FILED
SID J. WHITE
MAY 8
CLERK, SUPREME COURT
By
Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

CASE NO. 66,780

ROBERT MAKEMSON, ET AL.,

Petitioners,

vs.

MARTIN COUNTY,

Respondent.

ANSWER BRIEF

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CITATIONS OF AUTHORITY

PRELIMINARY STATEMENT

Petitioner was the Petitioner at the trial court level and was the Respondent in the District Court of Appeal. Respondent was the Respondent at the trial court level and was the Petitioner in the District Court of Appeal.

In this Brief the parties will be referred to as they appear before this Honorable Court. The following symbol will designate the appropriate portion of the transcript of the hearing before the trial court - "T".

STATEMENT OF THE CASE AND OF THE FACTS

Petitioner, ROBERT MAKEMSON, was appointed by the Honorable C. Pfeiffer Trowbridge of the Nineteenth Judicial Circuit, as a special public defender to represent the Defendant, J. B. PARKER, pursuant to Section 925.035, Florida Statutes (Appendix Item No. 1). J. B. PARKER was charged by the State of Florida with murder in the first degree, armed robbery, and kidnapping (Appendix Item No. 2). Petitioner was appointed on May 16, 1982, and represented the defendant through sentencing on January 11, 1983.

On February 18, 1983, after the close of the case, Petitioner moved the Honorable Philip G. Nourse of the Nineteenth Judicial Circuit, to award him attorney's fees in the amount of $9,652.00 (Appendix Item No. 3). Hearings were held on Petitioner's Petition for Attorney's Fees on March 11, 1983, and April 20, 1983, before the Honorable Philip G. Nourse (Appendix Item No. 4). At the hearings two expert witnesses testified that this was an exceptional case, and after the conclusion of the hearing the Honorable Philip G. Nourse entered an Order on May 4, 1983, finding Section 925.036, Florida Statutes (1981), unconstitutional and awarding Petitioner $9,500.00 as attorney's fees (Appendix Item No. 5). Said Order directed Respondent to pay Petitioner $3,500.00 immediately and to put $6,000 00 in escrow pending appeal of the Order.

Also by said Order, the Honorable Philip G. Nouse appointed Petitioner, ROBERT G. UDELL, to represent the defendant on appeal and set his attorney's fee at $4,500.00. The Order directed Respondent to put $4,500.00 in escrow for payment of Petitioner UDELL's fees.

Respondent, MARTIN COUNTY filed a Notice of Appeal with the Clerk of the Circuit Court of the Nineteenth Judicial Circuit in and for Martin County, Florida, on May 31, 1983 (Appendix Item No. 6). On February 1, 1984, the Fourth District Court of Appeal filed an Order granting Respondent's Motion to Treat the Notice of Appeal as a Petition for Writ of Common Law Certiorari (Appendix Item No. 7).

On March 6, 1985, the Fourth District Court of Appeal rendered a decision granting the Writ of Certiorari and quashing the award of attorney's fees to trial counsel. The Order of the Fourth District Court of Appeal also granted the Writ of Certiorari as to the fee of Petitioner Udell, and quashed the award of attorney's fees to Petitioner Udell. In that opinion, the Fourth District Court of Appeal certified to the Supreme Court the questions involved in this appeal (Appendix Item No. 8).

On March 18, 1985, Petitioners, ROBERT MAKEMSON and ROBERT G. UDELL, filed a Notice to Invoke Discretionary Jurisdication with the Clerk of the Fourth District Court of Appeal (Appendix Item No. 9).

QUESTIONS CERTIFIED AS BEING OF GREAT PUBLIC IMPORTANCE

I.

IS SECTION 925.036, FLORIDA STATUTES, (1981) UNCONSTITUTIONAL ON ITS FACE AS AN INTERFERENCE WITH THE INHERENT AUTHORITY OF THE COURT TO ENTER SUCH ORDERS AS ARE NECESSARY TO CARRY OUT ITS CONSTITUIONAL AUTHORITY?

II.

