NO. COA13-131
NORTH CAROLINA COURT OF APPEALS

Filed: 19 November 2013

STATE OF NORTH CAROLINA

v. Cumberland County
No. 12 CRS 4256-4258

DENNIS NEWSON

Appeal by defendant from orders entered 30 May 2012, 6 June 2012, and 7 June 2012 by Judge Tanya T. Wallace in Cumberland County Superior Court. Heard in the Court of Appeals 12 September 2013.

Attorney General Roy Cooper, by Assistant Attorney General Laura E. Parker, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Mary Cook, for defendant-appellant.

HUNTER, JR., Robert N., Judge.

Dennis Newson ("Defendant") applied for the issuance of a writ of *certiorari* seeking review of three written contempt orders entered 30 May 2012, 6 June 2012, and 7 June 2012 by Judge Tanya T. Wallace in Cumberland County Superior Court. Upon

review, we grant request for the issuance of the writ, affirm the first contempt order, and reverse the remaining two contempt orders.

I. Facts & Procedural History

On 23 March 2010, Defendant was indicted by the Cumberland County grand jury for assault with a deadly weapon on a government officer or employee; assault with a deadly weapon with intent to kill; and two counts of communicating threats in 10 CRS 4885. The case was heard at the 21 May 2012 Criminal Session of Cumberland County Superior Court before Judge Tanya Wallace. The evidence and testimony presented tended to show the following facts.

On 10 March 2010, Sheriff Hubert Peterkin ("Sheriff Peterkin") of Hoke County ate lunch at a Western Sizzlin' Steakhouse in Cumberland County with Chief Deputy Gary Hammond ("Deputy Hammond") and Major of Operations Freddy Johnson ("Major Johnson"). After an hour lunch at the restaurant, the three made their way to the parking lot. Sheriff Peterkin testified that as he walked to his vehicle from the restaurant, he heard a car's engine "rev up as if it was accelerating." Sheriff Peterkin looked to his right when he saw the car heading toward him and jumped out of its path as it approached. Sheriff Peterkin testified that the car would have struck him had he not leapt out of its way.

After this encounter, Sheriff Peterkin testified that Defendant "jumped out of the vehicle" and began threatening Sheriff Peterkin, calling him a "black, bubble-lipped[] mother-fucker." Next, Defendant told Sheriff Peterkin "I'm going to kill you" and that he was "out of [his] jurisdiction." When Sheriff Peterkin approached Defendant, Deputy Hammond stepped between them. Defendant then called Deputy Hammond a "fat mother fucker" and told Deputy Hammond and Sheriff Peterkin that he would kill them both. Deputy Hammond called 911. Defendant returned to his vehicle and drove away. Defendant was followed by Deputy Hammond until he was stopped by Fayetteville police. After being stopped, Defendant told the Fayetteville police that Sheriff Peterkin "jumped out in front of his car."

During the course of the trial, Defendant frequently spoke over the trial court, spoke over the assistant district attorney, spoke at the same time as the assistant district attorney, and ignored orders by the trial court to not speak out of turn.

The trial court warned Defendant to refrain from interrupting the court and to be quiet. Following these admonitions, Defendant continued speaking when the judge was talking. Later, the trial court warned that if Defendant didn't "listen to my rulings and abide by them," Defendant would forfeit the right to "say anything" and would be restrained with masking tape to prevent further interruptions.

Defendant proceeded through his trial *pro se*, but had dealings with counsel throughout the proceedings. The trial court found Defendant had "hired and fired or had dealings with four to five attorneys and has acquired two standby counsels at the behest of this Court." Defendant also asked that one of his standby counsel be removed. Defendant also made statements indicating a desire for the appointment of counsel, including "I quit representing myself pro se." However, Defendant also made contradictory statements indicating an intention to continue appearing *pro se*. The court noted these various contradictory statements:

> The defendant, throughout the course of this -- the hearings held has before a variety of judges given conflicting information concerning his desire for counsel which, of course, is protected by the Sixth Amendment and the Court looked at very carefully.
>
> The defendant on various occasions has told the Court that he wished to hire his own attorney. Has said he never wished to have a court-appointed attorney, that he would hire one himself and has stated and has had at least one attorney and has had other attorneys. The Court believes there's been at least two that have, quote, unquote, done work on his case, were acquired through his friend, Mr. Harris, but were never actually hired by him.

