IN THE SUPREME COURT
STATE OF FLORIDA

NICHOLAS G. SCHOMMER and JAMES V. LOBOZZO, JR.,

Petitioners,

vs.

THE HONORABLE E. RANDOLPH BENTLEY, CIRCUIT JUDGE, IN AND FOR THE TENTH JUDICIAL CIRCUIT OF FLORIDA AND BOARD OF COUNTY COMMISSIONERS OF HIGHLANDS COUNTY, FLORIDA

Respondents.

Appeal No. 85-1289
Case No. 68,335

BRIEF OF AMICUS CURIAE

ATTORNEY GENERAL OF THE
STATE OF FLORIDA

JIM SMITH
ATTORNEY GENERAL

ANN GARRISON PASCHALL
Assistant Attorney General
1313 Tampa Street, Suite 804
Park Trammell Building
Tampa, Florida 33602
(813) 272-2670

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF CITATIONS

OTHER AUTHORITIES

TABLE OF CITATIONS

INTEREST OF AMICUS CURIAE

The Honorable Jim Smith, Attorney General, is the chief legal officer of the State of Florida, Art. IV, Sec. 4(c), Florida Constitution. As such it is his obligation to defend the laws of this state against attack. Section 16.01, Fla. Stat. (1985). The Attorney General appears in this proceeding with the written consent of all the parties pursuant to Rule 9.370, Florida Rules of Appellate Procedure.

PRELIMINARY STATEMENT

Nicholas G. Schommer and James V. Lobozzo, Jr., invoked the discretionary jurisdiction of this Court pursuant to Rule 9.030(a)(2)(v), Fla. R. App. P. to review four questions certified to be of great public importance by the Second District Court of Appeal in Schommer et al v. Bentley, et al, 11 F.L.W. 379 (Fla. 2d DCA, February 7, 1986). Nicholas G. Schommer and James V. Lobozzo, Jr. will be referred to herein as petitioners. Randolph J. Bentley, Circuit Judge[1] and the Highlands County Board of County Commissioners will be referred to as respondents. Amici curiae will be referred to by name. In this brief, the attorney general will use the symbol "R" followed by the appropriate page number in reference to the record on appeal.

1/ The Attorney General would respectfully submit that the trial judge who entered the order under review is not a proper or necessary party to this proceeding. Cf. Martin Co. v. Makemson, 464 So.2d 1281 (Fla. 4th DCA 1985) (rev. pending Fla. Sup. Ct. Case #66,780); Arvida Corp. v. Hewitt, 416 So.2d 1264 (Fla. 4th DCA 1982); Dade Co. v. Strauss, 246 So.2d 137 (Fla. 3d DCA 1971).

STATEMENT OF THE CASE AND FACTS

The Attorney General will rely on the statement of the case and facts filed herein by amicus curiae Florida Academy of Trial Lawyers and any additional statement of the case and facts contained in the respondent's brief.

SUMMARY OF THE ARGUMENT

The Second District Court of Appeal's analysis in Hayes, infra, that sections 925.035 and 925.036 do not authorize the appointment of multiple attorneys for one defendant or the payment of more than one attorney's fee is correct.

Petitioners have demonstrated no compelling reason for this Court to recede from its holding in Metropolitan Dade Co. v. Bridges, infra, that section 925.036, which provides maximum fees for court appointed counsel is constitutional. Nor have petitioners demonstrated that the statute is unconstitutional as applied to them in this case.

Assuming arguendo that the trial judge has the inherent authority to award a higher fee in an exceptional case, the record at bar is insufficient to establish petitioner's entitlement to a greater fee than the statute provides.

ARGUMENT

ISSUE I

WHERE A COURT ISSUES ONE ORDER UNDER SECTION 925.036, FLORIDA STATUTES (1983), WHICH AUTHORIZES MULTIPLE ATTORNEYS TO REPRESENT ONE DEFENDANT ON A SINGLE CHARGE, MAY EACH ATTORNEY BE AWARDED THE MAXIMUM COMPENSATION UNDER SECTION 925.036?

In the case at bar, Petitioner Schommer was appointed as a special public defender to represent Eddie Alexander on a capital charge. The trial court authorized Schommer to use additional members of his law firm, if needed. Schommer v. Bentley, supra. Following the trial, Petitioners Schommer and Lobozzo each submitted motions and affidavits for attorney's fees. (R.16-21). The trial judge awarded a single $3,500.00 fee, relying on Section 925.036 Fla. Stat.(1983) and the Second District Court of Appeal's decision in Board of County Commissioners of Collier County v. Hayes, 460 So.2d 1007 (Fla. 1984). (R.22-24).

The Attorney General submits that the Second District's opinion in Hayes, supra, which answers the instant certified question in the negative is a correct analysis of the applicable statutes. Id. at 1009,1010.

