

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH :
 :
 vs. : No. CR-1883-2010; 140-2011;
 : CR-787-2012; 788-2012
 DANIEL J. BELLOMA, :
 Defendant :

OPINION AND ORDER

Before the court is Defendant's Post Conviction Relief Act (PCRA) petition, in which Defendant challenged the legality of the imposition of fines, costs and fees and counsel's effectiveness for failing to file a post sentence motion for reconsideration of the fines, costs and fees imposed. The court rejected many of Defendant's claims in an Opinion and Order entered February 25, 2013, because most of the fees were mandated by statute, but the court granted an evidentiary hearing related to an Act 198 fee and the supervision fees assessed against Defendant.

At the hearing on this matter,¹ the Commonwealth conceded that the Act 198 fee in case 1883-2010 should have been \$100, not \$300. However, the Commonwealth contested Defendant's claim that paying this fee and any supervision fees would be a hardship for Defendant.

Defendant was the sole witness at the evidentiary hearing. He testified that he had no assets and his only personal belongings were the clothes that he had before he violated his intermediate punishment and parole sentences. Before Defendant was

¹The hearing was rescheduled twice, because Defendant wished to participate in the hearing via videoconferencing so he did not lose any of his programming. The first continuance occurred because

incarcerated on his most recent violations, he was living at the American Rescue Workers. In the past, Defendant worked as a cook and a waiter about 25 to 32 hours per week. His salary would be about \$320 per week gross and about \$265 per week net. After child support was withheld, he took home approximately \$125 per week.² Defendant testified that he also received tips, which was the main source of income used to pay his expenses.

In 2010 before he was incarcerated on any of these cases, Defendant was living above the New K Bar. He was able to meet his expenses, which included \$75 per week rent, \$20 per week for basic cable, \$50 per month for a pre-paid cell phone, child support, and \$10-\$20 per week for beer. He also testified that he was physically able to work more hours per week, but at that time he did not need to work more because he was able to pay his bills.

Defendant intends to reside at a shelter in Coatesville Pennsylvania when he is released from prison. He testified that he will not be able to work more than 30 hours per week while he resides there because the shelter has a 7:00 p.m. curfew. He intends to stay at the shelter 6 months to 1 year. He is hoping to gain an internship or employment with the shelter, which would pay minimum wage, and supplement his income with other employment. He generally has not had much difficulty finding a job as a cook or waiter, but he earned more when he worked the dinner shift (4:00 p.m. to 10:00 p.m.), which he will not be able to do because of the shelter's 7:00 p.m. curfew.

videoconferencing could not be conducted on the original date for the hearing. It was rescheduled a second time due to technical difficulties with the videoconferencing equipment at SCI-Dallas.

² Defendant has two children- one who resides in Pennsylvania and one who resides in Arizona. The child residing in Pennsylvania is now over the age of 18, but Defendant testified that he still owes approximately

Defendant also testified concerning his incarceration and supervision history. He stated he was incarcerated on his 2010 and 2011 cases from January 2011 to sometime in January 2012. He was out of jail for 25 days before he violated the conditions of his supervision by consuming alcohol and he returned to jail for 30 days. He was only out of jail for 5 days before he was picked up again on March 23, 2012. He has been incarcerated ever since that date.

This testimony led to a discussion during the parties' arguments concerning how Defendant could have incurred \$680 (or 17 months) of supervision fees when he had been incarcerated for all but about 30 days during the last 2 to 3 years. Neither party had any objection to the court asking someone from the Adult Probation Office to explain this discrepancy. Unfortunately, no one from that office with knowledge regarding Defendant's cases was available at the time of the hearing.

Following the hearing, the adult probation office submitted paperwork to waive 11 months of supervision fees on case number 1883-2010. For some unknown reason, however, all of the supervision fees were assessed on the bill of costs for case 140-2011.

At this point, Defendant's PCRA petition involves two issues: (1) a determination of the whether the Act 198 and supervision fees imposed were lawful; and (2) a determination whether counsel was ineffective for failing to argue, either at sentencing or in a motion for reconsideration, that Defendant should be excused from paying any amount toward these fees because it would be an undue hardship.

