RENDERED: AUGUST 24, 2018; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2016-CA-000669-MR

JOHNATHAN YOUNG AND
DEPARTMENT OF PUBLIC ADVOCACY,
AS INTERVENING APPELLANT — APPELLANTS

v.

APPEAL FROM MONROE CIRCUIT COURT
HONORABLE DAVID WILLIAMS, JUDGE
ACTION NO. 10-CR-00109-002

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
VACATING AND REMANDING

** ** ** ** **

BEFORE: ACREE, D. LAMBERT AND THOMPSON, JUDGES.

THOMPSON, JUDGE: Johnathan Young and the Department of Public Advocacy (DPA), as intervening appellant, appeal from the Monroe Circuit Court's *ex parte* order denying payment to an expert witness who was preapproved as a reasonably necessary expert and was prepared to testify during the penalty phase of Young's second trial. We vacate and remand because the circuit court abused its discretion

by effectively rescinding its prior order of preapproval after Young, the DPA and the expert relied on the order to their detriment.

After his first jury trial, Young was convicted of complicity to murder, complicity to first-degree robbery and complicity to second-degree arson and sentenced to sixty-five years' imprisonment. He appealed as a matter of right and his conviction was reversed based upon faulty jury instructions. *Young v. Commonwealth*, 426 S.W.3d 577 (Ky. 2014).

At all relevant times, Young has been represented by the DPA as an indigent defendant. While Young's retrial was pending, on August 25, 2015, Young filed an *ex parte*, sealed motion for expert funds through his counsel pursuant to Kentucky Revised Statutes (KRS) 31.110(1)(b) and KRS 31.185. Counsel requested the circuit court order the Kentucky Finance and Administration Cabinet (FAC) to provide funds for a neuropharmacology expert to assist the defense with mitigation because Young was facing a maximum life sentence, had a history of substance abuse and addiction as a young adult and "[h]is history of substance abuse and addiction will likely be themes that his defense counsel will need to present to the jury in deciding his fate in this trial." Counsel requested a "teaching expert" to assist in Young's defense and explained that expert's role as follows:

> A "teaching expert" would not examine Mr. Young himself, and therefore would save both time and resources in this matter, but would discuss the effects of drug and alcohol use and abuse on a young man's mind in a way that, combined with lay witness testimony about

> Mr. Young's substance abuse history, will demonstrate for the jury who Mr. Young is as a person and where he came from before being charged in this case. This is a crucial mitigating factor for the jury to consider in deciding Mr. Young's penalty, should this trial reach a penalty phase.

Counsel explained that Dr. Jonathan Lipman, a neuropharmacologist with significant experience, agreed to provide expert services and attached his curriculum vitae. Counsel stated Dr. Lipman charges $275 per hour and is in Tennessee within driving distance of Monroe County. Counsel requested an initial cap of $5,000 for his services.

On October 2, 2015, without any hearing on the *ex parte* motion, an order granting the motion was entered. The circuit court found that "[a] reasonable necessity has been shown for the defendant, by counsel, to employ the services of a neuropharmacology expert. The expert's assistance is necessary to provide Mr. Young with due process, effective assistance of counsel, and a fair trial under the federal and state constitutions[.]" The order authorized the employment of Dr. Lipman with payment to be allocated by the FAC of up to $5,000. It ordered any billings to be tendered by the DPA to the circuit court which would forward them to the FAC for payment following review and approval. The order specified that "[n]o further order of this Court beyond the order herein shall be necessary for said payment(s) to be disbursed[.]"

After retrial, Young was convicted of complicity to murder, complicity to second-degree arson and complicity to theft by unlawful taking under $500. On October 29, 2015, Dr. Lipman appeared to testify as a defense witness during the sentencing phase of trial. The circuit court determined his testimony was irrelevant to the sentencing phase and the remainder of his testimony was entered by avowal on the record. Following the conclusion of the sentencing phase of the trial, Young was sentenced to twenty-five years' imprisonment in accordance with the jury's recommendation.

