

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-3850
Summary Calendar

ALVIN SCOTT LOYD,

Petitioner-Appellant,

versus

JOHN P. WHITLEY, Warden,
Louisiana State Penitentiary,

Respondent-Appellee.

Appeal from the United States District Court
for the Eastern District of Louisiana
(89-CV-1389)

(April 12, 1994)

Before POLITZ, Chief Judge, HIGGINBOTHAM and DUHÉ, Circuit Judges.

PER CURIAM:*

Counsel for Alvin Scott Loyd appeals the denial of his motion for *nunc pro tunc* appointment as counsel and for the setting and allowance, thereafter, of attorney's fees, costs, and expenses under the Criminal Justice Act (CJA) and Federal Anti-Drug Abuse Act (ADAA), 18 U.S.C. § 3006A and 21 U.S.C. § 848, respectively.

*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

Finding neither error nor abuse of discretion in the district court's ruling we affirm.

Counsel undertook the representation of Loyd in both state and federal habeas proceedings on a *pro bono* basis. On October 29, 1992 we vacated Loyd's death sentence and remanded for resentencing, concluding that Loyd had been denied effective assistance of counsel at his second sentencing trial.¹ Loyd's petition for rehearing on other claims was denied. The Supreme Court denied the State of Louisiana's petition for writ of certiorari on May 17, 1993. Counsel attests that he did not seek appointment nor submit an application for payment until the conclusion of the case because he initially was unaware of the statutory allowances for same. Counsel acknowledges that he learned of the possibility of compensation during the first appeal to this court but stated that he did not review the statutes and case law thoroughly until after the conclusion of the case. Counsel opted to wait until the conclusion of the case to request court appointment and payment.

On October 22, 1993 counsel filed a motion and accompanying affidavit seeking *nunc pro tunc* appointment under the CJA and ADAA and payment of \$41,919.45 in fees and \$3,881.76 in costs and disbursements. The district court denied the motion. Counsel timely appealed.

We first must address jurisdiction. Although decisions

¹The course of proceedings is detailed in **Loyd v. Whitley**, 977 F.2d 149 (5th Cir. 1992), cert. denied, 113 S.Ct. 2343 (1993).

awarding or denying attorney's fees prior to the final disposition on the merits are generally not appealable,² on the particular facts of this case where counsel seeks a *nunc pro tunc* appointment and payment for legal services already performed, we will assume jurisdiction.

Counsel contends that the denial of *nunc pro tunc* appointment contravenes the CJA and ADAA which make compensation of counsel mandatory. Counsel's representation of Loyd on a *pro bono* basis belies this contention. Indeed, counsel received considerable favorable press in his home area in Minneapolis for what was legitimately recognized as a magnanimous *pro bono* representation in a difficult, highly publicized death penalty case in distant Louisiana. Counsel deserved that recognition for his unselfish and noteworthy professional action.

In denying counsel's request for a change in status *nunc pro tunc* neither the district court nor this court would ignore or attempt to circumvent the cited statutes. We simply must note that considering the total circumstances of this case, counsel did not timely seek the relief he would now have the court order. The district court did not abuse its discretion in denying counsel's motion.

AFFIRMED.

²**Campanioni v. Barr**, 962 F.2d 461 (5th Cir. 1992); **Dardar v. Lafourche Realty Co., Inc.**, 849 F.2d 955 (5th Cir. 1988).