ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Richland County
James R. Barber, Circuit Court Judge
Trial Court Case No. 2009GS4006690, 2009GS4006691,
2009GS4006696, 2009GS4006689

EX PARTE: TARA DAWN SHURLING,

APPELLANT,

IN RE: STATE OF SOUTH CAROLINA,

RESPONDENT

V.

ANTHONY HACKSHAW, DEFENDANT

Appellate Case No. 2012-208848

FINAL BRIEF OF RESPONDENT

J. HUGH RYAN, III
General Counsel

S.C. Commission on Indigent Defense
1330 Lady Street, Suite 401
Post Office Box 11433
Columbia, South Carolina 29211-1433

ATTORNEY FOR RESPONDENT

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

APPELLANT'S STATEMENT OF ISSUES ON APPEAL 1

RESPONDENT'S STATEMENT OF ISSUES ON APPEAL 3

RESPONDENT'S STATEMENT OF THE CASE 4

ARGUMENTS

I

Whether Judge Barber correctly ruled that Appellant should be limited to $15,000 in attorney's fees, in conjunction with the prior order of Judge Childs limiting payments to $15,000 without further advance approval of the court?. 5

II

Whether Judge Barber should be required to allow the Appellant to contact Judge Childs, or to contact Judge Childs himself, regarding her intent when she signed the order drafted by Appellant concerning attorney's fees and costs? 9

III

Whether Judge Barber abused his discretion in handling the payment of expenses in this case? 11

IV

Whether the brief of appellant complies with the Appellate Court rules in regards to the argument on takings, since the brief contains no reference to the matter in the statement of issues on appeal, and furthermore the argument on the merits is unsupported by the record? 13

CONCLUSION 16

TABLE OF AUTHORITIES

Cases

Brown v. DHEC, 349 S.C. 507, 560 S.E.2d 410 (2002).. 6

Ex Parte Brown, 393 S.C. 214, 711 S.E.2d 899 (2011).. 14, 15

Mid-State Auto Auction v. Altman, 324 S.C. 65, 476 S.E.2d 690 (1996).. 6

Salmonsen v. CGD, Inc. et. al., 377 S.C. 442, 661 S.E.2d 481 (2008).. 5

State v. Crocker, 366 S.C. 394, 621 S.E.2d 890 (Ct. App. 2005).. 13

State v. Meggett, 398 S.C. 516, 728 S.E.2d 492 (Ct. App. 2012).. 5

Statutes

S.C. Code Ann. § 17-3-50.. passim

Other Authorities

American Heritage Dictionary of the English Language.. 7

Rules

Rule 208(b)(1)(B), SCACR.. 13

Rule 220(c), SCACR.. 13

APPELLANT'S STATEMENT OF ISSUES ON APPEAL

I

Does S.C. Code Ann. § 17-3-50, (C) require advance approval of fees in excess of the statutory cap?

II

Did the lower court err in interpreting the previous order of the Chief Administrative Judge to limit total fees in this murder case to $15,000.00 regardless of the circumstances which developed subsequent to the date of that order?

III

Did the lower court err in interpreting the previous order of the Chief Administrative Judge pre-approving fees up to $15,000.00 in this murder case to mean that Appellant's total fees for this case could not exceed that figure without advance approval of the court?

IV

Did the lower court abuse its discretion by refusing to allow Appellant leave to seek clarification from the former Chief Administrative Judge regarding her intent in signing the fee order in dispute?

V

Did the lower court abuse its discretion by declining to contact former Chief Administrative Judge J. Michelle Childs to seek clarification from her regarding her recollection of this case and her intent in signing the fee order in dispute?

VI

Did the lower court abuse its discretion in declining to authorize payment of expenses which total less than the amount authorized in advance by the former Chief Administrative Judge?

VII

Did the lower court abuse its discretion in declining to authorize payment of expenses which totaled $186.58 more than the total authorized in advance by former Chief Administrative Judge even if the total expended in this case takes into account additional expenses approved by subsequent order of another Chief Administrative Judge?

