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IN THE COURT OF APPEALS OF NORTH CAROLINA

2021-NCCOA-641

No. COA21-9

Filed 16 November 2021

Orange County, No. 17 CRS 050340

STATE OF NORTH CAROLINA

v.

NAPIER SANDFORD FULLER

Appeal by defendant from judgment entered 9 August 2018 by Judge G. Bryan Collins, Jr. in Orange County Superior Court. Heard in the Court of Appeals 7 September 2021.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Mary Carla Babb, for the State.

Napier S. Fuller pro se.

Sarah H. Ludington and H. Jefferson Powell, for amicus curiae Duke University Law School First Amendment Clinic.

TYSON, Judge.

¶ 1 Napier Sandford Fuller ("Defendant") appeals from a judgment entered upon a jury's verdict finding him guilty of one count of cyberstalking. We vacate Defendant's conviction and the judgment entered thereon and remand for further proceedings.

I. Background

¶ 2 Between 27 December 2016 and 30 January 2017, Lisa de Saxe-Zerden, Pd.D. ("Dr. de Saxe-Zerden"), was a public employee, faculty member, and the Senior Associate Dean of the School of Social Work ("UNC School of Social Work") at the University of North Carolina at Chapel Hill ("UNC"), a taxpayer-funded and publicly-owned institution within North Carolina's university system. Dr. de Saxe-Zerden supervised approximately 35 faculty members and oversaw 300 students at the UNC School of Social Work. During this period, she and many students received twelve unsolicited emails from Defendant through her and their UNC email accounts.

¶ 3 Copies of the emails received by Dr. de Saxe-Zerden were admitted into evidence at trial. Among other things, they included sexually explicit content, but no sexually explicit images, *innuendo* about rape and violence against women, and images involving a noose and self-strangulation. Defendant repeated some of the emails' content, including cartoon-like stick figures. Defendant sent the emails from several different email addresses, some within hours of others and at odd, non-workday hours.

¶ 4 At trial, Dr. de Saxe-Zerden described Defendant's emails using various terms including: threatening, harassing, bizarre, disturbing, offensive, and representative of violence. She testified the emails had nothing to do with the business, research, mission, or teaching at the UNC School of Social Work. Defendant sent two of the

first three emails, received on 27 and 28 December to Dr. de Saxe-Zerden and others using a listserv created through the email distribution service, Mailchimp.

¶ 5 Defendant registered students and faculty unbeknownst to them and without their consent to receive his emails through the listserv. Dr. de Saxe-Zerden filed an abuse report with Mailchimp concerning Defendant's unsolicited emails. Defendant continued to send emails to them. He sent some emails by creating other listserv-like groups, including one labeled "diesel_dykes@unc.edu." UNC Faculty and students blocked Defendant's email address, unsubscribed from the listserv, and/or routed emails sent by Defendant directly to a designated folder. Faculty and students continued receiving messages because Defendant kept changing his own email address.

¶ 6 As Senior Associate Dean, Dr. de Saxe-Zerden asserts she was required to open the emails to monitor the content of what messages Defendant was sending. Dr. de Saxe-Zerden did not know of Defendant prior to receiving his emails. UNC Police Investigator Ross Barbee began an investigation regarding Defendant's unsolicited emails on 4 January 2017. On 25 January 2017, Investigator Barbee mailed and emailed Defendant a letter advising him the UNC Police Department had "obtained several unwanted electronic communications" Defendant had sent to university faculty and students, which he asserted possibly violated North Carolina's cyberstalking statute, N.C. Gen. Stat. § 14-196.3(b)(2). Investigator Barbee also

informed Defendant any further electronic communications might also violate the statute. Investigator Barbee advised Defendant this letter served as "notice that [Defendant] must immediately cease and desist from sending such communications to UNC-CH faculty staff and/or students." However, Investigator Barbee also advised Defendant where he could direct public records requests about the letter and informed him he was free to continue making use of the university's public facilities and express his concerns and opinions through use of the U.S. Mail. Defendant sent two of the twelve emails for which he was on trial on 27 and 30 January, respectively, after receipt of the above-noted letter. Barbee sought and obtained an arrest warrant for Defendant on 1 February 2017.

¶ 7 Defendant talked about the emails he had sent to Dr. de Saxe-Zerden and her colleagues on the podcast, "What Matters in North Carolina," in April 2017. More specifically, Defendant stated because his "academic" approach was not working, he had to "turn it up a notch," like "the talk show where they throw the chairs at each other, [t]rying to bring some of the Jerry Springer kind of excitement to the debate."

