STATE OF MICHIGAN

COURT OF APPEALS

In re Attorney Fees of Atchison and Hartman.

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 19, 2012
v CHARLES CURTIS MERRIMAN, Defendant, and MICHAEL J. ATCHISON and DANIEL J. HARTMAN, Appellants.	No. 292281 Charlevoix Circuit Court LC No. 07-036010-FC

Before: WHITBECK, P.J., and MARKEY and K. F. KELLY, JJ.

WHITBECK, J. (*concurring in part and dissenting in part*).

I agree with the majority's decision to affirm the circuit court's award of $641.41 in costs associated with appellants Michael Atchison's and Daniel Hartman's representation of defendant Charles Merriman. However, I respectfully disagree with the majority's conclusion that the circuit court abused its discretion by awarding only $5,000 in additional attorney fees. Contrary to the majority, I believe that the circuit court did not clearly err in concluding that Hartman participated in the underlying case on a pro bono basis. The Court did not, therefore, abuse its discretion either by declining to award additional fees to cover Atchison's overage or by declining to award any additional amount to Hartman. Accordingly, on the issue of additional fees, I would affirm.

I. FACTS

At the time relevant to these proceedings, a consortium of four attorneys, including Atchison, contracted to provide public defender services for all indigent criminal cases in Charlevoix County. While representing Merriman, Atchison brought Hartman into the case to

assist him. However, over the course of the trial, Hartman took over as de facto lead counsel. After the trial, characterizing the underlying case as one of unusual complexity and duration, Atchison and Hartman petitioned the circuit court for additional compensation and reimbursement of expenses. Atchison and Hartman provided records indicating that they devoted 1,173 hours to the case and that their expenses added up $3,144.11. Atchison and Hartman asserted that a consortium-based defense would normally add up to only 270 hours and that they should therefore be compensated for the additional 903 hours—193 hours for Atchison and 710 hours for Hartman. At their claimed rate of $75 an hour, Atchison and Hartman calculated that their reasonable compensation should be $67,725. The circuit court, however, authorized payment of only $641.14 for expenses and $5,000 in additional attorney fees.

On remand to the circuit court, the court held an evidentiary hearing, at the conclusion of which, the court held that Hartman's participation in the underlying case was on a pro bono basis. The circuit court characterized the issue as "not reasonable compensation for assigned Counsel," but "whether or not Counsel can bind the Court and the county after the fact," and added, "[T]hat's a precedent I don't think would be prudent to set." The circuit court reiterated that it would not award any additional fees or compensation for expenses.

II. AWARD OF FEES AND EXPENSES

A. STANDARD OF REVIEW

Atchison and Hartman argue that the circuit court erred in concluding that Hartman contributed his efforts to the underlying case pro bono and was therefore not entitled to an award of attorney fees. This Court reviews an award of costs and fees for an abuse of discretion.[1] An abuse of discretion occurs when the decision results in an outcome falling outside the range of principled outcomes.[2] This Court may not set aside a circuit court's findings of fact unless they are clearly erroneous.[3]

B. APPELLANT HARTMAN

That the underlying criminal case was an extraordinary one is not in dispute. Nor have any doubts been raised concerning the time and expenses that Hartman invested in the case. However, as the circuit court stated, the issue here is "not reasonable compensation for assigned Counsel," but "whether or not Counsel can bind the Court and the county after the fact."

Pursuant to the consortium agreement, each participating attorney was paid a fixed stipend. The agreement further provided,

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[1] See *In re Condemnation of Private Property for Highway Purposes* (*Dep't of Transportation v Curis*), 221 Mich App 136, 139-140; 561 NW2d 459 (fees); *Klinke v Mitsubishi Motors Corp*, 219 Mich App 500, 518; 556 NW2d 528 (1996) (costs).

[2] *Radeljak v DaimlerChrysler Corp*, 475 Mich 598, 603; 719 NW2d 40 (2006).

[3] MCR 2.613(C).

