

On June 28, 2012, as a result of Defendant's new convictions, Defendant's intermediate punishment with respect to Count 3 under Information No. 1883-2010 was again revoked. In addition to the costs and fine originally imposed, Defendant was ordered to pay costs in the amount of \$2,623.90, which were incurred as a result of his extradition from the state of California.

On October 11, 2012, Defendant filed a pro se PCRA Petition. By Order of Court dated October 23, 2012, the Court appointed Amy Boring, Esquire to represent the Defendant and to file either an amended Petition or a Turner/Finley letter on or before December 5, 2012.

An amended Petition for PCRA relief was filed on November 29, 2012. A conference was held before the Court on December 14, 2012. This Order will address the merits of Defendant's PCRA Petition.

In his petition, Defendant challenges the legality of imposing fines and costs against him under all four Informations without a hearing being held regarding his ability to pay. Defendant argues that his trial counsel was ineffective in not requesting a Motion to Modify the Sentence with respect to costs and fines in light of this alleged illegality. Defendant also asserts that the costs and fines imposed are excessive and burdensome and that the failure to request a modification so undermined the truth determining process that no reliable adjudication of guilt or innocence could have taken place. Defendant requests relief in the nature of an Order permitting him to file a Motion to Modify the sentence nunc pro tunc.

To establish a claim for ineffective assistance of counsel, a defendant must plead and prove the following: (1) the underlying claim is of arguable merit; (2) there was no

reasonable basis for counsel's act or omissions; and (3) the defendant was prejudiced as a result of counsel's acts or omissions; that is, there is a reasonable probability that but for counsel's act or omission, the outcome of the proceedings would have been different. Commonwealth v. Cooper, 596 Pa. 119, 941 A.2d 655, 664 (2007), citing Commonwealth v. Carpenter, 555 Pa. 567, 725 A.2d 154, 161 (1999). A failure to satisfy any prong of this test is fatal to the ineffectiveness claim. Cooper, 941 A.2d at 664, citing Commonwealth v. Sneed, 587 Pa. 318, 899 A.2d 1067, 1076 (2006).

With the exception of supervision fees and the Act 198 fee, which will be discussed in further detail infra, the Court finds that Defendant cannot meet the elements of an ineffective assistance of counsel claim because the fines and costs imposed were required by law.

The only fine imposed in this case was a mandatory minimum fine of \$500 for DUI. When a defendant commits a first DUI offense within ten years and his blood alcohol content is at least .10% but less than .16%, that individual shall be sentenced to "pay a fine of not less than \$500 nor more than \$5,000." 75 Pa.C.S.A. §3804(b)(1)(ii). To impose a fine less than \$500 or to not impose a fine at all would result in an illegal sentence. Furthermore, the imposition of a fine is not precluded merely because a defendant cannot pay the fine immediately or because he cannot do so without difficulty. Commonwealth v. Church, 513 Pa. 534, 540, 522 A.2d 30, 33 (1987); Commonwealth v. Hernandez, 917 A.2d 332 (Pa. Super. 2007). Therefore, even if defense counsel had filed a motion to modify sentence, it would not have been successful.

Section 9721(c.1) of the Judicial Code states:

Notwithstanding the provisions of section 9728 (relating to

collection of restitution, reparation, fees, costs, fines and penalties) or any provision of law to the contrary, in addition to the alternatives set forth in subsection (a), the court shall order the defendant to pay costs. In the event the court fails to issue an order for costs pursuant to section 9728, costs shall be imposed upon the defendant under this subsection. No court order shall be necessary for the defendant to incur liability for costs under this section. The provisions of this subsection do not alter the court's discretion under Pa.R.Crim.P. No. 706(C) (relating to fines or costs).

