

IN THE SUPREME COURT OF FLORIDA

CASE NO. 18-322

ALBERT A. A. CARTENUTO, III, and

MARIA DEL CARMEN CALZON,

APPELLANTS,

V.

THE JUSTICE ADMINISTRATIVE COMMISSION,

APPELLEE.

APPELLEE'S ANSWER BRIEF

ON APPEAL FROM THE CIRCUIT COURT

OF THE ELEVENTH JUDICIAL CIRCUIT,

IN AND FOR MIAMI-DADE COUNTY, STATE OF FLORIDA

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PRELIMINARY STATEMENT

Albert A. A. Cartenuto was designated to assist the court-appointed attorney for death row inmate Noel Doorbal in the underlying Capital Collateral case. Through this answer brief, Mr. Cartenuto will be referred to as “Counsel” or “Mr. Cartenuto”. The Justice Administrative Commission will be referred to as “JAC.” Because JAC is the state entity charged with paying attorney’s fees and costs for court-appointed counsel, JAC is the proper party to respond on behalf of the State. *See* § 27.5304(2), Fla. Stat. (2006). All references to the Record on Appeal will be designated by “R” and the appropriate page number. All references to the Supplemental Record on Appeal will be designated by “SR” followed by the appropriate page number.

JURISDICTION

Although styled as an initial brief, Counsel is seeking a writ of certiorari pursuant to Article V, Section 4(b)(1) and (3) of the Constitution of the State of Florida and Florida Rule of Appellate Procedure 9.100(c). Counsel seeks relief in this Court because the issues raised herein involve this Court's appellate review of the trial court's order. Petition for Writ of Certiorari is the method for review of an order awarding attorney fees for court-appointed counsel. Sheppard & White, P.A. v. City of Jacksonville, 827 So.2d 925 (Fla. 2002); Anderson v. E.T., 862 So.2d 839 (Fla. 4th DCA 2003).

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STATEMENT OF THE CASE

Appellee Justice Administrative Commission (JAC) accepts the Appellants' Statement of the case only as to those portions of the Statement which are supported by the Record on Appeal and Supplemental Record on Appeal. JAC notes that Appellants' footnotes 3, 4, 5 and 7 are not supported by the Record and are argumentative. JAC does not accept the Appellant's recital of the events at the November 30, 2017 attorney fee hearing as this recital is not supported by a transcript of the hearing.

STANDARD OF REVIEW

The standard of review for a petition for writ of certiorari is "whether the trial court had departed from the essential requirements of law." Sheppard & White, P.A. v. City of Jacksonville, 827 So.2d 925 (Fla. 2002).

Because the trial court's decision in a case involving attorney's fees is based upon findings of fact, it will not be disturbed if supported by competent, substantial evidence. *See, e.g., Sheppard & White, P.A. v. City of Jacksonville*, 827 So. 2d 925, 933 (Fla. 2002).

SUMMARY OF THE ARGUMENT

Appellants have failed to show that the trial court's decision that designated attorney Cartenuto was not qualified to act as a designated attorney pursuant to sections 27.711(4)(h), 27.710(2), and 27.704(2), Florida Statutes, is not supported by competent, substantial evidence. The instant case must therefore be either denied or remanded to the trial court for an evidentiary hearing.

ARGUMENT

WHETHER THE TRIAL COURT'S DECISION THAT THE ATTORNEY DESIGNATED BY APPOINTED COUNSEL IN THIS CAPITAL COLLATERAL CASE FAILED TO MEET THE STATUTORY QUALIFICATIONS TO ACT AS A DESIGNATED ATTORNEY IS SUPPORTED BY COMPETENT, SUBSTANTIAL EVIDENCE

In reviewing an award of attorney's fees and costs, the standard is whether competent substantial evidence supports the trial court's ruling. *See Fla. Dep't of Fin. Servs. v. Freeman*, 921 So. 2d 598, 601 (Fla. 2006) ("Because the trial court's decision in a case involving attorney's fees is based upon findings of fact, it will not be disturbed if supported by competent, substantial evidence."); *Sheppard & White, P.A.*, 827 So.2d at 933 (finding competent, substantial evidence supported

the award of fees by the trial court). This case does not involve a situation in which this Court may conduct a *de novo* review.

