IN THE COURT OF APPEALS OF NORTH CAROLINA

2021-NCCOA-225

No. COA20-340

Filed 18 May 2021

Davie County, Nos. 17 CRS 52147–49

STATE OF NORTH CAROLINA

v.

KEVIN BENNET CHAUDOIN

Appeal by defendant from judgments entered 12 April 2019, and by writ of certiorari from order entered 11 April 2019, by Judge Joseph N. Crosswhite in Davie County Superior Court. Heard in the Court of Appeals 14 April 2021.

*Attorney General Joshua H. Stein, by Special Deputy Attorney General Gwenda L. Laws, for the State.*

*Appellate Defender Glenn Gerding, by Assistant Appellant Defender Daniel Shatz, for defendant-appellant.*

ZACHARY, Judge.

¶ 1 Defendant Kevin Bennet Chaudoin appeals from judgments entered upon the jury's verdicts finding him guilty of taking indecent liberties with a child, statutory sexual offense with a child 15 years of age or younger, and statutory rape of a child 15 years of age or younger. After careful review, we vacate and remand to the trial court for further proceedings.

## ***Background***

¶ 2 In December of 2017, Defendant lived with Kristina Thompson, their two children, and Thompson's 13-year-old daughter, F.H.[1] Defendant and Thompson had been in a relationship for ten years, and Defendant helped raise F.H., as if he were her father. Then on 11 December 2017, F.H. told her grandmother that Defendant had raped her the previous evening. Her grandmother called Thompson, who came home from work and called the police.

¶ 3 On 12 March 2018, a Davie County grand jury returned true bills of indictment charging Defendant with taking indecent liberties with a child, two counts of statutory sexual offense of a child 15 years of age or younger, and statutory rape of a child 15 years of age or younger. On 10 April 2019, Defendant's case came on for trial before the Honorable Joseph N. Crosswhite in Davie County Superior Court.

¶ 4 On 12 April 2019, the jury returned its verdicts, finding Defendant not guilty of one count of statutory sexual offense of a child 15 years of age or younger, but guilty of the remaining charges. The trial court sentenced Defendant to two consecutive sentences of 276 to 392 months each in the custody of the North Carolina Division of Adult Correction for the statutory rape and sexual offense convictions, followed by a consecutive sentence of 19 to 32 months for the indecent liberties conviction. The trial

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[1] Consistent with the parties' briefs, initials are used to protect the identity of the juvenile.

court also ordered that Defendant register as a sex offender and enroll in satellite-based monitoring for the remainder of his natural life. Defendant gave oral notice of appeal in open court.

## *Discussion*

¶ 5 On appeal, Defendant argues that (1) he received ineffective assistance of counsel when his counsel implicitly admitted his guilt to at least some of the charges against him, (2) the trial court erred in imposing a lifetime satellite-based monitoring order against him, and (3) the trial court erred by imposing duplicative court costs in each judgment. We vacate and remand to the trial court for further proceedings.

### *I.*

¶ 6 Defendant first asserts that his counsel's closing argument to the jury violated his constitutional right to the effective assistance of counsel. We remand to the trial court for further proceedings on Defendant's consent to an implicit admission of guilt.

¶ 7 "A defendant's right to counsel includes the right to the effective assistance of counsel. When a defendant attacks his conviction on the basis that counsel was ineffective, he must show that his counsel's conduct fell below an objective standard of reasonableness." *State v. Braswell*, 312 N.C. 553, 561–62, 324 S.E.2d 241, 247–48 (1985) (citation omitted). In order to establish ineffective assistance of counsel, a defendant must first show "that counsel's performance was deficient. . . . Second, the defendant must show that the deficient performance prejudiced the defense." *Id.* at

562, 324 S.E.2d at 248 (quoting *Strickland v. Washington*, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 693 (1984)).