The trial court then ruled that Defendant had the ability and desire to represent himself:

> At some point in time, a superior court judge, whose name I won't supply, went through a litany –- a litany of questions

> designed to determine that the defendant understood with what he was charged, the possible sentences therein and delved into the defendant's background, education, experience, and determined that the defendant freely, voluntarily and willingly was going to represent himself pro se. The defendant on yesterday demanded that his -- that counsel be provided for him. This was at the end of a long day, approximately at 5:00 after hearing the defendant's motions all day.
>
> The Court finds that there have been a variety of judges that have addressed this particular issue, that the defendant has repeatedly hired and fired attorneys using abusive language in the process or has denied ever contacting them about representing him after they have done work on this case, including an investigator. That the defendant was warned at a previous time about forfeiture of an attorney by his acts.
>
> The Court will also note that there have been at least two cases in which the defendant's competency has been reviewed and at the last, which happened two weeks ago, that the Honorable Judge Tally found him competent to proceed. The Court finds, based on a mountain of motions that he filed, that he has the ability to represent himself. Desires -- has made the desire to represent himself known by this Court and that the only reason whereby he told the Court yesterday that he desired to have an attorney was because many of his motions were denied after being heard by the Court.

The trial court then proceeded to ask a standby counsel to be present throughout the hearing:

> The Court, however, in an abundance of caution, has asked that standby counsel sit throughout this hearing with the defendant or at least at his behest. This is not an attorney. He

> does not want an attorney. But it is somewhere whereby, if legal questions arise that he wishes to confer with this person, the Court will allow him to confer with this person or will allow him at any stage to bring to the Court matters that could possibly be addressed by the Court or, if the defendant desires, to confer with him about any legal matter. The defendant has the absolute right not to confer with this person. He is not the defendant's lawyer.

On 25 May 2012, standby counsel Shawn McManus ("McManus") appeared before the trial court and asked to review the "issue of counsel." McManus informed the trial court that on 24 May 2012, Defendant told McManus that he was "fired from the case" on two occasions. On the first occasion, McManus testified that Defendant called him an "unpleasant name" and asked to "fire" him. On the second occasion, McManus testified that while consulting with Defendant in a holding cell, Defendant began to "become very agitated, banging on the desk, pointing at me, cursing." Defendant again told McManus that he was fired. The trial court appointed a second standby counsel, Mike Stone ("Stone") and relieved McManus.

On 29 May 2012, the trial court asked Defendant to call his next witness. Defendant attempted to call Stone to the stand, and the trial court noted that Stone was standby counsel in the case. Defendant replied "[h]e is nothing to me." The court sustained an objection to Defendant's request. Defendant then said Stone told

Defendant Judge Wallace was "fucking [him] in this case." The trial court then began a contempt proceeding pursuant to N.C. Gen. Stat. § 5A-11(a) (2011):

> THE COURT: Mr. Newson -- show the jury is outside the hearing of this court. Mr. Newson, this Court has tried her best to ignore the remarks that you have made throughout this trial. At some point in time, however, as you were warned, you can be held in contempt. At this point in time, for the -- and I've lost count of the disruption of the court proceedings that you have made but the Court is telling you that you are on notice that you have disrupted the courtroom proceedings and you are impairing the respect due to a court during the proceedings, one and two of the criminal contempt statute. You are now on notice of criminal contempt. You have the ability to answer that and I will give you that chance right now.
>
> THE DEFENDANT: Okay. I am going to enter my notice of appeal and I would like to be heard in a hearing by an independent judge other than you. I think you know the statute as well as I do. If you're the one who cites the contempt, I have a right to have it heard by an independent judge.
>
> THE COURT: If indeed it's indirect contempt, you're right. If it's direct contempt, you're wrong. The Court at this time --
>
> THE DEFENDANT: So you had to get my answers before you figure out which one you're going to hold me in contempt for, right?
>
> THE COURT: No. I knew exactly what would happen.
>
> THE DEFENDANT: Judge is full of it but, anyway, go right ahead. Say what you got to say.

> THE COURT: That's another contempt matter again impairing the respect due to a court during the proceedings. The Court finds the defendant has willfully disrespected the Court and disrupted the court proceedings on two different occasions as just recited, and the Court will sentence the defendant at some point in time after we finish with this proceeding.
>
> THE DEFENDANT: And the defendant gives his notice of appeal.

Later on 29 May 2012, Defendant was asked if he had relevant questions for Deputy Hammond on re-direct. Defendant's standby counsel, Stone, asked to address the court:

> MR. STONE: Your Honor, I move to withdraw from the case. Mr. Newson is making assertions. I never met Mr. Newson, spoke with Mr. Newson prior to Friday of last week. I don't even know – didn't know the facts of this particular case.
>
> THE DEFENDANT: Ask him did he tell me that this case was fixed. Ask him did he tell me that you had fixed the case, Judge.
>
> MR. STONE: That's wrong as well.
>
> THE DEFENDANT: Ask him did he tell me that you fixed the case. Ask him did he tell me that you fixed the case.
>
> THE COURT: All right.
>
> THE DEFENDANT: Ask him.

