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Alan P. Smith v. Jeril B. Wilson et al : Brief of Appellant

Utah Supreme Court

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Ronald Brent Boutwell; Attorney for Respondents;

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IN THE SUPREME COURT
OF THE STATE OF UTAH

ALAN P. SMITH,)
)
Plaintiff and Appellant,)
)
-vs-)
)
JERIL B. WILSON, BRYCE K. BRYNER,)
and CARBON COUNTY, A Body Corporate)
and Politic,)
)
Defendants and Respondents.)

No. 15385

APPELLANT'S BRIEF

Appeal from the Judgment of the 7th
District Court for Carbon County
Hon. Merrill C. Faux, Senior District Judge

S. J. Sweetring
Oliveto Office Building
Price, Utah 84501
Attorney for Appellant

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Courthouse
Price, Utah 84501
Attorney for Respondents

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and Politic,

Defendants and Respondents.)

No. _____

APPELLANT'S BRIEF

STATEMENT OF THE KIND OF CASE

This is an action by a certified, free-lance shorthand reporter to recover the amount due him for his professional services in reporting the proceedings in three preliminary hearings, and the furnishing of transcripts to two of appointed counsel representing individual indigents.

DISPOSITION IN LOWER COURT

The case was tried to the court before the Hon. Merrill C. Faux, Senior District Judge. From the judgment that the action be dismissed on the merits with prejudice, plaintiff appeals.

RELIEF SOUGHT ON APPEAL

Plaintiff seeks reversal of the judgment and judgment in his favor as a

matter of law, or, that failing a new trial.

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STATEMENT OF FACTS

A complaint was filed in the City Court of Price, Carbon County, State of Utah, charging Gypsy Allen Codianna, Irvin Paul Dunsdon, and Craig Derrickson Marvell with the crime of Criminal Homicide, as admitted in the answer of the Defendants to plaintiff's complaint.

The defendant Jeril B. Wilson, an attorney at law, duly licensed to practice law in the State of Utah, was appointed to defend the defendant Irvin Paul Dunsdon; Bryce K. Bryner, an attorney at law, duly licensed to practice law in the State of Utah, was appointed to defend the defendant Gypsy Allen Codianna, as admitted in the answer of the defendants to plaintiff's complaint. S. J. Spring, an attorney at law, duly licensed to practice law in the State of Utah, was appointed to defend the defendant Craig Derrickson Marvell. (Rep. Tr. pgs. 36 & 45).

The plaintiff, Alan P. Smith, a Certified Shorthand Reporter of the State of Utah reported three (3) separate preliminary hearings, one (1) such preliminary hearing for each of the three defendants charged with homicide, as admitted in the answer of the defendants to plaintiff's complaint. The professional services of Mr. Smith, as a free-lance reporter, were engaged by the Honorable John Ruggeri, Judge of the City Court of Price. (Rep. Tr. pg. 3).

Mr. Smith submitted a bill to Mr. Wilson, and a bill to Mr. Bryner, each for the sum of \$418.18, for the respective copies of the transcripts.

to each of them. (Rep.Tr. p.36). A like bill for \$418.18 was submitted, as established by the evidence, for the copies of the transcripts furnished appointed counsel for Craig Derrickson Marvell, and same was duly submitted to Carbon County and paid by Carbon County. (Rep.Tr. pgs. 13-14). Upon Mr. Wilson and Mr. Bryner submitting their like bills from Mr. Smith to Carbon County, payment was refused; (Rep.Tr. pg. 10) and Mr. Smith was notified by Carbon County that the bills submitted by him to Wilson and Bryner, which were in turn submitted to Carbon County, were disallowed as being unreasonable, as admitted in the answer of the defendants to plaintiff's complaint. The facts, as above related, are admitted by the defendants without qualification.

At the conclusion of each of said preliminary hearings, it is alleged that the defendants Jerril B. Wilson and Bryce K. Bryner requested of the plaintiff, which request was concurred in by Ronald B. Boutwell, Carbon County Attorney, that they be furnished a copy of the transcripts of the proceedings in each of the three (3) separate preliminary hearings, and that said copies were necessary in the preparation of the defense of their respective clients. This allegation is denied by the defendants, but no competent evidence to rebut the allegation was introduced by the defendants, and the fact that such copies were delivered by Mr. Smith to Mr. Wilson and to Mr. Bryner, and that they were retained and used by them in the preparation of the defense of their respective clients, is conclusively established. (Rep.Tr. pgs. 53-54; 76-77). No evidence was introduced to dispute

the allegation that Ronald B. Boutwell, Carbon County Attorney, concurred in the request that copies be furnished by Mr. Smith to respective appointed defense counsel.

