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TO BE PUBLISHED

# Commonwealth of Kentucky

## Court of Appeals

NO. 2009-CA-000502-MR

BRYCE BONNER

APPELLANT

APPEAL FROM JEFFERSON CIRCUIT COURT  
v. HONORABLE JUDITH E. MCDONALD-BURKMAN, JUDGE  
ACTION NO. 04-CR-001298

COMMONWEALTH OF KENTUCKY

APPELLEE

### OPINION REVERSING AND REMANDING

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BEFORE: STUMBO AND THOMPSON, JUDGES; SHAKE,<sup>1</sup> SENIOR JUDGE.

THOMPSON, JUDGE: This is an appeal from a Jefferson Circuit Court order that denied a motion for costs related to a DNA analysis and expert services provided for Bryce Bonner's criminal defense despite the court's earlier finding that Bonner was indigent and entitled to have DNA testing and analysis paid pursuant to KRS 31.110(1)(b).

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<sup>1</sup> Senior Judge Ann O'Malley Shake sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

KRS 31.110 is part of the comprehensive statutory scheme governing the Commonwealth's public defender system contained in KRS Chapter 31. KRS 31.110(1)(a) provides that a needy person is entitled: "To be represented by an attorney to the same extent as a person having his or her own counsel is so entitled[.]" Consistent with that assurance, subsection (1)(b) provides that the needy person is "[t]o be provided with the necessary services and facilities of representation including investigation and other preparation." The issue presented is whether the trial court had authority to rescind its prior orders finding that Bonner was entitled to KRS Chapter 31 funds.

In 2005, after Bonner was charged with multiple counts of rape, robbery, burglary, kidnapping, and unlawful imprisonment, he submitted an affidavit of indigency and requested relief pursuant to KRS 31.110(1)(b). Because a relative had selected and paid for private counsel to represent Bonner, he did not seek the appointment of counsel but sought to have DNA testing paid in preparation for his defense.

At an indigency hearing, Bonner testified regarding his income and financial resources. Subsequently, the trial court issued an order granting Bonner indigency status for the purposes of KRS 31.110(1)(b). However, the various laboratory services providers contacted by defense counsel requested additional assurance from the court that payment would be made. Thus, defense counsel sought a clarification of the trial court's order.

On March 31, 2005, the trial court issued an order again finding that Bonner was entitled to expert expenses pursuant KRS 31.110(1)(b) and, specifically, “DNA analysis and any testimony regarding same.” However, the laboratory that agreed to provide the services, DNA Diagnostic Center, required a more specific order before commencing the DNA testing. Thus, on April 12, 2005, the trial court issued yet another order that stated:

The Court having GRANTED Defendant, Bryce Bonner, indigency status for purposes of KRS 31.110(1)(b). Under KRS 31.110(b), the Commonwealth shall pay for the DNA analysis. The bill for the DNA analysis services, to be conducted by DNA Diagnostic Center, 205 Corporate Court, Fairfield, Ohio 45014, shall be paid by Jefferson County, Kentucky, Fiscal Court, 531 Court Place, Louisville, Kentucky 40202.

In reliance on the trial court’s explicit language, defense counsel secured DNA Diagnostic Center’s services and from September 29, 2005, through March 10, 2006, the requested services were rendered.<sup>2</sup> After completion, an invoice for \$2,875 was presented to the Jefferson County Fiscal Court.

Although the Jefferson County Fiscal Court did not object to the trial court’s order requiring it to pay DNA Diagnostic Center, it refused to pay the invoice.<sup>3</sup> After the fiscal court refused to pay, defense counsel sought directive from the trial court regarding responsibility for payment.

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<sup>2</sup> A jury trial commenced on March 14, 2006. Bonner was found guilty of two counts of first-degree rape, two counts of first-degree robbery, two counts of kidnapping, two counts of first-degree burglary and two counts of unlawful imprisonment. A final judgment and sentence was entered on June 1, 2006.

<sup>3</sup> Because the fiscal court did not formally object to the circuit court’s order, we can only assume that its reason was its belief that under the current statutory scheme, it was not responsible for payment.

On April 13, 2006, over one year after the trial court's initial finding and order that Bonner was indigent and ordering KRS 31.110(1)(b) expenses, the trial court rescinded its prior orders. Without conducting a further evidentiary hearing concerning Bonner's indigency, the trial court held that because private counsel represented Bonner, he was not entitled to expert expenses pursuant to KRS Chapter 31.

