IN THE COURT OF APPEALS OF NORTH CAROLINA

2021-NCCOA-441

No. COA19-1157

Filed 17 August 2021

Wilson County, Nos. 15 CRS 50196, 50200, 50247, 50473

STATE OF NORTH CAROLINA

v.

JIMMY LEE FORTE, JR.

Appeal by defendant from judgments entered 16 May 2019 by Judge Walter H. Godwin, Jr., in Wilson County Superior Court. Heard in the Court of Appeals 8 June 2021.

Attorney General Joshua H. Stein, by Assistant Attorney General Robert C. Ennis, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Andrew DeSimone, for defendant.

DIETZ, Judge.

¶ 1 Defendant Jimmy Lee Forte, Jr. appeals several criminal judgments entered against him. He contends that the trial court abused its discretion by ordering his sentences to run consecutively. Forte also challenges various court costs, fees, and attorneys' fees in the judgments.

¶ 2 As explained below, we find no error in the trial court's judgments sentencing

Forte to consecutive sentences. With respect to the costs and fees, we vacate the court costs imposed in File No. 15 CRS 50247, vacate the failure to comply fee in File No. 15 CRS 50200, and vacate the money judgment for attorneys' fees, to the extent that judgment was entered, and remand for further proceedings.

Facts and Procedural History

¶ 3 In 2016, Defendant Jimmy Lee Forte, Jr. was convicted of two counts of breaking and entering, two counts of larceny after breaking and entering, multiple counts of larceny of a firearm, possession of a firearm by a felon, breaking and entering a motor vehicle, misdemeanor larceny, and attaining habitual felon status. The trial court consolidated the various charges into four judgments, sentencing Forte to three consecutive prison terms and one concurrent term. Forte appealed to this Court.

¶ 4 In 2018, this Court filed an opinion vacating all but one of the counts of felony larceny of a firearm, vacating the habitual felon conviction, and remanding for resentencing on the remaining convictions. *See State v. Forte*, 260 N.C. App. 245, 817 S.E.2d 764, *disc. rev. allowed and remanded*, 371 N.C. 779, 822 S.E.2d 701 (2018). The State petitioned for review in the Supreme Court. The Supreme Court allowed the petition and remanded the case to this Court for reconsideration of Forte's challenge to the habitual felon indictment. *See State v. Forte*, 371 N.C. 779, 822 S.E.2d 701 (2018).

¶ 5 In 2019, this Court then filed a new opinion holding that there was no error as to the habitual felon issue. We again vacated all but one count of felony larceny of a firearm and remanded the case for resentencing. *See State v. Forte*, 263 N.C. App. 710, 822 S.E.2d. 794, 2019 WL 438413, at *5 (2019) (unpublished).

¶ 6 On 15 May 2019, the trial court held a resentencing hearing. The parties presented competing arguments at resentencing. Forte's counsel argued that the resentencing "is a new ball game" and asked the trial court to impose a lesser total sentence on Forte, asserting to the court that it "can do whatever you want. You can habitualize on one of the judgments and sentence him on the others, not habitualize. You can consolidate. You can do whatever you think is fair and just." Among other arguments, Forte's counsel asked the trial court to consider concurrent sentences.

¶ 7 The State then countered that the trial court should impose "the same sentences" that the court imposed in 2016. The State noted that, at the initial sentencing, the trial court "took into account many of these factors and rejected many of these arguments" from Forte and that, even in his initial sentencing, "the court has shown great restraint in giving him really what amounts to a fairly lenient sentence compared to what he could have got."

