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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-280

Filed: 21 January 2020

Nash County, No. 17CRS050271

STATE OF NORTH CAROLINA,

v.

TIMOTHY DALE DAVIS, Defendant.

Appeal by Defendant from judgments entered 10 July 2018 by Judge Quentin T. Sumner in Nash County Superior Court. Heard in the Court of Appeals 4 December 2019.

Attorney General Joshua H. Stein, by Assistant Attorney General Madeline Lea, for the State-Appellee.

Guy J. Loranger for Defendant-Appellant.

COLLINS, Judge.

Defendant Timothy Dale Davis appeals from: (1) the 10 July 2018 criminal judgment entered upon his conviction for failure to comply with North Carolina's sex-offender registration laws in violation of N.C. Gen. Stat. § 14-208.11(a)(2); and (2) the 10 July 2018 civil judgment ordering that Defendant pay appointment and attorney's fees in connection with his defense. Defendant contends

that the trial court erred by: (1) entering the criminal judgment when he had been denied his rights to the effective assistance of counsel as guaranteed by the Sixth Amendment to the United States Constitution and Article I, section 23 of the North Carolina Constitution; and (2) entering the civil judgment without giving him an opportunity to be heard on the appointment and attorney's fees. We affirm and remand to fix a clerical error in part and vacate and remand in part.

I. Background

In 2014, following an *Alford* plea, Defendant was convicted of sexual battery in violation of N.C. Gen. Stat. § 14-27.5A. Upon the resulting judgment, Defendant became subject to North Carolina's sex-offender registration laws, as set forth in Article 27A of Chapter 14 of the North Carolina General Statutes, N.C. Gen. Stat. § 14-208.5 *et seq.* Defendant registered his address at that time at an apartment in Rocky Mount, where Nash County Sheriff's Deputy Elizabeth Cahoon verified that Defendant lived as recently as October 2016.

On 27 January 2017, Defendant was arrested and charged with willful failure by a person required to register under North Carolina's sex-offender registration laws to report a change in address to the sheriff in violation of N.C. Gen. Stat. § 14-208.11(a)(2). Defendant executed an affidavit of indigency on 31 January 2017, and the trial court appointed Defendant trial counsel the same day. Defendant was indicted for violating N.C. Gen. Stat. § 14-208.11 on 8 May 2017.

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Following discovery, the matter came on for trial on 10 July 2018. At the trial, the State admitted into evidence (1) Defendant's prior judgment for sexual battery and (2) documents indicating that Defendant had been evicted on 22 December 2016 from the apartment at which he had most recently registered. The State also introduced Cahoon as a witness, who testified that: (1) she learned of Defendant's eviction from the new tenant of the apartment upon Defendant's scheduled home visit on 17 January 2017, for which Defendant was not present; (2) Cahoon received a message from Defendant on 26 January 2017 providing a new address in Wilson County and a telephone number at which to contact him; and (3) once in custody, Defendant admitted to having been evicted.

After the State rested its case, Defendant moved to dismiss on grounds that (1) North Carolina's sex-offender registration laws are unconstitutionally vague and (2) the State had failed to meet its burden of proof. The trial court denied Defendant's motion. Defendant put on no evidence of his own, renewed his motion to dismiss, and the trial court again denied the motion.

During his closing argument, Defendant's trial counsel admitted that Defendant: (1) is a North Carolina resident who is subject to North Carolina's sex-offender registration laws by virtue of his earlier judgment for sexual battery; (2) was evicted and rendered homeless in December 2016; and (3) did not contact Cahoon to register a change in address until he established a new address in Wilson County.

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Defendant's trial counsel argued that the jury should acquit, however, because under Defendant's trial counsel's interpretation of N.C. Gen. Stat. § 14-208.11(a)(2), Defendant "had no knew [sic] address" upon being evicted, and "did not willingly change [his] address" until he established the new address in Wilson County. By registering the new address once he moved in, Defendant's trial counsel argued that Defendant had "followed the law" and should not be convicted. The record does not indicate whether or not Defendant approved Defendant's trial counsel's closing-argument strategy.

Following deliberations, the jury convicted Defendant of the offense. Defendant gave oral notice of appeal at that time.

The trial court then sentenced Defendant to an active term of 33 to 49 months' imprisonment, a presumptive-range sentence for a Class F felony based upon a prior record level of VI with 29¹ prior record points. The trial court then asked Defendant's trial counsel how much time he had spent litigating Defendant's case, and based upon Defendant's trial counsel's response that he had spent "20 hours, Your Honor, which

¹ The worksheet computing Defendant's prior record level signed by the trial court—to whose accuracy the State and Defendant stipulated—indicates that Defendant had only 21 prior record points, whereas the criminal judgment indicates that Defendant had 29 prior record points. Because a prior record level VI results whenever a convicted felon has 18 or more prior record points, *see* N.C. Gen. Stat. § 15A-1340.14(c) (2018), the discrepancy between the parties' stipulation and the criminal judgment indicates mere clerical error. Remand is appropriate, however, to correct clerical errors in a judgment, and we conclude that the criminal judgment must be remanded for correction. *See State v. Smith*, 188 N.C. App. 842, 845, 656 S.E.2d 695, 696 (2008) ("When, on appeal, a clerical error is discovered in the trial court's judgment or order, it is appropriate to remand the case to the trial court for correction because of the importance that the record speak the truth." (internal quotation marks and citations omitted)).

is \$1,200[,]” the trial court entered a civil judgment against Defendant for that amount plus a \$60 appointment fee.

