IN THE COURT OF APPEALS OF NORTH CAROLINA

2021-NCCOA-224

No. COA20-312

Filed 18 May 2021

Richmond County, Nos. 19 CRS 000537, 050658

STATE OF NORTH CAROLINA

v.

QUINTIN CALLOWAY, Defendant.

Appeal by Defendant from judgment entered 6 November 2019 by Judge Stephan R. Futrell in Richmond County Superior Court. Heard in the Court of Appeals 23 February 2021.

Attorney General Joshua H. Stein, by Assistant Attorney General Nicholas R. Sanders, for the State.

Richard J. Costanza for defendant-appellant.

MURPHY, Judge.

¶ 1 A motion to dismiss is properly denied when there is substantial evidence supporting all elements of the charged offense. Here, the State presented sufficient evidence Defendant possessed a firearm to support submitting the charge of possession of a firearm by a felon to the jury.

¶ 2 Additionally, a defendant is entitled to notice and an opportunity to be heard before attorney fees can be entered against the defendant in a civil judgment. Here, the Record reveals the trial court did not provide Defendant with notice of the total attorney fees or an opportunity to be heard on the issue. Accordingly, we vacate the civil judgment entered against Defendant for attorney fees and remand for further proceedings on this issue.

BACKGROUND

¶ 3 On 14 March 2019, Officer Corey Wilson ("Officer Wilson") was on patrol when an individual approached him and stated a vehicle at a nearby gas station smelled of marijuana. Officer Wilson spotted the vehicle and noticed two males seated inside the vehicle, who were later identified as Defendant Quintin Calloway and Winfred Dawkins. Officer Wilson followed the vehicle from the gas station and was told by dispatch that the registered owner of the vehicle, Dawkins, had a suspended license.

¶ 4 After confirming Dawkins was the driver of the vehicle, Officer Wilson planned to pull over the men, but, before he was able to do so, the vehicle turned into the driveway of a residence. Officer Wilson then pulled up behind the vehicle and activated his lights. According to Officer Wilson, as it was nighttime, the only light came from his vehicle headlights, vehicle blue lights, and possibly a front porch light from the house. While Officer Wilson was parking, Defendant and Dawkins exited the vehicle with their hands in their pockets, and began walking toward Officer

Wilson. Officer Wilson exited the vehicle with his service weapon drawn and told the two men to "show [] their hands." Defendant and Dawkins ignored Officer Wilson's instruction and continued walking toward him. Officer Wilson again told them to "show [] [their] hands[.]" After this repeated request, Defendant and Dawkins ran toward the backyard of the residence.

¶ 5 Officer Wilson began chasing both men, and observed Defendant running with his hands in his pockets, and Dawkins running, "flailing his hands[.]" After about twenty yards, the men began running in different directions. Officer Wilson noticed Dawkins "circling back around the back of the residence[,]" and focused on Defendant as he headed toward a heavily wooded corner in the property with his hands still in his pockets. Once Defendant reached the end of the property covered by trees, Officer Wilson "saw a flash and . . . heard a pop[,]" which he believed was a gunshot. Officer Wilson ran back to his vehicle, notified dispatch "shots were fired," and waited for other officers to arrive on the scene. During a search of the property and the vehicle, Defendant's driver's license and a sandal were found; however, no firearms or shell casings were discovered.

¶ 6 Defendant was indicted for possession of a firearm by a felon, resisting a public officer, and assault on a law enforcement officer with a firearm. At trial, Officer Wilson described his experience with firearm training during his time as a police officer. He testified, without objection, the popping "sounded like a gunshot[,]" and

the flash was a muzzle flash. At the close of the State's evidence, Defendant moved to dismiss the assault on a law enforcement officer with a firearm charge based on insufficiency of the evidence, then made "a motion to dismiss all the other matters[,]" both of which were denied.

¶ 7 Defendant was found guilty of possession of a firearm by a felon, and resisting a public officer; the jury found him not guilty of assault on a law enforcement officer with a firearm. The trial court consolidated the matters and sentenced Defendant to an active term of 19 to 32 months. At sentencing, defense counsel was asked how much time he had spent representing Defendant. Defense counsel responded, "I'm going to have to submit an affidavit to the Court. It's substantial. It's probably north of 30." The exact amount of attorney fees Defendant owed was not determined at sentencing and a civil judgment imposing $3,420.00 against Defendant was entered the following day outside Defendant's presence.

