

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
	:	
v.	:	
	:	
	:	
DANIEL FELDER	:	
	:	
Appellant	:	No. 2511 EDA 2025

Appeal from the Judgment of Sentence Entered July 17, 2025
In the Court of Common Pleas of Philadelphia County Criminal Division at
No(s): CP-51-CR-0003479-2024

BEFORE: LAZARUS, P.J., MURRAY, J., and FORD ELLIOTT, P.J.E.*

MEMORANDUM BY MURRAY, J.:

FILED SEPTEMBER 10, 2026

Daniel Felder (Appellant) appeals from the judgment of sentence imposed following his guilty plea to persons not to possess firearms (persons not to possess).¹ Appellant challenges the discretionary aspects and legality of his sentence. After careful consideration, we affirm in part and vacate in part.

In its opinion, the trial court detailed the history underlying Appellant's appeal:

On April 26, 2024, Appellant was arrested and charged with [persons not to possess,] as a felony of the first degree; firearm not to be carried without [a] license, as a felony of the third degree; carry[ing] firearms in public in Philadelphia, as a

* Retired Senior Judge assigned to the Superior Court.

¹ **See** 18 Pa.C.S.A. § 6105(a)(1).

misdemeanor of the first degree; and evading arrest or detention on foot, as a misdemeanor of the second degree.²

On May 14, 2024, Appellant was held for court ... on all charges except for evading arrest or detention on foot, which was dismissed.

The matter was listed for a waiver trial/[suppression] hearing on April 30, 2025. On that date, Appellant's [suppression] motion ... was heard and subsequently denied. Appellant then pled guilty to [persons not to possess], and the remaining two charges were *nolle prossed*.

Sentencing was deferred pending completion of a [presentence investigation (PSI)] report and [a] mental health evaluation. A PSI [evaluation] was scheduled for May 15, 2025. However, Appellant failed to appear for the PSI [evaluation]. When the assigned investigator attempted to contact Appellant to have him participate in the investigation, a woman answered the phone number [of] record and abruptly terminated the call. Despite subsequent letters and repeated attempts by the investigator to reach him, Appellant made no effort to participate in the PSI process. Subsequently, on July 17, 2025, [the trial court] proceeded to sentence Appellant to a term of three (3) to six (6) years of incarceration.

Trial Court Opinion, 11/19/25, at 1 (original footnotes omitted; one footnote added; punctuation modified).

Appellant filed a post-sentence motion for reconsideration of his sentence, which the trial court granted. On reconsideration, the trial court did not change the length of Appellant's sentence, but declared Appellant eligible for the Recidivism Risk Reduction Incentive Act³ program. Appellant timely

² **See** 18 Pa.C.S.A. §§ 6106(a)(1), 6108, 5104.2(a).

³ **See** 61 Pa.C.S.A. §§ 4501-4512.

filed the instant appeal. Appellant and the trial court have complied with Pa.R.A.P. 1925.

Appellant presents the following issues for our review:

1. Did not the sentencing court apply incorrect sentencing guidelines by miscalculating the prior record score, because it included a prior conviction that was an element of the 18 Pa.C.S.[A.] § 6105 [(persons not to possess)] offense, abusing its discretion and imposing an illegal sentence by double-counting this prior conviction?
2. After imposing a state sentence of imprisonment, did not the [sentencing] court, contrary to controlling statutes, err by imposing conditions of supervision and confinement?

Appellant's Brief at 2.

Appellant first claims that the sentencing court, in calculating his prior record score, improperly included the predicate conviction that rendered Appellant ineligible to possess a firearm (hereinafter, the "predicate conviction").⁴ *Id.* at 9. Appellant points out that in ***Commonwealth v. Myers***, 324 A.3d 528 (Pa. Super. 2024) (*en banc*) (plurality),⁵ ***appeal granted***, 336 A.3d 256 (Pa. 2025), this Court considered whether a predicate conviction can be included in calculating a defendant's prior record score.

⁴ Appellant's predicate conviction was for possession of a controlled substance with the intent to deliver (PWID), a violation of 35 P.S. § 780-113(a)(30). A person convicted of PWID is prohibited from possessing a firearm. 18 Pa.C.S.A. § 6105(c)(2).

