

STATE OF MICHIGAN
COURT OF APPEALS

In re Attorney Fees of JOHN W. UJLAKY.

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

SHAWN DOUGLAS SIMPSON,

Defendant,

and

JOHN W. UJLAKY,

Appellant.

UNPUBLISHED

October 23, 2014

No. 316494

Kent Circuit Court

LC No. 11-002833-FC

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

GILBERTO DELAROSA,

Defendant,

and

JOHN W. UJLAKY,

Appellant.

No. 316809

Kent Circuit Court

LC No. 05-011853-FH

Before: METER, P.J., and WHITBECK and RIORDAN, JJ.

PER CURIAM.

In Docket No. 316494, attorney John W. Ujlaky appeals by leave granted an April 16, 2013, order that denied Ujlaky's request for an award of extraordinary fees incurred during the appointed appellate representation of defendant Shawn Douglas Simpson. In Docket No. 316809, Ujlaky appeals by leave granted a May 14, 2013, order that denied Ujlaky's request for an award of extraordinary fees incurred during the appointed appellate representation of defendant Gilberto Delarosa. In both cases, the circuit court limited Ujlaky to recovering the flat rate allowed under a fee schedule used by Kent County to compensate appointed counsel. We affirm.

BASIC FACTS IN DOCKET NO. 316494

On March 12, 2012, Simpson pleaded guilty to first-degree criminal sexual conduct (CSC). In exchange for Simpson's plea, the prosecutor agreed to dismiss a charge of second-degree CSC, to dismiss the fourth-offense habitual offender and second-time CSC-offender sentence enhancements and the charges in another circuit-court case. Additionally, the plea was conditioned on Simpson's being allowed to challenge on appeal rulings by the circuit court that denied Simpson's motion to suppress inculpatory statements made by Simpson during an interview with police and to suppress other-acts evidence. Finally, the prosecutor agreed to not file any additional charges arising from acts committed with the two alleged victims. The circuit court sentenced Simpson on April 5, 2012, to 25 to 65 years' imprisonment.

Simpson requested appointed appellate counsel. The circuit court appointed Ujlaky to represent Simpson on appeal, and on September 13, 2012, Ujlaky filed in this Court a 31-page delayed application for leave to appeal on Simpson's behalf. He raised the following two issues:

I. DID THE TRIAL COURT ERR BY DENYING MR. SIMPSON'S MOTION *IN LIMINE* RE: SUPPRESSION OF OTHER ACTS EVIDENCE?

II. DID THE TRIAL COURT ERR BY DENYING MR. SIMPSON'S MOTION TO SUPPRESS HIS INCULPATORY STATEMENTS?

This Court denied the delayed application for lack of merit in the grounds presented. *People v Simpson*, unpublished order of the Court of Appeals, issued October 24, 2012 (Docket No. 312343). The Michigan Supreme Court denied leave to appeal. *People v Simpson*, 493 Mich 955; 828 NW2d 364 (2013).

On October 26, 2012, Ujlaky submitted a Michigan Appellate Assigned Counsel System (MAACS) Statement of Service and Order for Payment of Court Appointed Counsel to the Kent Circuit Court, pursuant to which he requested attorney fees in the amount of \$2,150.05 (39.1 hours x \$55, the hourly rate set by the Kent Circuit Court) and out-of-pocket expenses of \$335.03. He checked the box on the form to indicate that he was moving for an award of extraordinary fees and attached to the form an itemized listing of the services performed and the time spent performing those services.

Kent County pays appointed appellate counsel pursuant to the terms of a fee schedule. According to the fee schedule, the County compensates appointed counsel at a rate of \$55 an hour, but caps the total fee at \$660 for guilty-plea appeals. Additionally, the schedule allows for

the reimbursement of actual costs incurred as long as those expenses are itemized. Finally, the schedule allows for “[e]xtra fees with written justification & approval.”

