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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-1113

Filed: 15 September 2020

Davidson County, No. 17 CRS 1955, 17 CRS 54524

STATE OF NORTH CAROLINA

v.

DERRICK REID, Defendant.

Appeal by Defendant from order entered 31 May 2019 by Judge Julia L. Gullett in Davidson County Superior Court. Heard in the Court of Appeals 26 August 2020.

*Attorney General Joshua H. Stein, by Assistant Attorney General William A. Smith, for the State.*

*Epstein Law Firm, by Drew Nelson, for the defendant.*

BROOK, Judge.

Derrick Reid (“Defendant”) petitions for a writ of certiorari to review a civil judgment imposing attorney’s fees. In the exercise of our discretion, we grant Defendant’s petition, vacate the civil judgment, and remand for further proceedings.

I. Factual Background and Procedural History

On 31 May 2019, a Davidson County jury found Defendant guilty of assault with a deadly weapon with intent to kill and of discharging a weapon into a moving

STATE V. REID

*Opinion of the Court*

vehicle. The trial court entered judgment on these convictions and sentenced Defendant to two active consecutive sentences for 64 to 89 months and for 73 to 100 months, respectively. The trial court then asked defense counsel about the issue of attorney's fees:

THE COURT: Are you appointed or retained?

[DEFENSE COUNSEL]: Appointed. 60 hours. I have log sheet [sic].

THE COURT: The Court enters a civil judgment for the attorney fee. And I just need to calculate that.

[DEFENSE COUNSEL]: I'll present that in a few minutes, Your Honor.

THE COURT: Okay. Very Well [sic].

[PROSECUTOR]: Nothing further from the State, Your Honor.

THE COURT: The judgment for the attorney fee is \$4,500, and the Court would also enter a civil judgment for court costs.

The trial court ordered that the corresponding fee be reduced to a civil judgment. Defendant gave notice of appeal in open court; however, he never entered a written notice of appeal of the civil judgment.

## II. Analysis

We first address our jurisdiction to hear Defendant's appeal before turning to its merits.

### A. Defendant's Petition for Writ of Certiorari

STATE V. REID

*Opinion of the Court*

Defendant contends that the trial court erred in issuing a civil judgment for attorney's fees against him without providing him notice and an opportunity to be heard as required by N.C. Gen. Stat. § 7A-455. Defendant failed, however, to notice appeal in accord with our appellate procedural rules. N.C. R. App. P. 3(a) (requiring written notice of appeal in a civil matter). Defendant has petitioned this Court for a writ of certiorari to hear his appeal. As explained below, Defendant's argument on the issue of attorney's fees is meritorious, and we accordingly issue a writ of certiorari to review Defendant's appeal. *See State v. Patterson*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 839 S.E.2d 68, 73 (2020) (issuing writ of certiorari to review appeal of civil judgment of attorney's fees); *see also State v. Mayo*, 263 N.C. App. 546, 549, 823 S.E.2d 656, 659 (2019) (same); *State v. Friend*, 257 N.C. App. 516, 519, 809 S.E.2d 902, 905 (2018) (same).

B. Civil Judgment for Court-Appointed Attorney's Fees

Whether a trial court provided adequate "notice and an opportunity to be heard regarding the total amount of hours and fees claimed by the court-appointed attorney" is a question of law, *State v. Jacobs*, 172 N.C. App. 220, 236, 616 S.E.2d 306, 317 (2005), that we review de novo, *State v. Cox*, 367 N.C. 147, 151, 749 S.E.2d 271, 275 (2013).

After entering judgment in a criminal case, "[t]he trial court may enter a civil judgment against an indigent defendant following his conviction in the amount of the

STATE V. REID

*Opinion of the Court*

fees incurred by the defendant’s appointed trial counsel.” *Mayo*, 263 N.C. App. at 549, 823 S.E.2d at 659. However,

before 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.

*Friend*, 257 N.C. App. at 523, 809 S.E.2d at 907.

The State contends that *Friend* is distinguishable on these facts because, here, “the record shows that Defendant was aware that he could interject and would be heard by the [c]ourt.” We disagree and conclude that *Friend* controls. The record reveals no indication that Defendant “was aware of the opportunity to be heard on the issue [of attorney’s fees], and [that he] chose not to be heard[,]” as *Friend* and N.C. Gen. Stat. § 7A-455 require. *Id.* As the colloquy between defense counsel and the trial court indicates, the trial court did not inform Defendant of his right to be heard on the issue of attorney’s fees or provide him an opportunity to be heard. “Accordingly, we vacate the civil judgment for attorneys’ fees under N.C. Gen. Stat. § 7A-455 and remand to the trial court for further proceedings on this issue.” *Id.*

III. Conclusion

STATE V. REID

*Opinion of the Court*

Having issued a writ of certiorari to hear Defendant's appeal of a civil judgment, we conclude that the trial court erred in failing to provide Defendant with notice and an opportunity to be heard on the issue of his appointed counsel's attorney's fees. We therefore vacate the civil judgment and remand for further proceedings on the issue.

