IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-195

Filed: 16 October 2018

Union County, Nos. 13 CRS 054210-13; 14 CRS 000696, 51267; 16 CRS 52748-49; 17 CRS 000385, 50708

STATE OF NORTH CAROLINA

v.

MARTAVIOUS LEHOMER ALLEN

Appeal by defendant from judgments entered 1 August 2017 by Judge Christopher W. Bragg in Union County Superior Court. Heard in the Court of Appeals 3 October 2018.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Scott T. Slusser, for the State.

Meghan Adelle Jones for defendant-appellant.

TYSON, Judge.

Martavious Lehomer Allen ("Defendant") appeals from judgments entered upon: (1) jury verdicts finding Defendant guilty of two counts of obtaining property by false pretenses; (2) his guilty plea to another count of attempted obtaining property by false pretenses and attaining habitual felon status; and (3) the revocation of his

prior probation based upon his new convictions. We find no error at trial. The civil judgment entered against Defendant for payment of attorney's fees is vacated and remanded.

I. Factual and Procedural Background

On 24 June 2016, Defendant presented a payroll check issued in his name from Paris and Potter Management, in the amount of $765.00, to Action Cash, a check-cashing business. Defendant was paid ninety-seven percent of the value of the check. Action Cash retained the remaining three percent as a fee.

Three days later, on 27 June 2016, Defendant returned to Action Cash with another payroll check from Paris and Potter, this time in the amount of $567.63. The owner of Action Cash, who had processed Defendant's previous transaction, became suspicious and contacted Paris and Potter, and was informed that Defendant was not an employee. The owner of Action Cash contacted the Monroe Police Department, but Defendant left the business before officers arrived and without receiving any money for the second check.

Defendant was later indicted for two counts of obtaining or attempting to obtain property by false pretenses in 16 CRS 52748 and 16 CRS 52749 and attaining habitual felon status in 17 CRS 000385. The indictments indicated Defendant had obtained $765.00 and had attempted to obtain $567.63 from Action Cash.

At the close of the State's evidence and at the close of all the evidence, Defendant moved to dismiss the obtaining property by false pretense charges. He argued a fatal variance existed between the indictments and proof presented at trial, because the indictments did not account for the three percent check-cashing fee Action Cash retained. The trial court denied the motions.

On 1 August 2017, the jury returned verdicts finding Defendant guilty of both counts of obtaining or attempting to obtain property by false pretenses. Defendant entered into a plea arrangement with the State, whereby he pled guilty to attaining habitual felon status and one count of attempted obtaining property by false pretenses on a later and unrelated indictment in 17 CRS 50708. Defendant admitted that he had violated the terms of his probation imposed for prior convictions. The trial court entered four judgments.

For the two counts of obtaining property by false pretenses based upon the jury's verdicts and for attaining habitual felon status, the trial court imposed an active sentence of 97 to 129 months of imprisonment. The remaining judgments revoked Defendant's probation and imposed active sentences to run concurrently with and to expire prior to Defendant's completion of the 97 to 129 months of imprisonment. Defendant entered notice of appeal in open court. On 2 August 2017, the trial court entered a civil judgment against Defendant for $4,812.50 for his attorney's fees.

II. Jurisdiction

An appeal of right lies with this Court pursuant to N.C. Gen. Stat. §§ 7A-27(b) and 15A-1444 (2017).

III. Fatal Variance

Defendant argues that the trial court erred by denying his motion to dismiss based upon a fatal variance between the indictments and the proof at trial. We disagree.

This Court reviews the trial court's denial of a motion to dismiss based on a fatal variance *de novo*. *State v. Falana*, ___ N.C. App. ___, ___, 802 S.E.2d 582, 584 (2017).

"'It has long been the law of this State that a defendant must be convicted, if convicted at all, of the particular offense charged in the warrant or bill of indictment.'" *State v. Hicks*, 239 N.C. App. 396, 407, 768 S.E.2d 373, 379 (*quoting State v. Williams*, 318 N.C. 624, 628, 350 S.E.2d 353, 356 (1986)), *cert. denied,* 368 N.C. 267, 772 S.E.2d 731 (2015). "[T]he evidence in a criminal case must correspond to the material allegations of the indictment, and where the evidence tends to show the commission of an offense not charged in the indictment, there is a fatal variance between the allegations and the proof requiring dismissal." *State v. Seelig*, 226 N.C. App. 147, 162, 738 S.E.2d 427, 438 (citation and quotation marks omitted), *disc. review denied*, 366 N.C. 598, 743 S.E.2d 182 (2013).

> A variance occurs where the allegations in an indictment, although they may be sufficiently specific on their face, do not conform to the evidence actually established at trial. In order for a variance to warrant reversal, the variance must be material. A variance is not material, and is therefore not fatal, if it does not involve an essential element of the crime charged.

State v. Skinner, 162 N.C. App. 434, 445-46, 590 S.E.2d 876, 885 (2004) (citations and quotation marks omitted).

Here, Defendant was indicted for obtaining "$765.00 in U.S. currency" and attempting to obtain "$567.63 in U.S. currency[.]" He argues that the evidence at trial did not support these allegations because Action Cash retained three percent of any presented and paid payroll check as a check-cashing fee.

