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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM ORANGEBURG COUNTY
Court of General Sessions

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.

APPELLANT'S INITIAL BRIEF

September 4, 2024

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ISSUES ON APPEAL

- I. DID THE CIRCUIT COURT HAVE JURISDICTION TO RESCIND THE FUNDING ORDERS IN THIS MATTER?
- II. DID THE CIRCUIT COURT ERR IN DENYING THE RULE TO SHOW CAUSE?

PROCEDURAL HISTORY

On December 15, 2019, Kenneth Henry Eastwood was arrested and charged with Murder. At the time of his arrest, Eastwood was working as a stock person at the IGA grocery store in Eutawville and could not afford an attorney. Shortly thereafter, Eastwood's sister retained attorney James Falk on her brother's behalf. Mr. Falk remained the attorney of record until his death on May 9, 2023. On May 18, 2023, the Public Defender's Office was appointed to represent Eastwood and on June 15, 2023, Attorney Ashley Cornwell was retained on Eastwood's behalf at a discounted rate. Prior to trial, Eastwood submitted two ex parte funding petitions to the Court for the purpose of retaining two expert witnesses. On October 13, 2023, upon the conclusion of ex parte proceedings, the Court signed and filed an order granting Eastwood funds for a False Confession Expert to be paid by the Office of Indigent Defense. On November 2, 2023, the Court signed and filed another order granting Eastwood funds for an Expert in Forensic Pathology to be paid by the Office of Indigent Defense. Eastwood was tried during the November 6, 2023, term of court in Orangeburg County, with both expert witnesses testifying for the defense. On November 9, 2023, Eastwood was found guilty of murder and sentenced to life in prison. Eastwood filed a timely Notice of Appeal on November 18, 2023.

On December 12, 2023, counsel submitted the funding orders along with detailed invoices from the experts to SCCID for payment. Immediately upon receiving the request for payment, SCCID informed counsel of their objection to the orders, refusing to render payment to the experts. On December 19, 2023, counsel filed and served a petition for a Rule to Show Cause, requesting SCCID to render immediate payment to the expert witnesses for their services. In response to Eastwood's petition, SCCID submitted an objection letter to the Court on December 20, 2023, requesting the funding orders be rescinded. A virtual hearing was held on the Rule to Show Cause on January 18, 2024. On February 28, 2024, the trial court filed an Order Denying Defendant's

Rule to Show Cause, ruling that funds from indigent defense cannot be allocated to indigent defendants who have retained counsel and finding that SCCID was not in contempt for refusing to remit payment to the expert witnesses. Eastwood filed a Motion to Reconsider on March 7, 2024, which was denied on March 25, 2024. Appellant filed this appeal on April 5, 2024.

STANDARD OF REVIEW

In an appeal from an action in equity, an appellate court has jurisdiction to find facts in accordance with its own view of the preponderance of evidence and a de novo standard of review applies. *See Pinkey v. Warren*, 344 S.C. 382, 544 S.E. 2d 620 (2001).

ARGUMENT

1. THE CIRCUIT COURT LACKED JURISDICTION TO RESCIND THE FUNDING ORDERS.

In 2006, the S.C. Supreme Court found that by virtue of statutory amendment and pursuant to S.C. Code Section 17-3-330(A)(1), the Office of Indigent Defense was expanded and additionally authorized to serve as the entity which distributes all funds appropriated by the General Assembly for the defense of indigents, including but not limited to, funds for attorney fees and expenses in noncapital cases. *See* 2006-09-29-01 Order of the South Carolina Supreme Court. That Order further found the new law requiring the Office of Indigent Defense to effectuate payment shall be the controlling statute as applied to payments rendered for the defense of indigent defendants. *Id.* Pursuant to this finding, the 2006 Order established such rules and procedures as may be necessary for the proper administration of Chapter 3 Title 17, which pertains to indigent defense. *Id.* The procedures outlined in the 2006 order address the submission of vouchers submitted to SCCID by appointed counsel and specifically address the process if there is an objection by the Office of Indigent Defense pertaining to the reasonableness of the requested voucher amount. *Id.* at ¶5. While the 2006 order established rules and procedures for SCCID regarding the voucher process

