

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA : IN THE SUPERIOR COURT OF
: PENNSYLVANIA

V.

LUIS ALBERTO POLANCO-GUZMAN

Appellant

: IN THE SUPERIOR COURT OF
: PENNSYLVANIA

: No. 1122 MDA 2025

Appeal from the Judgment of Sentence Entered May 22, 2025
In the Court of Common Pleas of Lackawanna County Criminal Division at
No(s): CP-35-CR-0000613-2024

BEFORE: BOWES, J., OLSON, J., and KUNSELMAN, J.

MEMORANDUM BY BOWES, J.:

FILED: SEPTEMBER 24, 2026

Luis Alberto Polanco-Guzman appeals from the aggregate judgment of sentence of thirty to sixty months in prison, followed by six years of probation, imposed upon his guilty pleas to theft by deception and criminal use of a communication facility ("CUCF"). Appellant's counsel, Jordan T. Leonard, Esquire, has filed an application to withdraw and brief pursuant to ***Anders v. California***, 386 U.S. 738 (1967), and ***Commonwealth v. Santiago***, 978 A.2d 349 (Pa. 2009). We deny counsel's application, vacate Appellant's judgment of sentence, and remand for resentencing.

This matter arises from Appellant's theft of \$41,500 from Mildred Capwell, an eighty-year-old woman whom Appellant defrauded on February 15, 2023, by impersonating her grandson and falsely claiming to be in urgent need of funds. On that same day, Appellant arranged a Lyft ride to collect the

money from Ms. Capwell. He was subsequently arrested and charged with four counts of CUCF and one count each of dealing in proceeds unlawfully, theft by deception, and conspiracy.

The Commonwealth offered Appellant a guilty plea to one count each of theft by deception and CUCF, with \$20,000 in restitution to the victim, in exchange for *nolle prosequing* the remaining charges. Further, if Appellant tendered an additional \$16,500 to the victim by the time of sentencing, the Commonwealth agreed to *nolle prosequi* the theft by deception charge, leaving only one count of CUCF for sentencing. However, if Appellant failed to fulfill those requirements, the Commonwealth was free to revoke its offer. Appellant accepted the deal, and at the plea hearing, agreed to the above factual recitation. Following a colloquy, the court accepted the plea and deferred sentencing.

At the ensuing sentencing hearing, the Commonwealth reported that Appellant failed to make any payments in restitution to Ms. Capwell. While the Commonwealth did not revoke its offer, it did not *nolle prosequi* the theft offense, leaving both that crime and CUCF for sentencing. The court imposed a sentence in the aggravated range, considering “[t]he age of the victim, the complexity of the scheme, the amount of funding, and that it was not a one-time event[.]” N.T. Sentencing, 5/22/25, at 6. Specifically, it sentenced Appellant to one and one-half to three years in prison, followed by three years of probation, for theft by deception, and a consecutive one to two years in

prison, plus three years of probation, for CUCF. The court also ordered Appellant to pay the victim \$36,500 in restitution, and \$5,000 to the victim's compensation fund. The court did not state on the record Appellant's Recidivism Risk Reduction Incentive ("RRRI") eligibility.

Appellant was represented by Corey Eagen, Esquire, throughout his plea proceedings and sentencing. Eight days after Appellant was sentenced, Attorney Ryan Christian Barrett entered his appearance on Appellant's behalf. According to the docket, two days later, both Attorney Barrett and Appellant, acting *pro se*, filed separate timely post-sentence motions. Nevertheless, only Appellant's *pro se* motion was included in the certified record. The court scheduled a hearing, at the conclusion of which it denied the motion.¹ Appellant subsequently submitted a timely *pro se* notice of appeal.² It is unclear when Attorney Barrett ceased his representation, however, in the court's Pa.R.A.P. 1925(b) order, it appointed Donna DeVita, Esquire, and directed her to file a concise statement of errors on Appellant's behalf. Two months later, without complying with the concise statement order or

¹ The court failed to specify which motion it denied.