VACATED AND REMANDED.

Judge HAMPSON concurs.

Judge TYSON dissents by separate opinion.

Report per Rule 30(e).

No. COA19-1113 – *State v. Reid*

TYSON, Judge, concurring in part and dissenting in part:

I fully concur with the majority opinion’s conclusion that: “Defendant failed . . . to notice appeal in accord with our appellate procedural rules.” N.C. R. App. P. 3 (“requiring written notice of appeal in a civil matter”). Nothing else appearing, Defendant failed to invoke this court’s jurisdiction and this appeal would be dismissed.

Defendant filed a petition for writ of certiorari seeking a discretionary review of his assertions (“PWC”). Defendant’s PWC is wholly frivolous and fails to demonstrate neither any merit nor any prejudice to invoke discretionary review. I vote to deny Defendant’s PWC and to dismiss his arguments. I respectfully dissent.

#### I. Violations of Appellate Rules

North Carolina Appellate Courts have repeatedly held: “It is not the role of the appellate courts to create an appeal for an appellant. . . . Our Supreme Court previously stated that the Rules of Appellate Procedure must be consistently applied; otherwise, ‘the Rules become meaningless, and an appellee is left without notice of the basis upon which an appellate court might rule.’” *Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co.*, 192 N.C. App. 114, 118-19, 665 S.E.2d 493, 497-98 (2008) (quoting *Viar v. N.C. Dep’t of Transp.*, 359 N.C. 400, 402, 610 S.E.2d 360, 361 (2005)); *see also State v. Bursell*, 372 N.C. 196, 198-99, 827 S.E.2d 302, 304 (2019)

*TYSON, J., concurring on part and dissenting in part*

("[T]he Rules of Appellate Procedure are mandatory and not directory and the failure of the parties to comply with the rules, and failure of the appellate courts to demand compliance therewith, may impede the administration of justice.").

Defendant and the majority's opinion disregard our Court's long-standing policies, procedures, rules, and precedents by asserting and allowing this PWC to review a wholly frivolous petition with no demonstrated merit or prejudice to Defendant.

## II. No Merit

We all agree Defendant filed a defective notice of appeal. With no right of appeal, Defendant filed a PWC. For almost a century, our Supreme Court has held: "*Certiorari* is a discretionary writ, to be issued for good and sufficient cause shown, and it is not one to which the moving party is entitled as a matter of right." *Womble v. Gin Co.*, 194 N.C. 577, 579, 140 S.E. 230, 231 (1927) (citations omitted).

To warrant consideration of a PWC, our Supreme Court also held Defendant's "petition for the writ must show merit, or that error was probably committed below." *State v. Grundler*, 251 N.C. 177, 189, 111 S.E.2d 1, 9 (1959) (citation omitted). Without threshold allegations of both merit and prejudice, review by certiorari is not available to Defendant by rule, statute, or by precedents. *Id.*; N.C. Gen. Stat. §§ 15A-1443, 15A-1444(g); N.C. R. App. P. 21.

STATE V. REID

*TYSON, J., concurring on part and dissenting in part*

This frivolous PWC is purely form over substance, alleges no potential merit, asserts no prejudice, nor offers any probability of a different result upon remand. Defendant's meritless and non-prejudicial PWC is properly denied.

The majority's opinion cites no basis or merit to allow the petition, fails to identify any prejudice suffered by Defendant, or to forecast how any different result would be entered upon remand. The result needlessly compels the superior court to engage in an exercise of futility and potentially increases costs to Defendant.

After Defendant is given further notice and opportunity to be heard on the imposition of the civil judgment for attorney fees he expressly agreed to pay and did not contest, the trial court can and should re-enter the civil judgment. Also, an additional judgment should be entered for the time spent by his appointed trial counsel to prepare, re-appear, and present the original and an additional sheet for time spent for the unnecessary hearing upon remand.

Defendant fails to assert any ancillary arguments towards the quality of service appointed counsel rendered or the calculation of hours for services provided by his requested and court-appointed counsel. *See State v. Friend*, 257 N.C. App. 516, 521, 809 S.E.2d 902, 906 (2018). This remand is a waste of scarce and valuable judicial resources during a time when other pressing cases and matters are delayed due to closures and restrictions from the ongoing COVID-19 pandemic. Order of the Chief Justice of North Carolina, (24 Aug. 2020),



*TYSON, J., concurring on part and dissenting in part*

<https://www.nccourts.gov/news/tag/press-release/chief-justice-beasley-issues-order-extending-several-existing-emergency-directives>.

