# STATE OF MICHIGAN

# COURT OF APPEALS

*In re* Attorney Fees of MICHAEL A. FARAONE.

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BENJAMIN MARSHALL DONALDSON, JR.,

Defendant,

and

MICHAEL A. FARAONE,

Appellant.

UNPUBLISHED
May 20, 2021

No. 353378
Ottawa Circuit Court
LC No. 19-042891-FC

Before: SAWYER, P.J., and STEPHENS and RICK, JJ.

PER CURIAM.

Appellant, Michael A. Faraone, was appointed appellate counsel for defendant's underlying criminal case. Attorney Farone appeals as of right the trial court's order denying in part his request for attorney fees for defendant's plea-based appeal. For the reasons stated in this opinion, we reverse and remand for further proceedings.

## I. BACKGROUND

Defendant was charged with two counts of delivery of less than 50 grams of cocaine, MCL 333.7401(2)(a)(*iv*). Defendant pleaded guilty to count 1, and in exchange, count 2 was dismissed. Defendant was on parole at the time and told the trial court that his agent stated that he would receive jail credit. The trial court told defendant that that the Michigan Department of Corrections (MDOC) handled parole violations. Defendant stated, "I signed a waiver and [MDOC] said that my violation started." The trial court explained that if the violation ended before

defendant was sentenced for delivery of less than 50 grams of cocaine, he would receive jail credit. The trial court also explained that regardless of how MDOC handled his parole violation, his sentence would be consecutive. The trial court sentenced defendant, as a fourth-offense habitual offender, MCL 769.12, to a prison term of 2 to 20 years, to be served consecutively to defendant's parole violation sentence. The trial court told defendant, "You have zero days' credit because . . . it is consecutive."

Subsequently, appellant was appointed as appellate counsel to represent defendant. Appellant filed a motion to withdraw defendant's plea on the basis that defendant was "misled into believing that he would receive jail credit." The trial court granted defendant's request to withdraw his plea and granted appellant's request to give defendant a 21-day reconsideration period to reconsider his motion. The trial court subsequently entered an order leaving defendant's guilty plea intact on the basis that defendant, in a letter to the trial court, stated that he no longer wished to withdraw his guilty plea.

Appellant filed a motion for a reasonable fee, requesting $1,725 in attorney fees and $575.70 in actual expenses, for a total of $2,300.70. Appellant stated that he was willing to testify if the trial court wanted to conduct an evidentiary hearing.

Without holding an evidentiary hearing, the trial court entered an order granting in part and denying in part appellant's motion for reasonable fees. In its order, the trial court stated that appellant filed a Michigan Appellate Assigned Counsel System (MAACS) Statement of Service and Order for Payment of Court Appointed Counsel voucher (MAACS voucher) requesting $1,725 in attorney fees, "representing 29.1[1] hours at $75 per hour," $192.50 in travel hours, and $383.20 in expenses, a total of $2,300.70.[2] The trial court noted that "$75 per hour [was] the non-travel hourly rate for appointed appellate counsel in Level II criminal cases for plea-based appeals established by MAACS." The trial court stated, "The Court is starting with the presumption that 15 hours is reasonable in that appellate counsel voluntarily consented to represent defendant with the full knowledge of MAACS parameters of 15 hours for plea based appeals."

The trial court approved payment of $1,125 in attorney fees, the " 'presumptive maximum fee,' " plus $192.50 in travel hours and $383.20 in other expenses, a total of $1,700.70. The trial court found that 15 hours was a "reasonable number of hours for [appellant] to have expended" on the plea-based-appeal. The court also found that appellant "knew of the rate of pay, and the standard maximum fee when he accepted the appointment." The trial court explained,

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[1] This was clearly a typographical error because 29.1 hours at an hourly rate of $75 would have been $2,182.50. On appeal, appellant asserts that he billed 23 hours rather than 29.1 hours and the MAACS voucher indicates that he billed 23 hours.

[2] "This Court's review is limited to the record established by the trial court, and a party may not expand the record on appeal." *In re Rudell Estate*, 286 Mich App 391, 405; 780 NW2d 884 (2009) (cleaned up). Although the screenshot of the MAACS voucher is not located in the lower court file, the trial court clearly stated that appellant filed the MAACS voucher and, based on the specific language in the order referencing the voucher, the court considered it. Therefore, we consider the MAACS voucher on appeal.

"[Appellant's] request for the payment of the balance of the additional (extraordinary) fees is denied as this appeal involved a common, ordinary issue which can be efficiently addressed by an experienced appellate counsel, and is squarely within the time frame which [appellant] contemplated when he chose to accept this case." This appeal followed.

## II. STANDARD OF REVIEW

A trial court's determination regarding the reasonableness of compensation for services and expenses of court-appointed attorneys is reviewed for an abuse of discretion." *In re Foster Attorney Fees*, 317 Mich App 372, 375; 894 NW2d 718 (2016). "A trial court abuses its discretion when its decision falls outside the range of reasonable and principled outcomes." *Id.* (cleaned up).

