OA 9-3-98

SUPREME COURT OF FLORIDA

JOSEPH R. SPAZIANO,

Petitioner,

vs.

SEMINOLE COUNTY, FLORIDA,

Respondent.

CASE NOS. 92,801, 92,846 and 93,447

DISTRICT COURT OF APPEAL CASE NOS. 98-1170 and 98-1115

CIRCUIT COURT CASE NO. 75-430-CF-A

JOSEPH R. SPAZIANO,

Petitioner,

vs.

HARRY K. SINGLETARY, JR., etc.,

Respondent.

SEMINOLE COUNTY,

Petitioner,

vs.

JOSEPH R. SPAZIANO,

Respondent.

_____/

AMICUS BRIEF OF FLORIDA ASSOCIATION OF COUNTY ATTORNEYS AND ORANGE COUNTY

George L. Dorsett
Assistant County Attorney
Florida Bar No. 375098
Orange County Attorney's Office
Orange County Administration Center
201 S. Rosalind Avenue
Orlando, Florida 32802
(407) 836-7320
Attorney for Appellant, Orange County

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STATUTES

PRELIMINARY STATEMENT

Orange County and the Florida Association of County Attorneys adopt the Initial Brief of Seminole County as if more fully set forth herein, but would add the argument contained herein as a supplement.

F.A.C.A. means Florida Association of County Attorneys.

STATEMENT OF THE CASE AND FACTS

Orange County and F.A.C.A. would adopt the various statements of the cases and facts set forth by Seminole County, as if fully set forth herein.

SUMMARY OF THE ARGUMENTS

Florida law does not require a County to pay *anything* for attorneys fees, court costs or court fees unless specific provision is made by statute for such payment. There is no provision in the statutes or the constitution for the counties to pay at all for co-counsel for a private attorney or an opinion survey. This Court has stated that such provisions must be specified, not implied, even in cases where it concluded that there was a general duty on the part of the counties to front the money.

ARGUMENT

Regarding Case No. 92801

I. THE DEFENDANT DOES NOT GET HIS CHOICE OF CO-COUNSEL

It could hardly have been put better than Judge Cobb put it in his special concurring opinion, as follows:

> Attorney Russ is willing to represent the defendant *pro bono* but wants the assistance of co-counsel at public expense. This puts a new twist on the concept of *pro bono* representation. An indigent defendant is entitled to counsel, but is not permitted to select his or her counsel at public expense. The same is true for Russ, who should not be permitted to select his co-counsel at public expense. The order under review sets a bad precedent, because in the future an attorney with little or no experience in capital cases could agree to represent *pro bono* a criminal defendant and then move the court for the appointment of a more experienced attorney for assistance, to be compensated by the county. This practice would undermine the state public defender system created by the legislature as the way of providing counsel to indigent defendants. Although the trial judge was correct that he could not appoint a public defender to work as co-counsel with a private attorney, the trial court did not discuss the obvious alternatives: instruct Russ to seek out other attorneys who are willing to act as co-counsel on a *pro bono* basis, or appoint the public defender if Mr. Russ is unable to secure *pro bono* assistance and is not able to handle the case alone.

Seminole County v. Spaziano, 707 So.2 d 931 (Fla. 5th DCA 1998). (Emphasis added.)

Even if the original, lead counsel, Russ, had been appointed, in appointing the specific individual for co-counsel requested by the Defendant, as opposed to just "an attorney," without regard to the identity of the person, his experience, abilities and so forth, the Court has permitted the defendant, with the expert assistance of his original attorney, to pick and choose from among the

available attorneys, to shop around for the best he can find who are willing to do the work. Indigent defendants are not permitted their choice of attorney. Even where the original attorney was appointed and is asking for co-counsel. *Huckleberry v. State*, 337 So. 2d 400 (Fla. 2d DCA 1976). *See also, Mitchell v. State*, 407 So. 2d 1005, 1006 (Fla., 5th DCA 1981) where this the Fifth District held that "Mitchell had no right to pick and choose an appointed attorney, . . ." If the defendant is allowed his choice of co-counsel, he can circumvent entirely this Court's previous holdings. But here, as Seminole County points out, the statute does not provide for any co-counsel to be provided for a volunteer or retained attorney.

