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an abuse of discretion. *Evertson v. City of Kimball*, 278 Neb. 1, 767 N.W.2d 751 (2009). Due to the discretionary nature of the statute and the failure to adduce evidence concerning the fees, we find no abuse of discretion by the court in connection with its failure to award attorney fees.

CONCLUSION

The district court did not err in entering judgment in favor of Model on its breach of contract claim and did not abuse its discretion in failing to award attorney fees.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JOSEPH R. LOWERY, APPELLEE, AND STERLING T. HUFF, APPELLANT.

798 N.W.2d 626

Filed May 31, 2011. No. A-10-789.

1. **Attorney Fees: Appeal and Error.** When an attorney fee is authorized, the amount of the fee is addressed to the discretion of the trial court, whose ruling will not be disturbed on appeal absent an abuse of discretion.
2. **Judges: Words and Phrases.** An abuse of discretion occurs when the trial judge's reasons or rulings are clearly untenable, unfairly depriving a litigant of a substantial right and denying just results in matters submitted for disposition.
3. **Attorney Fees.** Attorney fees and expenses may be recovered only where provided for by statute, or when a recognized and accepted uniform course of procedure has been to allow recovery of an attorney fee.
4. ____. To determine proper and reasonable fees, it is necessary to consider the nature of the litigation, the time and labor required, the novelty and difficulty of the questions raised, the skill required to properly conduct the case, the responsibility assumed, the care and diligence exhibited, the result of the suit, the character and standing of the attorney, and the customary charges of the bar for similar services.
5. **Attorney Fees: Proof.** While attorney fees and expenses are ordinarily left to the trial court's discretion, an application for attorney fees and expenses must be granted where the record demonstrates that the amount requested was reasonable and there is no evidence or indication otherwise that the amount is unreasonable.
6. ____: ____. Where the evidence contained in the record supports the fact that the moving party's request for attorney fees and expenses is a reasonable request, and no other contrary evidence exists or is offered into evidence disputing reasonableness, the request for such reasonable attorney fees and expenses must be granted.

Appeal from the District Court for Scotts Bluff County: LEO DOBROVOLNY, Judge. Reversed and remanded with directions.

Sterling T. Huff, of Island, Huff & Nichols, P.C., L.L.O., pro se.

Jon Bruning, Attorney General, and James D. Smith for appellee State of Nebraska.

IRWIN, MOORE, and CASSEL, Judges.

MOORE, Judge.

INTRODUCTION

Sterling T. Huff, court-appointed counsel for Joseph R. Lowery, appeals from an order determining the amount of fees and expenses allowed to Huff in connection with his representation of Lowery in his criminal case. The parties stipulated to waive oral argument. We find that the district court abused its discretion in reducing the requested fees. We therefore reverse the district court's order and remand the cause with directions to grant Huff's application for fees.

BACKGROUND

Huff was originally appointed to represent Lowery in the county court for Scotts Bluff County in September 2009 in connection with a charge of felony false information accessory to second degree murder, a Class IV felony. Thereafter, an information was filed in district court which included the same Class IV felony, as well as a charge of tampering with evidence accessory to second degree murder, a Class III felony. The information was subsequently amended to two felony accessory to second degree murder counts. The charges stemmed from the stabbing of James Mendoza by Lowery's brother, Artie Lowery (Artie), and Mendoza's resulting death. Although Lowery was not present at or involved in the actual stabbing, he was alleged to have aided and abetted the murder by virtue of providing false information during the investigation and attempting to hide one of the weapons used in the murder. Pursuant to a plea agreement, Lowery ultimately pled no contest to one count of false reporting a criminal matter and one

count of attempted tampering with evidence, both Class I misdemeanors, and was sentenced to two consecutive 1-year terms in county jail, with credit given for 297 days served. Following Lowery's convictions and sentences, Huff filed an appeal challenging the sentences as excessive, after which Huff's appointment was terminated and the appeal was handled by the public defender's office. Huff's representation of Lowery ended on July 1, 2010.

On July 6, 2010, Huff filed a motion to approve attorney fees, and a hearing was held before the district court the same day. Testimony was given by Huff, and the court received Huff's application for fees and attached billing statement in evidence. While Huff was questioned by both the county attorney and the court concerning a few of his time entries, there was no evidence offered to disprove the reasonableness of Huff's fee application. The total requested fees were $21,343, which represented 304.9 hours at the court-appointed hourly rate of $70, plus expenses of $3,367.94 and minus a retainer of $14, for a total request of $24,696.94.