in matters that had not been reviewed by the circuit court, it was not intended to abdicate the rules of procedure for matters that had already been ruled upon by the circuit court; specifically stating ***“[n]othing herein shall preclude the trial court from taking immediate action on ex parte requests for fees and costs during the pendency of a case as may be authorized by statute or court rule.”*** 2006-09-29-01 Order of the South Carolina Supreme Court, ¶9 (emphasis added). Instead, Rule 59(e), SCRCR, requires that a motion to alter or amend a judgment “shall be filed no later than 10 days after receipt of written notice of the entry of order” for all matters previously ruled upon by the court. Similarly, Rule 203(b)(2) of the South Carolina Appellate Court Rules requires that a notice of appeal shall be filed and served on all respondents within ten (10) days after receipt of written notice of entry of the order or judgment. The requirement of service for the notice of appeal is jurisdictional, i.e., if a party misses the deadline, the court lacks jurisdiction to consider the appeal and has no authority or discretion to ‘rescue’ the delinquent party by extending or ignoring the deadline for service of the notice. These are the only procedures for a party to amend, alter or appeal an order that has already been entered by the Court. *See Wells Fargo Bank v. Fallon Properties*, 422 S.C. 211, 810 S.E.2d 856 (2018); *See also Norris v. Heyward*, 312 S.C. 67, 439 S.E.2d 264 (1993).

In the case at hand, the circuit court issued funding orders on October 13, 2023, and November 2, 2023, allocating fees to be paid by SCCID for the service of two expert witnesses. On December 12, 2023, after the case had concluded, counsel submitted invoices from the experts along with a copy of the sealed funding orders to SCCID for payment. On December 20, 2023, SCCID filed an objection letter with the circuit court, but did not file any procedural motions. In their letter SCCID objected to paying the funds as ordered, stating their position that the statutes, budget provisions and policies governing SCCID do not authorize the use of Indigent Defense Funds to pay expert fees or expenses in cases where the defendant has retained private counsel and requesting that the

circuit court rescind the funding orders in this matter. *See* State v. Kenneth Eastwood Objection Letter.

Here the circuit court duly considered whether Eastwood qualified as an indigent defendant and whether the funds being requested were reasonable and necessary during ex parte proceedings, as authorized pursuant to S.C. Code §17-3-50 (B) and (C). At the conclusion of each ex parte proceeding, the circuit court issued funding orders finding Eastwood was indigent and ruling that the amount SCCID was being ordered to pay “is appropriate because the services to be provided are reasonably and necessarily incurred”. *See* Ex Parte Order For Funding For False Confession Expert; *See also* Ex Parte Order For Funding For Forensic Pathology Expert. The circuit court also made a specific finding of fact in each order that “these services are reasonable and necessary to adequately represent the Defendant and ensure he has a complete and competent defense at trial” and ordering that the “amount listed establishes the maximum amount to be paid without additional authorization from this Court”. *Id.* SCCID failed to file the proper procedural motions objecting to the funding orders previously entered by the circuit court. Furthermore, the funding orders issued by the circuit court make clear and unambiguous findings regarding the reasonableness of the funds being ordered. Accordingly, the circuit court lacked jurisdiction to hear SCCID’s objections and erred as both a matter of procedure and of law in finding that SCCID was not in contempt for refusing to submit payment to the expert witnesses.

2. THE CIRCUIT COURT ERRED IN DENYING THE RULE TO SHOW CAUSE

“[T]he 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 defense to an indigent defendant.” *Bailey v. State*, 309 S.C. 455, 459, 424, S.E.2d 503, 506 (1992) (quoting *Ake v. Oklahoma*, 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985)). “Thus, 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 service of experts necessary to a meaningful defense.” *Id.* It is well-established that part of an accused’s constitutional right to counsel is that it be *effective counsel*, capable of presenting witnesses, evidence, and defenses on an accused’s behalf. *See Strickland v. Washington*, 466 U.S. 688, 104 S.Ct. 2052 (1984); *See also Reeves v. State*, 415 S.C. 366, 782 S.E.2d 747 (S.C.App. 2015). Necessary expenses of representation pursuant to this right of effective counsel include fees of expert witnesses, costs of scientific tests or exhibits for trial demonstration, costs of psychiatric examinations, and extraordinary travel expenses. *See* Rule 602 SCARCrImP. In determining whether a person is indigent there are a number of factors that must be considered, including but not limited to, sources of income, debts, assets, family situation, custodial status, etc. *Id.* Therefore, a person considered indigent through the legal system is one who, at the time they are required, does not have adequate funds to pay a necessary cost of their defense. Accordingly, the question of indigency may be determined or redetermined by the court at any stage of the matter in which a person is entitled to representation; and reasonable funds for necessary expenses may be ordered to provide for that person’s defense. *See* S.C. Code of Laws §17-3-330 and §17-3-50; *See also Reeves v. State*, 415 S.C. 366, 782 S.E.2d 747 (S.C. App. 2015).