¶ 8 Defendant appeals his conviction of possession of a firearm by a felon, arguing the trial court erred in denying his motion to dismiss for insufficiency of the evidence. Defendant also appeals the trial court's civil judgment assessing attorney fees against him; however, Defendant failed to timely appeal this civil judgment, and seeks review of this issue through a Petition for Writ of Certiorari.

ANALYSIS

A. Defendant's Motion to Dismiss

¶ 9 Defendant argues the trial court erred in denying his motion to dismiss the possession of a firearm by a felon charge based on the insufficiency of the evidence because the State's evidence merely created a suspicion Defendant possessed a firearm.

> This Court reviews the trial court's denial of a motion to dismiss *de novo*." *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007). Upon [the] defendant's motion for dismissal, the question for [us] is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of [the] defendant's being the perpetrator of such offense. If so, the motion is properly denied.

State v. Fritsch, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (quoting *State v. Barnes*, 334 N.C. 67, 75, 430 S.E.2d 914, 918 (1993)), *cert. denied*, 531 U.S. 890, 148 L. Ed. 2d 150 (2000). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980). "When ruling on a motion to dismiss, the trial court should be concerned only about whether the evidence is sufficient for jury consideration, not about the weight of the evidence." *State v. Scott*, 356 N.C. 591, 596-97, 573 S.E.2d 866, 869 (2002).

¶ 10 "In reviewing challenges to the sufficiency of evidence, we must view the evidence in the light most favorable to the State, giving the State the benefit of all reasonable inferences. Contradictions and discrepancies do not warrant dismissal of

the case but are for the jury to resolve." *Id.* at 596, 573 S.E.2d at 869 (2002) (citation omitted).

> If the evidence "is sufficient only to raise a suspicion or conjecture as to either the commission of the offense or the identity of the defendant as the perpetrator of it, the motion for nonsuit should be allowed. This is true even though the suspicion so aroused by the evidence is strong."

State v. Battle, 253 N.C. App. 141, 144-45, 799 S.E.2d 434, 437 (quoting *In re Vinson*, 298 N.C. 640, 656-57, 260 S.E.2d 591, 602 (1979)), *disc. rev. denied*, 369 N.C. 756, 799 S.E.2d 872 (2017).

¶ 11 "To convict [a] [d]efendant of felonious possession of a firearm by a felon, the State must prove: (1) [the] [d]efendant was previously convicted of a felony; and (2) the [d]efendant thereafter possessed a firearm." *Id.* at 144, 799 S.E.2d at 437; *see also* N.C.G.S. § 14-415.1 (2019). In this case, Defendant only challenges whether he actually possessed a firearm, as the parties agreed Defendant was a convicted felon through a stipulation at trial. "Actual possession requires that a party have physical or personal custody of the item." *State v. Chevallier*, 264 N.C. App. 204, 215, 824 S.E.2d 440, 449 (2019). Defendant's argument focuses on whether he physically possessed a firearm, or, more accurately, whether what he possessed was a firearm.

¶ 12 While we note this case is close, "a reasonable mind might accept" Defendant possessed a firearm given the circumstantial evidence presented at trial. *Smith*, 300 N.C. at 78, 265 S.E.2d at 169. Here, Officer Wilson's testimony, viewed in the light

most favorable to the State, provided substantial evidence to submit the issue to the jury. Officer Wilson's testimony showed Defendant exited the vehicle with his hands in his pockets. As Defendant approached, Officer Wilson repeatedly instructed him to show his hands. Rather than comply, Defendant kept his hands in his pockets and ran away from Officer Wilson. Defendant then ran toward the back of the property where Officer Wilson continued to "keep [an] eye on [Defendant]." Officer Wilson watched Defendant enter a wooded area, then "saw a flash and . . . heard a pop[]" that he identified as a muzzle flash and gunshot. This testimony by Officer Wilson was given without objection. Officer Wilson's testimony that the "flash and pop" were a muzzle flash and gunshot provided a sufficient link between Defendant and a firearm to allow the jury to consider Defendant possessed a firearm.

¶ 13 Taken together, this circumstantial evidence was substantial evidence rising beyond a suspicion that the item Defendant possessed was a firearm. Accordingly, there was substantial evidence of every element of felonious possession of a firearm by a felon and the trial court properly denied Defendant's motion to dismiss.

