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19-P-1198

Appeals Court

COMMONWEALTH vs. RICHARD SANTOS.

No. 19-P-1198.

Hampden. April 8, 2020. - March 26, 2021.

Present: Green, C.J., Henry, & Sacks, JJ.

Practice, Criminal, Request for fees and costs, Interlocutory appeal, Attorney's fees.

Indictments found and returned in the Superior Court Department on March 21, 2018.

Following review reported in 97 Mass. App. Ct. 719 (2020), an application for appellate attorney's fees was filed in this court on October 29, 2020.

The case was submitted on briefs.

John M. Thompson & Linda J. Thompson for the defendant.  
Travis H. Lynch, Assistant District Attorney, for the Commonwealth.

HENRY, J. The matter now before us concerns a motion for attorney's fees made by attorneys who were privately retained by the defendant, Richard Santos, to oppose the Commonwealth's interlocutory appeal of an order suppressing evidence. See

Mass. R. Crim. P. 15 (d), as amended, 476 Mass. 1501 (2017) (rule 15 [d]). The Commonwealth<sup>1</sup> opposes the motion, arguing that Santos's representation agreement (agreement) with counsel might be illusory and that the amount requested is excessive. We conclude that Santos's agreement with his counsel is not illusory and award attorney's fees in the amount of \$21,720 for proceedings before this court. We conclude that Santos must file a motion with the Supreme Judicial Court for fees incurred in connection with his opposition to the Commonwealth's application for further appellate review (FAR).

Background. Santos was privately represented in the Superior Court by an attorney who limits his practice to trial work. After Santos prevailed on a motion to suppress evidence, the Commonwealth received permission to file an interlocutory appeal and Santos's counsel referred him to experienced appellate lawyers. Santos also prevailed on appeal.

Commonwealth v. Santos, 97 Mass. App. Ct. 719 (2020). The

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<sup>1</sup> "We refer to 'the Commonwealth' in two senses [in this decision]. First, 'the Commonwealth' is the prosecuting entity in the criminal case," here, the Hampden County District Attorney. "Second, it is 'the Commonwealth' that is required to reimburse a defendant under rule 15 (d) for attorney's fees that he or she incurs in defense of the interlocutory appeal. More specifically, it is the particular district attorney's office that prosecutes the appeal and the administrative office of the Trial Court that are required to reimburse the defendant for his or her fees; each is responsible for paying fifty per cent of any fee award." Commonwealth v. Augustine, 470 Mass. 837, 842 n.11 (2015).

Commonwealth then sought FAR, which the Supreme Judicial Court denied. See Commonwealth v. Santos, 486 Mass. 1103 (2020).

Subsequently, Santos filed a motion for fees in this court pursuant to rule 15 (d). The motion for fees is supported by an affidavit of counsel representing that Santos had a written agreement with counsel and that Santos had "agreed to [the specified hourly] rate of compensation for work done" by each attorney and describing the work completed. The affidavit also avers that Santos was privately represented in the underlying criminal case.

Although the Commonwealth does not contest the facts set forth in the motion for fees, it does oppose the fee motion. The Commonwealth raises two arguments: (1) that Santos's motion did not "demonstrate that a fee award under [rule] 15 (d) is available," and (2) that the hours were excessive both in time spent and because the hours included time opposing the Commonwealth's application for FAR. The Commonwealth's argument is based in part on its awareness of a representation agreement between Santos's appellate attorneys and an unrelated defendant.

Santos filed a reply in support of his fee request that did not attach his representation agreement. In light of the Supreme Judicial Court's holding in Commonwealth v. Vasquez, 485 Mass. 405 (2020), we ordered Santos to submit his agreement. After we denied Santos's motion to reconsider, counsel filed the

fee agreement under protest.<sup>2</sup> After defining the scope of the representation and an hourly rate, the agreement provided, in relevant part:

"The parties further agree that the client will pay the attorney's fees and costs by assigning to the attorneys all of his right, title and interest in the award, if any, of compensation for reasonable attorney's fees made by the appropriate court under Rule 15(d) of the Rules of Criminal Procedure, at the conclusion of the appellate litigation now pending in the Supreme Judicial Court for Suffolk County, including any related proceedings in the Appeals Court and/or the Supreme Judicial Court. The client is not obligated to pay any other compensation to the attorneys."

