

IN THE UTAH COURT OF APPEALS

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State of Utah,	)	MEMORANDUM DECISION
	)	(Not For Official Publication)
Plaintiff and Appellee,	)	
	)	Case No. 20090024-CA
v.	)	
	)	F I L E D
Cody Augustine,	)	(August 6, 2009)
	)	
Defendant and Appellant.	)	<span style="border: 1px solid black; padding: 2px;">2009 UT App 218</span>

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Third District, Salt Lake Department, 081905753  
The Honorable Judith S.H. Atherton

Attorneys: Randall W. Richards, Ogden, for Appellant  
Mark L. Shurtleff and Christine F. Soltis, Salt Lake  
City, for Appellee

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Before Judges Greenwood, Bench, and Davis.

PER CURIAM:

Defendant Cody Augustine appeals the denial of his motion to retain a defense expert at public expense. The State moves to summarily reverse the finding that Augustine is not indigent and remand the case to resolve whether Augustine has established a "compelling reason" for appointment of a noncontracting defense expert. Utah Code Ann. § 77-32-302(2)(e) (2008). We grant the State's motion.

The district court originally determined that Augustine was indigent and appointed the Salt Lake Legal Defender Association (LDA) to represent him. Augustine's mother later retained private counsel, and LDA withdrew. Augustine moved for appointment of a forensic psychologist at Salt Lake County's expense. That psychologist does not have a contract with LDA to provide defense services. At an evidentiary hearing, Augustine testified that he was incarcerated, unemployed, and had no other assets. His mother testified that she hired counsel for \$15,000 by borrowing from friends and her retirement fund. She testified that she is paying counsel in installments and has no additional income available to pay for a defense expert after paying for food and other living expenses.

The district court found that Augustine "has sufficient funds to pay up to \$15,000 for a defense attorney, and . . . I have heard no testimony suggesting that his family will be deprived of food, shelter, clothing, or other necessities." See id. § 77-32-202(3)(a)(i) (stating that a person is indigent if he does not have sufficient means to pay for a defense "without depriving that person or the family of that person of food, shelter, clothing and other necessities"). On that basis, the district court found that Augustine was not indigent. The district court reasoned, "if he can afford representation, he can afford to pay for the representation in its entirety." The district court also found that Augustine "has access to" his mother's resources.

Utah Code section 77-32-301(3), which states the minimum standards for indigent criminal defense, requires a county to "provide the investigatory resources necessary for a complete defense." Id. § 77-32-301(3). Rule 15 of the Utah Rules of Criminal Procedure states that "upon showing that a defendant is financially unable to pay the fees of an expert whose services are necessary for adequate defense, the witness fee shall be paid as if he were called on behalf of the prosecutor." Utah R. Crim. P. 15. In State v. Burns, 2006 UT 56, 4 P.3d 795, the Utah Supreme Court held that "the only requirements for receiving public assistance for expert witnesses are proof of necessity and establishment of indigence." Id. ¶ 32. "While who is paying for a defendant's attorney may be a factor in the determination of indigency, it is not the determinative factor." Id. Thus, the supreme court held that the district court erred in holding "that LDA representation was a prerequisite to providing the statutorily required minimum standards for an indigent defense." Id.; see also State v. Barber, 2009 UT App 91, ¶ 21, 206 P.3d 1223 (stating that Utah law guarantees indigent defendants public assistance for expert witnesses irrespective of whether they are represented by the LDA or private counsel).

In State v. Vincent, 883 P.2d 278 (Utah 1994), the Utah Supreme Court stated that a court assessing indigency may consider "financial aid from family or friends." Id. at 283. Therefore, if the facts establish that two people are living together as a domestic unit, "then both persons' incomes may properly be considered in determining whether either of them is indigent." Id. at 283, n.6. The supreme court also cited Hill v. State, 805 S.W.2d 651, 653 (Ark. 1991) as "approving consideration of whether defendant 'has control or complete discretionary use of funds raised by others for his defense' in indigency determinations." Vincent, 883 P.2d at 283 n.6 (quoting Hill, 805 S.W.2d at 653); see also United States v. Zelenka, 112 F.Supp.2d 708, 716 (M.D. Tenn. 1999) ("[B]ased upon the fact that Defendant's personal finances have not changed and that Defendant

has no access, claim or control over the third party's assets, the Court [found] that Defendant remains unable to obtain counsel." ).

It is undisputed that Augustine is indigent if his mother's payments for a private attorney are excluded. There was no evidence demonstrating that he has control over the funds or can compel payment. The evidence also establishes that Augustine's mother is unable and unwilling to pay any additional defense costs. Accordingly, the district court's ruling that Augustine is not indigent is reversed. The case is remanded for determination whether Augustine can establish a compelling reason for appointing a noncontracting defense resource.

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Pamela T. Greenwood,  
Presiding Judge

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Russell W. Bench, Judge

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James Z. Davis, Judge