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Jun 03 2024

SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Orangeburg County

Maite Murphy, Circuit Court Judge

Ex Parte: South Carolina Commission on Indigent Defense, Respondent,

In Re: The State, Respondent,

v.

Kenneth Henry Eastwood, Appellant.

APPELLATE CASE NO. 2024-000583

RETURN TO MOTION FOR WAIVER OF FEES/ALLOCATION OF INDIGENT FUNDS
FOR PURPOSES OF ORDERING HEARING TRANSCRIPT

Respondent, the South Carolina Commission on Indigent Defense (hereinafter SCCID), opposes the motion filed by retained trial counsel Ashley Cornwell which requests that this Court issue an order requiring that Respondent SCCID pay for a transcript ordered by retained counsel in this action for the following reasons:

1. There are two materially different appeals pending before this Court. The present appeal was filed by retained counsel Cornwell following an order by the trial judge, the Honorable Maite Murphy, that “both the South Carolina Code and Rule 602, SCACR prohibit SCCID from expending indigent funds where counsel was not appointed, and where a defendant paid for legal services in the trial stage”. See Exhibit A, February 26, 2024, order of Judge Murphy at 5. In the separate appeal of State v. Kenneth Henry Eastwood, Appellate Case No. 2023-001798, Appellant Eastwood is appealing his criminal conviction. In that matter appellant

was determined to be indigent for purposes of appointing appellate counsel to handle the appeal. Due to a potential conflict of interest, the Division of Appellate Defense was relieved, and Attorney Adam Ruffin was appointed to handle Eastwood's criminal appeal before this Court.

2. The Division of Appellate Defense ordered the trial transcript in that criminal appeal prior to being relieved since Rule 207(a), SCACR states: "Where a transcript of the proceeding must be prepared by the court reporter, *appellant* shall, within the time provided for ordering the transcript, make satisfactory arrangements (including agreement regarding payment for the transcript), in writing with the court reporter for furnishing the transcript." (Emphasis added). That trial transcript was forwarded by the Division of Appellate Defense to appointed counsel Ruffin so that he can represent Eastwood in his criminal appeal before this Court.

3. However, the real parties in interest in the present monetary appeal are retained trial counsel Cornwell and SCCID.

4. SCCID respectfully asserts the fact that Appellant Eastwood was determined to be indigent for purposes of his criminal appeal before this Court has no bearing on the present action since this appeal does not concern Eastwood's underlying conviction.

5. This appeal simply involves the order of the Honorable Maite' Murphy denying retained counsel Cornwell's request that SCCID provide indigent funds for expert fees she incurred at the trial level. Judge Murphy ruled such funds are not available to retained counsel. "Although the Defendant was properly found indigent, State statutes and Court rules limit indigent funding to cases involving appointed private counsel or a public defender." See Exhibit A, February 26, 2024, order of Judge Murphy at 7.

6. Counsel Cornwell in her present motion requests that this Court either waive payment of the court reporter's transcript fee for the virtual motion hearing on held on January

18, 2024, before Judge Murphy, which pertained solely to the expert fees incurred by retained counsel, or “[o]rder indigent funds be made available to Appellant for the purpose of ordering a hearing transcript associated with this appeal.”

7. Rule 602(c), SCACR, provides, “[I]f 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.” This appeal involves a case where Counsel Cornwell was retained, and therefore “[n]o reimbursement may be had for indigent funds” pursuant to Rule 602, SCACR. Appellant Eastwood’s indigency status for his separate criminal appeal does not provide his retained trial counsel with access to indigent funds that are earmarked solely for public defenders and appointed counsel of indigent clients.

8. Counsel Cornwell initiated the present monetary appeal against SCCID. Again, Rule 207(a), SCACR states: “Where a transcript of the proceeding must be prepared by the court reporter, *appellant* shall, within the time provided for ordering the transcript, make satisfactory arrangements (including agreement regarding payment for the transcript), in writing with the court reporter for furnishing the transcript.” (Emphasis added). Rule 607(h)(B), SCACR, provides that parties, other than the appellant obligated to order and pay for the transcript, shall pay the court reporter a fee of “[O]ne Dollar (\$1.00) per page” for a copy of the original transcript ordered and provided to the appellant.

9. In addition, multiple sections of the Defense of Indigents Act, Chapter 3 of Title 17, make specific reference to the payment of fees or expenses in cases where the court has appointed counsel, being either the public defender or “private appointed counsel”. For example, S.C. Code §17-3-50 is specifically titled “Determination of fees for appointed counsel and public defenders . . .” S.C. Code § 17-3-80 is similarly titled “Appropriation for expenses of appointed

private counsel and public defenders; restrictions and limitations.” The text of the section provides that “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.” In addition, S.C. Code §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 with “Private, appointed counsel shall submit . . ., and the public defender shall do likewise. . .” (Emphasis added).