⁵ In ***Myers***, the *en banc* plurality concluded that the sentencing court did not err in determining the defendant's prior record score, when the court included, in its calculation, the defendant's predicate conviction. ***Myers***, 324 A.3d at 541-42.

Appellant's Brief at 10. The **Myers** plurality upheld the inclusion of the defendant's predicate conviction when calculating his prior record score. **Myers**, 324 A.3d at 541-42. Notwithstanding, Appellant claims that this issue remains an "open one," as the Pennsylvania Supreme Court has granted allowance of appeal in **Myers**. Appellant's Brief at 10.

Appellant further argues that his claim implicates the *legality* of his sentence, "because a judge has no discretion to decide to make an erroneous guidelines calculation or to double count a prior conviction when the law does not allow it." **Id.** at 10 n.2. Appellant acknowledges that in **Commonwealth v. Keiper**, 887 A.2d 317 (Pa. Super. 2005), a three-judge panel of this Court "rejected this double counting claim because it held that the prior conviction necessary for the Commonwealth to prove [persons not to possess] is not an element of that offense." Appellant's Brief at 11. Appellant disputes the **Keiper** Court's conclusion, arguing that

the enumerated [predicate conviction] is an element of the offense. The Commonwealth must prove the fact of the [predicate] conviction beyond a reasonable doubt to convert the legal conduct into illegal conduct under [18 Pa.C.S.A. §] 6105.

Id. at 11.

Appellant points out that in **Commonwealth v. Jemison**, 98 A.3d 1254 (Pa. 2014), our Supreme Court stated that the predicate conviction for persons not to possess "is an essential element of that crime." Appellant's Brief at 13 (quoting **Jemison**, 98 A.3d at 1261). However, Appellant concedes that this Court subsequently distinguished **Jemison** "many times in panel

decisions[,]” and held that **Keiper** “is still good law when it comes to guidelines sentencing issues[.]” **Id.** at 13.

Appellant also cites, as persuasive, the decision of the United States Third Circuit Court of Appeals in **Moses v. Dist. Att’y Phila.**, 133 F.4th 251 (3d Cir. 2025).⁶ Appellant’s Brief at 14. In that case, Appellant explains, the Third Circuit interpreted **Jemison** and concluded that, for the crime of persons not to possess, the predicate conviction is an “element” of the crime. **Id.** Appellant argues his predicate conviction (PWID) should not be included in calculating his prior record score, as it is already an element of persons not to

⁶ In **Moses**, the Third Circuit addressed, *inter alia*, whether, the defendant’s trial counsel ineffectively failed to object to the sentencing court’s calculation of his prior record score. **Moses**, 133 F.4th at 259. The defendant argued that his counsel should have objected to the sentencing court’s determination that his federal conviction for violating 18 U.S.C.A. § 922(g)(1) (prohibiting firearm possession by a person previously convicted of a crime punishable by imprisonment for a term exceeding one year) is equivalent to the Pennsylvania crime of persons not to possess. **Id.** Guided by our Supreme Court’s decision in **Jemison**, the Third Circuit concluded that the two statutes are not equivalent for sentencing purposes. **Id.** at 260. The Third Circuit explained that the crime of persons not to possess requires, as an element, a prior conviction of an offense enumerated in 18 Pa.C.S.A. § 6105(b). **Id.** at 260. By contrast, the federal statute requires a prior conviction of any crime punishable by up to one year in prison. **Id.** The Third Circuit emphasized the **Jemison** Court’s statement that a prior conviction of an enumerated offense is an “essential element” of persons not to possess. **Id.** The Third Circuit ultimately held that the defendant’s counsel rendered ineffective assistance by not challenging the sentencing court’s conclusion that the two crimes are equivalent for purposes of calculating the defendant’s prior record score. **Id.** at 262-63.

possess. **Id.** at 15. Appellant asks this Court to reverse his judgment of sentence and remand for resentencing. **Id.**

Although Appellant claims his issue implicates the legality of his sentence, the **Keiper** Court concluded that a “challenge to the calculation of the Sentencing Guidelines raises a question of the discretionary aspects of a defendant’s sentence.” **Keiper**, 887 A.2d at 319 (quoting **Commonwealth v. Johnson**, 758 A.2d 1214, 1216 (Pa. Super. 2000)). We are bound by our decision in **Keiper**, as it has not been overruled by this Court or the Pennsylvania Supreme Court. **See Commonwealth v. Beck**, 78 A.3d 656, 659 (Pa. Super. 2013) (“[A] panel of the Superior Court cannot overrule another panel of the Superior Court.”). Thus, we address Appellant’s claim as a challenge to the discretionary aspects of his sentence.

