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FEES FOR LEGAL ASSISTANCE TO INDIGENTS, MAY BE PAID FOR SERVICES ON APPEAL—FEES MAY NOT BE PAID FOR WORK IN OTHER THAN JUDICIAL PROCEEDINGS—§2941.51 R.C.

SYLLABUS:

1. Where the trial court, at the conclusion of trial of an indigent person, accused of murder, and resulting in a conviction, has made an allowance of compensation to defense counsel appointed by said court; and such counsel thereafter prosecutes an appeal from such conviction, such court, if it considers such appeal to be proper and to have been prosecuted in good faith, and if it considers its former allowance insufficient to cover all services rendered, may allow said counsel such additional compensation as it deems proper.

2. Compensation for services of counsel for an indigent person, which may be allowed by the court under the provisions of Section 2941.51, Revised Code, is limited to those services rendered in direct connection with judicial proceedings, and does not include services rendered in an appeal to the Pardon and Parole Commission, or in a sanity hearing in another county.

Columbus, Ohio, June 1, 1959

Hon. Warren F. Sheets, Prosecuting Attorney
Gallia County, Gallipolis, Ohio

Dear Sir:

I have before me your request for my opinion reading as follows:

"I have been requested by The Honorable Robert M. Betz, Judge of the Common Pleas Court of Gallia County, Ohio, to secure an opinion from your office concerning the payment of two attorneys assigned to defend an indigent person under the provisions of Section 2941.50 of the Revised Code of the State of Ohio. The pertinent facts are as follows:

"Mr. 'B', the defendant, was indicted for First Degree Murder. Upon arraignment, the court found the defendant to

be an indigent prisoner, and two local attorneys were appointed to defend the said defendant. The case was tried by jury, and the defendant was convicted of First Degree Murder without a recommendation of mercy. At the conclusion of the trial in the Common Pleas Court of Gallia County, Ohio, counsel for the defendant and the Judge of the Common Pleas Court agreed on a fee and said fee was paid in full at that time. This fee covered the services rendered to that date, and was paid under the provisions of Paragraph A, of Section 2941.51, of the Revised Code, State of Ohio.

"Then the same counsel filed a motion for a new trial which was denied. Counsel for the defendant then perfected an appeal to the Court of Appeals. Said Court of Appeals affirmed the judgment of the lower court.

"Thereafter, Counsel for the defendant filed a motion for leave to appeal in the Supreme Court of the State of Ohio. Said motion was denied.

"Next, counsel took the case before the Ohio Pardon and Parole Commission seeking executive clemency.

"The last service performed by Counsel for the defendant was in the Common Pleas Court of Franklin County, Ohio, wherein they represented the defendant at a sanity hearing.

"In addition to the representation of the defendant heretofore mentioned, counsel expended from their own personal resources the sum of $27.00 in perfecting said appeal.

"My question is, may the Judge of the Common Pleas Court of Gallia County, Ohio, approve and allow an additional fee for services performed after the conclusion of the trial in the Common Pleas Court of Gallia County, Ohio, once having paid in full, the fee agreed upon at the conclusion of the trial?

"It would appear from what research that I have made, that there is no authority in the State of Ohio on this exact point. The question, however, has been touched upon by your predecessor in Opinion No. 3104, Opinions of the Attorney General for 1931. Also, I direct your attention to the ALR, annotated, Volume 100, beginning at Page 313, with the State of Rhode Island vs. William B. Hudson, and numerous cases therein cited."

The basis for the allowance and payment by the state of attorney's fees for an indigent prisoner charged with a felony, is found in Sections 2941.50 and 2941.51 of the Revised Code. The provisions of these statutes, insofar as pertinent, are as follows:

Section 2941.50

"After a copy of an indictment has been served or opportunity had for receiving it, the accused shall be brought into court, *and if he is without and unable to employ counsel, the court shall assign him counsel,* not exceeding two, who shall have access to such accused at all reasonable hours. * * *"

(Emphasis added).