The Second District interpreted section 925.035 in its opinion in Hayes, stating:

> . . . the statute could well be intended to refer to the appointment of more than one attorney only when the public defender has a conflict in representing three or more defendants and, to avoid that conflict, retains the representation of one defendant while requesting the appointment of separate counsel for each of the other defendants.
>
> Id. at 1009.

The Attorney General further agrees with the Court of Appeal's conclusion in Hayes that the 1981 amendments to 925.036 were not intended to allow payment of the maximum statutory fee to each of multiple attorneys for one defendant. Id.

Petitioners argue that the statutes in question must be interpreted to allow both the appointment of multiple attorneys and the payment of fees to each, if defendants are to receive effective assistance of counsel. Petitioners have failed, however, to make a showing that the appointment of multiple counsel was necessary to provide the indigent defendant, Alexander, with the effective assistance of counsel contemplated by Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963) and Strickland v. Washington, __U.S.___, 104 S.Ct.___, 80 L.Ed2d 674 (1984)[2]. Like the attorneys in Pinellas County v. Maas, 400 So.2d 1028 (Fla. 2d DCA 1981), Petitioners suggested neither the hardship of their appointment or their need for fees in excess of the statutory maximum until their work was concluded. The record does not establish that indigent defendants are receiving ineffective counsel under the present statutory scheme. Id. The instant case differs from Okeechobee County v. Jennings, 473 So.2d 473 (Fla. 4th DCA 1985), rev. pending sub nom Dennis v. Okeechobee County, FSC 66,829, in which the court appointed attorneys moved pretrial to relax the statutory fee cap and presented evidence in support of their position. Id. at 1315.

2/ It is, of course, important to remember that an indigent defendant is entitled to the services of other professionals, including experts and an investigator where the need for same is shown to exist.

This Court and others have repeatedly held that the fee limitations of section 925.036 are mandatory on trial courts. See e.g. Metropolitan Dade Co. v. Bridges, 402 So.2d 411 (Fla. 1981); Metropolitan Dade County v. Lyons, 462 So.2d 487 (Fla. 3d DCA 1984); Hayes, supra. The Second District has correctly determined both in Hayes and the instant case that sections 925.035 and 925.036 do not authorize the appointment of multiple attorneys and multiple fees. Petitioners have failed to show that either is necessary.

ISSUE II

WHETHER SECTION 925.036, FLORIDA STATUTES IS UNCONSTITUTIONAL ON ITS FACE BECAUSE IT INTERFERES WITH THE INHERENT AUTHORITY OF THE COURT TO ENTER SUCH ORDERS WHICH ARE NECESSARY TO CARRY OUT ITS CONSTITUTIONAL AUTHORITY?

Petitioners have failed to demonstrate any reason which would compel this Court to recede from its holding in Metropolitan Dade Co. v. Bridges, supra, that section 925.036 is constitutional.

There was, of course, no inherent right to recover attorney's fees at common law, and therefore such fees mut be established by statute. See e.g. MacKenzie v. Hillsborough County, 288 So.2d 200 (Fla. 1973). Attorneys have an ethical obligation to represent the poor even without compensation. Therefore, an award of attorney's fees to one who is court appointed to represent an indigent person need not be equivalent to the going rate for the lawyer's services on the open market. Cf. In the Interest of D. B., 385 So.2d 83 (Fla. 1980).

This Court has rejected challenges to Section 925.036 where no showing or allegation has been made that an indigent defendant's right to competent counsel has been abridged by the statute. Cf. Bridges, supra.; Blair v. State, 406 So.2d 1103, 1108 (Fla. 1981). This Court has also held:

> The law is well established in this jurisdiction to the effect that one who challenges the constitutionality of an act of the legislature must point out to the court exactly how and in what manner his constitutional rights will surely be, or have been invaded or infringed.
>
> Smith v. Ervin, 64 So.2d 166,171 (Fla. 1953)

Since requiring a lawyer to perform his professional responsibility to represent the poor is not an unfair "taking" of private property, petitioners cannot complain of a violation of their own constitutional rights. Cf. In the interest of D.B., supra, Bridges, supra.

Amicus Curiae, Florida Academy of Trial Lawyers, argues that the instant statute infringes on a trial court's responsibility to see that indigent defendants are provided with competent counsel. However interesting this argument may be, it simply is not supported by the record before this Court. Judge Bentley, the trial judge, expressed concern that it was difficult to find competent counsel willing to handle court appointed cases for the statutory fee. (R.23). Judge Bentley did not find that the statute had ever precluded him from locating competent counsel willing to accept appointments or that indigent defendants were receiving ineffective assistance due to excessively low statutory fees.

This Court in Bridges, supra, did not find the 925.036 constitutional solely because it permitted stacking. The deletion of the stacking provision by the legislature has not suddenly rendered the statute unconstitutional on its face. Petitioners' argument on this point must fail.

