

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH

: No's.: CR-845-2009
: CR-1613-2009
: CR-1633-2009

vs.

: CRIMINAL ACTION – LAW

AMBER L. BARTO,
Defendant

: Post-Sentence Motion
:

OPINION AND ORDER

Defendant, along with her husband, were previously convicted following a jury trial of numerous criminal counts. On December 2, 2010, Defendant was sentenced on the various counts to an aggregate term of incarceration of five to ten years followed by a consecutive term of ten years probation.

Defendant timely filed a Post-Sentence Motion requesting a new trial. On January 6, 2011, a hearing was held on Defendant's Post-Sentence Motion. Following the hearing, the parties were provided an opportunity to submit written memoranda in support of their respective positions. Both parties submitted their written memoranda and this Opinion and Order shall address the Post-Sentence Motion.

Defendant contends that there existed an actual conflict of interest involving her trial counsel which adversely affected the performance of said counsel. Accordingly, Defendant requests a new trial.

George Lepley, Esquire testified at the hearing. He has been a practicing attorney for approximately 35 years.

Over the past ten plus years, Mr. Lepley has represented Greg Barto in connection with at least two separate criminal matters. In approximately 2009 following Mr.

Barto's arrest on charges related to the charges eventually filed against Defendant, Mr. Barto requested that Mr. Lepley represent him. Mr. Lepley began doing so until approximately the spring or summer of 2009 when Defendant was charged as well.

Both the Defendant and Mr. Barto then requested that Mr. Lepley represent both of them. Additional charges were filed against the Defendant and Mr. Barto. Mr. Lepley continued to represent both the Defendant and Mr. Barto from the filing of charges until approximately January 4, 2010.

Throughout this period of representation, Mr. Lepley often times met with both the Defendant and Mr. Barto to discuss the pending charges, although several times he met with Mr. Barto alone and a few times he met with the Defendant alone.

During his representation of both Mr. Barto and the Defendant, Mr. Barto became concerned about certain matters and requested that Mr. Lepley find him an attorney from outside of Lycoming County. On or about January 4, 2010, Attorney Mark Zearfaus began representing Mr. Barto, while Mr. Lepley continued representing the Defendant.

From the time that Mr. Zearfaus became involved through and including the trial in this case, Mr. Zearfaus, Mr. Lepley, Mr. Barto and the Defendant would meet jointly and discuss the pending charges, although Mr. Lepley did meet solely with the Defendant on a few occasions about a potential plea agreement. Mr. Lepley was aware that any plea agreement would involve the Defendant cooperating with the Commonwealth against her husband. Mr. Lepley was aware that the Defendant was not willing to do that; therefore, he did not pursue negotiations with the Commonwealth any further.

Mr. Lepley never discussed anything with the Defendant about a defense of duress. It was his “impression” that the Defendant would not do anything “detrimental to Greg.”

Following the trial, the Defendant advised Mr. Lepley that she was afraid of her husband. Although that was Mr. Lepley’s impression before trial, the Defendant had never said anything until after trial. He recalled Mr. Barto making statements along the lines that either they were both going to “get out together or get convicted.”

With respect to trial strategy, the Defendant “deferred” trial tactics to Mr. Barto and Mr. Zearfaus. The Defendant understood the potential offer by the Commonwealth would involve her testifying against her husband and she clearly was not willing to do so.

It was not until Mr. Barto was incarcerated following the trial that the Defendant said anything about being afraid of Mr. Barto and not wanting to do anything to make him “angry.” At no time did the Defendant, according to Mr. Lepley, ever seem to be inclined to take any offer.

The Defendant also testified. Following Mr. Zearfaus becoming involved, she remembers meeting with Mr. Lepley only a few occasions by herself. Approximately a week before trial, she specifically remembers speaking with Mr. Lepley about cooperating against her husband and the Commonwealth potentially recommending probation if she did so. According to the Defendant, Mr. Lepley never explained to her the consequences of not accepting that proposal by the Commonwealth. The Defendant, however, acknowledged she never said anything to Mr. Lepley either prior or during trial that she was coerced by her husband, that she was afraid of her husband or that she was under any type of duress.

The Defendant indicated that Mr. Lepley spoke to her about testifying at trial. Although she initially told Mr. Lepley that she would testify if he recommended that course of action, she subsequently told Mr. Lepley that she would not testify because her husband did not want her to do so. She believes that Mr. Barto was present along with Mr. Lepley when this matter was discussed.

Diane Irion, mother of the Defendant, also testified. Approximately a week before trial, she contacted the Assistant District Attorney prosecuting the matter and told her of alleged abuse and control of the Defendant by Mr. Barto.

Ms. Irion also spoke with the Assistant District Attorney (ADA) during trial. She told the ADA more of the circumstances of which she was aware that resulted in the Defendant being controlled and manipulated by her husband.

She never informed Mr. Lepley either before or during trial of her allegations that her daughter, the Defendant, was controlled, manipulated and/or abused by Mr. Barto.

During the trial, Ms. Irion spoke with her daughter regarding the Commonwealth's plea offer. She specifically urged her daughter to do what was best for herself and her daughter's child. According to Ms. Irion, the Defendant simply responded that she "knows."

