

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO

:

CASE NO: 11-1631

Appellee,

:

v.

:

:

ANTHONY SOWELL

:

Appellant

:

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Motion to Determine Proper Jurisdiction

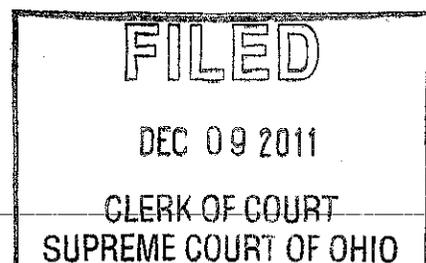
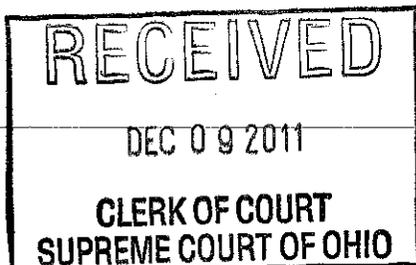
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Counsel for Appellee



## Memorandum

Whether this Court or the Eighth District Court of Appeals has jurisdiction over this fee dispute is not clearly answered by statute, rule or case law.

Counsel has filed an appeal in this case over the trial court's decision, issued after the jury recommended a death sentence, to cap attorney's fees without giving counsel notice or the opportunity to be heard and in direct violation of the agreement counsel had with the court before trial that there would be no cap in accordance with the ABA Guidelines for the Performance of Defense Counsel. The trial court's decision to cap the fees, after the trial was completed, has resulted in lead trial counsel being paid approximately \$18.50 per hour for the ten week trial in this case. Thus, counsel filed an appeal to determine whether this hourly rate is reasonable and whether counsel should otherwise be paid the agreed upon rate of \$95.00 per hour. The amount in dispute is approximately \$48,000.

O.R.C. 2953.02 gives this Court original jurisdiction over direct appeals in cases in which the death penalty has been imposed. Further, S.Ct. Prac. R. 19.2 (A)(1) requires the appellant to file the notice of appeal within 45 days from "the journalization of the entry being appealed or the filing of the trial court opinion...." Here, the entry being appealed is the journal entry concerning fee caps and journal entry concerning counsel's trial fee bill itself.

There is thus an open question and the above rule supports the position that this court has original jurisdiction over the trial court's judgment capping attorney fees and denying, without hearing or notice, counsel's fees for a death penalty trial.

Counsel agrees the State that the recent case of State v. Davis, 2011 Ohio 5028, para. 21-22, supports the position that the Eighth District rather than this Court has jurisdiction. However, Davis concerns a Motion for a New Trial and is open to interpretation as to whether it applies to judgments from the trial itself rather than an untimely new trial motion; counsel can certainly foresee the Eighth District declining to hear the appeal because this is a death penalty case and under R.C. 2953.02 the Supreme Court has original jurisdiction. It is well known that courts guard their jurisdiction carefully; and that courts won't exercise jurisdiction unless it is clearly established. Here, which Court has jurisdiction is simply not clearly ascertainable.

In fact, the Eighth District has dismissed counsel's appeal sua sponte and without the benefit of briefing. (CA 97293, journal entry issued October 28, 2011.) Counsel has filed a timely motion to reconsider but the court has not yet ruled on the motion.

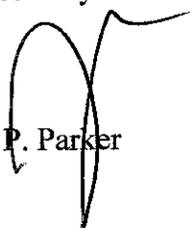
Certainly, either this Court or the Eighth District has jurisdiction. It matters not one bit to counsel which court has jurisdiction. Counsel filed appeals in both courts because it is not clear from the rules, statutes or case law which court has jurisdiction. Counsel does not want to be precluded from his day in court because the appeal was filed in the "wrong" court. Either this Court or the Eighth District has jurisdiction to decide the appeal. There are good arguments for either one.

There is case law supporting counsel's appeal. See State v. Torres, 174 Ohio App.3d 168 (2007), para. 26; see also Simmons v. State Public Defender, 791 N.W. 2d 69 (Iowa 2010) (Supreme Court of Iowa found fee caps unconstitutional for attorneys).

Also, Ohio Sup R. 20 cites to the ABA Guidelines and requires a high quality of legal representation and the Guidelines provide that counsel should be “fully compensated at a rate that is commensurate with the provision of high quality legal representation and reflects the extraordinary responsibilities inherent in death penalty representation.” See ABA Guideline 9.1(B). Additionally, ABA Guideline 9.1(B)(1) provides “Flat fees, caps on compensation and lump sum contracts are **improper** in death penalty cases.” (Emphasis added)

This Court has jurisdiction to decide this appeal and establish that counsel must be compensated in death penalty cases in accordance with the ABA Guidelines and pursuant to the agreement counsel had with the court and that the court can not sua sponte and without notice or hearing decide to cap attorney fees once the case is over and pay counsel only \$18.50 per hour for the ten week trial. No competent lawyer would have agreed to try this case for such an unreasonably low fee. Certainly that was not counsel’s agreement in this case.

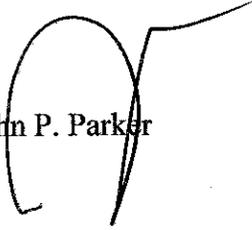
Respectfully submitted,

  
John P. Parker

Service

A copy of the foregoing document was served on Wm. Mason, County Prosecutor, 1200 Ontario, Justice Center-9th Floor, Cleveland, Ohio 44113 via regular U.S. mail postage prepaid this 8th day of December 2011.

John P. Parker

A handwritten signature in black ink, consisting of a large, stylized 'J' followed by a vertical line and a horizontal stroke at the top right.