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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-220

Filed: 15 October 2019

Iredell County, Nos. 16 CRS 53224-25

STATE OF NORTH CAROLINA

v.

MARK THOMAS BOGER

Appeal by defendant from judgments entered 4 October 2018 and 6 November 2018 by Judge Joseph N. Crosswhite in Iredell County Superior Court.

Heard in the Court of Appeals 19 September 2019.

Attorney General Joshua H. Stein, by Assistant Attorney General Neal T. McHenry, for the State.

Richard J. Costanza for defendant-appellant.

ARROWOOD, Judge.

Mark Thomas Boger (“defendant”) appeals from judgments entered upon his convictions for various controlled substance offenses and civil judgment assessing \$3,210.00 in attorney’s fees against him. For the following reasons, we find no error in part, vacate in part, and remand.

I. Background

The events leading to defendant's indictments and trial are not at issue on appeal. On 3 April 2017, defendant was indicted on one count of attaining habitual felon status and two counts each of possession with intent to sell or deliver a schedule II controlled substance, selling a schedule II controlled substance, and maintaining a dwelling to keep or sell controlled substances.

Defendant was tried during the 2 October 2018 criminal session of Iredell County Superior Court before the Honorable Joseph N. Crosswhite. Jury selection occurred in the afternoon of the same day, after which defendant's trial began. The original trial transcript failed to reflect if the jury was impaneled before defendant's trial commenced. On 13 June 2019, this Court entered an order allowing the State's motion to amend the transcript. The amended transcript reflects that the jury was impaneled by the trial court on 2 October 2018 at 3:03 p.m. On 4 October 2018, the jury returned verdicts finding defendant guilty of the six controlled substance offenses, and defendant subsequently pleaded guilty to having attained habitual felon status.

At the end of trial, defendant's counsel stated, "Judge, I want to also point out, I will submit a fee app. I don't know how many hours I have." The trial court instructed defense counsel to submit a fee application and stated that counsel's fees would be entered against defendant as a civil judgment. The trial court then asked

defendant if he wanted to say anything else. Defendant declined. The trial court then stated, “We’ll set [defense counsel]’s attorney fees when that is submitted as a civil judgment.” Defendant’s counsel submitted a fee application totaling \$3,210.00 on 18 October 2018. This application was entered as a civil judgment by the trial court on 6 November 2018. There is no indication in the record that defendant was present and afforded an opportunity to be heard when the attorney’s fee award was calculated or entered as a civil judgment. In fact, defendant notes that he was serving his sentences for his convictions in a correctional facility at this time.

II. Discussion

On appeal, defendant argues that: (a) the record does not adequately reflect that the jury was impaneled, requiring a new trial, and (b) the trial court’s judgment assessing attorney’s fees violated his due process right to notice and an opportunity to be heard. We address each argument in turn.

A. Evidence that the Jury was Impaneled

First, defendant argues that there is insufficient evidence in the record that the jury was impaneled at his trial, necessitating a retrial. However, the amended transcript reflects that the jury was impaneled. Therefore, we hold that the trial court did not err on this ground.

B. Attorney’s Fees

Second, defendant argues that the trial court erred by entering a civil judgment

against him for attorney's fees without providing him with notice and an opportunity to be heard on the matter. We agree.

As an initial matter, we must address our jurisdiction to hear the merits of this appeal. Defendant's appeal from the civil judgment assessing attorney's fees against him was not timely appealed within the time limits imposed by N.C.R. App. P. 3(c) (2019). As we have done in other cases involving appeals from civil judgments assessing attorney's fees against indigent defendants pursuant to N.C. Gen. Stat. § 7A-455 (2017), *see, e.g., State v. Friend*, __ N.C. App. __, __, 809 S.E.2d 902, 905 (2018), we grant *certiorari* and address the merits of defendant's argument.

Whether the trial court provided a defendant with notice and an opportunity to be heard before imposing attorney's fees is a question of law that we review *de novo*. *State v. Jacobs*, 172 N.C. App. 220, 235-37, 616 S.E.2d 306, 316-17 (2005).

N.C. Gen. Stat. § 7A-455 (2003) provides that the trial court may enter a civil judgment against a convicted indigent defendant for the amount of fees incurred by the defendant's court-appointed attorney. In *State v. Crews*, 284 N.C. 427, 201 S.E.2d 840 (1974), our Supreme Court noted that there was no evidence in the record supporting or negating the defendant's contention that a judgment imposing attorney's fees was entered without notice or opportunity for him to be heard. Accordingly, the Court vacated the judgment "without prejudice to the State's right to apply for a judgment in accordance with [N.C. Gen. Stat. §] 7A-455 after due notice to defendant and a hearing[.]" *Id.* at 442, 201 S.E.2d at 849-50.

Jacobs at 235, 616 S.E.2d at 316.

A defendant has not been given a proper opportunity to be heard on the issue of attorney's fees if the trial court provides his only opportunity to be heard on the issue before he is given notice of "the total amount of hours and fees claimed by the court-appointed attorney." *Id.* at 236, 616 S.E.2d at 317 ("[D]efendant was given notice of the trial court's intention to impose attorney's fees upon him. However, while the transcript reveals that attorney's fees were discussed following defendant's conviction, there is no indication in the record that defendant was notified of and given an opportunity to be heard regarding the appointed attorney's total hours or the total amount of fees imposed.")

In the instant case, there is no evidence in the record that defendant was given notice and an opportunity to be heard at a time when the total hours and fees claimed was established as a sum certain. Defendant was only provided an opportunity to be heard on the trial court's proposition that it would enter civil judgment based upon the hours calculated in his counsel's yet-to-be-submitted fee application. Therefore, we hold that defendant was not provided with adequate notice and an opportunity to be heard before the trial court entered a civil judgment of \$3,210.00 in attorney's fees against him.

III. Conclusion

For the foregoing reasons, we find no error in the trial court's impaneling of the jury, vacate the civil judgment imposing attorney's fees, and remand to the trial

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court with instructions to provide defendant with notice and an opportunity to be heard before entering judgment against him with respect to attorney's fees.

NO ERROR IN PART; VACATED IN PART AND REMANDED.

Judges ZACHARY and HAMPSON concur.

Report per Rule 30(e).