

**NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT O.P. 65.37**

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|------------------------------|---|--------------------------|
| COMMONWEALTH OF PENNSYLVANIA | : | IN THE SUPERIOR COURT OF |
|                              | : | PENNSYLVANIA             |
|                              | : |                          |
| v.                           | : |                          |
|                              | : |                          |
|                              | : |                          |
| RICHARD LEE PHILLIPS JR.     | : |                          |
|                              | : |                          |
| Appellant                    | : | No. 563 WDA 2025         |

Appeal from the Judgment of Sentence Entered April 14, 2025  
In the Court of Common Pleas of Allegheny County Criminal Division at  
No(s): CP-02-CR-0000521-2023

BEFORE: STABILE, J., DUBOW, J., and STEVENS, P.J.E.\*

MEMORANDUM BY STEVENS, P.J.E.: **FILED: September 11, 2026**

Richard Lee Phillips, Jr., appeals from the judgment of sentence entered by the Court of Common Pleas of Allegheny County after the court revoked his probation and imposed a violation of probation sentence. We vacate judgment of sentence and remand for further proceedings consistent with this decision.

On September 25, 2023, Phillips entered a counseled negotiated guilty plea to Fleeing or Attempting to Elude Officer,<sup>1</sup> Accidents Involving Death or Personal Injury,<sup>2</sup> and Driving While Operating Privilege is Suspended or

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\* Former Justice specially assigned to the Superior Court.

<sup>1</sup> 75 Pa.C.S.A. § 3733(a).

<sup>2</sup> 75 Pa.C.S.A. § 7342(a).

Revoked.<sup>3, 4</sup> Accepting the plea deal, the trial court sentenced him to three years' probation with restrictive conditions for Fleeing or Attempting to Elude Officer, a concurrent period of three years' probation with restrictive conditions for Accidents Involving Death or Personal Injury, and no further penalty for Driving While Operating Privilege is Suspended or Revoked.

While on probation, Phillips twice absconded and received negative reviews. In the first instance he failed to attend inpatient treatment, and in the second he fled from a van that was transporting him to alternative housing. Accordingly, the lower court revoked his probationary status as a drug court participant and deferred sentencing pending its receipt of a presentence report.

On April 14, 2025, the trial court conducted a **Gagnon II**<sup>5</sup> Probation Violation Hearing in which it reviewed the 35-year-old's medical/diagnostic history as well as his lengthy criminal record that began in 2008, and it

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<sup>3</sup> 75 Pa.C.S.A. § 1543(a).

<sup>4</sup> Pursuant to the plea deal, the Commonwealth withdrew the remaining charges, which included Recklessly Endangering Another Person, 18 Pa.C.S.A. § 2705, and numerous additional Vehicle Code violations.

<sup>5</sup> **Gagnon v. Scarpelli**, 411 U.S. 778 (1973). A **Gagnon I** hearing seeks to ensure "that probable cause exists to believe that a violation has been committed." **Commonwealth v. Ferguson**, 761 A.2d 613, 617 (Pa. Super. 2000) (citation omitted). A **Gagnon II** hearing "is required before a final revocation decision can be made." **Id.** (citation omitted).

accepted testimony<sup>6</sup> and argument bearing on the matter before it. At the conclusion of the hearing, the trial court revoked Phillips' probation and sentenced him to 30 to 60 months' incarceration, to be followed by two years' probation for fleeing/eluding. N.T. (Drug Court Gagnon II Hearing), 4/14/25, at 14-15; C.R. at #20 ("Order of Sentence – Probation Violation"). On April 24, 2025, the trial court denied Phillips' counseled post-sentence motion. This appeal followed.

On appeal, Phillips raises five issues challenging either the legality of his sentence<sup>7</sup> or the discretionary aspects of his sentence. We find that both of his legality of sentencing issues are meritorious and require remand for resentencing consistent with this decision.