¶ 8 Prior to his trial in superior court, Defendant filed several motions to dismiss which the trial court heard prior to trial. One such motion, questioned the jurisdiction of the superior court. The superior court found there was no jurisdiction in 17 CR 050341, but concluded it did have jurisdiction in 17 CR 050340.

¶ 9 Defendant waived appointed or retained counsel in superior court. He

proceeded *pro se,* testified, and presented evidence at trial. He also called Investigator Barbee and Terri Phoenix, Ph.D. as witnesses.

¶ 10 Acting on his own motion, the trial judge stated "I . . . find as a matter of law that paragraph E of [N.C. Gen. Stat. §] 14-196.3 presents a matter of law for the Court and not a matter of fact for the jury." As a result, the trial court omitted the broad speech exclusions of N.C. Gen Stat. § 14-196.3(e) from the jury instructions.

¶ 11 The jury found Defendant guilty on 9 August 2018 of one count of misdemeanor cyberstalking pursuant to N.C. Gen. Stat. § 14-196.3(b)(2), sentenced him to a 30-day sentence, with credit for one day served, which was suspended. Defendant was placed on supervised probation for an 18-month term and ordered to pay a $1,000 fine. Defendant appealed.

II. Jurisdiction

¶ 12 "The issue of jurisdiction over the subject matter of an action may be raised at any time during the proceedings, *including on appeal*. This Court is required to dismiss an appeal *ex mero motu* when it determines the lower court was without jurisdiction to decide the issues." *McClure v. County of Jackson*, 185 N.C. App. 462, 469, 648 S.E.2d 546, 550 (2007) (emphasis supplied) (citation omitted).

¶ 13 "Subject matter jurisdiction cannot be conferred upon a court by consent, waiver or estoppel, and therefore failure to . . . object to the jurisdiction is immaterial." *In re T.R.P.*, 360 N.C. 588, 595, 636 S.E.2d 787, 793 (2006) (citations

and internal quotation marks omitted). A court's subject matter jurisdiction is not invoked *sua sponte,* and is "never dependent upon the conduct of the parties" or inaction by the court. *Feldman v. Feldman*, 236 N.C. 731, 734, 73 S.E.2d 865, 867 (1953).

¶ 14 Defendant gave oral notice of appeal in open court following the oral rendition of conviction in district court on 20 July 2017. Defendant also filed a notice of appeal on 24 July 2017. Defendant filed a "Notice of Withdrawal of an Appeal From District Court to Superior Court for a Trial De Novo" with the Orange County Clerk of Superior Court on 28 August 2017.

¶ 15 N.C. Gen. Stat. § 15A-1431(g) provides: "The defendant may withdraw his appeal at any time prior to calendaring of the case for trial de novo. The case is then automatically remanded to the court from which the appeal was taken, for execution of the judgment." N.C. Gen. Stat. § 15A-1431(g) (2019). Defendant's case was calendared for trial on 23 July 2018. The "Notice of Withdrawal of an Appeal From District Court to Superior Court for a Trial De Novo," which was filed with the clerk of court on 28 August 2017 *almost a year before* the case was calendared for trial, immediately divested the superior court of jurisdiction. *Id.*

III. District Court Verdict

¶ 16 The record contains an AOC-CR-100 Warrant for Arrest that also contains Defendant's plea, verdict, judgment, and appellate entries. This document contains

a superior court clerk's office file stamp and certification. The plea and verdict and judgment for 17 CR 0050340 is listed as not guilty. The supplemental record also contains a non-filed stamped and non-certified AOC-CR-604D Judgment purportedly signed 20 July 2017. It contains a verdict of guilty in 17 CR 50340 on one count of harassing communications and an active sentence of 30 days suspended for 18 months of unsupervised probation, and $180.00 in court costs.

¶ 17 As noted, the AOC-CR-604D Judgment form does not bear the superior court clerk's stamp showing the filing date in accordance with N.C. R. App. P. 9(b)(3). Before the superior court while arguing a pretrial motion to dismiss, the Defendant asserted the clerk had improperly entered this judgment contrary to the prior judgment. The State responded a clerical error had been corrected.

¶ 18 Defendant's written notice of appeal lists the 17 CR 050340 case number on both the warrant and judgment forms as the case number he is appealing from district court to superior court for a trial *de novo* and in the filed withdrawal of his appeal.

IV. Conclusion

¶ 19 The trial court was divested of jurisdiction upon Defendant's filing of the "Notice of Withdrawal of an Appeal From District Court to Superior Court for a Trial De Novo" with the clerk of superior court prior to the case being calendared for trial in superior court. *Id.* The superior court was without jurisdiction to hear the trial *de*

novo. The judgment of the superior court is vacated and the case is remanded to the superior court with instructions to remand to the district court for further proceedings.

