An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA18-414

Filed: 6 November 2018

Rockingham County, No. 16 CRS 51, 50085

STATE OF NORTH CAROLINA

v.

EFRAIN GONZALEZ OCEGUEDA

Appeal by defendant from judgment entered 16 June 2016 by Judge Stanley L. Allen in Rockingham County Superior Court. Heard in the Court of Appeals 17 October 2018.

Attorney General Joshua H. Stein, by Assistant Attorney General Andrew O. Furuseth, for the State.

Sean P. Vitrano for defendant-appellant.

TYSON, Judge.

Efrain Gonzalez Ocegueda ("Defendant") appeals from judgments entered after a jury found him guilty of possession with intent to sell and deliver cocaine, sale or delivery of cocaine, and possession of cocaine, and his guilty plea to three charges of attempted trafficking in cocaine.

I. Background

The Eden Police Department engaged an informant to purchase cocaine from Defendant on 29 January 2015. The informant told officers he had previously purchased drugs from Defendant. Officers advanced the informant $2,250.00 in cash to purchase two ounces of cocaine. The informant met Defendant at Defendant's place of business, and returned with a plastic bag containing white powder, which later testing revealed to be 54.55 grams of cocaine. On 4 January 2016, Defendant was indicted in 16 CRS 51 for possession of cocaine with the intent to sell and deliver, and sell or deliver cocaine.

On 12 January 2016, Eden Police Sergeant Anthony Welch observed a tractor trailer illegally parked near Defendant's place of business. Sergeant Welch knew of previous drug activity around Defendant's shop, Defendant's previous indictments, and suspected a drug transaction might be taking place, so he stopped to investigate. He entered Defendant's shop through a door in the adjoining muffler shop and saw Defendant speaking with another person. Sergeant Welch questioned both men about the illegally parked tractor trailer. He patted them both down for weapons, asked them to remain in the parking lot, and called for backup.

A K-9 unit arrived and the dog reacted with a positive indication from the trailer. A subsequent search revealed a small amount of marijuana inside the trailer. One of the responding officers, Lee East, witnessed Defendant drop something over the wall near the place where Defendant had been instructed to stand by Sergeant

Welch. Officer East retrieved the object, a U.S. one dollar bill with a granular substance inside. Subsequent analysis determined the substance inside was 0.5 grams of cocaine.

On 7 March 2016, Defendant was indicted in 16 CRS 338 for three counts of trafficking cocaine for the 29 January 2015 incident. On 11 April 2016 Defendant was indicted in 16 CRS 50085 for felony possession of cocaine for the 12 January 2016 incident. The offenses were joined for trial.

The jury found Defendant guilty of possession with intent to sell or deliver cocaine, sell or deliver cocaine, and felony possession of cocaine. Defendant subsequently pled guilty to three counts of attempted trafficking of cocaine pursuant to a plea agreement.

Defendant was ordered to serve four sentences: consecutive sentences of 13-25 months for sell or deliver cocaine and 6-17 months for possession of cocaine with intent to deliver in 16 CRS 51; a consolidated sentence of 13-25 months for attempted trafficking in 16 CRS 338, to run concurrently with 16 CRS 51; and 6-17 months for possession of cocaine in 16 CRS 50085, to run concurrently with the sentences in 16 CRS 51 and 338.

In 16 CRS 50085, Defendant was ordered to pay costs of $4,410.00 for attorney's fees, $2,250.00 in restitution to the Eden Police Department, and $1,200.00 in restitution to the North Carolina Department of Justice. On 25 July 2016, the trial

court entered a restitution order for Defendant to pay $2,250.00 to the Eden Police Department-Narcotics Division, and entered an order for Defendant to pay $4,410.00 in attorney's fees and a $60.00 indigent defendant attorney appointment fee.

