

IN THE COURT OF APPEALS OF IOWA

No. 2-496 / 91-1827

FILED

FEB 23 1993

CLERK SUPREME COURT

DOROTHY L. DAKIN,

Plaintiff,

vs.

IOWA DISTRICT COURT FOR HAMILTON COUNTY,

Defendant.

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Appeal from the Iowa District Court for Hamilton County, David R. Danilson, District Associate Judge.

Plaintiff brought this certiorari action seeking to challenge the award of attorney fees she was paid for her representation of a criminal defendant. **WRIT SUSTAINED AND CASE REMANDED.**

Dorothy L. Dakin of Dakin Law Office, Boone, for plaintiff.

Bonnie J. Campbell, Attorney General; Thomas G. Fisher, Jr., Assistant Attorney General; Patrick Chambers, County Attorney; and Timothy R. Palmer, Assistant County Attorney, for defendant.

Considered by en banc. Habhab, J., takes no part.

SCHLEGEL, J.

Dorothy Dakin seeks certiorari relief to challenge the award of attorney fees she was paid for her representation of a criminal defendant.

In January 1991, Jerry and Sandy Young were arrested and charged with possession of marijuana in violation of Iowa Code section 204.401(3) (1991). Both Jerry and Sandra obtained court-appointed attorneys. Dakin was appointed to represent Sandra, and Kevin Fores was appointed to represent Jerry. In March 1991, Dakin filed an application to exceed the attorney fee limitations as it became apparent the matter would be tried to a jury. The court granted Dakin's motion and ordered any ruling on the appropriateness of Dakin's fee claim would be made at the conclusion of the case.

On the second day of trial, the co-defendant, Jerry Young, pleaded guilty. During the third day of trial, charges against Dakin's client, Sandra Young, were dismissed at the request of the county attorney.

Fores filed a claim for his fees, requesting payment for 35.05 hours of service at sixty dollars per hour plus expenses of \$201.19 for a total of \$2,304.19. Dakin filed a claim for attorney fees for 52.6 hours at sixty dollars per hour, plus \$32.40 for expenses for a total of \$3,188.40.

Upon the request of the county attorney, a hearing was held regarding the attorney fees claimed by Dakin. After

hearing the evidence, the district court issued an order awarding Dakin \$1,850 in attorney fees plus expenses of \$32.40. The district court also reduced Fores's claim by \$453, allowing him \$1,650 in fees and \$109.82 for out-of-pocket expenses.

Dakin brought this certiorari action seeking to challenge the district court's reduction of her attorney fees. Dakin contends the court acted illegally and exceeded its jurisdiction by failing to award her reasonable and customary attorney fees. Dakin specifically argues the court erred by penalizing her for failing to file a motion to sever and by granting Fores larger hourly fees in the same case.

Our scope of review is for an abuse of discretion. Mulse v. Wifvat, 306 N.W.2d 707, 709 (Iowa 1981). In order to show an abuse of discretion, one generally must show that the court exercised its discretion "'on grounds or for reasons clearly untenable or to an extent clearly unreasonable.'" State v. Blackwell, 238 N.W.2d 131, 138 (Iowa 1976) (quoting State v. Burnor, 326 A.2d 138, 140 (Vt. 1974)).

Dakin's claim for attorney fees must be determined in accordance with Iowa Code section 815.7 (1991). Section 815.7 states, in relevant part:

An attorney appointed by the court to represent any person charged with a crime in this state shall be entitled to a reasonable compensation which shall be the ordinary and customary charges for like services in the community to be decided in each case by a judge of

the district court, including such sum or sums as the court may determine are necessary for investigation in the interests of justice. . . .

(Emphasis added.) Our supreme court has recognized several factors which a district court should consider in awarding attorney fees. In Green v. Iowa District Court, 415 N.W.2d 606 (Iowa 1987), the court stated:

The legal standard for determining compensation for court-appointed counsel was outlined in Hulse v. Wifvat, 306 N.W.2d 707 (Iowa 1981), and later codified in Iowa Code section 815.7 (1985). This court ruled in Hulse that valuation must be based on a number of factors, including "the time necessarily spent, the nature and extent of the service, the possible punishment involved, the difficulty of handling and importance of the issues, responsibility assumed and results obtained, the standing and experience of the attorney in the profession, and the customary charges for similar service. . . ."

Id. at 607-08. In sum, we will consider two basic elements: (1) the services must have been reasonably necessary, and (2) the valuation must be reasonable in amount. Hulse, 306 N.W.2d at 709.

Here, the trial court apparently believed the present case was relatively unimportant as manifested by the court's statement:

This Court is . . . astonished by the number of hours spent by defense counsel in advance of trial. This case was not unlike many drug cases. This case arose out of the execution of a search warrant and involved a co-defendant. The charge was simple possession, a serious misdemeanor.

