

1968

The State of Utah v. Robert Lee Dixon, Hatch & Mcrae, Weber County, A Body Corporate and Politic of the State of Utah, The State of Utah v. Dennis A. Hunter, Hatch & Mcrae, Summit County, A Body Corporate and Politic of the State of Utah : Brief If Appellants

Utah Supreme Court

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IN THE SUPREME COURT
of the
STATE OF UTAH

THE STATE OF UTAH,

Plaintiff,

v.

ROBERT LEE DIXON,

Defendant,

Case No.

HATCH & McRAE,

Appellants,

11187

WEBER COUNTY, a body corporate
and politic of the state of Utah,

Respondent.

THE STATE OF UTAH,

Plaintiff,

v.

DENNIS A. HUNTER,

Defendant,

Case No.

HATCH & McRAE,

Appellants,

11199

SUMMIT COUNTY, a body corporate
and politic of the State of Utah,

Respondent.

FILED

MAY 1 - 1968

BRIEF OF APPELLANTS

Clerk, Supreme Court, Utah

Combined appeals from orders of the Honorable Charles G. Cowley, of the District Court of Weber County, and of the Honorable Merrill C. Faux, of the District Court of Summit County, State of Utah, denying attorneys fees and expenses for the court-appointed representation of defendants above named in the respective court proceedings.

D. JAY WILSON, *Weber County*

Attorney

GEORGE B. HANDY, *Assistant*

Attorney for Respondents

Ogden Courthouse

Ogden, Utah

ROBERT F. ORTON, *Summit County Attorney*

Attorney for Respondent

Newhouse Building

Salt Lake City, Utah

HATCH & McRAE,

Attorneys per se &

Appellants

707 Boston Bldg.

Salt Lake City, Utah 84111

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Respondent.

Case No.

11199

BRIEF OF APPELLANTS

STATEMENT OF KIND OF CASE (DIXON)

This is an appeal from an order entered December 12, 1967, denying appellants' motion for attorneys fees and expenses in representation of Robert Lee Dixon pur-

suant to appointment by this Court, the defendant having requested this Court to appoint counsel for him to prosecute an appeal on his behalf.

STATEMENT OF KIND OF CASE (HUNTER)

This is an appeal from an order dated February 26, 1968, denying appellants' motion for attorneys fees for the representation of Dennis A. Hunter, pursuant to an appointment by the lower court to defend him on the charge of assault with a deadly weapon.

DISPOSITION IN THE LOWER COURT (DIXON)

Robert Lee Dixon was convicted in the District Court of Weber County, State of Utah, for the offense of grand larceny. Thereafter, from a federal penal institution, a letter was directed to this Court, requesting counsel be appointed to prosecute an appeal from his conviction in Weber County. Prior to being sentenced to the Utah State Prison, Dixon was committed to the custody of the United States Attorney for an intervening federal conviction and was incarcerated first in a federal penitentiary. Appellants herein were requested by this Court to prosecute his appeal since appellants had represented Dixon in the Weber District Court proceedings. That appeal was heard before this Court in Case No. 11187, and subsequently, his conviction was sustained.

On November 15, 1967, a motion to fix attorneys fees and for an order directing Weber County to pay

the requested attorneys fees and expenses was filed in the office of the Weber County Clerk. (R. 8) That motion was filed after this Court in Case No. 10905, without argument, denied a similar motion as having been brought in the wrong forum.

On December 4, 1967, the Weber County motion was set down for argument before Judge Charles G. Cowley, the trial Judge in the lower court. A transcript of those proceedings, including appellant's counsels' sworn testimony in support of attorneys fees and expenses, is found at R. 17 and et. seq. On December 12, 1967, without comment or reason the District court denied appellants' motion (R. 11) from which a notice of appeal was timely filed with the Weber County Clerk (R. 12) and resubmitted on February 21, 1967, after a telephone conversation by Lee Cummings, Clerk of this Court, who ascertained on behalf of appellants that the documents (designated R. 8 through 12) could not be located by the Weber County Clerk.

