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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA24-45

Filed 3 September 2024

Wake County, No. 20-CR-209675

STATE OF NORTH CAROLINA

v.

PARISHDION MAURICE HIGGS

Appeal by defendant from a civil judgment for attorney's fees entered 10 March 2023 by Judge Winston M. Rozier, Jr. in Wake County Superior Court. Heard in the Court of Appeals 19 August 2024.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Lewis W. Lamar, Jr., for the State.

Patterson Harkavy LLP, by Christopher A. Brook, for defendant-appellant.

PER CURIAM.

Parishdion M. Higgs ("Defendant") argues the trial court erred by entering a civil judgment against him for attorney's fees and an attorney appointment fee without providing notice and an opportunity to be heard. We vacate the civil judgment and remand for resentencing.

I. Background

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N.C. State Highway Patrol Trooper Chris Matison (“Trooper Matison”) stopped Defendant on 21 June 2020, for speeding on I-440 West. Defendant was cited for driving 79 miles per hour in a 60 mile per hour zone. Upon performing a series of standardized field sobriety tests, Trooper Matison arrested Defendant for driving while impaired.

Defendant pled guilty to driving while impaired in Wake County District Court on 24 May 2022, after his pre-trial motion to suppress was denied. Defendant appealed to Wake County Superior Court. On 10 January 2023, Defendant’s pre-trial motion to suppress was heard. The court again denied his motion. Defendant pled guilty on 6 March 2023 to driving while impaired, pursuant to a plea agreement which preserved his right to appeal the denial of his motion to suppress.

Issues arose during the trial court’s hearing conducted on 6 March 2023 for the plea and sentencing. The trial court’s only conversation with Defendant regarding attorney’s fees follows:

THE COURT: How much time do you have on the matter?

MR. ELMORE ([D]efendant’s court-appointed attorney): Eight hours.

THE COURT: Sir, do you have any objection to the time your lawyer’s spent dedicated to your case?

DEFENDANT: No, sir.

THE COURT: You’ll be responsible for that as part of the costs.

At no point did the trial court specify the amount of the attorney’s fees or it was

imposing an attorney appointment fee, nor did the trial court allow Defendant to be heard on the issue.

On 10 March 2023, the trial court sentenced Defendant to twelve months suspended and placed him on supervised probation, Defendant's court-appointed attorney gave oral notice of appeal in open court. On 10 April 2023, the trial court entered a civil judgment for attorney's fees in the amount of \$520.00 and a \$75.00 attorney appointment fee. Defendant appeals.

II. Jurisdiction

"[J]udgments entered against a defendant for attorney fees and appointment fees constitute civil judgments, which require a defendant to comply with Rule 3(a) of the North Carolina Rules of Appellate Procedure when appealing from those judgments." *State v. Patterson*, 269 N.C. App. 640, 642, 839 S.E.2d 68, 71 (2020) (citations omitted). Rule 3(a) requires the appealing party to file and serve a written notice of appeal within thirty days after entry of judgment. N.C. R. App. P. 3(a). Failure to comply with the requirements of Rule 3 "mandates dismissal of an appeal." *Bailey v. State*, 353 N.C. 142, 156, 540 S.E.2d 313, 322 (2000).

Defendant appealed pursuant to N.C. Gen. Stat. § 7A-27, contemporaneously with a petition for writ of *certiorari* if his appeal is dismissed. As to his direct appeal, Defendant's counsel gave oral notice of appeal from Defendant's criminal judgment at the sentencing hearing on 10 March 2023. N.C. R. App. P. 4(a)(1). Judgments for attorney's fees are civil judgments. *Patterson*, 269 N.C. App. at 642, 839 S.E.2d at

71. Defendant was required to serve a written notice of appeal to preserve the issue of attorney's fees. N.C. R. App. P. 3(a). Defendant failed to serve a written notice of appeal, which mandates a dismissal of his direct appeal. *Bailey*, 353 N.C. at 156, 540 S.E.2d at 322.

Although Defendant's Rule 3 violation prohibits this Court from hearing his direct appeal, this Court possesses discretion to consider the matter by granting a petition for writ of *certiorari*. See *State v. McCoy*, 171 N.C. App. 636, 638, 615 S.E.2d 319, 321 (2005); N.C. Gen. Stat. § 7A-32(c) (2023); N.C. R. App. P. 21(a)(2023).

"The 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). "A petition for the writ must show merit or that error was probably committed below." *State v. Grundler*, 251 N.C. 177, 189, 111 S.E.2d 1, 9 (1959) (citation omitted).

In *State v. Friend*, this Court issued a writ of *certiorari* where a litigant failed to appeal a civil judgment for attorney's fees because the litigant's "argument on the issue of attorneys' fees [was] meritorious." 257 N.C. App. 516, 519, 809 S.E.2d 902, 905 (2018).