> THE COURT: Again, you yell back at this Court when you're not recognized, I'm going to hold you in contempt for a third time.
>
> THE DEFENDANT: You talking to me?
>
> THE COURT: I'm talking to you.

Stone made three attempts to withdraw from the case during the trial, although he was not relieved of his duty as standby counsel until his third attempt, which was made at the end of the sentencing phase of the trial.

On 30 May 2012, Defendant testified on his own behalf. During cross-examination, Defendant began to re-initiate direct examination of himself, spoke over the prosecutor, spoke over the court, made allegations of evidence tampering, and began stating that the United States Supreme Court had jurisdiction of his case:

> THE COURT: I -- I am cautioning each and every one of you that you will not speak -- you will not speak over anybody. There shall be no name calling, et. cetera.
>
> . . . .
>
> THE COURT: Further cross-examination?
>
> MR. HICKS: Yes, ma'am.
>
> MR. NEWSON: Your Honor, the defense, if you please ----
>
> MR. HICKS: It'll be brief.

MR. NEWSON: ---- the defense was not finished with direct cross-examination [sic], and the Court gave no warnings ----

MR. HICKS: If I may ----

MR. NEWSON: ---- as to discontinuing testimony; and, if -- if you would, please, I would like to continue with the direct examination; and, there are exhibits that I have to show to the jury to -- that will further support what I claim happened on the day and event; and, I think I'd have that right and to be allowed to do so.

THE COURT: All right; and, I think we've had repeated warnings outside the presence of the jury.

MR. NEWSON: I don't think that there was any warnings with regards to my direct testimony and direct examination.

THE COURT: All right. You may continue your cross-examination, counsel.

MR. HICKS: Thank you, Your Honor.

MR. NEWSON: And what about my direct

Q. As ----

MR. NEWSON: ---- cross-exam -- my direct examination ----

Q. As a member of the Moorish Nation, you continue to----

THE COURT: That's denied.

Q. ---- believe your name is Nobel Dennis Ali?

A. Again, Mr. Hicks, as I explained to you that -- the Moorish Nation has absolutely nothing to do with the

Article 3. You guys changed my birthplace to South Africa. So, under Article 3, Section 2, the jurisdiction is automatically transferred to the United States Supreme Court under the United States Constitution. The Moorish Nation has nothing
to do with the Supreme Court issue that I brought up. Those are two totally separate incidents.

THE COURT: All right.

A. The Moorish ----

Q. You're ----

A. ---- Nation incident ----

Q. You are ----

A. ---- it deals strictly with a -- a spiritual belief and nothing else.

THE COURT: All right.

A. And it is a mental and spiritual ----

THE COURT: You are now ----

A. ---- belief ----

THE COURT: ---- in contempt of this Court.

MR. NEWSON: Then I give you ----

THE COURT: We will ----

MR. NEWSON: ---- my notice to appeal.

> You won't even let me do my own direct examination, and you think you're going to run me up in here after kidnapping me for 28 months and play this little game, and you won't let these jurors sees these pictures that you know I got with the times on them with that clock on that Western Sizzlin video at the bottom, and you show them one on the top ----
>
> THE COURT: Any further questions?
>
> MR. HICKS: I ----
>
> MR. NEWSON: ---- that was black, and you know that you altered the video when you hacked-ed
> [phonetic] it, and the attorney told me that you hacked-ed it-
> ---
>
> MR. HICKS: [Indiscernible] ----
>
> THE COURT: Take him out, please.

This was the trial court's fourth and final finding that Defendant was in contempt. However, this finding of contempt was not reduced to an order. Defendant was allowed back into the courtroom for the charge conference and closing arguments.

The jury found Defendant guilty of assault with a deadly weapon on a government officer or employee, assault with a deadly weapon, and two counts of communicating threats. By means of an order entered on 30 May 2012, the trial court arrested judgment on the assault with a deadly weapon conviction. On 30 May 2012, the trial court entered judgment sentencing Defendant to a minimum term of 16 months

and a maximum term of 20 months for assault with a deadly weapon on a government official. Defendant received 798 days credit for pretrial confinement. The trial court sentenced Defendant to 45 days imprisonment for each of his two counts of communicating threats and placed Defendant on supervised probation for 18 months. Each sentence was to run consecutively.

