IN THE SUPREME COURT OF FLORIDA

FILED
CLERK, SUPREME COURT
By
Deputy Clerk

CASE NO. 66,731

MARSHA L. LYONS and the CIRCUIT COURT
FOR THE ELEVENTH JUDICIAL CIRCUIT
IN AND FOR DADE COUNTY, FLORIDA,
CRIMINAL DIVISION (03),

Petitioners,

vs.

METROPOLITAN DADE COUNTY,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW
FROM THIRD DISTRICT COURT OF APPEAL

BRIEF OF PETITIONERS ON THE MERITS

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STATEMENT OF THE CASE

In September of 1981 Petitioner Marsha L. Lyons was appointed by Circuit Court Judge Thomas E. Scott as a Special Assistant Public Defender to represent Robert Patton in Case Nos. 81-19702, 81-22454 and 81-05341, following certification of a conflict of interest filed by the public defender. Patton was indicted for three separate offenses in Case No. 81-19702, including murder in the first degree in connection with the shooting death of police officer Nathaniel Broome on September 2, 1981; grand theft of an automobile, which took place two days prior to the day of the shooting; and an armed robbery, which took place at another location shortly after the shooting. At the time of these alleged offenses, Patton was a convicted felon and on probation; as a result, he was also charged with unlawful possession of a firearm in Case No. 81-22454 and an Affidavit for Probation Violation was filed in Case No. 81-05341. (P.App. 3, 9, 10, 11).[1]

At the conclusion of that representation, Ms. Lyons filed a motion asking for a total of $30,313.00 in attorney's fees for her representation in the three cases based upon calculations using the hourly rates established by the Chief Judge of the Circuit. (P.App. 4). Metropolitan Dade County filed an objection to the motion arguing that

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1/ "P.App." is the desgnation for Petitioner's Appendix.

the Petitioner could not be paid in excess of the statutory limits pursuant to Fla. Stat. § 925.036 (P.App. 12).[2] On June 15, 1984, Judge Scott entered an Order Certifying and Awarding Special Assistant Public Defender Attorney's Fees in the sum of $25,000.00. (P.App. 3).

Metropolitan Dade County filed a Petition for Writ of Common Law Certiorari in the Third District Court of Appeal, and following briefing and oral argument on the issues, on December 18, 1984, the Third District entered its Opinion granting the petition and quashing the Order, finding that the trial court was not authorized to award fees in excess of $8,500.00 under Section 925.036 of the Florida Statutes (1981) (P.App. 2). Ms. Lyons filed a Petition for Rehearing which was denied on February 13, 1985. (P.App. 2).

The Petitioner filed a Notice to Invoke Discretionary Jurisdiction in the Supreme Court of Florida and on August 27, 1986, this Court entered its Order Accepting Jurisdiction and Dispensing with Oral Argument.

STATEMENT OF THE FACTS

On June 15, 1984, Judge Thomas Scott entered an Order awarding the Petitioner Lyons a total of $25,000.00 in attorney's fees in connection with her representation in three separate cases. Ms. Lyons' motion had requested the

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2/ The parties will be referred to by name or as designated in these proceedings.

sum of $30,313.00 based on her expenditure of 730.1 hours, utilizing the hourly rate established by the Chief Judge of the Circuit.

Although the court found that the sum requested was reasonable and that the time in fact was necessary and had been expended; the court recoginzing that the fees must be paid from public funds awarded the lesser sum. (P.App. 3). The motion was accompanied by a detailed description of the time expended by counsel as well as affidavits by attorneys Talbot D'Alemberte, Robert Josefsberg and Michael Von Zamft, all of whom found that the time expended was "necessary and eminently reasonable". (P.App. 5, 6, 7).

The death penalty case involved the highly publicized shooting death of a black police officer by a white defendant which occurred in an area of the city largely occupied by blacks. (P.App. 3).

The affidavits accompanying the motion recite additional information about the case and the scope of the evidence against Patton and the extent of the preparation which had to be undertaken by counsel, portions of which are summarized in the following paragraphs.

Over 100 State witnesses were provided to the defense as persons who would testify in the capital case. Approximately 50 of those witnesses were deposed by the Petitioner. All other witnesses, with the exception of approximately 10 who were later withdrawn by the State, were contacted and interviewed by counsel. (P.App. 5, 6, 7).

Crime scene reports were prepared not only at the site of each of the three separate offenses charged, but also at the place of the execution of three separate search warrants. Property was seized from each location and items seized were submitted for various types of laboratory analyses, including fingerprinting, bloodstains, powder residue and projectile examination. (P.App. 5, 6, 7).

Video tape recordings were made at the scene of the execution of one search warrant and of the defendant's booking procedure. The defendant had also made statements to several police officers and his probation officer regarding the offense. (P.App. 5, 6, 7).

