RENDERED: FEBRUARY 25, 2005; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-001197-MR

ROGER VAUGHN — APPELLANT

v.

APPEAL FROM LAUREL CIRCUIT COURT
HONORABLE RODERICK MESSER, JUDGE
ACTION NOS. 01-CR-00010 & 01-CR-00064

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
VACATING AND REMANDING

** ** ** ** **

BEFORE: COMBS, CHIEF JUDGE; BARBER AND BUCKINGHAM, JUDGES.

BARBER, JUDGE: Appellant, Roger Vaughn (Vaughn), appeals the Laurel Circuit Court's denial of payment for the services of an investigator, which were authorized by the court in advance. We vacate the court's order denying payment of the investigator, and remand for a determination of the reasonable and necessary nature of the expenses charged.

Vaughn was charged with assault in the first degree, wanton endangerment in the first degree, and being a persistent felony offender in the first degree. Defense counsel requested

and received authorization to incur expenses for an investigator. The court's order permitted defense counsel to utilize an investigator provided that a detailed billing was submitted, and expenditures did not exceed $5,000.00. An investigator was retained and provided services to the defense. The final bill for all investigative expenses was $4999.66. Vaughn pleaded guilty to the assault charge, and the other charges were dismissed. Defense counsel then submitted the investigator's bill to the court. The court authorized payment for only half the bill, allowing payment of $2,500.00 on September 24, 2001.

The investigator submitted an affidavit showing expenses incurred, and a bill, requesting payment of the remaining balance of $2,499.66. The court refused to authorize payment of the balance due and owing, and entered an order so showing on April 17, 2002. In its order the court stated that some of the entries on the bill were "very general in nature," and refused to authorize payment for that reason. The court did not detail which entries he found overly general, with the exception of the entry "attempt to locate and interview witnesses." The court's final determination was made without benefit of a hearing. The court made his order of April, 2002, final and appealable. It is this order which was appealed from.

Vaughn argues that as the court authorized the use of an investigator, and pre-approved investigative expenses up to the sum of $5,000.00, the court was required to approve payment of all reasonable and necessary expenses incurred. Vaughn requested and received pre-approval of the costs, as suggested in McCracken County Fiscal Court v. Graves, 885 S.W.2d 307, 312 (Ky. 1994).

In denying payment of the expenses, the court did not find that the expenses were not reasonable or necessary. Vaughn contends that the court's denial was an abuse of discretion. The court disallowed certain items on the expense report, but the specific items disallowed were not listed by the court. The items addressed by the court as being "too general" do not add up to the sum of expenses which were disallowed. Vaughn argues that this shows that the court was not acting properly in denying the expenses. The court gave the example of "attempting to locate witnesses to interview" as an invalid expense, and disallowed payment therefore. That expense was considerably less than the amount denied by the court. The court did not explain its disallowance of the remaining charges. With the exception of entries on the bill listed as "attempt to locate and interview witnesses," all other entries on the bill submitted are detailed, and contain specific information about

the action taken and the witness or documentary evidence to which such action related.

Vaughn asserts that locating witnesses was a reasonable and necessary service of the investigator, and expenses, therefore, were appropriate and should have been paid. Vaughn reminds this body that it is essential to locate witnesses as part of pre-trial preparation, and that the difficulty of locating such witnesses was one of the reasons the services of the investigator were requested. As the witnesses were not located, the investigator could not make those portions of his report more detailed. Often, such expenses are followed by expenses for interviewing named witnesses. Apparently, the attempt to locate witnesses was sometimes successful.

Vaughn argues that he was entitled to a hearing regarding the reasonable and necessary nature of the expenses prior to the court's entry of a final order disallowing half the expenses billed. This is particularly so where, as here, the court is objecting to certain items as not reasonable, or unnecessary for trial preparation. The bill at issue is four pages long and contains numerous separate entries for services rendered. In the "motion to pay additional amounts previously authorized for defense counsel to hire an investigator," defense counsel detailed the reasonable and necessary nature of the investigation, stating "the investigator worked diligently to

assist in the defense of this client." The investigator filed an affidavit which states that "the work indicated on the attached invoices was necessary and performed in good faith for the Laurel Circuit Court. . . ." The Commonwealth did not file a response to the motion.

Kentucky law mandates payment of reasonable and necessary defense expenses on behalf of an indigent defendant. Binion v. Commonwealth, 891 S.W.2d 383, 384 (Ky. 1995); McCracken Fiscal Court v. Graves, 855 S.W.2d 307, 314 (Ky. 1994). To disallow payment of half of the submitted expenses without a hearing to determine the reasonable and necessary nature of those expenses, is unfair and improper. Such a ruling may have a chilling effect on the ability of indigent defendants to obtain reasonable and necessary assistance with pre-trial preparation of a defense. For this reason, the court's denial of expenses, in the absence of a request for a more detailed accounting, constitutes reversible error.

The Commonwealth utterly fails to respond to the issue raised by Vaughn. The Commonwealth argues that as the motion for full payment was not made until April, 2002, it was untimely. The court granted partial payment of the invoice in September, 2001. That "Order to be Paid" was not made final or appealable by the court. That order was not a "judgment" making the case final, or depriving the court of jurisdiction over the

action. Following the filing of Vaughn's motion for full payment of the invoice, the court made a ruling it detailed as "final and appealable." It was not until that point that the matter was ripe for appeal. A timely appeal was taken from that order. Therefore, the appeal was timely filed.

The Commonwealth next asserts that the public defender should have been made a party to the appeal, and contends that the appeal should be dismissed for failure to name an indispensable party. In support of this contention, the Commonwealth cites McCracken Fiscal Court v. Graves, 855 S.W.2d 307, 314 (Ky. 1994). As is apparent from the style of that case, the public defender is not a party to the action, which was similar to the one before us today. As the Kentucky Supreme Court has made clear, the interested party in a case where an indigent defendant seeks funds to pay for reasonable and necessary defense preparation is the defendant himself. Binion v. Commonwealth, 891 S.W.2d 383, 384 (Ky. 1995). To require defense counsel to be made a party to such appeals is improper. Such a requirement would hamper judicial process, and place an additional burden upon those charged with defense of indigent defendants. We deny the Commonwealth's request for dismissal for failure to name an indispensable party.

The judgment of the Laurel Circuit Court is vacated and remanded for findings consistent with this Opinion.

ALL CONCUR.

BRIEF FOR APPELLANT:

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