ISSUE III

IF SECTION 925.036 IS CONSTITUTIONAL, MAY THE STATUTE BE HELD UNCONSTITUTIONAL AS APPLIED TO EXCEPTIONAL CIRCUMSTANCES; OR, IN THE ALTERNATIVE, DOES A TRIAL COURT HAVE THE INHERENT AUTHORITY TO AWARD A GREATER FEE FOR TRIAL AND APPEAL THAN THE STATUTORY MAXIMUM IN AN EXTRAORDINARY CASE?

In the case at bar, the Second District certified this question with little elaboration, noting it had previously been certified by the Fourth District in Makemson, supra. Neither this case nor Makemson provides much guidance as to what exceptional circumstances might be. In Bridges, Justice (now Chief Justice) Boyd stated in his concurring and dissenting opinion:

> "In the extremely rare, exceptional case where the statutory maximum amount is insufficient compensation for the lawyer to assure a fair trial, with effective assistance of counsel, to the accused, then the court has the power to order compensation in excess of the prescribed amounts."
>
> Id. at 416

Nothing in the instant record suggests that the statutory maximum was insufficient to insure a fair trial or effective assistance of counsel in this case. Cf. Okeechobee Co. v. Jennings, supra. No one has claimed that defendant Alexander's trial was unfair or his attorneys ineffective. This Court should not use this case as a vehicle to render what must be, on these facts, a purely advisory opinion. Cf. Smith v. Ervin, supra.

This is a question which should only be addressed when and if a case arises in which no competent attorney can be found to represent a defendant for the statutory fee or a defendant is

alleged to have received ineffective assistance of counsel due to the minimal fee. Petitioners' unhappiness over the size of the fee is not enough to warrant resolution of the question presented. Cf. Blair, supra.

The Attorney General would further note that petitioners' allege nothing peculiar to the Alexander trial which rendered it an unusual capital case. Rather petitioners must be saying that the $3,500.00 fee provided by 925.036 for all capital cases is too low. This is a contention which should be presented to the legislature. Cf. Mackenzie v. Hillsborough County, supra.

ISSUE IV

IF THE TRIAL COURT DOES HAVE THE AUTHORITY TO AWARD A GREATER FEE THAN THE STATUTORY MAXIMUM IN EXCEPTIONAL CIRCUMSTANCES, SHOULD THE TRIAL COURT HAVE AWARDED THE REQUESTED AMOUNT IN THIS CASE?

Assuming arguendo that the trial court can exceed the statutory fee in exceptional circumstances, the instant record is inadequate to determine whether the requested amount should have been awarded in this case. The record before this Court contains petitioners' motions and affidavits for fees. (R.16-21). No witnesses were introduced at the fee hearing. (R.2-12). The trial judge stated:

> "I'll take notice of the fact that I think everybody knows that the work done in a capital case in one such as this is on the marketplace worth more than thirty-five hundred dollars. I have no problem with the form of the affidavits and the information in the file that the fees are justified. I am not denying the motion on that ground. I am assuming for the purpose of my ruling that they can be economically justified, simply assuming it's not legally permissable". (R.12)

Thus, we have at most, the trial judge's opinion that petitioners' services were worth more than $3,500.00 on the open market and that the fees could be economically justified. As Amicus Curiae, Florida Academy of Trial Lawyers points out in its brief, petitioners are not entitled to a fee equal to that which they would receive from a paying client. See also D. B., supra, Murphy v. Escambia Co., 358 So.2d 903 (Fla. 1st DCA 1978).

Should this Court determine that fee in excess of the statutory maximum may be awarded, this Court should provide some direction for trial courts as to the nature of the exceptional circumstances required, and this case should be remanded to the trial court for a hearing regarding the existence of exceptional circumstances and the determination of a reasonable fee.

CONCLUSION

Based on the foregoing argument and authorities, the Attorney General asks this Court to answer the four certified questions presented in the negative.

Respectfully submitted,

JIM SMITH
ATTORNEY GENERAL

ANN GARRISON PASCHALL
Assistant Attorney General
Park Trammell Building
1313 Tampa Street, Suite 804
Tampa, Florida 33602
(813) 272-2670

Amicus Curiae

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Paul M. Rashkind, Chairman, Criminal Law Section, BAILEY, GERSTEIN, RASHKIND & DRESNICK, 4770 Biscayne Boulevard, Suite 950, Miami, Florida 33137; Nicholas G. Schommer and James V. Lobozzo, Jr., 329 South Commerce Avenue, Sebring, Florida 33870; Bert J. Harris, III, Dunty and Harris, 212 Interlake Boulevard, P.O. Box 548, Lake Placid, Florida 33852; Eric K. Gressman, Assistant County Attorney, Suite 2810, Metro Dade Center, 111 N.W. First St., Miami, FL 33128-1993 on this 4th day of April, 1986.

Of Counsel for Amicus Curiae