¶ 8 The trial court stated that it reviewed the court file and considered the parties' arguments and then resentenced Forte for the remaining convictions. In File No. 15 CRS 50200, the court consolidated Forte's convictions for breaking and entering and

larceny after breaking and entering and imposed a sentence of 84 to 113 months in prison. In File No. 15 CRS 50247, the court entered judgment for possession of a firearm by a felon and stated Forte "is hereby sentenced to not less than 84, not more than 113 months *to run at the expiration of the prior sentence pursuant to law*." (Emphasis added). In File No. 15 CRS 50196, the court consolidated Forte's convictions for breaking and entering and larceny after breaking and entering and imposed a sentence of 84 to 113 months in prison. In File No. 15 CRS 50473, the court entered a judgment for breaking and entering a motor vehicle, sentencing Forte to 33 to 52 months in prison "*pursuant to law to run at the expiration of that prior sentence*." (Emphasis added). For Forte's conviction for misdemeanor larceny in File No. 15 CRS 50473, the court entered a judgment sentencing him to 120 days in the Misdemeanant Confinement Program, ordered to run concurrently with the sentence in File No. 15 CRS 50196.

¶ 9 The following day, the trial court held a hearing on the State's request for clarification of the judgments. The State asked the court whether the sentence imposed in File No. 15 CRS 50196 was concurrent or consecutive. The trial court clarified that it intended for that sentence to run consecutively at the expiration of the sentence in File No. 15 CRS 50247. Forte gave oral notice of appeal following his resentencing and also filed a timely *pro se* written notice of appeal from the "judgments and sentences" which, although defective in several ways, was sufficient

to confer appellate jurisdiction on this Court.

Analysis

I. Challenge to consecutive sentences

¶ 10 Forte first argues that the trial court abused its discretion by ordering his first two sentences to run consecutively. Forte contends that, when the court indicated that those sentences would run at the expiration of the previous sentence "pursuant to law," the court must have believed it was *required* to impose consecutive sentences and thus was acting under a misapprehension of the law. We reject this argument.

¶ 11 Under N.C. Gen. Stat. § 15A-1354(a), when "multiple sentences of imprisonment are imposed on a person at the same time . . . the sentences may run either concurrently or consecutively, as determined by the court." "[T]he trial court may exercise its discretion in determining whether to impose concurrent or consecutive sentences." *State v. Duffie*, 241 N.C. App. 88, 96–97, 772 S.E.2d 100, 107 (2015).

¶ 12 This Court applies a presumption that the trial court "knows and follows the applicable law unless an appellant shows otherwise." *State v. Jones*, 260 N.C. App. 104, 108–09, 816 S.E.2d 921, 924 (2018). But this presumption can be overcome by evidence in the record that the trial court did not properly understand the law. When "a trial judge acts under a misapprehension of law, this constitutes an abuse of discretion." *State v. Nunez*, 204 N.C. App. 164, 170, 693 S.E.2d 223, 227 (2010). Thus,

if "the trial court erroneously believed that it was mandated by law to impose consecutive sentences," that is *per se* abuse of discretion. *Id.*

¶ 13 Here, there is no evidence in the record to rebut the presumption that the trial court properly applied the law and exercised its sound discretion. To be sure, as Forte points out, during the resentencing hearing the trial court used the words "pursuant to law" when imposing the consecutive sentences. But that is an accurate statement of the law: the law gives a trial court discretion to impose consecutive sentences if the court chooses to do so. N.C. Gen. Stat. § 15A-1354(a).

¶ 14 Considering the trial court's statement in context, the court understood it had discretion to impose consecutive or concurrent sentences and properly exercised that discretion when it ordered consecutive sentences in this case. First, the parties addressed this issue in their sentencing arguments and Forte asked the court to impose concurrent sentences. The State, by contrast, argued that Forte's position at resentencing was no different from his position at the initial sentencing and that the court should enter the same sentences as before. The trial court, before announcing its resentencing decision, stated that it was making its decision "after considering arguments of Counsel for both sides" and "review of the file." Finally, the next day, the parties asked the trial court to clarify whether one of its sentences was to run concurrently or consecutively. The trial court responded that "it's the intent of the Court" that the first four sentences were to run consecutively and that the fifth was

to run concurrently with the fourth.

