An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-916

Filed: 19 June 2018

Wilson County, No. 16 CRS 51279

STATE OF NORTH CAROLINA

v.

ROBERT THOMAS GREENE

Appeal by defendant by petition for writ of certiorari from judgments entered 29 March 2017 by Judge Quentin T. Sumner in Wilson County Superior Court. Heard in the Court of Appeals 18 June 2018.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Melody Hairston, for the State.

Dylan J.C. Buffum, for defendant-appellant.

CALABRIA, Judge.

Robert Thomas Greene ("defendant") appeals by petition for writ of certiorari from judgments entered upon his plea of no contest to voluntary manslaughter. After careful review, we conclude that defendant was not provided notice or an opportunity to be heard as to the amount of fees that would be awarded to his court-appointed

attorney. Accordingly, we vacate and remand the civil judgments entered pursuant to N.C. Gen. Stat. § 7A-455 (2017). In addition, we remand the criminal judgment for correction of a clerical error pertaining to the calculation of defendant's pretrial confinement.

I. Background

Early in the morning on 14 April 2016, Janice Crabtree ("Crabtree") was delivering newspapers for the Wilson Daily Times. Defendant encountered Crabtree and began to follow her in his truck. When she stopped at a convenience store, defendant attempted to approach her car. He continued to pursue Crabtree after she drove away, eventually following her into the parking lot of the City Operations Center.

For approximately 45 minutes to an hour, defendant used his truck to block Crabtree into the parking lot. Each time she attempted to escape, defendant maneuvered his truck to prevent her from getting away. At one point, defendant rammed into Crabtree's car to prevent her from leaving. When Crabtree's vehicle stopped moving, defendant exited his truck, looked inside Crabtree's vehicle, and left the scene. Crabtree had died from sudden cardiac arrest as a result of the stress of the confrontation with defendant. Defendant was detained and placed in an involuntary commitment later that morning, after he attempted to run another woman off the road.

At defendant's plea hearing on 20 March 2017, he agreed to be charged by information and pleaded no contest to voluntary manslaughter. Pursuant to the plea arrangement, the trial court sentenced defendant in the mitigated range to a term of 51 to 74 months in the custody of the North Carolina Division of Adult Correction. The trial court informed defendant that attorney's fees would be awarded to his appointed counsel at a later date, and that he would be required to reimburse the State for the expense.

Judgment was entered on 29 March 2017. Defendant was given credit for 335 days of pretrial confinement. In addition, the court ordered that "MONIES AND ATTY FEES ARE TO BE ENTERED AS A CIVIL JUDGMENT." However, according to the judgment, the amount of attorney's fees was "$0.00."

A series of civil judgments were entered with respect to defendant's attorney's fees. On 29 March 2017, three judgments were docketed for $4,489.50; $3,146.37; and $4,020.16. Each judgment also included a secondary judgment of $60.00 as an appointment fee pursuant to N.C. Gen. Stat. § 7A-455.1. However, only the first judgment for $4,489.50 was signed by a judge. On 27 April 2017, the Office of Indigent Defense Services ("IDS") served defendant with a "Notice to Defendant of Attorney Fee and Expense Award" stating that IDS had awarded defendant's trial counsel $26,339.52 in fees and expenses. A fee application attached to the notice calculated the fee as $12,430.12 in attorney's fees and $13,909.40 in "Support Services

Fees and Expenses." The application was signed by the IDS Director, but was neither signed by a judge nor docketed as a judgment.

II. Jurisdiction

As an initial matter, we must determine this Court's jurisdiction over defendant's appeal. On 18 April 2017, defendant sent a letter to the District Attorney indicating that he wished to appeal from his criminal judgment. Appellate entries were entered on 2 May 2017.

Defendant's appeal from his criminal judgment is governed by N.C.R. App. P. 4, which requires a written notice of appeal to be filed "within fourteen days after entry of the judgment or order . . . ." N.C.R. App. P. 4(a)(2). The criminal judgment in this case was entered on 29 March 2017, and defendant did not appeal this judgment within 14 days. Moreover, defendant never appealed any of the civil judgments entered against him for attorney's fees. *See* N.C.R. App. P. 3(a), (c) (providing that "[a]ny party entitled by law to appeal from a judgment or order of a superior or district court rendered in a civil action or special proceeding may take appeal by filing notice of appeal with the clerk of superior court and serving copies thereof upon all other parties" within thirty days after entry of judgment). Accordingly, defendant's appeal should be dismissed.

However, defendant's counsel has filed a petition for writ of certiorari as an alternative basis to review defendant's criminal and civil judgments. *See* N.C.R. App.

P. 21(a)(1) (stating that a writ of certiorari "may be issued in appropriate circumstances by either appellate court to permit review of the judgments and orders of trial tribunals when the right to prosecute an appeal has been lost by failure to take timely action"). In our discretion, we grant defendant's petition for writ of certiorari and proceed to the merits of his appeal.

