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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-231

Filed: 5 November 2019

Macon County, Nos. 16CRS051206, 17CRS34

STATE OF NORTH CAROLINA

v.

BENJAMIN JOHN PHILLIPS, Defendant.

Appeal by defendant from judgments entered 17 July 2018 and 29 August 2018 by Judge Mark E. Powell in Macon County Superior Court. Heard in the Court of Appeals 16 October 2019.

Attorney General Joshua H. Stein, by Assistant Attorney General Jonathan D. Shaw, for the State.

Daniel J. Dolan for defendant-appellant.

BERGER, Judge.

Benjamin John Phillips ("Defendant") was found guilty of possession of a firearm by a felon and having attained habitual felon status. Defendant was sentenced to 96 to 126 months in prison and ordered to pay $2,066.75 for his attorney's fees and an appointment fee. Defendant filed a petition for a writ of certiorari seeking appellate review on the entries of criminal judgments and civil

judgment. On appeal, Defendant argues the trial court erred when it denied his motion for a new attorney and the trial court erred in entering a civil judgment against him for attorney's fees and the appointment fee without providing him notice and an opportunity to be heard. We find no error in part, and vacate and remand in part.

Factual and Procedural Background

On July 10, 2017, Defendant signed a waiver of counsel and agreed to be tried "without the assistance of counsel, which includes the right to assigned counsel and the right to assistance of counsel." However, the record reflects about two months later, Defendant was assigned counsel.

The case was tried on July 17, 2018. The State presented evidence and Defendant elected not to testify or present evidence. The State's evidence tended to show that on October 2, 2016, Macon County law enforcement went to Defendant's home to serve an outstanding warrant on Defendant. After Defendant allowed them inside, he was advised that he was under arrest for the outstanding warrant and placed in handcuffs. Law enforcement then conducted a pat down of Defendant's person and found a firearm in his pants pocket. The firearm was removed and placed on top of his refrigerator. Defendant was then placed in a patrol car and taken to the Macon County Detention Center. Later that day, law enforcement returned to Defendant's home to recover the firearm because they became aware that Defendant

was a convicted felon and not allowed to possess firearms. Law enforcement entered the home and secured the firearm with verbal and written consent from Defendant's wife.

Defendant was charged with possession of a firearm by a felon and communicating threats. He was later indicted for possession of a firearm by a felon and for having attained habitual felon status. Defendant was found guilty of possession of a firearm by a felon and guilty of having attained habitual felon status. On July 17, 2018, Defendant was sentenced to 96 to 126 months in prison, and he was ordered to pay $402.50 in court costs. On August 29, 2018, the trial court entered an order and judgment requiring Defendant to pay $2,006.75 in attorney's fees and a $60.00 appointment fee.

On July 23 and 26, 2018, Defendant filed *pro se* notices of appeal from criminal judgments. On July 24 and 26, defense counsel filed notices of appeal from criminal judgments on Defendant's behalf, but failed to serve the first notice upon the prosecutor and failed to designate the court to which appeal is taken in the second notice. Neither Defendant nor defense counsel appealed from the order and judgment for attorney's fees and the appointment fee. In light of the defects in Defendant's criminal notices of appeal and failure to appeal the civil judgment, Defendant filed a petition for a writ of certiorari to review the criminal judgments entered July 17, 2018 and the civil judgment entered August 29, 2018.

Analysis

"A defendant who has entered a plea of not guilty to a criminal charge, and who has been found guilty of a crime, is entitled to appeal as a matter of right when final judgment has been entered." N.C. Gen. Stat. § 15A-1444(a) (2017). Rule 4 of the North Carolina Rules of Appellate Procedure provides that notice of appeal from criminal judgments may be given orally at trial or by filing a notice of appeal, must be served upon all adverse parties, and must designate the court to which appeal is taken. N.C.R. App. P. 4(a), (b). However, "a jurisdictional default, such as a failure to comply with Rule 4 precludes the appellate court from acting in any manner other than to dismiss the appeal." *State v. Hammonds*, 218 N.C. App. 158, 162, 720 S.E.2d 820, 823 (2012) (*purgandum*). A defendant is entitled to appeal as a matter of right "any final judgment of a superior court." N.C. Gen. Stat. § 7A-27(b)(1) (2017). Rule 3 of the North Carolina Rules of Appellate Procedure provides that notice of appeal from civil judgments may be given by filing notice of appeal and serving it upon all other parties. N.C.R. App. P. 3. Failure to comply with the jurisdictional requirements of Rule 3 requires dismissal of an appeal. *State v. Smith*, 188 N.C. App. 842, 846, 656 S.E.2d 695, 697 (2008).

