

**IN THE COURT OF COMMON PLEAS FOR
LYCOMING COUNTY, PENNSYLVANIA
CRIMINAL DIVISION**

COMMONWEALTH	:	
	:	
v.	:	NO: 01-10, 835
	:	
ROBERT CONNIFF,	:	
Defendant	:	
	:	

**OPINION IN SUPPORT OF ORDER
IN COMPLIANCE WITH RULE 1925(a)
OF THE RULES OF APPELLATE PROCEDURE**

The Defendant appeals this Court’s Order dated February 4, 2004, wherein the Defendant was sentenced to incarceration for a period of one and a half (1 ½) years to five (5) years with credit for time served. This Court imposed this sentence after finding the Defendant in violation of the conditions of his Intermediate Punishment Program (hereinafter “IPP”) for the sixth time since his original sentence was imposed on November 29, 2001¹.

On February 28, 2005, the Defendant filed a timely *pro se* Petition for Post Conviction Collateral Relief, alleging that there was insufficient evidence to support the Court’s February 4, 2004 finding that he violated the conditions of his IPP, and that he was denied effective assistance of counsel. On July 12, 2005, this Court granted Defendant’s Petition, in accordance with *Commonwealth v. Lantzy*, 558 Pa. 214, 736 A.2d 570 (1999), and allowed him to file his direct appeal *nunc pro tunc*. Defendant filed his appeal on August 12, 2005 and, pursuant to this Court’s September 6, 2005 Order, the Defendant, and his conflicts attorney, filed Concise

¹ The Defendant was sentenced to twenty-four (24) months under the IPP following his September 6, 2001 guilty plea to two counts of Driving Under the Influence of Alcohol. On February 13, 2002, May 15, 2002, December 11, 2002, January 29, 2003, and September 10, 2003, the Defendant was found in violation of the conditions of his IPP.

Statements of Matters Complained Of on September 19, 2005 and September 21, 2005 respectfully.

I. Insufficient Evidence

This Court rejects the Defendant's contention that it lacked sufficient evidence to find he violated the conditions of this IPP. The standard of review for the sufficiency of evidence requires this Court to "determine whether the evidence admitted at trial, and all reasonable inferences drawn from that evidence, when viewed in the light most favorable to the Commonwealth as verdict winner, was sufficient to enable the fact finder to conclude that the Commonwealth established all of the elements of the offense beyond a reasonable doubt." *Commonwealth v. Ockenhouse*, 562 Pa. 481, 490, 756 A.2d 1130, 1135 (2000).

Here, at the Defendant's February 4, 2004 IPP violation hearing, the Commonwealth presented testimony from the Defendant's Probation Officer, Brad Shoemaker, regarding the circumstances of Defendant's January 31, 2004 positive alcohol breath test that gave rise to the IPP violation hearing. Mr. Shoemaker testified that, on January 31, 2004, after missing four (4) mandatory check-in calls from Adult Probation, the Defendant failed an alcohol breath test in violation of the conditions of his IPP.

The Court specifically addressed this positive alcohol breath test at Defendant's February 4, 2004 IPP violation hearing:

THE COURT: So the 0.023 breath test you're saying is not accurate?

DEFENDANT: I guess that's the mouthwash.

THE COURT: Okay. Did you tell Mr. Shoemaker that?

DEFENDANT: Yes, I did.

THE COURT: Did you give him your mouth wash so he could send it out to be tested?

DEFENDANT: I have what's left of it. There's very little. I use that now and I had used that.

(N.T. 02/04/05, p. 6).

...

MR. SHOEMAKER: One thing, Your Honor, regardless of whether it was mouth wash or not, Mr. Conniff signed his conditions and was instructed that he is not use any mouth wash that would be in violation of the program, mouth wash, alcohol, whatever the case may be.

DEFENDANT: They did inform me of that, Your Honor.

