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SJC-12562

COMMONWEALTH vs. PEDRO VASQUEZ.

Hampden. December 6, 2018. - August 13, 2020.

Present: Gants, C.J., Lenk, Gaziano, Lowy, Budd, Cypher,
& Kafker, JJ.

Homicide. Indigent. Practice, Criminal, Request for fees and costs, Attorney's fees, Motion to suppress, Interlocutory appeal.

Indictments found and returned in the Superior Court Department on April 30, 2015.

Following review reported in 482 Mass. 850 (2019), an application for appellate attorney's fees and costs was filed in this court on September 23, 2019.

Calvin C. Carr, pro se.

Juan M. Rivera, pro se.

Katherine E. McMahon, Assistant District Attorney (Maximilian J. Bennett, Assistant District Attorney, also present) for the Commonwealth.

Daniel P. Sullivan for Executive Office of the Trial Court.

LENK, J. The defendant, who at all relevant times was and continues to be indigent, was charged with murder in the first degree and two firearm-related offenses in April, 2015. He was

convicted in February 2020 of murder in the second degree and the two firearm offenses. He has appealed, but his appeal has not yet been entered in the Appeals Court.

Before trial, the defendant filed several motions to suppress a variety of evidence, including witness identifications, evidence obtained from a search of his cell phone, cell site location information, and statements he had made to police in a custodial interrogation. A judge in the Superior Court denied most of the motions but allowed the motion to suppress the custodial statements. Both sides sought leave to appeal from the rulings that were adverse to them, pursuant to Mass. R. Crim. P. 15 (a) (2), as amended, 476 Mass. 1501 (2017), and a single justice of this court granted both sides' applications. On appeal, we affirmed in part and reversed in part the Superior Court judge's rulings. Commonwealth v. Vasquez, 482 Mass. 850, 852 (2019) (Vasquez I).

The matter now before us concerns a request for attorney's fees made by an attorney who claims to have been privately retained by the defendant for the sole purpose of opposing the Commonwealth's application for leave to appeal. See Mass. R. Crim. P. 15 (d), as amended, 476 Mass. 1501 (2017). The attorney asks to be paid slightly more than \$40,000 for that purpose. For the reasons that follow, we hold that no attorney's fees are required under rule 15 (d) in this

situation. 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 never expect to receive payment, even if, as here, the attorney claims to have been privately retained.

Facts. At his arraignment, the defendant was determined to be indigent, see S.J.C. Rule 3:10, as appearing in 475 Mass. 1301 (2016); Superior Court Rule 53, as amended (Nov. 17, 1986), and attorney Calvin C. Carr was appointed to represent him. Mr. Carr represented the defendant in all of the proceedings in the Superior Court, including on the motions to suppress and at trial. As court-appointed counsel, he was to be compensated for his services by the Committee for Public Counsel Services (CPCS). Mr. Carr was assisted, behind the scenes, by attorney Juan M. Rivera, who also represented the defendant as a court-appointed counsel in a different criminal case in the District Court. Mr. Rivera did not enter an appearance in the murder case, was not assigned to the matter in any capacity by CPCS, and apparently was not being paid by Mr. Carr, CPCS, or the defendant for any assistance he was providing.¹

¹ Mr. Rivera indicates that he provided all of his behind-the-scenes assistance "pro bono."

After the defendant's motions to suppress were decided, both sides indicated that they intended to appeal, and toward that end both sides filed applications in the county court requesting leave to appeal. See Mass. R. Crim. P. 15 (a) (2).² The Commonwealth filed its application first, on November 2, 2017, and the defendant filed his application on November 6, 2017. The defendant's application was signed and filed by Mr. Carr, although we now know that Mr. Rivera actually wrote the application. Mr. Carr acknowledges that he only signed and filed it. A question also arose along the way as to who would write the defendant's opposition to the Commonwealth's application. Because of the press of other important work, Mr. Carr asked Mr. Rivera to take on that task as well.³

² The rule provides: "A defendant or the Commonwealth shall have the right and opportunity to apply to a single justice of the Supreme Judicial Court, in the form and manner prescribed by a standing order of that court, for leave to appeal an order determining a motion to suppress evidence prior to trial. If the single justice determines that the administration of justice would be facilitated, the justice may grant that leave and may hear the appeal or may order it to the full Supreme Judicial Court or to the Appeals Court for determination." Mass. R. Crim. P. 15 (a) (2), as amended, 476 Mass. 1501 (2017).

