IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT OF FLORIDA

ROGER NATHANIEL ROSIER,

Appellant,

v. CASE NO. **1D16-2327**

STATE OF FLORIDA,

Appellee.
_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE SECOND JUDICIAL CIRCUIT,
IN AND FOR WAKULLA COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE AND THE FACTS

This is a direct appeal from a judgment and sentence for resisting an officer without violence, a first degree misdemeanor.[1] Roger Nathaniel Rosier was the defendant in the trial court and will be referred to in this brief as Mr. Rosier.

I. Procedural Statement of the Case

The May 2, 2016,[2] second amended Information in Wakulla County Case No. 2013-CF-195 charged Mr. Rosier with resisting an officer with violence. (R. 62.) It alleged that on or about June 30, 2013, Mr. Rosier "unlawfully, knowingly, and willfully" resisted, obstructed, or opposed law enforcement officers, Wakulla County Sheriff's Deputies Elise Collin, Will Hudson, Anthony Paul and/or Sergeant Jeremy Johnston, "in the lawful execution of a legal duty, effecting an arrest, by offering violence or by doing violence to the officer by pushing, kicking, making threats, being physically combative, contrary to Section 843.01, Florida Statutes." (R. 62.)

From July 22, 2013, to August 19, 2014, Mr. Rosier was represented by the Office of the Public Defender; on August 20, 2014, the Office of the Public Defender was permitted to withdraw due to conflict, and the Office of Criminal

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[1] References to the record are by "R" followed by the page number, all in parentheses. References to the one-volume trial transcript are by "T" followed by the page number, all in parentheses. References to the supplemental record of the Rule 3.800(b)(2) motion are by "M" followed by the page number, all in parentheses.

[2] The original Information was filed on July 31, 2013. (R. 6.)

Conflict & Civil Regional Counsel was appointed. (R. 5, 33-36.) Assistant Regional Counsel Brian Higgins represented Mr. Rosier throughout the remainder of the proceedings. The State was represented by Assistant State Attorneys Michael Gumula and John Fuchs. Proceedings below were held before Judges Charles Dodson and Dawn Caloca-Johnson in the Circuit Court for Wakulla County, Florida.

On October 7, 2013, the trial court adjudged Mr. Rosier incompetent to proceed and committed him to the Department of Children and Families. (R. 10-21.) On August 14, 2014, after receiving a report from a psychologist recommending Mr. Rosier be found competent to proceed, the trial court adjudged him competent to proceed by written order. (R. 22-32.)

On May 4, 2016, after a jury trial, Mr. Rosier was found guilty of the lesser included offense of resisting an officer without violence. (R. 77; T. 149-50.) He was sentenced to a time-served sentence of 11 months and 29 days and was released from custody. (R. 81-88; T. 151.) The notice of appeal was timely filed on May 9, 2016. (R. 89.)

On December 2, 2016, the undersigned filed in the trial court a Motion to Correct Sentencing Error pursuant to Florida Rule of Criminal Procedure 3.800(b)(2), challenging the imposition of a discretionary fine without the trial

court's orally pronouncing the fine. (M. 103-21.) The trial court did not enter an order resolving the motion within sixty days. (M. 122.)

II. Statement of the Facts

A. Competency

On October 7, 2013, the trial court entered an Order Adjudging Defendant Incompetent to Proceed and Commitment to Department of Children and Families, which included an August 19, 2013, report of a competency evaluation performed by psychologist Salvatore Blandino; this order was entered by Judge Dodson. (R. 10-21.) On June 27, 2014, the trial court entered an Order to Transport and Notice of Hearing; this order was also entered by Judge Dodson. (R. 22-23.) The June 27, 2014, order stated that the trial court had been advised by the DCF, through the Administrator of Florida State Hospital, that Mr. Rosier no longer met the criteria for continued commitment; the order directed that Mr. Rosier be transported to the appropriate detention facility within seven days and that he be brought before the trial court for a hearing on July 9, 2014; the order included a Forensic Mental Health Assessment Competency Evaluation Report to the Court, which had been completed by Senior Psychologist Leslie Dellenbarger. (R. 24-31.) It does not appear that the July 9, 2014, hearing or any other hearing relating to competency ever occurred. On August 14, 2014, the trial court entered a written order finding Mr. Rosier competent to proceed; the order noted that Ms. Dellenbarger had reported that Mr. Rosier was competent to proceed; Judge Caloca-Johnson entered