On November 14, 2012, Kent County issued a check to Ujlaky in the amount of \$995.03, which reflects payment of the flat fee of \$660 and reimbursement for actual costs incurred. Thereafter, Ujlaky moved for payment of extraordinary professional fees and requested additional payment in the amount of \$1,550.05, which reflected the unpaid balance of his original request for extraordinary fees, or in some other reasonable amount. Ujlaky emphasized the time he spent on the case and the typical rates for criminal and appellate attorneys. At the motion hearing, when asked by the court what characteristics of the case supported the request for extraordinary fees, Ujlaky responded:

Well, nothing particularly, you know. It’s just a matter of having to review the record. There were substantial transcripts of 94 pages which involved an extensive evidentiary hearing that had to be reviewed and prepared as part of the application for leave to appeal, and certainly services exceeded the base minimum.

The circuit court denied the motion by opinion and order entered on April 16, 2013. The court opined:

Defendant’s attorney seeks extraordinary fees arguing that the Court must review the appropriateness of his bills according to the usual factors used to determine whether the fees were reasonable.

The pertinent facts are these. The County paid a total of \$995.03 accounting for \$335.03 in out of pocket expenses and \$600.00 [sic, \$660.00] for professional services. The movant, Mr. John Ujlaky, argues these payments are insufficient to cover his services. Mr. Ujlaky billed a total of \$2,150.05. Mr. Ujlaky argues that the money paid to him equates to an hourly rate that is smaller than his usual hourly rate of \$180 per hour or than the average rates billed by similarly situated attorneys.

Mr. Ujlaky’s argument is not persuasive because “[r]easonable compensation” . . . does not mean [the] amount privately retained counsel would earn for providing similar services for members of the general public as [the] purpose underlying [the] statute was not to provide full compensation but, rather, to relieve members of bar of at least some of their professional obligation to provide free legal services to indigent [sic].

Mr. Ujlaky had accepted the Court’s fee schedule. By doing so, we acknowledge that he has honored part of his professional obligations assumed upon admission to practice law in this state. Consequently, the motion for extraordinary fees is DENIED. [Citations and quotation marks omitted.]

Ujlaky then moved for reconsideration and advanced the following arguments:

8. Although the \$55.00 per hour rate for legal services is not completely unreasonable, counsel did agree to accept the Court Appointment under the belief that he would be **justly compensated** under the rate of pay for Appointed Appellate Counsel as established by the 17th Judicial Circuit Court, which provides [for] “EXTRA FEES WITH WRITTEN JUSTIFICATION & APPROVAL[.]”

...

12. Reconsideration is being sought because the trial court clearly erred in its Opinion and Order dated April 16, 2013, to wit:

A) counsel **never** sought compensation in the amount of \$180.00 per hour;

B) counsel **never** sought compensation [at] “the average rates billed by similarly situated attorneys.”;

C) counsel **never claimed** that he was seeking payment at a rate earned for providing similar services to the general public;

D) counsel was paid the meager amount of \$15.3453 per hour for the 39.1 hours of professional services required and rendered [sic];

E) counsel sought a “reasonable” amount [of] compensation based upon the court’s rate schedule of \$55.00 per hour;

F) while counsel “accepted the Court’s fee schedule”, counsel did so under the belief that he would be **justly compensated** under the rate of pay for Appointed Appellate Counsel as established by the 17th Judicial Circuit Court, which provides [for] “EXTRA FEES WITH WRITTEN JUSTIFICATION & APPROVAL”. [Bolding in original.]

The circuit court denied reconsideration by order dated May 7, 2013, for the reason that Ujlaky failed to demonstrate palpable error.

BASIC FACTS IN DOCKET NO. 316809

On August 20, 2007, Delarosa pleaded nolo contendere to felonious assault and acknowledged his status as a fourth-offense habitual offender. In exchange for his plea, the prosecutor agreed to recommend that Delarosa’s sentence not exceed 12 months in the county jail. To establish his status as an habitual offender, Delarosa admitted that he had been convicted of two charges of operating a motor vehicle while under the influence of intoxicating liquor, third offense, in Michigan, and attempted possession of marijuana in Texas.

The circuit court sentenced Delarosa on October 4, 2007, to three years’ probation, with the first ten months to be served in the county jail. The court also ordered Delarosa to pay

restitution in an amount to be determined. On December 17, 2007, the court entered an amended judgment of sentence that directed Delarosa to pay restitution in the amount of \$30,368.13.