³ It appears that the responsibility for opposing a Commonwealth application for leave to appeal falls to the court-appointed trial counsel in the first instance. See Committee for Public Counsel Services (CPCS), Assigned Counsel Manual, Policies & Procedures, § 4.B.4.k (Jan. 1, 2019) (Assigned Counsel Manual) ("The conduct of interlocutory hearings, including the submission of briefs and oral argument, are ordinarily the responsibility of trial counsel, whether the hearing was initiated by counsel or by the prosecution. Private

Mr. Rivera, feeling exhausted from having written the defendant's application, and having already contributed a significant amount of assistance without being paid, said that he could not take on that additional task without being paid. Mr. Carr represents that he then advised Mr. Rivera that, in order to be paid, he would have to get assigned to the case by CPCS.

The plot thickens. Neither Mr. Carr nor Mr. Rivera contacted CPCS about getting Mr. Rivera assigned to the case. Instead, Mr. Rivera entered into a written "fee agreement" with the defendant, whereby the defendant purported to promise to pay Mr. Rivera \$250 an hour to represent him in opposition to the Commonwealth's application. Mr. Rivera candidly acknowledges that, at the time he entered into this agreement with the defendant, he knew that the defendant was indigent and had no means to pay him, and indeed he acknowledges that he never expected to be paid anything by the defendant, at any time. With respect to actual payment, the agreement provided in relevant part:

"It is understood that the Attorney shall make an application to the appropriate appellate court for costs pursuant to Mass. R. Crim. P. 15 (d) and the Client hereby assents to the Attorney's recovery of said fee and

court-appointed trial counsel handling an interlocutory appeal should contact the CPCS Director of Criminal Appeals -- Private Counsel Division to determine whether assistance by appellate counsel is warranted").

relinquishes any claim to any award of costs or fees by the appropriate appellate court.

" . . .

"It is understood by the parties that the Attorney shall recover his fees and costs upon application to the appropriate appellate court pursuant to Massachusetts Rules of Criminal Procedure 15 (d). The Client shall take all steps necessary, as requested by the Attorney, to submit any affidavits and/or other documentation or evidence necessary for the Attorney to present said application to the court."

In short, the defendant and Mr. Rivera had entered into an agreement which nominally obligated the defendant to pay Mr. Rivera \$250 an hour for his services -- but which they both 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).^{4,5} Mr. Rivera then wrote, signed, and

⁴ The rule provides: "If an appeal or application therefor is taken by the Commonwealth, 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 on the order of the trial court upon the entry of the rescript or the denial of the application." Mass. R. Crim. P. 15 (d), as amended, 476 Mass. 1501 (2017).

⁵ As to the source of payments for fee awards made under rule 15 (d), see Commonwealth v. Augustine, 470 Mass. 837, 842 n.11 (2015); Commonwealth v. Phinney, 448 Mass. 621, 624-625 (2007), and cases cited. The Trial Court is required to pay one-half of each such award from its annual budget appropriation; the remainder of each award is paid by the district attorney's office that pursued the interlocutory appeal. See St. 2019, c. 41, § 2, line items 0330-0300 (Trial Court), and 0340-0500 (Hampden district attorney).

