMAN, P.J., ALLEN, J., and STABILE, J.

MEMORANDUM BY GANTMAN, P.J.:

**FILED JULY 2, 2014**

Appellant, Dominique James Lewis, appeals from the judgment of sentence entered in the Allegheny County Court of Common Pleas, following his bench trial conviction of persons not to possess firearms.<sup>1</sup> We affirm.

The trial court's opinion summarizes the relevant facts and procedural history of this case as follows:

[Appellant] possessed a 9 millimeter handgun during a robbery attempt that quickly turned into a homicide [when Appellant] and another person attempted to rob the victim. During the course of the robbery numerous gunshots were fired into the victim and he died as a result of those gunshots. At the jury trial, Tyree Smith testified that he personally observed [Appellant] point what appeared to be

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<sup>1</sup> 18 Pa.C.S.A. § 6105(a)(1).

a 9 millimeter handgun at the victim and fire multiple gunshots toward the victim. Tyree Smith was vigorously cross-examined by defense counsel at trial. Another trial witness, Tashawn Blair, had been interviewed by police during the course of the homicide investigation. Detective James McGee, of the City of Pittsburgh Bureau of Police testified that during the homicide investigation, he interviewed Blair. Blair's statement was recorded and played for the jury. Blair told police that [Appellant] had come to his residence on or about March 22, 2011[,] and spent the night. [Appellant] left the next morning. A few days later, Mr. Blair found a 9 millimeter handgun on the top of the refrigerator of his residence. He testified that to his knowledge, the gun was not in his residence prior to [Appellant's] visit. [Blair] only discovered the gun after [Appellant] had left. At trial, Blair provided a different version of events and testified that he [did not] know how the gun got into his house and that someone who attended a "tattoo party" there must have left it there. He never mentioned a "tattoo party" to the detective. Because the statements made to the detectives were inconsistent with Blair's trial testimony, this [c]ourt permitted the admission of Blair's taped statement as substantive evidence in this case. Considering the testimony of Tyree Smith and Detective McGee, this [c]ourt believed that sufficient evidence was presented at trial that [Appellant] possessed a firearm. The Commonwealth and [Appellant] stipulated that [Appellant] had been adjudicated delinquent of robbery, a felony of the first degree, on June 16, 2008. ...

\* \* \*

At the conclusion of the jury trial, [Appellant] proceeded to a non-jury trial on the charges of being a person not to possess a firearm. The evidence presented at the jury trial was also being presented for consideration in the non-jury trial. This [c]ourt convicted [Appellant] of possessing a firearm as a person prohibited from possessing a firearm. This [c]ourt sentenced [Appellant] to a term of imprisonment of not less than 2.5 years nor more than 5 years which was ordered to run concurrently to a sentence of imprisonment of not less than 33.5 nor more than 67 years imposed on [Appellant] in an unrelated case.

(Trial Court Opinion, filed July 15, 2013, at 1-3). Appellant filed a timely post-sentence motion, which challenged the weight and sufficiency of the evidence. The court denied Appellant's motion on October 10, 2012, and Appellant timely filed a notice of appeal on November 9, 2012. The court ordered Appellant to file a concise statement of errors complained of on appeal pursuant to Pa.R.A.P. 1925(b). Appellant timely complied and again raised claims challenging the weight and sufficiency of the evidence.

Appellant raises the following issues for our review:

DID NOT THE TRIAL COURT ERR WHEN, IN SENTENCING APPELLANT FOR A VIOLATION OF 18 PA.C.S. § 6105(C)(7), IT BASED ITS SENTENCING DECISION ON AN ERRONEOUS PREMISE — THAT BEING THAT THE CORRECT OFFENSE GRAVITY SCORE FOR APPELLANT'S OFFENSE WAS LEVEL FIVE, WHEN IN FACT IT WAS LEVEL THREE (WITH THAT ERROR RESULTING IN THE TRIAL COURT ERRONEOUSLY CONCLUDING THAT THE BEYOND-THE-AGGRAVATED-RANGE 2½-TO-5 YEAR CONFINEMENT SENTENCE IT IMPOSED UPON APPELLANT WAS A STANDARD RANGE SENTENCE, WITH THAT ERROR BEING SUCH THAT VACATION OF SENTENCE AND A REMAND WITH INSTRUCTIONS IS REQUIRED BY 42 PA.C.S. § 9781(C)(1))?

