

RECEIVED

Apr 05 2024

SC Court of Appeals

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF ORANGEBURG) FIRST JUDICIAL CIRCUIT

FILED FOR RECORD
WINNIFA B. CLARK
2024 FEB 28 A) 9:02

INDICTMENT NO.: 2020-GS-38-00943

State of South Carolina,)

v.)

Kenneth Henry Eastwood,)

Defendant.)

CLERK OF COURT
ORANGEBURG, SC

**ORDER DENYING DEFENDANT'S
RULE TO SHOW CAUSE**

THIS MATTER came before the Court on a Rule to Show Cause filed by Defendant, by and through his retained counsel, and on an objection letter submitted by the South Carolina Commission on Indigent Defense (SCCID). A virtual hearing was held on January 18, 2024, and both parties submitted additional responses in writing. For purposes of this order, this Court makes the following findings of fact and conclusions of law:

PROCEDURAL HISTORY

On December 16, 2019, Kenneth Henry Eastwood was arrested and charged with Murder in the above-captioned matter. Bond was denied and he remained in custody. Eastwood did not apply for the appointment of counsel. Between the date of arrest and February 24, 2020, Eastwood retained attorney James Falk to represent him in this case.¹ Falk continued to be the attorney of record until his death on May 9, 2023. Because of the nature of the charge, his retained counsel's death, and the fact that Eastwood was in custody, a public defender was appointed to represent him on May 18, 2023. On or about June 15, 2023, Eastwood retained Attorney Ashley Cornwell to represent him, and the public defender was relieved. On or about September 19, 2023, Cornwell submitted to this Court an Ex Parte Motion and proposed Ex Parte Order for Funding for a False

¹ According to the Clerk of Court files, Attorney James Falk filed a Motion for Discovery in the case.

ATTEST: TRUE COPY
Winnifa B. Clark
CLERK OF COURT
ORANGEBURG COUNTY, SC

Confession Expert. This Court signed the proposed order on October 13, 2023.

On or about November 1, 2023, Cornwell submitted another Ex Parte Motion and a proposed Ex Parte Order for Funding for a Forensic Pathologist Expert. This Court signed the proposed order on November 2, 2023. Cornwell filed both orders with the Clerk of Court, under seal, but did not submit the orders to SCCID. A jury trial was held in this case on November 8–9, 2023, and both experts testified for the defense. On November 9, 2023, the jury found Eastwood guilty, and this Court sentenced him to life in prison.

Cornwell later submitted the funding orders and expert invoices to SCCID on December 12, 2023. SCCID discussed the submissions with Cornwell and informed her that, because she was retained counsel and there were questions of whether Defendant had been screened for indigency, the Agency did not have the funding authority to pay the expert costs. SCCID informed Cornwell the Agency would file an objection with the Court requesting the Court reconsider the granting of the funding orders and vacate and/or alter/amend the orders. On December 19, 2023, Cornwell filed a Rule to Show Cause petition. SCCID notified the Court that they were preparing an objection letter and filed the letter on December 20, 2023.² A virtual hearing was held on the Rule to Show Cause and SCCID's objection on January 18, 2024.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Indigency Determination

“The United States Supreme Court has held that the defendant must have ‘a fair opportunity to present his defense,’ thereby requiring the State to provide the ‘basic tools’ for an adequate

² The S.C. Supreme Court, by Order dated September 29, 2006, established procedures for the processing of indigent vouchers to include the ability of SCCD to file objections regarding the reasonableness of the submission.

defense to an indigent defendant.”³ And, “although the State is not required to provide the indigent defendant with unlimited funding, it must ensure that the defendant has competent counsel *and the services of experts* necessary to a meaningful defense.”⁴

“In making a determination whether a person is indigent, all factors concerning the person’s financial condition should be considered including income, debts, assets and family situation.”⁵ Rule 602, SCACR, includes the presumption that “a person is indigent if that person is financially unable to employ counsel.” However, this presumption can be overcome. The General Assembly has provided, “[t]he fact that the accused may have previously engaged and partially paid private counsel at his own expense in connection with pending charges shall not preclude a finding that he is financially unable to retain counsel.”⁶ Ultimately, “the final determination whether the accused is indigent shall be made by a judge of the court in which the matter is to be heard.”⁷