> In the event that *a Consortium member is assigned a case* that is extraordinary in its nature, severity, complexity, or duration, *said attorney may petition* the appropriate Court for additional compensation, which may be granted by the Court in its' [sic] discretion, and if so ordered, shall be paid by the County.[4]

Additionally, the agreement stated that "[t]he Consortium shall provide such other qualified attorneys as may be needed to perform the functions stated herein, *all of whom must be approved by the appropriate Judge or his/her designee prior to performing any services*."[5]

At the evidentiary hearing held on remand, Hartman testified that he "didn't get involved [in the case] with the idea of submitting the Court a bill, I got involved because the case and its complexities I thought needed me and I grossly underestimated the amount time . . . ." Hartman added that he "got in [to the case] as a volunteer and it exceeded what I had signed on for by a lot." The circuit court noted that the consortium agreement stated that "such other qualified attorneys as may be needed . . . must be approved by the appropriate Judge or his or her designee *prior to any performance of any services*," and added that the agreement "does not authorize a member of the Consortium to hire co-Counsel and then later demand the County to pay for that attorney."[6] The circuit court expressed its opinion that "if [Hartman] is to change his status from pro-bono to that of paid counsel, he must have advance approval." The court continued:

> [W]hen it came to the [instant] case, the Court anticipated that he was coming in another high publicity case on a pro-bono basis . . . .
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> Mr. Hartman testified that he didn't seek pre-approval because he didn't expect to be reimbursed. He testified that he got in as a volunteer and then the case exceeded what he expected . . . .
>
> At no time did either attorney come to the Court seeking compensation until the case was over. And, so, it was a pro-bono case for Mr. Hartman that turned out to be more work than he expected and he now seeks to be compensated by public funds.
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> * * *
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> The amount of compensation paid in this case was based on the understanding that, of everyone, I think, involved, that Mr. Hartman was serving on a pro-bono basis, as he has historically established in several previous cases. It is my opinion that if he is to change his status from pro-bono to that of paid counsel, he must have advance approval.

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[4] Emphasis added.

[5] Emphasis added.

[6] Emphasis added.

The circuit court's reasoning was sound. The circuit court correctly recognized that Hartman came into the case pro bono, did not seek to change that status until after trial, and was therefore not entitled to claim compensation after the fact. And while the case did develop into one that was "extraordinary in its nature, severity, complexity, or duration," under the terms of the consortium agreement only the "Consortium member . . . assigned [such] a case . . . may petition the appropriate Court for additional compensation . . . ." Therefore, *by contract*, only Atchison was entitled to petition for any such additional compensation. Although Hartman's efforts are worthy of commendation, because he was not a consortium member assigned to the case, he was not entitled to petition the court.

I further note that, arguably, any compensation to which Hartman may have been entitled was the responsibly of the consortium, not the county. Under the terms of the consortium agreement,

> In the case of non-representation of an indigent defendant by the Consortium, for any reason, the Consortium shall provide a qualified replacement attorney, approved by the appropriate Judge, as may be needed to perform the required services, and the Consortium shall be responsible for the remuneration of that attorney, without further expense to the County.

Here, Atchison was the consortium counsel assigned to represent Merriman, so admittedly this was not literally a case of "non-representation of an indigent defendant by the Consortium." However, as the record reflects, in reality, the case developed in such a way that Hartman was serving as a "qualified *replacement* attorney" due to his taking over as lead counsel on the case. And even though the circuit court was aware of and consented to this development, the replacement was done at the behest of the consortium and the county was contractually relieved of any compensatory responsibly for that change. Accordingly, I would conclude that the circuit court did not abuse its discretion by declining to award any additional amount to Hartman.

Additionally, I note that in addition to the terms of the consortium agreement, MCL 775.16 states, in pertinent part, "The attorney appointed by the court shall be entitled to receive from the county treasurer, on the certificate of the chief judge that the services have been rendered, the amount which the chief judge considers to be reasonable compensation for the services performed." I find Hartman's reliance on this provision misplaced for several reasons. I believe that any reasonable compensation contemplated by this provision was covered by the terms of the consortium agreement. And further, even assuming that this provision operated independently of the agreement, only the "*attorney appointed by the court*"—here, Atchison—was entitled to such reasonable compensation. Moreover, that Atchison—the approved consortium attorney—was the "1 attorney" who would have been entitled to compensation is further supported by MCL 775.18, which states,

> Only 1 attorney in any 1 case shall receive the compensation above contemplated, nor shall he be entitled to this compensation until he files his affidavit in the office of the county clerk, in which such trial or proceedings may be had, that he has not, directly or indirectly, received any compensation for such services from any other source.

In sum, I would conclude that the circuit court was correct in finding that Hartman was not entitled to compensation for his services.

C. APPELLANT ATCHISON

Atchison claimed 193 hours beyond his ordinary consortium workload, and the circuit court granted him $5,000 for that overage. By my calculation, that rate of compensation comes to slightly better than $25 an hour. Given that this compensation was supplemental in the context of a consortium case, I would conclude that the circuit court did not abuse its discretion by declining to award additional fees to cover Atchison's overage.

I would affirm.

/s/ William C. Whitbeck