IS SECTION 925.036, FLORIDA STATUTES, (1981) UNCONSTITUTIONAL AS APPLIED TO EXCEPTIONAL CIRCUMSTANCES OR DOES THE TRIAL COURT HAVE THE INHERENT AUTHORITY, IN THE ALTERNATIVE, TO AWARD A GREATER FEE FOR TRIAL AND APPEAL THAN THE STATUTORY MAXIMUM IN THE EXTRAORDINARY CASE?

III.

SHOULD THE TRIAL COURT HAVE AWARDED AN ATTORNEY'S FEE ABOVE THE STATUTORY MAXIMUM FOR PROCEEDINGS AT THE TRIAL LEVEL, GIVEN THE FACTS PRESENTED TO IT BY TRIAL COUNSEL BY HIS PETITION AND TESTIMONY?

IV.

SHOULD THE TRIAL COURT HAVE AWARDED AN ATTORNEY'S FEE ABOVE THE STATUTORY MAXIMUM FOR PROCEEDINGS AT THE APPELLATE LEVEL BEFORE THE SERVICES WERE RENDERED AND WITH THE FACTS KNOWN TO IT AT THE TIME OF THE AWARD?

SUMMARY OF ARGUMENT

Florida Statute 925.036 (1981) is not unconstitutional as it does not interfere with the authority of the courts in carrying out their obligation to provide fair trials to indigent criminal defendants. The Florida Legislature enacted all statutory provisions relating to the amount and procedures in determining attorneys fees and it is within their juridiction to modify the procedures.

Florida Statute 925.036 is not unconstitutional as applied to exceptional circumstances, nor does the trial court have the inherent authority to award a greater fee for trial and appeal than the statutory maximum.

The trial court should not have awarded an attorneys fee at trial or appellate level beyond the statutory cap. Only the Legislature can increase the limit established in 925.036, Florida Statutes and until such time as that is amended by the Legislature it can not be awarded.

I.

IS SECTION 925.036, FLORIDA STATUTES, (1981) UNCONSTITUTIONAL ON ITS FACE AS AN INTERFERENCE WITH THE INHERENT AUTHORITY OF THE COURT TO ENTER SUCH ORDERS AS ARE NECESSARY TO CARRY OUT ITS CONSTITUTIONAL AUTHORITY?

There is no constitutional authority establishing payment of attorneys' fees. In Dade County v. Straus, 246 So.2d 137 at page 141 (1971), the Third District Court of Appeals stated:

> "The right to recover attorneys' fees as part of the costs in an action did not exist at common law, and therefore it must be provided by statute or contract."

At common law, it was the professional obligation of an attorney to accept cases of indigent parties as directed by the court. There was no right to compensation from the government. In establishing the constitutional right to counsel, the United States Supreme Court placed an obligation to provide counsel on government rather than the individual attorney. The evaluation of the right to government furnished counsel is discussed in In Interest of D.B., 385 So.2d 83 (1980).

The Florida Legislature has determined that the Counties "shall provide appropriate courtrooms, facilities, equipment, and unless provided by the state, personnel necessary to operate the circuit and county courts." F.S. 43.28 (1981) Additionally, the legislature established a limit on fees to be paid Court appointed attorneys.

The Florida Supreme Court in Wakulla County v. Davis, 395 So.2d 540 (1981) was clear in its "goal of protecting county treasuries." The Court further stated its intent of:

> "providing quidelines for courts without impairing the section of the statute requiring reasonable compensation for court appointed attorneys. It leads to more reasonable, sensible results. It is proper under the rules of statutory construction." Wakulla County, supra at 543.

The Court also stated that in establishing compensation limits on fees for court appointed attorneys, "...the legislature clearly intended to limit the burden which such representation places on public treasuries, and to provide guidelines for courts to follow." Wakulla County, supra, at 542.

Section 925.036 is not unconstitutional on its face as an interference with the inherent authority of the constitution. It is the legislative branch that is charged with the responsibility of appropriating funds for public purposes, not the judiciary.

The Supreme Court of Arkansas in State v. Ruiz, 602 SW2d 625 (Ark. 1980) stated:

> "...this question of compensation is not a matter to be addressed by the court but is within the province of the legislature. It is obvious that most counties are unable to pay the type of fee required in such cases. The counties did not do anything to incur the obligation; and, no doubt, every county would prefer that if a crime is to be committed that it be done elsewhere. It would appear logical that the state owes an obligation to pay under circumstances such as presented here; however this is a matter which must be left to the sound discretion of the general assembly."

