

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH : No. CR-845-2009; CR-1613-2009;  
: CR-1633-2009  
:  
vs. :  
:  
:  
AMBER BARTO, : Opinion and Order re Defendant's  
Defendant : Post Conviction Relief Act (PCRA) Petition

**OPINION AND ORDER**

This matter came before the court on Defendant's Post Conviction Relief Act (PCRA) petition. The relevant facts follow.

Amber Barto and her husband, Gregory Barto, were charged with numerous crimes arising out of their providing controlled substances to minors and engaging in sexual acts with minors. When the charges were filed, both were represented by George Lepley. At some time shortly before January 2010, Gregory Barto wanted a more aggressive attorney to handle his case. He met Mark Zearfaus and was interested in having Mr. Zearfaus represent him. Although Mr. Lepley neither filed a formal motion to withdraw nor received formal court approval to withdraw, for all practical purposes Mr. Zearfaus represented Gregory Barto and Mr. Lepley represented Amber Barto from January 5, 2010 through the jury trial in these cases.<sup>1</sup>

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<sup>1</sup> The court takes judicial notice that on January 5, 2010, George Lepley and Mark Zearfus filed a praecipe to enter and withdraw appearance, which purported to withdraw Mr. Lepley's appearance as Gregory Barto's attorney and enter Mr. Zearfus' appearance as Mr. Barto's attorney. A copy of this praecipe is attached to this opinion as Exhibit A. The court recognizes that an appearance may be withdrawn only by leave of court. Pa.R.Crim.P. 120(B)(1). However, in this case, it was a mere oversight that Mr. Lepley's withdrawal was not expressly approved in a court order. Mr. Barto wanted Mr. Zearfaus to represent him and the change in counsel was occurring several months prior to trial. The court would have approved the change of counsel as a matter of course. In fact, to disallow the change in counsel arguably would violate Mr. Barto's rights. See Commonwealth v. Rucker, 563 Pa. 347, 761 A.2d 541 (2000).

Shortly before or during trial, the Commonwealth offered Amber Barto a plea agreement for a sentence of probation if she pled guilty and testified against her husband at trial. She rejected the plea offer and proceeded with the jury trial. The jury found her guilty of numerous drug, sex and corruption offenses. The offenses included sexual abuse of children, corruption of minors, possession with intent to deliver controlled substances, and possession of drug paraphernalia.

After trial, Mr. Lepley was granted leave to withdraw from representing Amber Barto and her current attorney, Robert Donaldson, entered his appearance. The court sentenced Amber Barto to five (5) to ten (10) years of incarceration in a state correctional institution, plus ten (10) years of consecutive probation.

Amber Barto filed a post sentence motion seeking a new trial on the basis that her attorney had a conflict of interest due to initially representing both her and her husband in these matters and previously representing her husband in unrelated matters. The court held a hearing on this issue on January 6, 2011 and, after reviewing the parties' written legal memoranda, rendered a decision on March 25, 2011 denying the motion.

Amber Barto filed an appeal, which included her claim regarding counsel's

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The undersigned took the bench in January 2010 and began handling this case in March or April. The court and the parties treated this case as if Mr. Lepley properly withdrew from his representation of Gregory Barto with the result that Mr. Zearfaus was representing Gregory Barto and Mr. Lepley was only representing Amber Barto. In fact, the prosecuting attorney, Mrs. Kilgus, made an oral motion in limine to limit Mr. Lepley's cross-examination of S.H. because he was only representing Amber Barto, who was not charged with any crimes against S.H. The court granted the motion and limited Mr. Lepley's cross-examination of S.H. at trial. See Order dated May 3, 2010; N.T., 05/06/2010, at 44-57.

ineffectiveness due to a conflict of interest, but the Pennsylvania Superior Court was unable to decide this issue on direct appeal without an express, knowing and voluntary waiver of PCRA review.

Amber Barto filed a timely PCRA petition,<sup>2</sup> in which she again asserted that Mr. Lepley provided ineffective assistance of counsel to her due to a conflict of interest. The transcript of the January 6, 2011 hearing was admitted into evidence and the parties were given the opportunity to present additional testimony.

Mr. Lepley testified at both hearings. He stated that he represented Greg Barto on at least two occasions in the past – on a traffic infraction over a decade ago and several years ago when Greg and Amber were in a motorcycle accident and Greg was charged with driving under the influence of a controlled substance. Initially, he represented both Greg and Amber Barto with respect to the current charges. At some point relatively early in the proceedings, Mr. Lepley spoke to another attorney, James Protasio, about representing Amber Barto in the event the Commonwealth filed a motion to preclude Mr. Lepley from representing both defendants or offered only one of the defendants a plea agreement.<sup>3</sup> There were times when Mr. Lepley met with Amber and Greg together and there were times when he met with just Greg, and other times when he only met with Amber. Generally, if he wanted to speak with Amber alone, he would contact her at the business when she was at

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<sup>2</sup> Mr. Donaldson is also representing Amber Barto in connection with her PCRA petition. The court conducted a colloquy with Mrs. Barto on December 19, 2013 regarding Mr. Donaldson's representation and the effect it potentially could have on her ability to ever raise a timely ineffective assistance of counsel claim against him.