Section 2941.51

"Counsel assigned in a case of felony under section 2941.50 of the Revised Code shall be paid for their services by the county, and shall receive therefor:

"(A) In a case of *murder in the first or second degree, such compensation as the court approves;*

"(B) In a case of manslaughter, not exceeding three hundred fifty dollars;

"(C) In other cases of felony, not exceeding one hundred dollars. (Emphasis added)

"* * * * * * * * *"

These statutes would require no construction if the activity of counsel had ended with the verdict and sentence. But it appears from your letter that the defendant was convicted of first degree murder without recommendation of mercy, and counsel saw fit to appeal to the Court of Appeals and then to the Supreme Court of Ohio; and later to the Ohio Pardon and Parole Commission. In addition to all of these proceedings, the counsel thus appointed represented the defendant at a sanity hearing in another county.

It will be noted at the outset that in the provisions of Section 2941.51, supra, the amount of compensation to counsel for defense of a person charged with first or second degree murder is not limited, but is left to the discretion of the trial court. As to lesser offenses, a maximum allowance is fixed by the statute.

Among the questions that arise are:

1. Has the judge of the trial court authority to allow compensation for any service excepting the trial in his court?

2. Is the allowance once fixed final and comprehensive, or may the court make an additional allowance for services incurred by way of appeal, or for supplementary services.

You have called my attention to Opinion No. 3104, Opinions of the Attorney General for 1931, page 487. In that case it appeared that the trial resulted in a mistrial. The offense charged was a minor felony for which the statute allowed only the sum of fifty dollars. It was held that the court was without authority to allow an additional fee of fifty dollars for the retrial.

Since that situation differs entirely from the one which you present, the decision in itself would throw no light on the present question. However, the opinion does review some former holdings and refers particularly to Opinion No. 621, Opinions of the Attorney General for 1913, page 1425, where under like circumstances, a request for an additional allowance of fifty dollars was held unlawful. That conclusion was sound, by reason of the statutory limitation. But the opinion concluded with this language:

> "The taking of a case to a reviewing court, as I view it, is no part of the duty of counsel appointed to defend an indigent prisoner, however much he may be convinced o ferror in the trial, or interested in securing a reversal. Counsel appointed in taking a cause to a reviewing court must do so with the understanding that he can only receive fifty dollars for his work in both courts, and also that if he secures a reversal he must go through a second trial with a limitation of $50 attached to his compensation."

I cannot quite agree with the statement that the taking of the case to a reviewing court is no part of the duty of counsel appointed to defend an indigent prisoner. It is my conception that the duty of such attorney does not end until he has exhausted every legal remedy to prove the innocence of his client or secure a minimum sentence, and this may require successive reviews, reversals and retrials. Certainly it is a matter of Common knowledge that many a person convicted of a crime, after repeated trials is found to be innocent, or guilty of a lesser offense.

At the same time I recognize the fact that an attorney, if he has an assurance of repeated allowances by a court in a capital case, might unduly prolong the proceeding without just or reasonable cause, and for his own enrichment.

I find in 100 A.L.R., page 313, a report of a Rhode Island case decided in 1935. This is the case of *State* v. *Hudson,* 55 R.I., 449; 179 Atl. 130. Pertinent portions of the syllabus in that case are as follows:

> "1. A statute providing that a trial court may appoint, whenever occasion may require, one or more attorneys 'to conduct

the defense of' any indigent person charged with crime, and providing that the attorney or attorneys so appointed shall receive for the services rendered 'in conducting the defense of' such indigent person a reasonable compensation to be allowed by the court within certain limits fixed by the statute, is broad enough to include the privilege of taking an appeal at the state's expense in the discretion of the trial court."

"5. The sum to be allowed for services before a court of appeals by an attorney appointed to defend an indigent person charged with crime is properly to be left to the sound discretion of the court that made the appointment."

