

IN THE COURT OF COMMON PLEAS OF CARBON COUNTY, PENNSYLVANIA
CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA, :

Appellee :

Vs. :

No. CR-53-2018

CR-54-2018

ANDREW PAUL LANTOSH, III, :

Appellant :

Robert Frycklund, Esquire

Counsel for Commonwealth

Assistant District Attorney

Michael Gough, Esquire

Counsel for Defendant

MEMORANDUM OPINION

Matika, J.- November 3, 2020

The Appellant, Andrew Paul Lantosh, III, (hereinafter "Lantosh") has filed an appeal to the Pennsylvania Superior Court seeking to overturn our decision which denied his "First Amended Petition for Post-Conviction Relief." For the reasons stated herein, this Court would ask the Appellate Court to deny that appeal and affirm our decision.

FACTUAL AND PROCEDURAL BACKGROUND

On November 4, 2019, Lantosh filed pro se, a motion for post-conviction collateral relief. In that motion, he also requested the appointment of counsel. On November 12, 2019, this Court appointed Attorney Michael Gough to represent Lantosh throughout the PCRA proceedings. On February 20, 2020, the "First Amended Petition for Post-Conviction Relief" was filed. Consequently, a hearing was scheduled and held on June 9, 2020. Lantosh was the

[FM-37-20]

only witness to testify.¹

After this hearing, both counsel took the opportunity to prepare and lodge briefs in support of their respective positions. On September 17, 2020, this Court issued a memorandum opinion denying Lantosh the relief he sought in his first amended petition.²

On October 13, 2020, Lantosh filed a timely appeal. On October 15, 2020, this Court issued an order directing Lantosh to file a concise statement of matters complained of on appeal. On October 26, 2020, that statement was filed. In that statement, Lantosh alleges that this Court erred in denying PCRA relief in not finding trial counsel ineffective in the following respects:

1. That Your Honorable Court erred in failing to consider that former counsel for the Defendant abandoned the latter by failing to request reconsideration of sentence and/or failing to lodge a timely appeal to the Superior Court of Pennsylvania.
2. That it was error for this Honorable Court not to conclude that former counsel for the Defendant was ineffective for not requesting a continuance of the Sentencing Hearing in

¹ Neither counsel for the Commonwealth, nor counsel for Lantosh presented Lantosh's trial counsel, Jennifer Rapa, Esquire for testimony.

² So as to avoid repetition, this Court refers to this memorandum opinion for a more detailed factual and procedural background of this matter, a copy of which is attached hereto.

these matters so as to allow the Defendant to first be sentenced in Lehigh County, a fact which former counsel knew.

3. That it was error for this Honorable Court not to conclude that former counsel of record was ineffective for failing to seek reconsideration of the Defendant being denied entry to the Carbon County Drug Treatment Court Program.
4. That it was error for this Honorable Court to reach the conclusion that former counsel was not effective when former counsel failed to appear at the Post Conviction Relief Act Hearing and therefore all testimony offered by the Defendant was not rebutted.

This Court is now prepared to address these four (4) issues.

LEGAL DISCUSSION

In reviewing the four (4) matters complained of, this Court believes it addressed the first three (3) in the attached memorandum opinion. The first error alleged is addressed in that opinion under the heading "III. OTHER ISSUES RAISED BUT NOT BRIEFED." Insofar as Lantosh's second issue that this Court erred in relation to his ineffectiveness claim in that trial counsel did not seek a continuance of the Carbon County sentence to allow him to be sentenced in Lehigh County first, this Court would point to its explanation and rationale as set forth in the section entitled "II. FAILURE TO SEEK CONTINUANCE OF CARBON COUNTY'S SENTENCE."

Next, as it relates to the third alleged error, to wit: Attorney Rapa's ineffectiveness for not seeking reconsideration of Lantosh's denial of entry into the Carbon County Drug Treatment Court, reference is made to the section labelled, "I. DRUG TREATMENT COURT PROGRAM."

The last issue raised by Lantosh in this appeal was a claimed error by this Court in not granting PCRA relief on the basis that the only testimony presented came from by Lantosh and this testimony went unrefuted since Attorney Rapa did not appear and testify. In other words, this Court should have granted Lantosh's PCRA relief, finding Attorney Rapa ineffective, simply because he was the only witness to testify.