filed the defendant's opposition to the Commonwealth's application.⁶

It was only after Mr. Rivera completed and filed his work that CPCS learned of Mr. Rivera's involvement. That fact came to light when Mr. Carr sent an e-mail message to CPCS's director of criminal appeals for its private counsel division, which stated in its entirety: "Need appellate counsel -- Juan Rivera is responding to [Commonwealth's] petition -- may make sense to have him assist here[.] Let me know your thoughts[.] Thanks." This appears to have been written in anticipation of one or both of the applications being allowed and the defendant needing counsel assigned by CPCS for an appeal to the full court. There followed a series of e-mail messages between CPCS, Mr. Carr, and Mr. Rivera. In a nutshell, CPCS seemed to be surprised to learn of Mr. Rivera's involvement in the case and questioned how he expected to be paid for the work he had done, to which Mr. Rivera replied that he was "privately retained solely for the Commonwealth's [r]ule 15 (a) (2) appeal response by the defendant." CPCS expressed skepticism about his being paid in

⁶ Both Mr. Carr and Mr. Rivera are listed on the county court docket for the Commonwealth's application (no. SJ-2017-412) as counsel of record for the defendant -- Mr. Carr because he was the court-appointed trial attorney and Mr. Rivera because he filed a notice of appearance. Only Mr. Carr is listed as counsel of record on the docket for the defendant's application (no. SJ-2017-417).

these circumstances under rule 15 (d), citing Commonwealth v. Sparks, 431 Mass. 299 (2000). Mr. Rivera responded that the situation in the Sparks case was different because in that case there was no contract between the client and the appellate attorneys, whereas in this case "there is a contract retaining me directly as appellate counsel by [the defendant], with a reference to [rule] 15 (d) for payment." When asked by CPCS how he would be paid if the motion for fees were denied, Mr. Rivera responded: "A motion to reconsider. Failing that, what is your opinion? Associate counsel voucher?^[7] I don't see the legal basis for the judge to do that under these circumstances. The facts are distinguishable from Sparks in many ways."

As stated, a single justice of this court granted both the defendant's application and the Commonwealth's application (over Mr. Rivera's opposition), and the cases then proceeded to the full court.⁸ CPCS assigned another attorney (one certified by CPCS to handle such appeals) to handle the two appeals.⁹ There

⁷ This appears to refer to CPCS's procedure by which a court-appointed attorney may engage an "associate counsel" to assist with certain tasks. See Assigned Counsel Manual, supra at § 5.Y.1. The assigned counsel submits a voucher to CPCS for the associate's time, and the associate is then compensated at the rate of forty-five dollars per hour. Id. at § 5.Y.1.f.

⁸ The single justice initially ordered the cases to proceed in the Appeals Court. This court subsequently granted the defendant's application for direct appellate review.

⁹ Mr. Rivera was not certified by CPCS to handle murder cases.

is no indication in the record before us, one way or the other, whether Mr. Rivera assisted with the appeals. We note only that he did not file an appearance in the case when it was before the full court, until after we decided it.

After we issued our opinion, see Vasquez I, supra, Mr. Rivera filed a request for attorney's fees and costs in the full court, pursuant to rule 15 (d), which the Commonwealth opposed. He seeks to be compensated, as a privately retained attorney, for writing and filing in the county court the defendant's opposition to the Commonwealth's application for leave to appeal. Specifically, he seeks fees in the amount of \$40,125 and costs in the amount of \$302.40.¹⁰ He does not seek any compensation for the work he did behind the scenes on the defendant's application for leave to appeal, or for any work he may have done behind the scenes in the full court. The Commonwealth opposes both the entitlement to a fee in these circumstances and the amount of the fees sought.¹¹

¹⁰ Counsel has filed an itemized list of his time spent on this matter, totaling 160.5 hours. This includes, among other things, time spent researching and writing the defendant's opposition to the Commonwealth's request for leave to appeal (from November 3 to November 28, 2017); time spent preparing his motion for fees; and assorted other time spent in communication with the defendant, Mr. Carr, and CPCS.

