

IN THE SUPREME COURT FOR THE STATE OF IOWA
Supreme Court No.17-1909
Monona County No. SRCR016184

APPEAL FROM THE IOWA DISTRICT
FOR MONONA COUNTY

THE HONORABLE DUANE E. HOFFMEYER

THE STATE OF IOWA,
Plaintiff-Appellee,

vs.

LORI DEE MATHES,
Defendant-Appellant

BRIEF OF THE APPELLANT

Rees Conrad Douglas AT0002097
The Benson Building
705 Douglas St.
Ste. 323
Sioux City, IA 51101
(712) 233-1822
blackstreamlaw51@gmail.com
ATTORNEY FOR DEFENDANT-APPELLANT

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STATEMENT OF THE ISSUES

PRESENTED FOR REVIEW

Did the district court err in requiring Lori Dee Mathes to pay attorney fees when the case against her was dismissed and she lacked reasonable ability to pay?

ROUTING STATEMENT

This case appeals the order to pay attorney fees following dismissal in a criminal proceeding and should be transferred to the Court of Appeals in accordance with Iowa Rule 6.1101(3)(a).

STATEMENT OF THE CASE

Lori Dee Mathes appeals the requirement that she pay attorney fees as required by the Dismissal Order in Monona County SRCR016184.

On December 22, 2015, a complaint was filed against Lori Dee Mathes (“Mathes”), charging her with Possession of Marijuana in violation of Iowa Code §§124.401(5), 903.1(1)(b). Complaint. Appx. 7. On February 3, 2016, the State filed a Trial Information charging Mathes with Possession of a Controlled Substance, Third Offense, a Class D Felony, in violation of Iowa Code §124.401(5). Appx. 11-12. On April 21, 2016, a motion to suppress with supporting brief was filed. Appx. 19-29. On November 2, 2016, the motion to suppress was denied. Appx. 42-54.

On October 20, 2017, the State filed a motion to dismiss the case “[u]pon agreement of the parties.” Appx. 65. The case was dismissed on October 27, 2017. Appx. 66. A Notice of Appeal was filed on November 21, 2017. Appx. 73.

STATEMENT OF FACTS

On January 13, 2016, Mathes applied for appointment of counsel, listing an income of \$750.00 (alimony) and \$641.00 (SSI). Appx. 8. The district court granted the application, citing “income at or below 125% of the guidelines, not appointing would cause financial hardship.” Appx. 9. On April 10, 2016, trial counsel #1¹ filed a motion to exceed fee limits, stating “the undersigned has spent approximately 18.90 hours working on this case at the rate of \$60.00 per hour which amounts to \$1,134.00 (excluding expenses).” Appx. 13. The application was approved on April 11, 2016. Appx. 16.

On May 18, 2016, trial counsel #1 filed a motion to withdraw, citing retention of other counsel #2. Appx. 39. On December 14,

¹Mathes had several trial counsels, each of whom will be designated by number.

2016, trial counsel #2 filed a motion to withdraw, citing retention of trial counsel #3. Appx. 56. On July 24, 2017, trial counsel #3 filed a motion to withdraw. Appx. 59. On July 26, 2017, the court re-appointed trial counsel #1, noting “that although [trial counsel #3] was privately retained, Defendant was previously found to be indigent and entitled to court-appointed counsel.” Appx. 60. On July 27, 2017, trial counsel #1 then moved to withdraw again, citing a conflict of interest. Appx. 61. On July 30, 2017, the court appointed trial counsel #4. Appx. 63.

The October 22, 2017, dismissal order stated in relevant part:

Costs are taxed to the Defendant.

By agreement of the parties, administrative fees of the county sheriff, court-appointed attorney fees, and restitution are taxed to the Defendant. Based on information in the case file and other information provided by the parties, the Court finds that the Defendant has the reasonable ability to pay. The Defendant shall pay fees, costs, and other expenses of court-appointed counsel in the amount approved by the State Public Defender.

Dismissal Order. Appx. 66.

On November 16, 2017, the court filed a letter from Mathes stating in relevant part.

I didn't agree to what is stated, and have been unsuccessful in getting [trial counsel #4] to respond, as to he made this agreement without my consent. [Trial counsel #4] informed me specifically that the charges I would be charged would be less than \$500.00. I even had him make a call to find out, before I would agree to paying any costs, because I refused at first, since the dismissal was based on the warrant being bad. (Something not notice[d, presumably in the motion to dismiss].) The only reason I agreed to "less than \$500.00" was to get it over with. I didn't agree to anything else.

Mathes's letter also expressed a desire to appeal. Appx. 68.

On November 16, 2017, the district court issued an order.

Defendant's correspondence is presented to the Court. She asserts the dismissal order herein orders her to pay costs she did not agree to and seeks the appointment of a new attorney. Mr. Loos shall contact Ms. Mathes with a view towards filing a notice of appeal. The time for filing an appear is about to expire. If Mr. Loos cannot continue to ethically represent defendant for this purpose he should immediately file a notice to withdraw. So ordered.

