

IN THE COURT OF APPEALS OF NORTH CAROLINA

2021-NCCOA-145

No. COA20-251

Filed 20 April 2021

Columbus County, No. 18 CRS 418-19

STATE OF NORTH CAROLINA

v.

RHASHEEM MCMILLIAN

Appeal by Defendant from judgments entered 26 September 2019 by Judge N. Hunt Gwyn in Columbus County Superior Court. Heard in the Court of Appeals 26 January 2021.

*Attorney General Joshua H. Stein, by Assistant Attorney General Scott A. Conklin, for the State.*

*Appellate Defender Glenn Gerding, by Assistant Appellate Defender Jillian C. Katz, for Defendant-Appellant.*

GORE, Judge.

¶ 1

Rhasheem McMillian (“Defendant”) appeals from judgments entered following a jury verdict convicting him of robbery with a dangerous weapon and resisting a public officer. On appeal, Defendant argues that the trial court erred by denying his motion for a continuance before the start of trial. Defendant contends that the trial court’s ruling violated his constitutional rights because he did not have adequate time to locate or subpoena a witness vital to his defense. Additionally, Defendant argues

the trial court erred by entering a civil judgment for attorney's fees without providing him with notice and an opportunity to be heard. For the following reasons, we affirm in part, and vacate and remand on the issue of attorney's fees.

### **I. Background**

¶ 2 The evidence at trial tended to show that on 19 May 2018, Glenn Moore ("Moore"), and his wife Alicia Bellamy ("Bellamy"), took out \$180 from a Credit Union and drove to Walmart to go shopping. While taking the back way into the Walmart parking lot, Moore noticed Defendant standing outside a parked white Chevy Malibu. Defendant waved Moore down and asked for a cigarette and lighter.

¶ 3 As Moore reached out the window, Defendant grabbed Moore by the shirt and tried to pull him out of the truck. While Moore struggled with Defendant, two other men approached the truck and opened the door. The men pulled Moore out and pushed him up against the truck. Moore heard Defendant say, "You know what time it is, bitch," and one of the men say, "Don't look back." Moore looked back and saw Defendant pressing what appeared to be a black, 9-millimeter or .380, automatic gun into his side. Defendant took \$180 in cash from Moore's left pocket, got into the white Malibu with the other men, and sped off.

¶ 4 Moore got back into his truck and called 911 while following the men. Moore told 911 dispatch that three black males had "yoked" him out of his truck. When dispatch asked whether the men were armed, Moore responded "I couldn't tell if they

had a weapon.” On the call, Moore identified one of the three men as “Quan.” At trial, Moore identified Defendant as the man he knew as “Quan,” and explained that he thought he knew him through his stepdaughter from three or four years prior.

¶ 5           Officer Mark Corder (“Officer Corder”) of the Whiteville Police Department responded to the 911 call and arrived at Moore’s location. Officer Corder activated his blue lights and sirens, and the Chevy Malibu took off abruptly at a high speed, spinning tires, driving down a dead-end road. Officer Corder knew that the suspects would have to turn around, so he waited for them to return. The Chevy Malibu turned back and drove directly towards Officer Corder, almost striking his patrol vehicle.

¶ 6           Officer Corder followed the suspects as they turned down another dead-end road. As the Chevy Malibu neared the dead-end, the driver slammed on the brakes and the vehicle slid off onto a muddy grass field. All three men exited the vehicle and ran for a nearby tunnel. Officer Corder saw a black semiautomatic handgun in Defendant’s right hand as he exited the vehicle. Now on foot, Officer Corder chased the three men while yelling for them to stop, but lost sight of them for about 10 seconds after exiting the tunnel.

¶ 7           Corporal Rawls of the Whiteville Police Department pulled up in his vehicle and cut off Defendant while the other two men continued to run. The officers ordered Defendant to get on the ground, and Corporal Rawls handcuffed him. The officers managed to apprehend one additional suspect, Deheem Durant, but were unable to

apprehend the third suspect. Corporal Rawls identified Defendant as the man he arrested but did not see or recover a handgun at the scene.

¶ 8 Right before the start of trial, Defendant’s counsel moved to continue. Defendant argued that he was finally available to review Moore’s videotaped statements that day, and he was previously unable to do so because of a prohibitive work schedule. After viewing the video, Defendant disclosed to counsel for the first time that “We need [Moore’s] wife because his wife has come to my brother and made statements that exculpated me and were impeaching as to this particular witness’s credibility.” The trial court denied Defendant’s motion to continue.

¶ 9 At trial, Defendant testified that he did not rob Moore, did not have a handgun, and was only guilty of running from the police. The officers found \$533 in Defendant’s pocket, but Defendant claimed that money was the pay he received after a job. Defendant stated that he recognized Moore and Bellamy from a few weeks prior to the alleged robbery when he saw them at Sandy Ridge Apartments. Defendant claimed that Moore was looking to buy narcotics, but Defendant did not sell narcotics. Defendant suggested that Moore falsely accused him of the robbery because Moore was unsatisfied with the drugs he purchased and wanted to get his money back, despite Defendant not selling Moore any drugs.

