

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF SPOKANE

STATE OF WASHINGTON,)	
)	NO. 13-1-01907-9
Plaintiff,)	
)	
v.)	COURT'S RULING
)	ON FEES
GAIL HERBERT GERLACH,)	
)	
Defendant.)	

SUMMARY

Defendant, Gail Gerlach (Gerlach), was charged with Manslaughter in the First Degree from an incident on March 25, 2013, in the shooting death of Brendan Kaluza-Graham. The State filed the charge on May 29, 2013. A summons was sent to Gerlach, and an arraignment was set for June 12, 2013.

On May 30, 2013, Attorney Richard Lee filed a notice of appearance on behalf of Gerlach. That same day, Attorney David Stevens filed a notice of association of counsel with Richard Lee on Gerlach's behalf.

At arraignment on June 12, 2013, the Defendant entered a plea of not guilty, and the case was set for trial for September 3, 2013. On August 9, 2013, counsel agreed to a continuance of the trial until December 10, 2013, and the case was to be pre-assigned to a specific judge. On August 13, 2013, the case was assigned to this court.

On August 14, 2013, the Court set deadlines for filing suppression and dismissal motions. A suppression motion was heard by the Court on October 25, 2013, however, due to a detective being out on medical leave, the balance of the hearing had to be reset. At the time of the motion, both parties requested another continuance of the trial, and a new date was set by the Court for March 31, 2014. The Court heard the continuation of the October suppression motion on February 14, 2014, and a ruling was given on the record. On March 5, 2014, the Court heard a motion for reconsideration from the State and other various pretrial motions of which the Court again ruled from the bench.

On March 26, 2014, just 6 days before the trial was to commence, Attorney Teresa Border filed an association of counsel with Lee and Stevens. This would be Gerlach's third counsel of record.

On March 31, 2014, the trial commenced with jury selection. Opening statements took place on April 1, 2014, and witnesses began testifying on April 2, 2014. Closing arguments were heard by the jury on April 9, 2013. On April 10, 2013, the jury acquitted Gerlach and then deliberated on the question of whether Gerlach proved by a preponderance that the use of force was justified. The jury agreed with the defense. Counsel for Gerlach now submits a request for reimbursement of \$332,865.06 in attorney fees, expert fees and costs. The State objects as excessive, duplicative and unnecessary.

ANALYSIS

A person who is acquitted by reason of self-defense is entitled to be reimbursed by the State for all reasonable costs. These include loss of time, legal fees incurred and other expenses involved in the person's defense.

In determining the right to reimbursement, the defendant has the burden of proving self-defense by a preponderance of the evidence. This statute contemplates an objective determination of whether the defendant's actions were justified. This is different from the normal self-defense standard, which examines the situation as it appeared to the defendant.

The amount of the award is determined by the trial judge. Reimbursement for legal fees only covers the amounts that the defendant paid or is legally obligated to pay. If the defendant was represented by retained counsel, he or she is entitled to the amount that will reasonably compensate **one** retained attorney. *State v. Jones*, 92 Wn.App 555, 566 (1998). The State must pay additional amounts of fees incurred because more than one retained attorney chose to attend the trial, fees incurred for paralegals, research and investigative services, only if the trial court affirmatively finds that they were reasonable and necessary to defend Gerlach. *Id at 566-567*.

The burden of demonstrating that an attorney fee request is reasonable is upon the fee applicant. *Berryman v. Metcalf*, 177 Wn.App. 644 (2013). Courts must take an active role in assessing the reasonableness of attorney fee awards rather than treating cost decisions as a litigation afterthought. *Mahler v. Szucs*, 135 Wn.2d 398 (1998). Courts should not simply accept unquestioningly attorney fee affidavits from counsel. *Mahler at 434-435*. A trial court need not deduct hours here and there just to prove to the appellate court that it has taken an active role in assessing the reasonableness of an attorney fees request, but to facilitate review. The findings must do more than give lip service to the word "reasonable". It must show how the Court resolved disputed issues of fact, and the conclusions must explain the Court's analysis.

A determination of reasonable attorney fees begins with calculation of the lodestar, which is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate. For an example, efforts of attorneys who each billed for all days of trial, preparing and attending the same depositions, reviewing the same documents, and engaging in the same pretrial preparation were an unreasonable duplication of effort that required discount of attorney fee award. *Metcalf at 660*. It is appropriate to discount attorney fees award for unproductive time. *Bowers v. Transamerica Title Ins. Co., 100 Wn.2d 581, 597 (1983)*. Additionally, when making an attorney fee award, the attorney's reasonable hourly rate encompasses the attorney's efficiency or ability to produce results in the minimum time.

