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NO. COA10-1600  
NORTH CAROLINA COURT OF APPEALS

Filed: 20 September 2011

STATE OF NORTH CAROLINA

v.

Buncombe County  
Nos. 09 CRS 2818, 65343  
10 CRS 97

BARRY WILLIAM HUDGINS

Appeal by Defendant from judgment entered 3 August 2010 by Judge Christopher M. Collier in Buncombe County Superior Court. Heard in the Court of Appeals 6 September 2011.

*Attorney General Roy Cooper, by Assistant Attorney General Patrick S. Wooten, for the State.*

*Charlotte Gail Blake for Defendant-appellant.*

HUNTER, JR., Robert N., Judge.

Barry William Hudgins ("Defendant") appeals from judgment entered upon his conviction and guilty plea and argues the trial court erred by (1) failing to dismiss the charges after Defendant raised a speedy trial claim, and (2) entering an award of restitution based on insufficient evidence and in the form of a civil judgment. We find no error in part and reverse and remand the determination of restitution.

### **I. Factual and Procedural History**

On 4 March 2009, Defendant was indicted for breaking and entering a motor vehicle, felony larceny, and habitual felon status. On 20 April 2009, Defendant failed to appear in court. Defendant was subsequently indicted on 3 August 2009 for failure to appear on a felony. Another habitual felon indictment was issued on 1 March 2010.

The matter came on for trial on 3 August 2010. A jury convicted Defendant of failure to appear. Defendant then entered an *Alford* plea to breaking and entering a motor vehicle, larceny, and having attained habitual felon status. All four offenses were consolidated for judgment, and Defendant was sentenced to an active term of a minimum of 90 months to a maximum of 117 months imprisonment.

### **II. Jurisdiction and Standard of Review**

As Defendant appeals from the final judgment of a superior court, this Court has jurisdiction to hear the appeal pursuant to N.C. Gen. Stat. § 7A-27(b) (2009).

We review *de novo* the trial court's failure to dismiss Defendant's charges after Defendant raised his right to a speedy trial, because under the Sixth Amendment of the United States Constitution and by Article I, section 18 of the North Carolina

Constitution, Defendant is guaranteed the right to a speedy trial. *Klopfer v. North Carolina*, 386 U.S. 213, 18 L. Ed. 2d 1 (1967).

"On appeal, we consider *de novo* whether the restitution order was supported by evidence adduced at trial or at sentencing." *State v. McNeil*, 707 S.E.2d 674, 684 (2011) (citations and quotation marks omitted).

### **III. Analysis**

#### **A. Speedy Trial**

By his first argument, Defendant contends the trial court erred by failing to grant his motion to dismiss all the charges where he raised a claim that his right to a speedy trial was violated. Prior to trial, Defendant filed multiple *pro se* motions, including a motion for appropriate relief where Defendant asserted numerous arguments including his case had been subjected to undue delay and his right to a speedy trial had been violated. Defendant also requested the charges against him be dismissed. On the day of trial prior to jury selection, the trial court reviewed Defendant's Motion for Appropriate Relief. Neither Defendant nor defense counsel specifically mentioned Defendant's concern about a speedy trial. The trial court explained that this motion was "premature" and any

relevant arguments should be made during the course of the trial. Defendant made several other motions, including a motion to dismiss, all of which were denied. At the close of all the evidence, Defendant renewed his Motion to Dismiss, and the trial court denied the motion. The trial court never ruled on Defendant's motion for appropriate relief.

The State cites *State v. Grooms* for the proposition that a defendant who has legal representation "cannot also file motions on his own behalf or attempt to represent himself." 353 N.C. 50, 61-62, 540 S.E.2d 713, 721 (2000). The State further writes in its brief "[a]ccording to our Supreme Court, defendant's own motions were a nullity, and are not subject to appellate review."

