

IN THE SUPREME COURT OF FLORIDA

CASE NO. 68,335

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.

.....

RESPONDENTS' ANSWER BRIEF

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STATUTES

Section 925.036, Florida Statutes (1983)

STATEMENT OF THE CASE AND FACTS

The Appellees, E. Randolph Bentley, Circuit Judge (Judge Bentley) and the Board of County Commissioners of Highlands County, Florida (Highlands County) accept the Statement of the Case and Facts posited by the Academy of Florida Trial Lawyers in its Amicus Brief.

While not contesting the facts, the Appellees would emphasize one point, to wit: Judge Bentley appointed only Schommer to represent the Defendant. Schommer was authorized to utilize other members of his firm. At the hearing on attorney fees Judge Bentley reiterated his intention by stating that his authorization to allow Schommer to utilize additional attorneys in his firm ". . . was just intended to authorize someone else to appear in Court." Judge Bentley also stated that his order was not intended to be determinative of the issue (T-8).

Opposing counsel has accurately represented the foregoing facts.

SUMMARY OF ARGUMENT

Appellees, the BOARD OF COUNTY COMMISSIONERS OF HIGHLANDS COUNTY, FLORIDA (HIGHLANDS COUNTY) and the HONORABLE E. RANDOLPH BENTLEY, CIRCUIT JUDGE (JUDGE BENTLEY), respectfully urge this Honorable Court to find Section 925.036 Florida Statutes (1983), hereinafter referred to as Section 925.036, constitutional. This court has previously visited the very similar issue in Metropolitan Dade County v. Bridges, 402 So.2d 411 (1981).

There have been no substantial changes in law which would require this court to recede from or clarify Bridges. Furthermore, there is no specific constitutional provision violated by the effect of Section 925.036.

In the absence of Section 925.036 there would be no authority at all to compensate attorneys representing indigent defendants, as long as there has been no violation of the indigent accused's right to counsel. The judicially legislated replacement for Section 925.036 awarding a reasonable fee, or excess fee for exceptional circumstances, constitute an enormous invasion of public treasuries at a time when the public is strictly scrutinizing court awarded attorney's fees. Section 925.036 does not need fixing. It should again be held constitutional.

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?

The Appellees, Highlands County and Judge Bentley, would encourage this Court to reframe the first certified question. As drafted the first certified question presumes that two attorneys can be appointed and compensated for representing one defendant on one charge. That presumed issue is one of the primary two questions in this Appeal.

Furthermore, the facts of this case do not fit the first certified question. Judge Bentley explained in his ruling that his Order authorizing additional counsel was not intended to be dispositive of this issue, but ". . . was intended to authorize someone else to appear in Court." (T-8). Therefore, this Court does not have before it an initial order authorizing two separate attorneys to be compensated for their representation under one initial order.

Respectfully, the certified question should be the one asked by the Second District Court of Appeal in Board of County Commissioners of Collier County vs. Hayes, 460 So.2d 1007 (Fla. 2nd DCA 1984), to

wit:

CAN EACH OF MULTIPLE ATTORNEYS APPOINTED PURSUANT TO SECTION 925.036 TO REPRESENT A DEFENDANT ON A SINGLE CHARGE BE AWARDED THE MAXIMUM COMPENSATION PROVIDED IN SECTION 925.036 FOR THAT CHARGE?

The Second District Court of Appeal answered its foregoing certified question in the negative. Its opinion set out considerable rationale supporting the Court's decision. The opinion weighs carefully the statute's instruction, the legislative policies, and the realm within which

the legislature and Courts should operate on this subject. Appellees could not improve the rationale presented in the opinion and will simply refer this Court thereto.

Appellees would submit one additional argument which the Second District did not address in Collier County, to wit: If the Appellants prevail, where will the compensation stop? This and other similar cases seem to involve two attorneys seeking compensation of their services.

However, Section 925.036 is construed to allow two attorneys to receive the maximum compensation for representing one defendant upon one charge, then would not the Court be required to allow three, four, or more attorneys the same compensation? This interpretation of the statute would absolutely viciate the historic interpretation of Section 925.036. If such expanded compensation was the intention of the legislature, then there would be no reason to have a cap.

For example, successive attorneys could provide counsel until each reached the maximum fee, and then seek replacement on the ground of financial ruination, time constraint, or other argument which would find a sympathetic judicial ear. This concept does not seem terribly far fetched in light of the dictum in so many cases of this type where the courts practically take judicial notice that the lawyers defending indigents are being compensated for a mere fraction of their time. Upon the law and logic expressed by the Second District Court of Appeal in Collier County, and the foregoing reasons, Appellees urge this Court to answer the first certified question in the negative. Section 925.036 does not allow for the compensation of multiple attorneys representing one defendant on one charge.