Discovery indicated that there were numerous witnesses who would be able to identify the defendant both immediately prior to and immediately following the shooting of Officer Broome. Additionally, the gun positively identified as the murder weapon was located hidden at the defendant's grandmother's house, and the State could establish that the defendant had gone there shortly after the shooting. Patton could also be linked, both by physical evidence and numerous witnesses, to the theft of a vehicle prior to the shooting and to an armed robbery which occurred at another location after Officer Broome's death. (P.App. 5, 6, 7).

Although Robert Patton had been adjudicated not guilty by reason of insanity and placed in a State mental

institution in 1976, Judge Scott found him competent to stand trial in connection with the September, 1981, offenses. However, the defendant had had an extensive history of child abuse and resulting mental disorder. The earliest diagnosis was at age three and records were located from approximately 12 different doctors and institutions throughout the State of Florida. Because of the location and age of some of this information, well over 80 contacts by subpoena or letter were made by the Petitioner in attempts to locate this information.[3]

Throughout the pre-trial and trial stages of the matter, the State was represented by lead counsel, David Waxman. Mr. Waxman was assisted at all stages by Assistant State Attorney Malcolm Purow and legal intern Mark Seiden. Assistant State Attorney Arthur Berger assisted in connection with research on all matters having appellate ramifications. These attorneys were present and represented the State during evidentiary hearings and throughout the trial. (P.App. 5, 6, 7).

Active representation began on September 3, 1981, and continued for approximately seven months. (P.App. 8A).

3/ All of this information was utilized to support either statutory or non-statutory mitigating factors at the penalty phase. Although Patton was convicted and sentenced to death, this Court vacated the death sentence and remanded the case for a new sentencing proceeding, directing the "trial court's attention to the United States Supreme Court decision in Eddings v. Oklahoma, 455 U.S. 102 (1982). Patton v. State of Florida, 467 So.2d 975, cert. denied 106 S.Ct. 198.

The trial in connection with the charges against the defendant lasted six days. There were approximately 18 other court appearances in regard to motions and evidentiary hearings. (P.App. 5, 6, 7). Petitioner stated in her Affidavit in Support of Motion for Attorney's Fees, that the amounts of time expended were:

> "absolutely essential in living up to her obligations under the Cannons of Ethics to provide the Defendant with his right to counsel, effective assistance of counsel . . ." under the State and Federal Constitutions. (P.App. 8).

The trial court also specifically accepted as true and adopted the factual information contained in the Affidavit In Support of the Motion for Attorney's Fees filed by Ms. Lyons, the supporting exhibits and affidavits of attorneys. (P.App. 3).

SUMMARY OF ARGUMENT

The Third District Court of Appeal erred in quashing the trial court's Order Awarding Attorney's Fees in excess of the statutory amount set forth in 925.036, Florida Statutes, and in finding that the court had no authority to award fees in excess of that provided by statute regardless of the extraordinary circumstances of the case.

The Petitioner asserts that the trial court did have the inherent authority to enter the Order, having found that the maximum amount designated under the statute under the extraordinary circumstances of this case, was unreasonably

insufficient and would have made it impossible for the court to have appointed any competent counsel to represent the defendant Patton.

ARGUMENT

POINT I

THE THIRD DISTRICT COURT OF APPEAL ERRED IN QUASHING THE TRIAL COURT'S ORDER AWARDING ATTORNEY'S FEES WHEN THE TRIAL COURT FOUND THAT THE MAXIMUM AMOUNT DESIGNATED UNDER 925.036, FLORIDA STATUTES, WAS UNREASONABLY INSUFFICIENT UNDER THE EXTRAORDINARY CIRCUMSTANCES OF THE CASE AND INVOKED ITS INHERENT AUTHORITY TO AWARD FEES IN EXCESS OF THE STATUTORY GUIDELINES.

The Third District Court of Appeal's Opinion entered on December 18, 1984, quashing Judge Scott's Order awarding Petitioner attorney's fees, relied on Metropolitan Dade County v. Bridges, 402 So.2d 411 (Fla. 1981), as holding "with unmistakeable clarity" that the language in Section 925.036 is mandatory and that the trial court had no inherent authority to award fees in excess of the statutory amount.

However, this Court's recent decision in Makemson v. Martin County, 491 So.2d 1109, 1115 (Fla. 1986), recedes from that position stating:

> "In summary, we hold that it is within the inherent power of Florida's trial courts to allow, in extraordinary and unusual cases, departure from the statute's fee guidelines when necessary in order to ensure that an attorney who has served the public by defending the accused is not compensated in an amount

> which is confiscatory of his or her time, energy and talents. More precise delineation, we believe, is not necessary. Trial and appellate judges, well aware of the complexity of a given case and the attorney's effectiveness therein, know best those instances in which justice requires departure from the statutory guidelines. We recede from that portion of Bridges which is inconsistent with this opinion, and, in sum, find the statute directory rather than mandatory in nature.