¹¹ With respect to the amount requested, neither the district attorney nor the Trial Court opposes the hourly rate of

We referred Mr. Rivera's fees motion to a single justice for a recommendation. The single justice held a hearing by telephone in which Mr. Carr, Mr. Rivera, prosecutors from the Hampden district attorney's office, and the general counsel for the Trial Court were present. Having considered Mr. Rivera's motion and supporting documentation, the Commonwealth's opposition, Mr. Rivera's reply, the audio recording of the hearing, copies of e-mail messages supplied by Mr. Rivera at the single justice's request, and the single justice's recommendation, we are now in a position to rule on the motion.

Discussion. a. Entitlement to a fee. The facts of this case are somewhat messy, but the legal analysis is really quite simple.

"Although rule 15 (d) does not so state explicitly, our decisions have made clear since the rule was first adopted that it is not applicable to indigent defendants who are represented by counsel appointed or assigned by CPCS. Rather, the rule is intended for the benefit and protection of defendants who do not have appointed or assigned counsel and must incur fees for private representation to defend against a Commonwealth appeal. . . . Defendants with appointed or assigned attorneys are not required to expend their own funds for their representation. Their defense, including a zealous defense against any Commonwealth appeal, is paid for by CPCS from its budget appropriation. See G. L. c. 211D" (footnote omitted).

Commonwealth v. Augustine, 470 Mass. 837, 841 (2015), and cases cited. Thus:

\$250, but both claim that the time spent on the matter, and hence the total amount of fees sought, was excessive.

"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. A defendant who is able to retain private counsel may not have the funds for an interlocutory appeal from a suppression motion on which he has prevailed. The lawyer should not be placed in the untenable position of either volunteering his services on the appeal or abandoning the defendant. These considerations are present in every case and especially operative when the case involves a significant constitutional issue on which the defense bar has an equal interest with the prosecution in establishing the law."

Commonwealth v. Gonsalves, 432 Mass. 613, 617 (2000). In other words, the rule is for clients who are paying for their own representation. If, in the course of the proceeding in the trial court, the Commonwealth takes a detour for an interlocutory appeal, the fee-paying client may not have the funds to pay his or her attorney to follow. The rules fixes this by requiring the Commonwealth to pay in that situation.

If that is not clear enough, we also have said that the rule is "a rule of 'reimbursement,'" and nothing more.

Augustine, 470 Mass. at 842 n.10, quoting Reporters' Notes to Rule 15 (d), Mass. Ann. Laws Court Rules, Rules of Criminal Procedure, at 1595 (LexisNexis 2014-2015) ("This subdivision was drafted to dispel any uncertainty concerning the defendant's right to reimbursement of his or her costs of appeal and attorney's fees" [emphasis added]). If a defendant pays no fees for private representation -- and is never expected to pay

anything -- there is nothing to reimburse. Augustine, supra at 841-842.¹²

In the Augustine case, we dealt with the situation where a private (non-CPCS) attorney agreed to represent an indigent defendant on a Commonwealth interlocutory appeal at no charge to the defendant. Augustine, 470 Mass. at 841. The defendant was entitled to (and initially had) an attorney assigned by CPCS to represent him, but he opted for the private counsel instead. Id. at 839. We held that the private attorney was not entitled to be compensated by the Commonwealth pursuant to rule 15 (d) for his services. Id. at 841-843. The defendant paid the attorney nothing, so there was nothing to reimburse. Id. at 841-842. We explained that the rule is for the defendant's benefit, i.e., to reimburse him or her for what he or she owes, and in that sense is quite different from other fee-shifting rules that permit counsel to be compensated even when the client owes nothing. Id. at 842-843.