Keeping these requirements in mind in this case, the Court must decide if three different attorneys were reasonable and essential to the successful outcome. The Court, also, had to decide if the services provided were duplicative or unnecessary. *Berryman at 664*. The trial judge is "in the best position to determine which hours should be included in the lodestar calculation". *Chuong Van Pham, 159 Wn.2d 527, 540 (2007)*. It is appropriate to discount for unproductive time. *Bowers, 100 Wn.2d 581,597 (1983)*.

A useful way for a trial court to determine lodestar is to prepare a simple table that lists for each attorney the hours reasonably performed for particular tasks and the rate charged, which may vary with the type of work. *Bowers at 597-598*. Such a table would be helpful in this case to cut through the fog generated by block billing. *Westlake, LLC v. Engstrom Props., LLC, 169 Wa App. 700, 740 (2012)*. In virtually every case the quality of the work will be reflected in the reasonable hourly rate. *Bowers, 100 Wa.2d at 599*.

In this case at first glance, the billing appears to be grossly inflated. In order for the Court to decide if the services were necessary and reasonable, the Court prepared a chart of the charges that the Court believes were unnecessary, duplicate or extremely unreasonable. The following list shows hours that the Court found extremely unnecessary and excessive:

Richard Lee

05/30/13	Working on Jury Instructions	0.5
06/19/13	Drafting jury instructions	3
06/23/13	Research/Prepare jury instructions	2.5
07/01/13	Prepare draft jury instructions	1.5
07/15/13	Begin closing argument	2.5
08/19/13	Closing summation	2
08/20/13	Closing summation	3
09/09/13	Closing summation	3.3
09/11/13	Continue Closing arguments	1.2
09/15/13	Closing arguments	.30
09/16/13	Worked on Closing	2
09/17/13	Closing	2
09/22/13	Concepts for closing	1
10/23/13	Closing summation prep	2
10/24/13	Jury selection prep	0.1
10/24/13	Prepare closing	1
10/29/13	Further Prepare closing	3.5

01/20/14	Witnesses for closing	6.5
01/21/14	Closing Presentation all witnesses	7.5
01/24/14	Summary of Closing	6.5
02/5/14	Closing argument	4.5
02/06/14	Revisions to closing & upgrades	8
02/10/14	Reworked entire present for closing	11.5
02/13/14	Updated Closing –edits	3
02/15/14	Update Closing	.4
02/19/14	Edit Closing & Prepare	1.5
02/26/14	Updated Closing	3.5
02/28/14	Reviewed Closing	2.5
03/06/14	Edit Closing	1.5
03/12/14	Worked on Closing	1.5
03/14/14	Continued Closing	2.5
03/20/14	Continued Closing	2
04/10/14	Waiting for special verdict	2.5
	TOTAL:	96.8 hrs.

These listed above show that Lee began “working” on jury instructions the very same day he filed his notice of appearance (NOA) for Gerlach. Seven days after the arraignment, Lee began “drafting” jury instructions. The Court finds that drafting jury instructions this early in the case was wasted time. Lee spent 200+ hours preparing, drafting, editing, updating, reviewing and working on his closing. The Court finds this excessive and not efficient.

Lee stressed to the Court that Stevens was co-counsel, and he was the lead counsel. In his argument to the Court for fees, Lee stated he brought Stevens on because of his vast experience in trials and previous work history. Yet, Stevens only charges \$200 dollars per hour for any non-court time and \$300 per hour for court time, but Lee charges a flat premium rate for any work performed. The Court finds that if Stevens is the more experienced attorney, then Lee should not be charging the higher rate for an attorney.

Lee did not provide the Court with a declaration or affidavit as to his experience which would then justify his \$300 per hour rate. Nor did he supply declarations from other attorneys in the community to support such a rate. The Court has had numerous cases where the lawyer provided the Court with a declaration of their career history and highlights such as how long they practiced, the different levels of courts they appeared in and how many trials they have done in the past which would justify their hourly fee.

Since the Court does not have the benefit of this information and the Deputy Prosecutor stated on the record in Court that Lee has only filed an NOA in 10 criminal cases in Spokane Superior Court, the Court finds that Lee's rate is unreasonable and excessive. Lee did not employ any paralegals, interns, externs or office help to do some of the research or running errands and billed these tasks at the premium attorney rate. This, again, is unnecessary and unreasonable.