On 30 May 2012, after the jury returned its verdicts, the trial court entered judgments for three counts of direct criminal contempt of court and ordered Defendant to spend 30 days in jail for each instance of contempt. The trial court made several findings of fact while entering judgment on three counts of direct criminal contempt:

> [THE COURT]: The Court also finds today that the following occurred: That at the -- that the Court had cautioned everyone that there would be no talking and no name-calling; that, on -- the defendant continued, while on cross-examination went on, crossing --continued to talk over the Court. After the Court told him to be quiet, he continued to talk, continued to put on the evidence matters for which the Court had already stopped cross-examination; gave a notice of appeal in a rambling manner; and the Court told him -- had told him to be taken out; and he, continued on talking after the Court had repeatedly cautioned him not to; the 30 days to run at the expiration of the sentence just given.
>
> The Court will also put on the record the following: That the Court finds that, during the course of this trial, the defendant repeatedly talked over opposing counsel, over witnesses and over the Court; number 2, that the defendant repeatedly ignored the Court's rulings, continued to ask questions to which objections had already been sustained; 3,

repeatedly attempted to get matters before the jury with loud explanations and by summarizing matters, in his own words, which were outside the record or completely extraneous; that, throughout the course of the trial, the defendant has attempted to issue subpoenas on persons with no connection at all to any part of the issues at trial; that the defendant has repeatedly accused court personnel of improper conduct and collusiveness and altering evidence; that the Court, after repeatedly enduring the conduct of the defendant, held the defendant in direct contempt of court on two occasions and cited him for the third that's already been addressed; that the defendant called witnesses names, spoke sarcastically to the Court and others, interrupted numerous times and was disruptive numerous times and treated the bailiffs with more than disrespect; that the defendant --next number -- also as noted earlier, hired and fired or had dealings with four to five attorneys and has acquired two standby counsels at the behest of this Court, the Court removing one at the defendant's request and the Court still appointing a standby counsel; even though the defendant was abusive to the original standby counsel, the Court did release him in favor of a second standby counsel; that the defendant has prev -- has previously been found by a judge, who made the appropriate findings, that the defendant wished to see -- wished to proceed pro se, which the Court is required to let him do; that the Court threatened to have the defendant's mouth taped shut, but chose not to do so in light of his self-representation; that the Court has found the defendant repeatedly rehash -- rehashing matters not in evidence and by -- and that the Court has been through 7 days of testimony on a relatively short matter; that the Court has removed him from the courtroom but has allowed him to reenter; that the defendant has delayed the trial by filing motions, various suits against at least five judges, threatened this Court with a report to the Judicial Standards Commission, claimed to be completely blind while reading out loud at an earlier time ----

> [MR. NEWSON]: Objection
>
> THE COURT: ---- last Wednesday ----
>
> [MR. NEWSON]: The Court is lying.
>
> THE COURT: ---- and pointed out that the State's -- while pointing out that a State's exhibit, shown to a witness, was actually the wrong exhibit and delayed this Court for his hemorrhoids up to the point where the Court told standby counsel that he would forfeit his right to be present and to offer other testimony, and then he appeared in front of this Court, and he refused to dress out on two occasions and has refused to take a shower this week; that members of the jury had stood up at least twice during the defendant's litanies; and, the Court after receiving a note, critical of the delay and abuse occasioned by the defendant, found no alternative other than -- that the defendant, after having already spent an hour on his examination of himself, and in its discretion, and the Court being mandated to control the courtroom and avoid needless confusion, to stop the defendant's questioning his last witness, himself, after more than an hour; that, as a result, the Court stopped the defendant's questioning, allowed the defendant to return, argue to the jury and then listen to the charge of this Court. That's just for the record to explain the Court's cutting off the defendant's testimony.

On 30 May 2012, the court issued and Judge Wallace signed three AOC-CR-390 forms, which included the title "Direct Criminal Contempt/Summary Proceedings/Findings and Order." The text of the AOC-CR-390 forms contains blank space for findings of the court, in which the trial court wrote "SEE COURT

TRANSCRIPTS FOR FINDINGS." On 6 June 2012 and 7 June 2012, the trial court issued additional orders combining several findings of fact relating to the actions occurring 29 May 2012 and 30 May 2012.

II. Petition for Certiorari

We note at the outset that Defendant's Notice of Appeal does not comply with the requirements of Rule 4 of our Rules of Appellate Procedure. However, in our discretion, we grant Defendant's petition for the issuance of a writ of *certiorari* pursuant to N.C R. App. P. 21.

