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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-1025

Filed: 5 September 2017

Alamance County, Nos. 15 CRS 54988–89

STATE OF NORTH CAROLINA

v.

MICHAEL LEWIS BYRD

Appeal by defendant from judgments entered 14 April 2016 by Judge James K. Roberson in Alamance County Superior Court. Heard in the Court of Appeals 8 August 2017.

*Attorney General Joshua H. Stein, by Special Deputy Attorney General Karen A. Blum, for the State.*

*Edward Eldred, Attorney at Law, PLLC, by Edward Eldred for defendant-appellant.*

BRYANT, Judge.

Where defendant has not acknowledged that his notice of appeal fails to comply with Appellate Rule 3, we dismiss the appeal. However, we treat defendant's brief as a petition for writ of certiorari in order to address the merits of his appeal and hold that where defendant was not given adequate notice or an opportunity to be heard regarding the total number of hours or attorney's fees imposed against him for the

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cost of his appointed counsel, we vacate the civil judgment and remand without prejudice to the State's right to seek the imposition of attorney's fees, provided defendant is afforded proper notice and an opportunity to be heard.

A grand jury indicted defendant Michael Lewis Byrd on one count of malicious conduct by a prisoner, two counts of assault on a government official or employee, two counts of communicating threats, and one count of resisting a public officer. At the close of the State's evidence, the trial court dismissed one charge of communicating threats. The jury found defendant guilty of the five remaining charges. On 14 April 2016, the trial court imposed an active sentence of thirty-three to forty-nine days for the malicious conduct by a prisoner conviction. The trial court also imposed two concurrent sentences of 150 days for the remaining convictions and ordered them to begin at the expiration of his sentence for malicious conduct by a prisoner. In one judgment, the trial court ordered that "a civil judgment shall be entered [ ] as civil judgment for attorney fee, upon submitting and court cost." Defendant gave oral notice of appeal in open court. On 7 June 2016, the trial court entered a civil judgment against defendant for attorney's fees in the amount of \$1,140.00. Defendant appeals.

As an initial matter, we must determine whether we have jurisdiction to reach the merits of defendant's appeal. Here, the judgment at issue was entered against defendant for attorney's fees. *See* N.C. Gen. Stat. § 7A-455(a) (2015). Because this is

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technically a civil judgment, albeit rendered following a criminal action, defendant is required to comply with Rule 3 of the North Carolina Rules of Appellate Procedure when noticing this appeal. *See* N.C. R. App. P. 3(a) (2017) (“Any party entitled by law to appeal from a judgment or order . . . rendered in a *civil action* or special proceeding may take appeal by filing notice of appeal with the clerk . . . .” (emphasis added)); N.C. R. App. P. 4 (2017) (“Any party entitled by law to appeal from a judgment or order . . . rendered in a *criminal action* may take appeal by: (1) giving oral notice of appeal at trial, or (2) filing notice of appeal with the superior court . . . .” (emphasis added)). Defendant failed to give notice of appeal pursuant to Rule 3, and therefore his appeal is subject to dismissal. However, because defendant gave timely notice of appeal in open court following his criminal conviction, we elect to treat defendant’s brief as a petition for writ of certiorari and address the merits of his appeal. *See State v. Brooks*, 204 N.C. App. 193, 195, 693 S.E.2d 204, 206 (2010) (citing *Putnam v. Alexander*, 194 N.C. App. 578, 581–83, 670 S.E.2d 610, 614 (2009)); *see also* N.C. R. App. P. 21(a)(1) (2017).

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Defendant’s sole argument on appeal is that the trial court erred in imposing attorney’s fees as a civil judgment without providing sufficient notice and an opportunity to be heard regarding the total hours and fees claimed by his attorney. We agree.

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N.C. Gen. Stat. § 7A-455 “provides that the 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). But, where there is no evidence in the record that a defendant “received any opportunity to be heard on the matter” regarding attorney’s fees, *see id.*, this Court will vacate a civil judgment imposing the same and remand for the State to “apply for a judgment in accordance with N.C. Gen. Stat. § 7A-455, provided that [the] defendant is given notice and an opportunity to be heard regarding the total amount of hours and fees claimed by the court-appointed attorney.” *See id.* at 236, 616 S.E.2d at 317; *see also State v. Crews*, 284 N.C. 427, 442, 201 S.E.2d 840, 849–50 (1974) (vacating judgment where there was no evidence in the record supporting or negating the defendant’s contention that a judgment imposing attorney’s fees was entered without notice or opportunity for him to be heard); *State v. Stafford*, 45 N.C. App. 297, 300, 262 S.E.2d 695, 697 (1980) (vacating a civil judgment imposing attorney’s fees on the defendant where there was no indication that the defendant received any opportunity to be heard on the matter).

In the instant case, the State concedes that defendant was not given proper notice and an opportunity to be heard regarding the amount of attorney’s fees imposed. After pronouncing defendant’s sentences, the trial court stated, “[A]ny attorney fees will be a civil judgment. [C]ourt costs are civil judgments. Any jail fees

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for that 200 days are remitted. All right, any other matters we need to address?” There is no indication in the record that defendant was given notice or an opportunity to be heard regarding the total time claimed by his trial counsel, nor the total amount of fees allowed by the trial court in its civil judgment entered almost two months later. Accordingly, pursuant to *Jacobs* and similar cases, we are required to vacate the civil judgment entered against defendant.

As defendant has not raised any challenges to his convictions for the charged offenses or the sentence imposed against him (except for attorney’s fees), we find no error in defendant’s convictions, but vacate the civil judgment and remand without prejudice to the State’s right to seek the imposition of attorney’s fees, provided defendant is given notice and an opportunity to be heard on the same.

NO ERROR IN PART; VACATED AND REMANDED IN PART.

Judges CALABRIA and STROUD concur.

Report per Rule 30(e).