FILED
JUN 24 1987
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

H WALTER GREEN,)

Plaintiff,)

vs)

DISTRICT JUDGE GLEN McGEE and DISTRICT JUDGES' REVIEW MEETING, FOURTH JUDICIAL DISTRICT, CHIEF JUDGE OF THE FOURTH JUDICIAL DISTRICT PAUL H. SULHOFF,)

Defendants.)

Filed June 24, 1987

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7-113
86-594

Appeal from the Iowa District Court for Mills County (2141), Glen McGee and Paul H. Sulhoff, Judges.

Plaintiff is an attorney who was appointed by the district court to represent a criminal defendant. The attorney has brought this certiorari proceeding to challenge the amount of the fee allowed him by the district court. **REMANDED FOR FURTHER PROCEEDINGS.**

H. Walter Green, Glenwood, pro se.

Thomas J. Miller, Attorney General of Iowa, and David C. Dorff, Assistant Attorney General, for defendants.

Considered by Oxberger, C.J., and Donielson and Schlegel, JJ.

SCHLEGEL, J.

This is an original certiorari proceedings brought by H. Walter Green, a lawyer who was court-appointed to provide representation for one David A Rodgers, an indigent defendant, charged with first degree murder. Green sought a writ of certiorari to review the order entered by the Honorable Glen M McGee, setting the fee for Green's representation at $4,700. Writ was issued on order of Justice David Harris of the Iowa Supreme Court. The matter was transferred to this court for review under that writ.

I. Pertinent to this case, Iowa Code section 815.7 (1985), provides as follows:

> 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. . . .

The Iowa Supreme Court has dealt with the problem of setting of fees in cases where attorneys are appointed to represent indigent defendants in criminal cases upon numerous occasions. A major concern of the court has been the ability to "provide competent representation to indigents in criminal cases, prevent vast disparity in fees allowed in the various counties throughout the state, and be fair to the attorneys providing the services and the taxpayers who pay the fees awarded." Coonrad v. Van Metre, 362 N.W.2d 197, 201 (Iowa 1985). As set out in the special concurrence in Coonrad:

> The obvious purposes of Section 815.7 are twofold. First, it meets the constitutional standards requiring legal representation for indigent criminal defendants. Secondly, reasonable compensation is defined in a manner that should attract competent and effective counsel. Whether or not we are meeting this second purpose forms the central issue of this case.
>
> I believe it is self-evident that to attract able counsel to accept court appointments, the State must provide adequate remuneration.

> As in any other profession, the skills and abilities of attorneys that practice law vary. The more able attorneys can command larger fees. Despite ethical considerations, it is obvious that modern day law offices have high overhead which must be paid from the fees that a lawyer can generate. The legislature wisely recognized the problem presented by the great number of indigent defendants that need competent representation and realized the bar no longer could be expected to greatly subsidize the public by performing pro-bono criminal work.

In Hulse v. Wifvat, 306 N.W.2d 707, 711 (Iowa 1981), the supreme court stated:

> [W]e believe the legislature intended that reasonable compensation for court-appointed lawyers be set under the criteria which govern reasonable compensation for other litigation services. These are the criteria delineated in DR 2-106(B) which were adapted to criminal cases in Parrish. The effect of this change (the legislature's addition that reasonable compensation "shall be the ordinary and customary charges for like services in the community") is to make reasonable compensation full compensation. No discount is now required based on an attorney's duty to represent the poor.

Hulse recognized that the burden of indigent criminal defense work falls upon a small segment of the bar, and that demands of constitutional and statutory law have vastly increased the difficulty and complexity of criminal cases. Questions of effectiveness of counsel are common. Lawyers must make special efforts to achieve the level of ability which is necessary to provide the requisite standard of representation. These efforts involve substantial investments of time, expense, education, and experience. Id..

The court must exercise independent judgment in determining the extent of reasonably necessary services. Id. at 710. The court must, in exercising its independent judgment, however, put itself in the position of a reasonable attorney at the time the services were undertaken. Id. In determining reasonable compensation, the court must consider: (1) the time spent; (2) the nature and extent of the service; (3) the possible punishment involved; (4) the difficulty of handling and importance of the issues; (5) responsibility assumed and results obtained; (6) the standing and experience of the attorney in the profession;

and (7) the ordinary and customary charges for similar services in the community Id at 711; Parrish v. Denato, 262 N.W.2d 281 (Iowa 1979).

