

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-540

Filed: 7 April 2020

Cleveland County, Nos. 16CRS002285, 054727, 054730; 17CRS000512

STATE OF NORTH CAROLINA

v.

BOBBY WILLIAMS, JR., Defendant.

Appeal by defendant from judgment entered 17 November 2017 by Judge Robert T. Sumner in Superior Court, Cleveland County. Heard in the Court of Appeals 4 December 2019.

Attorney General Joshua H. Stein, by Assistant Attorney General Tien Cheng, for the State.

Sean P. Vitrano, for defendant-appellant.

STROUD, Judge.

Where this Court has previously allowed defendant's petition for writ of certiorari to review his criminal judgment and a prior panel of this Court has denied defendant's motion to amend the record to add the civil judgment for attorney fees, we deny defendant's second petition for writ of certiorari requesting review of the civil judgment for attorney fees which would necessarily require amending the record to

add the civil judgment, a request this Court has already denied. Therefore, we dismiss this appeal.

I. Procedural Background

On or about 17 November 2017, the trial court entered judgment against defendant for possession of a firearm by a felon, possession of methamphetamine, possession of drug paraphernalia, and habitual felon status. Defendant did not give oral or written notice of appeal. Although the trial court’s judgment ordered that defendant’s attorney fees would be a “CIVIL LIEN[,]” the order for attorney fees was not entered until 8 January 2018.¹

In October of 2018, defendant filed a petition for writ of certiorari with this Court, requesting review of “his conviction and sentence for possession of a firearm by a felon, possession of methamphetamine, possession of drug paraphernalia, and habitual felon status[.]” This Court allowed defendant’s petition on 8 November 2018.

On 25 August 2019, defendant filed both his appellant brief and a motion to amend the record on appeal to add the “Non-Capital Criminal Case Trial Level Fee Application Order for Payment Judgment against Indigent[,]” (original in all caps), because it was “necessary for this Court to understand the issue raised on appeal” and “was inadvertently omitted from the Record on Appeal.” The State opposed the motion to amend, noting that

¹ We note this date from defendant’s motion to amend the record. As noted, the order for attorney fees is not part of our record.

[t]he Appellate Rules shall not be construed to extend or limit the jurisdiction of the courts of the appellate division as that is established by law. N.C. R. App. P. 1(c). By law, where there is no civil judgment in the record ordering the defendant to pay attorney fees, the Court of Appeals has no subject matter jurisdiction on the issue.” Jacobs, 361 N.C. at 566, 648 S.E.2d at 842 (citing N.C. R. App. P. 3(a); N.C. R. App. P. 9(a)(1)(h)).

(Quotation marks and brackets omitted). The State also noted that the 8 November 2018 order granting certiorari did not authorize review of the civil judgment. On 5 September 2019, this Court denied defendant’s motion to amend the record to add the civil judgment. The State filed its appellee brief on 10 September 2019.

On 26 September 2019, defendant filed a second petition for writ of certiorari, requesting review of the civil judgment ordering petitioner to pay attorney fees entered on 8 January 2018. Defendant attached a copy of the civil order, the criminal judgment, and a portion of the sentencing hearing transcript.

II. Dismissal of Appeal

In defendant’s brief, he contends that “[t]he trial court erred by entering judgment for attorney fees without affording . . . [defendant] notice and an opportunity to be heard.” (Original in all caps.) Defendant did not raise any issues regarding his criminal convictions and sentencing. The State contends we are without jurisdiction to consider defendant’s appeal because “the record does not contain a copy of the civil judgment[.]” Although this Court granted defendant’s petition for certiorari to review the criminal judgment entered in November 2017, he

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has not raised any issues based upon that judgment. After defendant's motion to amend the record to add the civil judgment was denied by this Court, and after the State had filed its brief on appeal, defendant filed a second petition for writ of certiorari requesting review of the civil judgment and to consider his included civil judgment as part of the record for this Court. *See generally State v. Mayo*, ___ N.C. App. ___, ___, 823 S.E.2d 656, 659 (2019) ("A criminal defendant may file a petition for a writ of certiorari to appeal a civil judgment for attorney's fees and costs.").

This case is distinguished from others where we have granted a writ of certiorari because here a prior panel of this Court already denied defendant's motion to amend the record. *See, e.g., State v. Mangum*, ___ N.C. App. ___, ___ S.E.2d ___ (3 March 2020) (No. COA18-850). This case is also distinguished from *Mangum* because in *Mangum*, the defendant had already given timely notice of appeal from his criminal judgment in April 2018, but the civil judgment was not entered until October 2018. *See id.* at ___, ___ S.E.2d at ___, slip op. at *1-3. Here, *both* the criminal judgment and the civil judgment were entered prior to the defendant's first petition for certiorari. In addition, this Court has already granted defendant's petition for certiorari which requested *only* review of his criminal convictions and judgment. Although a direct appeal to this Court and a review via certiorari are technically different methods of appellate review, in substance defendant is asking us to overrule a prior panel of this Court, which we cannot do. *See In re Civil Penalty*, 324 N.C. 373,

384, 379 S.E.2d 30, 37 (1989) (stating that a subsequent panel of this Court cannot overrule a prior panel).

We recognize that this Court has discretion to grant review by certiorari under Appellate Rule 21(a)(1), and our Supreme Court has noted,

Under Rule 3(a) of the North Carolina Rules of Appellate Procedure, any party entitled by law to appeal from a judgment of a superior court rendered in a civil action may take appeal by filing notice of appeal with the clerk of superior court and serving copies thereof upon all other parties in a timely manner. Appellate Rule 27(c) provides in pertinent part: “Courts may not extend the time for taking an appeal prescribed by these rules or by law.” Appellate Rule 21(a)(1) provides: “The writ of certiorari may be issued in appropriate circumstances by either appellate court to permit review of the judgments of trial tribunals when the right to prosecute an appeal has been lost by failure to take timely action.” Construing these rules together, we conclude that Rule 21(a)(1) gives an appellate court the authority to review the merits of an appeal by certiorari even if the party has failed to file notice of appeal in a timely manner.

Anderson v. Hollifield, 345 N.C. 480, 482, 480 S.E.2d 661, 663 (1997) (ellipses omitted).

Even if we assume we have discretion to grant review by certiorari, despite this Court’s prior grant of certiorari to review the criminal judgment and prior denial of defendant’s motion to amend the record on appeal, in our discretion, we will deny defendant’s second petition for certiorari and the amendment of the record it requires to proceed. *See generally id.* “Our Supreme Court previously stated that the Rules

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of Appellate Procedure must be consistently applied; otherwise, the Rules become meaningless, and an appellee is left without notice of the basis upon which an appellate court might rule.” *Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co.*, 192 N.C. App. 114, 119, 665 S.E.2d 493, 497–98 (2008) (citation and quotation marks omitted). A prior panel of this Court denied defendant’s motion to amend the record on appeal; we therefore deny defendant’s petition for a writ of certiorari, and without a civil judgment in our record, the State is correct that we are without jurisdiction to consider defendant’s appeal. *See State v. Jacobs*, 361 N.C. 565, 566, 648 S.E.2d 841, 842 (2007) (“We conclude that because there is no civil judgment in the record ordering defendant to pay attorney fees, the Court of Appeals had no subject matter jurisdiction on this issue.”). This appeal is dismissed.

DISMISSED.

Judges ARROWOOD and Brook concur.

Report per Rule 30(e).