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POINTS ON REVIEW - CERTIFIED QUESTIONS:

- A. WHETHER SECTION 925.036 FLORIDA STATUTES (1983) IS 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;
- B. IF THE ANSWER TO THE FIRST QUESTION IS NEGATIVE, COULD THE STATUTE BE HELD UNCONSTITUTIONAL AS APPLIED TO EXCEPTIONAL CIRCUMSTANCES;
- C. IF THE ANSWER TO THE SECOND QUESTION IS AFFIRMATIVE, 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 THEIR PETITIONS AND TESTIMONY;

STATEMENT OF CASE AND FACTS

V. L. Underhill and eleven others were charged with violating several provisions of the Florida Statutes relating to trafficking in illegal drugs (R.O.A. P. 22). Underhill and several other defendants were certified as indigent and counsel was appointed to represent them, pursuant to Section 27.35, Florida Statutes. Before the conclusion of representation, the Court held a formal hearing February 25, 1983, to determine whether or not the court appointed counsel should receive compensation in excess of \$2,500, the maximum limit set for court appointed counsel in non-capital, non-life felony cases (R.O.A. pp. 1-72). After hearing all interested parties the Court held Section 925.036, Florida Statutes, unconstitutional as applied and allowed fees in excess of \$2,500 (R.O.A. pp. 56-59). Subsequently, the Circuit Judge ruled that court appointed counsel be allowed a maximum of \$10,000 each for representation of each defendant in this case. In situations where a defendant had first been represented by one court appointed attorney, and later by another, each attorney was to receive \$5,000.

The Circuit Court's Order was officially rendered May 9, 1983 (R.O.A. P. 182). Okeechobee County filed its Notice of Appeal June 6, 1983 (R.O.A. P. 188). An Amended Order was filed by the Circuit Judge June 17, 1983 (R.O.A. P. 179).

On March 6, 1985, the Honorable District Court of Appeal of Florida, Fourth District issued its opinion in the instant case and companion case of Martin County V. Makemson No. 83-1138, (Fla. 4DCA March 6, 1985) 10 F.L.W. 569, certifying the instant points on appeal for decision by The Supreme Court of Florida. On April 3, 1985 the Petitioner filed his invocation of jurisdiction of the Supreme Court, and on April 8, 1985 the Supreme Court ordered the filings by Petitioner and Respondent of their briefs on the merits.

ARGUMENT

A. POINT ON REVIEW - CERTIFIED QUESTION NUMBER ONE:

WHETHER FLORIDA STATUTE 925.036 (1983) IS UNCONSTITUTIONAL ON ITS FACE AS AN INTERFERENCE WITH THE INHERENT AUTHORITY OF THE TRIAL COURTS TO ENTER SUCH ORDERS AS ARE NECESSARY TO CARRY OUT ITS CONSTITUTIONAL AUTHORITY:

This Honorable Court has consistently rejected the claim that the fee limitations set forth in this Statute are an unconstitutional interference with the inherent authority of the County. In Metropolitan Dade County V. Bridges, 402 So. 2d 411, (Fla. 1981), this Court specifically upheld the constitutionality of the pre-1981 version of this Statute:

Neither the due process nor equal protection clauses are implicated by section 925.036. In MacKenzie V. Hillsborough County, 288 So. 2d 200 (Fla. 1973), we upheld the constitutional validity of section 925.035 which established a maximum of \$750 as reasonable compensation to counsel appointed to represent an indigent in a criminal case. This statute was challenged on the basis that it contravened the equal protection and due process clauses of the Constitutions of the United States and of the State of Florida. Initially, we reiterated that the right to recover attorney's fees as a part of the costs in an action did not exist at common law and that it therefore was provided for by the legislature's enactment of section 925.035. (emphasis added.)

The plurality went on to hold that:

...this section (925.036) is mandatory and not directory and that the trial court erred in construing it by adding the language which would permit the trial court to award fees higher than those specified by statute where the trial court determined exceptional circumstances to exist.