¶ 8 However, our Supreme Court has held that "when counsel to the surprise of his client admits his client's guilt, the harm is so likely and so apparent that the issue of prejudice need not be addressed." *State v. Harbison*, 315 N.C. 175, 180, 337 S.E.2d 504, 507 (1985), *cert. denied*, 476 U.S. 1123, 90 L. Ed. 2d 672 (1986). "[A] criminal defendant suffers a per se violation of his constitutional right to effective assistance of counsel when his counsel concedes the defendant's guilt to the jury without his prior consent." *State v. McAllister*, 375 N.C. 455, 456, 847 S.E.2d 711, 712 (2020).

¶ 9 Moreover, a *Harbison* violation is not limited to cases in which defense counsel expressly admits to the defendant's guilt of a specific charged offense: "*Harbison* should instead be applied more broadly so as to also encompass situations in which defense counsel *impliedly* concedes his client's guilt without prior authorization." *Id.* at 473, 847 S.E.2d at 722 (emphasis added).

¶ 10 In *McAllister*, the defendant was charged with "(1) habitual misdemeanor assault—based on the underlying offense of assault on a female, (2) assault by strangulation, (3) second-degree sexual offense, and (4) second-degree rape." *Id.* at 458–59, 847 S.E.2d at 714 (footnote omitted). In his closing arguments, the defense counsel referred to statements that the defendant made in a videotaped interview shown to the jury: "You heard him admit that things got physical. You heard him

admit that he did wrong. God knows he did." *Id.* at 473, 847 S.E.2d at 722. Counsel referred to these recorded statements as the defendant "being honest" with law enforcement, and later told the jury: "[W]hat I'm asking you to do is you may dislike Mr. McAllister for injuring Ms. Leonard, that may bother you to your core but he, without a lawyer and in front of two detectives, admitted what he did and only what he did." *Id.* at 473–74, 847 S.E.2d at 722.

¶ 11 Our Supreme Court determined that defense counsel implicitly admitted to his client's guilt of the charge of assault on a female in an attempt to avoid the defendant's conviction of the remaining charges, which "carried penalties significantly greater than that for the crime of assault on a female." *Id.* at 472–73, 847 S.E.2d at 722. Indeed, "at the very end of his closing argument, defense counsel asked the jury to find [the] defendant not guilty of every offense for which he had been charged *except for the assault on a female offense*." *Id.* at 474, 847 S.E.2d at 723 (emphasis added). Nonetheless, "under *Harbison* and its progeny defense counsel was required to obtain the informed consent of [the] defendant before embarking on such a strategy that implicitly acknowledged to the jury his guilt of a separately charged offense." *Id.* at 475, 847 S.E.2d at 723–24. Accordingly, the case was remanded to the trial court for an evidentiary hearing as to whether the defendant "knowingly consented in advance to his attorney's admission of guilt to the assault on a female charge." *Id.* at 477, 847 S.E.2d at 725.

¶ 12 Here, relying on *Harbison* as applied by *McAllister*, Defendant argues that his counsel implicitly admitted his guilt "to at least some of the charges against him" in his closing argument to the jury. There were four charges against Defendant: taking indecent liberties with a child, two counts of statutory sexual offense with a child 15 years of age or younger (one alleging cunnilingus and one alleging object penetration), and statutory rape of a child 15 years of age or younger. And as was the case in *McAllister*, defense counsel appeared to defend against the most serious charges by implicitly conceding at least one of the lesser charges.

¶ 13 Toward the beginning of his closing argument, defense counsel told the jury: "Something bad happened. I can't sugarcoat it. I can't avoid it. I can't dismiss it. You know, it is what it is. Something bad happened." Counsel then focused on the gravity of the consequences that Defendant faced, describing the possible sentencing range if the jury convicted him of all four charges. Defense counsel told the jury:

> And now his life hangs in the balance, literally. With this kind of time, he could die in prison. I would submit even with just that time, he may well die in prison. And don't misunderstand any of this. I know [F.H.] is dealing with some serious consequences too. I'm not trying to dismiss that. But you're tasked with determining what the judge gets. Does he get four guilties? Does he get three guilties? Two guilties? One guilty? That's going to play a huge role in this matter.