MR. SHOEMAKER: We informed him of the mouthwash because one of the concerns that he stated right from the start was that I do have some dental problems I use mouthwash. Agent Whiteman and I were right in his house that say we stated absolutely no mouthwash with alcohol. There are other mouthwashes that don't have it you cannot have anything because if it presented itself where you tested positive you stated that it was mouthwash that's a violation because he's informed that he's not allowed to use mouthwash with alcohol.

(N.T. 02/04/05, p. 8).

As evidenced by the above cited portion of Defendant's IPP violation hearing transcript, the Defendant acknowledged at that hearing that he tested positive for alcohol on January 31, 2004. Furthermore, the Defendant admitted using mouthwash, in violation of the conditions of his IPP, and blamed it for his positive alcohol breath test. Given the totality of the evidence presented, both by the Commonwealth and also the Defendant's testimony, there is more than enough evidence to sustain the Defendant's convictions for violating the conditions of his IPP.

II. Ineffective Assistance of Counsel

Defendant next alleges that his public defender and conflicts attorney were ineffective in assisting him at his IPP violation hearing and with his subsequent appeal. In order to make a claim for ineffective assistance of counsel, the Defendant must demonstrate that: (1) the

underlying claim is of arguable merit; (2) counsel's performance was unreasonable; and (3) counsel's ineffectiveness prejudiced defendant. *Commonwealth v. Beasley*, 544 Pa. 554, 678 A.2d 773, 778 (1996). Because counsel's effectiveness is presumed, the burden of establishing ineffectiveness rests squarely with the Defendant. *Commonwealth v. Baker*, 531 Pa. 541, 561, 614 A.2d 663, 673 (1992). Instantly, the Court will address each allegation of ineffectiveness in the order raised.

The Court rejects the Defendant's contention that his counsel was not adequately prepared for his IPP violation hearing. The Defendant, in his September 19, 2005 Concise Statement of Matters Complained Of, admits that counsel met with this Court prior to his IPP violation hearing evidencing counsel's preparation for the matter. Even if counsel was not adequately prepared for the Defendant's IPP violation hearing, part of the Defendant's burden in establishing a claim for ineffective assistance of counsel includes a showing of a reasonable probability that the result in the particular case would have been different but for counsel's actions. *LaCourt v. Pennsylvania Board of Probation & Parole*, 87 Pa. Commw. 384, 392, 488 A.2d 70, 75 (Pa. Cmmw. 1985), citing *Strickland v. Washington*, 466 U.S. 668, 80 L. Ed. 2d 674 (1984). Here, irrespective of Defense counsel's alleged unpreparedness the Defendant would surely have been found guilty of violating the conditions of his IPP by virtue of his positive alcohol breath test and his admission in open court that he consumed mouthwash in violation of the conditions of his IPP.

The Court next rejects the Defendant's contention that counsel failed to adequately assist in his appeal. "First-time *pro se* PCRA² petitioners are entitled to the benefit of the assistance of counsel to help identify and properly present potentially meritorious issues for the trial court's

² Post Conviction Relief Act, 42 P.S. § 9541, *et seq.*

consideration.” *Commonwealth v. Padden*, 2001 Pa. Super. 246, 783 A.2d 299, 308 (2001); see also Pa.R.Crim.P. Rule 904. Accordingly, on February 23, 2005, this Court appointed Mr. Protasio as counsel for the Defendant. In the six (6) months prior to the filing of the Defendant’s Concise Statement of the Matters Complained Of, Mr. Protasio met with the Court twice regarding the Defendant’s appeal. In accordance with Pa.R.A.P. 1925(b), this Court ordered the Defendant to file a Concise Statement of the Matters Complained Of on appeal; both appointed counsel and the Defendant filed said statements. Because it is apparent that Mr. Protasio has taken reasonable steps to assist in the Defendant’s appeal, the Defendant has failed to meet his burden in establishing a claim for ineffective assistance of counsel.

By The Court,

Nancy L. Butts, Judge

DATED:

xc: DA
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