A defendant’s incarceration is a factor to be considered in determining whether a person is indigent. The law also provides for a potential presumption of indigency based on a person’s income. In this case, Eastwood had already been incarcerated for nearly four years when he petitioned this Court for Funding Orders to secure expert witnesses. Thus, it had been nearly four years since Eastwood lost his job and source of income. Furthermore, Eastwood had already been appointed a public defender for those very same charges. That public defender was only relieved upon Eastwood retaining Cornwell. In petitioning the Court for *ex parte* funding, Cornwell disclosed that Eastwood had retained her services at a reduced rate.

³ *Bailey v. State*, 309 S.C. 455, 459, 424 S.E.2d 503, 506 (1992) (quoting *Ake v. Oklahoma*, 470 U.S. 68, 76, 77 (1985)).

⁴ *Id.* (emphasis added).

⁵ Rule 602(b), SCACR (flush language).

⁶ S.C. Code Ann. § 17-3-10.

⁷ Rule 602(b), SCACR (flush language).

Therefore, it is the finding of the Court that Defendant is indigent, and was indigent at the time the Funding Orders were granted.

2. Defense of Indigents Fund Is Restricted for Public Defender and Private Court-Appointed Counsel

Chapter 3 of Title 17 of the South Carolina Code contains the Defense of Indigents Act. Multiple sections reference the payment of fees and/or expenses in cases where the court has appointed counsel, being either the public defender or “private appointed counsel.” Section 17-3-50 is specifically titled “Determination of fees for appointed counsel and public defenders” This section begins with the words: “When private counsel is appointed pursuant to this chapter”⁸ Similarly, § 17-3-80 is titled “Appropriation for expenses of appointed private counsel and public defenders; restrictions and limitations.” The text of the section provides: “This fund must be used to reimburse private-appointed counsel, public defenders, and assistant public defenders for necessary expenses . . . actually incurred in the representation of persons pursuant to this chapter, so long as expenses are approved by the trial judge.” Finally, § 17-3-90 is titled “Vouchers for payment for services by private appointed counsel and for reimbursement of expenses; approval and submission for payment.” The section’s text begins: “Private, appointed counsel shall submit a voucher . . . , and the public defender shall do likewise” No part of Chapter 3 of Title 17 (the “Defense of Indigents” Chapter) provides a protocol for privately retained counsel to obtain funds for indigent clients.

However, an argument can be made that the specific provision concerning expert funding makes no stipulation that counsel be appointed. That provision reads, in its entirety:

⁸ S.C. Code Ann. § 17-3-50(A).

Upon a finding in ex parte proceedings that investigative, expert, or other services are reasonably necessary for the representation of the defendant, the court shall authorize the defendant's attorney to obtain such services on behalf of the defendant and shall order the payment, from funds available to the Office of Indigent Defense, of fees and expenses not to exceed five hundred dollars as the court considers appropriate.⁹

This is immediately followed by a provision for increasing those funding caps, which likewise has no express qualifier that defense counsel must be court appointed:

Payment in excess of the hourly rates and limits in subsection (A) or (B) is authorized only if the court certifies, in a written order with specific findings of fact, that payment in excess of the rates is necessary to provide compensation adequate to ensure effective assistance of counsel and payment in excess of the limit is appropriate because the services provided were reasonably and necessarily incurred.¹⁰

Nevertheless, SCCID's interpretation, based on the statutory language and legislative intent, is that the Defense of Indigents Fund is limited to cases where the courts have appointed private counsel or a public defender. This Court gives deference to that interpretation.¹¹

Further authority that reimbursement shall not be had from indigent funds in this matter is the unambiguous language of Rule 602(c), SCACR, which provides "if counsel shall have been retained and partially paid for his services in either the trial or appeal stages, no reimbursement may be had from indigent funds."

Therefore, both the S.C. Code and Rule 602, SCACR, prohibit SCCID from expending indigent funds in this matter where counsel was not appointed, and where the defendant paid for legal services in the trial stage.

⁹ § 17-3-50(B).