42 Pa.C.S. §9721(c.1).

While Defendant argues that the costs imposed were improper because no hearing was held on his ability to pay, all the costs imposed were mandatory, except the supervision fees and Act 198 fee. See 18 P.S. § 11.1101; 42 Pa. C.S.A. §§ 1725.1, 1725.4, 3571, 3575, 3733, 3733.1, 9728 (g); 61 Pa.C.S.A. §6308(b)(1); 75 Pa.C.S.A. §§3121, 3804, 6506(a)(7)(i) Commonwealth v. Davy, 456 Pa. 88, 317 A.2d 48 (1974) (per curiam) (extradition costs). Moreover, Rule 706 does not require a hearing prior to the imposition of costs, but rather prior to incarcerating a defendant as a contempt sanction for the failure to pay the costs. See Rule 706(a); Hernandez, supra. Although Defendant is incarcerated, he is incarcerated on the sentence for his charges and not as a result of a contempt proceeding for failing to pay his costs and fines.

There are two areas where Defendant's petition could have merit: the Act 198 fees and the supervision fees. The Act 198 fees are set forth in 18 Pa.C.S. §7508.1, which states in relevant part:

(b) Imposition. – Unless the court finds that undue hardship would result, a mandatory cost of \$100, which shall be in addition to any other costs imposed pursuant to statutory authority, shall automatically be assessed on any individual convicted, adjudicated delinquent or granted Accelerated Rehabilitative Disposition or any individual who pleads guilty or nolo contendere for a violation of the Controlled Substance, Drug, Device and Cosmetic Act, or a violation of 75 Pa.C.S. §3802 (relating to driving under the influence of alcohol or controlled substance).

(c) Additional assessment – In addition to the assessment required by subsection (b), a person convicted of or adjudicated delinquent for a violation of 75 Pa.C.S. §3802 shall be assessed \$200 where the amount of alcohol by weight in the blood of the person is equal to or greater than .16% at the time a chemical test is performed on a sample of the person’s breath, blood or urine. For the purposes of this subsection, the sample of the person’s breath, blood or urine shall be taken within two hours after the person is placed under arrest.

First, a \$300 fee may have been improperly imposed, because it appears that Defendant’s blood alcohol content was .14%. Second, Defendant’s claim that he does not have the financial ability to pay such a fee presents an issue of undue hardship. Therefore, the court will grant an evidentiary hearing on this issue.

Similarly, the statute governing supervision fees states, in relevant part:

(c) COURT. – The court shall impose as a condition of supervision a monthly supervision fee of at least \$25 on any offender placed on probation, parole, accelerated rehabilitative disposition, probation without verdict or intermediate punishment unless the court finds that the fee should be reduced, waived or deferred based on the offender’s present inability to pay.

18 P.S. §11.1102(c).

The court notes that the monthly supervision fee in Lycoming County typically is \$40. There are two bills of costs in file 140-2011. The first bill of costs dated October 4, 2011 did not include any supervision fees. A second bill of costs dated September 14, 2012 lists a total of \$680 in offender supervision fees.¹ Since the statute specifically permits reduction, waiver or deferral of supervision fees based on the offender’s inability to pay, the court also will grant an evidentiary hearing on this issue.

¹For the benefit of the parties, the court is attaching a copy of these bills of costs as Exhibits A and B. The supervision fees are designated on the bill of costs as “OSP (Lycoming/State)(Act 35 of 1991).” This designation is somewhat misleading because the offender supervision program provisions of Act 35 of 1991 were replaced by section 1102 of Act 111 of 1998 and codified at 18 P.S. §11.1102.

ORDER

AND NOW, this ____ day of February, 2013, upon review of Defendant's PCRA Petition and Amended PCRA Petition, the court grants Defendant an evidentiary hearing but only on the issues related to Act 198 fees and offender supervision fees. The hearing is scheduled for **May 1, 2013 at 3:30 pm. in Courtroom #4** of the Lycoming County Courthouse. The imposition of the fine, and other costs and fees were statutorily required and a defendant's inability to pay is only considered under Rule 706 when the court is considering incarceration as a sanction for the defendant's failure to pay.

By The Court,

Marc F. Lovecchio, Judge

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