## III. ANALYSIS

Appellant argues that the trial court abused its discretion by determining that the requested $1,725 in attorney fees was excessive or unreasonable. We agree.

Appellant relies on an order issued by the Michigan Supreme Court, which, as is the case here, concerned the compensation of court-appointed appellate counsel. The order provides, in relevant part:

> [W]e remand this case to the Kent Circuit Court for a determination of the reasonableness of the attorney fees requested. The trial court applied the county's fee schedule, which capped compensation for plea cases at $660, but did not address at all the reasonableness of the fee in relation to the actual services rendered, as itemized by the appellant. See *In re Recorder's Court Bar Ass'n*, 443 Mich 110, 131 [503 NW2d 885] (1993). Although the expenditure of any amount of time beyond that contemplated by the schedule for the typical case does not, ipso facto, warrant extra fees, spending a significant but reasonable number of hours beyond the norm may. On remand, the trial court shall either award the requested fees, or articulate on the record its basis for concluding that such fees are not reasonable. See, e.g., *In re Attorney Fees of Mullkoff*, 176 Mich App 82, 85-88 [438 NW2d 878] (1989), and *In re Attorney Fees of Jamnik*, 176 Mich App 827, 831 [440 NW2d 112] (1989). [*In re Ujlaky Attorney Fees*, 498 Mich 890, 890 (2015).[3]]

To constitute reasonable compensation, "the compensation *actually* paid must be reasonably related to the representational services that the individual attorneys *actually* perform." *In re Recorder's Court Bar Ass'n*, 443 Mich at 131. Although the trial court has wide discretion

[3] A peremptory order of the Michigan Supreme Court is binding precedent if it can be understood. *People v Phillips (After Second Remand)*, 227 Mich App 28, 38 n 11; 575 NW2d 784 (1997); see also *People v Crall*, 444 Mich 463, 464 n 8; 510 NW2d 182 (1993) (stating that an order of the Michigan Supreme Court is binding if it is "a final Supreme Court disposition of an application, and the order contains a concise statement of the applicable facts and the reason for the decision"). We concluded that the *Ujlaky* order meets these requirements and, therefore, is binding on this Court.

in determining reasonable compensation, it may not "simply deny" compensation for billed services without an explanation. See *In re Attorney Fees of Jamnik*, 176 Mich App 827, 831-832; 440 NW2d 112 (1989), aff'd sub nom *People v Hunter*, 434 Mich 883 (1990). Accordingly, a trial court must "either award the requested fees, or articulate on the record its basis for concluding that such fees are not reasonable." *In re Ujlaky Attorney Fees*, 498 Mich at 890.

The trial court relied on factors laid out in *Smith v Khouri*, 481 Mich 519, 529-531; 751 NW2d 472 (2008) to determine the reasonableness of appellant's attorney fees. The Michigan Supreme Court recently revisited the *Smith* framework and set forth the following non-exhaustive list of factors that a court should consider in determining the reasonableness of an attorney fee:

> (1) the experience, reputation, and ability of the lawyer or lawyers performing the services,
>
> (2) the difficulty of the case, i.e., the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly,
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> (3) the amount in question and the results obtained,
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> (4) the expenses incurred,
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> (5) the nature and length of the professional relationship with the client,
>
> (6) the likelihood, if apparent to the client, that acceptance of the particular employment will preclude other employment by the lawyer,
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> (7) the time limitations imposed by the client or by the circumstances, and
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> (8) whether the fee is fixed or contingent. [*Pirgu v United Servs Auto Ass'n*, 499 Mich 269, 282; 884 NW2d 257 (2016).]

"These factors are not exclusive, and the trial court may consider any additional relevant factors." *Id*. The Michigan Supreme Court has declined to adopt a specific formula for determining reasonable compensation. *In re Recorder's Court Bar Ass'n*, 443 Mich at 128-129.[4]

[4] In *In re Attorney Fees of Jamnik*, 176 Mich App at 831, this Court explained that the following factors should be considered in determining reasonable compensation:

> 1. The complexity and difficulty of the case and the time and expense of counsel which can reasonably be justified.
>
> 2. The trial court's policy as to compensation.

In the instant case, Appellant submitted a MAACS voucher detailing an itemized bill of services, totaling 23 hours. In denying in part appellant's request for fees, the trial court analyzed the *Smith* factors and explained:

> None of these factors justify an attorney fee greater than what counsel contemplated when he voluntarily accepted the case. The time counsel claims to have spent on this plea based conviction is excessive given the straightforward issue involved. There is, comparatively, much time billed for administrative matters and communications with client. Such time is squarely within the contemplated contract. This amount of time spent on these "routine" administrative matters is excessive in that the file is rather minimal in that it contains basic court documents. Given counsel's experience, he should have used the efficiencies gained through that experience to set forth his positions within the time parameters which he agreed when he accepted the case.