DISPOSITION IN THE LOWER COURT (HUNTER)

In the fall of 1966 appellants were appointed to represent Dennis A. Hunter on a charge of assault with a deadly weapon. After representing him as a juvenile in a preliminary hearing (Hunter having been certified by the juvenile authorities to be treated as an adult offender), the case was ultimately tried before a jury and after deliberating for several hours, Hunter was

found guilty. On December 30, 1966, he was sentenced to the Utah State prison, and no further services were requested of appellants.

On November 18, 1967, request (R. 54) was made upon the Board of Commissioners of Summit County to pay for appellants' services. A motion (R. 55) was filed in support thereof and noticed for hearing December 18, 1967. After that hearing a more detailed billing was forwarded to Summit County Commissioners (R. 67) and the matter was further heard on February 18, 1968, (R. 82 et. seq.) The Summit County Commissioners declined to honor the itemized billing (R. 70A). Judge Merrill C. Faux thereafter denied appellants' motion.

RELIEF SOUGHT ON APPEAL

Appellants seek to reverse the Honorable Charles G. Cowley and the Honorable Merrill C. Faux in their orders denying appellants' compensation for court-appointed representation of defendants, and for judgment and orders in each case directing the respective counties to pay the reasonable value of appellants' services in accordance with the evidence adduced in the lower courts' proceedings.

STATEMENT OF FACTS

The relevant facts having heretofore been set forth in each Disposition Before the Lower Court, no further

facts need be referred to for purposes of this appeal which involves only questions of law.

POINT I

COUNTIES HAVE A STATUTORY OBLIGATION TO PAY REASONABLE COMPENSATION AND EXPENSES TO COURT APPOINTED DEFENSE COUNSEL.

Chapter 64 of Title 77, Utah Code Annotated was added by the Chapter Laws of 1965. Section I states:

“Minimum standards provided by county for defense of indigent defendants. —

“The legislature of the State of Utah hereby declares the following to be *minimum* standards to be provided by each county for the defense of defendants who are financially unable to obtain an adequate defense in criminal cases in the courts and various administrative bodies of the State of Utah:

(1) Provide counsel for every indigent person unable to employ counsel who faces the possibility of the deprivation of his liberty or other serious criminal sanction. (See the briefs of appellant and respondent in the Dixon decision evidencing his incarceration for the indeterminate term as provided by law in the Utah State Prison. Also see 76-7-6, UCA, for the penalties in Hunter)

* * *

(6) Include the taking of appeals and the prosecuting of other remedies, before or after

conviction, considered by defending counsel to be in the interest of justice." (Emphasis added)

Section 2 states:

"Assigned counsel shall represent each indigent person who is under arrest or charged with a crime in which the penalty to be imposed could be confinement for more than six months in either jail or prison if:

(1) The defendant requests it, or

(2) The court, on its own motion or otherwise, so orders, and the defendant does not affirmatively reject of record the opportunity to be represented."

The correspondence records in the Supreme Court of this State will indicate that Robert Lee Dixon requested this Court to appoint counsel for him, which counsel was appointed and constitutes appellants herein. These counsel represented Dixon's rights of appeal on the points heretofore raised before this Court and such facts need not be reheated.

The minute records of Summit County indicate appellants' appearance on November 3, 1966, to represent Hunter in his preliminary hearing (R. 5) and Hunter's file clearly reflects representation at all stages thereafter through and including sentencing.