II. The Iowa Supreme Court, in an effort to achieve some predictability in budgeting for compensation for attorneys representing indigent defendants, has adopted certain guidelines for carrying out the judicial department's responsibilities relating to payment of attorney fees and expenses for indigents when the law requires such payment from public funds. In Supreme Court Supervisory order of August 19, 1985, effective September 3, 1985; December 12, 1986, effective February 2, 1987; the court stated:

> 2 . . . These guidelines shall apply only to court appointment services in situations where compensation is required by law to be determined by a judgment of the district court.
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> 3 In making such appointments, the courts shall consider the attorney's competence, diligence and availability to perform the assigned service. The court also shall consider accessibility of the attorney to the represented person, as well as other relevant factors bearing on the effectiveness and efficiency of services.
>
> 4. In performing services, attorneys shall be governed by applicable statutes and rules as well as by relevant provisions of the Iowa Code of Professional Responsibility for Lawyers.
>
> a. When required to do so by law or when the attorney has any question about incurring a particular expense, the attorney shall obtain court approval before incurring the obligation.
>
> b. In addition, the attorney must obtain advance district court approval for anticipated compensation in excess of amounts that shall be established for particular categories of cases from time to time by the supreme court. Until modified by subsequent order of this court, those amounts are as shown on exhibit "A" attached to these guidelines.
>
> (1) The purpose of requiring such approval is not to inhibit reasonably necessary services but to provide a system for monitoring and a basis for predicting and budgeting amounts necessary for such compensation.
>
> (2) In determining whether an application should be sustained, the court shall consider whether the anticipated services are necessary in the reasonable professional judgment of counsel. The requirement that an application be made shall not have any bearing on whether an application should be sustained. Moreover, the court

shall not require disclosure by the attorney of any information not subject to discovery under applicable law.

(3) Such applications, except as to appeals, ordinarily shall be made at arraignment, and in any event within the period available for discovery prior to trial. They shall not be made later except upon a showing of good cause.

c Nothing in these guidelines shall affect the duty of the court to determine the amount of allowable compensation for court appointment services in accordance with applicable statutes.

The supervisory order continues by setting out the procedure counsel must follow in making application for compensation for court appointment services and expenses. Paragraph 5 of the order states:

. The application shall be accompanied by an itemized statement showing the time necessarily spent on the case, the nature and extent of services and expenses, the penal consequences involved, the difficulty of handling and importance of the issue, responsibilities assumed and results obtained.

a. A copy of the application shall be provided to the county attorney.

b. If written request for hearing is not filed with the clerk within fifteen days after a copy of the application has been provided to the county attorney, or if hearing is earlier waived, the clerk shall direct the application for ruling to the trial judge, or if the case was not tried, to the presiding judge in the case. If hearing is requested, the clerk shall direct the application to the appropriate judge, as above stated, for hearing and ruling.

c. When hearing is held, the parties shall have the opportunity to offer evidence relevant to the factors affecting the amount of compensation.

d. In any event, the judge with responsibility for determining compensation is encouraged to consult with other judges of the district to obtain advice and guidance. Each district should establish procedures to facilitate such consultation. Nothing in these guidelines, however, is intended to affect the prerogative of the responsible judge to determine the amount of compensation by appropriate ruling on the application.

Paragraph 6 of said supervisory order goes on to state:

6. When applicable law requires compensation to be made on the basis of ordinary and customary charges for like services in the community, the court shall not reduce compensation based on an attorney's duty to represent the poor but shall consider all of the factors dictated by pertinent statutory law and supreme court

> decisions, including certainty of payment. Moreover, the court shall consider the evidence, its own knowledge on the subject, and any other relevant information bearing on the issue. In order to provide guidance to the court and to foster uniformity in compensation for like services in like communities in the state, the supreme court shall from time to time promulgate guidelines including a range of hourly rates reflecting ordinary and customary charges for like services in the communities of the state, as provided by statute. Until modified by subsequent order of this court, that range is determined as shown in exhibit "A" attached to these guidelines. These guidelines shall be considered by the court, along with all other relevant information, in determining the reasonable value of the attorney's services in the community in question.

Finally, paragraph 7 of the order provides:

> If aggrieved by the court's ruling, either the attorney or public entity may seek appellate review of the compensation award pursuant to the certiorari rules of the supreme court.

For the case here involved, Exhibit A provides:

> Amounts which cannot be exceeded without prior approval of the district court in accordance with paragraph 4b of the guidelines:
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> 1. Class A felonies, $2,500.
>
> * * *
>
> Range of hourly compensation in accordance with paragraph 6 of the guidelines:
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> $40 to $60 per hour for attorneys, $20 to $30 per hour for paralegal/legal assistants.

III. Green was appointed to represent a defendant charged with first-degree murder. Within the time limits of the supervisory order, he filed a motion for relief from fee limitations set out above, stating that if a resolution by plea were not arranged, discovery and pretrial motion practice could consume as much as 100 to 150 hours. Counsel's motion was heard, and the following calendar entry was made:

> 10/21/85 Hearing held on Co-counsel's appl. to exceed recommended fee schedule. The ct suggests that counsel for defendant keep the ct informed periodically of time expended. Keith E. Burgett, Judge.

Trial of the case ensued, with the jury finding the defendant guilty of voluntary manslaughter. Following trial, but prior to sentencing, Green submitted his application for compensation. It was made on a standard Bar form, and to it was attached an itemized statement showing all services performed, and a total of 173.35 hours expended in the representation. The application was brought to the attention of The Honorable Glen M. McGee, who presided at the trial involved. No hearing was held, and no waiver of hearing appears of record. Eight days after Green executed the application, Judge McGee signed the order found on the application form, and allowed a fee of $4,700. After sentencing, Green submitted an addition to the itemized time list and a summary sheet which he entitled "Final Summary." That sheet showed time spent in preparation for the sentencing, involving 2.8 additional hours, and summarized all the time spent in representation of the defendant through trial and sentencing.

