

IN THE CIRCUIT COURT OF CRITTENDEN COUNTY, ARKANSAS
STATE OF ARKANSAS

PLAINTIFF

VS.

NOS. CR 93-516
CR 93-517
CR 93-518

FILED

at _____ o'clock _____ m

NOV 9 1993

LAVADA NORRIS, CLERK
DEFENDANTS

DAMIEN ECHOLS, JESSIE MISSKELLEY,
AND JASON BALDWIN

ATTORNEY GENERAL'S BRIEF

INTRODUCTION

The Defendants in this case are charged with capital murder. They were found to be indigent and were appointed two counsel each. Robin Wadley and Paul Ford were appointed to represent Jason Baldwin, Val Price and Scott Davidson were appointed to represent Damien Echols, and Dan Stidham and Greg Crow were appointed to represent Jessie Misskelley. The appointments were made in June of 1993. Applications for attorneys' fees have not been made; however, in a preliminary hearing, Mr. Ford raised the issue of who would be responsible for the payment of attorneys' fees. In a letter dated September 2, 1993, Mr. Ford notified the Attorney General that he would present the issue of attorneys' fees, and more particularly, who should pay those attorneys' fees, to the Court on September 27, 1993. On September 27, 1993, Assistant Attorney General Sarah Harberg appeared on behalf of the State, and Joe Rogers appeared on behalf of Crittenden County. After a short hearing, the Court requested that briefs be submitted on the question of whether the state or the county of

Crittenden is responsible for the payment of attorneys' fees.

HISTORY

In Arnold v. Kemp, 306 Ark. 294, 813 S.W.2d 770 (1991), the Arkansas Supreme Court held that the statutory "fee cap" found at Ark. Code Ann. §16-92-108(b), denied appointed counsel just compensation and equal protection of the laws in violation of the Fifth and Fourteenth Amendments to the United States Constitution. The Court held that appointed counsel were entitled to reasonable compensation. In State v. Post, 311 Ark. 510, 845 S.W.2d 478 (1993), the Arkansas Supreme Court addressed the issue of whether the state or county was responsible for payment of defense attorney fees in light of Arnold. The Court invalidated Ark. Code Ann. §16-92-108 in its entirety, stating that the portion of the statute which allocated responsibility between the county and state could not be severed from the fee cap provision struck down as unconstitutional in Arnold. The Court found that in the absence of statutory authority for placing the responsibility of indigent defense fees on the county, that the state was responsible, pursuant to the United State Constitution and the Constitution of the State of Arkansas.

Post left undecided the issue of whether a county could be responsible for indigent defense fees if it had enacted an ordinance pursuant to Ark. Code Ann. §14-20-102 that did not contain a fee cap provision. In State v. Independence County, 312 Ark. 472 (1993), the Court reaffirmed its holding in Post, and held that regardless of a county

ordinance which provides for indigent defense, the state is responsible for the costs of indigent defense fees.

In response to the Post decision, the legislature enacted Act 1193 of 1993 which places the responsibility for payment of indigent defense on the counties. The Act became effective July 1, 1993.

THE STATE IS RESPONSIBLE FOR SERVICES RENDERED
FROM THE DATE OF THE APPOINTMENTS IN JUNE, 1993
TO JULY 1, 1993

As set forth in the memorandum filed by the State on September 27, 1993, the State concedes it is responsible for the payment of reasonable attorneys' fees for services rendered from the date the appointments were made in June, 1993 until July 1, 1993, pursuant to the Arkansas Supreme Court's ruling in Independence County.

THE COUNTY OF CRITTENDEN IS RESPONSIBLE
FOR SERVICES RENDERED AFTER JUNE 30, 1993

Act 1193 of 1993 places the responsibility for paying private attorneys representing indigent defendants on the county wherein the crime was committed. Section 8 of the Act specifically states:

When private attorneys or trial public defenders from another area are appointed to represent an indigent person, the attorneys or trial public defenders shall be paid by the county wherein the crime was committed.

Since Act 1193 became effective July 1, 1993, fees for services rendered by the attorneys after June 30, 1993 are the responsibility of Crittenden County.

The essence of Crittenden County's argument is that the county is not responsible for attorneys' fees in these

cases, irrespective of Act 1193, because the appointments were made in June of 1993, when the state was obligated to pay for indigent defense. In other words, "the date of the appointment", rather than "the date the services were rendered", is the deciding factor. However, in Simmons v. Lockhart, 931 F.2d 1226 (8th Cir. 1991), the United States Court of Appeals for the Eight Circuit, when faced with an almost identical fact situation, found the deciding factor to be the date the services were rendered.