While the court offered some justification for the attorney fee award, it did not consider "the reasonableness of the fee" in relation to the "*actual* services rendered, as *itemized* by the appellant." *In re Ujlaky Attorney Fees*, 498 Mich at 890 (emphasis added). Rather, it appears the court merely concluded that the case *could* have been handled in 15 hours. Although the court indicated that 15 hours was the "standard maximum fee" for a plea-based appeal as established by MAACS, that reasoning alone is insufficient to establish that the requested fees for services rendered beyond 15 hours were unreasonable.

The trial court could not "simply deny" eight of the claimed hours. *In re Attorney Fees of Jamnik*, 176 Mich App at 831-832. And the trial court could not merely characterize the claimed amount as "unreasonable" with no explanation as to why the services performed by appellant were unreasonable. For example, there were numerous entries for administrative tasks and appellant's meetings and communications with defendant. The court found that "[s]ome of the administrative matters claimed are secretarial in nature . . . . These are simply not recoverable attorney fees." The MAACS Standard Attorney Fee and Expense Policy provides, in relevant part:

> Hourly Rate (Legal, Administrative, Investigative)
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> Level I: $50 per hour
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> Level II: $75 per hour

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3. The minimum standards for indigent criminal appellate defense services promulgated by the Michigan Supreme Court in Administrative Order 1981-7, 412 Mich lxxxiv-xci.

Presumptive Maximum Fees*

Plea-based appeals: 15 hours ($750 Level I; $1225 Levels [sic] II)

Trial-based appeals: 45 hours ($3375)

*The presumptive maximum fee represents the maximum number of hours that will be presumed reasonably necessary. Requests for fees beyond the presumptive maximum must be accompanied by a motion explaining the authority for the fees and why the case reasonably required additional effort. Potential grounds for excess fees include, but are not limited to, lengthy trials, complex legal issues, fact investigation, and trial court litigation. [Michigan State Appellate Defender Office and Criminal Defense Resource Center, *MAACS Regional Assignment Lists Standard Attorney Fee and Expense Policy*, < http://www.sado.org/content/pub/11118_MAACS-Regional-Assignment-Lists-Standard-Attorney-.pdf> (accessed on April 22, 2021).]

Given the lack of justification provided by the court, we are left to wonder what services performed by appellant and specifically delineated on his bill were unwarranted. However, we do not mean to suggest that the trial court must accept appellant's claimed hours at face value. If, on remand, the trial court finds that the amount of time spent on services was unreasonable, it must state, with specificity, those services which it finds unreasonable and articulate a basis for that conclusion. In the absence of such analysis, we cannot say that the court's attorney-fee award was a principled outcome. *In re Foster Attorney Fees*, 317 Mich App at 375.

Although the trial court abused its discretion, we note that extensive analysis by the court is not required but that it must indicate how the claimed hours are being adjusted. See *In re Attorney Fees of Jacobs*, 185 Mich App 642, 647; 463 NW2d 171 (1990) ("The court did not simply reduce the total fee requested by forty percent, as claimed by the parties, but adjusted the hours claimed line by line . . . ."). On remand, the court must either award the full amount requested related to the work performed or "articulate on the record its basis for concluding that such fees are not reasonable." *In re Ujlaky*, 498 Mich. at 890. The trial court has the discretion to grant appellant an evidentiary hearing on his motion for further findings. See MCR 2.119(E).

In light of our disposition, we decline to address appellant's unpreserved argument that the reduction in fees violated defendant's Sixth Amendment right to the effective assistance of counsel. See *Taylor v Auditor General*, 360 Mich 146, 154; 503 NW2d 885 (1960), overruled in part on other grounds by *Parkwood Ltd Dividend Housing Ass'n v State Housing Dev Auth*, 468 Mich 763, 773-774 (2003) ("[F]ew principles of judicial interpretation are more firmly grounded than this: a court does not grapple with a constitutional issue except as a last resort.").

Reversed and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Cynthia Diane Stephens
/s/ Michelle M. Rick

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SAWYER, P.J. (*dissenting*).

I respectfully dissent.

In this case, the trial court went to great lengths to explain why any amount over $1,125 was unreasonable. The trial court recognized that appellant was a "highly experienced appellate attorney who, presumably, uses that experience to quickly spot issues and handle the case in an efficient manner." The trial court concluded that the time appellant spent was "excessive given the straightforward issue involved." In doing so, the trial court noted that defendant's motion to withdraw his plea was only four pages in length and that the transcript for the hearing on defendant's motion was, similarly, not lengthy. Appellant argues that the motion was more complex because defendant wanted jail credit rather than to withdraw his plea. However, based on an e-mail appellant received from MDOC in October 2019, appellant knew that defendant was ineligible to receive jail credit well before he filed the motion to withdraw the plea on defendant's

behalf in January 2020. For these reasons, the trial court did not abuse its discretion by awarding appellant $1,125 rather than the requested $1,725 in attorney fees.

/s/ David H. Sawyer