Lee billed 487.9 hours for non-court time and 109.7 hours of in court time. The Court finds that his hours spent on tasks outside the court should be reduced to \$200 per hour and not paid at the premium time of \$300 as he did. This is based on the fact that Stevens, the more experienced attorney, billed the \$200 per hour. Lee's court time will be paid at the \$250

per hour which is, also, slightly less than his more experienced co-counsel. The Court, also, notes that Lee was responsible for opening and closing statements and jury instructions while the more experienced attorney was responsible during the trial for questioning the witnesses.

Last, the Court will reduce the excessive hours as explained above and the 487.9 hours become 391.1 hours. The total that will be paid by the State for Lee will be \$105,645. This number was achieved by the following:

$391.1 \times 200 = \$78,220$ (out of court time) + $109.7 \times 250 = \$27,425$ (in court time) for a total of \$105,695 for Lee's time.

As to the bill provided by David Stevens, the Court finds that Lee could not have achieved the result of the verdict without the assistance of Stevens. Therefore, a second attorney was necessary and reasonable to assist Lee. As noted above, Stevens did all the questioning of the witnesses while Lee did opening and closing. The Court is confident that there were many other highly qualified criminal defense attorneys in the Spokane area that could have co-chaired this case. Since it was Gerlach who choose an attorney who did not reside in Spokane, the State should not have to bear those costs related to Stevens' travel expenses. It, also, appears from Lee's summary of the fund that was raised for the defense of Gerlach on the internet, some of Stevens' costs were already paid by those donated funds.

As for Stevens' hours, the Court finds most were reasonable, except for those listed below. Three days during the trial, Stevens billed 64 hours of time out of a 72 hour span. The Court finds that it would be hard, if not impossible, for any attorney to work 22 hours two days in a row and then work 20 hours the third day. The Court finds this excessive and reduced the additional two days to what the Court considered reasonable.

David Stevens

08/07/13	Travel from Sacramento, Attorney time 4hrs	\$ 800
08/08/13	Per Diem in addition to hourly	\$1100
08/09/13	Travel time 2 hr when to travel time was .4 hr	\$ 320
08/12/13	Travel time 2.6 hrs when travel time there was .4 hr	\$ 440
08/14/13	Travel time to DPA office reduced	\$ 200
09/22/13	Travel from Spokane to Sacramento 4.15	\$ 830
09/24/13	Travel from Sacramento to Spokane 6 hrs	\$1200
10/02/13	Travel from Court 1.5 hrs (took .5 hr there)	\$ 200
10/05/13	Travel from Spokane to Sacramento 3 hrs	\$ 600
03/15/14	Travel from Kosovo (Europe) 20 hrs	\$4000
03/26/14	Discussion with Smith, (not on Smith bill)	\$ 100
03/31/14	Charged travel time twice (Pg 14 & Pg 15)	\$ 75
03/31/13	Took 6 hours to review jury notes after selection & review police reports Court reduced by ½	\$ 600
04/01/14	Worked total of 22.5hrs for jury selection Court Reduced by 5 hours (not reasonable).	\$1000
04/02/14	Worked total of 22.4 hrs - 9 hours of evening trial Preparation. (reduced by 5)	\$1000
04/03/14	Worked total of 20 hrs – Court did not find the 7 hrs In the evening reasonable as there was no court on 4/4. Attorneys already worked 18.4 hrs the next day when there was no court.	\$1400
04/04/14	No Court -debriefing for 14.4 hrs & 4 hrs on witness	\$ 800

Testimony & direct of defense experts.

04/10/14 "Time allotted waiting for special verdict". \$ 750

04/10/14 Final notations for billing (reducing to 200 fee) \$ 50

Plane ticket from Kosvo \$1548

Total Court is reducing bill of Stevens: \$17,013.

Stevens' bill was \$110,978.00 with the reduction by the Court of the amount listed above the total paid will be **\$93,965.**

TERESA BORDER

The Court did not find that a **third** attorney was reasonable, necessary or warranted in this case. Ms. Border filed a notice of appearance a week before the trial began and billed for reviewing documents and appearing in court on two occasions during jury selection. Both Lee and Stevens had already reviewed and billed for this same type of work, and both were in court at the time Ms. Border appeared. The Court is not disputing that she is qualified as an attorney. However, this case already had two capable attorneys appearing. The Court will not award the \$2,412.50 billed for this third attorney.