There is no absolute right to appellate review of a discretionary sentencing claim. **Commonwealth v. Solomon**, 247 A.3d 1163, 1167 (Pa. Super. 2021) (*en banc*). Rather,

we conduct a four-part analysis to determine: (1) whether appellant has filed a timely notice of appeal, **see** Pa.R.A.P. 902 and 903; (2) whether the issue was properly preserved at sentencing or in a motion to reconsider and modify sentence; **see** Pa.R.Crim.P. 720; (3) whether appellant’s brief has a fatal defect, Pa.R.A.P. 2119(f); and (4) whether there is a substantial question that the sentence appealed from is not appropriate under the Sentencing Code, 42 Pa.C.S.A. § 9781(b).

Commonwealth v. Manivannan, 186 A.3d 472, 489 (Pa. Super. 2018) (some citations omitted). Following satisfaction of all four elements, this Court then reviews the underlying discretionary aspects of sentencing issue.

Commonwealth v. Akhmedov, 216 A.3d 307, 328-29 (Pa. Super. 2019) (*en banc*).

Our review discloses that Appellant timely filed his notice of appeal, preserved his claim in his post-sentence motion, and included in his brief a Rule 2119(f) statement. With regard to the fourth prong, we note that

[t]he 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.

Commonwealth v. Ali, 197 A.3d 742, 760 (Pa. Super. 2018) (citations omitted). Here, Appellant's claim that the sentencing court double counted a conviction in calculating his prior record score raises a substantial question. ***See Keiper***, 887 A.2d at 319 ("A claim that the sentencing court misapplied the Sentencing Guidelines in double counting a prior conviction in its calculation of the prior record score presents a substantial question."). Because Appellant satisfied all four elements, we will review his sentencing challenge. ***See Akhmedov***, 216 A.3d at 328-29.

We are mindful of our standard of review: "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." ***Commonwealth v. Barnes***, 167 A.3d 110, 122 n.9 (Pa. Super. 2017) (*en*

banc) (citation omitted), ***overruled on other grounds by Commonwealth v. Cruz***, 320 A.3d 1257, 1275 (Pa. Super. 2024) (*en banc*).

In this context, an abuse of discretion is not shown merely by an error in judgment. Rather, the appellant must establish, by reference to the record, that the sentencing court ignored or misapplied the law, exercised its judgment for reasons of partiality, prejudice, bias or ill will, or arrived at a manifestly unreasonable decision.

Commonwealth v. Warren, 350 A.3d 1018, 1031 (Pa. Super. 2025) (citation omitted).

Relevantly, the Crimes Code defines the offense of persons not to possess as follows:

§ 6105. Persons not to possess, use, manufacture, control, sell or transfer firearms

(a) Offense defined.—

(1) A person who has been convicted of an offense enumerated in subsection (b), within or without this Commonwealth, regardless of the length of sentence or whose conduct meets the criteria in subsection (c) shall not possess, use, control, sell, transfer or manufacture or obtain a license to possess, use, control, sell, transfer or manufacture a firearm in this Commonwealth.

* * *

(a.1) Penalty.—

(1) Except as provided under paragraph (1.1), a person convicted of a felony enumerated under subsection (b) or a felony under the act of April 14, 1972 (P.L. 233, No. 64), known as The Controlled Substance, Drug, Device and Cosmetic Act, or any equivalent Federal statute of any other state, who violates subsection (a) commits a felony of the second degree.

* * *

(c) Other persons.—In addition to any person who has been convicted of any offense listed under subsection (b), the following persons shall be subject to the prohibition of subsection (a):

* * *

(2) A person who has been convicted of an offense under the act of April 14, 1972 (P.L. 233, No. 64), known as The Controlled Substance, Drug, Device and Cosmetic Act, or any equivalent Federal statute or equivalent statute of any other state, that may be punishable by a term of imprisonment exceeding two years.