II. Appellate Jurisdiction

The oral notice of appeal Defendant gave in open court following the jury’s verdict was sufficient to invoke this Court’s jurisdiction to review the criminal judgment entered against him. N.C. Gen. Stat. § 7A-27(b)(1) (2018); N.C. R. App. P. 4(a)(1).

Defendant did not separately file a written notice of appeal from the civil judgment against him. However, Defendant has filed a petition for a writ of certiorari with this Court asking that we review the civil judgment, and we exercise our authority under North Carolina Rule of Appellate Procedure 21 to grant Defendant’s petition and review the civil judgment as well.

III. Discussion

Defendant contends that the trial court erred because: (1) he was denied the effective assistance of counsel in defending against the criminal charge; and (2) the civil judgment was entered before Defendant was given the opportunity to be heard thereupon. We address each argument in turn.

A. Criminal Judgment/Ineffective Assistance of Counsel

While ineffective-assistance-of-counsel claims generally should be decided on motions for appropriate relief made to the trial court, we may reach the merits of such

a claim on direct review “when the cold record reveals that no further investigation is required[.]” *State v. Fair*, 354 N.C. 131, 166, 557 S.E.2d 500, 524 (2001). No further investigation is required in this case,² and we accordingly will review *de novo* whether Defendant was denied the effective assistance of counsel. *State v. Wilson*, 236 N.C. App. 472, 475, 762 S.E.2d 894, 896 (2014).

The criminal judgment entered by the trial court states that the jury convicted Defendant of violating N.C. Gen. Stat. § 14-208.11(a)(2),³ which sets forth:

A person required by [N.C. Gen. Stat. § 14-208.5 *et seq.*] to register who willfully does any of the following is guilty of a Class F felony: . . .

- (2) Fails to notify the last registering sheriff of a change of address as required by [N.C. Gen. Stat. § 14-208.5 *et seq.*]

N.C. Gen. Stat. § 14-208.11(a)(2) (2016). N.C. Gen. Stat. § 14-208.9 further explains what is required when a person who is required to register under our sex-offender registration laws changes his address, and sets forth in relevant part:

If a person required to register changes address, the person shall report in person and provide written notice of the new address *not later than the third business day after the change* to the sheriff of the county with whom the person had last registered. . . .

² Because, as discussed below, we conclude that Defendant’s trial counsel did not admit Defendant’s guilt during his closing argument, no further investigation is required to determine whether or not Defendant consented to such an admission.

³ Defendant was indicted for violating N.C. Gen. Stat. § 14-208.11 for “fail[ing] to notify the last registering sheriff of a change of address within three business days,” which N.C. Gen. Stat. § 14-208.11(a)(2) prohibits.

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N.C. Gen. Stat. § 14-208.9(a) (2016) (emphasis added). This Court has stated:

[B]ecause [N.C. Gen. Stat. §§ 14-208.9 and 14-208.11] deal with the same subject matter, they must be construed *in pari materia* to give effect to each. . . . Read together, the offense of failing to notify the appropriate sheriff of a sex offender’s change of address contains three essential elements:

- (1) the defendant is a person required to register;
- (2) the defendant changes his or her address; and
- (3) the defendant willfully fails to notify the last registering sheriff of the change of address, not later than the third day after the change.

State v. Fox, 216 N.C. App. 153, 156-57, 716 S.E.2d 261, 264-65 (2011) (footnote omitted) (internal quotation marks, ellipsis, brackets, and citations omitted).

Our Supreme Court has said that where “defendant’s counsel admits the defendant’s guilt to the jury without the defendant’s consent[.]” counsel’s performance is *per se* ineffective in violation of the Sixth Amendment. *State v. Harbison*, 315 N.C. 175, 180, 337 S.E.2d 504, 507-08 (1985), *cert. denied*, 476 U.S. 1123 (1986). Defendant argues that his trial counsel committed “*Harbison* error” by admitting each of the *Fox* elements during his closing argument without obtaining Defendant’s consent to such admissions.