¹⁰ § 17-3-50(C). Notably, the next and final provision of § 17-3-50—subsection (D)—states "Nothing in this section shall be construed to alter the provisions of Section 17-3-10 concerning those defendants who are entitled to legal representation." As mentioned previously, § 17-3-10 includes the protection, "[t]he fact that the accused may have previously engaged and partially paid private counsel at his own expense in connection with pending charges shall not preclude a finding that he is financially unable to retain counsel."

¹¹ See Doe v. Keel, 440 S.C. 427, 431, 892 S.E.2d 427, 284 (2023) ("[T]he Court generally gives deference to an administrative agency's interpretation of an applicable statute or its own regulation." (quoting Brown v. Bi-Lo, Inc., 354 S.C. 436, 440, 581 S.E.2d 836, 838 (2003))).

3. Defense Failed to Follow SCCID Policies in Seeking Remittance for Expert Funding

Former Chief Justice Toal, in a 2006 Supreme Court Order, established the requirement that, “upon appointment by the court in an indigent case or proceeding, counsel shall notify the office of Indigent Defense within 15 days of said appointment by registering the case online at the Indigent Defense’s website”¹² The SCCID Voucher Payment Policy likewise requires, “within 15 days of receiving notice of the appointment or assignment of any indigent defense case, counsel must register the case with SCCID online at www.sccid.sc.gov.” In addition, the Policy also requires “the appointed attorney must submit all Funding Orders approved by the Court to SCCID within 15 days of the date of the order.”

SCCID has the authority established by §§ 17-3-310(G)(2) and 17-3-340(I) to implement policies for the “delivery of indigent services.”¹³ As such, SCCID points out that Cornwell was subject to the procedures established by the Agency for the “delivery of indigent services,” which include the policies outlined above. Had those procedures been followed, SCCID could have timely notified Cornwell of the requirement that she be court appointed. Cornwell could then have taken the appropriate steps¹⁴ to comply with SCCID policy while also protecting Eastwood’s right to a meaningful defense.

¹² S.C. Sup. Ct. Order dated Sept. 29, 2006.

¹³ The General Assembly has also mandated in Proviso 61.4 of the current Appropriations Act (H 4300) that “vouchers must be reviewed and paid pursuant to procedures established by the Commission on Indigent Defense.”

¹⁴ For example, Cornwell could have moved to be relieved as counsel, or asked to be appointed rather than retained. Such steps would be in harmony with Reeves v. State, 415 S.C. 366, 377 n.5, 782 S.E.2d 747, 753 n.5 (Ct. App. 2015). In Reeves, the Court of Appeals indicated the defendant, who had retained counsel, could have potentially received expert funding from SCCID. Id. However, the Reeves Court did not articulate what procedural steps that defendant would need to take to comply with SCCID policy.

4. Rule to Show Cause

SCCID was not in willful violation of this Court's Orders by refusing to remit the expert funding to Ms. Cornwell. SCCID has followed the procedures and policies granted and established by the Court and Legislature to address concerns regarding submitted expert vouchers.

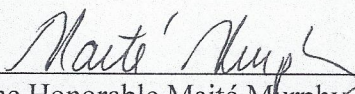
CONCLUSION

Defendant asks this Court to compel SCCID for expert funding. Although Defendant was properly found indigent, State statutes and Court rules limit indigent funding to cases involving appointed private counsel or a public defender. In cases of retained counsel, Rule 602, SCACR, specifically states that if "counsel shall have been retained and partially paid for his services in either trial or appeal stages, no reimbursement may be had from indigent funds." Furthermore, even if such funds were available to retained counsel, Cornwell failed to adhere to SCCID policy in seeking a remittance of those funds, and thus would not be in a position to compel SCCID to remit such funds.

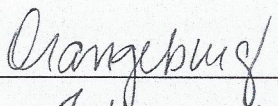
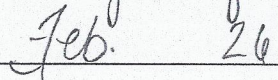
IT IS THEREFORE ORDERED:

1. Defendant's Petition for Rule to Show Cause is denied.
2. SCCID is NOT in contempt for failing to remit expert funding.
2. Attorney Cornwell's request for attorney fees is denied.

AND IT IS SO ORDERED.



The Honorable Maité Murphy
Circuit Court Judge, First Judicial Circuit


_____, South Carolina

_____, 2024