As of the date of the filing of this answer brief, Counsel has not provided this Court with a transcript of the hearing on the motion for attorney's fees. Pursuant to Florida Rule of Appellate Procedure 9.200(e), Counsel has the burden to provide this Court with the record on appeal. Counsel needs to supplement the record with the transcript of the hearing on the motion for attorney's fees in order for the Court to review this matter properly. *See Fla. R. App. P. 9.200(f)(1)(2)*.

Counsel has the burden to show the trial court departed from the essential requirements of law. In that this case involves factual findings by the trial court, in the absence of a transcript, this Court cannot determine if the trial court departed from the essential requirements of law. *See generally Applegate v. Barnett Bank*, 377 So. 2d 1150, 1152 (Fla. 1979). *See also Tebrugge v. Eastman*, 703 So. 2d 1166, 1167 (Fla. 1st DCA 1997) (holding that the absence of the motion for attorney's fees and the transcript of the hearing on attorney fees made the record before the court "inadequate for appellate review on this issue"); *Hoover v. Sprecher*, 610 So. 2d 99, 99 (Fla. 1st DCA 1992) (holding that lack of transcript precluded review of an order denying attorney's fees).

The resolution of this matter involves the question of whether sufficient competent, substantial evidence was presented for the trial court to make its determination as to whether Counsel was qualified pursuant to the applicable statutes. JAC notes that this issue was raised *sua sponte* by the trial court at the fee hearing.

Section 27.711(4)(h), Florida Statutes (2018) provides in pertinent part:

The hours billed by a contracting attorney under this subsection may include time devoted to representation of the defendant by another attorney who is qualified under s. 27.710 and who has been designated by the contracting attorney to assist him or her.

Section 27.710(2), Florida Statutes (2018), provides:

To be eligible for court appointment as counsel in postconviction capital collateral proceedings, an attorney must certify on an application provided by the executive director that he or she satisfies the minimum requirements for private counsel set forth in s. 27.704(2).

Section 27.704(2), Florida Statutes (2018), provides in pertinent part:

A private counsel or public defender under contract with the regional counsel must not be disqualified pursuant to s. 27.7045; must have at least 3 years' experience in the practice of criminal law; and, prior to the contract, must have participated in at least two capital trials or capital sentencing proceedings, five felony appeals, or five capital postconviction evidentiary hearings, or any combination of at least five of such proceedings.

In the Initial Brief at pages 10 and 11, Counsel references the 2014 amendment to Fla. R. Crim. P. 3.112(k), which sets forth with specificity the qualifications for **lead** counsel in capital postconviction proceedings. Inasmuch as the matter at issue here is the qualifications of **designated** counsel, the amendment to Rule 3.112(k) has no bearing in this case, and the statutory qualifications therefore apply.

Counsel also argues that his motion for reconsideration filed in the trial court (R 69-74) setting forth his legal experience constituted proof that he met the statutory requirements. JAC submits that a listing of cases in a pleading is not competent, substantial evidence, and Counsel has thus failed to demonstrate that he has met the “prior to the contract” requirements pursuant to section 27.704(2), Florida Statutes (2018) and (2012). The trial court concluded that “(t)he designated attorney stated on the record that he does not meet the qualifications set forth in §27.704(2)” (SR 2).

CONCLUSION

Based on the foregoing, the instant cause should be denied based on a lack of evidence supporting the Appellants' claim. In the alternative, the Court may remand the cause to the trial court for an evidentiary hearing.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been sent by email, and/or U.S. Mail on this 6th day of June, 2018 to:

Honorable Dava Tunis
Sent via email

Maria del Carmen Calzon, Esq.
Sent via email

Albert A. A. Cartenuto, Esq.
Sent via email

Respectfully submitted,

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CERTIFICATE OF FONT

I HEREBY CERTIFY that this Answer Brief has been produced in a 14 point Times New Roman font.