VIII

Did the lower court abuse its discretion in declining to authorize payment of Appellant's expenses which totaled less than the amount authorized in advance by the former Chief Administrative Judge, but exceeded the amount authorized for a certain category of expenses, where the South Carolina Commission on Indigent Defense routinely pays expenses authorized at the end of a case by the trial judge and regularly pays expenses of up to $500.00 without any court order approving those expenses?

RESPONDENT'S STATEMENT OF ISSUES ON APPEAL

I

Whether Judge Barber correctly ruled that Appellant should be limited to $15,000 in attorney's fees, in conjunction with the prior order of Judge Childs limiting payments to $15,000 without further advance approval of the court?

II

Whether Judge Barber should be required to allow the Appellant to contact Judge Childs, or to contact Judge Childs himself, regarding her intent when she signed the order drafted by Appellant concerning attorney's fees and costs?

III

Whether Judge Barber abused his discretion in handling the payment of expenses in this case?

IV

Whether the brief of appellant complies with the Appellate Court rules in regards to the argument on takings, since the brief contains no reference to the matter in the statement of issues on appeal, and furthermore the argument on the merits is unsupported by the record?

RESPONDENT'S STATEMENT OF THE CASE

Appellant (hereafter referred to as "Attorney Shurling") was court-appointed for the underlying criminal prosecution for murder and other offenses. The Honorable J. Michelle Childs signed an order "nunc pro tunc – Date of Appointment" concerning attorney fees. She also signed an order for General Expenses dated March 4, 2010. The criminal case was tried, and Mr. Hackshaw was convicted of murder and other charges in or about November, 2010.

On October 31, 2011, Counsel submitted requests for payment of attorney fees in the amount of $44,426 and expenses in the amount of $1,962.66. R. p. 131, ll. 9-16. Hearings were conducted by Judge Barber on January 4, 2012, and January 24, 2012 regarding Attorney Shurling's requests for attorney fees and expenses. Judge Barber issued his order on January 25, 2012 denying Attorney Shurling's request for attorney fees in excess of the $15,000 approved by Judge Childs and expenses in excess of the $1,500 approved by Judge Childs.

Attorney Shurling filed a Motion to Reconsider Order for Payment of Fees and Expenses which was dated February 6, 2012. Judge Barber issued his order denying her Motion to Reconsider on February 14, 2012. Attorney Shurling has appealed.

ARGUMENTS

I

Whether Judge Barber correctly ruled that Attorney Shurling should be limited to $15,000 in attorney's fees, in conjunction with the prior order of Judge Childs limiting payments to $15,000 without further advance approval of the court?

This argument will address issues I - III from Attorney Shurling's statement of issues on appeal. Judge Childs signed an order which held "Counsel may submit for approval by the court a voucher for payment of fees up to $15,000 without further advance approval of this Court." R. p. 123-125. The order was dated *nunc pro tunc* as of the date of appointment of counsel. Counsel did not follow this order and seek any advance approval for additional fees. Furthermore, nothing was ever received in regard to this order. R. p. 166, l. 21 – p. 167, l. 3. No motion to reconsider this order was entered. Attorney Shurling candidly admitted that the order signed by Judge Childs was drafted by her. R. p. 178, ll. 1-2. A party cannot complain of a purported error which its own conduct has induced. e.g. State v. Meggett, 398 S.C. 516, 728 S.E.2d 492, 496 (Ct. App. 2012).

As shown, the record does not reflect that any objection was made to the order of Judge Childs, or that she was asked to reconsider it in light of the arguments later presented. Judge Barber would not have the authority to overturn the order of Judge Childs and thus the $15,000 limit on fees established by Judge Childs stands as the law of the case. See generally Salmonsen v. CGD, Inc. et. al., 377 S.C. 442 at 454, 661 S.E.2d 481 at 88 (2008). As Judge Barber stated: The Judge's [Childs] order speaks for itself. R. p. 139, ll. 17-18.