As mentioned above, the transcript shows that Defendant’s trial counsel admitted during closing arguments that Defendant: (1) is required to register under

North Carolina's sex-offender registration laws; (2) was evicted from his registered address in December 2016; and (3) did not contact Cahoon to register a change in address until he established a new address in Wilson County. But these admissions do not amount to an admission of guilt within the meaning of *Harbison*. While the transcript demonstrates that Defendant's trial counsel admitted that Defendant was required to register under North Carolina's sex-offender registration laws, and therefore admitted the first *Fox* element, the transcript also demonstrates that Defendant's trial counsel expressly denied the second *Fox* element, i.e., that Defendant had changed address within the meaning of N.C. Gen. Stat. § 14-208.11(a)(2). Defendant's trial counsel argued that Defendant "had no knew [sic] address" following his eviction, and "did not willingly change [his] address" until he established the new address in Wilson County. Defendant's trial counsel also argued that Defendant "followed the law" by reporting the new address once he lived there—a denial of the third *Fox* element—and urged the jury not to convict. Because he denied elements of the offense and asked the jury to acquit, Defendant's trial counsel's closing argument was not an admission of guilt within the meaning of *Harbison*, and we therefore reject Defendant's argument that his trial counsel committed *Harbison* error. See *State v. Fisher*, 318 N.C. 512, 532, 350 S.E.2d 334, 346 (1986) (no *Harbison* error where defendant's counsel admitted element of crime but "never clearly admitted guilt").

Where the record does not demonstrate *Harbison* error, we must analyze a defendant's ineffective-assistance-of-counsel claim under the standard set forth by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984). *Fisher*, 318 N.C. at 533, 350 S.E.2d at 346. Applying *Strickland*, our Supreme Court has said that a defendant making an ineffective-assistance-of-counsel claim must make two showings:

First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment.

Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

State v. Braswell, 312 N.C. 553, 562, 324 S.E.2d 241, 248 (1985) (emphasis omitted) (quoting *Strickland*, 466 U.S. at 687). Where we conclude that counsel's performance did not prejudice the defense, we need not analyze whether counsel's performance was deficient. *State v. Phillips*, 365 N.C. 103, 122, 711 S.E.2d 122, 138 (2011).

To establish prejudice, a defendant "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. We conclude that Defendant has not made such a showing. At trial, the State introduced compelling evidence

tending to establish all three of the elements necessary to convict a person of violating N.C. Gen. Stat. § 14-208.11(a)(2) under *Fox*:

- (1) The judgment entered upon Defendant's prior conviction for sexual battery demonstrates that Defendant was required to register under North Carolina's sex-offender registration laws;
- (2) Documentary evidence of Defendant's December 2016 eviction tends to establish that Defendant changed his address, *see State v. Worley*, 198 N.C. App. 329, 337-38, 679 S.E.2d 857, 863-64 (2009) (holding that person rendered homeless following eviction had changed his address within the meaning of N.C. Gen. Stat. § 14-208.11(a)(2)); and
- (3) Cahoon's testimony regarding (a) her 17 January 2017 scheduled visit to Defendant's previous address and (b) Defendant's failure to contact her until 26 January 2017 with a new address tends to establish that Defendant willfully failed to notify the sheriff of the change of address within three business days of the change.

In light of such evidence, we conclude that there is not a reasonable probability that the result of Defendant's trial would have been different had Defendant's trial counsel not made the closing argument that Defendant contends rendered his assistance ineffective.

We accordingly reject Defendant's ineffective-assistance-of-counsel claim, and affirm the criminal judgment.

B. Civil Judgment/Opportunity to Be Heard

N.C. Gen. Stat. § 7A-455.1 requires indigent criminal defendants requesting appointment of trial counsel to pay an appointment fee, and N.C. Gen. Stat. § 7A-455 allows the trial court to enter a civil judgment against a convicted indigent defendant for attorney's fees and costs. Before a judgment imposing appointment or attorney's fees may be entered against him, an indigent criminal defendant must be given notice and an opportunity to be heard thereupon. *See State v. Harris*, 255 N.C. App. 653, 664, 805 S.E.2d 729, 737 (2017) (vacating appointment fee for lack of notice and opportunity to be heard); *State v. Jacobs*, 172 N.C. App. 220, 235-36, 616 S.E.2d 306, 316-17 (2005) (vacating attorney's fees because "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").

Defendant argues that he was not given an opportunity to be heard regarding either the appointment fee or attorney's fees contemplated within the civil judgment entered against him. The State concedes in its brief that the trial court's failure to provide Defendant with an opportunity to be heard before the civil judgment was entered was error. We agree with the parties that the civil judgment must accordingly be set aside.

IV. Conclusion

Because we conclude that Defendant has not shown that his trial counsel's performance prejudiced his defense, we affirm the criminal judgment, but remand to the trial court for the correction of the clerical error discussed in note 1. Because Defendant was not given an opportunity to be heard before the trial court entered the civil judgment against him, we vacate the civil judgment and remand to the trial court for a new hearing on the appointment and attorney's fees.

AFFIRMED AND REMANDED IN PART AND VACATED AND REMANDED
IN PART.

Judges BRYANT and HAMPSON concur.

Report per Rule 30(e).