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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-480

Filed: 2 June 2020

Rockingham County, Nos. 16 CRS 052193, 1318–19

STATE OF NORTH CAROLINA

v.

BOBBY JONATHAN PERDUE

Appeal by defendant from judgments entered 5 and 11 September 2017 by Judge Edwin G. Wilson Jr. in Rockingham County Superior Court. Heard in the Court of Appeals 12 November 2019.

*Attorney General Joshua H. Stein, by Special Deputy Attorney General Scott T. Slusser, for the State.*

*Leslie Rawls for defendant-appellant.*

BRYANT, Judge.

Where the trial court imposed court costs pursuant to N.C. Gen. Stat. § 7A-304 in a criminal judgment against defendant Bobby Jonathan Perdue outside of defendant's presence, we hold no error. However, where the trial court imposed attorney's fees and a second court-appointed attorney fee against defendant in a civil

judgment outside of defendant's presence, we hold the trial court erred. Accordingly, we vacate the civil judgment and remand this matter to the trial court.

On 6 September 2016, a Rockingham County grand jury indicted defendant on charges of felony obstruction of justice and attaining habitual felon status. Defendant was appointed counsel, and in orders entered 3 January and 12 July 2017, the trial court twice denied defendant's motions to discharge his counsel. On 7 August 2017, a grand jury indicted defendant on the charge of intimidating a witness. The matters proceeded to a jury trial in Rockingham County Superior Court on 5 September 2017 before the Honorable Edwin G. Wilson Jr., Judge presiding.

Following the presentation of evidence, the jury found defendant guilty of intimidating a witness, attaining habitual felon status, and misdemeanor obstruction of justice. After the guilt/innocence phase of the trial, the court held a sentencing hearing, and the record reflects the trial court addressed defendant's imprisonment but not court costs or attorney's fees. However, in the judgment against defendant entered 5 September 2017, the court ordered defendant to pay \$4,252.50, with \$4,192.50 allocated toward court costs and \$60.00 toward a court-appointed counsel fee.

Six days later, on 11 September 2017, outside of defendant's presence, the court entered a civil judgment ordering defendant to pay \$4,375.00 for attorney's

fees.<sup>1</sup> In addition, the trial court imposed a second \$60.00 court-appointed counsel fee.

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On 31 December 2018, defendant filed a petition for writ of certiorari to review the 5 September 2017 judgment against him. This Court granted defendant's petition for writ of certiorari. We apply Rule 2 and review the 11 September 2017 civil judgment as well.<sup>2</sup>

On appeal, defendant argues that the trial court committed plain error by failing to give defendant notice and an opportunity to be heard before ordering him to pay court costs, attorney fees, and twice ordering him to pay attorney appointment fees. We agree in part.

For clarity, we will separately consider (A) the court costs and court-appointed attorney fee imposed on defendant in the criminal judgment and (B) the attorney's fees and additional court-appointed attorney fee imposed in the civil judgment.

A

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<sup>1</sup> Sometime after the trial, defendant's appointed counsel filed a fee application for payment claiming 62.50 hours for defendant's representation. Defendant's appointed counsel fee application is dated 6 February 2017 and signed by counsel on 5 April 2017. Because defendant's trial was not heard until 5 September 2017, this Court does not know whether these dates are a clerical error.

<sup>2</sup> Defendant's petition for writ of certiorari referenced only the 5 September 2017 criminal judgment. We apply Rule 2 of our Rules of Appellate Procedure in order to review the 11 September 2017 civil judgment as well. *See* N.C.R. App. P. 2 ("To prevent manifest injustice to a party . . . [this Court] may, except as otherwise expressly provided by these rules, suspend or vary the requirements or provisions of any of these rules in a case pending before it . . . upon its own initiative . . .").

First, defendant argues the trial court erred by entering a criminal judgment against him, including court costs and a court-appointed counsel fee without providing him with notice and an opportunity to be heard. We disagree.