The prosecutor subsequently charged Delarosa with violating the terms of his probation by failing to pay restitution. Delarosa pleaded guilty to the charge at a hearing held on November 3, 2010. The circuit court then delayed sentencing for one year, extended Delarosa's probation for one year, suspended the payment of costs, ordered Delarosa to pay \$60 a week in restitution, and gave Delarosa one year to show progress.

The circuit court sentenced Delarosa on September 22, 2011, to 3 to 15 years' imprisonment and ordered him to pay restitution in the amount of \$30,368.13.

The court appointed attorney Ujlaky to represent Delarosa. Delarosa moved to withdraw his plea or, in the alternative, for resentencing. He argued that he had been improperly charged as a four-time habitual offender because his Texas conviction for attempted marijuana possession was a misdemeanor offense. Delarosa also asserted that the circuit court erroneously ordered him to pay restitution and to pay restitution in an amount unsubstantiated by the record. Delarosa further argued that he had been improperly imprisoned for failure to pay restitution.

The circuit court heard arguments on the motion on April 13, 2012. The court rejected Delarosa's assertion that he was incorrectly charged as a fourth-offense habitual offender because the presentence report characterized the Texas conviction as a felony. The court rejected Delarosa's arguments regarding restitution by noting that the victim's injuries were severe.

Ujlaky then filed a 25-page delayed application for leave to appeal on Delarosa's behalf on April 25, 2012, in which he raised the following three issues:

I. IS MR. DELAROSA ENTITLED TO WITHDRAW HIS NO CONTEST PLEA BECAUSE HE WAS IMPROPERLY CHARGED AS A 4TH FELONY HABITUAL OFFENDER WHEN HE ONLY HAD TWO PRIOR FELONY OR FELONY LIKE CONVICTIONS?

II. WAS RESTITUTION IMPROPERLY ENTERED AND WAS IT ENTERED IN AN IMPROPER AMOUNT?

III. WAS MR. DELAROSA IMPROPERLY IMPRISONED FOR NON PAYMENT OF RESTITUTION?

This Court remanded the matter to the circuit court

. . . with instructions that the prosecutor establish that the facts of defendant's Texas conviction would support a felony conviction in Michigan, or, in the alternative, proceed under a different habitual offender statute. *People v Quintanilla*, 225 Mich App 477, 479; 571 NW2d 228 (1997).

In addition, the case is remanded for an evidentiary hearing on the issue of restitution. The prosecution must prove the amount of the victim's allowable loss

by a preponderance of the evidence. MCL 780.767(4). [*People v Delarosa*, unpublished order of the Court of Appeals, issued November 21, 2012 (Docket No. 309934).]

Following remand, the circuit court conducted an evidentiary hearing on March 7, 2013. The prosecutor conceded that the Texas conviction should not be used for purposes of Delarosa's status as an habitual offender. The court then heard the testimony of two witnesses regarding the amount of restitution. The court set Delarosa's resentencing as a third-offense habitual offender for a later date and advised the parties that additional evidence on the issue of restitution could be introduced at that hearing. The court also directed the parties to brief, if they wished, the issues regarding whether lost wages and college tuition could be awarded as restitution. Ultimately, the court resentenced Delarosa to 3 to 15 years' imprisonment and ordered him to pay restitution in the amount of \$27,257.13.

On May 13, 2013, Ujlaky submitted a MAACS Statement of Service and Order for Payment of Court Appointed Counsel to the Kent Circuit Court, pursuant to which he requested attorney fees in the amount of \$4,207.50 (76.5 hours x \$55) and out-of-pocket expenses of \$789.57. He checked the box on the form to indicate that he was moving for an award of extraordinary fees and attached to the form an itemized listing of the services performed and the time spent performing those services.

On May 14, 2013, the circuit court ordered Kent County to pay Ujlaky \$1,449.57, which reflects payment of the flat fee of \$660 and reimbursement for actual costs incurred. On June 3, 2013, Kent County issued a check to Ujlaky in the amount ordered by the court.