Pursuant to Rule 4, notice of appeal may be given either orally at trial, or in a writing filed "with the clerk of superior court and serving copies thereof upon all adverse parties within fourteen days after entry of the judgment[.]" N.C. R. App. P. 4(a). While compliance with Rule 4 is essential for conferring jurisdiction upon this Court, we are entitled to liberally construe the notice of appeal to confer jurisdiction. More specifically, "if a party technically fails to comply with procedural requirements in filing papers with the [C]ourt, the [C]ourt may determine that the party complied with the rule if the party accomplishes the '*functional equivalent*' of the requirement." *Von Ramm v. Von Ramm*, 99 N.C. App. 153, 157, 392 S.E.2d 422, 424 (1990) (citation omitted).

This Court has allowed a request for the issuance of a writ of *certiorari* despite technical defects in a notice of appeal in a variety of circumstances. *State v. Crawford*,

___ N.C. App. ___, ___, 737 S.E.2d 768, 769 (2013) (allowing a writ to issue despite a defendant's failure to serve a *pro se* notice of appeal); *State v. Hammonds*, ___ N.C. App. ___, ___, 720 S.E.2d 820, 823 (2012) (allowing a writ to issue when a defendant lost the right to appeal through counsel's drafting errors); *In re I.T.P–L.* 194 N.C. App. 453, 460, 670 S.E.2d 282, 285 (2008) (allowing review pursuant to Rule 21 because "the timely, albeit incomplete, notices of appeal together with the amended notices of appeal provide record evidence that Respondents desired to pursue the appeal, understood the nature of the appeal, and cooperated with counsel in filing the notice of appeal" and because allowing review would "avoid penalizing Respondents for their attorneys' errors"), *disc. review denied*, 363 N.C. 581, 681 S.E.2d 783 (2009); *but see State v. Hughes*, 210 N.C. App. 482, 484, 707 S.E.2d 777, 778 (2011) (denying a request for the issuance of a writ of *certiorari* where defendant never actually filed a written notice of appeal and there was no oral notice of appeal). Rule 21(a)(1) provides this Court with the authority to review the merits of an appeal via the issuance of a writ of *certiorari* even when the appeal is filed in an untimely manner. *Anderson v. Hollifield*, 345 N.C. 480, 482, 480 S.E.2d 661, 663 (1997).

Here, Defendant gave oral notice of his notice of appeal in open court, and filed a *pro se* written notice of appeal with an illegible file stamp that the Cumberland County Clerk's Office told Defendant reads 30 May 2012. Defendant referenced the incorrect

file number on his written notice of appeal. The Appellate Defender was later appointed to perfect petitioner's appeal. In his petition for the issuance of a writ of *certiorari*, Defendant concedes that he failed to serve his *pro se* notice of appeal upon the State and that other defects in his notice of appeal exist.

The State points to *State v. Grundler*, which holds that discretionary writs may be issued only if there is a meritorious claim to present on appeal or error was probably committed below. 251 N.C. 177, 189, 111 S.E.2d 1, 9 (1959), *cert. denied*, 362 U.S. 917 (1960). We find there was error committed below with respect to the second and third contempt orders, making issuance of the writ proper. After careful review, we determine that Defendant attempted to provide notice of appeal of the contempt orders and that his appeal was simply technically deficient. Thus, we issue the requested writ of *certiorari*.

III. Jurisdiction & Standard of Review

This Court has jurisdiction to hear the instant case pursuant to N.C. Gen. Stat. §§ 5A-17, 7A–27(b) (2011).

The first two issues raise the question of whether the trial court followed the procedures set forth in N.C. Gen. Stat. §§ 5A-14, 15 (2011) for direct contempt proceedings. "'[W]hen a trial court acts contrary to a statutory mandate and a defendant is prejudiced thereby, the right to appeal the court's action is preserved,

notwithstanding defendant's failure to object at trial.'" *State v. Skipper*, ___ N.C. App. ___, ___, 715 S.E.2d 271, 272 (2011) (quoting State v. Ashe, 314 N.C. 28, 39, 331 S.E.2d 652, 659 (1985)) (alteration in original). "An alleged error in statutory interpretation is an error of law, and thus our standard of review for this question is *de novo*." *Armstrong v. N.C. State Bd. of Dental Examiners*, 129 N.C. App. 153, 156, 499 S.E.2d 462, 466 (1998) (citations omitted).

Defendant's third issue on appeal is whether the trial court erred by reducing its oral findings of contempt to writing out-of-session, and is an issue of law. "Conclusions of law are reviewed de novo and are subject to full review." *State v. Biber*, 365 N.C. 162, 168, 712 S.E.2d 874, 878 (2011); *see also Carolina Power & Light Co. v. City of Asheville*, 358 N.C. 512, 517, 597 S.E.2d 717, 721 (2004) ("Conclusions of law drawn by the trial court from its findings of fact are reviewable *de novo* on appeal.").