On August 5, 2010, the district court entered a detailed six-page order which allowed "[f]ees for attorney services . . . in the amount of $12,000, and [expenses in the requested sum] of $3,367.94 for a total of $15,367.00." Further details regarding the court's findings will be discussed in the analysis below. Huff filed a timely appeal.

ASSIGNMENTS OF ERROR

Huff asserts that the district court abused its discretion in reducing Huff's court-appointed fees from $21,343 to $12,000 and that the court erred in considering sua sponte the fees billed and approved in a companion case.

STANDARD OF REVIEW

[1] When an attorney fee is authorized, the amount of the fee is addressed to the discretion of the trial court, whose ruling will not be disturbed on appeal absent an abuse of discretion. *Schirber v. State*, 254 Neb. 1002, 581 N.W.2d 873 (1998).

[2] An abuse of discretion occurs when the trial judge's reasons or rulings are clearly untenable, unfairly depriving a

litigant of a substantial right and denying just results in matters submitted for disposition. *Boamah-Wiafe v. Rashleigh*, 9 Neb. App. 503, 614 N.W.2d 778 (2000).

ANALYSIS

The primary question presented in this appeal is whether the attorney fees requested by Huff in connection with his representation of Lowery were reasonable in amount.

[3] Attorney fees and expenses may be recovered only where provided for by statute, or when a recognized and accepted uniform course of procedure has been to allow recovery of an attorney fee. *Schirber v. State, supra*. Neb. Rev. Stat. § 29-3905 (Reissue 2008) applies in this case and provides:

> Appointed counsel for an indigent felony defendant other than the public defender shall apply to the district court which appointed him or her for all expenses reasonably necessary to permit him or her to effectively and competently represent his or her client and for fees for services performed pursuant to such appointment . . . . The court, upon hearing the application, shall fix reasonable expenses and fees, and the county board shall allow payment to counsel in the full amount determined by the court.

[4,5] To determine proper and reasonable fees, it is necessary to consider the nature of the litigation, the time and labor required, the novelty and difficulty of the questions raised, the skill required to properly conduct the case, the responsibility assumed, the care and diligence exhibited, the result of the suit, the character and standing of the attorney, and the customary charges of the bar for similar services. *Schirber v. State, supra*; *Koehler v. Farmers Alliance Mut. Ins. Co.*, 252 Neb. 712, 566 N.W.2d 750 (1997). While such attorney fees and expenses are ordinarily left to the trial court's discretion, an application for attorney fees and expenses must be granted where the record demonstrates that the amount requested was reasonable and there is no evidence or indication otherwise that the amount is unreasonable. *Schirber v. State, supra*; *Koehler v. Farmers Alliance Mut. Ins. Co., supra*.

After recognizing the foregoing principles, the district court analyzed the work performed by Huff. Huff filed 15 motions on behalf of Lowery, and the State also filed 15 motions. Two hearings were held which were lengthy: one being a preliminary hearing after the first amended information was filed and the second being the hearing on the motion to suppress and other pending motions. Two briefs were submitted by Huff: a 6-page brief on the plea in bar and motion to quash and a 26-page brief on the motion to suppress and other pending motions. The district court then applied the factors set forth in *Koehler* and made the following findings:

> 1. Nature of the litigation: This case was initially charged in two counts, one class III and one class IV felony. Summarized, [Lowery] was alleged to have lied to police about his brother's involvement in a homicide, and was alleged to have attempted to dispose of the weapon used. There were four persons charged in connection with the homicide. All of the cases were resolved without trials, this case in a negotiated plea to two class I misdemeanors.
>
> 2. Novelty and difficulty of the questions raised: The case did not present particularly novel or difficult questions of law or fact. Due to the accessory charge, the nature of the underlying crime takes on importance, and considerable time was spent addressing the viability of the underlying homicide.
>
> 3. Skill required to properly conduct the case: The case required an experienced and skilled criminal defense attorney. While not novel or difficult, the case was somewhat complex due to the interaction of the four cases.
>
> 4. The responsibility assumed: The attorney was the sole legal representative of the defendant, whose responsibility was to ensure a fair trial for [Lowery].
>
> 5. Care and diligence exhibited: The attorney exhibited a high level of care and diligence. Numerous motions were filed to address current issues in the case.
>
> 6. Result of the suit: The result obtained was very favorable to [Lowery], avoiding any felony convictions.

