VERMONT SUPREME COURT
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Case No. 22-AP-023

ENTRY ORDER

FEBRUARY TERM, 2022

State of Vermont v. Joseph Ferlazzo, Jr.* } APPEALED FROM:
} Superior Court, Chittenden Unit, Criminal Division
} CASE NO. 21-CR-08967

In the above-entitled cause, the Clerk will enter:

Defendant Joseph Ferlazzo, Jr. appeals from the trial court's order regarding his application for public-defender services. Though the trial court determined that defendant was a "needy person" under 13 V.S.A. § 5236, we conclude that it failed to make the necessary findings regarding his ability to pay for public-defender representation, and that the court failed to follow the statutory procedure for determining both defendant's ability to pay and his contribution to public-defender services under 13 V.S.A. § 5238. We remand for the trial court to make additional findings consistent with this order, to conduct a hearing if necessary, and for defendant to file a new, consolidated public-defender application.

On October 20, 2021, defendant was arraigned on a single charge of first-degree murder, in violation of 13 V.S.A. § 2301. On that date, the trial court provisionally assigned representation to defendant pending receipt of a public-defender application. Defendant filed an application on November 16. He represented a total income for the previous twelve months of $4000, of which $1000 was contributed by cohabiting family members. Defendant listed various assets including $10,000 in cash, $1300 in a checking account, a recreational vehicle (which was also the alleged crime scene) and a motorcycle each valued at $3500. The application was not notarized.

At a status conference on December 3, 2021, the court denied defendant's application. The court initially indicated that defendant "would qualify for a public defender" based on its review of the application, but that defendant would have to "spend down" assets before he could be "eligible for the appointment of a public defender." However, during the hearing, the court was made aware of more than $20,000 in cash seized at the crime scene that defendant appeared to have failed to report on this application, and that defendant owned two additional vehicles he did not report, a 2016 Jeep and a 2021 Ducati motorcycle. The State indicated that it was not keeping the cash and the Jeep as evidence, and that it would release them to defendant. The State represented that both motorcycles were in already in possession of defendant's friends.

Defendant filed a motion to reconsider on December 23, 2021. Defendant attached a new notarized public defender application signed on December 22, 2021. Defendant again reported $4000 in income for the previous twelve months. He also attached a summary of his financial assets prepared by Attorney Harley Brown, to whom he had granted a power of attorney to manage his financial matters. The summary indicated that defendant owed approximately $12,000 on the Jeep, and that the bank had begun repossession proceedings. It stated that defendant owed approximately $6000 on the Ducati motorcycle, and confirmed defendant had cash assets of "$20,000 plus." The summary also indicated that defendant had not filed a 2020 tax return and that defendant owed taxes.

The trial court denied defendant's motion in a January 5, 2022, entry order.[1] The court expressed concern that defendant had not listed assets of his wife (the alleged victim) despite acknowledging income she earned during the December 3 hearing, that defendant's December 22 application contained "scant" financial information, and that his financial summary submitted with the application was not a sworn statement. In response, Attorney Brown filed an affidavit the same day containing much of the same financial information defendant had filed with his December 23 application. Defendant also filed a supplement to his motion to reconsider on January 20, 2022, providing the estimated representation costs from a private attorney in the area who suggested that a retainer alone would be in the $50,000 to $75,000 range, and that total costs of representation could exceed $100,000.

On January 25, the trial court issued an order approving defendant's application for a public defender. The court first found that defendant had not provided credible income information and expressed misgivings about the amount of defendant's assets considering defendant's reported income for the previous twelve months. The court noted that the Jeep and the Ducati motorcycle had been financed with bank loans purportedly requiring income verification. The order's only reference to defendant's income was the following: "Despite claiming only $750 earned in the month prior to his arrest and incarceration and only $4000 for the preceding year, [defendant] had a number of relatively new vehicles." Nevertheless, the court found defendant a "needy person" under 13 V.S.A. § 5236(b). It concluded that defendant is incarcerated, held without bail, and the facts of the case indicate that defendant will be unable to earn income for the foreseeable future. Given his assets, the court concluded, he would be able to hire counsel initially, but would be unable to retain counsel for the duration of the case without "undue hardship."