10. The Legislative intent and plain language of the Chapter 3 of Title 17 make it apparent that defense of indigent funds are limited to cases where private counsel or the public defender have been appointed. This is also SCCID’s interpretation of this statutory language, which SCCID is tasked with implementing. See Brown v. DHEC, 348 S.C. 507, 515, 560 S.E.2d 410, 414 (2002) (The Court generally gives deference to an administrative agency’s interpretation of an applicable statute or its own regulation.).

11. The funds appropriated by the General Assembly are intended to provide for indigent representation for those persons that are financially unable to retain counsel. The funds are not appropriated to supplement fees and costs for privately retained counsel. Clients who are financially able to retain counsel assume the cost of that litigation and it is standard practice in any retainer agreement that matters pertaining to litigation costs are addressed and included as part of the contract. Counsel Cornwell states specifically that her retainer agreements “do provide notice to the client that, in addition to the agreed upon legal fee, they are also responsible for all additional costs associated with resolving their case”. Cornwell, Response to SCCID’s Objections to Funding Orders at 3. (January 19, 2024).”

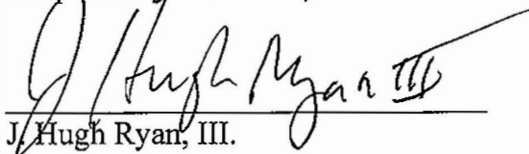
The retainer agreement (contract) governs each parties' obligations to perform under the terms of that agreement. The State is not a party to this contract, which was voluntarily entered into between two individual parties, and indigent funds should not serve as an insurance policy for counsel imprudently entering a retainer agreement.

12. Counsel Cornwell is asking this Court to ignore the current law and require SCCID to pay costs the Agency firmly believes they do not have the budgetary authority to pay. While some states have made provisions in their statutes and court rules for retained counsel to potentially have access to taxpayer funds, South Carolina is not one of them. Any decision to provide access to state funds for retained counsel is an issue for the General Assembly to address through their "power of the purse" in the annual appropriations act, statutory changes, and additions.

13. There could be profound detrimental consequences to the indigent defense system if retained counsel has unfettered access to funds for investigative, expert, transcripts, or other services based upon the mere assertion of indigency after the client has paid what is often a substantial retainer fee. This could create a system ripe for exploitation wherein counsel can collect more in attorneys' fees by shifting the cost of expert expenses to the State to cover the cost of a private contractual matter. The General Assembly has given SCCID and the courts the authority to protect these limited funds to ensure the funds are available for their intended purpose.

WHEREFORE, undersigned counsel respectfully requests retained counsel's motion for an order from this Court requiring SCCID to pay for the transcript of the lower court proceeding in the above-captioned action be denied.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "J. Hugh Ryan, III", is written over a horizontal line.

J. Hugh Ryan, III.

Hervy Young

Post Office Box 11433

Columbia, SC 29211

ATTORNEYS FOR RESPONDENT

Other Counsel of Record:

Ashley B. Cornwell

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acornwell@cornwellfirm

EXHIBIT

A

STATE OF SOUTH CAROLINA IN THE COURT OF COMMON PLEAS
COUNTY OF ORANGEBURG) FIRST JUDICIAL CIRCUIT
INDICTMENT NO.: 2020-GS-38-00943

State of South Carolina,)

v.)

Kenneth Henry Eastwood,)

Defendant.)

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

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
Winnie 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.

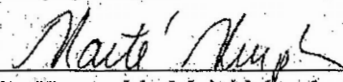
CONCLUSION

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

Orangeburg, South Carolina
Feb. 26, 2024

RECEIVED

Jun 03 2024

SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Orangeburg County
Honorable Maite Murphy, Circuit Court Judge

Appellate Case No.: 2024-000583

Ex Parte: South Carolina Commission on Indigent Defense, Respondent,

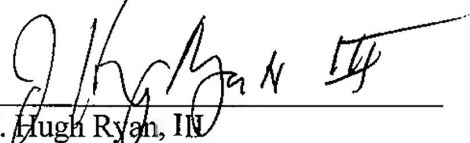
In Re: The State, Respondent,

v.

Kenneth Henry Eastwood, Appellant.

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Return to the Motion for Funding dated June 3, 2024, in the above-referenced case has been served upon Ashley B. Cornwell, Esquire, this 3rd day of June, 2024.



J. Hugh Ryan, III
Herverly Young
Attorneys for Respondent
South Carolina Commission on
Indigent Defense

From: [Pollard, Shelby](#)
To: [Ashley Cornwell](#)
Cc: [Ryan, Hugh](#); [Young, Hervery](#)
Subject: Kenneth H. Eastwood - Appellate Case No. 2024-000583 - Return to Motion for Funding
Date: Monday, June 3, 2024 12:49:00 PM
Attachments: [Kenneth Eastwood - Appellate Case No. 2024-000583 - Return to Motion for Funding.pdf](#)

Good Afternoon,

Please find attached for service in the above-referenced case the Return to Motion for Funding. This will be filed today, June 3, 2024, with the Court of Appeals via email filing.

Respectfully,
Shelby

Shelby Pollard

Administrative Assistant
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