In conclusion, it is within the sole authority of the legislature to determine the maximum compensation of attorneys or appointed counsel. This was done for sound reasons and it should be the legislature's responsibility to review the schedule.

II.

IS SECTION 925.036, FLORIDA STATUTES, (1981) UNCONSTITUTIONAL AS APPLIED TO EXCEPTIONAL CIRCUMSTANCES OR DOES THE TRIAL COURT HAVE THE INHERENT AUTHORITY, IN THE ALTERNATIVE, TO AWARD A GREATER FEE FOR TRIAL AND APPEAL THAN THE STATUTORY MAXIMUM IN THE EXTRAORDINARY CASE?

Section 925.036, Florida Statutes (1981) is not unconstitutional as applied to exceptional circumstances, nor does the trial court have the inherent authority to award a greater fee for trial and appeal than the statutory maximum in an extraordinary case.

In Metropolitan Dade County v. Bridges, 402 So.2d 411, 413 (1981) the Court stated:

> "A legislative enactment is presumed valid and will not be declared unconstitutional unless it is demonstrated beyond a reasonable doubt that the statute conflicts with some designated provision of the constitution. But the court, in construing a statute, may not invade the province of the legislature and add words which change the plain meaning of the statute. State v. Elder, 382 So.2d 687 (Fla. 1980) Futhermore, courts may not vary the intent of the legislature with respect to the meaning of the statute in order to render the statute constitutional."

In Bridges, supra, the trial court held the language of 925.036(3), Florida Statutes, to be directory only, and added the words "subject to extraordinary and unusual circumstances." The Court upheld the constitutionality of the statute stating the statutory fee schedule was mandatory.

In Haralambic v. Pima County, 669 P2d 984 (Ariz. 1983), the Court of Appeals of Arizona wrestled with a similar question. A trial Judge in a dependency proceeding and in a termination of parental rights proceeding appointed an attorney and then ordered payment in excess of the $250.00 statutory limit. The questions addressed were 1) the constitutionality of the statute and 2) the authority of the Judge to order compensation in excess of the statutory limit.

The Arizona Court of Appeals indicated that the question of constitutionality has already been answered for them by the Supreme Court:

> "There the court held valid a statutory limit on compensation to be paid to attorneys representing indigents. The court stated, '... counsel will have to look to the legislature for their remedy and not to the courts.'" Haralambic, supra at 986

The Court also noted that the indigent statutory cap was ultimately amended and the compensation limit deleted.

In determining the juvenile court Judge's order void ab initio, the Court of Appeals went on to note:

> "While it is axiomatic that a trial judge has authority to interpret the law reasonably, it must be in conformity with the Statutes of the State of Arizona and the decisions of the Arizona appellate courts. He may not alter the law or fashion it to his own liking. This is the function of the legislative branch of the government. Haralambic, supra at p. 986

The Supreme Court of Florida stated:

> "No judge is permitted to substitute his concept of what the law ought to be for what the law actually is. In re: Inquiry Concerning a Judge, J.Q.C. No. 77-16, 357 So.2d 172, 179 (Fla. 1978)

The Supreme Court of West Virginia in State v. Oakley, 227 SE2d 314 (1976) dealt with the question of exceeding a statutory maximum of $200.00 for any felony case.

The State of West Virginia did not have a public defender system and attorneys averaged in excess of six appointed criminal cases per year (some circuits 13-16 per year). The Court recommended various alternatives to assure adequate representation.

The Supreme Court of West Virginia also recognized the legislative process when it stated in State v. Oakley, supra, at 323:

> "It is the opinion of this Court that the ultimate decision concerning the specifics of providing a defense system in accordance with the concepts expressed in this opinion is appropriately left to the Legislature of the State. That body is best suited to weigh the many variables and to tailor the system to the particular needs of this State. In addition, it is the sole prerogative of the Legislature to appropriate the requisite funds to maintain the system so established."

The Court's order was to relieve the attorneys of West Virginia of the requirement to accept criminal appointments. However, in order to allow the Legislature to take the Court's recommended action, it did not implement the order until one year after the opinion giving the Legislature "the full opportunity to carefully scrutinize all the probative aspects of the need" for revisions to this system. The Court also expressed a basic confidence in the Legislature.

