IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-800

Filed: 6 August 2019

Pitt County, No. 16CRS058158

STATE OF NORTH CAROLINA

v.

RASHEMA BIVENS, Defendant.

Appeal by Defendant from civil judgments entered 8 November 2017 by Judge Jeffery B. Foster in Pitt County Superior Court. Heard in the Court of Appeals 6 June 2019.

Attorney General Joshua H. Stein, by Assistant Attorney General Bethany A. Burgon, for the State.

Morgan & Carter PLLC, by Michelle F. Lynch, for Defendant-Appellant.

INMAN, Judge.

Rashema Bivens ("Defendant") appeals the civil judgments entered against her for attorney's fees following a plea of guilty to two counts of obtaining property by false pretenses. Defendant argues that the lower court violated her right to due process by not giving her notice and an opportunity to be heard on the issue of attorney's fees before issuing the civil judgments. After a careful review of the record

and the applicable law, we grant the State's motion to dismiss because Defendant failed to properly notice an appeal from the civil judgments. Nevertheless, we grant Defendant's petition for a writ of certiorari in our discretion and review her appeal, holding that the lower court erred in entering the civil judgments without giving Defendant adequate notice and an opportunity to be heard concerning attorney's fees. We vacate the civil judgments and remand to the lower court for further proceedings consistent with this opinion.

I. Factual and Procedural History

Defendant pled guilty to two counts of obtaining property by false pretenses at a hearing before the Superior Court of Pitt County on 31 October 2017. Throughout the proceedings, attorney Derek Brown served as Defendant's appointed counsel. Following sentencing on the first charge, the trial court briefly turned its attention to the matter of Mr. Brown's fee and engaged in the following discussion:

> THE COURT: She is to pay the cost of this action. Are you appointed or retained?
>
> MR. BROWN: I'm appointed, Your Honor. I'll submit my time later.
>
> THE COURT: Okay, that's fine. I'm going to make it a civil judgment against her, anyway.
>
> MR. BROWN: Thank you, Your Honor.

The trial court then proceeded to sentence Defendant on the second charge and entered a criminal judgment against her. That judgment, however, did not include an order for attorney's fees.

Six days after the hearing and entry of judgment against Defendant, Mr. Brown submitted a fee application to the trial court; the following day, on 8 November 2017, the trial judge entered civil judgments on Mr. Brown's application ordering Defendant to pay a total of $725 in appointment and legal fees. The trial court found in the civil judgments that Defendant had "due notice . . . and opportunity to be heard[;]" nothing in the record, however, suggests that Defendant had notice or an opportunity to be heard after the 31 October 2017 hearing.

Defendant sent a letter to Mr. Brown on 2 November 2017 requesting that he file notice of appeal. Mr. Brown received the request on 10 November 2017 and filed a notice of appeal on 13 November 2017, but he was unable to contact Defendant before filing. This notice expressly stated that Defendant was appealing "the Judgment of the Superior Court of Pitt County on October 31, 2017[,]" and omitted any reference to the civil judgments entered on 7 November 2017. Following the filing of the record on appeal and her principal brief—which concerned only the validity of the civil judgments—Defendant petitioned this Court for a writ of certiorari to review them. The State filed a response to Defendant's petition alongside a motion to dismiss

for failure to comply with Rule 3 of the North Carolina Rules of Appellate Procedure shortly thereafter.

II. Analysis

A. Motion to Dismiss

We have jurisdiction to hear only those cases brought pursuant to the Rules of Appellate Procedure. *See Abels v. Renfro Corp.*, 126 N.C. App. 800, 802, 486 S.E.2d 735, 737 (citation omitted), *disc. review denied*, 347 N.C. 263, 493 S.E.2d 450 (1997) ("The provisions of Rule 3 are jurisdictional, and failure to follow the requirements thereof requires dismissal of an appeal."); *see also State v. Hart*, 361 N.C. 309, 311, 644 S.E.2d 201, 202 (2007) ("It is well settled that the Rules of Appellate Procedure are mandatory and not directory. Thus, compliance with the Rules is required." (quotations and citations omitted)). These rules require persons appealing from civil judgments to file a notice of appeal that "designate[s] the judgment or order from which appeal is taken." N.C. R. App. P. 3(d) (2019). If a criminal defendant fails to identify a civil judgment for fees in his notice of appeal consistent with the Rule's requirement, we will dismiss the appeal. *See State v. Smith*, 188 NC. App. 842, 846, 656 S.E.2d 695, 697 (2008) (reviewing a criminal defendant's criminal conviction but holding his failure to give notice of appeal from civil judgments imposing appointment and attorney's fees mandated dismissal of that portion of his appeal). The record in this case, like that in *Smith*, is devoid of a notice appealing the civil judgments. As a

result, we dismiss the appeal, finding ourselves "without jurisdiction to address the propriety of those judgments." *Id.*