Order. Appx. 73.

ARGUMENT:

THE DISTRICT COURT ERRED IN REQUIRING MATHES

TO PAY ATTORNEY FEES

Preservation of Error

“In connection with restitution orders, a criminal defendant may challenge restitution at the time of sentencing and may file a timely appeal in the criminal case of any restitution order.” State v. Jenkins, 788 N.W.2d 640, 644 (Iowa 2010) (citing State v. Blank, 570 N.W.2d 924, 925-26 (Iowa 1997)). Alternatively, the issue raised by Mathes may be addressed as an ineffective-assistance claim. “[O]ur ordinary preservation rules do not apply to claims of ineffective assistance of counsel.” State v. Halverson, 857 N.W.2d 632, 634–35 (Iowa 2015) (citing State v. Ondayog, 722 N.W.2d 778, 784 (Iowa 2006)).

Standard of Review

We review rulings on questions of statutory interpretation for correction of errors at law. We also review restitution orders for correction of errors at law. In reviewing a restitution order we determine whether the court's findings lack substantial evidentiary support, or whether the court has not properly applied the law.

State v. Iowa Dist. Ct., 889 N.W.2d 467, 470 (Iowa 2017) (internal

citations and quotation punctuation omitted).

“Ineffective-assistance-of-counsel claims are reviewed de novo.”

Halverson, 857 N.W.2d at 634 (citing State v. McKettrick, 480 N.W.2d 52, 55 (Iowa 1992)).

Merits

Iowa Code §815.9(3) states:

If a person is granted an appointed attorney, the person shall be required to reimburse the state for the total cost of legal assistance provided to the person pursuant to this section. “Legal assistance” as used in this section shall include not only the expense of the public defender or an appointed attorney, but also transcripts, witness fees, expenses, and any other goods or services required by law to be provided to an indigent person entitled to an appointed attorney.

On the basis of amendments to this statute and to §910.2 (pertaining to convicted people and referring to §815.9), the Court of Appeals ruled:

Section 815.9(3) requires a person, if granted an appointed attorney, “to reimburse the state for the total cost of legal assistance provided to the person.” (emphasis added). Section 815.9 provides no exception to a defendant's requirement to reimburse the State for attorney fees incurred in his defense

State v. Hill, No. 03–0560, 2004 WL 433844, at *2 (Iowa Ct.App., .

March 10, 2004).

Effective 2013, §815.9 was amended so that §815.9(6) read
(as it still does):

If the person receiving legal assistance is acquitted in a criminal case or is a party in a case other than a criminal case, the court shall order the payment of all or a portion of the total costs and fees incurred for legal assistance, to the extent the person is reasonably able to pay, after an inquiry which includes notice and reasonable opportunity to be heard.

Iowa Code §815.9(6) (2013).

However, this subsection addresses acquittals. To the undersigned's knowledge, there is no statute addressing payment of attorney fees in dismissals. One could take the view that §815.9(6) is most nearly applicable to a dismissal. This was the view of the district court in State v. Swift, No. 15-1229, 2016 WL 3275606, at *1 (Iowa Ct.App. June 15, 2016). In Swift, the Court of Appeals did not take this approach, and instead applied State v. Petrie, 478 N.W.2d 620 (Iowa 1991). Id. at *3. "Without an agreement evidencing Swift's intent to pay the court costs and attorney fees, we find Swift is not responsible for the costs and

attorney fees associated with the dismissed charges.” Id. (citing Petrie, 478 N.W.2d at 622 (holding that a defendant is not to be charged for attorney fees when cases against her is dismissed, absent an agreement); citing also State v. Goad, No. 13–1319, 2014 WL 2885036, at *2 (Iowa Ct.App. June 25, 2014); State v. Wheeler, No. 11–0827, 2012 WL 3026274, at *1 (Iowa Ct.App. July 25, 2012).

One could assert that the instant case is distinguishable from Petrie, because the district court’s order in the instant case refers to “by agreement of the parties.” Appx. 66. The record contains no signature by Mathes attesting to her agreement to pay attorney fees. Mathes’s letter to the court indicates strongly that she sought to limit any authorization of trial counsel #4 to enter into any such agreement. Appx. 68. There is nothing in the record to indicate that Mathes agreed to waive the inquiry about her “reasonable ability” to pay attorney fees or that she authorized trial counsel #4 to waive the inquiry.

The district court, in assigning attorney fees to Mathes, did

not hold the required inquiry. A review of her financial affidavit and of trial counsel #1's application to exceed fee limits should have raised questions about her ability to pay attorney fees. The district court's order stated (in relevant part):

By agreement of the parties, administrative fees of the county sheriff, court-appointed attorney fees, and restitution are taxed to the Defendant. Based on information in the case file and other information provided by the parties, the Court finds that the Defendant has the reasonable ability to pay.