Defendant's fourth issue on appeal is whether Defendant was entitled to counsel during the contempt proceeding, and is a constitutional issue. "The standard of review for alleged violations of constitutional rights is *de novo*." State v. Graham, 200 N.C. App. 204, 214, 683 S.E.2d 437, 444 (2009), *appeal dismissed and disc. review denied*, 363 N.C. 857, 694 S.E.2d 766 (2010); *see also Piedmont Triad Reg'l Water Auth. v. Sumner Hills Inc.*, 353 N.C. 343, 348, 543 S.E.2d 844, 848 (2001) ("[D]e novo review is ordinarily appropriate in cases where constitutional rights are implicated.").

IV. Analysis

A. Direct Contempt

Defendant argues that the trial court did not comply with N.C. Gen. Stat. §§ 5A-14, 5A-15 by making findings of contempt that were not "substantially contemporaneous" with the contempt proceedings. Defendant also argues that the contemptuous acts so involved Judge Wallace that her objectivity could be questioned under Section 5A-15. We disagree with both arguments.

Direct criminal contempt is contempt that "(1) Is committed within the sight or hearing of a presiding judicial official; and (2) Is committed in, or in immediate proximity to, the room where proceedings are being held before the court; and (3) Is likely to interrupt or interfere with matters then before the court." N.C. Gen. Stat. § 5A-13(a) (2011). The judge may punish summarily for direct contempt, subject to the requirements of N.C. Gen. Stat. § 5A-14 (2011). N.C. Gen. Stat. § 5A-14 provides:

> (a) The presiding judicial official may summarily impose measures in response to direct criminal contempt when necessary to restore order or maintain the dignity and authority of the court and when the measures are imposed substantially contemporaneously with the contempt.
>
> (b) Before imposing measures under this section, the judicial official must give the person charged with contempt summary notice of the charges and a summary opportunity to respond and must find facts supporting the summary

> imposition of measures in response to contempt. The facts must be established beyond a reasonable doubt.

If adjudication and sentencing proceedings for contempt are deferred, the court "must, immediately following the conduct, inform the person of his intention to institute contempt proceedings" and proceed under N.C. Gen. Stat. § 5A-15. N.C. Gen. Stat. § 5A-13(a). Section 5A-15 requires that if "the criminal contempt is based upon acts before a judge which so involve him that his objectivity may reasonably be questioned, the order must be returned before a different judge." N.C. Gen. Stat. § 5A-15.

Defendant argues that contempt was not imposed by the trial court "substantially contemporaneously" as required by N.C. Gen. Stat. § 5A-14. However, this Court has recognized that summary contempt proceedings need not occur immediately following the contemptuous behavior. *In re Nakell*, 104 N.C. App. 638, 649, 411 S.E.2d 159, 165–66 (1991) (finding a two day period between when the direct criminal contempt occurred and when the later hearing occurred was "substantially contemporaneous"); *State v. Johnson*, 52 N.C. App. 592, 596, 279 S.E.2d 77, 79, *disc. review denied and appeal dismissed*, 303 N.C. 549, 281 S.E.2d 390 (1981) (affirming a summary contempt order entered against a defendant for behavior occurring during a bond hearing the day prior to conducting a summary contempt proceeding).

Here, the trial court found Defendant in contempt on four separate occasions; three times on 29 May 2012 and once on 30 May 2012. The trial court imposed punishment via three written orders filed on 30 May 2012. The 30 May 2012 orders reflect a continuation of the earlier contempt findings and would qualify as substantially contemporaneous under *In re Nakell* and *Johnson*. As such, this remained a summary proceeding subject to the requirements of Section 5A-14.

Defendant further argues that the "direct criminal contempts were clearly based upon acts that so involved the trial court that her objectivity could reasonably be questioned." This argument is without merit, as Defendant was charged with direct criminal contempt under Section 5A-14, making Section 5A-15's requirements irrelevant.

