

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA19-1084

Filed: 19 May 2020

Dare County, Nos. 17CRS051424-25

STATE OF NORTH CAROLINA

v.

RICHARD DANIEL KING, IV

Appeal by Defendant from judgments entered 16 July and 28 August 2019 by Judge Jerry R. Tillett in Dare County Superior Court. Heard in the Court of Appeals 28 April 2020.

Attorney General Joshua H. Stein, by Assistant Attorney General Lisa B. Finkelstein, for the State-Appellee.

Epstein Law Firm, by Drew Nelson, for Defendant-Appellant.

COLLINS, Judge.

Defendant appeals from judgments entered upon jury verdicts of guilty of statutory rape and two counts of statutory sex offense, and a judgment for attorney's fees. Defendant argues that the trial court committed structural error by applying the wrong standard when assessing Defendant's request for a continuance, and erred by issuing a civil judgment for attorney's fees without personally addressing

Defendant. Because Defendant's request for reconsideration of the trial court's denial of his trial counsel's motion to withdraw was not a request for a continuance, and the trial court did not abuse its discretion in denying Defendant's request for reconsideration, we reject Defendant's structural error argument. Because Defendant was not given an opportunity to be heard before the trial court entered the civil judgment for attorney's fees against him, we vacate the order for attorney's fees and remand the case.

I. Background

Defendant was indicted on 13 November 2017 on two counts of statutory rape and two counts of statutory sex offense. On 5 July 2019, ten days before the case was scheduled for trial, defense counsel filed a written motion to withdraw as counsel for Defendant. That motion was denied. Defendant's case was called for trial on 15 July 2019, at which time defense counsel, Mr. Yacobi, addressed the trial court as follows:

Judge, . . . I filed a motion for me to withdraw from the case due to-- what I saw as a potential conflict with representation. And I notified the State and I went over to talk to my client about it and spoke to him about it to make sure that, A, he was aware, and B, to see if he consented to my withdrawal, which he said he did.

Now I know we need to address that, for one, Judge, and my client would at the appropriate time if the Court so chooses he would like to address the Court as well.

Defense counsel acknowledged that his motion had been denied pre-trial and that nothing had changed from his point of view since that denial. Defense counsel

STATE V. KING

Opinion of the Court

stated, however, that Defendant “wanted to address the Court about that.” The trial court allowed Defendant to personally address the Court, at which time Defendant stated,

I spoke with Mr. Yacobi and he expressed to me that he has a conflict of interest in my case. My financial status has changed recently. My family is going to hire me a private attorney. I would ask if the Courts will let Mr. Yacobi withdraw from my case today?

In response, the State argued, “Your Honor, we will be objecting to any sort-- we’ve discussed that this-- that it does not rise to the level of conflict. The State has prepared this case multiple times for trial.” The State also argued that Defendant’s previous counsel had withdrawn, and that there had been several discussions that the case would be first up for trial. The State also noted that, at the most recent trial setting, Defendant’s assigned counsel received a continuance based on a scheduling conflict with a case pending in Virginia; Defendant had been in jail for 653 days; and the State’s witnesses were school-age children on summer recess, so continuing the case to a setting during the school year would create a hardship on them.

The trial court then addressed defense counsel as follows:

THE COURT: Mr. Yacobi, you prepared to try the case?

MR. YACOBI: Yes, Judge.

THE COURT: Are you able, notwithstanding any family concerns, to zealously represent this defendant within the bounds of law?

MR. YACOBI: I can.

THE COURT: Then that motion is denied.

Defendant's trial began shortly thereafter. Defendant was convicted of one count of statutory rape and two counts of statutory sex offense. The trial court entered judgments upon the jury's guilty verdicts, sentencing Defendant to three consecutive terms of 276-344 months' imprisonment. The trial court issued three amended judgments, changing the sentences to three consecutive terms of 276-392 months' imprisonment. Defendant entered oral notice of appeal in open court. The trial court entered a civil judgment for attorney's fees on 28 August 2019.

II. Appellate Jurisdiction

Defendant filed a petition for writ of certiorari on 30 December 2019 asking this Court to review the issues in Defendant's brief, should this Court determine that Defendant's oral notice of appeal of was insufficient. As the trial transcript reveals that Defendant's oral notice of appeal was given when "[t]rial resumed" after other matters had been taken up, Defendant's oral notice of appeal of the criminal judgments was sufficient to confer jurisdiction upon this Court. *See* N.C. R. App. P. 4(a)(1) ("Any party entitled by law to appeal from a judgment or order of a superior or district court rendered in a criminal action may take appeal by . . . giving oral notice of appeal at trial[.]"). Defendant's petition for a writ of certiorari to address the issue related to these judgments is dismissed as moot.

However, Defendant's oral notice of appeal was insufficient to invoke this Court's jurisdiction to review the civil judgment entered against him. N.C. R. App.

P. (3)(a) (“Any party entitled by law to appeal from a judgment or order of a superior or district court rendered in a civil action or special proceeding may take appeal by filing notice of appeal with the clerk of superior court and serving copies thereof upon all other parties”). We exercise our discretion under North Carolina Rule of Appellate Procedure 21 to grant Defendant’s petition and review the issue related to that judgment.

III. Discussion

A. Defendant’s Request

Defendant first argues that the trial court structurally erred by applying the wrong standard when assessing Defendant’s request for a continuance. Because Defendant did not, in fact, request a trial continuance, we reject his argument.