In consideration of Eastwoods’s ex parte petitions for funding and the follow-up ex parte communications regarding Eastwood, the circuit court found that Eastwood did qualify as an indigent defendant and the requested funds for the services of these experts were a reasonable and necessary expense for trial. The circuit court further found that without this funding Defendant would be denied the opportunity to meaningfully participate in a judicial proceeding in which his

liberty was at stake. Pursuant to these findings, the circuit court entered funding orders for each expert witness to be paid with funds from Indigent Defense in accordance with §17-3-50.

S.C. Code Ann. §17-3-50 is specifically titled “Determination of fees for appointed counsel and public defenders; maximum amounts; authorization to exceed maximums; payment for certain services”. Pursuant to the “payment for certain services” section of the statute, §17-3-50(B) allows “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 authorized 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 payment...” while §17-3-50(C) allows for payment in excess of the statutory rates to provide compensation adequate to ensure effective assistance of counsel. Neither of these statutes indicate that the ex parte proceeding for funds can only be conducted by appointed counsel nor that compensation in excess of statutory rates may only be obtained in cases where counsel has been appointed. The clear and unambiguous language provided in the statute as applied to ex parte hearings for funds involving investigative services, expert witnesses, and other services is that a “defendant’s attorney” shall obtain such services on behalf of the defendant not “appointed counsel shall...” Common practice followed by both the courts and SCCID has always allowed for retained counsel to engage in ex parte hearings and obtain funding orders to be paid by SCCID for investigative, expert and other expenses reasonably necessary for the representation of a defendant pursuant to §17-3-50(B) and (C).

In *Reeves v. State* the Court of Appeals found that Reeves’ retained counsel was ineffective for failing to consult with and present expert witnesses at trial to dispute the State’s evidence. In that case retained counsel indicated that he did not consult with expert witnesses because he did not believe that Reeves was financially capable of retaining the services of the experts. In their finding

the appellate court cited *Bailey v. State* and also referenced §17-3-50(B) in finding that counsel was ineffective for not seeking funding to retain expert witnesses on Reeves behalf. *See Reeves v. State*, 415 S.C. 366, 782 S.E.2d 747 (S.C. App. 2015).

The primary argument made by SCCID in objecting to the funding orders that were granted in this matter is that the court erred in finding Mr. Eastwood indigent based solely on the fact that he (or someone on his behalf) was able to retain private counsel to represent him in this matter. SCCID further argued that the funds allocated by the General Assembly to SCCID for the defense of indigent persons can only be used for persons represented by public defenders or court appointed attorneys regardless of their indigent status. Their position is that once a person retains private counsel they can no longer be considered indigent defendants for financial purposes. That argument is fundamentally flawed, and is not cited in any constitutional amendment, article, state statute, rule, or case law. Furthermore, it directly contradicts the language found in §17-3-50, Rule 602 SCARCrImP, and this Court's finding in *Reeves v. State*. Accordingly, the circuit court's finding that Eastwood was indigent at the time the orders were given but is not entitled to funds from Indigent Defense because he was not represented by court appointed counsel is an error of law and is not good cause for SCCID's refusal to comply with the funding orders previously issued by the circuit court.

CONCLUSION

The funding orders in this matter were properly issued by the circuit court upon finding Eastwood was indigent and the requested funds for expert witnesses were reasonable and necessary expenses to ensure a complete and competent defense at trial. Furthermore, SCCID's objection letter is not a proper procedural motion therefore the circuit court lacked jurisdiction to rescind the

funding orders in this matter. Accordingly, the Order Denying the Rule to Show Cause should be reversed.

Respectfully Submitted,

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