Section 7A-304 of our General Statutes provides that “[i]n every criminal case in the superior or district court, wherein the defendant is convicted . . . the following costs shall be assessed and collected.” N.C. Gen. Stat. § 7A-304(a) (2019). “[A] defendant who receives an active sentence is [] required to be assessed court costs unless the trial court specifically makes a written finding of just cause to waive these costs.” *State v. Phillips*, 227 N.C. App. 416, 426, 742 S.E.2d 338, 345 (2013) (alteration in original) (citing *State v. Patterson*, 223 N.C. App. 180, 182, 735 S.E.2d 602, 604 (2012)).

Here, the trial court did not make a written finding of just cause to waive costs. Thus, the trial court assessed costs pursuant to N.C. Gen. Stat. § 7A-304. Defendant argues he was required to have notice and an opportunity to be heard concerning court costs during the sentencing hearing. However, the record shows that given defendant’s conviction, the statutory language “costs *shall* be assessed and collected,” N.C.G.S. § 7A-304(a) (emphasis added), required the trial court to impose costs upon defendant’s conviction.

The trial court assessed the following statutory costs<sup>3</sup>:

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<sup>3</sup> Each of the statutory costs is from the 2017 NC General Statutes.

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- (1) Superior Court Fee – \$153.55 (N.C. Gen. Stat. § 7A-304(a)(4))
- (2) District Court Fee – \$146.55 (N.C. Gen. Stat. § 7A-304(a)(4))
- (3) Law Enforcement Retirement Fee – \$7.50 (N.C. Gen. Stat. § 7A-304(a)(3) and N.C. Gen. Stat. § 7A-304(3a))
- (4) Law Enforcement Training and Certification Fee – \$2.00 (N.C. Gen. Stat. § 7A-304(a)(3b))
- (5) Telecommunications and Data Connectivity Fee – \$4.00 (N.C. Gen. Stat. § 7A-304(a)(2a))
- (6) Superior Court State Bar Legal Aid Account Fee – \$0.95 (N.C. Gen. Stat. § 7A-304(a)(4))
- (7) District Court State Bar Legal Aid Account Fee – \$0.95 (N.C. Gen. Stat. § 7A-304(a)(4))
- (8) Rockingham County Sheriff's Office Service Fee – \$5.00 (N.C. Gen. Stat. § 7A-304(a)(1))
- (9) Rockingham County Superior Courthouse Facilities Fee – \$30.00 (N.C. Gen. Stat. § 7A-304(a)(2))
- (10) Superior Court State DNA Fee – \$2.00 (N.C. Gen. Stat. § 7A-304(a)(9))
- (11) Rockingham County Jail Fee (Pretrial) – \$3,840.00 (N.C. Gen. Stat. § 7A-313 and N.C. Gen. Stat. § 7A-304(c))
- (12) Attorney Appointment Fee – \$60.00 (N.C. Gen. Stat. § 7A-455.1)

Here, the costs and fees totaled \$4,252.50. Defendant does not challenge the amount imposed and even acknowledge the court's right to impose the statutory \$60.00 fee for appointed counsel.

Although the trial court assessed criminal court costs outside of defendant's presence, this Court has previously found that it is not error to do so. *See State v. Arrington*, 215 N.C. App. 161, 166–68, 714 S.E.2d 777, 781–82 (2011) (holding “the imposition of costs [outside defendant's presence] did not infringe upon his right to be present at the time sentence is pronounced, not only because these statutorily

mandated fees were an integral part of the sentence . . . but because . . . [imposition of costs] did not constitute an additional or other punishment . . .” (citation omitted)). Further, we agree with the State’s argument that defendant had constructive notice where the costs imposed were mandatory statutory costs. Thus, defendant’s argument that he was required to receive notice and an opportunity to be heard after conviction but prior to the trial’s imposition of statutorily mandated criminal fees and costs is misplaced. Accordingly, the trial court did not err in assessing criminal court costs and fees.

*B*

Next, defendant argues the trial court erred when a civil judgment was entered against him awarding attorney’s fees and a second court-appointed fee. Defendant further argues he was denied notice and an opportunity to be heard about fees. We agree.

