

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellee	:	
	:	
v.	:	
	:	
ROBERT LAVANANT,	:	
	:	
Appellant	:	No. 2692 EDA 2013

Appeal from the Judgment of Sentence August 22, 2013
In the Court of Common Pleas of Pike County
Criminal Division No(s): 81-2012

BEFORE: BENDER, P.J.E., SHOGAN, and FITZGERALD,* JJ.

MEMORANDUM BY FITZGERALD, J.: **FILED JUNE 26, 2014**

Appellant, Robert Lavanant, appeals from the judgment of sentence entered in the Pike County Court of Common Pleas. Appellant contends the court erred in sentencing him for simple assault and recklessly endangering another person utilizing the deadly weapon used matrix ("DWE"). We affirm.

The trial court summarized the facts of this case as follows:

This case arose out of an incident that occurred on November 26, 2011 in Delaware Township, Pike County. At approximately 1:30 P.M. that day, the victim, Nicole Lutz, was driving down Spencer Road which ran in front of the home of [Appellant]. As she approached [Appellant's]

* Former Justice specially assigned to the Superior Court.

home, [he] emerged from the house and ran towards her car. [Appellant] then stopped running and pointed a handgun in the victim's direction and fired several rounds. The victim saw [Appellant] pointing the gun, head (sic) the shots and then fled the area. [Appellant] was arrested that same day.

Trial Ct. Op., 11/19/13, at 1. Following a jury trial, Appellant was convicted of Possession of an Instrument of Crime ("PIC"),¹ Simple Assault-Physical Menace,² and Recklessly Endangering Another Person.³ Appellant was sentenced to nine to thirty-six months in prison for PIC. He was sentenced to a consecutive term of twelve to twenty-four months in prison for simple assault. He received a concurrent sentence of twelve to twenty-four months in prison for recklessly endangering another person. Appellant filed a post-sentence motion that was denied. This timely appeal followed. Appellant filed a court-ordered Pa.R.A.P. 1925(b) statement of errors complained of on appeal and the trial court filed a responsive opinion.

Appellant raises the following issues for our review:

1. Did the lower court err in sentencing Appellant for Count III, simple assault, utilizing the deadly weapon used matrix because the jury did not make a specific finding that Appellant used a deadly weapon, and, as further evidence of this fact, the jury verdict slip did not specify which of the four sections of the offense of simple assault, section 2701(A), some of which clearly do not require the use of a

¹ 18 Pa.C.S. § 907(a).

² 18 Pa.C.S. § 2701(a)(3).

³ 18 Pa.C.S. § 2705.

deadly weapon, (sic) it found that Appellant had committed?

2. Did the lower court err in sentencing Appellant for Count IV, recklessly endangering another person, utilizing the deadly weapon used matrix because the jury did not make a specific finding that Appellant used a deadly weapon?

Appellant's Brief at 15.⁴

Appellant contends that the application of the DWE violated his Sixth Amendment rights because the jury did not make a specific finding that he used a weapon, citing *Alleyne v. United States*, 133 S. Ct. 2151 (2013). He also claims the court erred in applying the enhancement because the jury did not make a specific finding as to the subsection of simple assault he violated.⁵

⁴ We note that Appellant addresses both issues together in the argument section of his brief in violation of Pa.R.A.P. 2119(a). However, because this defect does not impede our ability to conduct appellate review, we decline to find waiver. We address the issues together because they are based upon the same argument.

⁵ We note Appellant was convicted of the following subsection of simple assault:

(a) Offense defined.— Except as provided under section 702 (relating to aggravated assault), a person is guilty of assault if he:

(3) attempts by physical menace to put another in fear of imminent serious bodily injury;

18 Pa.C.S. 2701(a)(3).

A challenge to the application of the DWE implicates the discretionary aspects of the sentence. **Commonwealth v. Phillips**, 946 A.2d 103, 112 (Pa. Super. 2008). This Court has stated,

Challenges to the discretionary aspects of sentencing do not entitle an appellant to an appeal as of right. Prior to reaching the merits of a discretionary sentencing issue:

[W]e conduct a four part analysis to determine: (1) whether appellant has filed a timely notice of appeal; (2) whether the issue was properly preserved at sentencing or in a motion to reconsider and modify sentence; (3) whether appellant's brief has a fatal defect; and (4) whether there is a substantial question that the sentence appealed from is not appropriate under the Sentencing Code.

When appealing the discretionary aspects of a sentence, an appellant must invoke the appellate court's jurisdiction by including in his brief a separate concise statement demonstrating that there is a substantial question as to the appropriateness of the sentence under the Sentencing Code. [**See**] Pa.R.A.P. 2119(f). "The requirement that an appellant separately set forth the reasons relied upon for allowance of appeal 'furthers the purpose evident in the Sentencing Code as a whole of limiting any challenges to the trial court's evaluation of the multitude of factors impinging on the sentencing decision to exceptional cases.'"

The determination of what constitutes a substantial question must be evaluated on a case-by-case basis. A substantial question exists "only when the appellant advances a colorable argument that the sentencing judge's actions were either: (1) inconsistent with a specific provision of the Sentencing Code; or (2) contrary to the fundamental norms which underlie the sentencing process."

Id. (some citations omitted). "This Court has found that application of the DWE presents a substantial question for review." **Commonwealth v.**

J. S26035/14

Buterbaugh, ___ A.3d ___, ___, 2014 WL 1898968 at *17 (Pa. Super. May 13, 2014).

In the instant matter, Appellant preserved the issue at sentencing. He argued that the DWE should not be applied at sentencing “given the fact that there was no specific finding that a weapon was used” by Appellant. N.T., 8/22/13, at 3. Appellant’s brief includes the necessary Rule 2119(f) statement. According to his Rule 2119(f) statement, the trial court’s utilization of the DWE resulted in a sentence that was unreasonable. Appellant’s Brief at 14.