Regardless, Judge Wallace displayed ample patience and forbearance in dealing with Defendant throughout the trial. For example, while Major Johnson was being cross-examined by Defendant, Defendant insisted that Major Johnson was committing perjury. Defendant also insisted that evidence was being hidden from the jury. Defendant also began slamming his hands on a courtroom table. Judge Wallace excused the jury, and then stated the following:

> The Court has repeatedly warned the defendant of his demeanor, told him on Monday before the jury came in that the Court would consider, if need be, using masking tape or

> something else if compelled to do so. The Court has allowed the defendant time to talk with standby counsel throughout the course of his trial and has warned standby counsel about his demeanor, raised voices, gestures and repeated commentary.
>
> The Court has exercised her discretion finally yesterday using Rule 611 and all of its three tenets to stop, after some period of time, the harassment of the witnesses and he repeated a continuous offering of extraneous, immaterial evidence from the defense and material that had been gone over at a previous time.
>
> At this time, the Court will warn the defendant that -- and I should have cited him probably before now for contempt of court. Indeed the Court does not want to stifle the defendant by not allowing him to question since he has chosen and is acting as pro se counsel but the Court will do what it has to do to make sure that this case goes on for hearing. The Court warns that criminal contempt sanctions will be considered and criminal contempt is served up to 30 days for each incident, plus a $500 fine.

Despite these repeated warnings, Defendant continued his misbehavior, culminating in the findings of contempt. While Judge Wallace's findings of contempt involved Defendant's conduct toward the trial court, her patient responses to Defendant's repeated outbursts do not demonstrate that her objectivity could be "reasonably questioned," even if Section 5A-15 applied. Further, Judge Wallace's first finding of contempt came after these repeated warnings to Defendant, and the contempt finding was made due to the cumulative effect of Defendant's behavior, rather than any

personal irritation Judge Wallace may have had with Defendant. We therefore find Defendant's first argument concerning Section 5A-15's applicability without merit.

Since we find Defendant was summarily punished for direct contempt, the right to counsel also did not attach. "Summary punishment for direct contempt committed in the presence of the court does not contemplate a trial at which the person charged with contempt is represented by counsel." *In re Williams*, 269 N.C. 68, 76, 152 S.E.2d 317, 323, *cert. denied*, 388 U.S. 918 (1967). Defendant's fourth argument is therefore without merit.

B. Opportunity to Be Heard

Defendant argues that the trial court did not provide him with sufficient opportunity to be heard prior to finding him in contempt, as required by N.C. Gen. Stat. § 5A-14(b). We agree that in the proceedings involving two of the three contempt counts, Judge Wallace failed to provide Defendant with an opportunity to be heard.

Before imposing summary contempt measures under Section 5A-14, a judicial officer must provide the alleged contemnor with summary notice of the charges and a chance to respond to those charges. N.C. Gen. Stat. § 5A-14(b). The Supreme Court has held that "[n]otice and a *formal* hearing are not required when the trial court promptly punishes acts of contempt in its presence." *In re Owens*, 128 N.C. App. 577, 581, 496 S.E.2d 592, 595 (1998), *aff'd per curiam*, 350 N.C. 656, 517 S.E.2d 605 (1999) (emphasis

added). However, a potential contemnor must have a chance to respond to the charges against him or her before punishment is imposed. *Peaches v. Payne*, 139 N.C. App. 580, 586–87, 533 S.E.2d 851, 854 (2000); *see also State v. Randell*, 152 N.C. App. 469, 472, 567 S.E.2d 814, 817 (2002) (reversing the trial court's order of contempt due to a lack of opportunity to be heard).

Put another way, the contemnor must have "an opportunity to present reasons not to impose a sanction." *Owens*, 128 N.C. App. at 581, 496 S.E.2d at 594. Further, a "judicial official's findings in a summary contempt proceeding should clearly reflect that the contemnor was given an opportunity to be heard, along with a summary of whatever response was made and that judicial official's finding that the excuse or explanation proffered was inadequate or disbelieved." *State v. Verbal*, 41 N.C. App. 306, 307, 254 S.E.2d 794, 795 (1979).

Here, the trial court provided Defendant with a sufficient opportunity to be heard in the first contempt proceeding. Judge Wallace made clear to Defendant that he was on "notice of criminal contempt" and stated to Defendant that "[y]ou have the ability to answer that and I will give you that chance right now." Defendant responded by entering a notice of appeal, demanding a new judge for his direct contempt proceeding, and choosing not to respond to the contempt charge. As noted in *Owens*, a formal hearing is not required; it is enough to provide a contemnor with an opportunity

to present reasons why he or she should not be held in contempt. *Owens*, 128 N.C. App. at 581, 496 S.E.2d at 595. By stating "you have the ability to answer" the contempt charge, Defendant was "provided ample opportunity to present the trial court with reasons [he] should not be found in contempt" as to the first charge. *State v. Terry*, 149 N.C. App. 434, 440, 562 S.E.2d 537, 541 (2002).