Our Supreme Court recently addressed a similar issue. *State v. Mostafavi*, 370 N.C. 681, 811 S.E.2d 138 (2018). In *Mostafavi*, the indictment charged Mostafavi with two counts of obtaining property by false pretenses, by stating that the defendant obtained "United States Currency from Cash Now Pawn[.]" *Id.* at 685, 811 S.E.2d at 141. The defendant asserted that any indictment charging him with obtaining money by false pretenses must include the stated amount of money he had obtained. *Id.* at 686, 811 S.E.2d at 141. The Supreme Court held "the indictment did not need to include the amount of money obtained because it adequately advised defendant of the conduct that is the subject of the accusation." *Id.* (footnote omitted).

This Court has stated, "[i]t is not legally significant whether the thing gained by the party perpetrating the criminal act is in the same form as it was when taken

by false pretense from the owner." *State v. Wilson*, 34 N.C. App. 474, 476, 238 S.E.2d 632, 634, *disc. review denied and appeal dismissed*, 294 N.C. 188, 241 S.E.2d 72 (1977).

Defendant's receipt of proceeds of his fraudulent checks as ninety-seven percent cash and three percent as a check-cashing fee is immaterial. *See id.* (finding no variance when the "indictment charge[d] that the defendant obtained money from Pilot Freight Carriers and the evidence disclose[d] that he received a color television set and a clothes dryer from B. F. Goodrich").

Even if a variance exists, it "does not require reversal unless the defendant is prejudiced as a result. This Court has required a defendant to demonstrate that he or she was misled by a variance, or hampered in his/her defense before this Court will consider the variance error." *State v. Weaver*, 123 N.C. App. 276, 291, 473 S.E.2d 362, 371 (citation omitted), *cert. denied and disc. review denied*, 344 N.C. 636, 477 S.E.2d 53 (1996). No evidence tends to show Defendant was misled by the alleged variance in either indictment. The transactions, which provided the basis for the indictments, are clear from the allegations therein. Defendant was not hampered in his defense simply because there was no allegation he also received or attempted to receive "check-cashing services" as part of the transactions. This argument is overruled.

IV. Civil Judgment

Defendant argues the trial court erred by ordering Defendant's attorney's fees to be entered as a civil judgment without providing Defendant prior notice and an opportunity to be heard. The State concedes the issue and we agree.

As an initial matter, we must determine if the civil judgment at issue is properly before this Court. Defendant concedes he never entered a written notice of appeal as to the civil judgment entered against him for attorney's fees. *See* N.C. R. App. P. 3(a) ("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"). Defendant's appeal from the civil judgment is subject to dismissal.

Defendant has filed a petition for writ of certiorari as an alternative basis to review Defendant's civil judgment. *See* N.C. R. App. P. 21(a)(1) (A writ of certiorari may be issued "in appropriate circumstances" 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"). Under Rule 21 and in our discretion, we allow the petition and address the merits of Defendant's appeal from the civil judgment.

N.C. Gen. Stat. § 7A-455 (2017) permits the trial court to enter a civil judgment against an indigent defendant for fees incurred by that defendant's court-appointed attorney. *See State v. Jacobs*, 172 N.C. App. 220, 235, 616 S.E.2d 306, 316 (2005). Prior to entering judgment pursuant to N.C. Gen. Stat. § 7A-455, 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." *Id.* at 236, 616 S.E.2d at 317.

> [B]efore entering money judgments against indigent defendants for fees imposed by their court-appointed counsel under N.C. Gen. Stat. § 7A-455, trial courts should ask defendants -- personally, not through counsel -- whether they wish to be heard on the issue. Absent a colloquy directly with the defendant on this issue, the requirements of notice and opportunity to be heard will be satisfied only if there is other evidence in the record demonstrating that the defendant received notice, was aware of the opportunity to be heard on the issue, and chose not to be heard.

State v. Friend, ___ N.C. App. ___, ___, 809 S.E.2d 902, 907 (2018).

After judgment was entered, defense counsel informed the trial court that he would "submit at the appropriate time" an attorney's fee application and asked that the fees be made a civil judgment. The trial court agreed, but neither counsel nor the court notified Defendant of the actual amount of fees proposed to be awarded nor asked Defendant whether he wished to be heard.

The civil judgment resulting from the award of attorney's fees is vacated and remanded. *See Jacobs*, 172 N.C. App. at 235-36, 616 S.E.2d at 316-17 (vacating and remanding civil judgment because although the trial court notified the defendant that he would be awarding attorney's fees at the State-determined "rate of $65 an hour[,]" the defendant's appointed attorney "had not yet calculated his hours of work related to defendant's representation"). "On remand, the State may apply for a judgment in

accordance with N.C. Gen. Stat. § 7A-455, provided that [Defendant] is given [prior] notice and an opportunity to be heard regarding the total amount of hours and fees claimed by the court-appointed attorney." *Id.* at 236, 616 S.E.2d at 317.

V. Conclusion

The trial court properly denied Defendant's motion to dismiss based upon a fatal variance. No error occurred at Defendant's trial, in the jury's verdict or in the pleas and criminal judgment entered thereon.

The civil judgment for attorney's fees was entered without providing notice or an opportunity to be heard to Defendant. We vacate and remand that judgment. *It is so ordered.*

NO ERROR IN PART, VACATED IN PART, AND REMANDED.

Judges CALABRIA and ZACHARY concur.

Report per Rule 30(e).