VACATED AND REMANDED.

Judge DILLON concurs.

Chief Judge STROUD concurs in the result with separate opinion.

Report per Rule 30(e).

STROUD, Chief Judge, concurring.

¶ 20 While I agree with the Majority's opinion that the superior court and thus this court lacked subject matter jurisdiction, I write separately to address the errors that led to this situation.

¶ 21 This case has only reached this point due to a series of mistakes. As the Majority's opinion notes, the lack of subject matter jurisdiction here arises from Defendant's withdrawal of his appeal from district court to superior court. The State did not raise an argument on appeal regarding lack of jurisdiction; this issue was raised *sua sponte* by this Court, so we do not have the benefit of briefs addressing this issue. Based upon the record and transcripts, it appears Defendant only withdrew his appeal because of an apparent clerical error—the explanation the State gave to the superior court—in the original district court judgment. Before the district court, Defendant was tried on two charges in two separate file numbers; he was found guilty in one case and not guilty in the other, but the file numbers were switched on the judgments. Defendant attempted to appeal the case in which he was found guilty to superior court. Defendant believed the district court found him not guilty on the case before us, 17CRS50340. He had a judgment from the district court showing a verdict of "not guilty" in the case, and he made clear this was the reason he dismissed his appeal to superior court. Defendant's first argument to the superior court was that he was found not guilty in district court. The withdrawal of notice of appeal also reflects Defendant believed he was not guilty based on the district court judgment;

he indicated he was accepting the signed judgment that reflected a "not guilty" verdict and requested that the clerk of court update the electronic case management system to reflect the "not guilty" verdict. Thus, Defendant attempted to dismiss the appeal of the case in which he was found not guilty and to proceed with the appeal of the case in which he was found guilty, but the wrong file numbers were on the judgments.

¶ 22 The superior court then failed to correct this mistake by the district court in the documents filed in this case. I do appreciate that the superior court's job was complicated by the fact that Defendant appeared *pro se*, and he has filed many motions and other documents addressing matters which are entirely irrelevant. But Defendant did make a motion to dismiss based explicitly on his withdrawal of his appeal of the "not guilty" judgment, and the superior court knew jurisdiction was at issue based upon the error in the file numbers on the judgments. But the superior court did not correct the transposed case file numbers, despite stating in open court that "the record indicates that the [district court] judge found him guilty after a bench trial in 17~CR~50340" and that Defendant had "timely filed notice of appeal from that judgment [the district court judgment in the case now on appeal], thereby conferring jurisdiction upon the superior court."

¶ 23 Based upon these apparent clerical errors, Defendant was found guilty in district court but no longer has his right to appeal the correct judgment as that time has expired. By remanding to the district court, the majority opinion leaves

Defendant with a guilty judgment he intended to appeal. The right to appeal from district court to superior court for a trial *de novo* requires notice of appeal within ten days of entry of judgment. N.C. Gen. Stat. § 15A-1431(b)–(c). Since that ten-day period has long since passed, Defendant would be guilty but also would not have an appeal of right due to a failure to take timely action. Thus, while based upon the record before us it appears this Court lacks jurisdiction, Defendant should not be entirely deprived of his right to appeal based upon clerical errors.

¶ 24 However, upon remand, there is the potential for a petition for a writ of certiorari in superior court to allow for further review. *See State v. Doss*, 268 N.C. App. 547, 550, 836 S.E.2d 856, 858 (2019) (noting existence of this procedure) (citing *State v. Hamrick*, 110 N.C. App. 60, 65, 428 S.E.2d 830, 832 (1993)); *see also*, N.C. R. Super. & Dist. Cts. Rule 19 ("In proper cases and in like manner [i.e. "upon petition specifying the grounds of the application"], the court may grant the writ of certiorari."). The "superior court's authority to issue a writ of certiorari to review matters from the district court pursuant to Rule 19 . . . are [sic] analogous to our Court's right to issue such writs pursuant to Section 7A-32(c)." *Doss*, 268 N.C. App. at 550, 836 S.E.2d at 858 (emphasis removed). And unlike this Court, which must rely upon the "cold record" despite its omissions or deficiencies, the trial court also has the advantage of its ability to determine exactly what happened and to hear from the parties on any issues presented. But I express no opinion on the merits of those

issues, as this court does not have jurisdiction.

¶ 25 I therefore respectfully concur.