The court next undertook a determination as to defendant's ability to pay for defender services under 13 V.S.A. § 5238. The court referenced its "financial findings" in the "needy person" analysis but did not specifically reference defendant's income. Nor did it cite the federal poverty level guidelines or the Defender General's average cost of representation. Instead, it found that defendant's current expenses were minimal, and that he could sell his vehicles "likely result[ing] in a net of approximately $24,000 in addition to the sale of the RV van and $20,000 in cash." The court concluded that "defendant has liquid assets and personal property assets available to partially compensate his legal counsel."

[1] Defendant references a status hearing on January 5, 2022, at which the trial court apparently "withdrew its [January 5, 2022] written decision denying the public defender application." The Court was not provided a transcript of the hearing. However, our conclusion today does not depend on any development that defendant argues occurred at the hearing.

After finding that defendant could pay a portion of his public-defender representation fees, the court assessed a contribution amount of $5000. The court divided the $5000 into a co-payment of fifty dollars and a reimbursement payment of $4,950.00 pursuant to 13 V.S.A. § 4238(c). The court's repayment analysis concluded that defendant's "liquid assets" were sufficient to pay this amount within the sixty days required under § 5238(e). It did not reference defendant's income or the Defender General's cost of representation at this step. Defendant now appeals arguing that the trial court failed to properly determine defendant's ability to pay pursuant to § 5238(b), and erred by subsequently assessing a $5000 contribution to defender services under § 4238(c).

"In reviewing a trial court's decision on whether a defendant is eligible for a requested service to be provided at the state's expense, we defer to the trial court unless there is a showing that the court abused or failed to exercise its discretion." State v. Higginbotham, 174 Vt. 640, 640 (2002) (mem.). "[W]hether the trial court conducted the proper analysis in determining whether to appoint counsel" is legal question we review without deference. State v. Kittredge, 2018 VT 6, ¶ 4, 206 Vt. 661 (mem.).

Courts determine a defendant's eligibility for public-defender services using a three-part analysis. The first step is to determine whether the defendant is a "needy person" under 13 V.S.A. § 5236(b) and Supreme Court Administrative Order 4 § 5(b) and (c). The statute defines a "needy person" as "a person who at the time his or her need is determined is financially unable, without undue hardship, to provide for the full payment of an attorney and all other necessary expenses of representation." 13 V.S.A. § 5201(3). This determination can include consideration of the defendant's "income, property owned, [and] outstanding obligations" among other factors. Id. § 5236(b); Kittredge, 2018 VT 6, ¶ 9.

The second step is to determine the defendant's ability to pay for defender services. At this step, the court considers the income of the defendant along with that of their cohabiting family members. 13 V.S.A. § 5238(b); Kitteridge, 2018 VT 6, ¶ 10. "The statute sets forth the repayment amount, according to income, as a percentage of the average direct cost of representation per case." State v. Morgan, 173 Vt. 533, 533-34 (2001) (mem.) (emphasis added); see also 13 V.S.A. § 5238(b) (providing table for calculating income as percentage of federal income poverty levels as applied to average cost of representation). The defendant's last twelve months of income is used in the calculation in the second step. 13 V.S.A. § 5238(b); A.O. 4 § 5(d).