The sole question before this Court would appear to be whether the wording of Chapter 77-64-6 is permis-

sive or mandatory on the question of compensation and expense reimbursement in light of the foregoing legislative mandate and Section 6 of Chapter 64, which reads as follows:

"The Board of County Commissioners *may*, at county expense, either:

(1) Authorize the court to provide the services prescribed by this act by appointing a qualified attorney in each case and *awarding him reasonable compensation and expenses*; or

(2) Arrange to provide those services through non-profit legal aid or other associations. If an incorporated city or town wishes to donate moneys for any of the purposes specified in this Section such action is hereby authorized." (Emphasis added)

The apparent principal point of County contention is the use of the word "may" in the preliminary sentence of the foregoing quoted section of our code. Does this word allow permissive expenditures on the Board of County Commissioners and the mere right "to appropriate funds" for that purpose or does reading the first quoted portions of Chapter 64 mean that such expenditures are mandatory and the *method of expenditure* is the permissive portion of the act?

Directing the Court's attention to the declared "*minimum standards*" to be provided by each county for the defense of persons incapable of retaining their own counsel, a logical interpretation of this statute would be

to create a duty on counties to provide these standards rather than a discretionary function which a county might engage in if it so elected.

Nowhere in the record is it contended, or is there evidence of the fact, that either County has voluntarily complied with any of the provisions of 77-64-6, as of the date of filing the motions appealed from before the lower court. Therefore, an issue to be decided by this Court would be that which has heretofore been raised, to wit, has the subject matter legislation created a mandatory duty on the Boards of County Commissioners, on their failure to provide legal services through non-profit legal aid associations, to pay court-appointed counsel for persons requesting representation for charges arising out of county felony prosecutions, i.e., District Court trials and subsequent appeals.

It is fundamental now that a person who has not intelligently and competently waived his right to counsel, and requests the court for appointment of counsel, is entitled to have an attorney to represent him at *all* stages of proceedings against him. See *Gideon v. Wainwright* 372 U.S. 335, 83 Sup. Ct. 792, 93 ALR 2d 733, 9 L Ed 2d 799, *Miranda v. Arizona* 384 U.S. 436, 86 Sup.Ct. 1602, 16 L Ed 2d 694, 10 ALR 3d 974. *Gideon*, having already been announced prior to the 1965 legislature, creates a logical argument that our legislature's intent was to codify its standards and delegate the monetary burden to the respective counties.

The United States Supreme Court standards, codified by our legislature, require local discretion for effective implementation. Obviously the larger counties on the Wasatch front could more economically exhaust their duties through non-profit legal aid associations than could the smaller counties whose criminal prosecution rate is but several cases per year. Certain of the smaller counties in the State of Utah could well find themselves in the position of not having resident attorneys for court appointment, and may not have attorneys who would come under Subsections 2 and 3 of 77-64-1 (1965). Since the obligation to "provide" such services as a county expense is apparently mandatory, only the means of accomplishing the required end ought to be the discretionary intent of the statute.

This Court has discussed the problem of compensation of counsel assigned to represent indigent persons on several occasions. In the early case of *Pardee v. Salt Lake County*, 39 Utah 482, 118 P. 122 (1911), the obligation to compensate appointed counsel was raised in an argument predicated upon Section 12, Article I of the Constitution of Utah, pertaining to the right of a person to appear with counsel in criminal prosecutions, and Sections 7 and 22 of the same Article, on deprivation or taking of private property without due process of law. This Supreme Court, after discussing in detail the constitutional aspects of the question before it and several relevant statutes which were argued by appellant Pardee, concluded regarding indigent appointment cases:

“ . . . that the power to provide compensation for services rendered under such circumstances rests with the legislature, not with the courts.”

This held, in essence, there was no county monetary liability for appointed counsel merely because a court is required to assign counsel for such accused. This Court also noted a lack of an express provision in the law authorizing a county to pay for such services and then noted as follows:

“We do not only concede — we assert — the proposition that the legislature of this state should at the first opportunity provide for a reasonable compensation to be allowed to attorneys in cases where they are required to devote their attention, skill, and time to defending indigent persons charged with crime, and are placed on trial therefor.” Utah, page 495

The Court again reviewed the rule of Pardee in *Ruckenbrod v. Mullins*, 102 Utah 548, 133 P. 2d 325 (1943). While adhering to the Pardee rule, the Court said at page 562, Utah:

“However, nothing in this opinion is to be construed as holding that the legislature has not the power or that it would not be the fair thing for it to make an appropriation for payment for services rendered by attorneys who have been appointed by the court to defend impecunious indigents.”

