

**NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37**

COMMONWEALTH OF PENNSYLVANIA

IN THE SUPERIOR COURT OF  
PENNSYLVANIA

Appellee

v.

ROBERT WILLIAM LYONS

Appellant

No. 964 MDA 2013

Appeal from the Judgment of Sentence dated May 15, 2013  
In the Court of Common Pleas of Lycoming County  
Criminal Division at No: CP-41-CR-0001417-2012

BEFORE: MUNDY, OLSON, AND STABILE, JJ.

MEMORANDUM BY STABILE, J.:

**FILED MAY 23, 2014**

Appellant, Robert William Lyons, appeals from the trial court's May 15, 2013 judgment of sentence imposing an aggregate six to twelve years of incarceration for three counts of aggravated assault by physical menace, 18 Pa.C.S.A. § 2702(a)(6).<sup>1</sup> We affirm.

Appellant's convictions resulted from a July 28, 2012 armed standoff between Appellant and several Pennsylvania state troopers at Appellant's home. The police officers arrived at Appellant's home to investigate a reported domestic dispute. The standoff ended with no shots fired and no

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<sup>1</sup> A violation of § 2702(a)(6) occurs where the defendant "attempts by physical menace to put any [police officer], while in the performance of duty, in fear of imminent serious bodily injury[.]" 18 Pa.C.S.A. § 2702(a)(6).

injuries. Nonetheless, Appellant was yelling and pointing a firearm in the direction of the police officers.

A jury found Appellant guilty of aggravated assault by physical menace at the conclusion of a March 5, 2013 trial. The trial court imposed sentence on May 15, 2013, and Appellant did not challenge the discretionary aspects at the hearing or in a subsequent post-sentence motion. Appellant filed this timely appeal on May 28, 2013.

Appellant raises three issues for our review:

1. Did the lower court err in imposing a deadly weapon enhancement at sentencing, absent a specific finding by the jury that a deadly weapon was possessed during the commission of the offense?
2. Did the lower court err in imposing three consecutive sentences on the charges of aggravated assault with intent to put enumerated officials in fear, insofar as the sentences should have been made to run concurrently because [Appellant's] offense was limited in time and space and the number of victims was a function of police calls for backup rather than an escalation by [Appellant], such that the sentence is manifestly excessive in the aggregate?
3. Was sentencing counsel ineffective in failing to preserve issues regarding the excessiveness of sentence?

Appellant's Brief at 2.

Appellant's first two issues challenge the trial court's sentencing discretion. In order to preserve those issues for appellate review, Appellant needed to file a timely appeal, raise the issues before the trial court either at

sentencing or in a post-sentence motion, and include in his appellate brief a concise statement of reason relied upon for allowance of appeal in accordance with Pa.R.A.P. 2119(f). **Commonwealth v. Cartrette**, 83 A.3d 1030, 1042 (Pa. Super. 2013). Appellant filed a timely appeal, but failed to raise his sentencing challenges before the trial court or include a Pa.R.A.P. 2119(f) statement in his brief. This failure results in waiver: “[I]ssues challenging the discretionary aspects of a sentence must be raised in a post-sentence motion or by presenting the claim to the trial court during the sentencing proceedings. Absent such efforts, an objection to a discretionary aspect of a sentence is waived.” **Id.**

Appellant seeks to avoid waiver by asserting the sentence is illegal, or in the alternative, that sentencing counsel was ineffective. Concerning illegality, Appellant cites the United States Supreme Court’s opinion in **United States v. Alleyne**, 133 S.Ct. 2151 (2013), in which the Court held that any fact that increases a mandatory minimum sentence must be submitted to the jury. Appellant argues **Alleyne** precluded the trial court from applying the deadly weapon enhancement (“DWE”)<sup>2</sup> to arrive at the appropriate guideline range for Appellant’s offense. Appellant argues, pursuant to **Alleyne**, that the DWE cannot apply absent a finding by the jury that he employed a deadly weapon in the commission of his offense.

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<sup>2</sup> **See** 204 Pa. Code § 303.10.

Appellant's argument is unavailing. We observe that the Supreme Court decided **Alleyne** on June 17, 2013, more than one month after the trial court imposed Appellant's sentence. Appellant develops no argument for retroactive application of **Alleyne**. Furthermore, **Alleyne** applies to findings of fact that result in a mandatory minimum sentence. The **Alleyne** Court was careful to distinguish between facts that trigger a mandatory minimum and facts that can influence sentencing discretion. **Id.** at 2163. "Nothing [...] suggests that it is impermissible for judges to exercise discretion—taking into consideration various factors relating both to offense and offender—in imposing a judgment *within the range* prescribed by statute." **Id.** (quoting **Apprendi v. New Jersey**, 530 U.S. 466, 481 (2000) (emphasis in original). Instantly, the DWE affects the recommended guideline range applicable to an offense, but it does not impose a mandatory minimum sentence. **See** 204 Pa. Code § 303.9(b). The trial court retains discretion to impose a sentence beneath the guideline range where no mandatory minimum is required. Appellant's reliance on **Alleyne** is misplaced.

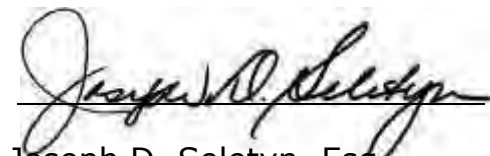
Appellant also seeks to avoid waiver by asserting sentencing counsel's ineffectiveness for failing to preserve Appellant's sentencing challenges. Appellant relies on **Commonwealth v. Seachrist**, 383 A.2d 199 (Pa. 1978), in which the Pennsylvania Supreme Court held that a claim of ineffective assistance of counsel is reviewable on direct appeal if the appellant raises

the issue “at the earliest stage in the proceedings at which counsel whose ineffectiveness is being challenged no longer represents the appellant.” **Id.** at 663. The law in this area has changed considerably since **Seachrist**. Our Supreme Court has held that claims of ineffective assistance of counsel are reserved for collateral review except in limited circumstances. **Commonwealth v. Holmes**, 79 A.3d 562 (Pa. 2013). While the **Holmes** opinion post-dated Appellant’s trial and sentencing, the general rule relied upon in **Holmes** has been in effect since the Supreme Court’s opinion in **Commonwealth v. Grant**, 813 A.2d 726 (Pa. 2002). Appellant fails to acknowledge **Holmes** or **Grant**, much less argue for the applicability of an exception to the general rule established therein. Accordingly, Appellant must await collateral review to challenge sentencing counsel’s stewardship.

Judgment of sentence affirmed.

Judge Olson concurs in the result.

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: 5/23/2014