Following receipt of the trial court's order, defense counsel forwarded a copy to DNA Diagnostic Center. However, DNA Diagnostic Center did not pursue payment for the services rendered until March 13, 2008, when defense counsel received an invoice. Thus, on March 26, 2008, defense counsel filed a CR 60.02 motion requesting that the court enforce its orders entered on March 31, 2005, and April 12, 2005, requiring payment to DNA Diagnostic Center by the fiscal court. The Commonwealth did not object to the motion.

Despite its previous orders and no objection by the Commonwealth, the trial court denied the motion on the basis that counsel was not a party in interest and, therefore, had no standing to seek CR 60.02 relief. It further found that the facts and circumstances did not rise to the level necessary to merit granting extraordinary post-judgment relief. Finally, because Bonner was represented by private counsel, the trial court concluded that Bonner should pay the expert's expenses.

Initially, we address the issue of standing. The issue was not presented by the Commonwealth below and is not presented to this Court by the

Commonwealth. Nevertheless, because the trial court found that defense counsel lacked standing, comment is necessary.

Apparently, the trial court construed the motion to be pursued for the benefit of defense counsel based on counsel's statement that DNA Diagnostic Center sent her the invoice. However, the issue presented by the motion was whether the trial court's orders issued prior to the DNA testing and analysis entitling Bonner to KRS 31.110(1)(b) funding could be rescinded by the court's subsequent order. The defendant is the interested party where an indigent defendant seeks funds to pay for reasonable and necessary defense preparation. Thus, defense counsel properly pursued the motion naming Bonner as the movant. Therefore, the trial court's finding that defense counsel lacked standing is without a factual or legal basis.

The Commonwealth presents a single argument to this Court. It contends that defense counsel improperly filed a CR 60.02 motion and, instead, was required to file a writ of mandamus seeking compliance with the trial court's orders. However, because the Commonwealth did not object to the CR 60.02 motion, the issue it presents to this Court is waived. *Grundy v. Commonwealth*, 25 S.W.3d 76, 84 (Ky. 2000).

Before discussing the substantive issue presented, clarification is useful. There is no issue presented regarding whether DNA Diagnostic Center's fees were reasonable and necessary and no evidence that Bonner was not indigent when the trial court rescinded its prior orders finding him entitled to KRS 31.110(1)(b)

funds. Moreover, we do not address whether Bonner was precluded from seeking KRS 31.110(1)(b) funds because he had private counsel. The issue presented is straight-forward: When is a trial court's determination that a defendant is no longer entitled to KRS Chapter 31 indigency status effective? Although the current fact situation differs, we have guidance from this Court's decision in *Department of Public Advocacy Com. of Ky. v. Patrick*, 765 S.W.2d 36 (Ky.App. 1989).

In that case, the Department of Public Advocacy (DPA) appealed a judgment ordering it to pay an attorney for a defendant's representation. DPA contended that the trial court acted outside its authority and jurisdiction because it previously found the defendant ineligible for indigency status. This Court held that although pursuant to KRS 31.120 the trial court was required to determine indigency at each stage of the proceedings, absent evidence that the defendant's indigency status had changed, the trial court was without statutory authority to reconsider its prior indigency order. *Id.* at 37.

*McCracken County Fiscal Court v. Graves*, 885 S.W.2d 307 (Ky. 1994), also guides our decision. The Court addressed the question of "who must pay" for expert witness fees incurred on behalf of indigent defendants.<sup>4</sup> Relevant to our discussion, the Court advised that defense counsel should seek advance authorization for payment of KRS 31.110 expenses.

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<sup>4</sup> The case was decided prior to the 2002 amendments to KRS Chapter 31, including the repeal of KRS 31.200 entitled, "Expenses chargeable to county and to public advocate."

Furthermore, we cannot overstate the importance of the process of *advance authorization*. With this opinion, we hold that it is the duty of trial counsel (as counsel did in this case) to move for advance authorization of expenses which he considers properly chargeable to the county under the law as we have stated it. Likewise, we declare it to be the duty of the trial court to attempt to specifically and timely find that an expense is “reasonable and necessary,” or not. Employing the KRS 31.110(1)(a) guideline suggested above, this determination should be made in accordance with other applicable law and independently of the question of who must pay. If a trial judge is unable to grant or deny pre-authorization, he must state his reasons in writing for the record.