DID NOT TRIAL COUNSEL RENDER INEFFECTIVE ASSISTANCE, CLEAR FROM THE FACE OF THE CERTIFIED RECORD, WHEN [TRIAL COUNSEL] FAILED TO OBJECT TO THE TRIAL COURT SENTENCING BASED UPON AN ERRONEOUS OFFENSE GRAVITY SCORE AND THUS AN ERRONEOUS SENTENCING GUIDELINES RANGE (WITH THE REMEDY FOR THAT INEFFECTIVENESS BEING TO EXCUSE THE WAIVER OCCASIONED BY HER FAILURE TO OBJECT, AND TO REACH THE MERITS OF THE WAIVED CLAIM)?

DID NOT CURRENT COUNSEL, AS DIRECT APPEAL COUNSEL, RENDER INEFFECTIVE ASSISTANCE, CLEAR FROM THE FACE OF THE CERTIFIED RECORD, WHEN HE

FAILED TO ASSERT, IN THE CONCISE STATEMENT OF ERRORS THAT HE FILED ON APPELLANT'S BEHALF, THE CLAIM THAT TRIAL COUNSEL RENDER[ED] INEFFECTIVE ASSISTANCE, CLEAR FROM THE FACE OF THE CERTIFIED RECORD, WHEN [TRIAL COUNSEL] FAILED TO OBJECT TO THE TRIAL COURT SENTENCING BASED UPON AN ERRONEOUS OFFENSE GRAVITY SCORE AND THUS AN ERRONEOUS SENTENCING GUIDELINES RANGE (WITH THE REMEDY FOR CURRENT COUNSEL'S INEFFECTIVENESS BEING TO EXCUSE HIS WAIVER AND REACH [THE] MERITS OF THE WAIVED CLAIM OF INEFFECTIVE TRIAL COUNSEL)?

(Appellant's Brief at 4-5).

In his first issue, Appellant argues his sentence of two and one-half (2½) to five (5) years' imprisonment was beyond the aggravated range because the sentencing court applied an incorrect offense gravity score. Specifically, Appellant contends the sentencing court applied an offense gravity score of five (5), when the correct score for Appellant's offense was three (3), and as a result the sentencing court imposed what it believed to be a standard range sentence, but the sentence imposed was actually a sentence beyond the aggravated range. Appellant alleges he was convicted of persons not to possess firearms under Section 6105(c)(7) because he was previously adjudicated delinquent of a separate robbery offense. Appellant claims the sentencing guidelines do not provide an offense gravity score for a violation of Section 6105(c)(7) and, pursuant to 204 Pa.Code § 303.15, the sentencing guidelines apply a default offense gravity score of three (3), which was the proper offense gravity score to apply to Appellant's current conviction. Appellant concludes the sentencing court erred in applying an

incorrect offense gravity score, and this Court should remand for resentencing. Appellant's claim challenges the discretionary aspects of his sentence. **See Commonwealth v. Lamonda**, 52 A.3d 365 (Pa.Super. 2012) (explaining claim that sentencing court applied incorrect offense gravity score challenges discretionary aspects of sentencing); **Commonwealth v. Robinson**, 931 A.2d 15 (Pa.Super. 2007) (stating miscalculation of offense gravity score constitutes challenge to discretionary aspects of sentencing); **Commonwealth v. Archer**, 722 A.2d 203 (Pa.Super. 1998) (determining claim of improper calculation of offense gravity score implicates discretionary aspects of sentencing).

Preliminarily we observe Appellant did not object to the offense gravity score during sentencing or in a post-sentence motion challenging the discretionary aspects of sentencing. **See Commonwealth v. Mann**, 820 A.2d 788 (Pa.Super. 2003) (stating issues that challenge discretionary aspects of sentencing are generally waived if they are not raised during sentencing proceedings or in post-sentence motion). Furthermore, "to preserve their claims for appellate review, appellants must comply whenever the trial court orders them to file a Statement of [Errors] Complained of on Appeal pursuant to [Rule] 1925. Any issues not raised in a [Rule] 1925(b) statement will be deemed waived." **Commonwealth v. Castillo**, 585 Pa. 395, 403, 888 A.2d 775, 780 (2005) (quoting **Commonwealth v. Lord**, 553 Pa. 415, 420, 719 A.2d 306, 309 (1998)). Instantly, Appellant raised

only the weight and sufficiency of the evidence in his post-sentence motion and in his Rule 1925(b) statement. Consequently, Appellant's discretionary aspects of sentencing claim is waived. ***See id.; Mann, supra.***