Section 7A-455 of our General Statutes provides that a trial court may enter a civil judgment and impose attorney’s fees against a convicted, indigent defendant for the costs incurred by a defendant’s appointed counsel. N.C. Gen. Stat. § 7A-455(a) (2019). Our statutes allow for a court-appointed attorney fee of \$60.00 in a criminal case against a convicted defendant. *Id.* § 7A-455.1(a). However, “[t]he appointment fee [of \$60.00] required by this section shall be assessed only once for each attorney appointment, regardless of the number of cases to which the attorney was assigned.”

*Id.* § 7A-455.1(e); *see also State v. Rieger*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 833 S.E.2d 699, 703 (2019) (holding “the trial court may assess court costs only once, even if the case involves multiple charges that result in multiple, separate judgments”). In addition, before the trial court can impose itemized attorney fees, it must provide the defendant with notice and an opportunity to be heard. *State v. Jacobs*, 172 N.C. App. 220, 236, 616 S.E.2d 306, 317 (2005).

In *Jacobs*, at a sentencing hearing, the trial court inquired whether the defendant’s attorney was appointed. *Id.* at 235, 616 S.E.2d at 316. The defendant’s counsel informed the judge he was appointed but had yet to calculate his hours of work on behalf of the defendant. *Id.* The trial court instructed counsel to submit his hours to the court and informed the defendant that his counsel would submit a bill the defendant would be required to pay. *Id.* at 235–36, 616 S.E.2d at 316–17. This Court held that the defendant was told he would have to pay *some* attorney’s fees and thus had notice. *Id.* However, the trial court’s decision was remanded because the defendant was not informed of the *exact* fees. Therefore, the defendant did not have an opportunity to be heard “regarding the appointed attorney’s total hours or the total amount of fees imposed.” *Id.*

In this case, the trial court did not address attorney’s fees in open court in defendant’s presence. Instead, the trial court imposed attorney’s fees in the 11 September 2017 civil judgment outside of defendant’s presence. Like the defendant

in *Jacobs*, defendant was not allowed to address counsel's total bill of 62.50 hours worth \$4,375.00, plus a second \$60.00 court-appointed fee.

Since *Jacobs*, this Court has laid out the importance of ensuring defendants understand their right to be heard regarding attorney's fees. In *State v. Friend*, 257 N.C. App. 516, 809 S.E.2d 902 (2018), the defendant argued that the trial court erred by entering a civil judgment against him for attorney's fees incurred by his court-appointed counsel. *Id.* at 517, 809 S.E.2d at 904. In that case, although the trial court engaged in conversation with the defendant's attorney, the defendant was not personally informed of his right to be heard regarding attorney's fees. *Id.* at 523, 809 S.E.2d at 907. The Court held that

[a]bsent 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.*

Here, there was no personal discussion or "colloquy" with defendant about attorney's fees prior to the trial court entering the civil judgment imposing attorney's fees and imposing a second \$60.00 court-appointed counsel fee. Because defendant had already been assessed \$60.00 for the court-appointed counsel fee in the 5 September 2017 criminal judgment, the second fine imposed upon defendant in the civil judgment was inconsistent with N.C. Gen. Stat. § 7A-455.1(e).

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Because nothing in the record indicates that defendant received notice and an opportunity to be heard on the issue of attorney's fees before the trial court's civil judgment was imposed and because defendant was improperly fined twice for the court-appointed counsel fee, we vacate the 11 September 2017 civil judgment and remand the matter to the trial court without prejudice to conduct further proceedings to impose attorney's fees, where notice is provided, and defendant is afforded an opportunity to be heard pursuant to N.C. Gen. Stat. § 7A-455 and the reasoning set forth in *Friend*.

Accordingly, for the reasons stated above, we hold the trial court did not err by imposing statutorily mandated court costs and the attorney-appointment fee in its criminal judgment. Regarding the civil judgment for attorney's fees and the second attorney-appointment fee, we vacate and remand for further proceedings.

NO ERROR IN PART; VACATED AND REMANDED IN PART.

Chief Judge McGEE and Judge BERGER concur.

Report per Rule 30(e).