Because Defendant has not properly given notice of appeal from criminal judgments and civil judgment, we are without jurisdiction to hear the appeals. However, a writ of certiorari may be issued "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). The power to do so is discretionary and may only be done in "appropriate circumstances." N.C.R. App. P. 21(a)(1). In our discretion, we issue a writ of certiorari to review the issues raised in Defendant's petition. *See State v. Friend*, ___ N.C. App. ___, 809 S.E.2d 902, 905 (2018) (issuing a writ of certiorari to review both the criminal judgment and civil money judgment entered against the defendant). On appeal, Defendant argues the trial court erred when it denied his motion for a new attorney and the trial court erred in entering judgment against him for attorney's fees without providing him notice and an opportunity to be heard. We find no error in part, and vacate and remand in part.

I. Substitution of Counsel

Defendant contends the trial court abused its discretion when it denied Defendant's motion for a new attorney. We disagree.

"Substitution of counsel rests in the sound discretion of the trial court." *State v. Gary*, 348 N.C. 510, 516, 501 S.E.2d 57, 62 (1998) (citation omitted). "Abuse of discretion results where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988).

"An indigent defendant's right to appointed counsel in a criminal prosecution is guaranteed by both the North Carolina Constitution and the Sixth Amendment to

the United States Constitution. The right to appointed counsel, however, does not include the privilege to insist that counsel be removed and replaced with other counsel merely because defendant becomes dissatisfied with his attorney's services." *State v. Holloman*, 231 N.C. App. 426, 429, 751 S.E.2d 638, 641 (2013) (citations and internal quotation marks omitted).

"A trial court is constitutionally required to appoint substitute counsel whenever representation by counsel originally appointed would amount to denial of defendant's right to effective assistance of counsel, that is, when the initial appointment has not afforded defendant his constitutional right to counsel." *State v. Thacker*, 301 N.C. 348, 352, 271 S.E.2d 252, 255 (1980). "Thus, when it appears to the trial court that the original counsel is reasonably competent to present defendant's case and the nature of the conflict between defendant and counsel is not such as would render counsel incompetent or ineffective to represent that defendant, denial of defendant's request to appoint substitute counsel is entirely proper." *Id.* at 352, 271 S.E.2d at 255. "In order to be granted substitute counsel, the defendant must show good cause, such as a conflict of interest, a complete breakdown in communication, or an irreconcilable conflict which leads to an apparently unjust verdict." *Gary*, 348 N.C. at 516, 501 S.E.2d at 62 (internal citation and quotation marks omitted).

In the present case, Defendant takes issue with the level of inquiry the trial court made into determining whether Defendant's appointed counsel was able to provide competent representation. However, the trial court's obligation is "to inquire into defendant's reasons for wanting to discharge his attorney and to determine whether those reasons are legally sufficient to require the discharge of counsel." *Holloman*, 231 N.C. App. at 430, 751 S.E.2d at 641 (*purgandum*). Thus, the "trial court's sole obligation when faced with a request that counsel be withdrawn is to make sufficient inquiry into defendant's reasons to the extent necessary to determine whether defendant will receive effective assistance of counsel." *State v. Poole*, 305 N.C. 308, 312, 289 S.E.2d 335, 338 (1982). "Once it becomes apparent that the assistance of counsel has not been rendered ineffective, the trial judge is not required to delve any further into the alleged conflict." *Holloman*, 231 N.C. App. at 430, 751 S.E.2d at 641 (citation and quotation marks omitted).

Here, when the trial court asked Defendant why he wanted a new attorney, he replied that he had issues with his attorney's level of communication, level of preparedness, and potential conflict of interest. However, none of these grievances rose to the level of rendering the court-appointed assistance ineffective.

Defendant argues his attorney only spent about 15-20 minutes discussing the case with Defendant, that his attorney never returned his phone calls, and that Defendant had not spoken to his attorney until the day before trial. However, the

existence of some communication problems between the defendant and his court-appointed counsel is not sufficient to require the trial court to replace court appointed counsel. *Thacker*, 301 N.C. at 352-53, 271 S.E.2d at 255. Moreover, "frequency of contact between an attorney and his client is one factor to be weighed in evaluating the effectiveness of counsel" and the level of contact will not render assistance ineffective if it does not adversely affect the attorney's preparation for trial. *State v. Hutchins*, 303 N.C. 321, 336, 279 S.E.2d 788, 798 (1981). Defense counsel testified that he had four conversations with Defendant. Defense counsel further testified he had a conference with Defendant the day before trial to discuss the case and the potential issues with his case, and listened to Defendant's concerns with the law and facts of his case.

