OA 10-5-88

Reg A

IN THE SUPREME COURT OF FLORIDA

JOHN THOR WHITE,

Petitioner,

vs.

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

Respondent.

_____/

CASE NO. 72,170

DISTRICT COURT OF APPEAL
2ND DISTRICT - NO. 87-1136

PETITIONER'S INITIAL BRIEF

PREPARED BY:

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Petitioner

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SUMMARY OF ARGUMENTS

Petitioner contends that the limitation of his fee award to the statutory fee schedule cap of $3,500.00 ($26.12/hr) is unreasonable and confiscatory.

To support this contention, Petitioner relies upon the authority of Makemsom v. Martin County, 391 So. 2d 1109 (Fla. 1986) which mandated that the lower court should depart from the capital case fee schedule when to do otherwise would constitute a forfeiture of the attorney's time, energy and talents.

Petitioner further contends that the lower court's order appealed from was in error because a very substantial portion of the labor expended by Petitioner was in trial, thereby depriving him of income from his private clientele and exacerbating the hardship inherent in the hourly rate awarded.

STATEMENT OF THE CASE AND FACTS

Petitioner was appointed to represent one Mark A. Davis on a charge of Murder in the First Degree (R 12).

At the conclusion of his representation, Petitioner petitioned the lower tribunal (Criminal Administrator) for payment of attorney's fees in excess of the statutory cap set forth in Fla. Stat. 925.036 (2)(d) (R 5-11).

At Petitioner's fee petition hearing all factual allegations set forth in the petition were stipulated to and accepted into evidence in lieu of testimony (R 21, 22). Among these allegations were: the expertise exhibited by Petitioner during trial, his considerable prior criminal defense experience, and labor expended (134 hours) (R 5-11, 21-22).

Also pertinent is the lower tribunal's acknowledgment of the local fee schedule of $50.00 per hour in court appointed indigent cases (R 13).

At the said fee hearing Petitioner requested compensation at the prevailing rate of $50.00 per hour in indigency cases (R 31-32), counsel for the County (the entity funding such expenditures) replied by voicing budgetary concerns (R 27) and eventually the lower tribunal, in a lengthy order, awarded Petitioner the statutory cap of $3,500 (R 12-14) or $26.12 per hour.

Petitioner thereupon appealed the subject order to the Second DCA. The District Court's opinion/order affirmed the lower tribunal by 2:1 majority vote, rehearing was denied, and Petitioner's petition for discretionary review was granted by the Court.

FIRST ISSUE ON APPEAL:

WHETHER THE LOWER TRIBUNAL ERRED IN LIMITING FEES TO THE AMOUNT OF $3,500

The lower tribunal paid Petitioner the statutory maximum fee of $3,500 (R 14). This award compensated him at the rate of $26.12 per hour (R 9).

Petitioner continues to contend that this compensation violates his perception of the court's holding in Makemson v. Martin County, 491 So. 2d 1109 (Fla. 1986).

It should be noted that Petitioner does not assert that $26.12 per hour is per se unjust compensation for representing a client charged with a capital offense. At least arguably, payment at the rate of $26.12 per hour might be justified in a case wherein the matter is resolved under circumstances whereby the attorney's labor is expended in bits and pieces, a few hours here, then a few hours there.

By contrast, in the instant case, compensation at the rate of $26.12 per hour was unfair because the Petitioner suffered a double forfeiture of sorts: First, he was paid at a rate almost one-half the rate paid locally to court appointed attorneys in felonies of lesser magnitude (R 13). Second, because he expended the equivalent of nine days in-court labor (at one point spanning 4 consecutive days of trial), Petitioner suffered a concomitant loss of business in his private practice (R 8).

Petitioner believes that he was paid so minimally because the Criminal Administrator misconstrued Makemsom and thereupon misapplied

that holding to the undisputed facts of the instant case. The lower tribunal's interpretation of Makemsom seems self-evident from the four corners of her ruling on Petitioner's petition for "excess" fees. In her opinion/order the Criminal Administrator repeatedly (and virtually exclusively) asserted that the case at bar did not meet the "extraordinary and unusal" criterium set forth in Makemsom (R 12-14). Indeed, that very phraseology was quoted with emphasis added in the order appealed from (R 12) and at one point the order opines that a fee departure can only be appropriate if "...a particular case is extraordinary and unusual" (R 13).

Petitioner contends that the lower tribunal's narrow interpretation of Makemsom ignored the true intent of the Makemsom holding which was to ensure that the attorney was not to be compensated at a rate confiscatory of his time, energy and talents. 491 So. 2d at 115.

Makemsom's attempt to ensure the availability of attorneys in indigent capital cases was not novel; by 1963 the Supreme Court decision in Gideon vs Wainwright, 372 US 335, 83 S. Ct. 792 (1963) had placed that burden upon the government. Makemsom was simply endeavouring to buttress the Sixth Amendment right of indigents to adequate representation which was then being negated by the statutory fee schedule. To achieve this end, the Court in Makemsom exercised the inherent power of the judiciary to ensure its independence from the legislative branch by construing a statute as directory and not mandatory when necessary. The Court in Makemsom exercised this inherent power because it was necessary: the strict fee limitations

of Fla. Stat. 925.036 (2)(d) were fostering a system of compensation that simply would not work!

In short, contrary to the holding of the lower tribunal, Makemson was not concerned with simply awarding "excess" fees to attorneys involved in "high profile" or "unusual cases;" rather the Court was clearly concerned with ensuring that adequate counsel could be secured in the future for the representation of indigent defendants in capital cases.

The Court in an attempt to avoid a "more precise delineation" did not precisely define which type of case justified a departure from the statutory fee cap. Petitioner submits that the Court still does not need to more precisely delineate types of cases justifying fee departures. Rather, the Court simply needs to point out that to avoid a fee award which is confiscatory of the attorney's time, energy and talents, the lower courts should focus upon the time the defense attorney expended and its impact upon the attorney's availability to serve other clients.

Affirmation of the logic inherent in the lower court's ruling appealed from would be an affirmation of fee compensation criteria in indigent cases that would inevitably erode the indigents' right to adequate counsel afforded by the Sixth Amendment; and it would constitute an unwarranted retreat from the rather simple mandate of Makemsom.

Experience has shown that many courthouse coffee shop adages are true: "No case is as bad as it looks on paper." "All cases are winnable, all cases are losable." And "murder cases are different."

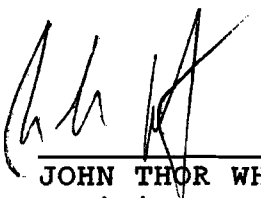
Murder cases are different. No other crime has so many attendant procedural safeguards. Does any other prosecution secure so much labor from this state's best and brightest, at so many levels, for so many years? And in what other genera of cases does the defense attorney struggle with his own emotions as he pleads for life instead of death? And when can you close your file....

CONCLUSION

The lower tribunal erred in limiting Petitioner's award of attorney's fees to the statutory maximum; hence the subject order should be reversed and the cause remanded with directions to pay Petitioner at the rate that attorneys are customarily paid for indigent cases in the jurisdiction.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to John E. Schaefer, Assistant County Attorney and counsel for Appellee, at 315 - Court Street, Clearwater, FL 34616, by regular US mail on this 25th day of July, 1988.



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