We believe this has been done by our legislature. See also 18 ALR 3d 1078, for a discussion of other state statutes favoring this construction.

Appellants contend since this Court, having made the previous suggestions to the legislature of the State of Utah, and the legislature thereafter having delegated to the counties by statute the appointed-counsel obligations of *Gideon v. Wainwright*, supra, that appointed defense counsel are now entitled to compensation as contemplated by our legislature. Also, see 4 *Utah Review* 231 for a report of the anticipated problem now facing this Court.

Massachusetts, in *Abodeely v. County of Worcester*, 227 NE 2d 486, (1967), 18 ALR 3d 1080, in light of *Application of Gault* 387 U.S. 1, 87 Sup. Ct. 1428, 18 L. Ed 2d 527, reconsidered previous similar statutory and constitutional obligations inferred by implication to pay appointed counsel arguments as had been discussed by this Court in *Pardee*, supra. In overruling them, their court considered a statute which read:

“The Courts shall, respectively, receive, examine, and allow accounts for services and expenses incident to their sittings in the several counties and order payment thereof out of the respective county treasuries.” (Citing *G.L.C.* 213, Section 8)

The Court then stated:

“Other statutes indicate that it has been the legislative intent that the counties of the Commonwealth shall bear the costs of criminal prosecution. (Citing their code) It is clear that the expenses of such prosecutions are to be county obligations.”

The Massachusetts court held:

“We believe that the provisions of the code (citation above) be extended to cover also the costs of defense counsel.”

We therefore submit the rulings of the respective District Judges to be erroneous.

POINT II

THE PROCEDURE UNDERTAKEN BY APPELLANTS TO SECURE COMPENSATION WAS AN APPROPRIATE PROCEDURE.

It is anticipated that each county in this appeal will argue in reply briefs the form of procedure undertaken by appellants to secure compensation under the statute discussed in Point I. Their oral arguments, Dixon R. 17, page 9, and Hunter R. 81 and 82, et. seq. contended the provisions of 17-15-10, Utah Code Annotated, as amended by the laws of 1963, presented the only manner in which appellants herein could proceed to force compensation. A dilemma with this argument is created. In the same legislative year as the enactment of the Indigent Defendants Act (77-64-1), our legislature also passed the Utah Governmental Immunity Act (63-30-2). Generally, provisions of Sections 5 and 6 thereof could be argued to apply to the instant compensation claim; however, it is equally as arguable that the Governmental Immunity Act would not apply since the Act necessarily requires the person commencing any civil action against a govern-

mental entity to file in advance of commencing such action an undertaking in the sum of not less than \$300.00 to insure payment of the governmental body's costs in the event the plaintiff fails to recover judgment. Since strict liability appears to have been imposed on the counties by the legislature in its standards section (77-64-1), requiring bonds as a condition precedent to enforcing compensation for appointed counsel would be highly illogical. Likewise, it would appear that the Act should not apply since its effective date would be one year after the effective date of the instant legislation under which appellants claim the right to compensation.

The County Claims Act (17-15-10, Chapt. 1963) also provides for the taxing of costs against a non-prevailing claimant notwithstanding the provisions of Rule 54(d)(1) Utah Rules of Civil Procedure.

The issue to be decided, therefore, would appear to be as follows: Is the right of action afforded a claimant under 17-15-10, and 12 Utah Code Annotated, as amended, and the sanction of costs being taxed against him for loss of his lawsuit consistent with what our legislature intended in the instant type of claims? Conceivably an attorney could present a claim for less than the cost bond to be taxed against him after an adverse judgment, assuming that an attorney could lose such a suit. Can it be said that such penalties against counsel are in the spirit of the "minimum standards imposed on counties"? Appellants submit such is not the law or the fair import of legislative intent, nor should it create the sole remedy

available to attorneys in speedily prosecuting their right to compensation and reimbursement for expenses.

