STATE OF MICHIGAN

COURT OF APPEALS

In re Attorney Fees of MITCHELL T. FOSTER.

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KEVIN JOHN RIEMAN,

Defendant,

and

MITCHELL T. FOSTER,

Appellant.

UNPUBLISHED
July 30, 2020

No. 350644
Bay Circuit Court
LC No. 15-010218-FH

Before: FORT HOOD, P.J., and JANSEN and TUCKEL, JJ.

PER CURIAM.

Appellant, Mitchell T. Foster, appointed appellate counsel for Kevin J. Rieman in Rieman's underlying criminal case, appeals as of right the trial court's order awarding him attorney fees for his postconviction work in Rieman's case. We affirm in part, reverse in part, and remand for further proceedings.

Rieman was convicted of embezzlement by an agent of property having a value of at least $20,000 but less than $50,000, MCL 750.174(5)(a), forgery, MCL 750.248, and uttering and publishing, MCL 750.249, for which the trial court sentenced him to five years of probation. Foster was appointed to represent Rieman in postconviction proceedings. On June 6, 2019, Foster petitioned the trial court for reasonable and extraordinary fees in relation to his postjudgment representation of Rieman. Foster requested $10,875 for 145 hours of work. The trial court initially awarded Foster $6,247.50, which equates to 83.3 hours of work at the applicable $75 hourly rate.

Foster filed a motion for reconsideration. Foster argued that there was no explanation or rationale given by the trial court for not paying Foster the amount he had requested. Foster requested that he be paid the full requested amount or that the court conduct an evidentiary hearing regarding those fees. The trial court modified its prior award to increase the award to $7,845. The trial court also noted that there is no right to a hearing on the issue of reasonableness; there is only a requirement that the court state its decision on the record. The court then detailed the deductions it subtracted from Foster's original submitted request. Based on its analysis, the court reduced the number of compensable hours from 145.0 to 104.6, which resulted in an overall attorney fee award of $7,845. The trial court also noted that numerous other communications between Rieman and Foster and the amount of time Foster had spent reviewing the transcripts could have been found excessive as well, but nonetheless allowed Foster to be compensated for them.

This appeal followed. Foster argues that the trial court erred when it failed to compensate him for the total amount of hours he had requested in connection with representing Rieman in the postconviction proceedings.

We review an award of attorney fees for an abuse of discretion. *Moore v Secura Ins*, 482 Mich 507, 516; 759 NW2d 833 (2008). A court abuses its discretion when it selects an outcome that falls outside the range of reasonable and principled outcomes. *Id*. However, any questions of law, including the proper interpretation of court rules, are reviewed de novo. *ISB Sales Co v Dave's Cakes*, 258 Mich App 520, 526; 672 NW2d 181 (2003).

There are two components to the issue on appeal: (1) whether the trial court erred when it determined that some of the services Foster provided were not "necessary" and therefore not compensable; and (2) whether the trial court erred when it determined that some of Foster's claimed time was excessive.

I. "NECESSARY" SERVICES

The trial court precluded Foster from receiving compensation for some of the services he had performed because the court determined that the services were "not necessary" to Foster's representation of Rieman in relation to his appeal to this Court. Foster on appeal challenges the trial court's refusal to compensate him for time spent (1) working on a postconviction motion to have Det. Brian Berthiaume show cause why he should not be held in contempt of court; (2) working on a postconviction motion to allow Rieman to travel out of state and for removal of an alcohol tether; and (3) reviewing seven FOIA requests made by Rieman and the responses he received.

We hold that the trial court viewed Foster's scope of responsibilities too narrowly. MCR 6.425(G)(2) provides, in pertinent part:

> The responsibilities of the appellate lawyer appointed to represent the defendant include representing the defendant
>
> (a) in available postconviction proceedings in the trial court the lawyer deems appropriate,
>
> (b) in postconviction proceedings in the Court of Appeals[.]

Thus, not only is appointed appellate counsel to represent a defendant in a postconviction proceeding in the Court of Appeals, MCR 6.425(G)(2)(b), counsel's responsibilities include pursuing "postconviction proceedings in the trial court the lawyer deems appropriate," MCR 6.425(G)(2)(a).