In 1982, the Fifth District dealt with this matter in Marion County V. DeBoisblanc, App., (5th) 410 So. 2d 951 (1982). The trial court invalidated Section 925.036 on the grounds that it was a mandatory usurpation by the legislature of constitutional power vested solely in the judiciary under Article V, S. 1, Florida Constitution (1918), which powers removed from the legislature by Article II, S. 3, Florida Constitution (1918)..." The Court reversed and held the statute constitutional, stating "...it has long been the established law in this country that there is an obligation on the part of the legal profession to represent indigents upon Court Order without any compensation." The landmark case of Powell V. Alabama, 287 U. S. 45, 53 S. Ct. 55, 77 L.Ed. 158 (1932) was cited in which the U. S. Supreme Court said: "Attorneys are officer of the court, and are bound to render services when required by such an appointment."

In the companion case to this, Martin County V. Makemson, No. 83-1138, (Fla. 4DCA March 6, 1985) 10 F.L.W. 569, the District Court of Appeal cites Smith V. State, ___ N.H. ___, 394 A. 2d 834, (1978), as an example of a Court declaring a similar statute unconstitutional because it intruded upon a proper judicial to function, but added "...We have found no agreement by other states that such statute is facially unconstitutional as a usurpation of the judicial role. In fact, the entire current of the law has been flowing in a direction opposite to that of New Hampshire's highest court. (Emphasis added) See Bias V. State, 568 P. 2d 1269, 1271

(Okla. 1977) and the cases cited therein." Another point made in Metropolitan Dade County V. Bridges was emphasized by the court below in Makemson:

A legislative enactment 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. Whenever possible and consistent with the protection of constitutional rights, courts will construe statutes in such manner as to avoid conflict with the constitution.

Clearly, the answer to the first certified question must be negative.

B. POINT ON REVIEW - CERTIFIED QUESTION NUMBER TWO:

IF THE ANSWER TO THE FIRST QUESTION IS NEGATIVE, COULD THE STATUTE BE HELD UNCONSTITUTIONAL AS APPLIED TO EXCEPTIONAL CIRCUMSTANCES:

We must look to Metropolitan Dade County V. Bridges for guidance on this question:

"...unless it is demonstrated that the maximum amounts designated for representation in criminal cases by Section 925.036 are so unreasonably insufficient as to make it impossible for the courts to appoint competent counsel to represent indigent defendants, we cannot say that Section 925.036 violates the Sixth Amendment right to counsel..." (emphasis added by Respondent)

The operative word above is "impossible". Only if it is clearly shown that it is impossible for competent counsel to be appointed could a trial court waive the statutory limitations on fees.

Different trial judges will no doubt differ when confronted with almost identical fact situations alleging that it is "impossible" for competent counsel to be appointed in a particular case unless the judge declares the statute unconstitutional as applied.

A better approach would be for trial attorneys to lobby the legislature for higher fee limits.

C. POINT ON REVIEW - CERTIFIED QUESTION THREE:

IF THE ANSWER TO THE SECOND QUESTION IS IN THE AFFIRMATIVE, SHOULD THE TRIAL COURT HAVE AWARDED ATTORNEY'S FEE ABOVE THE STATUTORY MAXIMUM AS THE TRIAL LEVEL, GIVEN THE FACTS PRESENTED TO IT BY TRIAL COUNSEL WITH THEIR PETITIONS AND TESTIMONY:

The answer is clearly NO. The trial court in this case heard testimony from five attorneys, two of whom were representing defendants in the identical case. All five expressed their view that the \$2,500 fee limit was unreasonable. After hearing the testimony and arguments of counsel, the Court held Section 925.036 unconstitutional as applied in this case. Describing the complexity and length of this case, the Court stated that an attorney could "reasonably expect" to be paid between \$30,000 and \$40,000 for such a case.

The trial Court never held and of course could not hold, that it was "impossible" for competent counsel to have been appointed in this case with the fee limitations left intact. The trial judge only held that it was "extremely unlikely."