The New Jersey Supreme Court in State v. Rujh, 217 A2 441 (NJ 1966) also determined that the Legislature should have an opportunity to review the question of compensation of counsel. The Court recognized that the legislation was "explicit" and that because the matter of costs affects the State and local taxpayer, the "legislature should have an opportunity to decide" a viable solution.

Because the legislation in Florida is so clear, the Supreme Court should give the Legislature the task, with proper direction to change Section 925.036, Florida Statutes (1981) as this Court in its determination sees best for the proper administration of justice.

III.

SHOULD THE TRIAL COURT HAVE AWARDED AN ATTORNEY'S FEE ABOVE THE STATUTORY MAXIMUM FOR PROCEEDINGS AT THE TRIAL LEVEL, GIVEN THE FACTS PRESENTED TO IT BY TRIAL COUNSEL BY HIS PETITION AND TESTIMONY?

As discussed within this brief, Respondent, Martin County does not concede that the trial court could have awarded an attorneys fee above the statutory maximum for proceedings at the trial level.

There is no question that the Petitioner competently represented his client throughout the trial. Makemson accepted the appointment to represent the Defendant being fully aware of the statutory limit. Since the most serious offense that the Petitioner represented the Defendant on was a "capital case", the $3,500.00 maximum fee limit is applicable. Section 925.036(2)(d) Florida Statutes.

The Supreme Court of Nevada in Brown v. Board of County Commissioners, 451 P2 798 (Nev. 1969) at 711 stated:

> "The obligation of counsel to assume the burden of defending indigents necessarily involves personal sacrifice. It is to be presumed that courts charged with the appointment of counsel will never so burden one, or a few, members of the bar to the exclusion of others. We commend the petitioner for his services in this case. His willingness to assist the court is in the highest tradition of our profession and brings honor to him and to the bar as well. Our commendation may be an inadequate exchange for his personal sacrifice. Nonetheless, it is sincerely offered, and we repeat our invitation for legislative correction." (emphasis added)

IV.

SHOULD THE TRIAL COURT HAVE AWARDED AN ATTORNEY'S FEE ABOVE THE STATUTORY MAXIMUM FOR PROCEEDINGS AT THE APPELLATE LEVEL BEFORE THE SERVICES WERE RENDERED AND WITH THE FACTS KNOWN TO IT AT THE TIME OF THE AWARD?

The trial court should not have awarded an attorneys fee above the statutory maximum for proceedings at the appellate level. Honorable Philip G. Nourse states in his order (Appendix Item No. 1) that he "requested bids" for the representation of Defendant and that Petitioner Udell's bid in the amount of $4,500.00 was the only one submitted. There is not evidence that the request for bids set forth the statutory maximum to be used as a guideline. Nor is there any evidence that the Court specifically directed any members of the bar to represent Defendant on appeal, for the statutory amount, and that the attorneys refused, or asserted that representation presented a hardship. The Court did not even determine the number of hours expended by Udell prior to setting compensation.

In Metropolitan Dade v. Bridges, 402 So.2d 411 (Fla. 1981) the Court discussed the impossibility of appointment of competent counsel. This was not followed and therefore there can be no basis to exceed the statutory requirement of 925.036, Florida Statutes (1981).

CONCLUSION

The decision of the Fourth District Court of Appeals should not be reversed, as the matter of compensation beyond the statutory limit is not within the province of the trial court. The Florida Legislature should be directed to review the question of payment of attorneys fees per Florida Statute 925.036 (1981).

The precedent established by the Florida Supreme Court would prohibit the trial court from authorizing payment beyond the statutory maximum.

The counties of the State of Florida need a procedure whereby they can properly budget. Florida Statute 925.036 gives them that tool. The Legislature should review the impact of this statute from the attorney's perspective as well as the taxpayers.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Answer Brief has been furnished, by mail, to Robert Makemson, Esquire, 200 Seminole Street, Stuart, Florida 33497; and to Robert G. Udell, Esquire, 217 E. Ocean Boulevard, Stuart, Florida 33494, this 6th day of May, 1985.

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