In case 1883-2010, Defendant pled guilty to driving under the influence of a

high rate of alcohol. Defendant's blood alcohol content (BAC) was .14%. Therefore, the Act 198 fee should have been \$100, not \$300. See 18 Pa.C.S.A. §7508.1. The Commonwealth conceded that Defendant's Act 198 fee should be reduced from \$300 to \$100. Thus, at a minimum, the court will direct the cost clerk's office to reduce the Act 198 fee.

With respect to the supervision fees, Defendant's testimony regarding the time that he was incarcerated is generally supported by the records in his case files. On April 8, 2011, Defendant was sentenced to 6 months on the intermediate punishment program with the first 22 days at the Lycoming County Prison or Pre-Release Center for Count 1, DUI, and 12 months on the intermediate punishment program for Count 3, Accidents Involving Damage to Attended Property, in case 1883-2010. He also was sentenced to a period of 10 to 20 months of incarceration at the Lycoming County Prison for Terroristic Threats in case 140-2011 to be served consecutive to the sentence in case in 1883-2010. Defendant was given credit for time served from January 24, 2011 through April 7, 2011. He was paroled on January 6, 2012.

On February 9, 2012, Defendant's intermediate punishment sentence on Count 3 was revoked and he was re-sentenced to 12 months under the intermediate punishment program with the first 30 days to be served at the Pre-Release Center. He received credit for time served from February 2 through February 8, 2012. Defendant was released on March 2, 2012.

Defendant sent threatening and harassing text messages and voicemails to his

ex-girlfriend on March 6 and 7, 2012, and she called the police. The text messages and voicemails formed the basis of the criminal charges that were filed in cases 787-2012 and 788-2012. On March 8, 2012, a bench warrant for absconding from supervision was issued. On March 23, 2012, Defendant was apprehended in California, and he was extradited back to Pennsylvania. He has been incarcerated continuously since that date. See Guilty Plea and Sentencing Order dated June 25, 2012 in cases 787-2012 and 788-2012; Parole and Intermediate Punishment Violation Order dated June 28, 2012 in cases 1883-2010 and 140-2011.

Defendant was not incarcerated and was actually being supervised by the adult probation office during portions of January, February and March 2012 on case 1883-2010 and 140-2011. Other than portions of those three months, Defendant was incarcerated from January 24, 2011 through the present. Therefore, the court finds that it is only appropriate to assess Defendant for three months of supervision fees.³

The monthly supervision fee in Lycoming County is \$40 per month. Three months of supervision fees would total \$120. Therefore, at a minimum, the court will direct the cost clerk's office to reduce the supervision fees on case 140-2011 from \$680 to \$120.

Defendant also argues that it either was unlawful for the court to impose the Act 198 fee and the supervision fees without holding a hearing on his ability to pay those fees or counsel was ineffective for failing to request a waiver of those fees at the time of

³ The adult probation office has forms to adjust an offender's fee schedule for numerous situations, including situations where a defendant's sentence is changed due to violations of parole, probation or the intermediate punishment program. The court does not know why such a form was not used in this case when Defendant was sentenced to incarceration in a state correctional institution as a result of his intermediate punishment

sentencing or in a post sentence motion due to Defendant's limited financial resources.

Section 7508.1(b) of the Crimes Code governs the imposition of Act 198 fees and states:

(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).

18 Pa.C.S.A. §7508.1(b). 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).

No evidence was presented at the time of sentencing to show that Defendant lacked an ability to pay or that an undue hardship would result. Absent such a showing, the court was required to impose these fees. Therefore, the imposition of these fees did not result in an illegal sentence. See Commonwealth v. Childs, 63 A.3d 323, 326 (Pa. Super. 2013)

In the alternative, Defendant argues that counsel was ineffective for failing to request a waiver of these fees and to present evidence that would support such a waiver.

Although Defendant presented evidence at the PCRA hearing that he had limited financial

resources and significant expenses, he did not present evidence to satisfy all of the prongs of an ineffective assistance of counsel claim.

Counsel is presumed effective and the burden is on a PCRA petitioner to prove that counsel's performance was deficient. Commonwealth v. Busanet, 56 A.3d 35, 45 (Pa. 2012). To prove trial counsel ineffective, "the petitioner must demonstrate that: (1) the underlying legal issue has arguable merit; (2) counsel's actions lacked an objective reasonable basis; and (3) the petitioner was prejudiced by counsel's act or omission." Id., citing Commonwealth v. Pierce, 515 Pa. 153, 527 A.2d 973, 975 (1987).

