

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 9, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

No. 98-0484-FT

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

**IN THE MATTER OF ATTORNEY FEES IN THE CASE OF
STATE V. THERMOND LARRY III:**

ROBERT D. ZITOWSKY,

APPELLANT,

V.

DANE COUNTY,

RESPONDENT.

APPEAL from an order of the circuit court for Dane County:
JACK F. AULIK, Judge. *Reversed and cause remanded.*

Before Vergeront, Roggensack and Deininger, JJ.

PER CURIAM. Robert Zitowsky, an attorney, appeals from an order awarding him a \$2,000 fee as a court-appointed counsel in a felony prosecution. Zitowsky claimed \$10,521 from Dane County, based on 150.3 hours

of representation times the \$70 per hour rate for court-appointed attorneys provided in SCR 81:02. He contends that the trial court erroneously exercised its discretion when it reduced the award by more than eighty percent. We agree and therefore reverse and remand for further consideration of Zitowsky's claim.

Zitowsky represented Thermond Larry III in a felony drug prosecution that resulted in Larry's conviction and sentence to fifteen years in prison. Zitowsky commenced representation in July 1996, appeared at Larry's jury trial in October 1996, at his sentencing in February 1997, and completed his duties in March 1997. According to Zitowsky, the prosecution turned into a lengthy and complex proceeding. He spent 19.7 hours in court during the three days of trial, and 13.6 hours appearing at nine pretrial and post-trial hearings. The remaining 120 hours were spent on various tasks, such as preparation and research, investigation and communication with his client and witnesses. There were frequent phone conversations with Karen Patterson, Larry's case manager in a community treatment program for mentally ill persons. Zitowsky describes her as his liaison with Larry, who did not have a phone, and as his main source of information on Larry. He identifies some of the time consuming issues in the case besides trial and trial preparation: his attempt to suppress evidence seized in a police search; litigating several evidentiary issues including the exclusion of a signed confession exonerating Larry; attending four hearings on the issue of post-verdict bail and sentencing; and the State's motion for contempt based on Larry's failure to pay a court-ordered contribution to Zitowsky's fees.

In March 1997, Zitowsky sent the trial court eighteen pages of attorney time sheets itemizing his work, and asked the court to approve the

County's payment for his services. The trial court responded with a letter describing the claim as "shockingly high." The letter continued:

Areas of concern include the following:

Conference with Karen Patterson, \$399.00. I can't conceive why any conferences with Ms. Patterson were necessary.

Research, \$740.00.

The county should not be responsible for legal education.

Search warrant & suppression issues, \$2450.00.

Debra-Frazier Hall issues, \$896.00.

Bail issues, \$700.00

Prepare for sentencing, \$630.00.

There are 2.7 hours charged for appellate issues which are outside of the representation authorized by the appointment of yourself.

A review of average amounts paid by the public defender's office reflects this bill is many times more than the average amount paid by the public defender's office for felony cases that actually go to trial. The average is \$9 - \$1100 plus one day of trial. Considering a trial day of 10 hours, this could represent an average of \$1600 to \$1800.

This Court will not approve a bill much exceeding the Public Defender's average without convincing proof such an amount is warranted.

The court also applies its experience in what is normal adequate representation of persons charged with possession of a controlled substance with intent to deliver, which went through trial and sentencing.

From that experience, it is this Court's opinion 16-20 hours of attorney time allows adequate representation of a defendant.

In response to the court's letter, Zitowsky defended his claim in a letter brief and specifically addressed the court's areas of concern. The court responded with a letter stating: "The bottom line continues to be, what is the ordinary, necessary, and reasonable amount of attorney's fees to represent a

person charged with a felony, conducting a one-day trial.” The court added that there was “nothing unusual in this case.” Zitowsky wrote two more letters, asking for a hearing or meeting in one, and arguing his case in both, but received no response. Six months later, after intervention from the district’s chief judge, the trial court issued an order awarding \$2,000 based on the following findings:

That there was nothing unusual in this case which should have caused any extraordinary attorney fees

That several of the charges imposed by Atty. Zitkowsky [sic] are found to be unnecessary including the following:

- a) conferences with Karen Patterson
- b) research
- c) search and seizure issues
- d) Debra Frazier-Hall issues
- e) bail issues
- f) charges for appellate issues

That the average amount charged to the County for legal representation in criminal cases in 1995 and 1996, was approximately \$851.00.