18 Pa.C.S.A. § 6105(a)(1), (a.1)(1), (c)(2) (emphasis added).

In ***Keiper***, a three-judge panel of this Court addressed whether the sentencing court abused its discretion by including the defendant's predicate conviction in calculating his prior record score. ***Keiper***, 887 A.2d at 332. As the ***Keiper*** Court observed, the Pennsylvania Code states that "any prior conviction which contributed to an increase in the grade of a subsequent conviction shall not be used in computing the Prior Record Score." ***Id.*** at 321 (quoting 204 Pa. Code § 303.8(g)(2)). The ***Keiper*** Court concluded that, by its plain language, Section 303.8(g)(2)

demonstrates that this section prevents the inflation of a prior record score in cases where the statutory definitions of the crimes provide for the grading of the crimes (*i.e.*, misdemeanor of the first or second degree, or felony of the first, second, or third degree) based on whether prior offenses have been committed. Clearly, in these types of circumstances, a defendant's prior conviction would be double counting and would place a defendant in an unfair situation. ... Based on a plain reading of section 6105, only one grading of the offense exists, a felony in the second degree. No increase of gradation of the offense for any prior convictions is apparent....

Id. (citation and quotation marks omitted). The **Keiper** Court concluded that because there was no increase in the grading of any offense, the defendant's predicate offense is "merely a pre-condition" to persons not to possess. **Id.** The Court thus concluded that no abuse of discretion occurred, because "the trial court only counted the [predicate offense] once." **Id.**

In **Myers**, the *en banc* plurality considered whether it should overrule **Keiper** and prohibit counting the predicate conviction in determining a defendant's prior record score. **Myers**, 324 A.3d at 535. The **Myers** plurality concluded it need not determine whether the defendant's prior felony drug conviction (making him ineligible to possess a firearm) constituted an "element" or a "mere precondition" of the persons not to possess offense. **Id.** at 541.

This is ... because even if [the defendant's] prior felony drug conviction constitutes a material element of his [persons not to possess] charge, **the [sentencing] court was not precluded from including it in [the defendant's prior record score] because it did not elevate the grading of his persons not to possess [] offense. See** 204 Pa. Code. § 303.8(g)(3). Indeed, the parties agree that [the defendant's] persons not to possess [] offense remains a second-degree felony regardless of the inclusion of [the defendant's] prior felony drug conviction in [his prior record score]. **See** 18 Pa.C.S.A. § 6105(a.1). [The defendant's] prior felony drug conviction does not increase the grading of his current persons not to possess offense.

Id. (emphasis added; some citations omitted). The **Myers** plurality opined,

[i]f the Sentencing Commission had intended for a prior conviction that served as a disqualifying or predicate offense for a crime to be excluded from calculation of the [prior record score], then the

Sentencing Commission could have expressly provided this exclusion; it did not....

Id. The **Myers** plurality ultimately concluded, “the [sentencing] court did not misapply the law in computing [the defendant’s prior record score,] and relying on the sentencing guidelines based on [the defendant’s prior record score,] when fashioning [the defendant’s] sentence.” **Id.** at 542. Thus, the Court declined to overrule **Keiper**.⁷

Although the Pennsylvania Supreme Court granted allowance of appeal in **Myers**, it has not yet issued a decision. Consequently, our panel decision in **Keiper** remains controlling precedent. **See Beck**, 78 A.3d at 659 (stating that a “panel [of this Court] is not empowered to overrule another panel of

⁷ In **Myers**, the Pennsylvania Supreme Court granted allowance of appeal on the following issues:

Whether the *en banc* Superior Court’s Opinion in Support of Affirmance is inconsistent with this Court’s holding in **Commonwealth v. Jemison**, ... 98 A.3d 1254 (Pa. 2014)[,] by defining one of Petitioner’s prior disqualifying convictions as a pre-condition rather than an element of the offense for purposes of sentencing of a conviction for [persons not to possess] under 18 Pa.C.S.A. § 6105, thereby double counting the prior disqualifying convictions in Petitioner’s prior record score and his offense gravity score under the Pennsylvania Sentencing Guidelines[.]

....

Where the Superior Court found that this issue implicated the discretionary aspects of Petitioner’s sentence, does 42 Pa.C.S.[A.] § 9781(f) preclude this Court’s jurisdiction over further review?