On November 10, 2015, Young's counsel emailed the circuit court about payment of Dr. Lipman's invoice for a total of $4,979.72. Counsel attached Dr. Lipman's invoice, which billed for 17.3 hours at his rate of $275 per hour for reviewing records and memoranda, requesting alcohol information and performing calculations, meeting and conferring with attorneys, attending court and travel time. Eight hours were expended for travel time. Dr. Lipman also requested mileage reimbursement for 542 miles at $0.41 per mile.

During a telephone call with counsel on January 27, 2016, the circuit court indicated it was not inclined to approve payment for Dr. Lipman's invoice based on concerns regarding the validity of neuropharmacology as well as the fact that Dr. Lipman did not evaluate Young and that an order would be entered to that effect.

After no order was received regarding this matter, on April 12, 2016, counsel filed an *ex parte* motion for payment order. That same day, an *ex parte* order denying payment was entered. The circuit court stated that Dr. Lipman's testimony was deemed irrelevant because he did not evaluate Young, it had concerns regarding the validity of the science underpinning Dr. Lipman's avowal testimony and it had concerns regarding the exorbitant travel expenses charged by Dr. Lipman. Young appealed and on August 11, 2016, the DPA filed a motion to intervene as a party appellant which the Commonwealth opposed. The Court of Appeals granted the DPA's motion to intervene.[1]

Initially, we must address whether Young properly brought this appeal without naming the DPA as a party. The Commonwealth argues that the appeal should either be dismissed for failure to name the DPA as an indispensable party or, alternatively, the DPA should not be a party to the appeal. It argues Young has no interest in the outcome of this appeal because he is not liable to pay Lipman.[2]

The indigent defendant on whose behalf the expert witness is employed is certainly the proper party to appeal as to whether he was unfairly denied funds for

[1] The Commonwealth filed a motion to reconsider, which was denied by an order which stated "[n]othing in this order prevents appellee from presenting the arguments presented in the motion to reconsider to this Court in its brief on the merits of this appeal." The Commonwealth filed a motion for discretionary review with the Kentucky Supreme Court. The Court of Appeals ordered the appeal held in abeyance but, after the Kentucky Supreme Court denied the motion, the Court of Appeals ordered the appeal returned to the Court's active docket.

[2] Young argued he was aggrieved because if his direct appeal were to result in a retrial, he would need Dr. Lipman to be paid if he was to serve as a witness in his retrial. After Young submitted his appellate brief, the Kentucky Supreme Court affirmed Young's conviction. *Young v. Commonwealth*, No. 2016-SC-000050-MR, 2017 WL 639390 (Ky. 2017) (unpublished).

his own defense. *See Binion v. Commonwealth*, 891 S.W.2d 383, 384 (Ky. 1995). We agree with the reasoning in *Vaughn v. Commonwealth*, No. 2002-CA-001197-MR, 2005 WL 433797, 3 (Ky.App. 2005) (unpublished),[3] that an appeal should not be dismissed for failure to name the DPA as an indispensable party for this type of appeal: "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."

It was appropriate to allow the DPA to intervene because it must be able to rely on a circuit court's order granting preapproval for the cost of paying expert witnesses in planning a client's defense rather than having to pay the cost of the experts itself. *See McCracken Cty. Fiscal Court v. Graves*, 885 S.W.2d 307, 314 (Ky. 1994) and *Young v. Commonwealth*, 585 S.W.2d 378, 379 (Ky. 1979) (both holding that public defenders can be ordered to pay for expert witness fees they authorized which are not reasonable and necessary).

Young and the DPA argue the circuit court erred in denying payment to Dr. Lipman because proper preapproval was sought and obtained for his fees and never revoked until after Dr. Lipman performed his services. Young argues that it is inappropriate for the circuit court to disapprove payment on grounds that were

[3] Pursuant to Kentucky Rules of Civil Procedure (CR) 76.28(4)(c) we may properly cite to this decision because "there is no published opinion that would adequately address the issue before the court."

disclosed in the initial request for approval for payment as an expert witness. Young also argues that the expenditure for Dr. Lipman's travel time at his hourly rate was reasonable.