The South Carolina Commission on Indigent Defense (hereafter referred to as "SCCID") asserts that the argument raised by Attorney Shurling regarding whether advance

approval of fees in excess of the statutory cap is required under S.C. Code Ann. § 17-3-50 (C) is not an issue in this matter. Judge Childs properly exercising her authority and discretion specifically ordered that advance approval was required to exceed the increased cap of $15,000.

However assuming arguendo that an analysis of §17-3-50 is even applicable, SCCID does not agree with the statutory interpretation advocated by Attorney Shurling. In construing statutes courts are not to consider a particular clause in isolation but in the context of the purpose of the whole statute. Mid-State Auto Auction v. Altman, 324 S.C. 65, 476 S.E.2d 690 (1996). Attorney Shurling is asking the Court to consider the clause in 17-3-50(C) that "payment in excess of the limit is appropriate because the services provided were reasonably and necessarily incurred" in isolation. She is asking the Court to only consider this last phrase found in S.C. Code Ann.17-3-50(C). SCCID agrees the last nine (9) words in Section C are in the past tense. However after examining the whole statute, the correct interpretation of the statute is that prior approval is required for expenses and fees exceeding the statutory caps. Courts generally give deference to an administrative agency's interpretation of its own statute. Brown v. DHEC, 349 S.C. 507, 560 S.E.2d 410 (2002). S.C. Code Ann. § 17-3-50 provides:

> (A) When private counsel is appointed pursuant to this chapter, he must be paid a reasonable fee to be determined on the basis of forty dollars an hour for time spent out of court and sixty dollars an hour for time spent in court. The same hourly rates apply in post-conviction proceedings. Compensation may not exceed three thousand five hundred dollars in a case in which one or more felonies is charged and one thousand dollars in a case in which only misdemeanors are charged. Compensation must be paid from funds available to the Office of Indigent Defense for the defense of indigents represented by court-appointed,

> private counsel. The same basis must be employed to determine the value of services provided by the office of the public defender for purposes of Section 17-3-40.
>
> (B) 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.
>
> (C) 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.

The entire language in Section B and the majority of Section C supports prior approval. Attorney Shurling in her brief acknowledges that S.C. Code Ann. § 17-3-50(B) arguably requires advance approval for certain expenses. Brief of Appellant, p. 15 (italics in original)

The word authorize means: to grant authority, to give permission for; sanction.[1] The idea of giving permission involves having something approved before it takes place. The statute also speaks of this authorization in the context seeking to ensure effective assistance of counsel. Seeking to ensure the effective assistance of counsel implies these issues will be addressed before the actual representation. It is too late to try and ensure the effective assistance of counsel after the matter is already complete. It is only logical that counsel would be more effective if counsel had prior assurance from a court that her

---

[1] The American Heritage Dictionary of the English Language

fee could exceed the statutory cap, up to an amount authorized by the court, rather than only hoping after the fact she is allowed to exceed the cap.

Also, without prior approval being required to exceed the statutory cap there would in essence be no statutory cap. 17-3-50(A) specifically states that "compensation may not exceed three thousand five hundred dollars in a case in which one or more felonies are charged." (emphasis added) If counsel could automatically exceed the cap, then an important step in the process of judges and SCCID being able to monitor and ensure resources are being properly and effectively expended would be by-passed. Situations such, as the instant one, will arise where SCCID and the judge believe only a maximum of $15,000 in state funds will be necessary, only to find out later that fees in excess of $44,000 are being sought. SCCID would submit it benefits all parties involved to address these matters on the front end so a proper allocation of limited State resources can be made and attorneys understand the fees they may or may not be entitled to.

Judge Barber described the process familiar to the Court:

> I've never had anybody submit a case after the fact saying I need to be paid more than $3,500. I've had them ahead of time say it's going to take more than $3,500 worth of time and I would like to get approval for something in excess of that up to this amount, which you did.