<sup>3</sup> Neither of those possibilities came to fruition before Mr. Zearfaus became involved in the case.

work, because Greg generally would be in their trailer.

Although Mr. Lepley stated that he did not get a written conflict of interest waiver, he spoke to both Amber and Greg about the possible impact of dual representation. In fact, he told them he didn't think it was a good idea, but they both wanted to do it, at least for a period of time.

Sometime before January 2010, there came a time when Greg thought Mr. Lepley should be more aggressive or thought that Mr. Lepley was too concerned with alienating the District Attorney's office or the judges and he wanted counsel from outside Lycoming County. Greg had met Mark Zearfaus, who made a positive impression, and he brought Mr. Zearfaus into the case in January 2010. Mr. Zearfaus represented Greg and Mr. Lepley represented Amber. Mr. Lepley could not recall whether he filed a motion to withdraw his appearance.

At some point, either on the eve of trial or during trial, the Commonwealth gave Amber Barto an offer of probation if she would plead guilty and testify at trial against Greg. The offer was not made in writing. Mr. Lepley orally informed Amber of the offer and advised her to take it. He spoke with her alone at least twice about the offer. He explained to her, however, that she could not take the offer and then testify that Greg didn't do anything; she would have to testify against Greg. He encouraged her to think of her child and take the offer, but Amber would not do anything that Greg didn't want her to do. When asked if he told her of the maximum penalties she was facing, Mr. Lepley replied, "Yes, she knew that it was -- I told her that it was very serious, that there were multiple years

involved.” Trying to find a way to get Amber to accept the deal, Mr. Lepley mentioned the plea offer on one occasion when Greg and Mr. Zearfaus were present, hoping that Greg would think of Amber and their small child and would encourage Amber to take the plea. Instead, Greg said something like “either we’re going to sink together or win together.”

Mr. Lepley also spoke to Amber alone several times about defense strategy and at the very least her testifying at trial that some things did not happen and to explain or clarify other issues. She chose not to do so.

Mr. Lepley also testified that he could not prevent Amber from discussing these issues with Greg or Greg from influencing Amber’s decisions. Amber’s comments and concerns were statements such as “what does Greg think” or “what does Greg say.” The defendants also were out on bail. They were living together and traveling together to the proceedings.

Amber Barto’s mother, Diane Irion, testified at the January 6, 2011 hearing. She stated that she wrote and talked to ADA Kilgus, telling her how Amber was manipulated by Greg and afraid of him. Mrs. Kilgus told Mrs. Irion about the plea offer for probation. Mrs. Irion implored Amber to take the offer. She told Amber that she had to think about herself and her daughter. Amber simply replied, “I know.” Amber, though, would not do anything that Greg did not want her to do.

Mary Kilgus, the prosecuting attorney for the trial in this case, briefly testified at the hearing on March 21, 2014. She did not recall a lot of details, but she indicated that she recalled trying to get Amber to testify against Greg and she probably would have offered

probation or “something at some point.”

Amber Barto also testified at both hearings. She admitted that Mr. Lepley told her about the offer and spoke to her at least twice in private about it. The offer also was mentioned in a meeting they had with Greg and Mr. Zearfaus. She acknowledged that Mr. Lepley told her to take the offer. She knew the charges were serious and she could go to jail, but she did not remember Mr. Lepley going over the statutory maximum penalties with her or any “real sit down conversation” about the deal. As they were returning to the courtroom following a break, Mr. Lepley asked her, “Are you sure you don’t want to take that deal?” She shook her head no.

She also testified that Mr. Lepley wanted her to testify. She claimed she told Lepley that if he thought it was a good idea, she would testify, but she also testified that Greg did not want her to testify and he was afraid she would “throw him under the bus.” After the trial was over, she told Mr. Lepley that she was afraid of Greg and afraid to go against what he wanted.

Counsel is presumed effective, and a PCRA petitioner bears the burden of proving by a preponderance of the evidence that counsel’s performance was deficient and such deficiency prejudiced her. Commonwealth v. Busanet, 54 A.3d 35, 45 (Pa. 2012). To prove counsel ineffective, a petitioner must demonstrate that: (1) the underlying issue has arguable merit; (2) trial counsel had no reasonable basis for his action or failure to act; and (3) prejudice, i.e., but for counsel’s act or omission there is a reasonable probability that the outcome of the proceedings would have been different. Id.; Commonwealth v. Pierce, 567

Pa. 186, 786 A.2d 203, 213 (2001). Where it is clear that a petitioner has failed to meet any one of these elements, the claim may be disposed of on that basis alone without a determination whether the other two elements have been met. Commonwealth v. Steele, 599 Pa. 341, 961 A.2d 786, 797 (2008).

Barto asserts that she was denied effective assistance of counsel in plea negotiations and decisions to testify at trial due to her attorney's conflict of interest. The court cannot agree.