Notably, counsel did not suggest that the jury could also return "no guilties." And counsel concluded by arguing:

> The point is he's not a monster. He's a man. He's in an impossible situation. And for all the good things that he did with his life and for what was something that took place, according to the State, for not a long time, this is -- this is what he's looking at. And there's no doubt that *if the jury returns four guilties, there's no doubt this man has the possibility of dying in prison.*
>
> *I'd ask you to consider doing something less than that* to signal to the judge that [Defendant] can have some reason to hope, some reason to think that if he suffers through this personal hell, just like [F.H.] will have to -- or get through her own personal hell, that maybe, maybe on the other side, he can get out and he can reunite.

(Emphasis added). The State objected and moved to strike these concluding remarks, and the trial court sustained the objection, instructing the jury to disregard them.

¶ 14 At other points in the closing argument, defense counsel raised the possibility that, because F.H. "had no previous sexual activity[,]" it was "a fair question" as to whether she would be able to distinguish digital penetration from cunnilingus from intercourse by feel alone. These arguments suggest that, as a defense to the charges of statutory rape and statutory sexual offense (cunnilingus), defense counsel was implicitly conceding Defendant's guilt to the charge of statutory sexual offense (object penetration).

¶ 15 The State contends that defense counsel did not commit a *Harbison* violation because he did not specifically admit that Defendant committed the alleged offenses; rather, counsel merely acknowledged that "[s]omething bad happened" to F.H. in

order to engender credibility with the jury in light of the State's overwhelming evidence. As regards the charge of statutory sexual offense (object penetration), the State argues that defense counsel did not concede that charge's element of acting "for the purpose of arousing or satisfying sexual desire."

¶ 16 However, our Supreme Court in *McAllister* cautioned against viewing *Harbison* claims through such a formalistic, element-based lens:

> The Court of Appeals majority applied an overly strict interpretation of *Harbison* here by confining its analysis to (1) whether defense counsel had expressly conceded [the] defendant's guilt of the assault on a female charge; or (2) whether counsel's statements "checked the box" as to each element of the offense. We believe, however, that such an approach reflects too cramped of a construction of *Harbison*.

*Id.* at 475, 847 S.E.2d at 723 (footnote omitted).

¶ 17 Defendant raises a colorable *Harbison* claim with regard to the issue of whether his counsel implicitly admitted his guilt to at least one of the charged offenses. However, a successful *Harbison* claim also requires that defense counsel admit to the defendant's guilt "without [the defendant's] prior consent." *Id.* at 477, 847 S.E.2d at 724. While our Supreme Court has stated "that an on-the-record exchange between the trial court and the defendant is the preferred method of determining whether the defendant knowingly and voluntarily consented to an admission of guilt during closing argument," it has "also declined to define such a

colloquy as the sole measurement of consent." *Id.* (citations and internal quotation marks omitted). Moreover, our appellate courts "will not presume from a silent record that defense counsel argued defendant's guilt without defendant's consent." *Id.* at 477, 847 S.E.2d at 725 (citation omitted).

¶ 18 In this case, the court did not conduct a *Harbison* colloquy, either before or after defense counsel's argument. Despite this, Defendant maintains that the record is not silent on the issue of consent, and instead reflects that he did not knowingly and voluntarily consent to his counsel's implicit admission of guilt to any charge. During the charge conference, defense counsel stated that Defendant was "adamantly opposed to the B1 charge." Defendant asserts that, because both statutory rape and statutory sexual offense are Class B1 felonies, N.C. Gen. Stat. §§ 14-27.25(a), -27.30(a), this statement establishes that he did not consent to his counsel's implicit admission of guilt.