See also, Dennis v. Okeechobee County, 491 So.2d 1115 (Fla. 1986).

This Court also affirmed the doctrine of "inherent judicial power" discussed in Rose v. Palm Beach County, 361 So.2d 135 (1978), stating:

> "We must once again affirm the proposition that 'the courts have inherent authority to do things that are absolutely essential to the performance of their judicial functions.' Makemson, supra, at p. 1113."

This Court found that the trial court had met its burden of showing that its action in exceeding the statutory maximum "was necessary to enable it to perform its essential judicial function of ensuring adequate representation by compentent counsel." Makemson, supra, at p. 1113.

In the case at bar, Judge Scott specifically found in his Order that:

> "(1) The maximum amount designated for representation in a capital case under Fla. Stat. 926.036, as applied to this case, is so unreasonably insufficient as to make it impossible for this Court to have appointed any competent

counsel to represent the Defendant Robert Patton, even recognizing the willingness of attorneys to generously provide their time and services to indigent defendants, without the expectation of any or minimal compensation."[4]

Judge Scott's Order specifically recites certain facts that he considered particularly important in finding that the statutory limitations had to be waived in this instance.

> "2. The case involved the highly-publicized shooting of a black police officer by a white Defendant in Overtown, which is an area of the city largely occupied by blacks.
>
> "3. The extensive investigation which was undertaken by the police and the State Attorney's Office resulted in defense counsel being provided with the names of over one hundred witnesses to the three separate offenses which were charged in the Indictment, each of which took place at different times and locations, and necessarily involved different witnesses and physical evidence.
>
> "4. At most evidentiary hearings and the trial, the prosecution was represented not only by experienced trial counsel and assistants and investigators, but by appellate counsel as well.

4/ Confronted with the nature of the charges and the scope of the evidence, counsel attempted to explore possible alternatives to trial, but the State made it abundantly clear that they were seeking the death penalty and were unwilling to discuss any other alternative. (P.App. 5, 6, 7). The Petitioner filed a motion asking the court to appoint a separate law firm to handle the penalty phase of the murder indictment.

Judge Scott denied that motion, but during the hearing ordered the Petitioner to utilize whatever time it took and not to "be bound or have any consideration . . . as to the monetary limitations provided by law". The trial judge stated that he could waive the fee limitations, if they prohibited effective representation of counsel and that he was doing so in this case. He said that he would contact the County Attorney to have him waive the fees in this case, although there is no evidence that was ever done. (P.App. 8B).

"5. The Court, recognizing the extreme circumstances facing the Defendant in this case and the impossibility of defense counsel providing effective representation within the purviews of the statutory fees, ordered appointed counsel to expend whatever amounts of time were necessary to represent the Defendant in this case, and told counsel that the Court would see that the statutory fees would be waived by the County Attorney.

* * *

"7. From approximately mid-January to the end of the trial, defense counsel had to utilize an average of nearly twelve hours a day, every day of the month, of attorney time available in her office in connection with these matters.

"8. To have stayed within the statutory fees provided in all three cases, counsel would have had to have reduced the number of hours spent (even at the $40.00 an hour rate) by over two-thirds. No attorney could have provided even minimally effective representation of the Defenant in this case within such confines.

"9. The Court has no doubt that counsel expended far more time in the representation of this Defendant than is contained in the detailed time listing contained in Exhibit "A". The Court finds, and the County does not disagree, that the amount of time contained in the Motion for Attorney's Fees was reasonable and necessary for providing representation in this case, and that the fee requested of $30,313.00 is reasonable. Nonetheless, the County has objected to the payment of any amount in excess of $3,500.00." (P.App. 3).

In conclusion, the trial judge stated:

> "IN ALL of the death cases which this Court has presided over and is aware of, this is the most extreme case the Court has ever observed in terms of the thoroughness of the State's investigation, the number of State witnesses and exhibits, the lack of options available to the defense, and the extreme consequences faced by the Defendant." (P.App. 3).

CONCLUSION

For the above reasons, the Petitioner asks that this Court quash the Third District Court of Appeal's quashal of the trial court's Order awarding just compensation for Petitioner's service and reinstating the trial court Order Certifying and Awarding Attorney's Fees.

Respectfully submitted,

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By:
MARSHA L. LYONS

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing has been mailed to: ERIC K. GRESSMAN, ESQ., Assistant County Attorney, Suite 2810, Metro Dade Center, 111 N.W. First Street, Miami, FL 33128; and THE HONORABLE GERALD T. WETHERINGTON, Chief Judge, Dade County Circuit Court, 73 W. Flagler St., Miami, FL 33130, this 21st day of October, 1986.

By: MARSHA L. LYONS