

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA14-760

Filed: 19 May 2015

Pender County, Nos. 08 CRS 3155, 08 CRS 52362

STATE OF NORTH CAROLINA

v.

DANIEL LEE FENNELL, Defendant.

Appeal by defendant from judgment entered 17 April 2014 by Judge Jay D. Hockenbury in Pender County Superior Court. Heard in the Court of Appeals 4 December 2014.

Attorney General Roy Cooper, by Assistant Attorney General Kimberly N. Callahan, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender James R. Grant, for defendant-appellant.

GEER, Judge.

Defendant Daniel Lee Fennell appeals from a judgment entered after his fourth sentencing hearing on his convictions for sale of a schedule II controlled substance, possession of a schedule II controlled substance, and being a habitual felon. Defendant's sole argument on appeal is that the trial court erred in calculating the amount of jail fees assessed against him by using the daily rate provided in the revised version of N.C. Gen. Stat. § 7A-313 (2013) -- a version that was inapplicable to defendant because it did not become effective until after defendant had completed

his pretrial confinement. We agree and remand for recalculation of jail fees using the correct daily rate.

Facts

On 2 June 2011, defendant was found guilty by a jury of possession of a schedule II controlled substance, selling a schedule II controlled substance, and delivering a schedule II controlled substance. Defendant pled guilty to being a habitual felon and stipulated to having a prior record level of VI. The trial court entered a consolidated judgment and sentenced defendant to a presumptive-range term of 150 to 189 months imprisonment and ordered him to pay \$720.00 in restitution. Defendant appealed to this Court. In an opinion filed 6 March 2012, this Court held that defendant received a trial free of prejudicial error and that the trial court did not err in ordering restitution. The Court, however, remanded for a new sentencing hearing due to an error in the trial court's prior record level determination. *State v. Fennell*, 219 N.C. App. 401, 722 S.E.2d 212, 2012 WL 698252, at *3, 2012 N.C. App. LEXIS 302, at *8 (2012) (unpublished).

At his new sentencing, defendant stipulated that he had a prior record level of V, and the trial court sentenced him to a presumptive-range term of 125 to 159 months imprisonment. The trial court also ordered defendant to pay \$4,454.50 in costs, \$2,606.25 in attorneys' fees, and \$60.00 in miscellaneous fees, for a total of \$7,120.75. However, the trial court did not order payment of any restitution.

Defendant again appealed to this Court, arguing that the trial court again erred in calculating his prior record level and by imposing a more severe monetary judgment than the original sentence. This court held that the trial court erroneously relied on a structured sentencing chart that was inapplicable to defendant, remanded for resentencing, and deemed defendant's remaining arguments concerning the monetary judgment moot. *State v. Fennell*, ___ N.C. App. ___, 739 S.E.2d 628, 2013 WL 1121500, at *1, 2013 N.C. App. LEXIS 297, at *3 (2013) (unpublished).

Defendant's third sentencing hearing was held on 30 April 2013. Defendant stipulated to having a prior record level of IV. The trial court sentenced defendant to a presumptive-range term of 111 to 143 months imprisonment and again ordered defendant to pay \$4,454.50 in costs, \$2,606.25 in attorneys' fees, and \$60.00 in miscellaneous fees, for a total of \$7,120.75. However, the costs and fees were not imposed during the sentencing hearing, but rather were only imposed in the written judgment signed and entered after defendant had left the courtroom.

Defendant appealed and argued that the trial court erred in imposing costs and fees outside of his physical presence. This Court agreed and remanded "for a determination of what costs and fees, if any, to impose after defendant is afforded notice and an opportunity to be heard." *State v. Fennell*, ___ N.C. App. ___, 758 S.E.2d 185, 2014 WL 859271, at *3, 2014 N.C. App. LEXIS 242, at *7 (2014) (unpublished).

A fourth hearing was held on 17 April 2014. A new judgment was entered ordering defendant to pay \$120.00 in restitution, \$4,120.00 in costs, \$2,531.25 in attorney's fees, and \$60.00 in appointment/miscellaneous fees, for a total of \$6,831.25. Defendant timely appealed to this Court.

Discussion

On appeal, defendant challenges only the amount of jail fees the trial court assessed against him. N.C. Gen. Stat. § 7A-304(a) (2013) sets forth certain costs that “shall be assessed and collected” in every criminal case in which the defendant is convicted or enters a plea of guilty. Among the fees listed in the statute are “jail fees . . . [that] shall be assessed as provided by law.” N.C. Gen. Stat. § 7A-304(c). “Jail fees” are governed by N.C. Gen. Stat. § 7A-313 and relate only to a defendant's pre-trial confinement in jail.

In this case, defendant spent 352 days in jail awaiting trial prior to the original judgment being entered on 3 June 2011. N.C. Gen. Stat. § 7A-313 (2009), as it existed at that time, provided:

Persons who are lawfully confined in jail awaiting trial shall be liable to the county or municipality maintaining the jail in the sum of five dollars (\$5.00) for each 24 hours' confinement, or fraction thereof, except that a person so confined shall not be liable for this fee if the case or proceeding against him is dismissed, or if acquitted, or if judgment is arrested, or if probable cause is not found, or if the grand jury fails to return a true bill.

Effective 1 August 2011, the General Assembly amended N.C. Gen. Stat. § 7A-313 to increase the jail fee from \$5.00 a day to \$10.00 a day. *See* 2011 N.C. Sess. Laws ch. 145, § 31.26(e); 2011 N.C. Sess. Laws ch. 192, § 7(n). At defendant's sentencing hearing, the trial court calculated the amount of jail fees using the \$10.00 rate in the amended version of the statute. Defendant contends that this was error because his pretrial confinement was completed prior to the effective date of the amendment increasing the jail fee. The State does not dispute that the jail fees should have been calculated at a rate of \$5.00 per day, but argues that the issue is not properly before this Court.

