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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-691

Filed: 16 April 2019

Mecklenburg County, No. 15 CRS 28429

STATE OF NORTH CAROLINA

v.

DEONTAE SAVON GREEN

Appeal by defendant from judgment entered 15 December 2017 by Judge Daniel A. Kuehnert in Mecklenburg County Superior Court. Heard in the Court of Appeals 8 April 2019.

Attorney General Joshua H. Stein, by Assistant Attorney General David L. Gore, III, for the State.

Guy J. Loranger for defendant-appellant.

ARROWOOD, Judge.

Deontae Savon Green (“defendant”) appeals from a judgment entered upon his conviction for driving while impaired (“DWI”). Where defendant raises no issues regarding the judgment, we dismiss his appeal in part. Defendant has also filed a petition for *writ of certiorari* seeking review of the trial court’s 20 December 2017 civil

judgment ordering payment of attorney fees. We allow the petition for *writ of certiorari* in our discretion, and for the reasons set forth below, we vacate that money judgment and remand for further proceedings.

I. Background

On 16 August 2015, defendant was arrested and charged with DWI. He was found guilty in district court on 1 May 2017. Defendant appealed to the superior court and his case came on for trial on 12 December 2017. The jury found defendant guilty of DWI on 15 December 2017. The trial court sentenced defendant to six months in the Misdemeanant Confinement Program, suspended, and 18 months of supervised probation, with a possibility for transfer to unsupervised probation after 12 months. The trial court also ordered defendant to serve a “split sentence” of 16 days on weekends as determined by his probation officer. At the end of sentencing, the trial court and defendant’s counsel had the following exchange:

THE COURT: . . . And are you retained, or are you court-appointed?

[DEFENSE COUNSEL]: I’m appointed, your Honor. I’ll hand up the -- I have a total of 57.7 hours and \$25 in expenses.

THE COURT: All right. Counsel fees will be a civil judgment.

Defendant gave notice of appeal in open court.

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On 20 December 2017, defendant’s trial counsel filed in the trial court a form titled “Non-Capital Criminal Case Trial Level Fee Application Order for Payment Judgment Against Indigent.” The form indicates it was signed by Judge Daniel A. Kuehnert on 15 December 2017 and orders defendant to pay \$3,462.00 in attorney fees for 57.7 hours approved by the court and \$25.00 for expenses.

In his lone issue before this Court, defendant contends that the trial court erred in ordering payment of attorney fees without first providing him sufficient notice and an opportunity to be heard. Defendant acknowledges that he failed to timely appeal from the trial court’s civil judgment and accordingly has filed a petition for *writ of certiorari* asking this Court to review his challenge to the trial court’s imposition of attorney fees. The State acknowledges that it is within this Court’s discretion to issue the writ and concedes error in the trial court’s civil judgment. We allow the petition and conclude that defendant’s issue has merit.

“In certain circumstances, trial courts may enter civil judgments against convicted indigent defendants for the attorneys’ fees incurred by their court-appointed counsel.” *State v. Friend*, __ N.C. App. __, __, 809 S.E.2d 902, 906 (2018) (citing N.C. Gen. Stat. § 7A-455 (2017)). “Before imposing a judgment for these attorneys’ fees, the trial court must afford the defendant notice and an opportunity to be heard.” *Id.* at __, 809 S.E.2d at 906 (citations omitted).

In *Friend*, this Court noted that counsel ordinarily acts as the defendant's proxy, such that affording counsel an opportunity to be heard is in effect doing so for the defendant. *Id.* at ___, 809 S.E.2d at 907. However, this Court also noted that “[w]hen the court is contemplating a money judgment against the defendant for attorneys’ fees incurred by appointed counsel under N.C. Gen. Stat. § 7A-455, the interests of the defendant and trial counsel are not necessarily aligned.” *Id.* at ___, 809 S.E.2d at 907. In light of this particular circumstance, this Court held that “before 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.” *Id.* at ___, 809 S.E.2d at 907; *see also State v. Baker*, ___ N.C. App. ___, ___, 817 S.E.2d 907, 912 (2018) (vacating the trial court’s civil judgment for attorney fees and remanding for further proceedings where there was “no indication that the trial court addressed Defendant with regard to the issue of attorney’s fees, or that Defendant knew he had the opportunity to address the trial court”).

Here, as in *Friend*, “the State concedes that the trial court did not inform [defendant] of his right to be heard on the issue of attorneys’ fees, and nothing in the record indicates that [defendant] understood he had that right.” *Friend*, ___ N.C. App. at ___, 809 S.E.2d at 907. As a result, we vacate the civil judgment for attorney fees and remand to the trial court for further proceedings on this issue.

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DISMISSED IN PART; VACATED AND REMANDED IN PART.

Judges BRYANT and TYSON concur.

Report per Rule 30(e).