Even when a lone witness testifies, that witness does not automatically come into court with a ticket to be believed. Credibility determinations are made at each proceeding before the Court and it is up to the trier of fact to decide if the witnesses are credible, even if it is only one witness. This Court has addressed in the underlying memorandum opinion several examples where it did not find Lantosh credible based upon contradictions in testimony or appropriate inferences that can be drawn from that testimony. Even though no one, specifically Attorney Rapa, presented themselves to otherwise refute Lantosh's testimony, it does not automatically make his testimony credible. As noted in our memorandum opinion, this Court does not find Lantosh's

testimony wholly credible. "A PCRA Court passed on witnesses' credibility at PCRA hearings and its credibility determinations should be provided great deference by reviewing Courts so long as they are supported by the record." *Comm. v. Johnson*, 966 A.2d 523, 539 (Pa. 2009). This Court believes its credibility determination vis-à-vis Lantosh is supported in the record and should withstand any appellate scrutiny.

CONCLUSION

Based upon the foregoing, this Court would respectfully request that the appeal be dismissed.

BY THE COURT:



Joseph J. Matika, J.

IN THE COURT OF COMMON PLEAS OF CARBON COUNTY, PENNSYLVANIA
CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA,	:	
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	:	
Vs.	:	No. CR-53-2018
	:	CR-54-2018
	:	
ANDREW PAUL LANTOSH, III,	:	
Defendant	:	
	:	
Robert Frycklund, Esquire		Counsel for Commonwealth
		Assistant District Attorney
Michael Gough, Esquire		Counsel for Defendant

MEMORANDUM OPINION

Matika, J. - September 17, 2020

Before the Court is the "First Amended¹ Petition for Post-Conviction Relief" filed by the Defendant, Andrew Paul Lantosh, III. For the reasons stated herein, the petition is DENIED.

FACTUAL AND PROCEDURAL BACKGROUND

On or about March 23, 2018, the Defendant, Andrew Paul Lantosh, III (hereinafter "Lantosh") executed a counselled stipulation to enter a guilty plea to one count of Criminal Trespass, [18 Pa.C.S.A. §3502(A)(i)(ii)] and one count of Driving Under Suspension - DUI related [75 Pa. C.S.A. § 1543(b)(1)] in the case indexed to CP-13-CR-53-2018. Lantosh also executed a stipulation in the case indexed to CP-13-CR-54-2018 in which he

¹ The Defendant filed a Pro Se Petition on November 4, 2019, which was amended by Court Appointed Counsel, Michael Gough, Esquire on February 20, 2020.

agreed to enter a guilty plea to a second charge of Criminal Trespass in that case. On both stipulations, the Commonwealth indicated that it had "no objection to IPP or weekend sentence."

On December 10, 2018, Lantosh appeared with then counsel, Jennifer Rapa, Esquire (hereinafter "Attorney Rapa") to enter the above counselled guilty pleas. Upon those pleas being accepted, sentencing was deferred until March 1st, 2019 to allow defense counsel to "check with Lehigh County (possible DTC)."²

On February 28, 2019, Lantosh filed a continuance of his sentencing. On this continuance, it was noted that the reason for requesting such was that drug court application was still pending. Sentencing was then moved to March 22, 2019. At the March 22, 2019 sentencing hearing another application for continuance was filed and granted by the Court. This time the reason listed for this continuance was "working to make eligible for drug court." The granting of this continuance moved Lantosh's sentencing to May 17, 2019.³

On May 17, 2019, Lantosh appeared for sentencing with Attorney Rapa. At the onset of that hearing, Attorney Rapa was asked if her client was ready to be sentenced and she indicated that "he

² It should be noted that the undersigned wrote "possible DTC" as the additional reason for the sentencing deferral knowing that effective January 1, 2019, Carbon County was going to start a Drug Treatment Court.

³ Information regarding these facts pertaining to the continuances of the sentencing was gleaned from the docket entries in these cases.

was." Initially, Attorney Rapa expressed dismay at the fact that her client was not accepted into the Drug Treatment Court, however, notwithstanding that denial and in light thereof, he was ready to be sentenced. Additionally, at that sentencing proceeding the Court inquired about Lantosh's pending Lehigh County case. The following colloquoy took place:

THE COURT: Wasn't he sentenced in Lehigh already?

ATTORNEY RAPA: No. It's -- the 28th?

THE DEFENDANT: 28th.

ATTORNEY RAPA: 28th.

THE COURT: Okay. So you entered your plea only?

ATTORNEY RAPA: Yes.

THE DEFENDANT: Yes, sir.

THE COURT: Do you know what you're facing in Lehigh?

THE DEFENDANT: Yes. It's around 27 months.

THE COURT: Minimum?

THE DEFENDANT: Minimum? They're still bargaining with the courts for SIP with the victims in my case, so it's still undecided, but I'm looking at probably a minimum of 27 months.