> 7. Character and standing of the attorney: . . . Huff is an attorney who has been in practice since 1999. He practices criminal law regularly. No evidence is offered that he is not of good character and high standing.
>
> 8. Customary charges of the bar for similar services - time and labor required: The county rate for appointed counsel is $70.00 per hour. The Court is aware that attorneys of . . . Huff's experience would bill an hourly rate of $125.00 per hour if this were not a court appointment. This awareness is from fee affidavits submitted by attorneys in conjunction with requests for fees in other cases.
>
> The time and labor required has been considered by the Court. This application shows over [300] hours of attorney time. The amount of time would be consistent with a case that had proceeded to jury trial rather than one which was resolved by plea. The total number of the hours billed, despite being actually incurred hours, exceed what is reasonable under *Koehler*.

The court then listed several examples of time billed, totaling 133.7 hours, that it deemed excessive. These entries related to preparing for the initial preliminary hearing (11.1 hours), preparing a plea in abatement and praecipe for transcript (.9 hours), "review[ing] materials and audio/videotapes" (52.3 hours), attending Artie's motion to suppress hearing (4.4 hours), preparing for Lowery's motion to suppress and other motions heard on January 29 and February 3, 2010 (approximately 50 hours), attending and waiting for Artie's sentencing hearing (4.1 hours), and preparing a brief that was not called for or submitted (10.9 hours). The court also noted that fees billed and approved in a companion case by other appointed counsel were $3,266. Finally, the court found that none of the expenses were challenged and did not appear unreasonable.

The court concluded that "by the reasonableness standard which applies in Nebraska, the amount of hours expended, and therefore the billed time submitted, extends beyond the time and labor required for a case of this nature which resulted in a plea before trial." In reaching this conclusion, the court noted that while *Schirber v. State*, 254 Neb. 1002, 581 N.W.2d 873

(1998), holds that a fee application must be granted if it is a reasonable request, the court in *Schirber* also found that such rule did not create a presumption of validity or abdicate the discretion granted to all trial courts to determine reasonable attorney fees and expenses.

While we recognize the deference which we are required to give to the district court's decision under our standard of review, we nevertheless conclude that the holding in *Schirber v. State, supra*, requires us, under the facts of this case, to find that the district court abused its discretion in reducing the requested fees.

First, the district court, in its recitation of examples of excessive time expended, excluded all of the time expended for the noted activities (304.9 hours of time in fee application minus 133.7 hours of excluded time, equals 171.2 hours allowed at $70 per hour for a total fee of $11,984). Some of the time excluded by the court was for matters that the court had previously noted were significant in the case, such as preparation for Joseph's suppression hearing. Further, the court did not state that all of the time for the listed activities was unnecessary; only that the total hours exceeded what is reasonable. To completely exclude all time for the activities listed by the district court amounts to an untenable result. The State in fact conceded in its brief on appeal that Huff should be paid for "some" of the time completely excluded by the court. Brief for appellee at 7.

Second, and of greater import, is that the evidence contained in the record supports the conclusion that Huff's request for fees in connection with the activities excluded by the court, as well as the balance of the time contained in his application, was reasonable. At the hearing on Huff's application for fees, Huff testified about the complexity of the case from the standpoint of the existence of several codefendants, and the fact that Lowery's aiding and abetting charge was dependent upon the outcome of Artie's homicide case. Huff testified that the time he put into Lowery's case was all fair, reasonable, and necessary for his adequate representation. There was no evidence presented to rebut this testimony. The prosecuting attorney asked about the time entries for preparation for the

initial preliminary hearing, for reviewing videotapes and audiotapes, and for letters sent to witnesses. Huff provided detailed responses to these questions indicating that the time listed was actually spent in the particular activity and why the time was necessary. For example, Huff testified that there were significant hours of videotape and audiotape to review, including Artie's and the other codefendant's interrogation by the police and Artie's polygraph examination. The district court also examined Huff, asking about the length of time Huff had been practicing law, the nature of his practice, his hourly charges, the resolution of the case by plea, the level of difficulty of the case, and the relationship of Lowery's case with Artie's case. Huff answered the court's questions thoroughly, again stressing the complexity of the case and the inability to resolve Lowery's case until following Artie's plea and obtaining Artie's proffer agreement and a recording confirming that the victim had been the initial aggressor in the altercation with Artie.