II. EVEN THE APPOINTMENT, MUCH LESS THE PAYMENT, OF CO-COUNSEL IS NOT REQUIRED.

Lowe v. State, 650 So. 2d 969 (Fla. 1994) addressed the initial question of appointment, as opposed to appointment and payment by the County, of co-counsel, and in addition, addressed the issue of whether it was required in all such cases, where the Supreme Court of Florida held:

> Lowe's fourth claim concerns his contention that he was denied his constitutional rights to effective assistance of counsel and the equal protection of the law when the trial court refused to appoint two attorneys to assist in Lowe's defense. Lowe bases his equal protection argument on the assertion that the circuit in which Lowe was tried typically appoints two attorneys to represent indigent defendants in capital proceedings. We find that, despite the local practice of appointing dual attorneys, the decision of whether to appoint co-counsel is not a right but is a privilege that is subject to the trial court's discretion. After having reviewed the entire record we find that the trial court did not abuse its discretion in refusing to appoint co-counsel.

The Supreme Court of Florida also went on to say, in footnote 3 of that case:

> [3] We note that a trial judge is authorized by law to appoint co-counsel in the situation presented by the facts in the instant case. See §925.034, Fla. Stat. (1993) (as to a public defender with a conflict on

> a capital case, "it shall be his duty to move the court to appoint one or more members of The Florida Bar . . . to represent the[e] accused."). Although we encourage trial judges to appoint dual counsel pursuant to this statute under the proper circumstances, we do not suggest that dual representation is mandated in every circumstance.

Thus, the initial appointment of a co-counsel is not even required by the Constitution, but is only included as one of the discretionary decisions which the trial court is permitted to make.

III. SECTION 925.035(1) FLA. STAT. DOES NOT GIVE TO THE COURTS POWER TO APPOINT ONE OR MORE ATTORNEYS TO DEFENDANT, TO ASSIST A PRIVATE ATTORNEY.

Section 925.035(1) states:

> 925.035 **Appointment and compensation of an attorney in capital cases; appeals from judgments imposing the death penalty. --**
>
> (1) If the court determines that the defendant in a capital case is insolvent and desires counsel, it shall appoint a public defender to represent the defendant. If the public defender appointed to represent two or more defendants found to be insolvent determines that neither he nor his staff can counsel all of the accused without conflict of interest, it shall be his duty to move the court to appoint one or more members of The Florida Bar, who are in no way affiliated with the public defender in his capacity as such or in his private practice, to represent those accused. The attorney shall be allowed compensation, as provided for in s. 925.036 for representing a defendant.

Nothing is there to allow a private attorney to move to obtain a co-counsel at county's expense. As previously stated, and as shown below in Argument V, unless it is shown in the statute, it cannot be implied.

Regarding Case No. 92,846

IV. THE COUNTIES ARE NOT STATUTORILY RESPONSIBLE TO PAY FOR A PUBLIC OPINION SURVEY.

In addition to noting *Mills v. State*, 462 So. 2d 1075 (Fla. 1985) cited by Seminole County, which specifically rules out payment by counties for such things, this Court should also be aware that for all intents and purposes, the use of such a survey relates indirectly to the selection of a jury. The use of experts and the expenditure of money for jury selection has been long. ago excluded as one of the expenses which a court must grant and that counties are expected to cover. *San Martin v. State*, 705 So. 2d 1337, 1346 (Fla. 1997); *Goldberg v. County of Dade*, 378 So. 2d 1242, 1244 (Fla. 3rd DCA 1979); *Short v. State*, 479 So. 2d 163 (Fla. 2d DCA 1991)

There must be a connection somewhere between a statutory provision and the costs which are expected to be paid by a county, and only those costs "reasonably within the scope of statutory authority" may be taxed to a county. *Goldburg*, 1244.

Argument Applying to Both Cases, 92,846 and 92,801

V. IF A PAYMENT IS NOT PROVIDED FOR BY STATUTE, THE COUNTIES SHOULD BE PRESUMED NOT RESPONSIBLE FOR PAYMENT

The Circuit Court below did not focus on this Court's underlying position as concerns payments of attorneys fees and costs. Several cases have been decided by this Court which make it very plain that no court can force a government to pay fees or costs where that payment has not been provided for specifically, and by statute. *Board of County Commissioners, Pinellas County v. Tom F. Sawyer*, 620 So. 2d 757 (Fla. 1993); *Wolf v. Volusia County*, 22 Fla.L.Weekly S192 (1997); *Orange County v. Williams*, 702 So. 2d 1245 (Fla. 1997); *Milligan v. Palm Beach Bd. Of County Comm.*, 704 So. 2d 1050 (Fla. 1998).