R. p. 145, ll. 19-24.

II

Whether Judge Barber should be required to allow Attorney Shurling to contact Judge Childs, or to contact Judge Childs himself, regarding her intent when she signed the order drafted by Attorney Shurling concerning attorney's fees and costs?

In issues IV and V, Attorney Shurling argues that Judge Barber committed an error by not permitting her to call Judge Childs, or calling Judge Childs himself, to interpret her order, discussed in pertinent part above. Brief of Appellant, p. 4. SCCID is not aware of any precedent, and Attorney Shurling does not cite to any such, that it is error or reversible error for a circuit judge not to contact another judge to obtain their verbal recollection and interpretation of a prior order. Nor does there appear to be any precedent that would require the judge to permit counsel in a proceeding to call the judge who issued a prior ruling to discuss their purported intent in writing it.

Furthermore:

> THE COURT: That's correct. And I read that, any additional funds over $15,000, you have to have advance approval.
>
> MS. SHURLING: And I would respectfully object to that.
>
> THE COURT: And I don't see anywhere that that was done.
>
> MS. SHURLING: Well, with all due respect, I wrote the order, I know the intent.
>
> The intent was that - -
>
> THE COURT: Well, that was your intent. I don't know what the judge's intent was. The judge's order speaks for itself. (emphasis added)

R. p. 139, ll. 6-18. It would be an unworkable situation if counsel could force a judge to contact one who had issued a prior order in a case for an interpretation of the order. Judge Barber committed no error by not contacting Judge Childs, or allowing Attorney Shurling to do so directly.

III

Whether Judge Barber abused his discretion in handling the payment of expenses in this case?

This issue will address Attorney Shurling's issues VI, VII, and VIII as set forth in her statement of issues on appeal at page 4 of the brief. In his order of January 25, 2012, Judge Barber authorized the payment of $1,500 for expenses to Attorney Shurling for this case. R. p. 188. Judge Childs' order on expenses was separate from the one discussed above concerning attorney's fees, it was signed on March 4, 2010, and that order specifically authorized expenses of $1,000 for witness fees and mileage and additional expenses up to $1,500 was allowed without additional authorization of the court. The order of Judge Childs further provided that:

> This order expressly authorizes payment of any expenses already incurred by counsel prior to the date of this order provided the total expenditure does not exceed the limits set herein, $1,000 for witness fees and expenses and $1,500 for all other expenses incurred. Total expenses shall not exceed $2,500 without prior authorization from this court. (emphasis added) R. p. 126.

There is no contention here that Counsel sought any prior approval for expense reimbursement in excess of $1,500 in general expenses. Attorney Shurling does not dispute that the $1,962.66 falls within this category of $1,500 for general expenses. While Judge Childs' order is very specific in breaking the expenses into two distinct categories, Attorney Shurling attempts to merge these categories and use the combined cap of $2,500 provided for total expenses.

As previously argued in this brief concerning the issue of attorney's fees, SCCID does not believe the issue of whether prior approval of expenses is required under S.C.

Code Ann. § 17-3-50 is even an issue before the Court. The issue is simply that Judge Childs established that prior approval to exceed the expense caps was required. That is the law of the case as it pertains to the issue of prior approval. It was established in an order counsel drafted and never complained of until well after the trial ended.

However, again assuming arguendo this analysis is applicable, S.C. Code Ann. § 17-3-50(B) requires prior approval of expenses. S.C. Code Ann. § 17-3-50(B), notes that the court shall authorize "the defendant's attorney <u>to obtain</u> such services on behalf of the defendant" upon a finding of necessity. S.C. Code Ann. § 17-3-50(B). (Emphasis added) This is against a statutory cap of $500. The authorization to obtain the services, by reasonable interpretation, would indicate that advance approval is to be obtained by the attorney before incurring expenses. Attorney Shurling argues that S.C. Code Ann. § 17-3-50(C) provides a court can find after the fact that payment in excess of the limits can be made. However, this analysis would lead to the absurd result that you have to have prior approval of expenses up to $500 as established in S.C. Code Ann. § 17-3-50(B), yet any amount beyond the $500 can be approved after the fact under 17-3-50(C), even though it may involve considerably greater expenses.