Phillips' first legality of sentence issue asks if the trial court imposed an illegal sentence when it failed to determine, on the record at the time of sentencing, whether Mr. Phillips was RRRI eligible. Brief of Appellant, at 8.<sup>8</sup>

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<sup>6</sup> Phillips' mother testified that her son's 20-year record as a scofflaw, despite his receiving both family support and social services support during the relevant time, had left her resigned to the opinion that he should be incarcerated.

<sup>7</sup> Phillips' alternate legality of sentencing claim, that the trial court's imposition of more than 30 days of total confinement for a second technical violation of probation an illegal sentence when it imposed, likewise qualifies for an exception to the issue preservation requirement. **See Commonwealth v. Thorne**, 276 A.3d 1192, 1196 (Pa 2022).

<sup>8</sup> The Commonwealth concedes that Phillips' sentence must be vacated and remanded for an on-the-record judicial determination as to RRRI eligibility. Commonwealth Brief at 12-13.

“When the legality of a sentence is at issue, our standard of review over such questions is *de novo* and our scope of review is plenary.” ***Commonwealth v. Ford***, 217 A.3d 824 (Pa. 2019) (citation and original quotation marks omitted).

The Sentencing Code provides, in relevant part:

**§ 9756. Sentence of total confinement**

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**(b.1) Recidivism risk reduction incentive minimum sentence.**—The court shall determine if the defendant is eligible for a recidivism risk reduction incentive sentence under 61 Pa.C.S. Ch. 45 (relating to recidivism risk reduction incentive). If the defendant is eligible, the court shall impose a recidivism risk reduction minimum sentence in addition to a minimum sentence and a maximum sentence, except, if the defendant was previously sentenced to two or more recidivism risk reduction incentive minimum sentences, the court shall have the discretion to impose a sentence with no recidivism risk reduction incentive minimum.

42 Pa.C.S.A. § 9756(b.1).

This Court has held that when “the trial court fails to make a statutorily required determination regarding a defendant's eligibility for an RRRI minimum sentence as required, the sentence is illegal.” ***Commonwealth v. Kent***, 351 A.3d 222 (Pa. Super. 2025)<sup>9</sup> (quoting ***Commonwealth v. Robinson***, 7 A.3d 868, 871 (Pa. Super. 2010)). Moreover, “challenges to an

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<sup>9</sup> Pursuant to the Pennsylvania Rules of Appellate Procedure, we may cite nonprecedential memorandum decisions of this Court that were filed after May 1, 2019, for their “persuasive value.” Pa.R.A.P. 126(b)(1)-(2).

illegal sentence can never be waived[.]” ***Commonwealth v. Whalley***, 326 A.3d 948, 950 (Pa. Super. 2024) (citations omitted). Finally, “we apply a *de novo* standard of review and plenary scope of review to questions of legality of sentence.” ***Commonwealth v. Risoldi***, 276 A.3d 279, 281 (Pa. Super. 2022)(citation omitted).

Our review of Phillips’ sentencing transcript shows that the trial court did not determine on the record whether he was RRRI eligible before it imposed a sentence of imprisonment in a state correctional institution. Because this omission rendered Phillips’ sentence illegal, we remand to allow the court an opportunity to correct his sentence by making an on-the-record determination regarding his RRRI eligibility.

In Phillips’ second legality of sentencing claim, he asserts that the trial court’s sentencing order imposing more than 30 days of total confinement for a second technical violation of probation violated 42 Pa.C.S.A. § 9771, which provides, in relevant part:

**§ 9771. Modification or revocation of order of probation**

**(a) General rule.**--The court has inherent power to at any time terminate continued supervision, lessen the conditions upon which an order of probation has been imposed or increase the conditions under which an order of probation has been imposed upon a finding by clear and convincing evidence that a person presents an identifiable threat to public safety.

