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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-921

Filed: 4 August 2020

Forsyth County, Nos. 17 CRS 56072, 56472; 18 CRS 360

STATE OF NORTH CAROLINA

v.

BRIAN KEITH MANLEY

Appeal by defendant from judgments entered 6 December 2018 and order entered 17 December 2018 by Judge David L. Hall in Forsyth County Superior Court. Heard in Court of Appeals 15 April 2020.

Attorney General Joshua H. Stein, by Assistant Attorney General Donna B. Wojcik, for the State.

Sarah Holladay for defendant.

DIETZ, Judge.

Defendant Brian Keith Manley challenges his criminal sentences, arguing that the trial court's written judgments substantively changed the sentences the court orally rendered at the hearing. Manley also challenges the court's order of restitution and civil judgment for attorneys' fees.

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As explained below, we find no error in the trial court's written judgments sentencing Manley to consecutive sentences for his three separate convictions. Those judgments are consistent with the court's oral rendering of those same sentences. The State concedes error with respect to the restitution order, and we agree. We therefore vacate and remand the restitution order for further proceedings. Finally, under our recent decision in *State v. Friend*, 257 N.C. App. 516, 809 S.E.2d 902 (2018), Manley was not provided an opportunity to be heard before the imposition of the civil judgment for attorneys' fees. We therefore vacate and remand the civil judgment for further proceedings as well.

Facts and Procedural History

In 2017, Brian Keith Manley pointed a gun at Travis Dekmar and forced him to make a video confessing to being solely responsible for a breaking and entering for which Manley also had been charged. Manley then shot Dekmar in the head and left him for dead. Remarkably, Dekmar survived after surgery and several days in the hospital.

In 2018, a jury found Manley guilty of attempted first degree murder, assault with a deadly weapon with intent to kill inflicting serious injury, and possession of a firearm by a felon. The trial court sentenced Manley to consecutive sentences of 300 to 372 months in prison for attempted first degree murder, 144 to 185 months in prison for assault with a deadly weapon with intent to kill inflicting serious injury,

and 25 to 39 months in prison for possession of a firearm by a felon. The trial court also ordered restitution and imposed a civil judgment for the attorneys' fees of Manley's court-appointed counsel.

Manley timely appealed the criminal judgments. He also petitioned for a writ of certiorari, asking this Court to review the civil judgment for which he failed to file a written notice of appeal.

Analysis

I. Challenge to consecutive sentences in the written judgments

Manley first argues that the trial court erred by entering written judgments sentencing him to consecutive terms because the court stated at the sentencing hearing that two of the three sentences would run concurrently. This argument is not supported by the record and we reject it.

We review Manley's challenge to the alleged errors in the written judgments *de novo*. *State v. Briggs*, 249 N.C. App. 95, 97, 790 S.E.2d 671, 673 (2016). "It is well-settled that a defendant has a right to be present at the time that his sentence is imposed." *State v. Leaks*, 240 N.C. App. 573, 578, 771 S.E.2d 795, 799 (2015). Ordinarily, this requirement is satisfied when the trial court imposes a criminal sentence in open court during a sentencing hearing, even if that sentence is not formally reduced to writing until after the defendant has left the courtroom. *State v. Crumbley*, 135 N.C. App. 59, 66–67, 519 S.E.2d 94, 99 (1999). But if the trial court

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announces a sentence in open court and then later enters a different sentence in a written judgment outside the defendant's presence, we will vacate the judgment and remand for resentencing. *Id.*

That is not what happened here. To be sure, after hearing the parties' sentencing presentations, the court initially indicated that Manley's sentence for the assault charge would "run concurrently with the sentence imposed for attempted first degree murder" while the possession of a firearm sentence would "begin at the expiration of the sentence imposed for attempted first degree murder."

But after the trial court made that initial determination, the State asked for a sidebar. After a discussion between the parties' counsel and the court at the bench, the court announced that "it is my intent, and it is ordered and shall not be disturbed, that these sentences run at the expiration of each other." The trial court then entered written judgments with consecutive sentences.

We see no ambiguity in the court's statement in open court that "these sentences run at the expiration of each other." Had the court intended to impose the same sentence it indicated before the sidebar, it would have said that the possession of a firearm sentence runs at the expiration of the other two, or simply announced that its previous statement remained unchanged. Instead, the court emphasized that "*these sentences* run at the expiration of *each other*." This phraseology unambiguously indicates that all three sentences will run consecutively.

Thus, this is not a case where there was a “substantive change in the sentence” from the one orally rendered to the one memorialized in writing. *Crumbley*, 135 N.C. App. at 67, 519 S.E.2d at 99. We therefore reject Manley’s argument and find no error in the consecutive sentences imposed in the court’s written judgments.

II. Restitution order

Manley next argues that the trial court erred by entering an order for restitution that is not supported by the record. The State concedes that the restitution order is not supported by the record, and we agree.

“The amount of restitution ordered by the trial court must be supported by competent evidence presented at trial or sentencing.” *State v. Mauer*, 202 N.C. App. 546, 551, 688 S.E.2d 774, 777 (2010). “A restitution worksheet, unsupported by testimony, documentation, or stipulation, is insufficient to support an order of restitution.” *State v. Blount*, 209 N.C. App. 340, 348, 703 S.E.2d 921, 927 (2011).

Here, the trial court awarded restitution for a cell phone that Manley took from the victim, but there was no evidence at sentencing concerning the value of that phone. Accordingly, as the State concedes, we must vacate the restitution order and remand that matter for further proceedings in the trial court. *State v. Moore*, 365 N.C. 283, 286, 715 S.E.2d 847, 849–50 (2011).

III. Civil judgment for court-appointed counsel’s fees

Finally, Manley argues that the trial court erred by entering a civil money

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judgment against him for the fees incurred by his court-appointed counsel. He contends that the trial court failed to give him adequate notice and an opportunity to be heard. We agree.

As an initial matter, Manley has petitioned for a writ of certiorari because he failed to file a written notice of appeal from the civil judgment for attorneys' fee. He has also moved to amend the record to include a copy of that judgment, which he asserts was unavailable when he initially prepared the record on appeal. Because, as explained below, Manley has a meritorious argument on this issue, we exercise our discretion to issue a writ of certiorari and allow the motion to amend, so that we can address Manley's arguments on the merits. *State v. Friend*, 257 N.C. App. 516, 519, 809 S.E.2d 902, 905 (2018).

This Court recently reaffirmed that, before imposing a civil judgment for attorneys' fees in a criminal case, the trial court must engage in a personal colloquy with the defendant to ensure that the defendant has an opportunity to be heard. *Id.* at 522–23, 809 S.E.2d at 906–07. “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.” *Id.* at 523, 809 S.E.2d at 907.

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Here, the trial court did not address Manley directly to give him an opportunity to be heard before entering the judgment for attorneys' fees. Moreover, the record does not contain any other indication that Manley understood he had the right to be heard. Accordingly, under *Friend*, we vacate the civil judgment for attorneys' fees and remand for further proceedings.

Conclusion

We find no error in the trial court's criminal sentences and judgments. We vacate the restitution order and the civil judgment for attorneys' fees and remand those matters for further proceedings.

NO ERROR IN PART; VACATED AND REMANDED IN PART.

Judges DILLON and INMAN concur.

Report per Rule 30(e).