² Appellant was still represented by Attorney Barrett at this stage, which would normally deem his filing a legal nullity. ***See Commonwealth v. Bradley***, 326 A.3d 982, 985 (Pa.Super. 2024) ("[P]ro se filings submitted by counseled defendants are generally treated as legal nullities."). However, a represented litigant retains the right to preserve an appeal through a timely *pro se* notice. ***Id.***

indicating her intent to file an **Anders** brief on appeal, Attorney DeVita requested to withdraw in the trial court. The court granted her motion, appointed Attorney Leonard, and again ordered counsel to file a statement pursuant to Rule 1925(b).³ Attorney Leonard complied and challenged, among other things, the court's failure to determine Appellant's RRRI eligibility at the time of sentencing.

Upon review of the Rule 1925(b) statement, the court concluded Appellant was RRRI eligible and, without notice to the parties, modified the sentencing order. In an amended sentencing order, the court reduced Appellant's minimum sentence to twenty-two and one-half months in prison consistent with RRRI, but retained the remainder of Appellant's original sentence. The court also authored a Rule 1925(a) opinion.

In this Court, counsel has filed a petition to withdraw and an **Anders** brief. We begin with the principles governing our review:

Direct appeal counsel seeking to withdraw under **Anders** must file a petition averring that, after a conscientious examination of the record, counsel finds the appeal to be wholly frivolous. Counsel must also file an **Anders** brief setting forth issues that might arguably support the appeal along with any other issues necessary for the effective appellate presentation thereof[.]

Anders counsel must also provide a copy of the **Anders** petition and brief to the appellant, advising the appellant of the right to retain new counsel, proceed *pro se* or raise any additional points worthy of this Court's attention.

³ We remind the trial court that all Rule 1925(b) orders must indicate the addresses to which the statement may be mailed and served by hand-delivery. **See** Pa.R.A.P. 1925(b)(3)(iii).

If counsel does not fulfill the aforesaid technical requirements of **Anders**, this Court will deny the petition to withdraw and remand the case with appropriate instructions (*e.g.*, directing counsel either to comply with **Anders** or file an advocate's brief on Appellant's behalf). By contrast, if counsel's petition and brief satisfy **Anders**, we will then undertake our own review of the appeal to determine if it is wholly frivolous.

. . . .

In the **Anders** brief that accompanies court-appointed counsel's petition to withdraw, counsel must: (1) provide a summary of the procedural history and facts, with citations to the record; (2) refer to anything in the record that counsel believes arguably supports the appeal; (3) set forth counsel's conclusion that the appeal is frivolous; and (4) state counsel's reasons for concluding that the appeal is frivolous. Counsel should articulate the relevant facts of record, controlling case law, and/or statutes on point that have led to the conclusion that the appeal is frivolous.

Commonwealth v. Falcey, 310 A.3d 313, 314–15 (Pa.Super. 2024) (cleaned up).

Our evaluation reveals that Attorney Leonard has failed to thoroughly examine the record.⁴ Three of the four issues that counsel has identified as potentially meritorious implicate the discretionary aspects of Appellant's sentence. **See Anders** brief at 3. In such a case, an appellant must first invoke this Court's jurisdiction by, *inter alia*, preserving the issue in a timely

⁴ Upon our initial review, this Court ordered counsel to file a new letter advising Appellant of his immediate right to proceed *pro se*, retain new counsel, or raise any other arguments he deemed worthy of our attention. **See** Order, 3/11/26. Attorney Leonard submitted a revised compliant letter but failed to file a new petition to withdraw. He submitted an amended petition after this Court issued a subsequent order directing him to do so. **See** Order, 4/13/26.

post-sentence motion or through an objection during sentencing. **See Commonwealth v. Lawrence**, 313 A.3d 265, 284 (Pa.Super. 2024). No objection was raised at sentencing, but Attorney Leonard noted that “post-sentence motions were filed on, or about[,] June 2, 2025.” **Anders** brief at 8. As mentioned, the docket reflects that both Attorney Barrett and Appellant, acting *pro se*, filed post-sentence motions on that date, but only Appellant’s *pro se* motion is included in the record.⁵ Since Appellant’s filing was a legal nullity, and we are without Attorney Barrett’s post-sentence motion, “we can neither confirm that counsel complied with the duty to conscientiously examine the record, nor conduct our own review to confirm the frivolity of the appeal.” **Commonwealth v. Stroud**, 298 A.3d 1152, 1158 (Pa.Super. 2023).