¶ 10 Later, Defendant’s brother, Kapri McMillian (“Kapri”) testified on voir dire that Moore’s wife, Bellamy, had messaged him on Facebook and made exculpatory

statements about Defendant. Kapri claimed that Bellamy said she did not understand why Moore involved the police “because she already knew that [Defendant] didn’t rob [Moore].” Kapri claimed that he could not bring proof of the messages because, due to problems with his child’s mother, he had to change his password several times and create multiple new Facebook accounts. The trial court did not allow Kapri’s testimony to be presented to the jury due to foundational problems and hearsay.

¶ 11 The jury found Defendant guilty as charged. During sentencing, the trial court required Defendant to pay the costs of the action and conferred with defense counsel about fees incurred during Defendant’s court-appointed representation. The trial court did not provide Defendant with notice or an opportunity to be heard on the issue of attorney’s fees. Subsequently, defense counsel submitted an affidavit regarding hours and fees claimed as a court-appointed attorney. After the trial concluded, the trial court entered an *ex parte* civil judgment for \$3,168.75 in attorney’s fees. Defendant appeals.

## II. Discussion

¶ 12 Defendant raises two issues on appeal. First, Defendant contends that the trial court erred by denying his motion for a continuance after he received and reviewed late discovery of Moore’s videotaped statement and the 911 call the morning before trial. Second, Defendant argues that the trial court erred by entering a civil

judgment for attorney's fees without providing him with notice and an opportunity to be heard. We address both of assignments of error, and for the reasons stated below, affirm the trial court's denial of Defendant's motion for a continuance, and vacate and remand on the issue of attorney's fees.

### **A. Motion for a Continuance**

¶ 13 Defendant argues that the trial court erroneously denied his motion to continue before the start of trial. Defendant contends that the prosecution provided him with late discovery, the prosecuting witness Moore's videotaped statement and 911 call made at the time the incident occurred, which he was only able to review for the first time the morning of trial. Consequently, Defendant did not have time to locate or subpoena Moore's wife Bellamy, whom Defendant regarded as a crucial witness in the case against him. Ultimately, Defendant asserts that the trial court's denial of continuance was a constitutional violation because it prevented him from presenting crucial evidence in his defense, forced him to testify on his own behalf, and Bellamy's absence made Kapri's testimony about her exculpatory statements inadmissible. We disagree.

It is, of course, axiomatic that a motion for a continuance is ordinarily addressed to the sound discretion of the trial judge whose ruling thereon is not subject to review absent a gross abuse. It is equally well established, however, that, when such a motion raises a constitutional issue, the trial court's action upon it involves a question of law which is fully reviewable by an examination of the particular

circumstances of each case. Denial of a motion for a continuance, regardless of its nature, is, nevertheless, grounds for a new trial only upon a showing by defendant that the denial was erroneous and that this case was prejudiced thereby.

*State v. Searles*, 304 N.C. 149, 153, 282 S.E.2d 430, 433 (1981) (internal citations omitted).

¶ 14 “The constitutional guarantees of due process, assistance of counsel and confrontation of witnesses unquestionably include the right of a defendant to have a reasonable time to investigate and prepare his case.” *State v. Branch*, 306 N.C. 101, 104, 291 S.E.2d 653, 656 (1982). “[T]he right to face one’s accusers and witnesses with other testimony are guaranteed by the Sixth Amendment to the Federal Constitution which is made applicable to the States by the Fourteenth Amendment, and by Article I, Sections 19 and 23 of the Constitution of North Carolina.” *State v. Cradle*, 281 N.C. 198, 207, 188 S.E.2d 296, 302 (1972). “Hence, the question presented by this assignment is whether the refusal of the trial court to grant defendant’s motion for a continuance impinged upon h[is] constitutional right to confrontation and effective representation by counsel by denying h[im] a reasonable time within which to prepare and present h[is] defense.” *Id.* at 207-08, 188 S.E.2d at 303.

As a general rule, continuances are not favored, and ought not to be granted unless the reasons therefor are fully established. In the nature of things, the ruling on a motion

to continue must be based on matters called to the judge's attention at the hearing of the motion previous to trial on the merits. For this reason, it is desirable that an application for a continuance should be supported by an affidavit showing sufficient grounds for the continuance.

*State v. Gibson*, 229 N.C. 497, 501, 50 S.E.2d 520, 523 (1948) (internal citation omitted).

¶ 15 In this case, the record does not support Defendant's argument that the trial court's denial of his motion for a continuance amounted to a constitutional violation. Counsel for Defendant orally moved for a continuance the morning of trial and explained:

[Defendant] told me for the first time, we need this man's wife because his wife has come to my brother and made statements that exculpated me and were impeaching as to this particular witness's credibility.

Counsel for Defendant was assigned over nine months prior to trial, he received 50 pages of written discovery, and the felony report listed Bellamy as a witness. Apparently, it did not occur to Defendant that Bellamy would be a crucial witness until he reviewed a three-minute video immediately before trial. However, even before reviewing the video, Defendant was on notice that Bellamy was a witness he may wish to consult with about his case.