This language implies the defense of such a charge is unimportant and therefore does not demand the best efforts of defense counsel. The court's criticism of the failure

to file a motion to sever (a process that would have required expending additional time and possibly additional research) and its criticism of counsel's effort to impeach a non-governmental informant at best indicates a disagreement in the necessary procedure.

These criticisms indicate that the trial court's basis for denying a reasonable fee was the court's belief it knew how to best defend the client. However, if counsel would have followed the court's hindsight and a conviction would have resulted, it is unlikely the trial court would have been sympathetic to counsel's lack of preparation or failure to pursue every avenue of defense. While it may have been unlikely that postconviction relief would be pursued in this case, it should be pointed out that defending oneself from a claim of ineffective assistance of counsel does not permit a claim for fees for the time spent in that defense.

While it is clear a lawyer has an obligation to the profession to represent the indigent, even to the extent of acting pro bono if necessary, the law does not require such an arrangement in every case. One of the factors to be considered by the court in determining an appropriate fee arrangement in accordance with the valuation standard established in Iowa Code section 815.7 (1991) is certainty of payment. Hulse, 306 N.W.2d at 712.

In the present case, the trial proceeded into the third day, and no evidence exists suggesting that Dakin's bill was padded with unnecessary expenses or proceedings. The trial court was "astonished by the number of hours spent by defense counsel in advance of trial" and felt the case was relatively unimportant, not justifying the amount of time spent by defense counsel. However, the amount of time necessary for the thorough preparation of any trial is not measurable with exactitude. Interestingly, in its ruling, the district court recognized that Dakin was much more thoroughly prepared for trial than Fores.

Nonetheless, based upon the time spent by Dakin, the court permitted a fee of approximately \$35.00 per hour. Such a rate is clearly unreasonable and not in accordance with "the ordinary and customary charges for like services in the community. See Iowa Code § 815.7 (1991). The court, in essence, determined that only 30.8 hours at sixty dollars per hour were necessary and proper for three days of trial plus preparation, including motions and investigation. Such a determination is unreasonable.

The trial court should not need to be reminded that counsel for the defendant owes nothing to the State, except a duty to conduct herself professionally. However, defense counsel owes every effort to successfully defend her client. Our function in certiorari is to determine whether the district court abused its discretion to the extent that it acted illegally in awarding the attorney fees. Green,

415 N.W.2d at 608. We determine the district court abused its discretion in reducing Dakin's attorney fees. Accordingly, this case is remanded to the trial court for a proper determination of a reasonable attorney fee, absent consideration of the unsubstantiated and unwarranted matters referred to by the trial court in its initial ruling.

**WRIT SUSTAINED AND CASE REMANDED.**

All judges concur, except Donielson, J., who dissents.

DONIELSON, P.J. (dissenting)

I dissent. I find the district court did not abuse its discretion in reducing Dakin's attorney fees, and I would not sustain Dakin's writ of certiorari.

"'The district court is itself an expert on the issue of reasonable attorney fees.'" Green v. Iowa District Court, 415 N.W.2d 606, 608 (Iowa 1987) (quoting State v. See, 387 N.W.2d 583, 586 (Iowa 1986)). The district court was in the best position to determine whether Dakin should have pursued a motion to sever. It was well within the district court's judgment to determine whether Dakin's attempt to impeach a non-governmental informant in a motion to suppress was necessary to the defense.

I also am not persuaded by Dakin's argument that she should at least receive the same "hourly rate" as Fores received. An attorney is not guaranteed payment at a fixed hourly rate for every hour expended. Green, 415 N.W.2d at 608 (citing Walters v. Herrick, 351 N.W.2d 794, 797 (Iowa 1984)). Neither is the court bound by evidence regarding the customary charges of other attorneys. Id. (citing Soldat v. Iowa District Court, 283 N.W.2d 497, 499 (Iowa 1979)).

In awarding attorney fees, the district court examines both the hourly rate (the valuation) and the actual amount of hours spent working on the case (the extent of services performed). By reducing the award of attorney fees to Dakin, the district court was not necessarily reducing her

hourly rate. Rather, the district court was also assessing whether all of the 52.6 hours Dakin spent on this case were reasonably necessary (as compared to the 35.05 hours Fores spent on the codefendant's case).

Our standard of review is not to substitute our judgment as if we were sitting as the trial judge, as I believe the majority has done in this instance. Rather, our function in certiorari is to determine whether the district court abused its discretion to the extent that it acted illegally in awarding attorney fees. Green, 415 N.W.1d at 608. I find the trial judge did not abuse his discretion in reducing the attorney fees awarded to Dakin. I would annul Dakin's writ of certiorari.