While Defendant and defense counsel may have only spoken four times, the record indicates these conversations provided defense counsel the opportunity to prepare for trial and that defense counsel was prepared at trial. During trial, defense counsel cross-examined both of the State's witnesses and thoroughly questioned the witnesses on their conduct and observations on the day they arrested Defendant. Defense counsel also filed three motions on behalf of Defendant, including a motion to dismiss the charges for insufficient evidence and for a fatal variance between the indictment and evidence presented at trial. Accordingly, these facts do not amount

to a complete breakdown of communication or preparation which would warrant the appointment of substitute counsel.

Defendant also argues defense counsel was laboring under a conflict of interest due to his representation of Defendant's girlfriend in another matter. When a defendant requests the appointment of substitute counsel based on an alleged conflict of interest, "the trial court must satisfy itself only that present counsel is able to render competent assistance and that the nature or degree of the conflict is not such as to render that assistance ineffective." *Thacker*, 301 N.C. at 353, 271 S.E.2d at 256. Here, the trial court was satisfied that defense counsel could provide competent assistance despite Defendant's assertions regarding communication issues and level of preparedness. Furthermore, the trial court inquired into the potential conflict of interest. Defense counsel informed the trial court that he had been assigned to represent Defendant's girlfriend in a prior case, but she had been appointed another attorney and he did not know the disposition of the case. Also, he informed the trial court he was unaware of the relationship until the day before trial and had no reservations representing Defendant on the current case.

Because the trial court sufficiently inquired into Defendant's reasons for wanting a new attorney and determined counsel's level of communication, level of preparation, and conflict of interest were not legally sufficient reasons to replace

Defendant's counsel, the trial court did not abuse its discretion when it denied Defendant's request for substitute counsel. Accordingly, we find no error.

We note on September 23, 2019 Defendant filed a "MEMORANDUM OF ADDITIONAL AUTHORITY" pursuant to Rule 28(g) of the North Carolina Rules of Appellate Procedure. Rule 28(g) states:

> Additional authorities discovered by a party after filing its brief may be brought to the attention of the court by filing a memorandum thereof with the clerk of the court and serving copies upon all other parties. The memorandum may not be used as a reply brief or for additional argument, but shall simply state the issue to which the additional authority applies and provide a full citation of the authority.

N.C.R. App. P. 28(g). In his memorandum, Defendant cites to *State v. Goodwin*, ___ N.C. App. ___, ___ S.E.2d ___, No. COA18-1157, 2019 WL 4439654 (Sept. 17, 2019) and states it applies to the first issue raised in his brief.

In *State v. Goodwin*, the defendant, prior to trial, moved to terminate representation by counsel. The defendant requested new counsel, "explaining to the trial court that he believed [defense counsel] was not competent to represent him because they could not agree on which witnesses to call and could not properly communicate. Defendant also said he wanted to hire a private attorney and could acquire the money to pay for one." *Id.* at ___, ___ S.E.2d at ___, No. COA18-1157, 2019 WL 4439654, at *1. The trial court denied the motion to withdraw stating there was not an absolute impasse between the defendant and defense counsel. *Id.* at ___,

___ S.E.2d at ___, No. COA18-1157, 2019 WL 4439654, at *1. On appeal, the defendant argued "the trial court committed a structural error when it used the ineffective assistance of counsel standard established in *State v. Ali*, 329 N.C. 394, 402, 407 S.E.2d 183, 188 (1991), to deny his request for chosen counsel" and asserted "the standard from *State v. McFadden*, 292 N.C. 609, 613-14, 234 S.E.2d 742, 746 (1977), was instead appropriate." *Id.* at ___, ___ S.E.2d at ___, No. COA18-1157, 2019 WL 4439654, at *2. This Court agreed and concluded the defendant had requested counsel of his choice and characterized the trial court's treatment of the defendant's request under an ineffective assistance of counsel standard was structural error. *Id.* at ___, ___ S.E.2d at ___, WL 4439654, at *2 (defining structural error as one that "should not be deemed harmless beyond a reasonable doubt because it affects the framework within which the trial proceeds, rather than being simply an error in the trial process itself" (*purgandum*)).

This Court reasoned, "[a]lthough Defendant expressed doubts about [defense counsel]'s competency to the trial court, that alone is insufficient to transform his request into an argument regarding effective assistance of counsel, as the trial court concluded; instead, it supports Defendant's assertion that he was entitled to hire counsel of his choice." *Id.* at ___, ___ S.E.2d at ___, WL 4439654, at *3. It then vacated the judgment and remanded for a new trial after concluding that the trial court committed structural error and defendant "asserted his right to hire chosen counsel

and the trial court treated that request as an ineffective assistance of counsel claim." *Id.* at ___, ___ S.E.2d at ___, WL 4439654, at *4.