**(b) Revocation.**--The court may increase the conditions, impose a brief sanction under section 9771.1 (relating to court-imposed sanctions for violating probation) or revoke an order of probation upon proof of the violation of specified conditions of the probation. Subject to the limitations of subsections (b.1) and (c), upon

revocation the sentencing alternatives available to the court shall be the same as were available at the time of initial sentencing, due consideration being given to the time spent serving the order of probation. The attorney for the Commonwealth may file notice at any time prior to resentencing of the Commonwealth's intention to proceed under an applicable provision of law requiring a mandatory minimum sentence.

. . .

**(c) Limitation on sentence of total confinement.--**There is a presumption against total confinement for technical violations of probation. The following shall apply:

- (1) The court may impose a sentence of total confinement upon revocation only if:

. . .

(iii) the court finds by a preponderance of the evidence that the defendant committed a technical violation and any of the following apply:

. . .

(E) The defendant absconded and cannot be safely diverted from total confinement through less restrictive means.

(F) The technical violation involved an intentional and unexcused failure to adhere to recommended programming or conditions on three or more separate occasions and the defendant cannot be safely diverted from total confinement through less restrictive means. For purposes of this

clause, multiple technical violations stemming from the same episode of events shall not constitute separate technical violations.

(2) If a court imposes a sentence of total confinement following a revocation, the basis of which is for one or more technical violations under paragraph (1)(ii) or (iii), the court shall consider the employment status of the defendant. The defendant shall be sentenced as follows:

(i) For a first technical violation, a maximum period of 14 days.

(ii) For a second technical violation, a maximum period of 30 days.

(iii) For a third or subsequent technical violation, the court may impose any sentencing alternatives available at the time of initial sentencing.

(iv) The time limitations contained in this paragraph shall not apply to the extent that a reasonable term of additional total confinement, not to exceed 30 days, is necessary to allow a defendant to either be evaluated for or to participate in:

(A) a court-ordered drug, alcohol or mental health treatment program; or

(B) a treatment court provided for in section 916 (relating to treatment courts).

. . . .

42 Pa.C.S.A. § 9771(a), (b), and (c).

Phillips contends that pursuant to Section 9771(c)(2)(ii), the trial court could impose a probation revocation sentence of no more than 30 days' incarceration after it determined at the December 23, 2024, hearing that he had committed his second technical violation of probation when he absconded from a van that was transporting him to alternative housing. The Commonwealth argues that the trial court was well-informed of Phillips' long history of absconding from programs. Commonwealth's Brief at 14-15.

In ***Commonwealth v. Oglesby***, 357 A.3d 122, 132 (Pa. Super. 2026), this Court observed that because "the plain language of section 9771(c), a penal statute, is latently ambiguous [on how a VOP court is to determine the number of predicate violating behaviors], the rule of lenity mandates that we resolve the ambiguity in [a defendant's] favor." ***Id.*** at 137. Therefore, we held that "in calculating a probationer's technical violations for purposes of section 9771(c), a VOP court must consider only violating behaviors that were accompanied by a judicial finding that the probationer committed a violation." ***Id.*** at 137.<sup>10</sup>

Herein, the record is unclear as to the number of times Phillips' alleged violating behaviors were accompanied by a judicial finding that he had

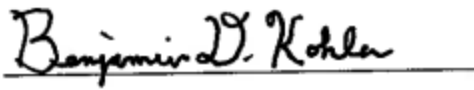
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<sup>10</sup> Specifically, the ***Oglesby*** Court acknowledged the appellant's argument that, "even if there was properly-admitted evidence in the record suggesting that [Appellant], while on Judge Means' supervision, absconded from time to time and failed to obtain court-ordered [drug] treatment, Judge Means ultimately never found [Appellant] in technical violation for those (or any other) reasons." ***Id.*** at 29-30.

committed a probation violation. Therefore, we vacate judgment of sentence and remand this matter to the lower court for further proceedings consistent with this decision.

Judgment of sentence is vacated and remanded for further proceedings consistent with this decision. Jurisdiction relinquished.

Judgment Entered.

A handwritten signature in black ink, reading "Benjamin D. Kohler", is written over a horizontal line.

Benjamin D. Kohler, Esq.  
Prothonotary

DATE: 9/11/2026