this order. (R. 32.) It is apparent that at some point between Judge Dodson's June 27, 2014, Order to Transport and Notice of Hearing and Judge Caloca-Johnson's August 14, 2014, order finding Mr. Rosier competent, the case had been reassigned to Judge Caloca-Johnson. Judge Caloca-Johnson was the presiding judge in all of the remaining proceedings in this case.

B. Sentencing and 3.800(b)(2) Motion

On May 4, 2016, after a jury trial, the jury found Mr. Rosier guilty of the lesser included offense of resisting an officer. (R. 77; T. 149-50.) After the jury was excused, the trial court confirmed that Mr. Rosier's sentence would "be a credit, time-served sentence" because the lesser included offense was a first degree misdemeanor; the trial court adjudicated Mr. Rosier guilty of resisting an officer without violence and sentenced him to "11 months, 29 days in the county jail with all credit for time served, so you are free to go." (T. 151.) The trial court advised that the court costs were $533; Mr. Rosier requested and was granted a civil judgment of all costs except the cost of prosecution. (T. 152-53.) The May 5, 2016, written Judgment and Sentence generally reflected the trial court's oral pronouncements. The written costs judgment ordered Mr. Rosier to pay, *inter alia*, $60.00 as a fine pursuant to section 775.083, Florida Statutes, and $3.00 as the 5% surcharge on the fine required by section 938.04, Florida Statutes. (R. 86.)

On December 2, 2016, the undersigned filed in the trial court a Motion to Correct Sentencing Error pursuant to Florida Rule of Criminal Procedure 3.800(b)(2), asserting that the trial court had erred by imposing a $60.00 fine pursuant to section 775.083, Florida Statutes, which was not orally pronounced at sentencing, and a $3.00 surcharge on the fine pursuant to section 938.04, Florida Statutes. (M. 103-21.) The trial court did not enter an order ruling on the 3.800(b)(2) motion within sixty days of its having been filed. On February 16, 2017, the Wakulla County Deputy Clerk filed a document indicating that no order had been timely filed. (M. 122.)

SUMMARY OF THE ARGUMENT

The trial court reversibly erred when it failed to hold a hearing regarding restoration of Mr. Rosier's competency. Where a defendant has been adjudged incompetent, the trial court must hold a hearing and independently determine if competency has been restored before the trial court enters an order adjudging the defendant competent to proceed. In this case, the trial court failed to follow the procedures required by Florida Rule of Criminal Procedure 3.212(c) and improperly entered an order finding Mr. Rosier competent to proceed without conducting the hearing required by that rule and case law interpreting the rule.

The trial court erred as a matter of law by imposing a discretionary $60.00 fine and a $3.00 surcharge on the fine, which were not orally pronounced at sentencing.

ARGUMENT

I. Whether the trial court erred as a matter of law by failing to conduct a competency hearing prior to adjudicating Mr. Rosier competent to proceed where Mr. Rosier had previously been adjudicated incompetent to proceed and had been committed to the custody of the Department of Children and Families.

Because Mr. Rosier had previously been adjudged incompetent and committed, it was error for the trial court to enter an order adjudging him competent without holding a hearing on the matter.

Standard of Review: The trial judge has discretion to determine whether a defendant is competent to stand trial. Ferguson v. State, 789 So. 2d 306, 314 (Fla. 2001). Thus, a decision on that issue is reviewed for an abuse of discretion. Id. at 315. However, when a legal argument presents a pure question of law, the appellate court's review is *de novo*. Plott v. State, 148 So. 3d 90, 93 (Fla. 2014). This claim of this appeal addresses a pure question of law and is subject to *de novo* review.