Here, there is evidence in the record that Defendant stated he wanted to hire his own attorney.[1] However, on appeal, Defendant's brief and his petition for writ of certiorari focus on Defendant's request for a new lawyer, not the opportunity to hire private counsel. In his brief, Defendant does not argue he was denied the right to retain private counsel, he had reached an impasse with defense counsel, or that the trial court committed structural error.

Although this Court filed *Goodwin* after Defendant filed his brief to this Court, Defendant could have argued he had invoked his right to private counsel at trial and did not need to cite to *Goodwin* in order to raise the issue on appeal. "It is not the role of this Court to craft defendant's arguments for him." *State v. Earls*, 234 N.C. App. 186, 192, 758 S.E.2d 654, 658 (2014). Even if a party complies with Rule 28(g), this Court cannot review additional authorities cited in a memorandum of additional authorities if the underlying issue contained therein was not preserved on appeal. *See State v. Kelly*, 118 N.C. App. 589, 597, 456 S.E.2d 861, 868 (1995) (declining to

[1] When Defendant initially moved for a new attorney, the trial court inquired into his reasons. Defendant stated he had issues with his attorney's level of communication, level of preparedness, and potential conflict of interest. At no point did Defendant argue he had reached an impasse with defense counsel. After listening to Defendant's reasons, the trial court informed Defendant it did not want to replace his attorney in the middle of trial. Defendant responded, "Well, sir, if he had did what I asked him to do, that's the point, and we wouldn't be in the middle of a trial . . . I could hire my own attorney or something." The court then denied his motion and recessed. Upon returning from recess, Defendant asked to address the court and again raised his concerns regarding defense counsel. He also stated, "I wish that you would let me hire my own attorney."

review the State's argument on appeal because it was raised for the first time in a memorandum of additional authorities and not in its brief). Accordingly, we decline to address Defendant's argument on this issue.

II. Attorney's Fees and Appointment Fee

Defendant also contends the trial court erred in entering judgment against him for attorney's fees and the appointment fee without first providing him notice and an opportunity to be heard. We agree.

The trial court may enter a civil judgment against a convicted, indigent defendant who was appointed counsel for the amount of fees incurred by the defendant's court-appointed counsel. N.C. Gen. Stat. § 7A-455 (2017). The trial court shall also order a convicted defendant who was appointed counsel to pay an appointment fee of sixty dollars. N.C. Gen. Stat. § 7A-455.1 (2017). However, "where there is no indication in the record that a defendant was notified of and given an opportunity to be heard regarding the appointed attorney's total hours or the total amount of fees imposed, the imposition of attorney's fees must be vacated." *State v. Harris*, ___ N.C. App. ___, ___, 805 S.E.2d 729, 737 (2017) (*purgandum*), *review denied*, 370 N.C. 579, 809 S.E.2d 872 (2018). Similarly, a convicted indigent defendant must be "given notice of the appointment fee" and must also be "given an opportunity to be heard and object to the imposition of this cost." *Id.* at ___, 805 S.E.2d at 737 (quotation marks and citations omitted).

Here, the order and judgment for attorney's fees and the appointment fee was entered in August 2018, about a month after criminal judgment was entered. There is no evidence in the record that Defendant was given notice that attorney's fees and the appointment fee would be entered against him at any point. Additionally, the record does not reflect that Defendant was given an opportunity to be heard prior to the entry of attorney's fees and the appointment fee. Therefore, the trial court erred when it awarded attorney's fees and ordered payment of the appointment fee. Accordingly, the civil judgment is vacated and remanded without prejudice and the State may apply for a judgment in accordance with Sections 7A-455 and 7A-455.1 after Defendant is "given notice and an opportunity to be heard regarding the total amount of hours and fees claimed by the court-appointed attorney." *State v. Jacobs*, 172 N.C. App. 220, 236, 616 S.E.2d 306, 316 (2005).

Conclusion

The trial court did not err when it denied Defendant's motion for a new attorney. However, the trial court erred when it did not afford Defendant notice and an opportunity to be heard before the imposition of a civil judgment for attorney's fees and the appointment fee. Accordingly, we find no error in part, and vacate the civil judgment for attorney's fees and the appointment fee and remand for further proceedings on this sole issue.

NO ERROR IN PART; VACATED AND REMANDED IN PART.

Judges STROUD and DILLON concur.

Report per Rule 30(e).