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?

This Court's initial inquiry in the second certified question should be to locate the specific constitutional provision violated by Section 925.036.

Appellants' rely upon the Sixth Amendment right to counsel explained in Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963) (see Appellants' introduction to argument on page one). However, there is no allegation or evidence in the record before this Court that the defendant did not receive effective assistance of counsel.

This Court therefore is asked to find Section 925.036 unconstitutional on its face, even though its application has not denied the defendant his right to the effectiveness of assistance to counsel.

Second, this Court has recently ruled upon this very question in Bridges, supra, and touched again thereon in Blair v. State, 406 So.2d 1103, 1108 (Fla. 1981). This Court has not been shown any change in law or fact which would require it to revisit Bridges, supra.

In fact, reasoning of this Court in Bridges, supra, raises an interesting point. This Court observed that there is a common law duty upon the bar to represent an indigent party when directed to do so by the Court - without right to compensation from the government or any other source. Bridges, supra, at page 414, in the interest of D. B., 385 So.2nd 83 (Fla. 1980).

Should Section 925.036 fall and there is no allegation, evidence, and finding that Defendant's Sixth Amendment right to counsel was deprived,

what then is the authority for recovery of attorney fees for said defendant's appointed counsel?

My Brother Schommer would scream violation of the right to counsel. However, there has been no such violation in this case before absent 925.036 he would not be paid at all.

Using the circumstances of this very case it is very difficult to see how Section 925.036 could be held unconstitutional on its face.

Simply stated, where the defendant has been adequately represented, as in this case, Section 925.036 cannot be held unconstitutional but nor can a greater fee be awarded.

III-A. IF SECTION 925.036 IS CONSTITUTIONAL, MAY THE STATUTE BE HELD UNCONSTITUTIONAL AS APPLIED TO EXCEPTIONAL CIRCUMSTANCES.

The third certified question combines two issues. They will be addressed separately as questions III-A. and III-B.

Certified question III-A asks whether Section 925.036 may be held unconstitutional as applied to exceptional circumstances. However, two practical barriers prohibit an affirmative answer to this question in this case.

In truth and fact, that there was insufficient proof before the court to justify a finding that section 925.036 caused a denial of effective representation of counsel (T-10).

First, to be held unconstitutional as applied in this case, the appellants must show that the defendant was denied his right to the effective assistance of counsel. The record contains no allegation, fact or finding that the defendant's right to counsel was denied. The absence of this key element prohibits finding that Section 925.036 is unconstitutional as applied in this cause, Blair, supra, and Bridges, supra.

Speaking for the majority in Bridges, supra, Justice Alderman explained that the record must contain proof that Section 925.036 hinged upon indigent defendant's right to counsel. Bridges, supra, at page 414.. This court's detailed analysis of this question in Bridges, supra, as well as its rather summary conclusion upon the same issue in Blair, supra, shows that this issue has been thoroughly reviewed by this court. Nothing has changed since this court's visitation of this issue in Bridges, supra and Blair, supra.

The second reason that this cause will not support a finding that Section 925.036 is unconstitutional as applied to exceptional circumstances is that this cause contains no exceptional circumstances. While a five-day murder trial is unquestionably complex and exceptional in its own right, it does not appear exceptional when compared to other murder trials. Furthermore, the record contains no serious contention or proof that trial of the defendant really contained exceptional circumstances for a murder trial. Appellant submits that this Honorable Court is in the best position of all to determine whether the cause at bar contained exceptional circumstances as this court reviews such a large number of these cases on direct appeal.

Finally, some might argue that it is unfair for the criminal defense portion of the bar to alone suffer the cost of defending indigents. They correctly point out that other members of the bar do not ordinarily contribute their talent in these cases.

However, we would hope that members of the criminal bar would similarly admit that the non-criminal defense portion of the bar contributes time and talents to the indigent in the civil forum.

Next, consider the result of finding Section 925.036 unconstitutional, and for the sake of arguement, assume that it is replaced with some authority to award a "reasonable fee" to attorneys representing indigents. In this day the attorney, like other professionals, would be required to pursue every possible avenue for the defense of the accused. Although this is an academically pleasing concept, it would result in an indigent being afforded an even greater defense at public expense than the average citizen. Most citizens paying their own way must ultimately make a

decision that certain defense is not economically worthwhile. Such a decision would not, and could not be reached, by counsel for the indigent defendant.