I quote the folowing from the opinion of the court:

"To defend a person on trial before a court is, in our opinion, not equivalent to the provision *to conduct the defense* of such a person. While the first is necessarily included in the latter, the defense of a person conceivably may require proceedings beyond the presentation of his case to the trial court. *Serious questions of law may be in issue, which, especially in capital cases, may be of vital importance not only to the individual, but also in the impartial and equal administration of justice."* (Emphasis added)

I am impressed with the decision and the reasoning of the court. In the notations following the report of this case, I note a number of decisions which appear to support the ruling. Among others, *State* v. *Behrens,* 109 Iowa, 58; *Peoples* v. *Chapman,* 225 N.Y., 700.

The same questions are considered at length in 55 A.L.R. 2nd, page 1055, where the editor refers to a decision by the Supreme Court of the United States, *Griffin* v. *Illinois,* 351 U.S., 112, in which that court held that as a matter of right, under the Federal Constitution, an indigent prisoner who had been convicted of felony, was entitled, at the expense of the state, to a bill of exceptions for the purpose of appeal to a reviewing court. The editor of 55 A.L.R. 2nd, page 1085 points out that the Griffin case related only to the expense of a transcript and bill of exceptions and did not furnish a clear declaration as to the right of an indigent prisoner to compensated counsel on an appeal. He followed this statement with the following:

"Surely a substantial disadvantage exists where an appellant, because lacking the money with which to employ counsel, is forced to appear pro se before the appellate court. Thus, the establishment of the rule that a state must, as a matter of federal constitutional law, provide indigents with the assistance of counsel

> to prosecute appeals in criminal cases would appear to be no more than a logical extension of the Griffin doctrine."
> Citing in support, *Holmes* v. *United States,* (1942) 126 F. 2d, 431.

A number of other cases are cited in support of this general proposition, but it is pointed out, for good reason as I see it, that the trial court in allowing such additional compensation for appeal in a capital case, should determine that the appeal was proper and was carried on in good faith by counsel.

I note your statement that at the conclusion of the trial "counsel for the defendant and the judge of the Common Pleas Court agreed on a fee and said fee was paid in full at that time." I cannot see that the fee or compensation is in any respect a matter of agreement by the court and the attorney. This statement could only indicate that the attorney was satisfied at the time the original fee was fixed by the court. Knowing as I do that the trial of a person accused of a crime, even of murder, is frequently very brief, and the allowance liberal, it is no surprise to be told that the fee was agreed to by the attorney.

However, the circumstances may be such that counsel has very good reason to contend either that his client is not guilty at all, or that the verdict and sentence were too severe, and therefore, in performance of his duty to his client as well as to the state, he should exhaust every resource either to set aside the judgment of conviction or to reduce the penalty.

In such case, if the court believes that these supplemental proceedings by way of appeal have been taken in performance of that duty and in good faith, and the court considers that the compensation already allowed is inadequate, I can see no reason why the court would not have the right to make a supplemental allowance to counsel. There is nothing in the statute to indicate that the initial order of the court allowing compensation has exhausted its authority.

As to subsequent procedure before the Pardon and Parole Commission, and in a sanity hearing held in another county, it appears to me that these matters are beyond the scope of the case that was pending before the trial court and would not properly be considered the subject of additional allowances by such court. These services may have been justified, but they are entirely outside of the jurisdiction of the trial court.

Accordingly, in answer to the questions you have submitted, it is my opinion and you are advised:

1. Where the trial court, at the conclusion of trial of an indigent person, accused of murder, and resulting in a conviction, has made an allowance of compensation to defense counsel appointed by said court; and such counsel thereafter prosecutes an appeal from such conviction, such court, if it considers such appeal to be proper and to have been prosecuted in good faith, and if it considers its former allowance insufficient to cover all services rendered, may allow said counsel such additional compensation as it deems proper.

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Respectfully,
MARK MCELROY
Attorney General