B. Petition for a Writ of Certiorari

Having dispensed with the State's motion to dismiss, we now turn to Defendant's petition for writ of certiorari, which we may allow "in appropriate circumstances . . . when the right to prosecute an appeal . . . has been lost by failure to take timely action." N.C. R. App. P. 21(a)(2). If an appellant "unreasonably delays in filing [a] petition" for a writ of certiorari, however, "the petition shall be dismissed." N.C. R. App. P. 21(e). If an appellant filed his petition properly, a writ of certiorari "is allowed only on a reasonable show of merits and that the ends of justice will be thereby promoted." *King v. Taylor*, 188 N.C. 450, 451, 124 S.E. 751, 751 (1924). Where a "defendant has lost his appeal through no fault of his own, . . . failure to issue a writ of certiorari would be manifestly unjust." *State v. Hammonds*, 218 N.C. App. 158, 163, 720 S.E.2d 820, 823 (2012).

"A criminal defendant may file a petition for a writ of certiorari to appeal a civil judgment for attorney's fees and costs[,]" *State v. Mayo*, ___ N.C. App. ___, ___, 823 S.E.2d 656, 659 (2019) (citation omitted), and we have allowed such petitions on numerous occasions. *See, e.g.*, *id.*; *State v. Zimmerman*, No. COA18-934, 2019 WL 1281478 (N.C. Ct. App. March 19, 2019); *State v. Jones*, No. COA16-797, 2017 WL

1381808 (N.C. Ct. App. April 18, 2017); *State v. Friend*, ___ N.C. App. ___, 809 S.E.2d 902 (2018).

Here, Defendant submitted her petition for a writ of certiorari just shy of thirteen months after the lower court issued the civil judgments, which the State argues constitutes an unreasonable delay. However, we have previously found a thirteen-month delay in petitioning for a writ of certiorari not to be unreasonable, *see State v. Brown*, No. COA11-622, 2012 WL 2895174 at *1 (N.C. Ct. App. July 17, 2012), and we see nothing in the record before us that would compel us to reach a different result. Based on Defendant's petition, it appears that the delay in this case resulted from the failure to forward the civil judgments to Defendant's original appellate counsel upon her appointment to the case, which was discovered only following an *Anders* review.

The State also argues that we should follow the trend of typically not "allow[ing] a petition for a writ of certiorari where a litigant failed to timely appeal a civil judgment." *See Friend*, ___ N.C. App. at ___, 809 S.E.2d at 905; Defendant's omission in this case, however, does not appear to be her fault, as Defendant did not file the faulty notice of appeal. Rather, her attorney filed the notice without contacting Defendant and the record does not indicate that Defendant, as opposed to her attorney, received any notice that the civil judgments had been entered. Because Defendant "has lost [her] appeal through no fault of [her] own," the "failure to issue

a writ of certiorari would be manifestly unjust[,]" *Hammonds*, 218 N.C. App. at 163, 720 S.E.2d at 823, and we elect to allow her petition in our discretion and review her challenge to the civil judgments on the merits.

C. Civil Judgments

We review *de novo* whether a lower court provided a defendant with notice and an opportunity to be heard regarding attorney's fees. *See State v. Jacobs*, 172 N.C. App. 220, 235–37, 616 S.E.2d 306, 316–17 (2005). As for a trial court's findings of fact, they "are conclusive on appeal if supported by competent evidence, even if the evidence is conflicting." *State v. Brewington*, 352 N.C. 489, 498, 532 S.E.2d 496, 501 (2000) (citations and quotations omitted).