¶ 15 In *State v. Nunez*, this Court held that the trial court acted under a misapprehension of law and abused its discretion where both the State and defense counsel asserted that "the trial court was required as a matter of law to run the two sentences consecutively to each other" and the trial court accepted that assertion, stating that the sentences would run consecutively "as required by law." 204 N.C. App. at 169–70, 693 S.E.2d at 227. This case is readily distinguishable. Here, the parties separately argued for consecutive and concurrent sentences, and neither party suggested that the court was required to impose one or the other. We thus hold that Forte has not overcome the presumption that the trial court understood the law and properly exercised its discretion, pursuant to law, to impose consecutive rather than concurrent sentences. Accordingly, we find no abuse of discretion in the trial court's decision to impose consecutive sentences.

II. Duplicative court costs

¶ 16 Forte next argues that the trial court erred by assessing the same court costs as part of two separate criminal judgments in File Nos. 15 CRS 50200 and 15 CRS 50247. Forte contends that, although the court entered two separate judgments, those judgments were part of the same criminal case and thus the trial erred by entering duplicative court costs. The State concedes error and we agree.

¶ 17 In *State v. Rieger*, this Court held that "[w]hen 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 N.C. Gen. Stat. § 7A-304." 267 N.C. App. 647, 652–53, 833 S.E.2d 699, 703 (2019). Thus, "the trial court may assess costs only once, even if the case involves multiple charges that result in multiple, separate judgments." *Id.* at 653, 833 S.E.2d at 703.

¶ 18 Here, the State concedes that the two judgments stem from the same underlying event or transaction concerning an initial break-in and, as a result of the investigation of that break-in, the discovery of stolen firearms in Forte's possession. Thus, the State concedes that, under *Rieger*, the trial court could impose only a single judgment for costs. We agree with the parties that *Rieger* is controlling and we therefore vacate the imposition of costs in the judgment in File No. 15 CRS 50247.

III. Civil judgment for court-appointed attorneys' fees

¶ 19 Forte next argues that the trial court failed to give him notice and an opportunity to be heard before entering a money judgment against him for his court-appointed counsel's fees. As explained below, we vacate that judgment and remand for further proceedings.

¶ 20 In *State v. Friend*, this Court held that before imposing a judgment for the attorneys' fees of a defendant's court-appointed counsel, "the trial court must afford the defendant notice and an opportunity to be heard." 257 N.C. App. 516, 522, 809 S.E.2d 902, 906 (2018). To afford the necessary opportunity to be heard, "trial courts

should ask defendants—personally, not through counsel—whether they wish to be heard on the issue." *Id.* 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.*

¶ 21 Here, the State does not dispute that the trial court never engaged in the colloquy required by *Friend* before entering the money judgment for attorneys' fees. But the State contends that the judgment form in which the trial court directed the money judgment to be entered "bears no official stamp or other indication that it was filed of record and, therefore, that it was entered." We are unable to discern from the record whether that judgment was entered and we therefore remand this issue for further proceedings. To the extent that the judgment was entered, we vacate it. If the judgment is not yet entered, we instruct the trial court not to enter it until Forte is given notice and the opportunity to be heard on this issue as required by *Friend*.

IV. Failure to comply fee

¶ 22 Finally, Forte argues that the trial court erred by ordering him to pay a $50.00 failure to comply fee that is not supported by the record. The State concedes error and we agree.

¶ 23 This Court reviews the trial court's order to determine whether it was

"supported by evidence adduced at trial or at sentencing." *State v. Shelton*, 167 N.C. App. 225, 233, 605 S.E.2d 228, 233 (2004). Under N.C. Gen. Stat. § 7A-304(a)(6), a $50 failure to comply fee "is payable by a defendant who fails to pay a fine, penalty, or costs within 40 days of the date specified in the court's judgment." We agree with the parties that the record does not support imposition of that fee and therefore vacate that portion of the judgment.

Conclusion

¶ 24 We find no error in the trial court's criminal sentences, but we vacate the court costs imposed in File No. 15 CRS 50247, vacate the failure to comply fee in File No. 15 CRS 50200, and vacate the money judgment for attorneys' fees, to the extent that judgment was entered, and remand for further proceedings.

NO ERROR IN PART, VACATED IN PART, AND REMANDED.

Judges MURPHY and CARPENTER concur.

Report per Rule 30(e).