ATTORNEY RAPA: Judge, if he is granted state IP in that case -- in those cases in Lehigh, we would be motioning to amend our sentence to include the evaluation for state

IP as well.⁴

Additionally, the following was also stated at that sentencing hearing:

THE COURT: Now, I know if I sentence you today and you are sent to a state correctional institution, you can always ask to be placed in the SIP program once you're there assuming Lehigh County allows it. You can always ask while you're at the state correctional institution for that, and as long as everyone would be on board then we could change any sentence that I impose here. I would have no -- I would not be adverse to that because I think that's the help you need more so than anything.

THE DEFENDANT: Thank you, Your Honor.⁵

Thereafter, Lantosh was given an aggregate state sentence of not less than nine (9) months nor more than thirty-six (36) months on the Carbon County charges. No post-trial motion nor appeal was filed to this sentence.

Thereafter on May 27, 2019, Lantosh was sentenced in Lehigh County. According to Lantosh, he was transported to SCI Mahanoy on August 27, 2019.

On November 4, 2019, Lantosh filed a pro se motion for post-conviction collateral relief. In doing so, he requested counsel

⁴ Notes of Testimony from May 17, 2019 sentencing hearing, pp. 4-5.

⁵ Notes of Testimony from May 17, 2019 sentencing hearing, p. 11.

be appointed to represent him. On November 12, 2019, Michael Gough, Esquire was appointed to represent Lantosh. Thereafter, on February 20, 2020, the instant First Amended Petition for Post-Conviction Relief (hereinafter "PCRA Petition") was filed. In that petition, Lantosh alleges that his trial counsel, Jennifer Rapa, Esquire was ineffective in her representation of him and that his constitutional rights were violated based on the following:

- (1) That the Defendant was denied entry into what is commonly known and identified as the "Carbon County Drug Treatment Court Program" for a reason or reasons unknown to him, or for a reason or reasons bearing no basis in fact, or on the basis of a system that employs no criteria nor guidelines for determining who should, or who should not, be admitted to the Program.
- (2) That the Defendant was afforded no opportunity to request reconsideration of his denial to the Drug Treatment Court Program.
- (3) That former counsel, with full knowledge that the Defendant had pending charges in the Lehigh County Court of Common Pleas, failed to request a continuance of the May 17, 2019 Sentencing hearing in this Honorable Court, and thus the Defendant was first sentenced in Carbon County and then in Lehigh County, the result of which was the Defendant losing the opportunity to have the sentences imposed in each County running concurrent with each other.
- (4) That former counsel for the Defendant undertook no measures whatsoever, either in this Honorable Court or in the Superior Court of Pennsylvania, to challenge the sentences imposed here.
- (5) That former counsel for the Defendant failed to spend sufficient time meeting with the Defendant and failed to explain to the Defendant the elements comprising the offenses of Burglary and Criminal Trespass, respectively, such that the Defendant felt rushed when entering his pleas of guilty here.

At the evidentiary hearing held on Lantosh's PCRA petition, he testified that he was not aware, at the time of sentencing on May 17, 2019, that he was denied eligibility into the Drug Treatment Court. He also acknowledged that there were no discussions had nor requests made to challenge this decision or to reapply to Drug Treatment Court. He also acknowledged that there were no discussions had nor requests made to challenge this decision or to reapply to Drug Treatment Court or to request a continuance of the May 17, 2019 sentencing to explore that possibility. Lantosh also testified that he fully expected that the Lehigh County burglary charges were going to be transferred to Carbon County to be made part of the Drug Treatment Court program because that is what the victims in those cases wanted. Additionally, Lantosh testified that Attorney Rapa did not request a continuance of the sentencing in Carbon County, but should have so that Lehigh County could have sentenced him first, thus allowing Carbon County to run its sentence concurrent to Lehigh County. When questioned further, Lantosh stated that his Lehigh County Public Defender told him that the Lehigh County sentences could not be run concurrent to Carbon County because Lehigh County's sentences were longer than those imposed in Carbon County.⁶

Upon the conclusion of the PCRA hearing, counsel was given an

⁶ Notes of Testimony, PCRA hearing of June 9, 2020, pp.10-24.

opportunity to brief the issue before the Court. In Lantosh's Memorandum of Law in support of PCRA relief, he presented the following questions:⁷

- (1) Did a violation of the Fourteenth Amendment occur when the defendant was not afforded due process of law with regard to the denial of his application for the Carbon County Drug Treatment Court Program and his ability to request reconsideration of such denial?
- (2) Was former counsel for the defendant ineffective per se by failing to seek reconsideration of the defendant being denied participation in the Carbon County Drug Treatment Court Program?
- (3) Did former counsel for the defendant render ineffective assistance by allowing the defendant to first be sentenced in Carbon County as opposed to Lehigh County and thereby removing the possibility of the defendant being sentenced in a concurrent fashion between the counties?