At the sentencing hearing, defendant objected to the jail fees, but not on the specific grounds he now raises on appeal. Rather, defense counsel requested that the trial court not impose jail fees because it was a substantial amount of money and it was "unjust to put a man in jail against his will and charge him for being there." In response, the trial court noted that the jail fees were statutorily mandated pursuant to N.C. Gen. Stat. § 7A-313. Defense counsel later conceded that "in terms of the mandated jail fees, I guess we don't have a choice in that, given the wording of the statute."

The trial court then inquired as to the date of defendant's original judgment and specific date that the statute was amended. Defense counsel, the State, and the trial judge consulted the 2011 General Statutes book and noted that the book did not

indicate the exact date in 2011 that the statute was amended. The inquiry concluded with the following exchange:

[DEFENSE COUNSEL]: Logically speaking, your Honor, if it's a 2011 statute book it comes out the first of the year, it probably was changed prior to the date of the judgment.

THE COURT: You would think so. It didn't come out in 2012. It says it came out in 2011. This isn't a hardback, it looks like it's a 2011 edition. So assuming that it was in place on that date, it should have been imposed on that particular date.

The State first contends that defendant did not preserve the issue for appeal because he did not object below to the trial court's use of a rate of \$10.00 per day. Generally, "[i]n order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context." N.C.R. App. P. 10(a)(1).

Nevertheless, certain errors may be reviewable despite a defendant's failure to object at trial. Pertinent to this case, N.C. Gen. Stat. § 15A-1446(d)(18) (2013) authorizes appellate review of alleged errors in sentencing if "[t]he sentence imposed was unauthorized at the time imposed, exceeded the maximum authorized by law, was illegally imposed, or is otherwise invalid as a matter of law." In this case, defendant's challenge to the trial court's assessment of court costs amounts to a sentencing error reviewable pursuant to N.C. Gen. Stat. § 15A-1446(d)(18). *See State*

v. Patterson, ___ N.C. App. ___, ___, 735 S.E.2d 602, 603 (2012) (applying N.C. Gen. Stat. § 15A-1446(d)(18) and reviewing alleged error in imposition of court costs despite defendant's failure to object at sentencing hearing).

Additionally, it is well settled that “when a trial court acts contrary to a statutory mandate and a defendant is prejudiced thereby, the right to appeal the court’s action is preserved, notwithstanding defendant’s failure to object at trial.” *State v. Ashe*, 314 N.C. 28, 39, 331 S.E.2d 652, 659 (1985). As recognized by both the trial court and defendant at the sentencing hearing, the assessment of jail fees is statutorily mandated. *See* N.C. Gen. Stat. § 7A-304(a) (providing that jail fees “*shall* be assessed and collected” (emphasis added)); N.C. Gen. Stat. § 7A-313 (“[p]ersons who are lawfully confined in jail awaiting trial *shall* be liable to the county or municipality maintaining the jail in the sum of five dollars (\$5.00) for each 24 hours’ confinement, or fraction thereof” (emphasis added)). The trial court acted contrary to the statutory mandate in calculating the jail fees and prejudiced defendant by ordering him to pay twice the amount of jail fees authorized by statute. Accordingly, the issue of jail fees is also preserved under the rule articulated in *Ashe*.

Alternatively, the State argues that defendant is barred from raising this issue by the doctrine of res judicata. The State cites *State v. Speaks*, 95 N.C. 689, 691 (1886), and *State v. Melton*, 15 N.C. App. 198, 200, 189 S.E.2d 757, 758 (1972), for the proposition that “[t]he doctrine of res judicata prohibits a defendant from raising on

appeal issues that could have been raised in a prior appeal.” The State reasons that res judicata applies in this case because even though the trial court imposed jail fees in defendant’s second and third judgments, defendant did not challenge the per diem rate used to calculate those fees in his appeals of those judgments. We believe that the State misconstrues the doctrine of res judicata as applied with respect to appeals in criminal cases.

“Under the doctrine of res judicata . . . a final judgment on the merits in one action precludes a second suit based on the same cause of action between the same parties or their privies [and] prevents the relitigation of all matters . . . that were or should have been adjudicated in the prior action.” *Whitacre P’ship v. Biosignia, Inc.*, 358 N.C. 1, 15, 591 S.E.2d 870, 880 (2004) (internal citations and quotation marks omitted). As explained in *State v. Perry*, 122 N.C. 1018, 1019, 29 S.E. 384, 384 (1898), with respect to criminal cases, “[w]here there is an affirmance of a judgment, this necessarily is an adjudication upon every assignment of error, and of any matter which might have been urged[.]” However, when “a new trial [is] granted upon another point, . . . the judgment [is] only *res judicata* upon the errors ruled upon in the opinion.” *Id.*

In this case, the only matters that have been conclusively determined in defendant’s previous appeals are the validity of defendant’s underlying convictions, the proper calculation of his prior record level, and defendant’s right to be heard prior

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Opinion of the Court

to the imposition of court fees. There has not, however, been any final judgment or adjudication on the issue for which defendant seeks review -- the applicable rate for jail fees. Because defendant was granted a new sentencing hearing on another point and this Court did not previously address the jail fees issue, defendant was not barred by res judicata from seeking review of the jail fees issue.

Accordingly, we hold that the trial court should have applied the \$5.00 per diem rate in calculating the jail fees. We vacate defendant's judgment and remand for the limited purpose of subtracting \$1,760.00 from the amount of costs assessed against defendant.

VACATED IN PART AND REMANDED IN PART.

Judges STEELMAN and STEPHENS concur.