In the Makemson case, a companion to this; the Fourth District Court of Appeal points out that in Illinois in the

case of People V. Sanders 58 III. 2d 196, 317 N.E. 2d 552 (1974), the state's highest court refused to fine "exceptional circumstances" even though:

Both counsel had represented the indigent defendant for two years in defending him for the armed robbery and murder of a Chicago policeman; had conducted a three week trial; had successfully obtained a lengthy sentence rather than the death penalty; and had devoted 463 hours to the preparation and trial of the case. The trial court awarded a fee of \$250 and \$50 for expenses. Both appellate courts affirmed. (emphasis added)

Throughout the progress of this case, we have argued that the law is clear and the controlling Supreme Court case is clear. We pointed out the language in Broward County V. Wright, 420 So. 2d 401 (Fla. 4DCA 1982) that it is "a Lawyer's professional responsibility to represent the poor even when little or no compensation is provided for his services."

In short, an attorney who undertakes the representation of indigent criminal defendants in Florida should be on notice that he may not be compensated for his services to the extent that the value of such services exceeds the statutory limits. In effect, this overall scheme constitutes a form of pro bono publico service by the bar for the poor in criminal proceedings.

As we pointed out in our argument to the trial court:

The attorneys in question are competent counsel, they presumably knew the limitations in the statute, they nevertheless, without being forced to, accepted representation in this case, and they should have to live with that.

We would submit that if the law is unfair then it should be the legislature and not the court that should alter it.

And one other point we can presume or should presume that the attorneys who are making this request were aware of the complexities of this case prior to accepting representation, and knew or should have known that this could be a very lengthy proceeding.

In our initial brief before the Fourth District Court of Appeal we said:

No one forced the attorneys to represent the indigent defendants in this case. They did so with full knowledge of the \$2,500 limitations. Indeed one of them accepted the job midway during the proceedings. Then, when it became apparent that a long trial was in store for them, they decided that the \$2,500. limit wasn't fair or reasonable...There is simply no basis for the trial court's conclusion that competent counsel could not be obtained to represent these defendants. It is not fair for these attorneys to accept the job of representing indigent defendants, knowing full well the maximum fee they can receive, and then to turn around several weeks later and decide that \$2,500 is just not enough money. In effect, when the attorneys were appointed, they entered into a contract with the Court to accept a fee of no more than \$2,500. Justice would not be served if they are now allowed to disregard that contract.

One final point in the instant case that has been raised previously and is of great importance; - Disregarding the clear language of Section 925.036, the trial court allowed the excess fees, prior to the conclusion of the representation.

SUMMARY OF ARGUMENT


F.S. 925.036 is valid and constitutional and does not interfere with the inherent authority of trial courts to enter such orders as are necessary to carry out their constitutional authority. Case law is clear that the statute in question is constitutional and is in harmony with the well established principal that attorneys have an ethical obligation to represent indigent clients with little or no compensation.

Even if exceptional circumstances are shown to exist, it would have to be impossible to find competent counsel before a trial court should declare F.S. 925.036 unconstitutional as applied. If the fee limits are too low, then the legislature should address the matter.

Even if the answer to question number two is affirmative, the record clearly shows this is not an appropriate case for the trial court to declare the statute unconstitutional as applied.

CONCLUSION

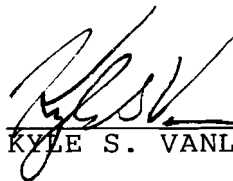
The answer to the first certified question is clearly in the negative. Certified question two cannot clearly be answered in light of existing case law, but with the statute clear as it is, the courts should yield to the legislative process rather than substitute their own judgment as to "exceptional circumstances." Finally, assuming the answer to question two is affirmative, we believe that the answer is No ---- given the facts and testimony the trial court should not have awarded attorney's fees above the statutory maximum in this case. Consequently, the decision of this Honorable District Court of Appeal of Florida, Fourth District should be upheld.



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true copy of the above and foregoing has been furnished to Michael Zelman, Esquire, Dade County Attorney, 3050 Biscayne Boulevard, Suite 503, Miami, Florida 33137; Robert Lee Dennis, Esquire, Petitioner, 106 N. E. 2nd Street, Okeechobee, Florida 33472; John R. Cook, Esquire, 202 N. W. 5th Avenue, Okeechobee, Florida 33472; and, J. Blayne Jennings, Esquire, 2871 45th Street, Gifford, Florida 32960, by U. S. Mail, this 16th day of May, 1985.



KYLE S. VANLANDINGHAM