The agreement included a similar provision for reimbursement of expenses, which were anticipated to be the printing of the defendant's brief and appendix and attorney travel expenses. As with fees, the agreement provided that "[t]his responsibility will be met solely by assignment of the client's right, title and interest to compensation for these expenses under Rule 15(d) of the Rules of Criminal Procedure."

Discussion. a. Entitlement to a rule 15 (d) fee award.

Pursuant to rule 15 (d), when the Commonwealth pursues an interlocutory appeal or application therefor,

"the appellate court, upon the written motion of the defendant supported by affidavit, shall determine and approve the payment to the defendant of his or her costs of appeal together with reasonable attorney's fees to be paid

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<sup>2</sup> Our order requiring Santos to file his fee agreement should not be construed as requiring that a fee agreement must be filed with every motion for fees in order to permit an award of fees.

on the order of the trial court upon the entry of the rescript or the denial of the application."

"[T]he award of attorney's fees to defendants is mandatory" under this rule. Commonwealth v. Ennis, 441 Mass. 718, 720 (2004). The Supreme Judicial Court has explained that rule 15 (d) "provides a needed measure of protection to the rights of defendants by seeking to equalize the resources of the defendant with those of the Commonwealth." Commonwealth v. Gonsalves, 432 Mass. 613, 617 (2000), S.C., 437 Mass. 1022 (2002) and 441 Mass. 1007 (2004). It "is intended for the benefit and protection of defendants who . . . must incur fees for private representation to defend against a Commonwealth appeal." Commonwealth v. Augustine, 470 Mass. 837, 841 (2015).<sup>3</sup> Rule 15 (d) provides that a defendant's fees are reimbursed regardless of which side prevails in the Commonwealth's interlocutory appeal. Id. at 842.

The Supreme Judicial Court has placed an important limitation on awards pursuant to rule 15. "Rule 15 (d) is meant to reimburse defendants who pay for their own counsel with their own funds; it is not meant for attorneys who represent defendants whom they know to be indigent, and from whom they

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<sup>3</sup> "To the extent rule 15 (d) adds to the costs of an interlocutory appeal by a prosecutor, the rule presents an administrative budgetary problem no different from any other faced by the prosecutor." Gonsalves, 432 Mass. at 621.

never expect to receive payment." Vasquez, 485 Mass. at 406. This is true even if "the attorney claims to have been privately retained." Id. In Vasquez, the court held that an indigent defendant who was represented by appointed counsel at the trial level was not eligible for rule 15 (d) reimbursement to pay a private lawyer to oppose the Commonwealth's application to appeal the partial allowance of the defendant's motions to suppress. Id. at 405-406, 412, 414-415. Both the lawyer and client "knew full well the defendant could not and would not ever pay -- with the expectation that the payment would be sought from, and made by, the district attorney and the Trial Court via a court order under rule 15 (d)." Id. at 408. The court found the agreement in Vasquez to be illusory, stating, "There is no indication in the record . . . of a genuine intent for the defendant ever actually to pay for private representation." Id. at 412.

The Commonwealth relies on the Vasquez language to argue that "[i]f a defendant pays no fees for private representation -- and is never expected to pay anything -- there is nothing to reimburse." Vasquez, 485 Mass. at 411. In essence, the Commonwealth argues that Santos has never been obligated to pay his attorneys anything and that therefore the fee agreement is illusory.