Regarding Foster's work pertaining to the postconviction motion to show cause and the postconviction motion to allow defendant to travel out of state and for removal of an alcohol tether, both of these motions involved matters related to the criminal case for which Foster was appointed to provide representation. Specifically, the motion to show cause involved Det. Berthiaume's failure to produce documents that Rieman had requested at his criminal trial, and the other motion sought relief from conditions that were imposed as part of Rieman's probation in his criminal case. These endeavors clearly constitute work on "postconviction proceedings in the trial court the lawyer deem[ed] appropriate." MCR 6.425(G)(2)(a). Thus, the trial court erred as a matter of law when it ruled that these activities were beyond the scope of Foster's responsibilities as appointed counsel. In addition to how the scope of Foster's work was defined by court rule, the order appointing him as counsel stated that he was "appointed counsel for the defendant in post-conviction proceedings." The order did not limit this representation to matters solely related to appellate work at this Court. Therefore, the trial court abused its discretion. See *People v Waterstone*, 296 Mich App 121, 132; 818 NW2d 432 (2012) ("A trial court necessarily abuses its discretion when it makes an error of law."). Consequently, we remand for the trial court to compensate Foster for the reasonable amount of time he spent related to his work on the motion to show cause and the motion to allow defendant to travel out of state and for removal of the alcohol tether.

Foster's work in pursuit of the appeal of the trial court's denial of the motion to show cause is compensable as well. The trial court's explanation for precluding Foster from being compensated for this work was that "[t]here was no need to file [this] separate appeal when the original appeal had not been filed yet." We disagree with the trial court's analysis. An appeal of right of Rieman's convictions could not be used as a vehicle to also challenge any postconviction orders. That is because "[a] party claiming an appeal of right from a final order is free to raise issues on appeal related to *prior* orders." *Green v Ziegelman*, 282 Mich App 292, 301 n 6; 767 NW2d 660 (2009) (quotation marks and citation omitted; emphasis added). Furthermore, Rieman could not appeal as of right the trial court's order denying his postjudgment motion to show cause because that was not a "final order" under the court rules. See MCR 7.202(6)(b); MCR 7.203(A). Thus, Foster, acting on behalf of Rieman, would have to seek leave to appeal the trial court's decision regarding the postjudgment motion to show cause, and this is precisely what he did. Accordingly, under MCR 6.425(G)(2)(b), Foster's responsibilities included pursuing leave to appeal the trial court's denial of the show-cause motion.

On remand, the trial court must either award the requested fees for the work associated with these two postconviction motions or "articulate on the record its basis for concluding that such fees are not reasonable." *In re Attorney Fees of Ujlaky*, 498 Mich 890 (2015).

However, we find no abuse of discretion with how the trial court handled Foster's work related to reviewing seven FOIA request letters issued by Rieman and the responses Rieman received because this work was not in the context of any postconviction proceeding. Any appeals from those FOIA rejections would have resulted in separate, original civil matters. See MCL

15.240(1)(b) (providing that after receiving a denial of a FOIA request, the person may "[c]ommence a civil action"). Notably, in his brief on appeal, Foster merely avers that these documents "were part of the 'available case documents' and part of the defendant's 'file.' " But regardless of Rieman having in his possession these FOIA requests and responses, they are not contained in the lower court record and were not even mentioned at trial. Thus, it is hard to envision any reasonable use for them.[1]

Foster relies on Standard 1 of the Minimum Standards for Indigent Criminal Appellate Defense Services, which states:

> Counsel shall promptly examine the trial court record and register of actions to determine the proceedings, in addition to trial, plea, and sentencing, for which transcripts or other documentation may be useful or necessary, and, in consultation with the defendant and, if possible, trial counsel, determine whether any relevant proceedings have been omitted from the register of actions, following which counsel shall request preparation and filing of such additional pertinent transcripts and review all transcripts and lower court records relevant to the appeal. Although the trial court is responsible for ordering the record pursuant to MCR 6.425(F)(2), appellate counsel is nonetheless responsible for ensuring that all useful and necessary portions of the transcript are ordered.[2]

The above standard's main purpose is to ensure that the lower court record is complete and that all transcripts from the lower court proceedings have been ordered. FOIA requests and rejections that are not contained within the lower court record or referenced in trial court can have no bearing on this goal.

Foster also directs this Court's attention to the commentary for this standard provided by the Michigan Appellate Assigned Counsel System (MAACS):

> To meaningfully consult with the client *and properly prepare an appeal*, appellate counsel must obtain and review all available case documents—including all transcripts, the full court file, and sentencing and discovery materials. Counsel should also obtain trial counsel's file, recognizing that trial counsel is obligated to provide these materials. [Emphasis added.[3]]

---

[1] We note that a review of these FOIA *requests and rejections* would be different than a review of *documents that had been turned over after a FOIA request* because those documents, at least, perhaps, could be used as justification for a new trial on account of newly discovered evidence. See *People v Grissom*, 492 Mich 296, 312-313; 821 NW2d 50 (2012).