That the amount charged to the County for felony criminal representation including trial, has in 1995 and 1996 never exceeded \$2,800.00.

That this Court is cognizant of all of the reasonable and necessary proceedings in the above case, and based on the Court’s experience, legal fees over \$2,000 would not be warranted.

The trial court’s determination of attorney fees is discretionary and we will reverse only for an erroneous exercise of that discretion. ***Standard Theatres Inc. v. DOT***, 118 Wis.2d 730, 747, 349 N.W.2d 661, 671 (1984).¹ We

¹ The case law Zitowsky cites for the proposition that we independently review reasonableness of an attorney fee award is no longer valid in Wisconsin. See ***Standard Theatres, Inc. v. DOT***, 118 Wis.2d 730, 746-47, 349 N.W.2d 651, 671 (1984).

will uphold a discretionary determination if the trial court examined the relevant facts, applied a proper standard of law, and using a demonstrated rational process, reached the conclusion that a reasonable judge could reach. *Loy v. Bunderson*, 107 Wis.2d 400, 414-15, 320 N.W.2d 175, 184 (1982).

The trial court should measure reasonableness of an appointed counsel's fees by "the amount and character of the services rendered, the labor, the time, and trouble involved, the character and importance of the litigation, ... the professional skill and experience called for, and the standing of the attorney in his profession." *State v. Sidney*, 66 Wis.2d 602, 607, 225 N.W.2d 438, 441 (1975).

Zitowsky asked the trial court and this court to consider the minimum attorney performance standards adopted by the Indigent Defense Committee of the Wisconsin State Bar Association and the Milwaukee Bar Association Committee for the Indigent. In relevant part, those standards provide that attorneys shall vigorously represent the client at all stages of proceedings; actively represent an incarcerated client on the issue of release throughout the case; consult with the client as often as necessary; investigate the facts and attempt to interview all witnesses, analyze all legal issues and develop a theory of defense; use experts and investigators where appropriate; file and argue any appropriate motions; keep the client fully informed of defense strategies and tactical choices; prepare the case for trial, prepare a plan or argument for sentencing; and advise the client of his or her right to appeal. The rate of compensation for Zitowsky was, as noted, \$70 per hour pursuant to SCR 81:02, subject to the reasonableness test as to the time spent.

The trial court erroneously exercised its discretion in deciding Zitowsky's fee. The trial court's letter of March 1997, and its subsequent order,

identified several areas of particular concern. However, the trial court apparently based its decision solely on the submitted time sheets and reference to other cases, without regard to the record or Zitowsky's explanations. The trial court did not explain why time spent on various identified issues was not compensable. For example, the trial court identifies sentencing preparation as an unreasonable expense, but offers no explanation why it was unnecessary for Zitowsky to prepare for sentencing. The record shows a sentence hearing lasting one hour and forty-five minutes at which Zitowsky called witnesses, including Larry's psychiatrist, and both attorneys presented lengthy arguments. Additionally, the court did not explain why it presided over four post-sentence bail hearings yet deemed unreasonable the fee claimed for representation on that issue.

Moreover, even if Zitowsky's fee was reduced by the amounts claimed in each of the trial court's expressed areas of concern, the remaining balance substantially exceeds the \$2,000 awarded. The trial court justified the additional reduction by reference to average amounts charged to the County for legal representation in criminal cases in 1995 and 1996. The trial court further indicated that it based its statistical analysis on the average time for a criminal proceeding involving a one-day trial, although the trial in this matter lasted three days. The statistics used are not of record, the trial court apparently did not consider Zitowsky's arguments why this case exceeded the average, and the analysis, again, gives no indication that the trial court considered the facts of this particular case. In short, the trial court's analysis does not reflect a proper use of discretion in the matter.

We therefore reverse the \$2,000 award and remand for reconsideration based on the relevant facts of record, and a reasoned decision based on those facts.

By the Court.—Order reversed and cause remanded.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.

