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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-136

Filed: 3 December 2019

Johnston County, Nos. 16 CRS 57114-16

STATE OF NORTH CAROLINA

v.

JAMES HANNA KELLY

Appeal by defendant from judgments entered 9 August 2018 by Judge Carolyn J. Thompson in Johnston County Superior Court. Heard in the Court of Appeals 5 September 2019.

Attorney General Joshua H. Stein, by Assistant Attorney General Robert C. Ennis, for the State.

Stephen G. Driggers for defendant-appellant.

ZACHARY, Judge.

Defendant James Hanna Kelly appeals from judgments entered upon his multiple convictions relating to possession of narcotics. Upon review, we vacate the judgments and remand for further proceedings.

Background

On 8 November 2016, Defendant consented to a search of his trailer by detectives from the Johnston County Sheriff's Office, which revealed, *inter alia*, various drugs,

weapons, ammunition, cash, and drug paraphernalia. As part of the investigation, various items seized by the detectives were sent to the North Carolina State Crime Laboratory for testing.

Defendant was tried in Johnston County Superior Court. On 13 July 2018, a jury found Defendant guilty of (1) possession with intent to manufacture, sell, or deliver cocaine; (2) maintaining a dwelling for the purpose of keeping or selling controlled substances; (3) trafficking opium or heroin by manufacture (more than four grams, less than fourteen grams); (4) trafficking opium or heroin by possession (more than four grams, less than fourteen grams); and (5) felonious possession of drug paraphernalia.[1] In addition to his prison sentence and a $50,000 fine, the trial court imposed three separate $600 laboratory fees, totaling $1,800. Defendant gave notice of appeal in open court.

Discussion

On appeal, Defendant contends that the trial court (1) committed plain error by admitting opinion testimony from the State's expert witness, and (2) erred by imposing $1,800 in fees for laboratory services, to be paid by Defendant as restitution to the North Carolina Department of Justice.[2]

A. Expert Testimony

[1] Defendant also pleaded guilty to attaining the status of a habitual felon.

[2] Defendant failed to file written notice of appeal from the civil judgment imposing laboratory fees. Nevertheless, Defendant petitioned for a writ of certiorari to permit review of this issue. In our discretion, we allowed his petition.

Ms. Alicia Matkowsky, a forensic scientist with the North Carolina State Crime Laboratory, analyzed the drug evidence in this case. The State tendered Ms. Matkowsky as an expert in the field of forensic chemistry, with a specialty in the analysis of controlled substances. On direct examination, she was asked about 40 pharmaceutically prepared pills related to the case. Based on her initial observations, Ms. Matkowsky suspected that the pills contained doses of morphine. To confirm her hypothesis, Ms. Matkowsky "did an extraction to do a confirmatory instrumental test," which involves "randomly pick[ing] one tablet out of the bunch and . . . do[ing] a . . . full chemical analysis on the one [pill]." She concluded that the substance was morphine. Defendant failed to object to this testimony, yet claims on appeal that this testimony should not have been admitted.

Regardless, we note that on cross-examination Defendant elicited the very testimony of which he now complains. When asked by Defendant if the laboratory results indicated that the substance was indeed morphine, Ms. Matkowsky answered in the affirmative. Soon thereafter, Ms. Matkowsky confirmed that she would only give her expert opinion as to the identity of a substance if she had run a chemical analysis.

"[A] defendant who invites error waives his right to all appellate review concerning the invited error, including plain error review." *State v. Grullon*, 240 N.C. App. 55, 58, 770 S.E.2d 379, 382 (quotation marks omitted), *disc. review denied*, 368 N.C. 269, 772 S.E.2d 732 (2015); *see also* N.C. Gen. Stat. § 15A-1443(c) (2017) ("A

defendant is not prejudiced by the granting of relief which he has sought or by error resulting from his own conduct."). Here, Defendant's own line of questioning evoked testimony that the chemically tested pill contained morphine, and that such testimony would only be given after a proper analysis. Thus, Defendant has waived any appellate review of this argument.

B. Restitution

Next, Defendant argues that the trial court erred by imposing three separate $600 laboratory fees for the services of the North Carolina State Crime Laboratory. Defendant contends that because there was only one "case," he should only have been assessed one laboratory fee under N.C. Gen. Stat. § 7A-304(a)(7). We agree.

The issue of restitution to the North Carolina Department of Justice is addressed in Article 28 of Chapter 7A of our General Statutes, which provides that:

> (a) In *every criminal case* . . . 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) (emphasis added).

"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) (internal quotation marks omitted). "[W]e 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 (internal quotation marks omitted), *disc. review denied*, 365 N.C. 351, 717 S.E.2d 743 (2011).

This Court recently addressed the assessment of fees pursuant to § 7A-304(a)(7) in *State v. Rieger*, No. COA18-960, ___ N.C. App. ___, ___, ___ S.E.2d ___, ___ (filed Oct. 1, 2019). In *Rieger*, the defendant was arrested and charged with possession of marijuana and possession of marijuana paraphernalia. *Id.* at ___, ___ S.E.2d at ___, slip op. at 1. At trial, the jury convicted him of both charges. *Id.* The trial court entered two judgments and assessed court costs in each, totaling nearly $800. *Id.* On appeal, this Court vacated one of the judgments and remanded for entry of a new judgment that did not include court costs, holding:

> When multiple criminal charges arise from the same underlying event or transaction and are adjudicated together in the same hearing or trial, they are part of a single "criminal case" for purposes of N.C. Gen. Stat. § 7A-304. In this situation, the trial court may assess costs only once, even if the case involves multiple charges that result in multiple, separate judgments.

Id. at ___, ___ S.E.2d at ___, slip op. at 10.

In the instant case, Defendant was convicted of five drug-related charges, all arising from the same underlying event. In connection with the criminal investigation, the State submitted five items to the North Carolina State Crime Laboratory for examination. The State's forensic expert analyzed the five items, and prepared three laboratory reports. Toward the end of the proceedings, the State specifically requested that the trial court order $1,800 (three $600 laboratory fees) in restitution to the North Carolina Department of Justice for laboratory services. The trial court ordered that the "$1,800 [laboratory] fees . . . be converted to a civil judgment," and that "the mandatory $50,000 fine be assessed against the defendant."

It is undisputed that the State Crime Laboratory completed numerous analyses of controlled substances possessed by Defendant as part of the investigation leading to Defendant's convictions. However, it is also evident that these multiple convictions arose from the same underlying event, rendering this a single "case." *See id.* Accordingly, the trial court was permitted to assess only a single $600 laboratory fee, rather than three $600 fees.

Conclusion

We conclude that Defendant waived any argument regarding expert testimony as a consequence of inviting the error. Further, the trial court erred in ordering payment of $1,800 in restitution for laboratory services. In that we vacate the judgments and remand for entry of costs consistent with this opinion, we do not address Defendant's

alternative argument that "there is no clear legal authority for criminal obligations to be docketed . . . from the outset of civil judgments."

DISMISSED IN PART; VACATED IN PART AND REMANDED.

Judges ARROWOOD and HAMPSON concur.

Report per Rule 30(e).