Defendant's "argument on the issue of attorney[s] fees is meritorious." *Id.* As occurred in *State v. Friend*, we allow Defendant's petition and issue a writ of *certiorari* to review Defendant's appeal. *Id.*

III. Standard of Review

“A party can recover attorney’s fees only if such a recovery is expressly authorized by statute.” *Marecic v. Baker*, 290 N.C. App. 552, 892 S.E.2d 110 (2023) (citation and quotation marks omitted). “The question of whether statutory requirements have been met for an award of attorney’s fees is a question of law reviewable de novo.” *Limerick v. Rojo-Limerick*, 288 N.C. App. 29, 32, 885 S.E.2d 96, 98 (2023) (citation omitted).

The standard of review for alleged violations of constitutional rights is also *de novo*. *State v. Shackelford*, 264 N.C. App. 542, 551, 825 S.E.2d 689, 695 (2018) (quoting *State v. Roberts*, 237 N.C. App. 551, 556, 767 S.E.2d 543, 548 (2014)). “Under a de novo review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal.” *State v. Williams*, 362 N.C. 628, 632–33, 669 S.E.2d 290, 294 (2008) (citation and quotation marks omitted).

IV. Issue

Did the trial court err in imposing attorney’s fees and an appointment fee on Defendant without providing him sufficient notice or the opportunity to be heard?

V. Analysis

A “trial court may enter a civil judgment against a convicted indigent defendant for the amount of fees incurred by the defendant’s court-appointed attorney.” *State v. Jacobs*, 172 N.C. App. 220, 235, 616 S.E.2d 306, 316 (2005); N.C. Gen. Stat. § 7A-455(b) (2023). The trial court may also impose a \$75.00 attorney

appointment fee. N.C. Gen. Stat. § 7A-455.1(a) (2023).

This Court has recognized awarding fees to a defendant's appointed trial counsel raises the concern that "the interests of appointed trial counsel and a defendant may not be aligned on this issue—including what amount of fees should reasonably be awarded." *State v. Baungartner*, 273 N.C. App. 580, 585, 850 S.E.2d 549, 553 (2020).

"For example, a defendant may believe that the amount of fees requested is unreasonable given the time, effort, or responsibility involved in defending the case. Counsel, unsurprisingly, might feel otherwise." *Friend*, 257 N.C. App. at 523, 809 S.E.2d at 907.

To avoid this risk, "the trial court must give the defendant 'notice and an opportunity to be heard regarding the total amount of hours and fees claimed by the court-appointed attorney.'" *State v. Morgan*, 259 N.C. App. 179, 185, 814 S.E.2d 843, 848 (2018), *rev'd on other grounds*, 372 N.C. 609, 831 S.E.2d 254 (2019) (quoting *Jacobs*, 172 N.C. App. at 236, 616 S.E.2d at 317). Failure to do so violates Defendant's constitutional right to due process; "the fundamental premise of procedural due process protection is notice and the opportunity to be heard." *Lipinski v. Town of Summerfield*, 230 N.C. App. 305, 308, 750 S.E.2d 46, 49 (2013) (citation omitted).

The State concedes Defendant "did not receive proper notice of the attorney's fees and appointment fee against him, nor an opportunity to be heard regarding these fees." The only conversation between the trial court and Defendant regarding

attorney's fees related to the number of hours Defendant's trial counsel had spent. The trial court did not provide Defendant with notice of the total amount of fees to be awarded, the appointment fee, or the opportunity to be heard on the issues. We vacate both the civil judgment for attorney's fees under N.C. Gen. Stat. § 7A-455(b), and the appointment fee under N.C. Gen. Stat. § 7A-455.1(a) and remand for further proceedings.

VI. Conclusion

A long line of cases from this Court and our Supreme Court have remanded trial court decisions for a proper hearing and imposition of attorney's fees. *Jacobs*, 172 N.C. App. at 237, 616 S.E.2d at 317; *Friend*, 257 N.C. App. at 523, 809 S.E.2d at 907; *Morgan*, 259 N.C. App. at 187, 814 S.E.2d at 849; *Baungartner*, 273 N.C. App. at 587, 850 S.E.2d at 554; *Patterson*, 269 N.C. App. at 648, 839 S.E.2d at 74.

"The potential . . . for unjustly depriving any person of basic due process right to notice and an opportunity to be heard outweighs any inefficiency caused by the process of remanding these matters back to the trial court." *Baungartner*, 273 N.C. App. at 587, 850 S.E.2d at 554 (2020).

Defendant's petition for writ of *certiorari* is granted. We vacate the trial court's imposition of attorney's fees and appointment fee and remand the case for further proceedings.

VACATED AND REMANDED.

Panel consisting of Judges Tyson, Zachary, and Hampson.

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Report per Rule 30(e).