Commonwealth v. Myers, 336 A.3d 256 (Pa. 2025) (Order).

the Superior Court.” (citation omitted)). Applying **Keiper**, we discern no abuse of the sentencing court’s discretion when it included Appellant’s predicate conviction in calculating his prior record score. Consequently, Appellant’s first issue merits no relief.

In his second issue, Appellant argues that the sentencing court improperly imposed conditions of supervision on his state sentence. Appellant’s Brief at 16. Appellant claims the sentencing court lacked the statutory authority to impose such conditions. **Id.** The Commonwealth agrees. Commonwealth’s Brief at 8. The trial court also agrees, and asks that we remand the matter so that it may “clarify the scope of the sentence and correct any potential legal error, ensuring that the final judgment comports with governing statutory principles.” Trial Court Opinion, 11/19/25, at 13.

Appellant’s issue implicates the legality of his sentence. “If no statutory authorization exists for a particular sentence, that sentence is illegal and subject to correction.” **Commonwealth v. Hodges**, 193 A.3d 428, 433 (Pa. Super. 2018). “An illegal sentence must be vacated.” **Id.** “In evaluating a trial court’s application of a statute, our standard of review is plenary and is limited to determining whether the trial court committed an error of law.” **Id.**

This Court addressed a similar issue in **Commonwealth v. Mears**, 972 A.2d 1210 (Pa. Super. 2009). In **Mears**, the trial court sentenced the defendant to 30 to 60 months in prison, and additionally ordered that the defendant be subject to random searches of his residence by the Gun Violence

Task Force during any period of parole. **Id.** at 1211. On appeal, the **Mears** Court addressed the legality of this sentence:

[B]ecause the court sentenced [the defendant] to a maximum term of incarceration of two or more years, [the defendant's] parole would be under the exclusive supervision of the Pennsylvania Board of Probation and Parole ("PBPP") and not the Court of Common Pleas. 61 P.S. § 331.17[;] **and see Commonwealth v. Camps**, 772 A.2d 70, 74 (Pa. Super. 2001) (holding that "[I]t is well settled that the [PBPP] has exclusive authority to determine parole when the offender is sentenced to a maximum term of imprisonment of two or more years[.]"). **Therefore, any condition the sentencing court purported to impose on [the defendant's] state parole is advisory only. See** 61 P.S. § 331.18 (A judge in his discretion may make at any time any recommendation he may desire to the board respecting the person sentenced and the term of imprisonment said judge believes such person should be required to serve before a parole is granted to him, but a recommendation made by a judge as aforesaid respecting the parole or terms of parole of such person shall be advisory only, and no order in respect thereto made or attempted to be made as a part of a sentence shall be binding upon the [PBPP] in performing the duties and functions herein conferred upon it.)

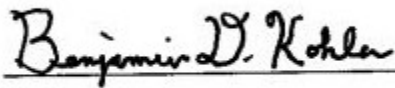
Id. at 1212 (emphasis added). Because the trial court lacked statutory authority to impose a condition on the defendant's state sentence, the **Mears** Court vacated the portion of the sentence imposing the condition, but left the remainder of the sentence in place. **Id.** Since the result in **Mears** did not affect the defendant's aggregate sentence, the **Mears** Court did not remand for resentencing. **Id. Mears** is directly on point.

Instantly, the sentencing court imposed conditions of supervision on Appellant's state sentence. As noted above, the trial court and the Commonwealth agree that the sentencing court lacked the statutory authority

to impose conditions on Appellant's state sentence. Trial Court Opinion, 11/19/25, at 13; Commonwealth's Brief at 8. We agree. We therefore vacate the portion of Appellant's sentence imposing conditions of supervision, as the conditions are advisory and not binding on the PBPP.⁸ **See Mears**, 972 A.2d at 1212. We affirm Appellant's judgment of sentence in all other respects.

Judgment of sentence vacated in part and affirmed in part. 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: 9/10/2026

⁸ Under these circumstances, a remand is not necessary. **See Commonwealth v. Alicea**, 449 A.2d 1381, 1385 n.9 (Pa. 1982) (stating that where a case requires the correction of a sentence, the reviewing Court has the option of either remanding for resentencing or amending the sentence directly).