[6] Where the evidence contained in the record supports the fact that the moving party's request for attorney fees and expenses is a reasonable request, per the factors enunciated in *Koehler v. Farmers Alliance Mut. Ins. Co.*, 252 Neb. 712, 566 N.W.2d 750 (1997), and no other contrary evidence exists or is offered into evidence disputing reasonableness, the request for such reasonable attorney fees and expenses must be granted. *Schirber v. State, supra*. In the case at hand, the record demonstrates that Huff's request for attorney fees and expenses was in fact a reasonable request, and no evidence was offered into evidence to rebut that fact. Accordingly, Huff's application for fees and expenses should have been granted.

Therefore, we reverse the decision of the district court and remand the cause with directions to allow the requested fees and expenses.

Huff also argues that it was error for the district court to consider the fees billed and approved in a companion case, particularly since such fees were not in evidence, the court did not take judicial notice of the fees, and the parties were not notified that such fees would be considered. Given our resolution above, we need not discuss this assignment of error further.

CONCLUSION

Because the record demonstrates that Huff's application for attorney fees and expenses was reasonable, and no evidence was offered to the contrary, the district court erred in reducing the requested fees. We reverse the decision of the district court and remand the cause with directions to grant Huff's application for fees and expenses.

REVERSED AND REMANDED WITH DIRECTIONS.

CASSEL, Judge, concurring.

I entirely agree with the court's opinion and write only to note the apparent tension between the standard of review for abuse of discretion and the analysis required by *Schirber v. State*, 254 Neb. 1002, 581 N.W.2d 873 (1998).

The definition of abuse of discretion has been frequently repeated. An abuse of discretion occurs when a trial court's decision is based upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence. *State v. Mata*, 280 Neb. 849, 790 N.W.2d 716 (2010). While trial courts and appellate courts equally are regarded as experts on the value of legal services, a trial court ordinarily has a better opportunity for practically appraising the situation, and an appellate court will interfere only to correct a patent injustice where the allowance is clearly excessive, or insufficient. *Omaha Paper Stock Co. v. California Union Ins. Co.*, 200 Neb. 31, 262 N.W.2d 175 (1978); *Junker v. Junker*, 188 Neb. 555, 198 N.W.2d 189 (1972); *Specht v. Specht*, 148 Neb. 325, 27 N.W.2d 390 (1947).

However, the *Schirber* opinion mandates that

> where the evidence contained in the record supports the fact that the moving party's request for attorney fees and expenses is a reasonable request, per the factors enunciated in *Koehler* [*v. Farmers Alliance Mut. Ins. Co.*, 252 Neb. 712, 566 N.W.2d 750 (1997)], and no other contrary evidence exists or is offered into evidence disputing reasonableness, the request for such reasonable attorney fees and expenses must be granted.

254 Neb. at 1006, 581 N.W.2d at 876. Although the *Schirber* court asserted that its ruling did not "create a presumption of validity or abdicate the discretion granted to all trial courts to

determine reasonable attorney fees and expenses," 254 Neb. at 1006-07, 581 N.W.2d at 876, I respectfully suggest that this is the practical result.

In the case before us, the trial court judge clearly believed that some of the requested fees were excessive. But the State did not offer any evidence to contradict the applicant's testimony regarding the necessity and reasonableness of the services. Following the analysis prescribed in *Schirber*, we no longer interfere only to correct a patent injustice, but, instead, must reverse to grant the requested fees because "no other contrary evidence exists or is offered into evidence disputing reasonableness." In my opinion, this deprives trial courts of any effective power to review fee applications in all but the most egregious instances.

Vertical stare decisis compels lower courts to follow strictly the decisions rendered by higher courts within the same judicial system. *State v. Hausmann*, 277 Neb. 819, 765 N.W.2d 219 (2009). Because the court's opinion faithfully follows the path mandated by the *Schirber* opinion, I join the court's opinion in full.