The DPA argues the circuit court could not void its earlier ruling that Dr. Lipman's expert testimony was reasonably necessary based on a later decision that his testimony was inadmissible. The DPA argues that if a court is uncertain as to whether it should approve hiring an expert when initially requested, it should request additional information at the time of an *ex parte* hearing, conform the use of the expert to what it considers appropriate or not allow defense counsel to hire the expert, rather than approve the expenditure and then deny it later. The DPA argues that if a court can alter its earlier ruling approving an expert's testimony as reasonably necessary and subject to being paid by the FAC, defense counsel and expert witnesses will be chilled from attempting to use KRS 31.185 to obtain expert witnesses, resulting in the harm that the preauthorization process is intended to prevent.

The Commonwealth makes no argument as to the merit of the expert fee issue on appeal.

We review the circuit court's order for abuse of discretion. *Benjamin v. Commonwealth*, 266 S.W.3d 775, 789 (Ky. 2008).

KRS 31.110 and KRS 31.185 have been interpreted as justifying the hiring of reasonable necessary experts for indigents. KRS 31.110(1) provides in relevant part as follows:

> A needy person . . . who is under formal charge of having committed, or is being detained under a conviction of, a serious crime . . . is entitled:
>
> . . .
>
> (b) . . . to be provided with the necessary services and facilities of representation, including investigation and other preparation.

KRS 31.185 provides in relevant part as follows:

> (1) Any defending attorney operating under the provisions of [chapter 31] is entitled to use the same state facilities for the evaluation of evidence as are available to the attorney representing the Commonwealth. If he or she considers their use impractical, the court of competent jurisdiction in which the case is pending may authorize the use of private facilities to be paid for on court order from the special account of the Finance and Administration Cabinet.
>
> . . .
>
> (3) Any direct expense[s] . . . are charges against the county, urban-county government, charter county government, unified local government, or consolidated local government on behalf of which the service is performed and shall be paid from the special account established in subsection (4) of this section and in accordance with procedures provided in subsection (5) of this section [that a local tax collected for this purpose will be administered by the FAC to pay such expenses]. However, a charge under this subsection shall not exceed

> the established rate charged by the Commonwealth and its agencies.

In *Benjamin*, 266 S.W.3d at 789, the Kentucky Supreme Court clarified "the appropriate test for determining when an indigent defendant is entitled to receive funding for expert witnesses under KRS 31.110(1)(b), will consider 1) whether the request has been pleaded with requisite specificity; and 2) whether funding for the particularized assistance is 'reasonably necessary'; 3) while weighing relevant due process considerations."

In *McCracken County Fiscal Court*, the Court stressed the importance of defense counsel asking for advanced authorization of expert witness fees and for the trial court to resolve this matter before fees are incurred:

> [W]e 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.

McCracken Cnty. Fiscal Court, 885 S.W.2d at 314 (footnote omitted). The Court did note that "[p]ost-trial proceedings will sometimes be necessary for the purpose of determining whether a pre-authorization order was complied with" but gave no indication that a trial court was authorized to negate a previous authorization after the expert witness performed. *Id.* at 314 n.5.

While courts have the inherent authority to modify or vacate interlocutory orders, the circuit court abused its discretion in doing so here when the DPA fully disclosed the basis it was relying upon for hiring Dr. Lipman and Dr. Lipman fully conformed the actions he undertook to the preauthorization that was made for hiring him. We agree with the DPA that any question about whether Dr. Lipman's expertise was reasonable and necessary should have been resolved at an *ex parte* evidentiary hearing prior to preapproving payment for his services.

The DPA properly followed the Kentucky Supreme Court's directive in *McCracken County Fiscal Court* by obtaining advanced authorization to hire Dr. Lipman for the express purpose of testifying in mitigation as a "teaching expert." It was plainly stated in the *ex parte* motion that Dr. Lipman would not examine

Young but would discuss the effects of drug and alcohol use and abuse generally on the adolescent mind.