The controlling statute is quite clear, as was the order of Judge Childs, to which no objection was made at the time it was rendered. Nothing in the record or argument indicates that Counsel was prevented from complying with the order requiring approval of expenses. As Judge Barber noted in colloquy, the order in question required additional approval and that none was sought here. R. p. 181, l. 18 – p. 182, l. 3.

IV

<u>Whether the brief of appellant complies with the Appellate Court rules in regards to the argument on takings, since the brief contains no reference to the matter in the statement of issues on appeal, and furthermore the argument on the merits is unsupported by the record?</u>

In the brief of Attorney Shurling at page 9-10, an argument is made that the limitation placed on her fee request would amount to an unconstitutional taking. Brief of Appellant, pp. 9-10. A review of the statement of issues on appeal, Brief of Appellant at p. 4, indicates no challenge to the order under appeal based upon a constitutional theory of taking. Appellate Rule 208(b)(1)(B), SCACR, provides that "Ordinarily, no point will be considered which is not set forth in the statement of issues on appeal." The brief of appellant does not comply with this rule, and the Court should therefore not consider the takings argument. <u>See</u> <u>State v. Crocker</u>, 366 S.C. 394, 621 S.E.2d 890 (Ct. App. 2005). Court Rule 220(c) notes that the Appellate Court may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal. Moreover, Rule 208(b)(1)(B) provides that "at the head of each part [of an argument], the particular issue to be addressed shall be set forth in distinctive type, followed by discussion and citations of authority." Particularly with regard to a constitutional issue, this rule should also have been complied with.

In any event, the argument concerning the takings appears to have been pegged to the office overhead of Attorney Shurling. No evidence was submitted concerning Attorney Shurling's office overhead, referred to at page 9 of Attorney Shurling's brief. Furthermore, it would not appear that pegging constitutionally mandated compensation to a particular law

office's overhead would be the proper manner of inquiry. Rather, as the Court stated in Ex Parte Brown, 393 S.C. 214, 711 S.E.2d 899 (2011):

> We decline to set bright-line rules, as we believe the better approach is to defer to the broad discretion of our able trial courts in addressing such claims on a case-by-case basis. The question of the taking is one of law. The question of what constitutes a fair attorney's fee under the circumstances would be one of fact, subject to an abuse of discretion standard of review.

The Court here approved a payment of $15,000 for fees, and $1,500 for expenses. See Order of Judge Barber dated January 25, 2012, R. p. 188. Judge Barber's Order therefore approved attorney's fees for more than four times the statutory cap of $3500 (S.C. Code Ann. § 17-3-50). The record reflects that the fee of over $44,000 requested by Attorney Shurling is significantly above the average fee of $8,100 for the murder/manslaughter category of cases. Court Exhibit 3, R. p. 211. Only three murder/manslaughter category cases submitted to SCCID have exceeded $20,000 in fees with a maximum of $25,000 since fiscal year 2008. R. p. 172, ll. 14-23.

Attorney Shurling asserts the lower court did not expressly find her fees were unreasonable and cites language that Judge Barber specifically stated he was not finding the $100 per hour was either reasonable or unreasonable and that he also acknowledges a rate of $60 and $40 was not reasonable. Brief of Appellant, p. 10.

However, Judge Barber was only addressing the hourly rate and not Attorney Shurling's total fee. Therefore any implication that this language somehow supports the argument that Attorney Shurling's total fees were reasonable is not correct. The question is whether the total fee of over $44,000 was reasonable. On that issue Judge Barber states:

> I would also say that when I saw the $44,000 charge I was amazed at that, and as a result, that's why I think, you know I asked Judge Newman to look at it.