However, the trial court did not provide sufficient opportunity to be heard on the latter charges of contempt. The second finding of contempt came immediately after the first:

> THE DEFENDANT: Judge is full of it but, anyway, go right ahead. Say what you got to say.
>
> THE COURT: *That's another contempt matter again impairing the respect due to a court during the proceedings.* The Court finds the defendant has willfully disrespected the Court and disrupted the court proceedings on two different occasions as just recited, and the Court will sentence the defendant at some point in time after we finish with this proceeding.
>
> THE DEFENDANT: And the defendant gives his notice of appeal.

The third finding of contempt came after standby counsel Stone moved to withdraw from the case:

> MR. STONE: Your Honor, I move to withdraw from the case. Mr. Newson is making assertions. I never met Mr. Newson, spoke with Mr. Newson prior to Friday of last

> week. I don't even know – didn't know the facts of this particular case.
>
> THE DEFENDANT: Ask him did he tell me that this case was fixed. Ask him did he tell me that you had fixed the case, Judge.
>
> MR. STONE: That's wrong as well.
>
> THE DEFENDANT: Ask him did he tell me that you fixed the case. Ask him did he tell me that you fixed the case.
>
> THE COURT: All right.
>
> THE DEFENDANT: Ask him.
>
> THE COURT: Again, you yell back at this Court when you're not recognized, *I'm going to hold you in contempt for a third time*.
>
> THE DEFENDANT: You talking to me?
>
> THE COURT: I'm talking to you.

A fourth and last finding of contempt came after Defendant testified on his own behalf during questioning about his membership in the Moorish Nation. Defendant was found in contempt while he continued to speak over the court, gave notice of appeal, and then was removed from the courtroom. After Defendant was convicted of the underlying offenses, Defendant was returned to the courtroom where a judgment was announced without providing an opportunity to respond to the contempt charges.

The State argues that Defendant has not shown prejudice. We find this argument without merit. *See Pierce v. Pierce*, 58 N.C. App. 815, 818, 295 S.E.2d 247, 249 (1982) ("The defendant also assigns error to the court's finding him in contempt for being late to court. We believe this assignment of error has merit. The court punished the defendant summarily for contempt. G.S. 5A-14 requires that before the court may punish a person summarily for contempt, the court must give the person 'summary notice of the charges and a summary opportunity to respond . . . .' The record discloses that no notice or opportunity to respond was given to the defendant. It was error to hold him in contempt.").

Diligent review of the record and trial transcript reveal numerous instances of behavior that this Court agrees is contemptuous. Nevertheless, the trial court did not comply with the statutory requirement that Defendant be provided with an adequate opportunity to be heard on the latter instances of contempt. The trial court had the ability to provide this opportunity when finding Defendant in contempt initially, at the conclusion of the trial, and during the sentencing phase, but did not ever provide Defendant with the chance to provide reasons why he was not in contempt for the remaining two contempt orders. For these reasons, we affirm the first contempt order and vacate the latter two contempt orders.

C. Orders of June 6 and 7, 2012

Defendant argues that the trial court's 6 and 7 June 2012 orders must be vacated based on having been entered out of session. We agree.

Orders entered out of term and out of session do not have legal effect. *State v. Boone*, 310 N.C. 284, 287, 311 S.E.2d 552, 555 (1984), *overruled on other grounds by State v. Oates*, 366 N.C. 264, 732 S.E.2d 571 (2012). "Term" is defined as the typical six-month assignment of superior court judges, and "session" is defined as the typical one-week assignments within terms. *State v. Trent*, 359 N.C. 583, 585, 614 S.E.2d 498, 499 (2005).

Here the court entered three direct contempt AOC-CR-390 forms on 30 May 2012, the same day Defendant's trial concluded. These forms are entitled "Direct Criminal Contempt Summary Proceedings/Findings and Order." Over a week later, on 6 June 2012 and 7 June 2012, the trial court entered three additional orders. These later orders, being out of session, thus have no legal effect and must be vacated. However, the first 30 May 2012 contempt order completed on the AOC-CR-390 form, which makes reference to and incorporates the trial court's oral findings and which was not entered out of term and out of session, is sufficient to support a determination that Defendant should be held in contempt for the first incident.

V. Conclusion

While Defendant clearly acted in a contemptuous manner during the proceedings, he was not provided an opportunity to be heard on the latter two

instances of contempt during the proceedings. Thus, we vacate the latter two orders of contempt and affirm the first order, which was properly issued on 30 May 2012.

AFFIRMED IN PART, VACATED IN PART.

Judges ERVIN and DAVIS concur.

Report per Rule 30(e).