OA 10-5-88 047

IN THE SUPREME COURT OF FLORIDA

JOHN THOR WHITE,

Petitioner,

vs. Case No. 72,170

PINELLAS COUNTY, a political subdivision of the State of Florida,

Respondent.
_____/

RESPONDENT'S ANSWER BRIEF

ON APPEAL FROM THE
SECOND DISTRICT COURT OF APPEAL
APPEAL NO. 87-1136

JOHN E. SCHAEFER
Assistant County Attorney
315 Court Street
Clearwater, FL 34616
(813) 462-3354
Attorney for Respondent

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STATEMENT OF THE CASE AND FACTS

Respondent, Pinellas County, completely agrees with Petitioner's recitation of the case and facts.

SUMMARY OF ARGUMENT

Respondent would respectfully show that this Court does not have conflict jurisdiction in this cause. The facts underlying this Court's decision in Makemson v. Martin County, 491 So.2d 1109 (Fla. 1986), cert. denied, _____ U.S. _____, 107 S. Ct. 908, 93 L. Ed. 2d 857 (1987), and the case at bar, are not substantially similar. Petitioner cannot point to an express and direct conflict.

Under the facts of this case, the Second District Court of Appeal appropriately exercised its discretion and denied certiorari. The discretion of the trial court and appellate court should not be redetermined on further appeal.

ARGUMENT

I. THERE IS NO CONFLICT JURISDICTION PURSUANT TO MAKEMSON v. MARTIN COUNTY, 491 So.2d 1109 (Fla. 1986), cert. denied, _____ U.S. _____, 107 S. Ct. 908, 93 L.Ed. 2d 857 (1987).

As a first issue on appeal, Respondent Pinellas County would respectfully suggest that there is no conflict jurisdiction in this case. For there to be conflict jurisdiction under Rule 9.030(a)(2)(A)(iv), Fla. R. App. P., this Court has stated there must be the following: (1) the announcement of a rule of law which conflicts with a rule previously announced by the Court, or (2) the application of a rule of law to produce a different result in a case which involves substantially the same controlling facts as a prior case disposed of by the Court. Nielsen v. City of Sarasota, 117 So.2d 731 (Fla. 1960).

In the instant case, the Second District Court of Appeal simply denied the petition for certiorari. The appellate court discussed that it was undisputed at the trial court level that Petitioner performed 134 reasonable and necessary hours of high quality representation. Based on this alone, the appellate court denied certiorari finding that the trial court did not depart from the essential requirements of law. It would appear, for there to be conflict jurisdiction, that this Court would have to determine that 134 hours of representation by court-appointed counsel at the statutory fee cap would per se

be unconstitutional and violative of Makemson v. Martin County, 491 So.2d 1109 (Fla. 1986), cert. denied, _____ U.S. _____, 107 S. Ct. 908, 93 L.Ed. 2d 857 (1987).

Interestingly, Petitioner does not even make this argument (P. 3 of Petitioner's Initial Brief). A careful review of the facts in Makemson, shows no substantial similarity to the case at bar. In a conflict jurisdiction case, this Court has stated:

> When our jurisdiction is invoked pursuant to this provision of the Constitution we are nor permitted the judicial luxury of upsetting a decision of a Court of Appeal merely because we might personally disagree with the so-called "justice of the case" as announced by the Court below. In order to assert our power to set aside the decision of a Court of Appeal on the conflict theory we must find in that decision a real, live and vital conflict within the limits above announced. Nielsen, 117 So.2d at 734-735.

There is no articulable express and direct conflict within the four corners of the Second District Court of Appeal's majority decision and this Court's Makemson decision. See also Reaves v. State, 485 So.2d 829 (Fla. 1986). Accordingly, Respondent would respectfully suggest that jurisdiction was improvidently granted and should now be denied. See also City of Jacksonville v. Florida First National Bank of Jacksonville, 339 So.2d 632 (Fla. 1976).

II. THE SECOND DISTRICT COURT OF APPEAL DID NOT ABUSE ITS DISCRETION TO DENY CERTIORARI OF THE TRIAL COURT'S DECISION PURSUANT TO MAKEMSON v. MARTIN COUNTY, 491 So. 2d 1109 (Fla. 1986), cert denied, ____ U.S. ____, 107 S. Ct. 908, 93 L. Ed. 2d 857 (1987).

Petitioner argues that the issue on appeal is whether the lower tribunal erred in limiting fees to the amount of $3500.00 (P. 3 of Petitioner's Initial Brief). That is not the issue. Rather, the issue is whether the Second District Court of Appeal could properly deny certiorari in this cause.

First, it should be pointed out that this matter came before the Second District Court of Appeal as a petition for certiorari. Generally, in a certiorari appeal, the appellate court may not reweigh or re-evaluate the evidence before the trial court. Rather, the appellate court merely examines the record to determine whether the trial court had before it competent substantial evidence to support its findings and judgment which must also accord with the essential requirements of the law. DeGroot v. Sheffield, 95 So.2d 912 (Fla. 1957). The Second District Court of Appeal held that the trial court comported with this standard.