The Circuit Court below, has analyzed the law from entirely the wrong direction, and based on a false assumption. It assumed that the entire analysis must take place from the standpoint of the defendant's right to a payment. It also assumed that if a defendant has a right, justified by a terrible need as well, then that need supports the idea that even a distant and debatable connection to a county would be enough to require a county to provide a given type of cost. The Circuit Court, as did Wolf, in *Wolf, supra*, assumed also that counties pay any and all costs for indigent defendants unless a specific case eliminates that cost from the list of possible costs. The analysis that follows shows the opposite with regard to all three assumptions:

In Board of County Commissioners, Pinellas County v. Tom F. Sawyer, 620 So. 2d 757 (Fla. 1993) this Court, in reversing the finding that an acquitted defendant could recover investigative costs, held that

> [1] *Common law provided no mechanism whereby one party could be charged with the costs of the other. Cost provisions are a creature of statute and must be carefully construed. This Court has held for over a century that cost provisions against the State must be expressly authorized:*
>
> *It may be premised that at common law neither party could be charged with the costs of the other, and it was only by statute that such a charge came to be allowed, but even after that in England and in this country the sovereign or the State was not chargeable with costs, either in civil or criminal cases, unless there was express provision of law to authorize it.*
>
> *Buckman v. Alenxander,* 24 Fla. 46, 49, 3 Do. 817 818 (1888).
>
> Contrary to the district court's finding of ambiguity, we find that section 939.06, Florida Statutes (1989), is unequivocal:
>
> • • •
>
> §939.06, Fla. Stat. (1989). Given its plain meaning, the relevant portion of this statute simply says: No acquitted criminal defendant shall be liable for any court costs or court fees, any costs or fees of a ministerial government office, or any charges for subsistence, and that if such a defendant has paid any of these taxable costs he or she shall be reimbursed by the county. *On its face, the statute does not authorize an acquitted defendant to be reimbursed for any additional disbursements. We hold that investigative costs are not taxable costs under the plain language of the statute.*
>
> Sawyer's mutuality claim is misplaced. Sections 939.01 and 939.06, Florida Statutes (1989), do not provide for mutuality of repayment. . . . *Further, we observe that the Legislature has expressly authorized repayment under various circumstances and could easily have done so here if such were the legislative intent.*

(Emphasis added, Footnotes deleted).

The critical consideration in this case is that (1) there is *no* statute directly providing that counties pay fees for attorneys appointed to supplement a private attorney as co-counsel, nor is it reasonable to presume that survey costs are within the statute either , (2) there is no statute indirectly providing

that counties will pay under any section which would require a public defender to represent such a defendant, (3) there is no organic, per se *constitutional* right in such a case connected with even a rough and ready general statute which would require direct responsibility by the counties, as opposed to any other entity, and (4) *Sawyer* is not just eliminating investigative costs, but any cost not specifically provided for by statute.

VI. THE DEFENDANT SHOULD GET AN ADEQUATE DEFENSE, NOT THE BEST POSSIBLE DEFENSE.

None of the cases supporting right to counsel or right to expert witnesses and costs paid by counties has ever said that an indigent gets the best possible defense. The case law instead says that the defendant gets adequate assistance of counsel, not the best, or the worst either.

Ake v. Oklahoma, 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed. 2 (1985) 53, held that indigent defendants must have meaningful access to the judicial process and an adequate opportunity to present their claims fairly within the adversary system.

Britt v. North Carolina, 404 U.S. 5226, 92 S.Ct. 431 30 L.Ed. 2d 700 (1971) stated that an indigent Defendant is entitled to the basic tools of an adequate defense. There is no requirement that there be a duplication of the legal support which might be available to a non-indigent. *Ross v. Moffit,* 417 U.S. 600, 41 L.Ed. 2d 341, 94 S.Ct. 2437 (1974).

CONCLUSION

Wherefore, Orange county and F.A.C.A. conclude that there is no support whatsoever for the payment of a county for a co-counsel for a private attorney in a criminal case where the defendant has been declared indigent, and the payment for a public opinion survey is clearly not within the scope of statutory authority. Orange County and F.A.C.A. would adopt the arguments and conclusions therefore of Seminole County as is more fully set forth herein.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to SUSAN E. DIETRICH, Assistant County Attorney, Seminole County Services Building, 1101 East First Street, Sanford, Florida 32771; THOMAS HASTINGS, Assistant State Attorney, 100 East First Street, Sanford, Florida 32771; and JAMES M. RUSS, ESQUIRE, 18 West Pine Street, Orlando, Florida 32801, by interdepartmental U.S. mail, this 30th day of July, 1998.

George L. Dorsett
Assistant County Attorney
Florida Bar No. 375098
ORANGE COUNTY ATTORNEY'S OFFICE
Orange County Administration Center
201 S. Rosalind Avenue
Orlando, Florida 32802
(407) 836-7320

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