¶ 19 However, at the charge conference, defense counsel also requested that the trial court instruct the jury on a Class E felony—sexual activity by a substitute parent or custodian under N.C. Gen. Stat. § 14-27.31—with which Defendant had not been charged, and which was not a lesser-included offense of any charge that he faced. Although the trial court declined to instruct the jury on that uncharged offense, in requesting that instruction, defense counsel plainly stated that Defendant was "ready, willing and able to accept all day long a finding of guilt. He would make an

admission of guilt to the Class E felony. I don't know how else to say it." The record is thus ambiguous on this issue, such that Defendant has not clearly established that he did not knowingly and voluntarily consent to his counsel's implicit admission of guilt to at least one of the charged offenses.

¶ 20 Consistent with *McAllister*, "the appropriate remedy is to remand this case . . . for an evidentiary hearing to be held as soon as practicable for the sole purpose of determining whether [D]efendant knowingly consented in advance to his attorney's admission of guilt" to any of the charged offenses. 375 N.C. at 477, 847 S.E.2d at 725. "Following the evidentiary hearing, the trial court shall expeditiously make findings of fact and conclusions of law and enter an order." *Id.*

***II.***

¶ 21 Defendant next argues that the trial court erred by ordering lifetime satellite-based monitoring of Defendant "because the State failed to present evidence that lifetime [satellite-based monitoring] of [Defendant] is a constitutionally reasonable search[.]" In response, the State "takes no position at this time." We conclude that Defendant's argument has merit.

¶ 22 As a threshold issue, Defendant acknowledges that his counsel neither objected to the imposition of the satellite-based monitoring order nor filed a written notice of appeal from the satellite-based monitoring order. Written notice of appeal from a satellite-based monitoring order is required to preserve issues for appellate review

because satellite-based monitoring "hearings and proceedings are not criminal actions, but are instead a civil regulatory scheme." *State v. Brooks*, 204 N.C. App. 193, 194, 693 S.E.2d 204, 206 (2010) (citation and internal quotation marks omitted). "While oral notice of appeal is proper in criminal actions, as permitted under N.C.R. App. P. 4(a)(1), oral notice of appeal is insufficient to confer jurisdiction on this Court in civil proceedings." *Id.*; *see also* N.C.R. App. P. 3(a).

¶ 23 Accordingly, Defendant has filed a petition for writ of certiorari seeking review of the satellite-based monitoring order. "This Court has discretion to allow a petition for a writ of certiorari to permit review of the judgments and orders of trial tribunals when the right to prosecute an appeal has been lost by failure to take timely action." *State v. Bishop*, 255 N.C. App. 767, 769, 805 S.E.2d 367, 369 (2017) (citation and internal quotation marks omitted), *disc. review denied*, 370 N.C. 695, 811 S.E.2d 159 (2018); *see also* N.C.R. App. P. 21(a). "[A] petition for the writ must show merit or that error was probably committed below." *Bishop*, 255 N.C. App. at 769, 805 S.E.2d at 369 (citation omitted). In its response to Defendant's petition, and in its brief to this Court, the State specifically declines to take a position. In our discretion, and in light of the merit shown as discussed below, we allow Defendant's petition.

¶ 24 Allowing Defendant's petition confers jurisdiction upon this Court. However, because defense counsel failed to object to the imposition of the satellite-based monitoring order, this issue was not preserved for our review. *See* N.C.R. App. P.

10(a)(1). Defendant thus also asks us to invoke Appellate Rule 2 in order to review his unpreserved argument.