Defendant argues that the lower court violated her due process rights by entering the civil judgments against her without giving her notice or an opportunity to be heard, pointing out that the only evidence in the record below concerning the imposition of fees is a limited discussion between her counsel and the trial court at sentencing. The State disagrees with Defendant's position, pointing out that the civil judgments expressly found that Defendant had been given notice and an opportunity to be heard. Defendant, the State reasons, has therefore failed to rebut the presumption of regularity afforded our trial courts on appeal. *Dogwood Dev. & Mgmt. Co. v. White Oak Transp. Co.*, 192 N.C. App. 114, 118, 665 S.E.2d 493, 497 (2008) (citation omitted). That presumption is not overcome by "mere allegations that an

error occurred[,]" but by "some specific, affirmative showing by the defendant that error was committed." *In re S.W.*, 171 N.C. App. 335, 340, 614 S.E.2d 424, 428 (2005) (citations and internal quotation marks omitted).

This Court has recently reviewed the notice and hearing requirements applicable to civil judgments for attorney's fees in criminal cases in *Friend*. There, the trial court did not address the defendant concerning the entry of a civil judgment for attorney's fees prior to imposing them, and "nothing in the record indicat[ed] that [the defendant] understood he had [the] right" to be heard on the issue. *Friend*, ___ N.C. App. at ___, 809 S.E.2d at 907. We vacated and remanded the civil judgment, recognizing the requirement that "[b]efore imposing [such] a judgment. . . , the trial court must afford the defendant notice and an opportunity to be heard." *Id.* at ___, 809 S.E.2d at 906 (citation omitted). In reaching that holding, we offered two means of satisfying the notice and hearing requirement: (1) "a colloquy directly with the defendant" where the trial court "ask[s] [the] defendant[]—personally, not through counsel—whether [he or she] wish[es] to be heard on the issue" of attorney's fees; or (2) some 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." *Id.* at ___, 809 S.E.2d at 907.

In the instant case, there is no indication that the lower court engaged in "a colloquy directly with" Defendant concerning the award of attorney fees, or the

amount of such an award. *Id*. Additionally, like in *Friend*, "nothing in the record indicates that [Defendant] understood [she] had [the] right" to be heard on attorney's fees. *Id.* The record does not show, and neither party asserts the existence of, any event between the plea hearing and the civil judgments where Defendant received notice and an opportunity to be heard. Although the trial court's order does contain a finding of fact that adequate notice and an opportunity were provided, Defendant correctly points out that, on this record, there is no indication that those were ever afforded to her by the trial court as required by law. *See id.* And contrary to the State's contention, it is not Defendant's burden to affirmatively disprove a finding of fact, but to show instead that the finding in question is unsupported by competent record evidence. *Brewington*, 352 N.C. at 498, 532 S.E.2d at 501.[1]

We also note that our Supreme Court has vacated and remanded a civil judgment similar to those involved in this appeal in like circumstances. *See State v. Crews*, 284 N.C. 427, 442, 201 S.E.2d 840, 849 (1974) (vacating and remanding a civil judgment for fees entered against a criminal defendant who argued that he was not given notice and an opportunity to be heard when "[n]othing [in the record] supports or negates defendant's contentions"). In short, Defendant's meritorious appeal presents more than a "mere allegation[] that an error occurred," and she makes a

[1] The State does not argue that Defendant has failed to adequately challenge the trial court's finding, or that the finding is otherwise binding on this Court. Indeed, the gravamen of Defendant's appeal is her contention that the record does not show adequate notice and an opportunity for hearing under the law as found by the trial court in its civil judgments.

"specific, affirmative showing" of error based on the transcript and the record sufficient to overcome any presumption of regularity. *In re S.W.*, 171 N.C. App. at 340, 614 S.E.2d at 428 (citation and quotation marks omitted). As a result, the trial court's civil judgments imposing appointment and attorney's fees are vacated and the case is remanded to the trial court for further proceedings not inconsistent with this opinion.

III. Conclusion

We hold that Defendant's appeal was defective under our appellate rules and grant the State's motion to dismiss. We also grant Defendant's petition for a writ of certiorari and, for the foregoing reasons, vacate the civil judgments and remand for further proceedings.

VACATED AND REMANDED.

Judges ARROWOOD and COLLINS concur.

Report per Rule 30(e).