By rescinding its prior order, the circuit court created precisely the post-trial proceeding sought to be avoided by advanced authorization. This is not only an inefficient result, but one that could chill defense counsel's ability to prepare an adequate defense.[4]

The circuit court's justification that it was inappropriate to hire Dr. Lipman because his testimony was inadmissible under *Daubert* does not justify rescinding its prior order. When an expert who was originally anticipated to testify does not end up testifying, this does not negate that this expert was reasonably necessary. For example, a defendant may agree to plead before trial or decide that an expert's testimony will not ultimately be helpful, but in such situations, courts do not disallow payments to experts for services already incurred.

We conclude that a court abuses its discretion if it rescinds its prior order approving expenses for indigent defendants, unless there are extraordinary circumstances, none of which are present here.[5] Counsel and experts who act in

[4] In *Commonwealth v. Bonner*, No. 2011-SC-000555-DG, 2013 WL 6729917, 3 (Ky. 2013) (unpublished), the Kentucky Supreme Court determined that CR 60.02 was an inappropriate vehicle for raising the issue of whether the trial court erred or abused its discretion in denying public funds to the defendant pursuant to KRS 31.110(1)(b) which had previously been preapproved as reasonably necessary for DNA analysis through an interlocutory order because this issue could have been raised on direct appeal. Therefore, we believe its decision was limited to the procedural posture of that case and its statement that "[w]e do not find our decision today to have a chilling effect on defense counsel's ability to prepare an adequate defense" is not controlling here. *Id.*

[5] We note that in *Bonner*, the defendant was challenging the trial court's decision to change who should pay for the DNA analysis and not whether the DNA analysis was reasonably necessary.

good faith must be able to rely on court orders approving expenses. Otherwise a counsel's efforts to provide a defense for an indigent defendant can be chilled by the inability to obtain experts and counsel will have conflicting interests in determining whether to obtain an expert that counsel thinks is necessary or forgo seeking such expert because of risk that the DPA may ultimately be liable to pay that expert. Therefore, the circuit court had no basis to deny payment for the hours Dr. Lipman expended that were detailed in his invoice as being used to review records and memoranda, request alcohol information and perform calculations, meet and confer with attorneys and for attending court as the circuit court did not question whether these hours were appropriate under the preauthorization, but whether the preauthorization ought to have been granted at all.

We acknowledge as noted in *McCracken Cnty. Fiscal Court*, 885 S.W.2d at 314 n.5, that although the purpose of the procedure it specified "is to significantly lessen the need for post-trial proceedings to determine whether services already provided were reasonable and necessary" that "[p]ost-trial proceedings will sometimes be necessary for the purpose of determining whether a pre-authorization order was complied with." However, as explained in *Vaughn*, the only case which

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While the Court acknowledged that a trial court has "inherent authority to modify or vacate its interlocutory orders at any point in the proceedings before final judgment" it did not make any ruling on whether the trial court's ruling was correct or an abuse of discretion. *Bonner*, No. 2011-SC-000555-DG, 2013 WL 6729917 at 3. Therefore, *Bonner* does not control our analysis.

has examined how it should be adjudged what expenses are reasonable and necessary within the scope of the preapproval:

> To disallow payment of . . . 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, [a] court's denial of expenses, in the absence of a request for a more detailed accounting, constitutes reversible error.

Vaughn, No. 2002-CA-001197-MR, 2005 WL 433797 at 2. Thus, to the extent that the circuit court questioned whether it was proper for Dr. Lipman to bill his normal hourly rate for his travel time or may now wish to question whether other billed expenses were proper, it should have held a hearing to determine the propriety of those expenses and allowed the DPA and Dr. Lipman to provide evidence justifying them before disallowing or modifying them. This does not authorize the circuit court to disallow compensation for the work Dr. Lipman properly performed within the scope of the preauthorization that was already adjudged to be reasonable and necessary.

Accordingly, we vacate the Monroe Circuit Court's *ex parte* order denying payment of an expert witness and remand for the court to either approve the expenses or hold a hearing regarding whether these expenses were properly within the scope of the preapproval and then issue an appropriate order making findings specifying what fees are appropriate and ordering the FAC to pay.

LAMBERT, D., JUDGE, CONCURS.