In summary, this cause will simply not support a ruling that Section 925.036 is unconstitutional as applied because it does not contain the required proofs and findings that defendant was denied the effective assistance of counsel or that cause involved exceptional circumstances.

III-B. 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?

As stated above, the record before this court in this cause does not contain sufficient pleading, evidence, or findings to support a claim to fees in excess of the statutory maximum based upon the extraordinary circumstances concept. However, other academic reasons should lead this court to rule that a trial court does not have the discretion to exceed the statutory maximum in an extraordinary case.

First, the Court's attention is again directed to its holdings in Bridges, supra. Then this court applied several basic rules of statutory construction to its test of the constitutionality of Section 925.036. They bear repeating:

1. The judiciary was not allowed to amend Section 925.036 by adding a higher fee in cases containing exceptional circumstances. Bridges, supra, at page 413.
2. "The 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." Bridges, supra at page 413.
3. "Whenever reasonably possible and consistent with the protection of constitutional rights, courts will construe statutes in such a manner as to avoid conflict with the constitution." Bridges, supra, at page 414.
4. ". . . 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." Bridges, supra at page 414.

These principles were the cornerstones used by this court to hold Section 925.036 constitutional and to prevent "stacking" in Bridges, supra.

However, these same constitutional concepts would apply to this court's analysis of the issue sub judice.

In the analysis, this court should ask the question: What specific constitutional provision has been so violated as to permit a court to amend a duly enacted law? An examination of the Constitution, Bridges, supra, and the record in this case, reveal none.

This court pointed out in Bridges, supra that there exists no common law right to recover attorney fees, and that common law included a professional obligation for a lawyer to accept an assignment to represent an indigent without compensation when so ordered by the court. Bridges, supra at page 414, and In RE THE interest of D.B., 385 So.2d 83 (Fla. 1980).

Absent a statutory or common law right to recover attorney fees for the representation of an indigent defendant, there is no authority to supercede a mandatory fee cap posited by Section 925.036, or award any fee at all.

In summary, there appears no authority to allow the judiciary to amend Section 925.036 to allow trial courts to award greater fees than those set out by the legislature.

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?

Even if this court rejects the argument of Highlands County and Judge Bentley on the foregoing certified questions, the court should answer the fourth certified question in the negative. There is no showing in the record that the defense involved exceptional circumstances.

Judge Bentley's strongest statement in favor of the exceptional circumstance theory is his recognition that everyone knows that capital cases are worth more than \$3,500.00. In fact, that very finding supports Highlands County's argument that the vast majority of capital cases are complex.

The record shows that the case is simply a capital case of normal complexity and not exceptional difficulty. The legislative fee schedule of Section 925.036 sets the standard fee for this precise type of normally complex litigation. To exceed that cap under the exceptional circumstance theory, if same is adopted by this court, Messrs. Schommer and Loboza would be required to prove that Alexander's defense was far and above the normal and in fact set itself apart from the standard capital case. Such a showing is not in the record.

This court should therefore deny the request for additional fees based upon exceptional circumstances in this cause or in the alternative remand this cause to the trial court to take additional evidence to determine whether exceptional circumstances existed.

CONCLUSION

The underlying battle-cry of the appellants and the amicus in this cause is that Section 925.036 works an unconstitutional deprivation of the indigent defendant's right to counsel. However, this court has not yet been presented with a case showing such a deprivation.

This court should not be tempted to assume such an important fact into the record in this or any other similar case.


Without convincing proof that Section 925.036 violates a specific provision of the United States of Florida Constitution, this court has no ground upon which to rule it unconstitutional.

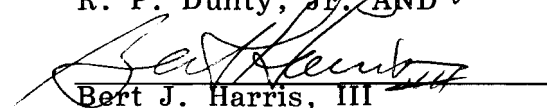
The most telling test is to search for a vehicle by which to compensate court appointed counsel for indigent defendants absent Section 925.036 and absent a violation of defendant's right to counsel.

This court should therefore follow its well founded decision in Bridges, supra, and repel the attack upon Section 925.036.

RESPECTFULLY SUBMITTED this the 7th day of April, 1986.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct original together with seven copies of the foregoing Respondents' Answer Brief were furnished to The Supreme Court, State of Florida, Supreme Court Building, Tallahassee, Florida 32301, and copies were mailed to the following:

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