¶ 16 Defendant made no previous attempt to contact Bellamy, and defense counsel expressed sincere doubt that they could locate her or secure her cooperation.



Additionally, Defendant’s motion for a continuance was not supported by an affidavit and did not describe with any particularity what Bellamy’s testimony would be beyond “exculpatory statements” that would “impeach her own husband and would impeach his credibility.” “The oral motion for continuance is not supported by affidavit or other proof. In fact, the record suggests only a natural reluctance to go to trial . . . [and] [w]e are left with the thought that defense counsel suffered more from lack of a defense than from lack of time.” *Cradle*, 281 N.C. at 208, 188 S.E.2d at 303. Therefore, we find that the trial court’s denial of Defendant’s motion for a continuance did not deprive him of his constitutional rights.

## **B. Attorney’s Fees**

### ***1. Notice of Appeal***

¶ 17 As a preliminary matter, Rule 4(a) of the North Carolina Rules of Appellate Procedure provides that a Defendant “in a criminal action may take appeal by: (1) giving oral notice of appeal at trial, or (2) filing notice of appeal with the clerk of superior court and serving copies thereof upon all adverse parties within fourteen days after entry of the judgment[.]” N.C.R. App. P. 4(a). Here, Defendant gave oral notice of appeal at trial following entry of judgment and preserved his right to appeal the criminal judgment.

¶ 18 However, a judgment for attorney’s fees constitutes a civil judgment that requires additional compliance with Rule 3(a) of the Rules of Appellate Procedure.

*See State v. Smith*, 188 N.C. App. 842, 845, 656 S.E.2d 695, 697 (2008). Rule 3(a) provides:

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 within the time prescribed by subsection (c) of this rule.

N.C.R. App. P. 3(a). This Court is without jurisdiction to address this civil judgment because Defendant failed to give written notice of appeal. *See Smith*, 188 N.C. App. at 846, 656 S.E.2d at 697 (citation omitted). Accordingly, we must dismiss Defendant's appeal from this civil judgment.

## ***2. Petition for Writ of Certiorari***

¶ 19 Defendant acknowledges his failure to comply with the requirements of N.C.R. App. P. 3(a) and filed petition for writ of certiorari. This Court routinely grants certiorari to permit review “when the right to prosecute an appeal has been lost by the failure to take timely action[.]” N.C.R. App. P. Rule 21(a)(1). In our discretion, we allow Defendant's petition and issue the writ of certiorari to permit review of the civil judgment for attorney's fees.

¶ 20 Defendant contends, and the State concedes, that the trial court erred by entering a civil judgment for attorney's fees without providing him with notice and an opportunity to be heard. We agree.

¶ 21 “In certain circumstances, trial courts may enter civil judgments against convicted indigent defendants for the attorneys’ fees incurred by their court-appointed counsel.” *State v. Friend*, 257 N.C. App. 516, 522, 809 S.E.2d 902, 906 (2018) (citing N.C. Gen. Stat. § 7A-455). “[T]rial courts must provide criminal defendants, personally and not through their appointed counsel, with an opportunity to be heard before entering a money judgment under § 7A-455.” *Id.* at 518, 809 S.E.2d at 904.

¶ 22 In the following exchange, the trial court discussed attorney’s fees with defense counsel:

THE COURT: . . . [Defendant] is to reimburse the State of North Carolina for the time that Mr. Lee has invested in this offense, which is –

MR. LEE: I do not have that figure.

THE COURT: Will you present to the Court an affidavit for that?

MR. LEE: I will do that, Your Honor. I can prepare an affidavit. I was working on that when we got called back over, but I’ll have it.

THE COURT: And [Defendant] is also to comply with the restitution worksheet order, in that he pay Mr. Glen Moore \$180. He is to pay the costs of the action.

¶ 23 After the trial proceedings concluded and Defendant was in the custody of the Department of Public Safety, the trial court entered an *ex parte* civil judgment in the amount of \$3,168.75 based on defense counsel’s affidavit.

¶ 24 Pursuant to N.C. Gen. Stat. §7A-455, the trial court is permitted to enter a civil judgment for attorney's fees against a convicted indigent defendant. However, the trial court must ask defendants personally whether they wish to be heard, or there must be some other evidence in the record indicating that Defendant had notice and an opportunity to be heard regarding hours and fees claimed by his court-appointed attorney. *Id.* at 523, 809 S.E.2d at 907. In this case, defense counsel submitted a fee application, but nothing in the record suggests that Defendant had notice of the civil judgment for \$3,168.75 in attorney's fees, or that he made a knowing waiver of his right to be heard. The proper remedy is remand for further proceedings on this issue.

### III. Conclusion

¶ 25 We affirm the trial court's denial of Defendant's motion for a continuance. On the issue of the civil judgment for attorney's fees, we allow Defendant's petition and issue writ of certiorari. The trial court's civil judgment for attorney's fees is vacated, and we remand for further proceedings on this issue.

AFFIRMED IN PART, VACATED IN PART, AND REMANDED.

Chief Judge STROUD and Judge ZACHARY concur.

Report per Rule 30(e).