To be sure, the defendant in this case signed a piece of paper saying that he agreed to pay Mr. Rivera at a rate of \$250 per hour for his services. It was perfectly clear at the time,

¹² Black's Law Dictionary 1539 (11th ed. 2019) defines "reimbursement" as "[r]epayment" or "[i]ndemnification." Webster's New World College Dictionary 1208 (4th ed. 2007) defines "reimburse" as "to pay back (money spent)" or "to repay or compensate (a person) for expenses, damages, losses, etc."

however, to both the defendant and Mr. Rivera, that the defendant could not afford to pay anything. Mr. Rivera knew the defendant was indigent and was represented by counsel assigned by CPCS, and Mr. Rivera has acknowledged that he never expected to be paid anything by the defendant. The plan, all along, was for the Commonwealth -- the district attorney and the Trial Court -- and not the defendant, to pay his fee. The fee agreement was, in a word, illusory.

There is no indication in the record before us of a genuine intent for the defendant ever actually to pay for private representation. There is no evidence that the defendant paid a retainer or otherwise provided any collateral or security for what he purported to promise to pay; no evidence that the defendant in fact paid anything during the course of the representation; and no evidence that Mr. Rivera ever sent the defendant a bill or communicated with him in any way whatsoever about private payment between the time they signed the agreement and when Mr. Rivera applied to the court, one and one-half years later, for payment under rule 15 (d). Indeed, all the indications are that the defendant would never pay anything out of pocket.¹³

¹³ The fee agreement itself is very telling. Although it says that the defendant would pay \$250 per hour, the provisions for where that money would come from make it plain that the attorney would obtain payment under rule 15 (d). Those

Mr. Rivera argues that his situation is like that of the attorney in Commonwealth v. Murphy, 423 Mass. 1010 (1996). It is not. In that case, as here, the defendant was represented in the trial court by an attorney who had been appointed by CPCS, and on the Commonwealth's (in that case unsuccessful) application for leave to take an interlocutory appeal he was represented by private counsel. Id. at 1010 & n.1. Though it does not appear in the opinion in that case, the record of the case indicates that the attorney appointed by CPCS and the attorney privately retained by the defendant were professionally affiliated at the same firm. Significantly, however, the record of the case also indicates that, when the motion for fees was litigated before the single justice, the Commonwealth conceded that the defendant was entitled to a fee award. The Commonwealth only contested who should have to pay the fees; it argued that the award should be paid by CPCS. The single justice rejected the Commonwealth's contention and ordered that the fees be paid by the district attorney's office.

provisions, which are quoted above, speak only in terms of the attorney being compensated, as if any fee award would belong to the attorney (e.g., that the attorney "shall recover his fees . . . upon application to the appropriate appellate court," and that the defendant "relinquishes any claim to any award of . . . fees"). The agreement says nothing about the defendant being reimbursed for anything he pays or owes.

The Commonwealth then moved for reconsideration, claiming that the single justice had "overlooked a fact, namely that the defendant was entitled to public counsel." The Commonwealth also contended that the single justice had "misapprehended the law, namely, in ruling that the [d]istrict [a]ttorney should pay the attorney[']s fees and costs." The single justice expressly denied reconsideration on the first point, noting that the Commonwealth had conceded the entitlement to a fee. He allowed reconsideration as to the second point only and, after further analysis, allowed his earlier ruling (i.e., that the district attorney was required to pay the fees) to stand. That was the posture of the case when the Commonwealth appealed to the full court.

On appeal, although the Commonwealth sought again to challenge the defendant's entitlement to a fee award, the court did not address that issue, which was entirely understandable given the Commonwealth's initial concession that a fee award was in order and the single justice's express refusal to revive the question on reconsideration. The only issue addressed by the court in that case, therefore, was who should pay the fee. Murphy, 423 Mass. at 1010 ("At issue is who should pay the attorney's fees determined and approved pursuant to Mass. R. Crim. P. 15 [d]"). The court's opinion in that case did not, as Mr. Rivera would have it, pass on the legitimacy of the private

counsel agreement in those circumstances, nor has any subsequent decision of the full court held that such an agreement in those circumstances -- or these -- was valid for purposes of rule 15 (d).