The trial court, in the third step, must then determine what amount the applicant must contribute to defender services, if anything. Morgan, 173 Vt. at 534. Under § 5238(d) and (e), the court may assess this contribution as a co-payment prior to assignment of counsel and a reimbursement amount to be paid within sixty days of the order. See Id., 173 Vt. at 534; see also State v. Sheltra, No. 2020-303, 2020 WL 7624768, at *2 (Vt. Dec. 18, 2020) (unpub. mem.), https://www.vermontjudiciary.org/sites/default/files/documents/eo20-303.pdf [https://perma.cc/36E9-X3UK]. Courts may consider the defendant's income or assets at this step. 13 V.S.A. § 5238(d) ("To the extent that the court finds that the eligible person has income or assets available to enable payment . . . it shall order such [payment] to cover in whole or in part the amount of the costs of representation."). Depending on defendant's income in relation to the federal poverty level guidelines and the Defender General's average cost of representation, the defendant

may be ordered to pay the statutory minimum co-payment of $50 with no reimbursement, up to the full cost of representation. Sheltra, 2020 WL 7624768, at *2.

We begin with the trial court's lack of an affirmative finding regarding defendant's income. See Kitteridge, 2018 VT 6, ¶ 10 ("To facilitate meaningful appellate review, the trial court must make specific findings of fact to support a denial of counsel."). In its January 25 order, the court found that "[defendant] has failed to provide credible information to the court for earning over the last 12 months." The court expressed its disbelief that defendant earned "only $4,000 for the preceding year" while possessing more than $20,000 in cash assets and "a number of new vehicles." This was the only reference the order made to defendant's sworn representation regarding his income. Consequently, in making no specific, affirmative finding regarding income, the trial court impermissibly instead relied on defendant's assets to determine his ability to pay for legal services.

The statute clearly states that it is defendant's income that is relevant to the determination of his ability to pay. 13 V.S.A. § 5238(b) (providing that determination depends on "income of the person and cohabiting family members for the past year" as applied to federal poverty levels and average cost of public-defender services (emphasis added)); Morgan, 173 Vt. at 533-34 ("The statute sets forth the repayment amount, according to income, as a percentage of the average direct cost of representation per case." (emphasis added)). Moreover, in the table provided in § 5238(b), the column containing the percentages of federal poverty levels is titled "Income as a percentage of federal poverty level applicable to family size." Because the trial court did not make an affirmative finding regarding defendant's income, it could not determine whether his income met the federal poverty level guidelines under § 5238(b), thereby also failing to determine what percentage of defender services he could pay based on the Defender General's average cost of representation.

We next turn to the trial court's determination that defendant's contribution to defender services would be $5000. While the trial court can consider defendant's assets under § 5238(d) at this step, the maximum amount the court can assess is limited by the calculation at step two under § 5238(b). See 13 V.S.A. § 5238(c) ("The amount to be paid under subsection (b) of this section shall be divided by the court between a co-payment and reimbursement amount."). Section 5238(b) contains no provision permitting a court to increase the contribution above the Defender General's average cost of representation, even if the court finds that defendant's income exceeds 200% of the federal poverty guidelines. Sheltra, 2020 WL 7624768, at *2 ("The statutory scheme clearly indicates that an applicant with an income 200% over the federal poverty guidelines, and who is required to reimburse the state for the entire cost of the defense, can nevertheless qualify as a needy person under § 5236."). Under current Defender General guidelines, the maximum amount a "needy person" would contribute to a felony case is $1,423.88.[2] Thus, the court's assessment of a $5000 contribution is incorrect.

In sum, the trial court failed to properly analyze defendant's ability to pay and assessed a defender-services contribution that exceeds the statutory maximum. Moreover, because there are seemingly conflicting and separate filings in this case, the trial court must permit defendant to file a new, consolidated application, attaching any sworn attachments and addenda necessary for the court

[2] Pursuant to 13 V.S.A. § 5238(a), the Defender General calculates the average cost of representation by category of case and provides this information to the judiciary on a yearly basis.

to make relevant findings as to defendant's ability to pay and his contribution for public-defender services. Accordingly, this matter is remanded for the trial court to make additional findings and conclusions consistent with this order, to conduct a hearing if necessary, and for defendant to file a new, consolidated public-defender application.

Remanded to permit defendant to file a new, consolidated public-defender application and for the trial court to make additional findings.

FOR THE COURT:

Karen R. Carroll, Associate Justice