Defendant failed to timely appeal. Defendant filed a petition for writ of certiorari with this Court on 27 April 2017 for a belated appeal, which was allowed 15 May 2017. On 14 June 2017, Defendant filed and served written notice of appeal from the judgments in 16 CRS 51 and 50085. Defendant did not serve any notice of appeal from the civil judgment for attorney's fees or the restitution order and judgment. On 14 June 2018, Defendant filed a second petition for writ of certiorari seeking review of the civil judgment and restitution order.

II. Jurisdiction

The judgments entered in 16 CRS 51 and 16 CRS 50085 on 20 June 2016 are final judgments from which an appeal of right lies with this Court. N.C. Gen. Stat. §§ 7A-27(b)(1) and 15A-1444 (2017). Defendant failed to timely appeal the judgments. This Court allowed Defendant's first petition for writ of certiorari to review these judgments entered, as "limited to those issues entitled to be raised by [Defendant] pursuant to N.C. Gen. Stat. 15A-1444[.]"

A writ of certiorari may also 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 . . . ."

N.C. R. App. P. 21(a)(1). Defendant's second petition for writ of certiorari requests this Court to review the judgments for restitution and attorney's fees entered against him on 25 July 2016, arising out of the same facts and transactions raised in his first petition. Where those issues go beyond the scope of any issues raised in the initially allowed petition for writ of certiorari, we deny Defendant's second petition in the exercise of our discretion.

III. Issues

Defendant argues the trial court erred in ordering Defendant to pay restitution to the Eden Police Department and the North Carolina Department of Justice. Defendant also argues the trial court erred in imposing attorney's fees without providing Defendant with notice and an opportunity to be heard.

IV. Standard of Review

An order for restitution is preserved for appellate review even when there was no objection at trial. *State v. Reynolds*, 161 N.C. App. 144, 149, 587 S.E.2d 456, 460 (2003). "A trial court's judgment ordering restitution must be supported by evidence adduced at trial or at sentencing." *State v. Mumford*, 364 N.C. 394, 403, 699 S.E.2d 911, 917 (2010) (citation and internal quotation marks omitted). "[T]he quantum of evidence needed to support a restitution award is not high. 'When . . . there is some evidence as to the appropriate amount of restitution, the recommendation will not be overruled on appeal.'" *State v. Moore*, 365 N.C. 283, 285, 715 S.E.2d 847, 849 (2011)

(quoting *State v. Hunt*, 80 N.C. App. 190, 195, 341 S.E.2d 350, 354 (1986)). "On appeal, we review *de novo* whether the restitution order was supported by evidence adduced at trial or at sentencing." *State v. Wright*, 212 N.C. App. 640, 645, 711 S.E.2d 797, 801 (2011) (citation and internal quotation marks omitted).

V. Analysis

Defendant challenges the trial court ordering Defendant to pay restitution to the Eden Police Department for money used in the controlled buy of cocaine on 29 January 2015, and restitution to the North Carolina Department of Justice for the laboratory analysis.

A. Eden Police Department

The State presented evidence that the Eden Police Department had provided $2,250.00 to an informant to purchase cocaine from Defendant on 29 January 2015, which resulted in the convictions and judgments in 16 CRS 51 and 338. Defendant argues the trial court erred because it imposed restitution in the judgment for 16 CRS 50085, which charged Defendant with felony possession of cocaine on 12 January 2016. Defendant asserts that because the "Eden Police Department did not expend funds to purchase controlled substances on 12 January 2016, it cannot be an aggrieved party entitled to restitution." We disagree.

When a defendant is convicted of certain drug related crimes, the trial court "may order him to make restitution to any law-enforcement agency for reasonable

expenditures made in purchasing controlled substances from him or his agent *as part of an investigation* leading to his conviction." N.C. Gen. Stat. § 90-95.3(a) (2017) (emphasis supplied). This Court has held that payments for drugs in an unindicted crime that was part of an investigation leading to a conviction are subject to restitution. *Reynolds*, 161 N.C. App. at 149, 587 S.E.2d at 460.