“[W]hen a trial court is faced with a Defendant’s request to substitute his court-appointed counsel for the private counsel of his choosing, it may only deny that request if granting it would cause significant prejudice or a disruption in the orderly process of justice.” *State v. Goodwin*, 833 S.E.2d 379, 382 (N.C. Ct. App. 2019) (citing *State v. McFadden*, 292 N.C. 609, 616, 234 S.E.2d 742, 747 (1977)). “It is within the trial court’s discretion to decide whether allowing a defendant’s request for continuance to hire the counsel of his choice would result in ‘significant prejudice . . . or in a disruption of the orderly processes of justice [that is] unreasonable under the circumstances of the particular case.’” *Id.* (quoting

McFadden, 292 N.C. at 613-14, 234 S.E.2d at 746). A trial court commits a structural error when it applies the incorrect standard in analyzing a defendant's request for new counsel. *Goodwin*, 833 S.E.2d at 383.

We review the denial of a defense counsel's motion to withdraw for abuse of discretion. *State v. Warren*, 244 N.C. App. 134, 142, 780 S.E.2d 835, 841 (2015).

Defendant's request in this case—"I would ask if the Courts will let Mr. Yacobi withdraw from my case today?"—was a request for the trial court to reconsider its denial of defense counsel's motion to withdraw, rather than a request for a continuance to seek counsel of his choice. Accordingly, the standard articulated in *Goodwin* is inapplicable here. Defendant does not argue on appeal that the trial court's denial of the motion to withdraw was an abuse of discretion, and we discern none. *See id.*

Defendant asserts on appeal, "This Court should interpret [Defendant's] statement as a request to continue the trial so that he could hire private counsel." We disagree. Had defense counsel's motion to withdraw been allowed, Defendant may have moved to continue the case and may have hired a private attorney. However, a request to continue the case was not before the trial court.

As the standard articulated in *Goodwin* is inapplicable, and the trial court did not abuse its discretion in denying Defendant's motion to reconsider the denial of his trial counsel's motion to withdraw, Defendant's argument is overruled. We note that

Defendant filed a Motion for Appropriate Relief (“MAR”) contemporaneously with his brief, which “incorporates all of the statements and arguments contained in his brief” on this issue. In light of our conclusion, we dismiss Defendant’s MAR as moot.

B. Civil Judgment

Defendant next argues that the trial court erred when it entered a civil judgment against Defendant for attorney’s fees without first personally addressing him about those fees.

Pursuant to N.C. Gen. Stat. § 7A-455, trial courts may enter civil judgments against convicted indigent defendants for the attorney’s fees incurred by their court-appointed counsel in certain circumstances. *See* N.C. Gen. Stat. § 7A-455 (2019). “[T]rial courts awarding counsel fees must take into account factors such as ‘the nature of the case, the time, effort, and responsibility involved, and the fee usually charged in similar cases.’” *State v. Friend*, 257 N.C. App. 516, 522, 809 S.E.2d 902, 906 (2018) (quoting N.C. Gen. Stat. § 7A-455(b)). Before imposing a civil judgment for these attorney’s fees, the trial court must afford the defendant notice and an opportunity to be heard. *Friend*, 257 N.C. App. at 522, 809 S.E.2d at 906 (citations omitted).

“[B]efore entering money judgments against indigent defendants for fees imposed by their court-appointed counsel under N.C. Gen. Stat. § 7A-455, trial courts should ask defendants—personally, not through counsel—whether they wish to be

heard on the issue.” *Friend*, 257 N.C. App. at 523, 809 S.E.2d at 907. “Absent a colloquy directly with the defendant on this issue, the requirements of notice and opportunity to be heard will be satisfied only if there is 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.*

During the sentencing phase of the trial, the trial court asked Mr. Yacobi whether he had calculated the time he had spent on the case. Mr. Yacobi asked the trial court if he could be allowed to deliver his time calculation the following day. In response, the trial court and Mr. Yacobi engaged in the following exchange:

THE COURT: Well, you want to talk to your client and see if he wants to waive his right to be heard as to that, I’ll do so.

MR. YACOBI: Judge, I think he understands, I have told him.

THE COURT: He does not wish to be heard as to that? All right. I will do so.

One month after the end of Defendant’s trial, the trial court issued a written civil judgment against him for \$7,979.70 for Mr. Yacobi’s fees.

Despite Defendant’s presence in the courtroom at sentencing, the trial court did not ask “[D]efendant[]—personally, not through counsel—whether [he] wish[ed] to be heard on the issue” of attorney’s fees. *Id.* The trial court allowed defense counsel to calculate his fees and deliver them to the court on the following day, outside of Defendant’s presence, and entered a civil judgment for attorney’s fees a month later.

The trial court did not engage in a direct colloquy with Defendant, and there is no “other evidence in the record demonstrating that [Defendant] received notice, was aware of the opportunity to be heard on the issue, and chose not to be heard.” *Id.* Accordingly, we vacate the civil judgment for attorney’s fees under N.C. Gen. Stat. § 7A-455 and remand to the trial court for further proceedings on this issue. *See id.*

IV. Conclusion

As the trial court did not abuse its discretion by denying defense counsel’s motion to withdraw, we find no error in the criminal judgments. However, as Defendant was not given an opportunity to be heard before the trial court entered the civil judgment for attorney’s fees against him, we vacate the order for attorney;s fees and remand the case for further proceedings on this issue.

NO ERROR IN PART; VACATED AND REMANDED IN PART.

Judges STROUD and INMAN concur.

Report per Rule 30(e).