The Supreme Judicial Court's decision in Vasquez was based on their conclusion that "[t]here is no indication in the record before us of a genuine intent for the defendant ever actually to pay for private representation." 485 Mass. at 412. Here, however, Santos had private representation in the trial court and on appeal. Santos never asserted that he was indigent and was never found to be indigent; the Commonwealth does not contend otherwise.<sup>4</sup> Indeed, the Commonwealth agrees that Santos was represented by private counsel in the trial court and concedes that "if he incurred expenses defending against the Commonwealth's interlocutory appeal, he is entitled to reimbursement under [rule 15 (d)]." Appellate defense counsel here did not agree to represent Santos without expectation of compensation. They knew Santos had a rule 15 (d) right to reimbursement and then entered into a fee agreement to represent Santos with provisions that fulfilled the spirit of rule 15 (d) to "equalize the resources of the defendant with those of the Commonwealth." Gonsalves, 432 Mass. at 617. We read the provisions of the fee agreement on which the Commonwealth relies to protect Santos in two important ways.

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<sup>4</sup> The docket does not reflect a finding that Santos is indigent. Even if it did, a client has the right to retain private counsel if he is able. See Commonwealth v. Francis, 485 Mass. 86, 97 (2020) (indigent defendant has "the right to be represented by an otherwise qualified attorney whom that defendant can afford to hire" [citation omitted]).

First, his attorneys agreed to carry the cost of the representation during the pendency of the appeal, which has now been more than two years, rather than require Santos to pay the fees and costs and later seek reimbursement under rule 15 (d). Were we to require otherwise, it could work a tremendous hardship on defendants and their families and treat them unequally relative to the Commonwealth, which does not have to reimburse the defendant's fees until far later. We acknowledge that, read literally, the fee agreement here could be construed to impose no obligation on the defendant to pay counsel's fees, insofar as it limited the obligation to pay fees solely to an assignment of the right to reimbursement. In the circumstances of the present case, however, and in contrast to those in Vasquez, it is inaccurate to say that counsel had no expectation of being paid by the defendant. To ignore that underlying reality would elevate form over substance -- an approach Vasquez itself sought to avoid. We note that the agreement here was entered into before the guidance furnished by the Supreme Judicial Court in Vasquez, and we expect that careful drafting will avoid any such issue in future fee agreements.

Second, the attorneys agreed to accept the amount of fees and costs we deem appropriate, even if it is a reduced fee, and even if we are conservative with the public's purse or simply



think that counsel could have been more efficient than they were.

This is not a case, like Vasquez, in which the defendant initially was represented by an attorney assigned to him by the Committee for Public Counsel Services in his application for leave to appeal from the partial denial of his motions to suppress, and subsequently hired private counsel to work on his opposition to the Commonwealth's parallel application. Vasquez, 485 Mass. at 406-407. Here, Santos had privately-retained counsel at all times, he had a rule 15 (d) right to reimbursement of fees incurred as a result of the Commonwealth's interlocutory appeal, and both Santos and counsel intended that counsel be paid. We therefore conclude that Santos is entitled to reimbursement for his attorney's fees pursuant to rule 15 (d).

We take this opportunity to caution all counsel who might be seeking fees pursuant to rule 15 (d) in the future to include that request in their primary brief. While Ennis, 441 Mass. at 720, held that a rule 15 (d) fee request need not be made in a party's brief, Mass. R. A. P. 16 (a) (10), (b), have since been amended to require that all fee requests be included in a party's brief.<sup>5</sup> Mass. R. A. P. 16 (a) (10), (b), as appearing in

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<sup>5</sup> This rule serves multiple salutary purposes: it allows the parties to plan and evaluate the financial risks of the

481 Mass. 1628 (2019). The application setting forth the specific amount of fees and costs and supporting documentation should be filed within thirty days of the issuance of the rescript. See Ennis, supra at 719-720.

b. Fees for opposing FAR application. Santos's fee motion to this court includes a request for reimbursement for fees expended to oppose the Commonwealth's unsuccessful FAR application. The Commonwealth argues that Santos must apply separately to the single justice of the Supreme Judicial Court who denied FAR for rule 15 (d) fees for that segment of its appeal. At least where the Commonwealth opposes our authority to decide the matter, the Commonwealth has the better argument, and accordingly we decline to award Santos the fees sought for opposing the unsuccessful FAR application.<sup>6</sup> See T & D Video, Inc. v. Revere, 450 Mass. 107, 114 (2007) (agreeing with this court "that it is [not] the business either of the Appeals Court or of a trial court to pass upon fee requests pertaining to proceedings in the Supreme Judicial Court," and holding that "the appropriate forum for [the fee] request" was Supreme

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case, allows us to plan our work, and ensures that we retain our notes until the fee application is considered.