¶ 25 "On its own motion or the motion of a party, an appellate court of North Carolina may employ Rule 2 and suspend any part of the appellate rules 'to prevent manifest injustice to a party, or to expedite decision in the public interest' except when prohibited by other Rules of Appellate Procedure." *State v. Bursell*, 372 N.C. 196, 200, 827 S.E.2d 302, 305 (2019) (quoting N.C.R. App. P. 2). "Rule 2 must be applied cautiously, and it may only be invoked in exceptional circumstances. A court should consider whether invoking Rule 2 is appropriate in light of the specific circumstances of individual cases and parties, such as whether substantial rights of an appellant are affected." *Id.* (citations and internal quotation marks omitted).

¶ 26 The imposition of satellite-based monitoring implicates such a "substantial right"—namely, the right to be free from unreasonable searches protected by the Fourth Amendment to the United States Constitution. *Id.* at 201, 827 S.E.2d at 305; *see also State v. Grady* ("*Grady III*"), 372 N.C. 509, 510, 831 S.E.2d 542, 546 (2019). Moreover, the invocation of Rule 2 is appropriate here, where the State lodges no objection and well-established precedent has not been followed.

¶ 27 When considering the reasonableness of subjecting a defendant to satellite-based monitoring, the court must examine the totality of the circumstances to determine "whether the warrantless, suspicionless search here is reasonable when

'its intrusion on the individual's Fourth Amendment interests' is balanced 'against its promotion of legitimate governmental interests.' " *Grady III*, 372 N.C. at 527, 831 S.E.2d at 557 (quoting *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 652–53, 132 L. Ed. 2d 564, 574 (1995)).

¶ 28 In the instant case, the trial court did not conduct a full satellite-based monitoring hearing or examine the reasonableness of subjecting Defendant to lifetime satellite-based monitoring. The extent of the hearing below occurred at the conclusion of sentencing, after the trial court ordered that Defendant register as a sex offender for the remainder of his natural life upon his release from prison:

> [THE STATE]: Thank you, Your Honor. And then the second portion would be the satellite[-]based monitoring that's required under the statute.
>
> THE COURT: Yes, sir. And we will find that, as well, okay?
>
> [THE STATE]: Yes, sir. Thank you.
>
> THE COURT: Thank you guys very much.

¶ 29 Pursuant to our Supreme Court's opinion in *Bursell*, because there was no hearing or examination of the reasonableness of subjecting Defendant to satellite-based monitoring, our proper remedy is "to vacate the trial court's [satellite-based monitoring] order without prejudice to the State's ability to file another application" for satellite-based monitoring. *Bursell*, 372 N.C. at 201, 827 S.E.2d at 306.

## *III.*

¶ 30 Finally, Defendant argues that the trial court erred by imposing duplicative court costs in the judgments. The State concedes error.

¶ 31 "The applicable statute authorizes court costs 'in every criminal case' in which the defendant is convicted." *State v. Rieger*, 267 N.C. App. 647, 648, 833 S.E.2d 699, 700 (2019) (quoting N.C. Gen. Stat. § 7A-304(a)). In *Rieger*, this Court held that "when multiple criminal charges arise from the same underlying event or transaction and are adjudicated together in the same hearing or trial, they are part of a single 'criminal case' for purposes of the costs statute." *Id.*

¶ 32 Here, the trial court entered three judgments, each for a single conviction. The charged offenses "ar[o]se from the same underlying event," and were adjudicated in the same trial. In accordance with the Court's decision in *Rieger*, the three charges constituted a single criminal case, for which the trial court could assess Defendant with costs but once. Accordingly, we vacate the imposition of duplicative costs in two of the three judgments against Defendant.

## ***Conclusion***

¶ 33 For the foregoing reasons, we remand to the trial court for a hearing on Defendant's *Harbison* claim, as instructed above. We vacate the trial court's satellite-based monitoring order without prejudice to the State's ability to file another application for satellite-based monitoring. Lastly, we vacate the judgments in 17 CRS 52147–48 and remand for entry of new judgments that do not include the costs

assessed against Defendant in 17 CRS 52149.

VACATED IN PART AND REMANDED.

Judges DIETZ and HAMPSON concur.

Report per Rule 30(e).