R. p. 136, ll. 17-20.

The Court further stated:

> Basically you're saying, "Let me go do whatever I want to do in this case, carte blanche. This is going to be my stimulus package for my law firm because I don't need any approval."
>
> We know what we are dealing with when we're dealing with $3,500 or we're dealing with $15,000 of dealing with whatever you ask me.

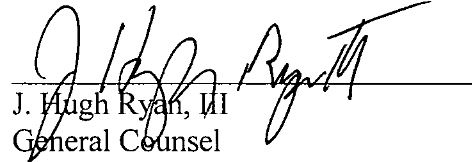
R. p. 141, ll. 8-14.

The record here simply does not reflect an abuse of the broad discretion afforded the trial courts, nor does it support a ruling that there has been an unconstitutional taking of Attorney Shurling's property. Nothing in Brown suggests that a finding of a reasonable attorney's fee or taking should somehow be pegged to law office overhead, which in any event was not entered into the record of this case. The order of Judge Barber granting Attorney Shurling a $15,000 attorney fee and $1,500 for expenses should be, therefore, affirmed as the record establishes that Judge Barber did not abuse his discretion.

CONCLUSION

The Court is asked to affirm the order of Judge Barber as to attorney's fees and expenses.

Respectfully submitted,



J. Hugh Ryan, III
General Counsel

S.C. Commission on Indigent Defense
1330 Lady Street, Suite 401
Post Office Box 11433
Columbia, South Carolina 29211-1433

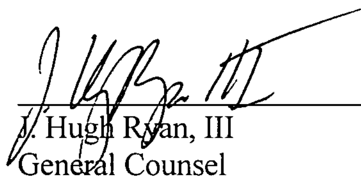
ATTORNEY FOR RESPONDENT

This 28th day of August, 2013.

CERTIFICATE OF COUNSEL

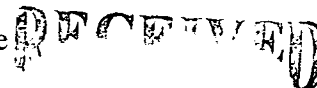
The undersigned certifies that to the best of my ability this Final Brief of Respondent complies with Rule 211(b), SCACR.

August 28th, 2013



J. Hugh Ryan, III
General Counsel

S.C. Commission on Indigent Defense
1330 Lady Street, Suite 401
Post Office Box 11433
Columbia, South Carolina 29211-1433



AUG 2 8 2013
SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Richland County
James R. Barber, Circuit Court Judge
Trial Court Case No. 2009GS4006690, 2009GS4006691,
2009GS4006696, 2009GS4006689

RECEIVED
AUG 28 2013
SC Court of Appeals

EX PARTE: TARA DAWN SHURLING,

APPELLANT,

IN RE: STATE OF SOUTH CAROLINA,

RESPONDENT

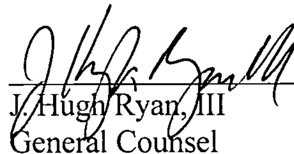
V.

ANTHONY HACKSHAW, DEFENDANT

Appellate Case No. 2012-208848

CERTIFICATE OF SERVICE

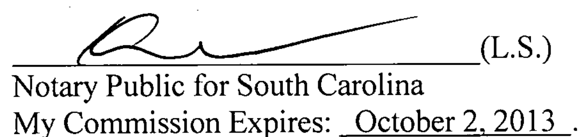
The undersigned attorney hereby certifies that a true copy of the Final Brief of Respondent in the above referenced case has been served upon Tara Dawn Shurling, Esquire, at 3614 Landmark Drive, Suite D, Columbia, SC 29204, this 28th day of August, 2013.



J. Hugh Ryan, III
General Counsel

ATTORNEY FOR RESPONDENT

SUBSCRIBED AND SWORN TO before me
this 28th day of August, 2013.



(L.S.)
Notary Public for South Carolina
My Commission Expires: October 2, 2013 .