At the time Mr. Lepley began representing the Defendant, he had previously been representing both the Defendant and Mr. Barto in connection with substantially related matters. Clearly, while representing both the Defendant and Mr. Barto, Mr. Lepley obtained confidential information from both parties which could be relevant and potentially detrimental to either or both parties. Indeed, Mr. Lepley was aware that it "was not a good idea" to

continue representing both and was actually expecting the Commonwealth to file an appropriate motion to disqualify him. Mr. Lepley also took proactive steps to remedy the potential conflict by speaking with another counsel about possibly representing the Defendant.

Rule 1.9 of the Pennsylvania Rules of Professional Conduct notes as follows:

“A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person’s interests are materially adverse to the interests of the former client, unless the former client gives consent.”

Rule 1.9 (a).

It is clear that Mr. Lepley never obtained informed consent from Mr. Barto to continue representing the Defendant in light of the conflict, but it is also equally true that the Defendant’s interests were not materially adverse to the interests of Mr. Barto.

Mr. Lepley spoke with Defendant on different occasions prior to trial about strategy, tactics, cooperation, plea negotiations, evidence and testimony. The Defendant specifically deferred to the decisions of her husband and his attorney. The Defendant was not concerned about or prepared to protect her own interests if they were different than her husband’s. According to Mr. Lepley, she was not prepared to do “what was necessary” to protect herself at the expense of her husband.

The Defendant clearly expressed to Mr. Lepley that she would do what her husband wanted her to do with respect to the charges and never, until after the verdict, mentioned anything to Mr. Lepley about coercion, duress or any other issue adverse to her husband’s interests.

Rule 1.7 of the Pennsylvania Rules of Professional Conduct precludes a lawyer from representing a client if the representation of one client will be directly adverse to another client or there is a significant risk that the representation of one client will be materially limited by the lawyer's responsibilities to another client or a former client. Rule 1.7 (a) (1); (a) (2).

While the Court cannot conclude that the representation of the Defendant was directly adverse to any existing client of Mr. Lepley, the Court questions whether there was a significant risk that the representation of the Defendant would be materially limited by Mr. Lepley's responsibilities to his former client, Mr. Barto.

More specifically, during his representation of Mr. Barto, Mr. Lepley met with him on numerous occasions to discuss the facts of the pending cases. During those discussions, Mr. Barto would have conveyed confidential information to Mr. Lepley. That confidential information would involve information about the alleged victims, Mr. Barto's role in the alleged criminal activities, and his wife's role in the alleged criminal activities.

In Mr. Lepley's representation of the Defendant, he would be precluded from utilizing any of the information that was conveyed to him by Mr. Barto through the attorney/client relationship as such information would have been deemed confidential. Rule 1.6.

The existence of the concurrent conflict of interest was never disclosed to the Defendant nor did the Defendant ever give informed consent to Mr. Lepley. Neither Mr. Barto nor the Defendant was aware of the relevant circumstances or of the manner in which Mr.

Lepley's representation of the Defendant could be limited by his responsibilities to Mr. Barto. See Rule 1.7, comment 18.

Nonetheless, because of the Defendant's clear directives to Mr. Lepley, there was never any risk that his obligations to Mr. Barto would materially limit his representation of the Defendant. The Defendant made it clear to Mr. Lepley that she would not testify against her husband and would not take any action that would be adverse to her husband's interest. Moreover, prior to Mr. Barto's incarceration following the verdict, she failed to disclose to Mr. Lepley any reason why he should question her choices. The Defendant chose not to accept the Commonwealth's offer by "cooperating" against her husband, which would have resulted in a plea recommendation by the Commonwealth of probation. Defendant was aware of the consequences of her choice and as long as she remained in "lock step" with her husband, Mr. Lepley's obligations to Mr. Barto did not limit his representation of the Defendant.

Under Pennsylvania law where there is a claimed conflict rooted in counsel's obligations to former clients, it is "at least necessary, to void the conviction, for [the] petitioner to establish that the conflict of interest adversely affected his counsel's performance." Commonwealth v. Weiss, 604 Pa. 573, 590, 986 A.2d 808, 818 (2009), quoting Mickens v. Taylor, 535 U.S. 162, 174, 122 S. Ct. 1237, 152 L.Ed.2d 291 (2002).

Where, however, the conflict at issue is an actual conflict, adverse affect or prejudice is presumed. Commonwealth v. Brown, 2011 PA Super 44 (March 9, 2011), citing Commonwealth v. Reeves, 592 Pa. 134, 923 A.2d 1119, 1128 (Pa. 2007). In these circumstances, prejudice to the accused is so likely that automatic relief is afforded. Brown,

supra.; see also Commonwealth v. Reed, 601 Pa. 257, 971 A.2d 1216, 1221 (Pa. 2009);
Commonwealth v. Halley, 582 Pa. 164, 870 A.2d 795 (Pa. 2005).

Defendant has failed to establish that an actual conflict of interest existed or that any claimed conflict of interest adversely affected her counsel's performance. "Absent some effect of [the] challenged conduct on the reliability of the trial process, the Sixth Amendment guarantee is generally not implicated." Brown, supra., citing, United States v. Cronin, 466 U.S. 648, 668 (1984). Accordingly, Defendant's Post-Sentence Motion shall be denied.

ORDER

AND NOW, this 24th day of March 2011 following a hearing, argument and the presentation of written legal memoranda, Defendant's Post-Sentence Motion is **DENIED**.

BY THE COURT,

Marc F. Lovecchio, Judge

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