In 50 *Am Jur*, Statute Section 392, is found the following:

“It is a general rule of law that statutes which are remedial in nature are entitled to liberal construction, in favor of the remedy provided by law, or in favor of those entitled to the benefits of the statute. This is true of a curative statute having a remedial purpose, or a statute seeking the correction of recognized errors and abuses, remedying defects and earlier acts, or implying an intention to reform or extend existing rights.”

This Court well knows more than most lawyers the varying required waiting times involved in the various judicial districts of this State should court action be required to enforce an attorneys fee claim. It hardly seems the intent of the legislature in enacting Title 77, Chapter 64 to require counsel to litigate a case twice, much less wait for twelve months to have their claim for compensation adjudicated by a court, especially when a fair argument exists obligating counties to adhere to *minimum standards* in providing defense counsel for indigent defendants. Should the legislature in passing Title 77, Section 64 have anticipated that counties would not adhere to its mandate by one of the alternative procedures prescribed by statute, we trust it would have established a more clear system of enforcement than the County Claims Act or Governmental Immunities Act. Since the problem was not covered, the fair import of

legislative intent would be to have the trial Judge hearing the case, or perhaps in the Dixon case, this Court, based on the evidence before it, fix the reasonableness of fees based on all of the facts and circumstances surrounding the case, the time involved, and the Court's personal contact with the record, proceedings before it, and evidence offered in support thereof, etc.

There is no reason why the State of Utah or respondents in this appeal at the conclusion of court-appointed representation could not appear at a hearing where evidence is adduced and thereafter the trial Judge expeditiously dispose of the compensation facet of a case. In fact this system is favored in a few jurisdictions now passing on the question. See 18 ALR 3d 1082. See also 77-64-6(1) which permits the court to appoint counsel and award him reasonable compensation.

Appellants contend the subject matter Indigent Defendants Act could hardly be termed as a private statute affording attorneys at law a private right of action per se against a Board of County Commissioners, since no mention is made of this procedural mode other than heretofore discussed. The only case which appellants can find in support of the procedure followed by them in the lower court proceedings is *Ruckenbrod v. Mullins*, supra. Twenty-five years ago in that case, the trial Judge awarded the sum of \$75.00 for services rendered and directed Salt Lake County to pay attorney Ruckenbrod's fee. Routinely, "attorneys fees" are fixed by the trial Judge in matters involving the obligation to pay those

tees since the trial Judge has first hand knowledge of the intricate proceedings of the case before him. It is senseless to impose the process of educating a new forum on the reasonable attorney fee applicable to a proceeding.

It cannot be denied that a claim was duly presented to each Board of County Commissioners. (See Stipulation to supplement record and Exhibit A attachment in Dixon case) The brief transcript of the short hearing further evidences that no response was made to the claim, except in open court to the Dixon claim. Summit County, on the other hand, did without reason, reject appellant's claim (Hunter R. 70A). Any argument predicated upon the failure to adhere to one of the two possibly available claims statutes should in this instance be to no avail since, for all practical purposes, the respective Board of County Commissioners have declined any liability or obligation. Appellants, having undertaken to proceed in the quickest and most expedient way to assure immediate relief before the forum most familiar with the case in the spirit of the 1965 legislation pertaining to indigent defendants and this Court's action in case No. 10905, now wish the relief intended by our legislature.

CONCLUSION

Appellants request this Court rule that counties must provide compensated counsel, at county expense, to represent indigents qualifying under the "minimum standards" established by the legislature. We further request

this Court sustain the procedure followed in these cases, and remand these cases with directions to pay the claims in accordance with the evidence, and to have their taxable costs which they have incurred in obtaining a ruling from this Court on the subject matter statutes.

Respectfully submitted,

HATCH & McRAE

By Robert M. McRae