In Simmons, a defense attorney performed services both before and after the effective date of the Anti-Drug Abuse Act. Prior to the Anti-Drug Abuse Act, the Criminal Justice Act (18 U.S.C. §3006A) provided for hourly ceilings of \$40 per hour for out-of-court time, and up to \$60 per hour for in-court time. The new Anti-Drug Abuse Act (21 U.S.C. §848) provides for "reasonable" attorneys' fees. The defense attorney sought retroactive application of the more beneficial fee statute. The Court found that there was no evidence of Congress's intent that the new law should be applied retroactively. In determining how the defense attorney would be paid, Justice Arnold looked at when the services were rendered by the defense attorney. Fees for time spent on the criminal case prior to the effective date of the Anti-Drug Abuse Act were figured at the hourly ceilings prescribed by the Criminal Justice Act, and fees for time spent after the effective date of the Anti-Drug Abuse Act were figured under the "reasonable" standard.

The State is not asking that Act 1193 be applied retroactively. The State accepts responsibility for payment up to July 1, 1993. The State asks that the Act be applied prospectively, from its effective date forward. Statutes are to be construed as having only a prospective operation, unless the purpose and intention of the legislature is to give them a retroactive effect and is expressly declared or necessarily implied from the language of the statute. Union National Bank v. Barnhart, 823 S.W.2d, 308 Ark. 190 (1992). The State does not take the position that the legislature intended that Act 1193 be applied retroactively, either by express declaration or necessary implication. In the Simmons case, the Court looked to the date the services were rendered and refused to apply the new Act retroactively. The State urges the Court to look to the date the services were rendered to determine who is responsible for payment, just as Judge Arnold looked to the date the services were rendered in Simmons to determine the controlling law, and computed the attorney's rate of pay in accordance with the controlling law.

In Simmons, the Court also found that appointed counsel's failure to seek reappointment under the new statute after its effective date, did not preclude application of the new statute to his fee request, because the attorney could be appointed under the new statute nunc pro tunc, as of the effective date of the new statute. In the case before the Court, the attorneys were not appointed

under any statute. They were appointed at a time when there was a statutory void with regard to responsibility for payment of indigent defendants. In Post, the Arkansas Supreme Court found that payment of fees to attorneys representing indigents is a responsibility of the state which the legislature had delegated to the counties by statute. The Court found no fault with the delegation, but held the delegating statute void for other reasons. In the absence of any statute obliging a county to pay for indigent defense, that is, because there was a statutory void, the Post Court held the state responsible. Legislative delegation to the counties of the costs attendant to indigent representation as imposed by Act 1193 of 1993 filled that statutory void.

It is clear that the legislature intended for the counties to pay the costs attendant to indigent representation beginning July 1, 1993, the effective date of Act 1193. If this Court believes that in order to effectuate the will of the legislature the attorneys in the present cases must be re-appointed under Act 1193, then they should be appointed nunc pro tunc, as of July 1, 1993.

The legislature, by and large, is the repository of what the public policy of the state is. Courts are ill-equipped to pass on public policy, and, traditionally, do not make public policy. McLeod v. Commercial National Bank of Little Rock, 178 S.W.2d 496, 206 Ark. 1086 (1944). The legislature holds public hearings, engages in full and open debates, and

passes laws which reflect the will of the public. Whether a law is good or bad, wise or unwise, fair or unfair, is not for the Courts to pass on. It is the function of the Courts to apply the law. It is not the function of the Courts to make declarations of public policy. Only if a law is unconstitutional can a Court ignore the will of the legislature.

The emergency clause of Act 1193 contains a statement of the public policy behind the act and states facts constituting an emergency requiring that the act become effective July 1, 1993:

SECTION 21. EMERGENCY. It is hereby found and determined by the Seventy-Ninth General Assembly that the decision of the Arkansas Supreme Court in State v. Post et al, Case No. 92-787, has created great uncertainty regarding the payment of the legal fees and expenses in connection with the legal representation of indigent persons charged with crimes punishable by imprisonment and that delay in the effective date of this act beyond July 1, 1993, would cause irreparable harm to the proper implementation of a statewide public defender program. Therefore, an emergency is hereby declared to exist and this act being necessary for the immediate preservation of the public peace, health and safety shall be in full force and effect from and after July 1, 1993.

This Court is duty bound to apply the law in effect at the time the attorneys' services are rendered. On July 1, 1993, the effective date of Act 1193, Crittenden County became obligated to pay the attorneys' fees in these cases.

CONCLUSION

For the foregoing reasons and citations to authority, Crittenden County is responsible for the payment of attorneys' fees in these cases from July 1, 1993 forward.

Respectfully submitted

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CERTIFICATE OF SERVICE

I, Patricia Van Ausdall, Assistant Attorney General, certify this 5th day of November, 1993, that a copy of the foregoing has been served by mailing a copy of same, postage prepaid, addressed to the following:

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