B. Defendant's Petition for Writ of Certiorari

¶ 14 Defendant seeks review of the civil judgment imposing attorney fees against him. Defendant acknowledges his appeal of the civil judgment is untimely for failure to file written notice of appeal, but petitions us for a writ of certiorari to review this issue. *See* N.C. R. App. P. 3(a) (2021) ("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 . . . .").

¶ 15 "[A] writ of certiorari may be issued in appropriate circumstances by either appellate court 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 . . . ." N.C. R. App. P. 21(a)(1) (2021). "*Certiorari* is a discretionary writ, to be issued only for good and sufficient cause shown." *State v. Grundler*, 251 N.C. 177, 189, 111 S.E.2d 1, 9 (1959), *cert. denied*, 362 U.S. 917, 4 L. Ed. 2d 738 (1960). "A petition for the writ [of certiorari] must show merit or that error was probably committed below." *Id.* "It is less common for this Court to allow a petition for a writ of certiorari where a litigant failed to timely appeal a civil judgment." *Friend*, 257 N.C. App. at 519, 809 S.E.2d at 905. However, we have held "[a] criminal defendant may file a petition for a writ of certiorari to appeal a civil judgment for attorney[] fees and costs." *State v. Mayo*, 263 N.C. App. 546, 549, 823 S.E.2d 656, 659 (2019) (citing *State v. Friend*, 257 N.C. App. 516, 519, 809 S.E.2d 902, 905 (2018)).

¶ 16 Here, Defendant argues, and the State concedes, error was committed below. Specifically, the Record provides Defendant was not given notice or an opportunity to be heard regarding attorney fees entered pursuant to N.C.G.S. § 7A-455. In our discretion, and based on the facts of this case alone, we allow Defendant's Petition for Writ of Certiorari.

¶ 17 "[T]rial courts may enter civil judgments against convicted indigent defendants for the attorney[] fees incurred by their court-appointed counsel." *Friend*, 257 N.C. App. at 522, 809 S.E.2d at 906 (citing N.C.G.S. § 7A-455). However, "[b]efore imposing a judgment for these attorney[] fees, the trial court must afford the defendant notice and an opportunity to be heard." *Id*. In *Friend*, we held:

> [B]efore entering money judgments against indigent defendants for fees imposed by their court-appointed counsel under [N.C.G.S.] § 7A-455, trial courts should ask defendants—personally, not through counsel—whether they wish to be heard on the issue. 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. at 523, 809 S.E.2d at 907.

¶ 18 In this case, the only conversation within the Record regarding attorney[] fees was as follows:

> THE COURT: Do you know how much time you have in this matter?
>
> [DEFENSE COUNSEL]: I'm going to have to submit an affidavit to the Court. It's substantial. It's probably north of 30.
>
> THE COURT: All right. The attorney[] fees will be taxed as part of the court costs. The court costs are taxed to [Defendant]. Given [Defendant's] position, does the State take a position as to whether that should be converted to a money judgment?

> [THE STATE]: The State doesn't take any position on that, Your Honor.
>
> . . .
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> THE COURT: I will order that the court costs be converted to a money judgment. And the court costs would include the attorney[] fees. [Defense counsel] will submit his affidavit of attorney[] fees for his time. And I'll review and make sure that it's in order.

The following day, a civil judgment was entered against Defendant for $3,420.00. The Record is silent as to whether Defendant was notified by the trial court regarding defense counsel's total hours or given an opportunity to be heard on the matter. Accordingly, we vacate the civil judgment for attorney fees and remand to the trial court for hearing on the issue of attorney fees. *See Mayo*, 263 N.C. App. at 550, 823 S.E.2d at 659 (vacating and remanding to the trial court the defendant's civil judgment imposing attorney fees).

CONCLUSION

¶ 19 The trial court did not err by denying Defendant's motion to dismiss. Viewing the evidence in the light most favorable to the State, the evidence of Defendant's possession of a firearm rose past a suspicion and was sufficient to permit submitting the issue to the jury. However, we vacate the civil judgment entered against Defendant for attorney fees and remand for further proceedings on this issue as Defendant did not receive notice or have an opportunity to be heard.

NO ERROR IN PART; VACATED AND REMANDED IN PART.

Chief Judge STROUD and Judge GRIFFIN concur.

Report per Rule 30(e).