Merits: "The Due Process Clause of the Fourteenth Amendment to the United States Constitution prohibits states from trying and convicting mentally incompetent defendants." Barnes v. State, 124 So. 3d 904, 915 (Fla. 2013), as revised on denial of reh'g (Oct. 17, 2013). The test for a judge to determine a defendant's competency is "whether he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding–and whether he has a rational as well as factual understanding of the proceedings against him." Dusky v. United States, 362 U.S. 402, 402 (1960).

The Florida Supreme Court has stated that "[a]n individual who has been adjudicated incompetent is presumed to remain incompetent until adjudicated competent to proceed by a court." Dougherty v. State, 149 So. 3d 672, 676 (Fla. 2014) (quoting Jackson v. State, 880 So. 2d 1241, 1242 (Fla. 1st DCA 2004)). This Court has held that a "defendant's legal status cannot be adjudicated from

incompetent to competent without the benefit of a hearing." Jackson, 880 So. 2d at 1242; see also Erickson v. State, 965 So. 2d 294, 295 (Fla. 5th DCA 2007) ("It is the trial court's responsibility, after a hearing, to determine whether a defendant has regained his competency in order to proceed."); Blow v. State, 902 So. 2d 340, 342 (Fla. 5th DCA 2005) ("A defendant's legal status cannot change from incompetent to competent without the benefit of a hearing."); Samson v. State, 853 So. 2d 1116, 1117 (Fla. 4th DCA 2003) (holding that defendant remained incompetent to proceed and could not validly enter pleas where trial court failed to hold competency hearing and failed to issue order declaring defendant's competency restored).

Florida Rule of Criminal Procedure 3.212(c) delineates the procedure for commitment upon a finding of incompetence and the procedure for judicial determination of restored competency. If, after commitment to a treating facility, the administrator of the facility determines that the defendant no longer meets the criteria for commitment, the administrator "shall notify the court by" report. Fla. R. Crim. P. 3.212(c)(5). The trial "court *shall hold a hearing* within 30 days of the receipt of any such report…." Fla. R. Crim. P. 3.212(c)(6) (emphasis added). If "at any time after…commitment [due to incompetency], the court decides, *after hearing*, that the defendant is competent to proceed, it shall enter its order so finding and shall proceed." Fla. R. Crim. P. 3.212(c)(7) (emphasis added). The

Florida Supreme Court has held that "the language of rule 3.212(c)(7). . . does not allow parties to stipulate to the issue of competency. In particular, the rules do not contemplate such stipulations where the trial court has previously concluded that a particular defendant is incompetent and his competency has yet to be restored." Dougherty, 149 So. 3d at 678.

Mr. Rosier was committed to the Florida State Hospital after the trial court found that he was incompetent to proceed on October 7, 2013. (R. 10-21.) After receiving a report recommending a finding of competency, the trial court scheduled the hearing required by Florida Rule of Criminal Procedure 3.212(c) for July 9, 2014; however, the required hearing never occurred. Subsequently, on August 14, 2014, a different circuit court judge entered an order finding that Mr. Rosier was competent. The controlling rules and case law cited above provide that a competency hearing is required in this context. The trial court erred as a matter of law by adjudging Mr. Rosier—who had previously been adjudged incompetent—competent without first holding a hearing.

II. Whether the trial court erred as a matter of law by imposing a $60.00 fine and a $3.00 surcharge on the fine, which were not orally pronounced at sentencing.

The trial court erred as a matter of law by imposing a discretionary $60.00 fine that was not orally pronounced at sentencing, and a 5% statutory surcharge on that fine. (M. 103-22.)

Standard of Review: This Court reviews pure questions of law under a *de novo* standard of review. See Plott, 148 So. 3d at 93. "[A] motion to correct a sentencing error involves a pure issue of law…." Kittles v. State, 31 So. 3d 283, 284 (Fla. 4th DCA 2010).