“A defendant cannot prevail on a conflict of interest claim absent a showing of actual prejudice.” Commonwealth v. Spotz, 587 Pa. 1, 896 A.2d 1191, 1231 (2006)(citations omitted).

In Missouri v. Frye, 132 S.Ct. 1399 (2012), the United States Supreme Court set forth the following standard for prejudice in the context of rejected plea offers:

To show prejudice from ineffective assistance of counsel where a plea offer has lapsed or been rejected because of counsel's deficient performance, defendants must demonstrate a reasonable probability they would have accepted the earlier plea offer had they been afforded effective assistance of counsel. Defendants must also demonstrate a reasonable probability the plea would have been entered without the prosecution canceling it or the trial court refusing to accept it, if they had the authority to exercise that discretion under state law. To establish prejudice in this instance, it is necessary to show a reasonable probability that the end result of the criminal process would have been more favorable by reason of a plea to a lesser charge or a sentence of less prison time.

Id. at 1409.

Mrs. Barto has failed to establish prejudice. She never testified that she would have accepted the plea agreement and testified against her husband.

Attorney Lepley informed Mrs. Barto of the plea offer and advised her to take it. He urged her to consider looking out for herself and taking the deal, but she refused. Her mother also urged her to consider herself and her daughter and take the plea offer. Whether out of love, fear, an inability to accept or recognize the wrongfulness of her conduct, a combination of these reasons or some other reason, Mrs. Barto was unable or unwilling to accept responsibility for her actions or testify against her husband until after they were convicted and her husband went to jail. Until then, Mrs. Barto was in complete “lock step” with her husband. Her questions and comments to Mr. Lepley did not concern her best interests, but rather what her husband thought or wanted. Even if Mrs. Barto had been represented by an attorney who never had any relationship with her husband, the court does not believe the result would have been different. Furthermore, while the court certainly would have accepted a plea agreement that did not involve incarceration in a state correctional institution, the court would not have accepted a plea agreement for probation in light of the number of teenage girls who were victims in this case, the conduct, and the length of time that the conduct occurred.

To prevail on a claim that counsel was ineffective for failing to call Mrs. Barto as a witness at trial, she must “demonstrate either: (1) that counsel interfered with her right to testify, or (2) that counsel gave advice so unreasonable as to vitiate a knowing and intelligent decision to testify on her own behalf.”

Commonwealth v. Fetter, 770 A.2d 762, 770 (Pa. Super. 2001).



Mr. Lepley did not interfere with Amber Barto's right to testify or give her unreasonable advice regarding such. He advised her to take the plea and testify against her husband. Even after she rejected the plea offer, Mr. Lepley tried to get her to testify at trial but she was unwilling to do so. The court also conducted a colloquy with Amber Barto regarding her right to testify in her own defense. She didn't want to testify and stated that no one had threatened, pressured, forced, or coerced her not to testify. N.T., 5/7/10, at 63-72.

Amber Barto also has failed to state what testimony she could have provided or how such testimony would have affected the outcome of the trial in this case. This is especially true with respect to the charges relating to A.W., because there was videotaped evidence of some of the activities with that victim.

None of the attorneys currently involved in this case were involved in the trial in this matter. Neither Amber Barto nor her husband seemed to recognize the wrongfulness of their conduct. They seemed to think that, as long as the teenaged girls were not physically being forced to do anything, there was nothing wrong with providing controlled substances to minors or engaging in sexual acts with them. This was evidenced by their demeanor during trial, especially that of Greg Barto, who at times was laughing and winking during some of the victim's testimony. It is extremely unlikely that Amber Barto would have ever accepted a plea offer prior to the jury's verdict when she could not even recognize that she had done anything wrong.

Furthermore, for whatever reasons, Amber Barto was unwilling to do anything without her husband's stamp of approval. Mr. Lepley and her mother tried to convince her to take the Commonwealth's plea offer, but she would not do so. Mr. Lepley also tried to convince her to testify in her own defense. This case epitomizes the classic saying "you can lead a horse to water, but you can't make it drink."

Since Amber Barto has failed to establish prejudice, she is not entitled to relief under the PCRA. Accordingly, the following order is entered.

**ORDER**

**AND NOW**, this \_\_\_ day of October 2014, the court DENIES Amber Barto's Post Conviction Relief Act (PCRA) petition.

Defendant is hereby notified that she has the right to appeal from this order to the Pennsylvania Superior Court. The appeal is initiated by the filing of a Notice of Appeal with the Clerk of Courts at the Lycoming County courthouse, and sending a copy to the trial judge, the court reporter and the prosecutor. The form and contents of the Notice of Appeal shall conform to the requirement set forth in Rule 904 of the Rules of Appellant Procedure. The Notice of Appeal shall 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 her 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,

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Marc F. Lovecchio, Judge

cc: Kenneth Osokow, Esquire (ADA)  
Robert Donaldson, Esquire  
Amber Barto, OQ8552 (certified and regular mail)  
451 Fullerton Avenue, Cambridge Springs, PA 16403-1238  
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