In *Reynolds*, the police department used a confidential informant to purchase marijuana from the defendant. *Id.* at 145, 587 S.E.2d at 457. After a second controlled buy, officers stopped the defendant for traffic violations. *Id.* at 145, 587 S.E.2d at 458. A subsequent search of the defendant's vehicle revealed several bags of marijuana, scales, and plastic bags. *Id.* at 146, 587 S.E.2d at 458.

The defendant was arrested and convicted of possession with the intent to sell marijuana. *Id.* As part of the judgment, the defendant was ordered to pay $30.00 to the police department, as reimbursement for the outlay of funds in the first controlled buy. *Id.* This Court held the first controlled buy "was part of an ongoing 'investigation leading to [the defendant's] conviction.'" *Id.* at 149, 587 S.E.2d at 460 (quoting N.C. Gen. Stat. § 90-95.3(a)).

As in *Reynolds*, the Eden Police Department continued its investigation into Defendant's activities after it had expended the funds for the controlled purchase of cocaine on 29 January 2015. Sergeant Welch testified one of the reasons for his investigation at Defendant's shop on 12 January 2016 was the prior drug activity in

that area and Defendant's prior indictment. Further, the State moved to join the charges in 16 CRS 51 and 50085 for trial, based upon the assertion that "the offenses [were] based on the same act or transaction or on a series of acts or transactions connected together or constituting parts of a single scheme or plan."

The controlled buy from Defendant on 29 January 2015 falls under the investigation provisions of N.C. Gen. Stat. § 90-95.3(a) for a trial court to order restitution. *See Reynolds*, 161 N.C. App. at 149, 587 S.E.2d at 460. Defendant's argument is overruled.

B. Department of Justice

Defendant argues the Department of Justice is only entitled to $600.00 in restitution for 16 CRS 50085, because only one analysis was conducted from the materials seized on 12 January 2016. However, our statutes provide that:

> (a) In *every* criminal case in the superior or district court, wherein the defendant is convicted . . . the following costs *shall* be assessed and collected.
>
> . . .
>
> > (7) For the services of the North Carolina State Crime Laboratory facilities, the district or superior court judge shall, upon conviction, order payment of the sum of six hundred dollars ($600.00) to be remitted to the Department of Justice for support of the Laboratory. This cost shall be assessed only in cases in which, *as part of the investigation leading to the defendant's conviction*, the laboratories have performed . . . analysis of any controlled substance possessed by the defendant[.]

N.C. Gen. Stat. § 7A-304(a)(7) (2017) (emphasis supplied).

The trial courts are required to assess costs of $600.00 for "every criminal case . . . wherein the defendant is convicted." *Id.*; *see also State v. Johnson*, 298 N.C. 355, 361, 259 S.E.2d 752, 757 (1979) ("As used in statutes, the word 'shall' is generally imperative or mandatory." (citations omitted)).

Evidence was presented at trial tending to show the North Carolina State Crime Laboratory conducted two lab tests of two separate drug seizures from Defendant: the bag containing 54.55 grams of cocaine seized as part of the controlled buy on 29 January 2015, leading to the charges in 16 CRS 51, and the granular substance concealed in a one dollar bill Defendant dropped during the investigation on 12 January 2016, leading to the charges in 16 CRS 50085. Defendant was convicted of the charges in both 16 CRS 51 and 50085. As previously stated, the events that led to the charges in 16 CRS 51 were part of the investigation leading to the conviction in 16 CRS 50085.

The trial court properly ordered Defendant to pay restitution in the amount of $1,200.00 to the Department of Justice for the two separate crime lab analyses. *See* N.C. Gen. Stat. § 7A-304(a)(7). Defendant's argument is overruled.

VI. Conclusion

The trial court did not err in ordering Defendant to pay $2,250.00 in restitution to the Eden Police Department, or $1,200.00 in restitution to the Department of

Justice. Because Defendant's second petition for writ of certiorari is denied, we do not reach the merits of the second issue he asserts. We find no error in the jury's convictions or in the judgments entered thereon. *It is so ordered.*

NO ERROR.

Judges CALABRIA and ZACHARY concur.

Report per Rule 30(e).