Secondly, a trial court's findings of fact and conclusions of law are clothed with a presumption of correctness and will not be disturbed unless they are shown to be clearly erroneous. Taylor Creek Village Assoc. v. Houghton, 349 So.2d 1219 (Fla. 3d DCA 1977). This presumption of correctness is enhanced yet further in this type of statutory attorney's fee case. This Court has stated repeatedly that the trial court

stands in the best position to evaluate the need for a departure from the statutory fee caps. Lyons v. Metropolitan Dade County, 507 So.2d 588 (Fla. 1987); Schommer v. Bentley, 500 So.2d. 118 (Fla. 1986); Makemson v. Martin County, 491 So.2d 1109 (Fla. 1986), cert. denied, _____ U.S. _____, 107 S. Ct. 908, 93 L. Ed. 2d 857 (1987). There is no question but that the trial court grappled long and hard with the issues presented here. The trial court's order is thoughtful and conscientious. Reluctantly, and in obvious sympathy to Petitioner's position, the trial court held that petitioner did not meet his burden of showing sufficient unusual and extraordinary circumstances. Accordingly, the statutory maximum provided in Section 925.036(d), Florida Statutes (1985), was imposed (R. 12-14). The Second District Court of Appeal agreed. Now, Petitioner seeks a second review of the trial court's decision.

Thirdly, there is no legal authority that the trial court abused its discretion. In its landmark decision, Makemson v. Martin County, 491 So.2d 1109 (Fla. 1986), cert. denied, _____ U.S. _____, 107 S. Ct. 908, 93 L. Ed. 2d 857 (1987), this Court stated:

> In summary, we hold that it is within the inherent power of Florida's trial courts to allow, in extraordinary and unusual circumstances, 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. Id. at 1115.

The trial and appellate judges have spoken in this case. They ruled that the dictates set forth in Makemson were not met here.

Petitioner does not argue that a pay rate of $26.12 per hour is per se confiscatory and unconstitutional. Petitioner concedes the rate might be justified in some cases (P. 3 of Petitioner's Initial Brief). This admission only reinforces the trial court's discretion. Certainly, individual judges may disagree on the reasonableness or fairness of the award in this case. Nonetheless, the trial court and appellate court ruled against Petitioner. In addition, reasonableness cannot be equated with the constitutional standard of review set forth in Makemson.

Petitioner argues that the trial court interpreted Makemson too narrowly. Specifically, Petitioner argues that this Court did not intent to permit exceeding the statutory limits only in "high profile" and "heavily prosecuted" cases such as Makemson. This is certainly so. However, these are among the many factors that must be considered together in determining whether or not any particular case is unusual and extraordinary. No one factor stands alone. Similarly, the time expended by an attorney is one of those factors. In the instant case, the trial court considered the time expended by

Petitioner amongst all the other factors and determined the case was not unusual and extraordinary.

Reversal by this Court, on the other hand, would almost certainly send the message throughout the State of Florida that 134 hours is per se unusual and extraordinary. That result would not comport with this Court's ruling in Makemson. Such a result would also be a significant financial burden to all the counties of Florida. In addition, such a result would be unfair to the appointed criminal defense attorneys. Some cases where less that 134 hours have been expended may, together with other factors, be unusual and extraordinary. Conversely, cases with more than 134 hours may not be unusual and extraordinary. It all depends on the facts.

Petitioner's argument would make virtually every capital case one where the statutory limits must be exceeded. The trial court recognized this fact in its ruling and rejected it (R. 12). In short, there is no hard and bright line as to how many hours must be expended to make a case unusual and extraordinary. Certainly, it is one significant factor, but only one. See Lyons v. Metropolitan Dade County, 507 So.2d 588 (Fla. 1987) (730.1 hours over 7-month period); Hillsborough County v. Sinardi, 524 So.2d 483 (Fla. 2d DCA 1988); Hillsborough County v. Unterberger, 523 So.2d 779 (Fla. 2d DCA 1988) (134.3 hours plus trial judge finding complex issues); Hillsborough County v. Marchese, 519 So.2d 728 (Fla. 2d DCA 1988) (200.85 hours plus hostile client); Hillsborough County

v. Lopez, 518 So.2d 372 (Fla. 2d DCA 1988) (160.8 hours plus trial court finding extraordinary circumstances); Metropolitan Dade County v. Gold, 509 So. 2d 407 (Fla. 3d DCA 1987) (110 hours plus trial court finding extraordinary circumstances); Okeechobee County v. Jennings, 473 So.2d 1314 (Fla. 4th DCA 1985), rev'd sub nom., Dennis v. Okeechobee County, 491 So.2d 1115 (Fla. 1986) (extremely complex case).

Petitioner did not meet his burden of showing unusual and extraordinary circumstances at the trial court level. The Second District Court of Appeal properly exercised its discretion to deny certiorari.

CONCLUSION

Conflict jurisdiction does not exist in this case. Petitioner cannot point to any facts that demonstrate an express and direct conflict with this Court's decision in Makemson v. Martin County, 491 So.2d 1109 (Fla. 1986), cert. denied, _____ U.S. _____, 107 S. Ct. 908, 93 L. Ed. 2d 857 (1987). Should this Court find there to be jurisdiction, the Second District Court of Appeal did not abuse its discretion in denying certiorari in this cause. Respondent Pinellas County, therefore respectfully prays that the appellate court's decision be affirmed.

Respectfully submitted,

JOHN E. SCHAEFER
Assistant County Attorney
315 Court Street
Clearwater, FL 34616
(813) 462-3354
Attorney for Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by U.S. Mail to JOHN THOR WHITE, ESQ., P.O. Box 10096, St. Petersburg, FL 33733 this 16th day of August, 1988.

JOHN E. SCHAEFER
Assistant County Attorney
315 Court Street
Clearwater, FL 34616
(813) 462-3354
Attorney for Respondent

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