The object, of course, is to significantly lessen the need for post-trial proceedings to determine whether services already provided were reasonable and necessary. The advantages to all parties are obvious. A before-the-fact ruling ensures prompt payment to individuals or facilities to whom compensation is due. (An expert witness should not “have a dog in this fight,” and be forced to hire a lawyer to represent his interests at a post-trial hearing, as happened here.) It also eliminates the risk a public advocate faces in deciding whether to incur an expense absent pre-authorization. We suspect it will reduce the number of “fishing expeditions” in which the defense may be tempted to engage. By now, the point should be clear.

*Id.* at 314 (footnote omitted).

Bonner’s defense counsel followed the Supreme Court’s directive and obtained advance authorization for DNA testing and analysis. As added assurance that the expenses would be paid, counsel obtained an order specifically directing that the expenses be paid to DNA Diagnostic Center. Yet, without a finding that Bonner’s indigency status had changed, the trial court rescinded its prior orders

creating precisely the post-trial proceedings sought to be avoided by advance authorization. This is not only an inefficient result, but one that could chill defense counsel's ability to prepare an adequate defense.

We conclude that a court has no authority to rescind its prior orders approving expenses for indigent defendants. The logic of only prospective application of such orders is obvious: Counsel and experts who act in good faith must be able to rely on the court's order approving expenses. Otherwise, counsel's efforts to provide a defense for the indigent defendant can be chilled by the inability to obtain experts and the risk faced in deciding whether to incur an expense. *Id.* Thus, if after a hearing pursuant to KRS 31.120, the trial court determines that a defendant is no longer indigent, its order can operate only prospectively.

Under the circumstances, we conclude that the trial court abused its discretion when it denied Bonner's CR 60.02(f) motion. *White v. Commonwealth*, 32 S.W.3d 83, 86 (Ky.App. 2000)(the standard of review upon the denial of a CR 60.02 motion is an abuse of discretion). The trial court was without authority to rescind its prior orders finding that Bonner is indigent and entitled to expert expenses incurred for DNA testing and analysis. As the facts and issues are presented to this Court, there is no issue presented as to "who should pay" and, therefore, we do not address whether the trial court properly ordered the Jefferson County Fiscal Court to pay DNA Diagnostic Center.<sup>5</sup>

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<sup>5</sup> The Office of the Louisville Metro Public Defender is organized pursuant to KRS 31.060 which provides:



Upon remand, the order requiring payment by the Jefferson County Fiscal Court shall be reinstated. Any objection by the fiscal court to the trial court's order shall be made by an appropriate timely motion in the Jefferson Circuit Court and, if necessary, by DPA and the Office of the Louisville Metro Public Defender joined to represent their interests. If the Jefferson County Fiscal Court continues to deny payment or intervene, then the trial court shall issue a show cause order for contempt for failure to pay.

Based on the foregoing, the order of the Jefferson Circuit Court is reversed, and the case remanded for further proceedings.

STUMBO, JUDGE, CONCURS.

SHAKE, SENIOR JUDGE, DISSENTS AND FILES SEPARATE  
OPINION.

SHAKE, SENIOR JUDGE, DISSENTING: I respectfully dissent.

The propriety of the orders denying the very relief granted by three previous orders should have been addressed on the direct appeal. The orders about which error is

(1) Each county, urban-county, charter county, and consolidated local government with a judicial district containing ten (10) or more Circuit Judges shall establish and maintain an office of public advocacy and submit a plan for the operation thereof to the Department of Public Advocacy. If the plan submitted is approved by the Department of Public Advocacy, the public advocate shall grant to the county, urban-county, charter county, or consolidated local government the amount to which it would be entitled under KRS 31.050(2) which shall be used as the Commonwealth's share in defraying the expenses of the program in that county, urban-county, charter county, or consolidated local government.

(2) A county, urban-county, charter county, or consolidated local government identified in subsection (1) of this section shall contribute to the funding of the plan selected and approved in such amounts as the Department of Public Advocacy shall deem reasonable and necessary.

alleged were entered March 31, 2005 and April 12, 2005. The Final Judgment and Sentencing was entered June 1, 2006. Appellant should have included the claim of error in the direct appeal.

BRIEFS AND ORAL ARGUMENT  
FOR APPELLANT:

Ninamary Buba Maginnis  
Louisville, Kentucky

BRIEF FOR APPELLEE:

Jack Conway  
Attorney General of Kentucky

Matthew R. Krygiel  
Assistant Attorney General  
Frankfort, Kentucky

ORAL ARGUMENT FOR  
APPELLEE:

Matthew R. Krygiel  
Assistant Attorney General  
Frankfort, Kentucky