The First Amended PCRA Petition is now ripe for disposition.

LEGAL DISCUSSION

In order to prevail on a claim of ineffective assistance of counsel, a PCRA petition must establish by a preponderance of the evidence the following: 1) that the underlying legal claim has arguable merit; 2) Counsel had no reasonable basis for acting or failing to act; and 3) the Petitioner has suffered prejudice as a result. *Commonwealth v. Buamhammers*, 92 A.3d 708, 719 (Pa. 2014). Petitioner must establish all of these factors, otherwise the claim fails. *Commonwealth v. Busanet*, 54 A.3d 35, 45 (2012).

⁷ In his First Amended PCRA Petition, Lantosh raised five (5) areas of concern. In his memorandum, he raised only three (3), one of which [#(1)] is being raised in that memorandum for the first time.

[A] PCRA petitioner will be granted relief only when he proves, by a preponderance of the evidence, that his conviction or sentence resulted from the ineffective assistance of counsel which, in the circumstances of he particular case, so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place. 42 Pa.C.S. §9543(a)(2)(ii). Counsel is presumed effective, and to rebut that presumption, the PCRA petitioner must demonstrate that counsel's performance was deficient and that such deficiency prejudiced him.

Commonwealth v. Spotz, 84 A.3d 294, 311-12 (Pa. 2014) (internal quotation marks and other punctuation omitted.)

To this must be added that

[g]enerally, counsel's assistance is deemed constitutionally effective if he chose a particular course of conduct that had some reasonable basis designed to effectuate his client's interests. Where matters of strategy and tactics are concerned, a finding that a chosen strategy lacked a reasonable basis is not warranted unless it can be concluded that an alternative not chosen offered a potential for success substantially greater than the course actually pursued. To demonstrate prejudice, the petitioner must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. A reasonable probability is a probability that is sufficient to undermine confidence in the outcome of the proceeding.

Spotz, 84 A.3d at 311-12 (internal quotations marks and other punctuation omitted).

I. DRUG TREATMENT COURT PROGRAM

Lantosh claims that Attorney Rapa was ineffective for not seeking reconsideration of the denial to admit him into Drug Treatment Court. He further argues that he was unaware of the actual denial when he appeared for sentencing on May 17, 2019, a

sentencing hearing that was continued from March 22, 2019.⁸ At the sentencing hearing this Court explained to Lantosh that the District Attorney's office had denied entry into Drug Treatment Court. Lantosh's claim at the PCRA hearing and at the sentencing hearing that he had no knowledge of this denial is contradicted by the fact that he requested a continuance of the March 22, 2019 sentencing hearing, because he and counsel was "working to make eligible for Drug Court." One can infer from the reason set forth for the continuance that Lantosh's eligibility and admission was rejected by the District Attorney's Office, otherwise there would be no reason to try to make him eligible.

Further, Lantosh's testimony that the victims in the Lehigh County case were agreeable to a placement in Carbon County's Drug Treatment Court was also not credible. At the PCRA hearing, Lantosh testified that the victims wanted Lantosh to enter Drug Treatment Court in Carbon County and that the victims did not want a state sentence consisting of a state intermediate punishment program sentence, nor concurrency between sentences. This testimony is inconsistent with that given by Lantosh at his sentencing hearing on May 17, 2019 *vis-à-vis* the victim's position related to sentencing in Lehigh County. At that hearing, Lantosh

⁸ It should again be noted that Lantosh had previously been scheduled for sentencing on March 22, 2019, a hearing that was continued at Lantosh's request because there was an attempt at "working to make eligible for Drug Court." The Court takes judicial notice of this docket filing.

stated, "They're still bargaining with the Courts for S.I.P. with the victims in my case, so its still undecided, but I'm looking at probably a minimum of 27 months.⁹ This statement clearly shows that at the time of sentencing, Lantosh was fully cognizant of where things stood in Lehigh County and that he was facing a minimum state sentence of twenty-seven (27) months of incarceration, unless the victims agreed to state intermediate punishment. Nothing was stated as to his ongoing possible involvement in the Drug Treatment Court program.

In applying these facts to the requirements Lantosh must prove to show Attorney Rapa to be ineffective, this Court finds he has failed to establish that the underlying claim, i.e., that he was denied due process and/or entry into Drug Treatment Court because of Attorney Rapa's inaction, is without arguable merit. Further Defendant's due process rights are not impacted by any perceived failure on Attorney Rapa's part as entry into Drug Treatment Court is not a constitutionally protected right, but rather a privilege afforded certain individuals after a careful review of eligibility criteria.