ANALYSES

Ujlaky argues that the circuit court abused its discretion when it refused to award Ujlaky extraordinary fees and, thus, to compensate counsel for the fair value of his services. He argues that the extraordinary fees requested were reasonable and well below the fees paid to public defenders in this state and to retained appellate counsel. Moreover, he contends, the time expended during the appeals was reasonable. He argues that the circuit court appears to be slavishly adhering to Kent County's fee schedule without considering whether justification exists to award extraordinary fees.

An appointed appellate attorney is entitled to reasonable compensation for representing an indigent criminal defendant on appeal. See *People v Edgley*, 187 Mich App 211, 213; 466 NW2d 296 (1991). Ujlaky, as the party requesting the extraordinary fees, bore the burden of proving the entitlement to those fees. *Adair v Michigan (On Fourth Remand)*, 301 Mich App 547, 552; 836 NW2d 742 (2013). This Court reviews for an abuse of discretion a lower court's determination regarding the reasonableness of the compensation awarded for services rendered by a court-appointed attorney. *In re Attorney Fees of Mullkoff*, 176 Mich App 82, 85; 438 NW2d 878 (1989).

Kent County compensates an appointed appellate attorney pursuant to a fee schedule. By agreeing to accept an appointment to represent an indigent criminal defendant on appeal from a criminal conviction in Kent County, Ujlaky necessarily and implicitly agreed to be compensated

under the terms of the fee schedule. The fees schedule caps the fee at \$660 for appeals from plea-based convictions. The fee schedule does allow for the payment of extra fees “with written justification & approval,” however. These fees are referred to as “extraordinary” on the MAACS form. Random House Webster’s College Dictionary (1997) defines the term “extraordinary” as “being beyond what is usual, regular, or established[.]” With this definition in mind, extraordinary fees must be fees incurred for services rendered that are beyond those usually required.

In Docket No. 316494, Ujlaky initially submitted a request for fees totaling \$2,150.05. He submitted the request on a MAACS form. He placed an “x” on the form next to Line 35, which provides: “Motion for extraordinary fees (attach copy).” Ujlaky attached no copy of a motion for extraordinary fees. Rather, he attached a statement of the hours expended and the services provided. Kent County paid Ujlaky the flat fee from the schedule. Ujlaky then filed a formal motion for extraordinary fees. We note that the circuit court failed to explicitly address whether the fees sought were both extraordinary and reasonable. Nevertheless, Ujlaky bore the burden of proving the extraordinary nature of the services rendered and the reasonableness of the fees sought. A review of his motion reveals that Ujlaky failed to explain how the services rendered in the appeal in Docket No. 312494 were of a character and an amount beyond those normally required in a guilty-plea appeal. Ujlaky filed a 22-page appellate analysis that addressed the two issues preserved by Simpson in his conditional plea. Those issues were the subject of briefing by the parties in the trial court, an evidentiary hearing, and a ruling by the trial court. Under such circumstances, Ujlaky would not have to have done a great deal of original analysis to present those issues on appeal. As noted, when asked by the court what characteristics of the case supported the request for extraordinary fees, Ujlaky responded: “Well, nothing particularly, you know.” Under the circumstances, we cannot find that Ujlaky carried his burden, and appellate relief is unwarranted.

In Docket No. 316809, Ujlaky submitted a request for attorney fees in the amount of \$4,207.50 on a MAACS form. Again, he placed an “x” on the form next to Line 35, which provides: “Motion for extraordinary fees (attach copy).” Ujlaky attached no copy of a motion for extraordinary fees. Rather, he attached a statement of the hours expended and the services provided. The circuit court signed the form order that is part of the second page of the MAACS form and, by so doing, authorized the payment of the flat fee. Although the circumstances of this case suggest that an award of extraordinary fees might have been in order, Ujlaky *did not attach a motion* to the MAACS form as required and, thus, never offered any explanation, beyond a recitation of his proposed billing, to the court regarding the apparent extraordinary nature of the services rendered and the reasonableness of the fees sought. Thus, again, Ujlaky failed to carry his burden. Appellate relief is unwarranted.

Affirmed.

/s/ Patrick M. Meter
/s/ William C. Whitbeck
/s/ Michael J. Riordan