Appx. 66.

Accepting ad arguendo that such an “agreement” could obviate a hearing, Mathes’s letter denies that she was part of any such agreement. The “information in the case file” available to the district court at the time of dismissal (financial affidavit, the anticipated fee from one of the court-appointed counsel) suggests that Mathes did not have a “reasonable ability to pay.” Because the district court failed to inquire adequately as to her ability to pay, this case should be remanded for the hearing required by Iowa Code §815.9(6).

A post-conviction relief petitioner appealed the district

court's assignment of restitution for fees of a court-appointed attorney. Ruden v. State, No. 16-0245, 2017 WL 108578 (Iowa Ct. App. January 11, 2017). The petitioner

contend[ed] the district court erred in assessing the costs of his court-appointed, postconviction-counsel against him without first making a determination whether Ruden could reasonably afford to pay the costs.

Id. at *2. The Court of Appeals quoted Iowa Code §815.9(6) and italicized the statutory words, “*after an inquiry.*” Id.

The language of the statute is clear: the district court is to make an inquiry, “which includes notice and reasonable opportunity to be heard” prior to assessing costs against an applicant in a postconviction proceeding.

Id. at *3. The same applies, mutatis mutandis, to a person who is acquitted or, it is respectfully submitted, when the criminal case against a person has been dismissed. The Ruden court “vacate[d] the district court's order assessing the costs of court-appointed counsel against Ruden. We remand this matter for a hearing regarding the assessment of costs.” Id.

Alternatively, the appellate court could address whether this

case was an example of ineffective assistance of counsel. The standard for determining whether a counsel offered ineffective assistance is whether “the attorney performed below the standard demanded of a reasonably competent attorney.” Ledezma v. State, 626 N.W.2d 134, 142 (Iowa 2001). The attorney's performance is measured against “prevailing professional norms,” and it is presumed the attorney performed competently. Id. “A claim of ineffective assistance is more likely to prevail when counsel lacked diligence as opposed to the exercise of judgment.” State v. Polly, 657 N.W.2d 462, 465 (Iowa 2003).

The appellate court could consider if there is adequate record to determine whether trial counsel #4 had “promptly inform[ed] the client of any decision or circumstance with respect to which the client's informed consent, as defined in rule 32:1.0(e), is required by these rules.” Iowa R. of Prof'l Conduct. 32:1.4. Iowa R. of Prof'l Conduct 32:1.0(e) defines “informed consent” as

the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed

course of conduct.

Mathes's letter suggests that trial counsel #4 did not adequately communicate with Mathes about the proposed agreement regarding attorney fees nor about Mathes's right to a hearing. Violation of Mathes's right to an inquiry would itself be prejudice, detrimental to her interests. Requiring Mathes to pay attorney fees in an amount beyond her "reasonable ability" would also be prejudice.

CONCLUSION

WHEREFORE the undersigned requests that the Court "vacate the district court's order assessing the costs of court-appointed counsel against" Mathes and "remand this matter for a hearing regarding the assessment of costs." Alternatively, the undersigned asks that the Court determine whether sufficient record is available to determine whether trial counsel #4 provided ineffective assistance of counsel and rule accordingly.

Dated this 7th day of September 2018.

Respectfully submitted,

/s/ Rees Conrad Douglas AT0002097
The Benson Building
705 Douglas St., Ste. 323
Sioux City, IA 51101
Phone (712) 233-1822
e-mail: blackstreamlaw51@gmail.com
COUNSEL FOR THE APPELLANT-DEFENDANT

REQUEST FOR NONORAL SUBMISSION

The undersigned requests that this case be decided without oral submission. In the event that consideration is given to oral submission, the undersigned requests 10 minutes for each side.

/s/ Rees Conrad Douglas

CERTIFICATE OF FILING AND SERVICE

This brief was filed electronically on September 7, 2018, with the Clerk of Court for the Supreme Court of Iowa through the Electronic Document Management System (EDMS) and that notice of said filing will be sent by the EDMS to the Attorney General for Iowa. This brief will also be served on the Appellant on September 7, 2018, by postal mail, all costs prepaid.

/s/ Rees Conrad Douglas

CERTIFICATE OF COMPLIANCE
WITH IOWA R. APP. P. 6.903(g)(1)

This brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) or (2) because:

This brief contains 2284 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

This brief complies with the typeface requirements of Iowa R. App. P. 6.903(1)(e) and the type-style requirements of Iowa R. App. P. 6.903(1)(f) because this brief has been prepared in a proportionally spaced typeface using WordPerfect X8 in 14 point Century Schoolbook.

/s/ Rees Conrad Douglas AT0002097

COST CERTIFICATE

I hereby certify that the cost of printing this brief was \$0 because the brief was electronically filed.

/s/ Rees Conrad Douglas