We find Appellant’s Rule 2119(f) statement presents a substantial question. **See Buterbaugh**, 2014 WL 1898968 at *17. Therefore, we will review the merits of Appellant’s challenge to the discretionary aspects of his sentence.

When reviewing a challenge to the sentencing court’s discretion, our standard of review is as follows:

Sentencing is a matter vested in the sound discretion of the sentencing judge, and a sentence will not be disturbed on appeal absent a manifest abuse of discretion. An abuse of discretion is more than just an error in judgment and, on appeal, the trial court will not be found to have abused its discretion unless the record discloses that the judgment exercised was manifestly unreasonable, or the result of partiality, prejudice, bias, or ill-will.

Commonwealth v. Bowen, 55 A.3d 1254, 1263 (Pa. Super. 2012) (citation omitted), *appeal denied*, 64 A.3d 630 (Pa. 2013).

Our function in interpreting a statute is to ascertain and effectuate the intent of the General Assembly. **See** 1 Pa. Cons.Stat. Ann. § 1921(a). The DWE, as part of the Pennsylvania Sentencing Guidelines adopted by the Pennsylvania Sentencing Commission, present a unique question of interpretation that was succinctly described by our Supreme Court in **Commonwealth v. Hackenberger**:

Although the Sentencing Commission (“the Commission”), rather than the General Assembly itself, directly adopts the Sentencing Guidelines (“the Guidelines”) and thus they are not statutes *per se*, the Guidelines nevertheless retain a legislative character, as the General Assembly may reject them in their entirety prior to their taking effect, subject, of course, to gubernatorial review. Moreover, the General Assembly itself has designated the Commission as a legislative agency.

575 Pa. 197, 836 A.2d 2, 4 n. 9 (Pa.2003) (citations omitted). Thus, the dictates of the Statutory Construction Act are applicable to our analysis based on the quasilegislative character of the DWE.

The Statutory Construction Act commands, “[w]hen the words of a statute are clear and free from ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit.” 1 Pa. Cons.Stat. Ann. § 1921(b). It is only when the words of a statute are not explicit that a court may rely on established rules of statutory construction. **See** 1 Pa. Cons.Stat. Ann. § 1921(c).

Penal provisions of a statute must be strictly construed. **See** 1 Pa. Cons.Stat. Ann. § 1928(b)(1). Such a directive does not compel us to attribute the narrowest possible meaning to the words, nor does it require us to disregard legislative intent; instead, it means that if we determine the language of a penal statute is ambiguous, this language will be interpreted in the light most favorable to the accused. **See Commonwealth v. Booth**, 564 Pa. 228, 766 A.2d 843, 846 (Pa.2001).

The deadly weapon enhancement provides, in part:

When the court determines that the offender used a deadly weapon during the commission of the current conviction offense, the court shall consider the DWE/Used Matrix (§ 303.17(b)). An offender has used a deadly weapon if any of the following were employed by the offender in a way that threatened or injured another individual:

(i) Any firearm, (as defined in 42 Pa.C.S. § 9712) whether loaded or unloaded, or

(ii) Any dangerous weapon (as defined in 18 Pa.C.S. § 913), or

(iii) Any device, implement, or instrumentality capable of producing death or serious bodily injury.

204 Pa. Code § 303.10(a)(2)(i)-(iii).

Buterbaugh, 2014 WL 1898968 at *17-18. This court held “[t]he plain language of the DWE in Section 303.10 applies to any offense for which a deadly weapon was possessed or used.” **Id.** at *19.

In **Buterbaugh**, this Court held that a motor vehicle was a deadly weapon and thus the DWE was applicable. **Id.** at *21. In light of its holding, this Court stated:

While not raised by either party, we find it necessary to discuss our finding that Appellant’s truck is a deadly weapon in light of the United States Supreme Court’s decisions in **Alleyne v. United States**, ___ U.S. ___, 133 S.Ct. 2151, 186 L.Ed.2d 314 (2013), and **Apprendi v. New Jersey**, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). In both cases, the Supreme Court determined that certain sentencing factors were considered elements of the underlying crime, and thus, to comply with the dictates of the Sixth Amendment, must be submitted to the jury and proven beyond a reasonable doubt instead being determined by the sentencing judge. However, this

inquiry is not relevant to our case because of the nature of the DWE.

Alleyne and **Apprendi** dealt with factors that either increased the mandatory minimum sentence or increased the prescribed sentencing range beyond the statutory maximum, respectively. Our case does not involve either situation; instead, we are dealing with a sentencing enhancement. If the enhancement applies, the sentencing court is required to raise the standard guideline range; however, the court retains the discretion to sentence outside the guideline range. Therefore, neither of the situations addressed in **Alleyne** and **Apprendi** are implicated.

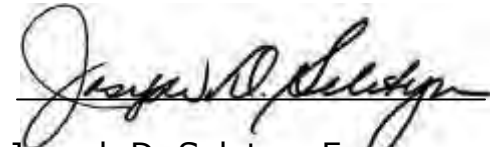
Id.

Instantly, the jury found Appellant guilty of PIC, *viz.*, a handgun, Simple Assault, and Recklessly Endangering Another Person, warranting the utilization of the DWE. **See id.** Because the DWE is a sentencing enhancement, **Alleyne** is not implicated. **See id.** Accordingly, having discerned no abuse of discretion, we affirm the judgment of sentence. **See Bowen**, 55 A.3d at 1263.

Judgment of sentence affirmed.

Shogan, J. concurs in the result.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 6/26/2014

J. S26035/14