Although Defendant's testimony was sufficient to show that he had an arguable claim that he lacked the ability to pay these fees, there is nothing in the record to establish why counsel failed to raise this claim. Defendant approached this claim as if the PCRA hearing was a sentencing hearing or a hearing on a post sentence motion and the sole issue was Defendant's inability to pay these fees, instead of approaching this issue in the context of an ineffective assistance of counsel claim. The defense did not call Defendant's former attorney to establish why he failed to raise this claim. Defendant also did not testify that he asked defense counsel to raise this claim or that he even told his attorney about his child support obligations and arrearages. Furthermore, Defendant's testimony covered some events and circumstances that did not occur until after his sentencing hearing. For example, he was not living in the American Rescue Workers shelter until he was paroled or otherwise released from incarceration on his sentences in cases 1883-2010 and 140-2011.

Counsel's performance cannot be assessed in hindsight, but rather must be

determined based on the information known to counsel at the time. In fact, the Pennsylvania Supreme Court stated, “a reviewing court must make every effort ‘to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel’s challenged conduct, and to evaluate the conduct from counsel’s perspective at the time.’” Commonwealth v. Lesko, 609 Pa. 128, 15 A.3d 345, 380 (2011), quoting Strickland v. Washington, 466 U.S. 668, 690 (1984). The court cannot assume that counsel lacked a reasonable basis to raise this claim; Defendant must present evidence to establish such. Since he has failed to present any evidence on this prong, his ineffective assistance of counsel claim must fail.

The Commonwealth also argued that Defendant did not show prejudice. Defendant testified that before he went to jail he was only working about 30 hours per week. He admitted that he had the physical ability to work more hours, but he did not need to because he was paying his bills. Defendant also testified that he was spending \$10 to \$20 dollars per week (or \$40 to \$80 per month) on beer. Therefore, according to the Commonwealth, Defendant could make monthly payments toward these fees without it being a hardship simply by foregoing the consumption of beer, which has been and likely will continue to be a condition of his supervision anyway.

In light of the court’s earlier rulings reducing the Act 198 fee to \$100 and the supervision fees to \$120, the court tends to agree with the Commonwealth. Even if counsel had raised this issue, the court likely would have ordered the fees, but permitted Defendant to make monthly payments after he was released from incarceration and if he failed to make the payments then held a hearing pursuant to Rule 706 before incarcerating him for failing to

pay. See Commonwealth v. Childs, 63 A.3d 323, 326 (Pa. Super. 2013).

Accordingly, the following order is entered:

cc: Kenneth Osokow, Esquire (ADA)
Jerry Lynch, Esquire
Daniel Belloma, KQ 2019
SCI Dallas, Follies Road, Drawer K, Dallas PA 18612-0286
Gary Weber, Esquire (Lycoming Reporter)

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ORDER

AND NOW, this ___ day of December 2013, upon consideration of Defendant's PCRA petition, the court GRANTS IN PART the request for relief with respect to the Act 198 and supervision fees. The Cost Clerk is directed to reduce the Act 198 assessed on case 1883-2010 from \$300 to \$100, because Defendant's blood alcohol content was below .16%. The Cost Clerk also is directed to remove 14 months or \$560 of supervision fees from case 140-2011, reducing the total amount of supervision fees from \$680 to \$120. In all other respects, the Court DENIES Defendant's PCRA petition.

Defendant is hereby notified that he has the right to appeal from this order to the Pennsylvania Superior Court. Defendant also has the right to the assistance of counsel for any appeal. Any appeal must be filed within thirty (30) days after the entry of the order from which the appeal is taken. Pa.R.App.P. 903. If the Notice of Appeal is not filed in the Clerk of Courts' office within the thirty (30) day time period, Defendant may lose forever his right to raise these issues.

The Prothonotary shall mail a copy of this order to the defendant by certified mail, return receipt requested.

By The Court,

Marc F. Lovecchio, Judge

cc: Kenneth Osokow, Esquire (ADA)
Jerry Lynch, Esquire
Daniel Belloma, KQ 2019 (certified mail)
SCI Dallas, Follies Road, Drawer K, Dallas PA 18612-0286
Gary Weber, Esquire (Lycoming Reporter)
Cost Clerk
Prothonotary
Work file