### III. Notice

Defendant was represented at trial by a court-appointed attorney he requested. Prior to his attorney's appointment, Defendant would have completed and filed an Affidavit of Indigency, Form AOC-CR-226. This form states, in bold lettering and a larger font:

**A court-appointed lawyer is not free. If you are convicted or plead guilty or no contest, you may be required to repay the cost of your lawyer as a part of your sentence. The Court may also enter a civil judgment against you, which will accrue interest at the legal rate set out in G.S. 24-1 from the date of the entry of judgment. Your North Carolina Tax Refund may be taken to pay for the cost of your court-appointed lawyer. In addition, if you are convicted or plead guilty or no contest, the Court must charge you an attorney appointment fee and may enter this fee as a civil judgment against you pursuant to G.S. 7A-455.1.**

*See* N.C. Gen. Stat. § 7A-455.1 (2019).

Defendant expressly requested, agreed to, and was on notice of his liability for payment of attorney fees as a consequence of his guilty plea or verdict. The notice requirements at judgment disposition from *Friend* is not as expansive as the

STATE V. REID

*TYSON, J., concurring on part and dissenting in part*

majority's opinion asserts. *See Friend*, 257 N.C. App. at 523, 809 S.E.2d at 907 (“Our holding today does not announce a new rule of constitutional law. The requirement that defendants be afforded notice and an opportunity to be heard before imposition of a civil judgment for attorneys’ fees was established in *Jacobs and Crews*.”). The State correctly argues, “the record shows that Defendant was [physically present,] aware that he could interject and would be heard by the [c]ourt,” but failed to do so.

Defendant’s prior notice, knowledge, and consent to entry of the civil judgment for the fees incurred by his appointed attorney after his express requests obviates merit or prejudice. *Friend* and the other cases cited by the majority do not control the outcome here, where Defendant’s PWC asserts no error or potential prejudice. *Id.* Under different and more egregious facts, this Court in *Friend* and its progeny only stated, “trial courts *should* ask defendants. . . only if there is [not] 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.” *Id.* at 523, 809 S.E.2d at 907. Defendant expressly agreed to pay his attorney fees, if pleading guilty or being found guilty, was present in court when the issue arose and was discussed, “and chose not to be heard.” *Id.*

Defendant was in court when his counsel presented the fee application. The AOC-CR-225 Judgment Form signed by the trial court contains the following sentence: “After due notice to the defendant named on the reverse and opportunity to

*TYSON, J., concurring on part and dissenting in part*

be heard.” **(R p 30)** Defendant does not challenge these findings and was aware of his right to be heard by the trial court regarding the imposition of the civil judgment for attorney fees. These unchallenged findings are binding upon appeal. Defendant “chose not to be heard” by the trial court upon the imposition of a civil judgment for fees he expressly agreed to pay. *Friend*, 257 N.C. App. at 523, 809 S.E.2d at 907.

#### IV. Conclusion

Defendant was informed his appointed counsel was not a free counsel. He expressly agreed to pay his fees in the event he pled or was found guilty. He specifically requested and is responsible for paying for his counsel’s fees. N.C. Gen. Stat. § 7A-455.1 (2019); *see* Form AOC-CR-226.

Defendant was present in court when the fee application was presented and was ordered to pay his attorney fees after sentencing. The civil judgment specifically states: “[a]fter due notice to the defendant named. . . and opportunity to be heard.” He was free to question or challenge but stood mute and failed to do so when the amount and his liability for this *civil* judgment was discussed and entered, and “chose not to be heard.” *Friend*, 257 N.C. App. at 523, 809 S.E.2d at 907. We all agree Defendant failed to file any notice of appeal from the judgment. N.C. R. App. P. 3 (“requiring written notice of appeal in a civil matter”). His assertions would be dismissed.

STATE V. REID

*TYSON, J., concurring on part and dissenting in part*

Defendant's PWC "must show merit or that error was probably committed below." *Grundler*, 251 N.C. at 189, 111 S.E.2d at 9. These standards mandate a PWC to be "issued only for good and sufficient cause shown." *Id.* Absent Defendant's mandatory "must" show "merit" or probable prejudicial "error," no "good and sufficient cause [is] shown to issue" the writ. *Id.*

Defendant's defective and frivolous PWC asserts no prejudice of how the result will differ upon remand, except for his appellate counsel to subject Defendant to an even higher civil fee judgment for his appointed trial counsel to prepare for and appear at the hearing on remand. Defendant's PWC is properly denied under our statutes, rules, procedures, and precedents.

Scarce judicial resources and taxpayer funds are wasted with these purported appeals and unnecessary remands which show no jurisdiction, assert no merits, result in no prejudice. The trial court will enter the same civil judgment of \$4,500.00 upon remand, plus any new fees incurred by counsel for that hearing.

Defendant offers no challenge to counsel's services or to the proper calculation of his agreed-upon fees. The PWC does not challenge the trial court's findings of fact. Defendant received notice and an opportunity to be heard, did not assert any merit or prejudice, and the majority's opinion does not find or demonstrate any prejudice. I vote to deny Defendant's PWC and dismiss. I respectfully dissent.