ARGUMENT

THE FINDINGS AND CONCLUSIONS OF THE COURT, AND THE JUDGMENT BASED THEREON, ARE OUTSIDE THE ISSUES RAISED BY THE PLEADING AND NOT SUPPORTED BY THE EVIDENCE.

The defendants Wilson and Bryner, in their answer to plaintiff's complaint, both denied that copies of the three preliminary hearings were necessary in the preparation of the defense of their respective clients, Dunsdon and Codanna. Yet, the defendant Wilson testified: "I will state that I desired to have those and use them." (Rep.Tr. 53-54). The defendant Bryner admitted that he had used the transcripts in the preparation of his defense of his client, Codanna (Rep.Tr. 76-77). As to the reasonableness of the plaintiff's bill, denied by the defendants in their answer to the complaint, the defendant Wilson testified: "To my knowledge, there was never discussion as to the reasonableness of the bill. I did not dispute it. I don't believe that I had any information as to the reasonableness or not. It didn't appear unreasonable nor reasonable. I just assumed that what he charged was what the service was worth, and I sent it on down to the Carbon County Commissioners." (Rep.Tr. p. 75).

There was no dispute of the fact that both the defendants Wilson and Bryner received the transcripts of the three preliminary hearings, and that they used

them in the defense of their respective clients (Rep.Tr. 53, 76-77).

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It has been held that an attorney is personally liable for stenographic expense incurred in relation to services for his client even though there was no explicit agreement with the stenographer for payment. Burt v. Gahan, 220 NE2d 817, 15 ALR3d 572, which case, however, recognizes that there is a contrary view, but which contrary view it deemed less persuasive.

Irrespective of whether in the instant case the defendant Wilson and the defendant Bryner are to be held personally liable, there is no question as to the liability of the defendant Carbon County. Chapter 64, Counsel for Indigent Defendants, U. C. A. 1953.

Under Sec. 77-64-3, U. C. A. 1953, appointed counsel is given broad powers to represent the defendant at the earliest possible stage of the criminal proceedings; and if, as in the instant homicide case, transcripts are a part of the expense incident to such representation, the county is liable for such expense. Sec. 77-64-5, U. C. A. 1953.

While the statutes of New Jersey are not the same as Utah, in that they require an application to the court for advance authorization as to necessary and reasonable expenses in the defense of an indigent, the conclusion of the court as to those items considered necessary and reasonable is pertinent to the facts in the instant case. In State v. Horton, 170 A.2d 1, The Supreme Court of New Jersey said:

"Customarily, and we think properly so, the reasonable costs of necessary items such as experts, whether witnesses or not,

medical examinations, scientific tests, photographs, depositions and transcripts, and, in essential circumstances, professional investigation, have been ordered paid from public funds by trial courts." (Emphasis added).

See: State v. Second Jud. Dist. Ct. in and for Co. of Washoe, 453 P.2d 421, citing State v. Horton, supra; and, while related to a transcript of the evidence of a first trial, as distinguished from a transcript of the evidence on preliminary hearing, see: State v. Eighth Judicial District, 396 P.2d 680, and also Beasley v. State, 404 P.2d 911, and Peterson v. United States, 351 F.2d 606.

In Roberts v. LaVallee, 389 U.S. 40, 19 L.Ed.2d 41, on the basis of a New York statute requiring payment of certain fees for a transcript of testimony of a prisoner's preliminary hearing, it was held that a refusal of free transcript of such hearing to an indigent accused amounted to denial of equal protection, it being presumably required for the purpose of preparing his defense.

From a reading of the Memorandum Opinion of Judge Faux (Pg. 3), it appears that in his judgment there was no "responsibility upon Carbon County for expenses instigated by the City Judge in proceedings in the City Court, to-wit, the securing of the plaintiff to reduce to writing as a deposition the testimony of each witness in the case of homicide before his court. However, the services of such a reporter as the plaintiff was mandatory as to Judge