Since *Grooms*, our Court has stated, in both *State v. Howell* and *State v. Williamson*, "[n]owhere in *Williams* or *Grooms* does our Supreme Court state that a trial court cannot consider a motion filed by a defendant personally when the defendant is represented by counsel, only that it is *not* error for the trial court to refuse to do so." *State v. Howell*, COA10-476, 2011 WL 1645851 at \*2 (May 3, 2011); *State v. Williamson*, COA10-883, 2011 WL 2207582, at \*4 (June 7, 2011) (emphasis added). A trial court has discretion to consider a represented defendant's *pro*

se motions and is not precluded from considering a motion on the merits.

However, here the trial court never ruled on Defendant's motion for appropriate relief. The motion is not properly before us on appeal. We therefore dismiss this assignment of error without prejudice for the Defendant to renew the motion for appropriate relief before the trial court.

**B. Restitution**

Next, Defendant contends the trial court erred in ordering him to pay restitution in an amount unsupported by sufficient evidence and without taking into consideration Defendant's financial circumstances. He also argues the court erred in ordering restitution be entered as a civil judgment against him. He argues the court mistakenly relied on N.C. Gen. Stat. § 15A-1340.38 (2009), which he asserts does not apply to this case. We agree that the amount of restitution ordered by the trial court is not fully supported by the evidence and that the court erred in ordering restitution to be entered as a civil judgment.

A court may order a Defendant to pay restitution to a victim of a crime to compensate for damages and losses pursuant to N.C. Gen. Stat. §§ 15A-1340.34 and 15A-1340.35 (2009). In so doing, the court shall consider the Defendant's assets, income,

ability to earn, whether he or she has any obligation to support dependents, and any other matters that pertain to his or her ability to make restitution. N.C. Gen. Stat. § 15A-1340.36(a) (2009). The amount "must be limited to that supported by the record." *Id.* A trial court is not required to make findings of fact or conclusions of law regarding the amount of restitution, but must consider the statutory factors before deciding on an amount. *State v. Mucci*, 163 N.C. App. 615, 626, 594 S.E.2d 411, 419 (2004).

Here, the only reference made to the amount of restitution was the prosecutor's request for restitution "for numerous items, cash, jewelry, and gold coins in the amount of \$15,700." It has been established, however, that a prosecutor's unsworn statement does not constitute evidence and is not sufficient to support an order of restitution. *State v. Replogle*, 181 N.C. App. 579, 584, 640 S.E.2d 757, 761 (2007). Therefore, the order of restitution in this case is not supported by any evidence and must be remanded for a new hearing.

We further conclude the trial court failed to consider Defendant's resources, earning ability, or other factors regarding his capacity to make restitution. On remand, if the trial court decides to impose restitution, the court shall take

into consideration these factors as required by section 15A-1340.36.

Finally, in the interest of avoiding a similar issue after remand, we address Defendant's argument that the court's decision to have the restitution order entered as a civil judgment is not appropriate in this case. Where a defendant is "sentenced for an offense for which the victim is entitled to restitution under" the Crime Victims' Rights Act, the trial court must enter an award of restitution. N.C. Gen. Stat. § 15A-1340.34(b) (2009). This category of restitution, if in excess of \$250.00, may be entered in the same manner as a civil judgment pursuant to N.C. Gen. Stat. § 15A-1340.38(a) (2009). Here, however, none of Defendant's offenses are listed in section 15A-830(a)(7) (2009), the relevant provision of the Crime Victims' Rights Act. Therefore, section 15A-1340.38(a) does not apply, and the trial court erred in ordering restitution to be entered as a civil judgment. The civil judgment is vacated.

#### **IV. Conclusion**

We conclude the trial court did not err when it failed to dismiss Defendant's charges after Defendant raised claims of violations of his right to a speedy trial. We further conclude

the restitution awarded in this case is not supported by any evidence and must be remanded for a new hearing. Lastly, we find the trial court erred in ordering restitution to be entered as a civil judgment and vacate the trial court's order.

Remanded in part; civil judgment vacated.

Judges MARTIN and THIGPEN concur.

Report per Rule 30(e).