<sup>6</sup> We do not decide whether we might decide a rule 15 (d) request for reimbursement of fees incurred as a result of successfully opposing the Commonwealth's FAR application in a case where the Commonwealth does not oppose such a ruling.

Judicial Court, because it is better positioned to "evaluate the worth of the appellate work than the trial judge" [citation omitted]). See also Jones v. Boykan, 464 Mass. 285, 296-298 (2013) (proper forum for considering fee requests is forum that heard merits of case). Also, we decline Santos's request that we transfer the rule 15 (d) portion of this court's case file directly to the Supreme Judicial Court. Nothing herein prevents Santos from filing with the Supreme Judicial Court a tailored request for fees related to the opposition to the Commonwealth's FAR application.

c. Amount of fees. A determination of the amount of reasonable appellate attorney's fees is "largely discretionary" (citation omitted). Stowe v. Bologna, 417 Mass. 199, 203 (1994). In making such a determination, we "properly exercise[] independent judgment concerning the request's reasonableness." Id. at 204. The assessment of fees is based on the "lodestar" method, which involves "multiplying the number of hours reasonably spent on the case times a reasonable hourly rate." Fontaine v. Ebttec Corp., 415 Mass. 309, 324 (1993). In determining whether a fee is reasonable, we do not focus on the amounts billed or the amount in controversy, but rather on

"(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly; (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment

by the lawyer; (3) the fee customarily charged in the locality for similar legal services; (4) the amount involved and the results obtained; (5) the time limitations imposed by the client or by the circumstances; (6) the nature and length of the professional relationship with the client; (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and (8) whether the fee is fixed or contingent."

Ennis, 441 Mass. at 722 n.6, quoting Mass. R. Prof. C. 1.5 (a), 426 Mass. 1315 (1998). We are not obliged to "review and allow or disallow each individual item in the bill, but [may] consider the bill as a whole." Berman v. Linnane, 434 Mass. 301, 303 (2001). "To be sure, conservative principles should apply to the determination of what is a reasonable fee when the pocket from which the fee is drawn belongs to someone other than the person who hired the lawyer." Strand v. Hubbard, 31 Mass. App. Ct. 914, 915 (1991). Cf. Commonwealth v. Gonsalves, 437 Mass. 1022, 1023 (2002), citing Stratos v. Department of Pub. Welfare, 387 Mass. 312, 325 (1982) (fees reasonably incurred in making fee petition, and responding to Commonwealth's opposition to that petition, are reimbursable).

Conclusion. After reviewing Santos's application and supporting materials, the Commonwealth's opposition, and the record in this matter, and considering the time expended by counsel and their level of expertise and experience, the nature of the appellate issues, and the fees customarily charged for

similar work, we conclude that \$21,720<sup>7</sup> is a fair and reasonable award. Any proceedings to enforce this award shall be commenced in the Superior Court.

So ordered.

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<sup>7</sup> This figure is comprised of Santos's original request for \$15,780, less \$4,170 for opposition to the Commonwealth's FAR application contained therein; Santos's first supplemental request for \$6,120; and Santos's second supplemental request for \$6,360, less the \$2,370 for his motions for reconsideration. In sum, we do not award any fees or costs for the repeated motions for reconsideration filed in this court or for the opposition to the Commonwealth's FAR application. (The latter, as we have noted, is declined not on the merits, but because the request must be filed in the Supreme Judicial Court.)