There was no issue raised by the pleadings with respect to the lack of a contractual relation between the defendants and the plaintiff. The only material issue raised by the pleadings was the reasonableness of the plaintiff's charges for his professional service as a free-lance reporter. As the pleading and the evidence show, without dispute, the defendant Carbon County paid the bill submitted directly to it by the plaintiff. The evidence further shows that Carbon County, without dispute paid the bill of the plaintiff that had been submitted by the plaintiff to appointed counsel for the accused Craig Marvell. It must be assumed that, pursuant to law, Sec. 17-19-1 U. C. A. 1953, the auditor of Carbon County, upon the receipt of the claim of the plaintiff, and the claim of appointed counsel for Craig Marvell, investigated and examined those claims, found them to be reasonable and justly due, and reported same to the Carbon County Commissioners with his approval endorsed thereon; and that the Carbon County Commissioners, pursuant to Sec. 17-5-23, thereupon settled and allowed said accounts, and ordered warrants to be drawn on the county treasurer therefor. The issue of the reasonableness of plaintiff's charges was not raised by Carbon County until it received the bills that had been submitted by the plaintiff to the defendants Wilson and Bryner as court appointed counsel for Dundson and Cordianna respectfully -- which bills were in the exact amount of the bill submitted by the plaintiff to the appointed counsel for Craig Marvell, and which identical bill had theretofore been determined reasonable, in no manner questioned, and was promptly paid.

In their attempt to attack the reasonableness of plaintiff's charges, defendants, over the objection of the plaintiff (Rep.Tr. p.58), were permitted by the court to question the plaintiff as to his earnings as a court reporter, distinguished from his charges as a free-lance reporter, when such evidence was irrelevant, incompetent and not embraced within the issues of the case, (Rep.Tr. pgs. 58, 59, 60). The defendants were further, over the objection of the plaintiff, permitted to question Wilson and Bryner as to whether it would have been of interest to them as to whether plaintiff's charges were reasonable or unreasonable if they were to be held personally liable. This was objected as calling for a conclusion. (Rep.Tr. 54 & 76). The Court held it was an intrusion as to the witness' "frame of mind;" (Rep.Tr. p.54), an ethereal state not subject to disproof, and in no manner binding upon the plaintiff, or relevant to the issue of reasonableness. There was not a scintilla of evidence introduced by the defendants to attack the reasonableness of plaintiff's charges. No Certified Shorthand Reporter, or any reporter, or any other competent or knowledgeable witness, testified that plaintiff's charges were unreasonable. There was a failure of proof to sustain defendants' bald allegation and conclusion that plaintiff's charges were unreasonable.

While in rendering its Memorandum Opinion, (Pg.4), the Court in its treatment of the major issue -- the reasonableness of plaintiff's charges -- the prime issue raised by the defendants in their answer, and to which issue the defendants' evidence, and the argument of counsel, was exclusively directed

-- the Court itself injected the minimal cost of copies by the use of a Xerox machine; and then ultimately arrived at the conclusion that the "fundamental and controlling question of the instant case is whether there was any contract between the parties and even before that, whether there was in their dealings the essential element, a meeting of the minds."

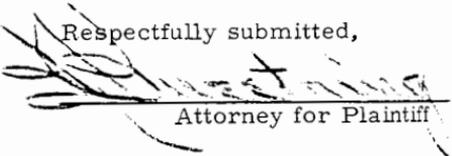
In his Memorandum Opinion, (Pg. 2) Judge Faux indicated that my (S. J. Sweetring's) representation of the plaintiff in this case carried overtones of "ethical impropriety." The Court, with no knowledge of the proceedings in the criminal case, and without justification, spoke of my being a "companion attorney with Wilson and Bryner" in the homicide case. (Pg. 2) The Court in its Findings also spoke of my being a "companion attorney." While these references are outside the issues of this case, I desire that the record indicate my resentment of being accused, for the first time in 48 years of practice in Utah, of "ethical impropriety." Had Mr. Wilson truly been my "companion" associate or comrade, I feel certain he would not have endeavored to have his client Dundson place the onus of the alleged homicide on my client Marvel, with a view to exonerating his client, which he did, and which the record in the homicide case establishes only too well as the strategy of Mr. Wilson in his defense of his client Dundson.

CONCLUSION

The defendants Wilson and Bryner, acting as counsel for their respective

indigent clients, and under the provisions of Sec. 77-64-1 U. C. A. 1953, we
entitled to, requested, received, and used in the defense of their respective
indigent clients, the transcripts of the three preliminary hearings. Irrespective
of the personal liability of the defendants Wilson and Bryner, and judgment
being prayed for in the alternative, the defendant Carbon County became
obligated to, and failed to pay for the transcripts, provided by the plaintiff.
The judgment of the lower court should be reversed and judgment entered for
the plaintiff as prayed for; or a new trial ordered.

Respectfully submitted,


Attorney for Plaintiff