From the record, no order was entered by the court following the sentencing and the submission of the final summary by Green.

There is no record from which we can determine the propriety of the process that followed. Both parties agree that the fee application, having been ruled upon by the trial judge, was next submitted to the monthly meeting of the judges of the Fourth Judicial District, at which time Green was allowed to present affidavits and argue or discuss his application. No record was made of those proceedings.

Presumably, the meeting of judges is designed, in part, to comply with Paragraph 5(d) of the Supervisory Order of the Supreme Court, cited above. Following the meeting, on the same day, the Court Administrator of that district forwarded a letter to Green, stating:

> The judges reviewed the fee allowance in the David Rodgers case and find the amount originally allowed is sufficient compensation for this case.

This action followed. We are here asked to find that the district court's determination of the amount of compensation was contrary to the dictates and intent of the law. In addition, Green asks us to provide guidance to arrive at a fair compensation for the services rendered in this case.

IV. From the record in this case, it is impossible for us to determine the basis upon which the fee was determined. No findings were made by the trial court when it entered the order awarding $4,700 following the submission of the original claim for attorneys fees. It is apparent that following that order and the submission of the further and "Final Summary" information, Green asked for a further review of the court's order. This is evident from the proceedings which ensued. Green was allowed to appear before the judges' monthly meeting, where he presented affidavits and argument. Following that meeting, at which, as has been heretofore observed, no record was made, no further order was entered. No findings emanated from that meeting, except the statement of the court administrator's letter that the judges found the amount originally allowed was sufficient compensation for this case.

V. Our scope of review depends upon whether we are dealing with a claim that the court applied an incorrect standard or whether we are dealing with a claim of abuse of the trial court's discretion, while applying the correct legal standard. When an incorrect standard is applied, we will remand for new findings and application of the correct standard. When it appears that the court has applied the correct legal standard, we will affirm unless the trial court's discretion was exercised on grounds or for reasons clearly untenable or to an extent clearly unreasonable. Walters v. Herrick, 351 N.W.2d 794, 796 (Iowa 1984); Hulse v. Wifvat, 306 N.W.2d 707. In this case, in view of

the total lack of findings of the trial court, either before or after the judges' meeting, we cannot determine that a correct legal standard was used in fixing the fee in this case.

The trial court is obliged to allow the fee that is consistent with the standards laid down by the supreme court in case law and in its supervisory order, cited above. Certain of the Hulse criteria are obvious and depend upon nothing more than the knowledge of the court for its decision. There is no dispute as to (3) the possible punishment involved, or (5) the responsibility assumed in this case. The result obtained should also be considered, in view of the fact that the result in this case is the reduction of a life sentence to an indeterminate term not to exceed ten years, with five years certain.

Matters, such as the time necessarily spent and services needed, cannot be determined without adequate record, and are peculiarly within the knowledge of the trial court. Green's standing and experience in the profession is an item subject only to the determination of the trial court. Item (7) of the Hulse criteria, the ordinary and customary charges for similar services in the community, are the subject of some evidence in the record and are addressed in the supreme court supervisory order, in an effort to achieve uniformity in the allowance of fees. Of course, the trial court is not bound to accept the amounts set out in the supervisory order as the rates required in this case. If the court were to find the time and services set forth in Green's itemized statement as reasonable and necessary, the court would be justified, under the Hulse criteria and the supervisory order, in allowing a fee more nearly in the range of that requested by Green's itemized statement.

Green claims six and one-half days of trial. If compensated at a rate of $60 per hour, trial time alone would seem to indicate an allowance of nearly $3,100. That would leave $1,600 for all preparation and all other services.

Only the trial court, employing the Hulse criteria, can determine if that result is proper in this case since it is not required to adopt any established hourly rate of compensation. In addition, the court may consider certainty of payment as a factor. Its determination should mirror the supreme court's concern for the ability to provide competent representation to indigents in criminal cases, prevent vast disparity in fees allowed in the various counties throughout the state, and be fair to the attorneys providing the services and the taxpayers who pay the fees awarded. Coonrad, id. While fairness to the taxpayers who pay the fees is of great importance, there is no legal standard requiring counsel for indigent defendants to alone carry the financial burden of effective counsel.

VI. Because we are unable to determine whether the court employed a correct legal standard in the fixing of the fee allowed herein, we remand this matter to the trial court for further hearing and a further determination of a reasonable fee under the legal standard established by statute and court decisions, with appropriate deference to the supreme court supervisory order and guidelines.

We believe that the monthly judges' meeting referred to in this case fulfills the direction of the supervisory order for procedures to facilitate consultation by judges for guidance and advice on the fixing of fees for the representation of indigent defendants. We do not, however, believe that such meeting should be intended to take the place of a review of the fee allowed. That should only be done in hearing before the court responsible for its allowance, and then only with a full record of the proceedings on review.

REMANDED FOR FURTHER PROCEEDINGS.