[2] See <http://www.sado.org/content/pub/11142_Minimum-Standards.pdf> (accessed June 15, 2020).

[3] See <http://www.sado.org/content/pub/11142_Minimum-Standards.pdf> (accessed June 15, 2020).

Contrary to what Foster contends, appellate counsel is not duty-bound to examine every document or piece of paper a defendant turns over to him. The commentary makes clear that consulting with the defendant is for the purpose of "prepar[ing] an appeal." Indeed, it is not hard to imagine some defendants possessing hordes of irrelevant materials they believe prove their innocence or some vast governmental conspiracy, when none of these materials was ever introduced in the trial court or played any role in any of the lower court proceedings.

Moreover, we note that in his petition seeking the attorney fees, Foster never mentioned the FOIA requests, let alone explained why they were needed. Instead, the only reference to them appears in the spreadsheets he attached to his petition, which detailed how he spent his time. "The party requesting an award of attorney fees bears the burden of proving the reasonableness of the fees requested." *Adair v Michigan (On Fourth Remand)*, 301 Mich App 547, 554; 836 NW2d 742 (2013) (quotation marks and citation omitted). Not offering any explanation beyond a mere recitation of his proposed billing is inadequate to show the reasonableness of the fees. *Petterman v Haverhill Farms, Inc*, 125 Mich App 30, 33; 335 NW2d 710 (1983). While such billing records may substantiate how an attorney spent his time and which services he performed, they cannot demonstrate why said time and services were needed or reasonable.

Consequently, we affirm the trial court's decision to not compensate Foster related to his review of the FOIA materials.

In sum, the trial court erroneously concluded that Foster could not recover attorney fees for his work related to his two postconviction motions. On remand, the court must either award the full amount requested related to the work performed on these motions, including appellate work, or "articulate on the record its basis for concluding that such fees are not reasonable." *In re Ujlaky*, 498 Mich at 890. But the court did not abuse its discretion by precluding compensation for Foster's work related to the FOIA requests.

II. "EXCESSIVENESS" OF CLAIMED TIME

Foster next argues that the trial court erred when it did not award the full amount he requested in relation to the time he spent preparing Rieman's brief on appeal in Docket No. 341041. In its opinion and order on reconsideration, the trial court stated:

> [A]ppellate counsel indicates a total of 31 ½ hours to draft the Statement of Facts for the appeal brief. . . . The total time requested for the drafting of the appeal brief was 42 ½ hours. The Court found this amount of time excessive for the issues presented and reduced the total amount of time for the brief to 21 ½ hours. Finally the last revision and editing of the appeal brief was on 6/2/19 in the amount of 4 ½ hours which the Court found excessive and reduced it to 1 ½ hours.

As previously mentioned, when a trial court authorizes compensation to an appellate attorney, the court must either award the requested fees or "articulate on the record its basis for concluding that such fees are not reasonable." *Id*. Although the trial court did not use the word "reasonable" in its analysis related to the time spent on the appellate brief, it found that Foster's time spent was "excessive," which is synonymous with unreasonable, because if something is

"excessive" (i.e., it was more than what was needed), it would be "unreasonable." Therefore, the trial court complied with the mandates of *In re Ujlaky*.

We also conclude that the trial court did not abuse its discretion in its analysis. We note that the requested time at issue does not include Foster's time spent reviewing the transcripts or conducting legal research, for which the trial court allowed Foster to be compensated. The requested time also does not include time for reviewing the prosecutor's brief or preparing a reply brief. The brief filed by Foster raised only three issues: a sufficiency of the evidence claim, a challenge to the admissibility of evidence under MRE 404(b)(1), and a *Brady*[4] challenge. None of these issues was particularly complex or lengthy. The trial court did not abuse its discretion by determining that 42.5 hours to merely *write* the appellate brief—exclusive of legal research or reviewing transcripts—was excessive or unreasonable.

While one perhaps could quibble with the actual amount down to which the trial court reduced the compensable hours, we cannot say that the trial court's decision fell outside the range of reasonable and principled outcomes. See *Nat'l Waterworks, Inc v Int'l Fidelity & Surety, Ltd*, 275 Mich App 256, 258; 739 NW2d 121 (2007) ("The abuse of discretion standard recognizes that there may be no single correct outcome in certain situations[.]"). Therefore, the trial court did not abuse its discretion by setting the number of compensable hours for the time spent writing Rieman's brief on appeal in Docket No. 341041 at 21.5 hours.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Karen M. Fort Hood
/s/ Kathleen Jansen
/s/ Jonathan Tukel

[4] *Brady v Maryland*, 373 US 83; 83 S Ct 1194; 10 L Ed 2d 215 (1963).