In both Augustine, 470 Mass. at 840, and Commonwealth v. Sparks, 431 Mass. 299, 304 n.8 (2000), we acknowledged that there might be circumstances where an indigent defendant, faced with an interlocutory appeal by the Commonwealth, might legitimately retain private counsel to defend him or her in that proceeding. Conceivably, for example, a defendant might have enough money or other assets to pay for private counsel for that limited task, yet not enough that would render him or her not indigent for purposes of having counsel assigned by CPCS; or a family member or friend might provide him or her with funds to pay for private counsel for the interlocutory appeal; or the private counsel might agree to represent the defendant for no fee or a significantly reduced fee. But when we spoke in those cases about "an indigent defendant's right to dismiss appointed counsel and retain his [or her] own private counsel under a private payment arrangement," Sparks, supra at 304 n.7, or an indigent defendant's entitlement "to discharge his [or her] appointed counsel and retain private counsel on such terms as he [or she] was able," Augustine, supra at 843, we were speaking about bona fide private representation agreements by which a

defendant had paid or would pay for his or her own counsel. We did not say or mean to suggest in those cases that an award of fees pursuant to rule 15 (d) is proper simply because a defendant has signed a paper promising to pay fees to a private counsel that he or she, and the attorney, know full well will never be paid. As we said in Augustine, supra, "[i]f that were the case, indigent defendants always would be able to engage private counsel of their choice, in lieu of their court-appointed counsel, at the Commonwealth's expense. There is no such right."

In this case, the indigent defendant had counsel assigned to him by CPCS, Mr. Carr. If Mr. Carr was unable to represent him in defense of the Commonwealth's application for leave to appeal, he was entitled to have another qualified lawyer appointed by CPCS. He did not have privately-retained counsel up to that point, and so was at no risk of having to pay more money to a privately-retained attorney when the Commonwealth sought to take its interlocutory appeal. Nor was a previously-retained private attorney placed in the untenable position of having to either abandon the defendant or represent him without getting paid. As the Gonsalves and Augustine cases make plain, therefore, this case is simply not one that rule 15 (d) was

designed to cover. See Augustine, 470 Mass. at 841; Gonsalves, 432 Mass. at 617.¹⁴

b. Amount of fees sought. Although we conclude that the defendant is not entitled to be reimbursed, and therefore Mr. Rivera is not entitled to be paid, for anything pursuant to rule 15 (d), we are compelled to comment briefly on the amount of the fees sought. We are not aware of any case, and none has been brought to our attention, where a fee award under rule 15 (d) in the neighborhood of \$40,000 solely for an opposition to the Commonwealth's application for leave to appeal has been granted. The hourly rate, as the Commonwealth concedes, may have been reasonable, but the time spent for the discrete task of preparing a twenty-six page opposition and for preparing a motion for fees -- a total of 160.5 hours -- was excessive. Had the defendant been entitled to reimbursement of fees, we would have reduced the amount substantially. While we cannot rule out the possibility entirely, it is difficult to imagine a situation -- it would likely require extraordinary

¹⁴ The Commonwealth contends that the defendant's recovery of fees is also precluded by the holding in Commonwealth v. Sparks, 431 Mass. 299 (2000), because here, as there, CPCS was not informed of the private counsel arrangement before it happened. Because we base our holding on the principles set forth in the Gonsalves and Augustine line of cases, we need not address the Commonwealth's additional point, and accordingly we express no view as to whether Sparks would also bar recovery here.

circumstances -- where an expenditure of 160.5 hours would be appropriate for the limited task of writing an opposition to a request for leave to appeal (and preparing a motion for fees), especially for an attorney who was already well-versed in the specifics of the case and the task at hand.

Conclusion. The motion for attorney's fees and costs is hereby denied.

So ordered.