III. Civil Judgments for Attorney's Fees

On appeal, defendant first argues that the trial court erred by ordering his attorney's fees to be entered as civil judgments without providing defendant with notice and an opportunity to be heard. We agree.

N.C. Gen. Stat. § 7A-455 permits the trial court to enter a civil judgment against a convicted indigent defendant for fees incurred by the defendant's court-appointed attorney. *State v. Jacobs*, 172 N.C. App. 220, 235, 616 S.E.2d 306, 316 (2005). However, before entering judgment, the trial court must provide the defendant with "notice and an opportunity to be heard regarding the total amount of hours and fees claimed by the court-appointed attorney." *Id.* at 236, 616 S.E.2d at 317.

> [B]efore entering money judgments against indigent defendants for fees imposed by their court-appointed counsel under N.C. Gen. Stat. § 7A-455, trial courts should ask defendants—personally, not through counsel—whether they wish to be heard on the issue. Absent a colloquy directly with the defendant on this issue, the requirements of notice and opportunity to be heard will be satisfied only if there is other evidence in the record

> demonstrating that the defendant received notice, was aware of the opportunity to be heard on the issue, and chose not to be heard.

State v. Friend, __ N.C. App. __, __, 809 S.E.2d 902, 907 (2018).

In the instant case, the trial court informed defendant during sentencing that "attorney's fees will be awarded to [defense counsel] at a later date, sir. You will be required to reimburse the State for the court-appointed attorney fees that are awarded." However, the court never notified defendant of *the amount* of fees that would be awarded, nor asked him whether he wished to be heard on the issue. Since there is no evidence demonstrating that defendant received notice and chose not to be heard, *id.*, we must vacate and remand the civil judgments resulting from the award of attorney's fees. *See Jacobs*, 172 N.C. App. at 235-36, 616 S.E.2d at 316-17 (vacating and remanding the civil judgment because although the trial court notified the defendant that he would be awarding attorney's fees at the State-determined "rate of $65 an hour[,]" the defendant's appointed attorney "had not yet calculated his hours of work related to defendant's representation"). "On remand, the State may apply for a judgment in accordance with N.C. Gen. Stat. § 7A-455, provided that defendant is given notice and an opportunity to be heard regarding the total amount of hours and fees claimed by the court-appointed attorney." *Id.* at 236, 616 S.E.2d at 317.

IV. Pretrial Confinement Credit

Defendant next asserts that the trial court erred by crediting him for 335 days spent in pretrial confinement when he had actually earned 340 days of credit. We agree.

Pursuant to N.C. Gen. Stat. § 15-196.1,

> [t]he minimum and maximum term of a sentence shall be credited with and diminished by the total amount of time a defendant has spent, committed to or in confinement in any State or local correctional, mental or other institution as a result of the charge that culminated in the sentence or the incident from which the charge arose. The credit provided shall be calculated from the date custody under the charge commenced . . . .

Id.

A trial court may correct a judgment that contains a "clerical error" regarding the defendant's time served under N.C. Gen. Stat. § 15-196.1 when it is apparent that the alleged mistake was not the result of judicial discretion or reasoning. *State v. Jarman,* 140 N.C. App. 198, 203, 535 S.E.2d 875, 879 (2000). A "clerical error" is "[a]n error resulting from a minor mistake or inadvertence, esp. in writing or copying something on the record, and not from judicial reasoning or determination." *Id.* at 202, 535 S.E.2d at 878 (citation and quotation marks omitted).

Pursuant to the terms of his plea arrangement, defendant should have received credit for the time he spent in the Nash County jail and his involuntary commitment from 14 April 2016 through 20 March 2017, a period of 340 days. However, the trial court only gave defendant credit for 335 days of pretrial confinement. The State

concedes that the miscalculation on the criminal judgment appears to be a mere clerical error, and we agree. Accordingly, we remand the criminal judgment to the trial court for correction of this clerical error.

V. Conclusion

Although the trial court notified defendant that attorney's fees would be awarded, there is no evidence in the record that defendant received notice and an opportunity to be heard regarding the amount of the fee award. Therefore, we vacate and remand the civil judgments entered pursuant to N.C. Gen. Stat. § 7A-455, without prejudice to the State. Furthermore, the criminal judgment erroneously credits defendant with only 335 days of pretrial confinement, rather than the 340 days of credit that he should have received. Accordingly, we remand the criminal judgment for the limited purpose of correcting this clerical error.

VACATED AND REMANDED IN PART, REMANDED FOR CORRECTION OF A CLERICAL ERROR IN PART.

Judges DAVIS and BERGER concur.

Report per Rule 30(e).