In his second and third issues combined, Appellant argues ineffective assistance of both trial counsel and current appeal counsel. Appellant claims trial counsel was ineffective for failing to object to the sentencing court's application of an incorrect offense gravity score, which resulted in a sentence beyond the aggravated range. Appellant alleges trial counsel's failure to object was unreasonable because an objection would have preserved Appellant's sentencing issue for appellate review. Appellant avers he suffered prejudice because he would have received a lesser sentence had trial counsel objected to the sentencing court's offense gravity score error. Appellant claims appellate counsel was ineffective for omitting a claim regarding trial counsel's ineffectiveness from Appellant's Rule 1925(b) statement, thereby waiving the claim on appeal as well. Appellant contends there was no reasonable basis for appellate counsel to omit the claim from Appellant's Rule 1925(b) statement, and there is a reasonable probability that the outcome of his appeal would have been different had trial counsel's ineffectiveness claim been properly preserved. Appellant concludes this Court should remedy trial and appellate counsels' ineffectiveness by reviewing the merits of these claims on direct appeal pursuant to ***Commonwealth v. Holmes***, \_\_\_ Pa. \_\_\_, 79 A.3d 562 (2013), as the

record on its face establishes the claims. We decline to address Appellant's ineffectiveness claims.

"[A]s a general rule, a petitioner should wait to raise claims of ineffective assistance of trial counsel until collateral review."

***Commonwealth v. Grant***, 572 Pa. 48, 67, 813 A.2d 726, 738 (2002).

"[A]ny ineffectiveness claim will be waived only after a petitioner has had the opportunity to raise that claim on collateral review and has failed to avail himself of that opportunity." ***Id.*** "[Thus], a claim raising trial counsel ineffectiveness will no longer be considered waived because new counsel on direct appeal did not raise a claim related to prior counsel's ineffectiveness."

***Id.***

Nevertheless, our Supreme Court has recognized two very limited exceptions to the general rule in ***Grant*** regarding the appropriate timing for review of ineffective assistance of counsel claims:

First, we appreciate that there may be extraordinary circumstances where a discrete claim (or claims) of trial counsel ineffectiveness is apparent from the record and meritorious to the extent that immediate consideration best serves the interests of justice; and we hold that **trial** courts retain their discretion to entertain such claims.

Second, with respect to other cases and claims...where the defendant seeks to litigate multiple or prolix claims of counsel ineffectiveness, including non-record-based claims, on post-verdict motions and direct appeal, we repose discretion in the **trial** courts to entertain such claims, but only if (1) there is good cause shown, and (2) the unitary review so indulged is preceded by the defendant's knowing and express waiver of his entitlement to seek PCRA review from his conviction and sentence, including an express

recognition that the waiver subjects further collateral review to the time and serial petition restrictions of the PCRA.

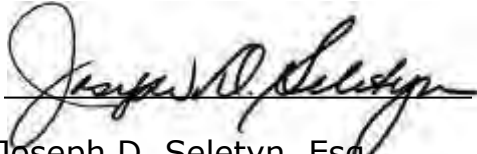
**See Holmes, supra** at \_\_\_, 79 A.3d at 563-64 (internal citations and footnotes omitted) (emphasis added).

Here, neither **Holmes** exception applies to Appellant's case as his ineffectiveness claims are not so apparent from the record, nor has he waived his entitlement to seek PCRA review. **See id.** Absent these exceptions, our Supreme Court in **Holmes** upheld the general rule in **Grant**. **See id.** at \_\_\_, 79 A.3d at 576 (holding ineffective assistance of counsel claims are to be deferred to PCRA review, and should not be reviewed on direct appeal). **Holmes** does not allow review of standard ineffectiveness of counsel claims, which are raised for the first time on appeal, even in the guise of "judicial economy." Thus, pursuant to **Grant**, we dismiss Appellant's ineffectiveness of counsel claims but without prejudice to Appellant to raise them in a timely petition for collateral relief. **See Grant, supra** at 69, 813 A.2d at 739. Accordingly, we affirm Appellant's judgment of sentence on waiver grounds. **See generally In re K.L.S.**, 594 Pa. 194, 197 n.3, 934 A.2d 1244, 1246 n.3 (2007) (stating where issues are waived on appeal, we should affirm rather than quash appeal).

Judgment of sentence affirmed.



Judgment Entered.

A handwritten signature in black ink, appearing to read "Joseph D. Seletyn", written over a horizontal line.

Joseph D. Seletyn, Esq.  
Prothonotary

Date: 7/2/2014