As to Appellant’s RRRI eligibility, the remaining potentially meritorious issue raised by Attorney Leonard, we have explained that “[i]t is legal error to fail to impose a RRRI minimum on an eligible offender.” **Commonwealth v. Tobin**, 89 A.3d 663, 670 (Pa.Super. 2014). “A challenge to a court’s failure

⁵ The trial court’s Rule 1925(a) opinion states that one post-sentence motion was filed on June 6, 2025. **See** Trial Court Opinion, 2/11/26, at 3. The docket fails to confirm that any document was filed on this date, and any such motion would have nevertheless been untimely where Appellant was sentenced on May 22, 2025. **See Commonwealth v. Green**, 862 A.2d 613, 617 (Pa.Super. 2004) (“[A] written post-sentence motion must be filed no later than [ten] days after the date of imposition of sentence[.]”).

to impose an RRRI sentence implicates the legality of the sentence.”

Commonwealth v. Hanna, 124 A.3d 757, 759 (Pa.Super. 2015).

RRRI status “permits offenders who exhibit good behavior and who complete rehabilitative programs in prison to be eligible for reduced sentences.” ***Commonwealth v. Quiles***, 166 A.3d 387, 392 (Pa.Super. 2017). Admissibility for RRRI is outlined as follows:

“Eligible person.” A defendant or inmate convicted of a criminal offense who will be committed to the custody of the department and who meets all of the following eligibility requirements:

(1) Does not demonstrate a history of present or past violent behavior.

(2) Has not been subject to a sentence the calculation of which includes an enhancement for the use of a deadly weapon as defined under law or the sentencing guidelines promulgated by the Pennsylvania Commission on Sentencing or the attorney for the Commonwealth has not demonstrated that the defendant has been found guilty of or was convicted of an offense involving a deadly weapon or offense under 18 Pa.C.S. Ch. 61 (relating to firearms and other dangerous articles) or the equivalent offense under the laws of the United States or one of its territories or possessions, another state, the District of Columbia, the Commonwealth of Puerto Rico or a foreign nation or criminal attempt, criminal solicitation or criminal conspiracy to commit any of these offenses.

(3) Has not been found guilty of or previously convicted of or adjudicated delinquent for or criminal attempt, criminal solicitation or criminal conspiracy to commit murder, a crime of violence as defined in 42 Pa.C.S. § 9714(g) (relating to sentences for second and subsequent offenses) or a personal injury crime as defined under section 103 of the act of November 24, 1998 (P.L. 882, No. 111), known as the Crime Victims Act, except for an offense under 18 Pa.C.S. § 2701 (relating to simple assault) when the offense is a misdemeanor of the third degree, or an equivalent

offense under the laws of the United States or one of its territories or possessions, another state, the District of Columbia, the Commonwealth of Puerto Rico or a foreign nation.

(4) Has not been found guilty or previously convicted or adjudicated delinquent for violating any of the following provisions or an equivalent offense under the laws of the United States or one of its territories or possessions, another state, the District of Columbia, the Commonwealth of Puerto Rico or a foreign nation or criminal attempt, criminal solicitation or criminal conspiracy to commit any of these offenses:

18 Pa.C.S. § 4302(a) (relating to incest).

18 Pa.C.S. § 5901 (relating to open lewdness).

18 Pa.C.S. Ch. 76 Subch. C2 (relating to Internet child sexual abuse material).

Received a criminal sentence pursuant to 42 Pa.C.S. § 9712.1 (relating to sentences for certain drug offenses committed with firearms).

Any offense listed under 42 Pa.C.S. Ch. 97 Subch. H3 (relating to registration of sexual offenders) or I4 (relating to continued registration of sexual offenders).

Drug trafficking as defined in section 4103 (relating to definitions).

(5) Is not awaiting trial or sentencing for additional criminal charges, if a conviction or sentence on the additional charges would cause the defendant to become ineligible under this definition.