⁹ Notes of Testimony, sentencing hearing May 17, 2019 p. 4.

II. FAILURE TO SEEK CONTINUANCE OF CARBON COUNTY'S SENTENCE

Lantosh next argues that Attorney Rapa was ineffective for failing to seek a continuance of the May 17, 2019 sentencing hearing in Carbon County until after Lantosh's May 28, 2019 sentencing hearing in Lehigh County and as a result Lantosh lost his opportunity to have all of his sentences run concurrent to one another.

At his sentencing hearing on May 17, 2019, Lantosh openly acknowledged that he was aware of his sentencing hearing scheduled in Lehigh. He was aware that the minimum sentence was going to be twenty-seven (27) months (unless the victims agreed to state intermediate punishment) and the Defendant was advised that if he received a state intermediate punishment sentence in Lehigh County, this particular sentence could be modified to place him into that program as well on the Carbon County charges.¹⁰

Additionally, Lantosh testified at his PCRA hearing that the victims in Lehigh County were opposed to any concurrency of sentences. Armed with this information, Attorney Rapa could not be said to be ineffective for not requesting a continuance. Further, concurrency, whether it be Carbon to Lehigh or Lehigh to Carbon, is within the sound discretion of the trial court. In light of the fact that there was no agreement that Carbon's

¹⁰ Notes of Testimony, sentencing hearing May 17, 2019, p. 11.

sentences would run concurrent to Lehigh's sentence, there is no guarantee of concurrency between counties. Thus, Defendant's argument that Lehigh County should have sentenced him before Carbon so that he could receive a concurrent sentence was no guarantee such that the failure to seek a continuance of Carbon's sentencing was not ineffective.

III. OTHER ISSUES RAISED BUT NOT BRIEFED

In the First Amended Petition, Lantosh raised five (5) separate issues, however, in his brief he only addressed three (3) issues.¹¹ This Court finds that issues four and five having been raised by Defendant in his First Amended Petition for Post-Conviction Relief but not raised in his subsequent briefing pertaining thereto, have been abandoned and therefore waived by Defendant. See 42 Pa. C.S.A. §9544(b) (issue waived if petitioner failed to raise it during unitary review); *Commonwealth v. Holly*, 396 A.2d 1215 (Pa. 1979) (issue waived if not challenged at **each stage** of proceeding). See also *Commonwealth v. LaCava*, 666 A.2d 221, 228 n.9 (Pa.1995) (e.g., issue raised on appeal but not included in subsequent brief deemed waived.)

¹¹ Since issues one and two are related we discussed them together herein.

CONCLUSION

For the reasons stated, this Court does not find that Lantosh has established by a preponderance of the evidence that Attorney Jennifer Rapa was ineffective in her representation of the Defendant. Accordingly, this Court enters the following order:

IN THE COURT OF COMMON PLEAS OF CARBON COUNTY, PENNSYLVANIA
CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA, :

Vs. :

No. CR-53-2018
CR-54-2018

ANDREW PAUL LANTOSH, III, :
Defendant :

Robert Frycklund, Esquire

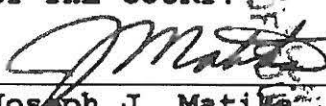
Counsel for Commonwealth
Assistant District Attorney
Counsel for Defendant

Michael Gough, Esquire

ORDER OF COURT

AND NOW, this 17th day of September, 2020 upon consideration of Defendant's "First Amended Petition for Post-Conviction Relief" filed on February 20, 2020 and in accordance with our Memorandum Opinion of this same date, it is hereby **ORDERED** and **DECREED** that the Petition is hereby **DENIED**.

BY THE COURT:


Joseph J. Matika, J.

FILED
2020 SEP 17 A 6:53
CLERK OF COURTS

Notice to Petitioner

1. You have the right to appeal to the Pennsylvania Superior Court from this order dismissing and denying your PCRA Petition and such appeal must be filed within 30 days from the entry of this order, Pa.R.A.P. 108 & 903.
2. You have the right to assistance of legal counsel in the preparation of the appeal.
3. You have the right to proceed in forma pauperis and to have an attorney appointed to assist you in the preparation of the appeal, if you are indigent. Michael Gough, Esquire is your current counsel. However, you may also "proceed pro se, or

by privately retained counsel, or not at all." *Commonwealth V. Turner*, 544 A.2d 927, 929 (Pa. 1988).