GAYLON WARREN /COLUMBIA LAB

Expert Gaylon Warren's bill does not mirror the declaration he filed with the Court on August 29, 2013. (*See Declaration of Gaylon Warren Document 23, filed August 29, 2013*). In his declaration, he believed that if Gerlach wants him to appear for the entire 10 day trial and his testimony, his bill would be approximately \$19,750.00. He went on to declare that he believed it would be reasonable that should he be retained, he should attend approximately three days of the trial and testimony estimating his costs to be about \$13,000.

Earlier in the case, the Court had granted a possible payment of \$2500 from the Court should Gerlach need some assistance on the retaining of an expert and if the funds he was raising would not be sufficient. In no way was the Court agreeing that an expert should be retained and remain in attendance during the *entire* trial. Warren is an expert in firearms and not an expert in jury selection nor was he hired to help pick a jury. There was certainly no reason for Warren to be present for opening or closing statements as Gerlach had two attorneys (and at times three) at counsel table. Warren testified on 04/08/14, the sixth day of trial. These extra days spent in trial would be unreasonable costs that the State should not have to bear. Warren also included in his declaration that he doesn't exceed \$1,975 a day in fees. However, on 04/08/14 he billed over that maximum amount.

The following will be deducted from Warren's final bill as unreasonable and unnecessary expenses. The Court finds the time Warren already billed for preparing, strategizing, discussing and interviewing Gerlach was sufficient, and the rest would be unwarranted.

03/31/14 Billed -but no explanation of why he was needed – (Court was in jury selection)	\$2,709.24
4/1/14 In Court Consult for opening statements & travel	\$1,042.12
04/02/14 Court Consultation	\$1,792.12
04/03/14 Examination & Consultation	\$2,042.12
04/08/14 Expert testimony MINUS over 1,975 max day)	\$ 292.12
4/9/14 Closing Arguments & Travel	\$1,292.12
	\$9,169.84

Warren's original bill was \$22,647.56. With the reduction of the above costs and expenses, the amount should be \$13,477.72. This is more in line with the declaration Warren

filed in August 2013. In his declaration on page two, line 4 and 5, he stated he would estimate a “reasonable” amount to be \$13,000.

Robert Smith – Expert

Lee called Smith as an expert on the use of force. Smith was called to testify on April 8, 2014, which was the 6th day of trial. In reviewing Smith’s bill, he billed his standard \$1,500 per day and \$150 per hour for anything outside court. This is extravagant and unwarranted for any of the time he was not testifying as an expert. Smith had interviewed Gerlach, examined all the reports and witness statements, met and discussed at length the strategy they would need for a successful end, but the Court finds that he was not needed to be present on every day of the trial.

The Court is familiar with experts testifying in trial and when they would be necessary for trial. Yet, Smith billed for each day of trial, including jury selection, opening statements, and closing statements. The attorneys did not give the Court a reasonable explanation of why this expert would be needed in trial every day. These charges were in addition to the two attorneys in court on behalf of Gerlach. The Court finds these extra days unnecessary and excessive.

During the argument for fees before the Court, Counsel could not give the Court a justifiable reason for the need of an expert to assist throughout the entire trial other than to be available if the two attorneys needed help strategizing. The Court finds that if something had come up, one of the two attorneys could have easily contacted the expert and asked the appropriate questions. At no time could Lee justify the necessity of the cost of an expert for each and every day of trial.

The Court finds the following billing unwarranted:

03/31/14	Day one of trial	\$ 1,500
03/31/14	After court practice of expert qualification.	\$ 375
04/01/14	Day two of trial	\$ 1,500
04/01/14	After court preparation	\$ 225
04/02/14	Day three of trial	\$ 1,500
04/03/13	Day four of trial	\$ 1,500
04/07/14	Day 5 of trial	\$ 1,500
04/09/14	Day 7 of trial	\$ 1,500
04/10/14	Court for verdict	<u>\$ 375</u>
		\$9,975

For Robert Smith's bill, the Court deduced this from his \$22,787.50 and finds that the \$12,812.50 is reasonable and necessary.

The Court finds that the total amount to be paid shall be: **\$221,574.72** (this includes the deduction for the balance of the fundraising taken out of Lee's amount). The Court included a summary with this opinion and incorporates these findings as above.

Dated 7/21/14



Judge Annette Plese