61 Pa.C.S. § 4503 (footnote omitted).

Here, the trial court initially failed to make a determination as to Appellant's RRRI eligibility and was made aware of its error when Appellant

filed his Rule 1925(b) statement. The court thereafter determined that Appellant was RRRI eligible and issued an amended sentencing order, relying upon its authority to “correct obvious and patent mistakes in sentencing.” Order, 2/10/26, at 1 (citation omitted).

Ordinarily, once an appellant files an appeal, the trial court loses jurisdiction to amend a sentencing order. **See** 42 Pa.C.S. § 5505. Even after an appeal is taken, however, a court may correct “clear clerical errors.” **Commonwealth v. Kramer**, 350 A.3d 975, 982 (Pa.Super. 2025). Our High Court has warned that this “exception to the general rule of [§] 5505 cannot expand to swallow the rule,” and “it is the obviousness of the illegality, rather than the illegality itself, that triggers the court’s inherent power.” **Commonwealth v. Holmes**, 933 A.2d 57, 66-67 (Pa. 2007). The error must therefore be “a clear clerical error or a patent and obvious mistake in order to be amenable to correction.” **Commonwealth v. Ellsworth**, 97 A.3d 1255, 1257 (Pa.Super. 2014). Only flagrant mistakes which are “apparent from a review of the docket without resort to third-party information” are amendable during an appeal. **Holmes**, 933 A.2d at 66.

This Court has also held that “[e]ven if there is a clear mistake, that does not relieve the court of its obligation to give notice as required by [§ 5505] to both the defendant and the district attorney of the proposed changes and an opportunity to respond to those changes.” **Commonwealth v. Blair**, 230 A.3d 1274, 1277 (Pa.Super. 2020). Where modification of a

sentencing order is at issue, notice is not only necessitated by § 5505, but “the sentencing process must also satisfy due process, which similarly requires a notice and opportunity to respond.” **Id.** (citation omitted). A court’s “[m]odification of a sentence without notifying the defendant is inconsistent with the accused being present at every vital stage of the criminal process.” **Id.** (cleaned up). Stated succinctly, “if the sentence is modified without giving notice, it is without effect.” **Id.** (citation omitted).

Attorney Leonard avers that pursuing a RRRI claim on appeal would be wholly frivolous because Appellant has been granted relief where the court determined he was RRRI eligible and amended his sentence accordingly. **See Anders** brief at 19-20. Without further explanation, he maintains that the court had the authority to alter Appellant’s sentencing order due to the “inherent power of a court to correct obvious and patent mistakes in its orders[.]” **Id.** at 20 (cleaned up).

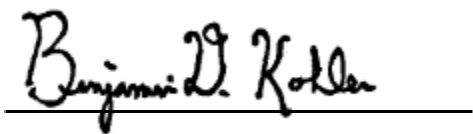
We disagree. Although the trial court’s error in failing to ascertain Appellant’s RRRI eligibility at the time of sentencing was obvious on the face of the record, the determination as to whether Appellant was eligible was not so clear. **See Holmes**, 933 A.2d at 66-67. Specifically, § 4503 required the court to engage in a five-pronged evaluation before determining Appellant’s eligibility. Moreover, the court modified Appellant’s sentence without first giving notice of its intent to do so, and thus neither party had the opportunity

to respond. The amended sentence is therefore “without effect” and the RRRI error has not been corrected. **Blair**, 230 A.3d at 1277.

Based on the foregoing, we deny Attorney Leonard’s application to withdraw. We vacate both Appellant’s amended judgment of sentence, entered without notice during the time this Court had jurisdiction of the case, and his original sentence which lacked the necessary RRRI eligibility finding. We remand for a new sentencing hearing, which will trigger a new opportunity for the parties to exercise their post-sentence rights. **See Commonwealth v. Hankerson**, 118 A.3d 415, 422 (Pa.Super. 2015) (remanding **Anders** appeal for resentencing without first requiring an advocate’s brief where the trial court imposed an illegal sentence).

Application of Jordan T. Leonard, Esquire, to withdraw denied. Judgment of sentence vacated. Case remanded for resentencing. 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: 9/24/2026