ACREE, JUDGE, CONCURS AND FILES SEPARATE OPINION.

ACREE, JUDGE, CONCURRING: I concur but write separately for two reasons. First, I believe Young proceeded just as the Supreme Court indicated he should, even if that indication was in an unpublished opinion. Second, I doubt the circuit court had jurisdiction to enter the order Young challenges.

Though the Supreme Court does not deem *Commonwealth v. Bonner* of sufficient quality to be relied upon by bench and bar, the case does say, "The issue of whether the trial court erred or abused its discretion in denying public funds to [the defendant] could have been raised on direct appeal." 2011-SC-000555-DG, 2013 WL 6729917, at *3 (Ky. Dec. 19, 2013). That seems perfectly logical to me. Here, in a direct appeal, Young challenges an order claiming the court erred. The hubbub over whether DPA is an indispensable party seems overblown considering Young is simply taking a direct appeal of a claimed circuit court error.

The judgment of conviction in this case was entered January 14, 2016. Timely notice of appeal was filed on February 3, 2016. Three months after the judgment, on April 12, 2016, the circuit court entered the order from which this second appeal was taken. The Supreme Court heard the first appeal because the sentence imposed was twenty years or more, KY. CONST. 110(2)(b), and affirmed

Young's conviction in another unpublished opinion. *Young v. Commonwealth*, 2016-SC-000050-MR, 2017 WL 639390, at *2 (Ky. Feb. 16, 2017).

Young properly appealed the circuit court's subsequent April 12, 2016 order to this Court. *Williams v. Venters*, 550 S.W.2d 547, 548 (Ky. 1977) (post-conviction order "is not a judgment 'imposing a sentence.' Hence an appeal from it is addressable to the Court of Appeals."). Because that order was not a judgment imposing a sentence of twenty years or more, an appeal to the Supreme Court instead of this Court would have been properly dismissed on jurisdictional grounds.

I agree with the majority that the circuit court abused its discretion here, and so it is only in passing that I question the circuit court's jurisdiction to enter the April 12, 2016 order 89 days after the judgment. "A court loses jurisdiction ten days after the entry of final judgment, and such jurisdiction can only be renewed or extended by statute or rule." *Peak v. Commonwealth*, 482 S.W.3d 409, 410 (Ky. App. 2015) (quoting *Rollins v. Commonwealth,* 294 S.W.3d 463, 466 (Ky. App. 2009)). Even though "[a] court may retain jurisdiction over a particular case by operation of rule or statute," *Commonwealth v. Griffin*, 942 S.W.2d 289, 291 (Ky. 1997), I am unaware of such a rule or statute applicable to this case. Specifically, KRS 31.185 does not have a provision enlarging the circuit court's jurisdiction beyond ten days. In fact, the statute only authorizes orders to be entered by "the court of competent jurisdiction in which the case is pending[.]"

KRS 31.185(1). The case was not pending in the circuit court when the April 12, 2016 order was entered; it was pending in the Supreme Court.

Furthermore, the Supreme Court "declare[d] it to be the duty of the trial court to attempt to specifically and ***timely*** find that an expense [under KRS 31.185] is 'reasonable and necessary,' or not. . . . The object, of course, is to significantly lessen the need for post-trial proceedings to determine whether services already provided were reasonable and necessary." *McCracken County Fiscal Court v. Graves*, 885 S.W.2d 307, 314 (Ky. 1994) (emphasis added). I read this passage in the context of our finality jurisprudence and understand the qualifier "***timely***" to mean the trial court cannot revisit its "reasonable and necessary" determination more than ten days after entry of the judgment. It has lost jurisdiction to do so. A court that has lost jurisdiction "has no 'power to do anything at all.'" *Commonwealth Health Corp. v. Croslin*, 920 S.W.2d 46, 48 (Ky. 1996) (quoting *Duncan v. O'Nan,* 451 S.W.2d 626, 631 (Ky. 1970)). If there is a reason not to declare this order void *ab initio*, I fail to see it.

For the reasons stated by the majority, and for these additional reasons, I concur.

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