Preservation: Florida Rule of Criminal Procedure 3.800(b)(2) provides as follows: "If an appeal is pending, a defendant or the state may file in the trial court a motion to correct a sentencing error." The Court Commentary to the 1999 Amendments to Rule 3.800(b) states, in pertinent part, as follows: "As revised, this rule permits the filing of a motion during the initial stages of an appeal. A motion pursuant to this rule is needed only if the sentencing error has not been adequately preserved for review at an earlier time in the trial court." This commentary clearly demonstrates that the Florida Supreme Court intended the Rule 3.800(b)(2) motion to provide a remedy when the sentencing error was not preserved for review by an objection in the sentencing proceeding. In Jackson v. State, 983 So. 2d 562, 569 (Fla. 2008), the court observed that "rule 3.800(b) creates a two-edged sword for defendants who do not object to sentencing errors before the sentence is rendered . . . it allows defendants to raise such errors for the first time *after* the sentence [and] . . . it also *requires* defendants to do so if the appellate court is to consider the issue."

Merits: "[T]he oral pronouncement of sentence controls and the written

order must be corrected to conform to the oral pronouncement." Timmons v. State, 453 So. 2d 143, 144 (Fla. 1st DCA 1984). The trial court is required to give the defendant "an opportunity to be heard regarding the imposition of any costs which are discretionary." Williams v. State, 845 So. 2d 987, 989 (Fla. 1st DCA 2003). If discretionary costs are not orally pronounced in order to give the defendant notice, they must be stricken. Roberts v. State, 813 So. 2d 1016, 1017 (Fla. 1st DCA 2002); see Cruz v. State, 830 So. 2d 892 (Fla. 2d DCA 2002) (striking discretionary costs due to the absence of oral pronouncement).

A discretionary fine imposed pursuant to section 775.083, Florida Statutes, and the statutory surcharges on the fine, must be stricken if the discretionary fine was not orally pronounced at sentencing. See Nix v. State, 84 So. 3d 424 (Fla. 1st DCA 2012); Pullam v. State, 55 So. 3d 674, 675 (Fla. 1st DCA 2011); Perdue v. State, 17 So. 3d 1283, 1283 (Fla. 2d DCA 2009); Masengale v. State, 969 So. 2d 1218, 1219 (Fla. 2d DCA 2007). In Nix, the trial court had sentenced the defendant on a drug charge and had orally pronounced "costs and fines" of $1,522.50, as well as a $100.00 cost of prosecution, a $100.00 "defense litigation fee," and a $50.00 public defender application fee. 84 So. 3d at 425. On appeal, this Court observed as follows:

> Appellant did not object to the imposition of these costs and fines at sentencing. He did, however, file a motion pursuant to Florida Rule of Criminal Procedure 3.800(b)(2) in which he argued that the $1,050 fine and $52.50 surcharge reflected in the written judgment and

> sentence should be stricken because they were not specifically pronounced at sentencing. The trial court denied the motion, finding that this claim was waived.
>
> The record does not support the trial court's finding of waiver. Nor is there any merit to the State's argument that this issue was not properly preserved for appellate review. Appellant preserved the issue through his rule 3.800(b)(2) motion. *See Jackson v. State*, 983 So. 2d 562, 574 (Fla. 2008); *Carter v. State*, 791 So. 2d 525, 526–27 (Fla. 1st DCA 2001).
>
> Statutorily-mandated costs may be imposed without notice and, thus, need not be specifically pronounced at the sentencing hearing. *See Bradshaw v. State*, 638 So. 2d 1024 (Fla. 1st DCA 1994). By contrast, discretionary costs must be orally pronounced at sentencing because such costs may not be imposed without affording the defendant notice and an opportunity to be heard. *See Smiley v. State*, 704 So. 2d 191, 195 (Fla. 1st DCA 1997); *Brooks v. State*, 676 So. 2d 48 (Fla. 1st DCA 1996) (citing *Reyes v. State*, 655 So. 2d 111 (Fla. 2d DCA 1995)).
>
> Here, the trial court orally pronounced a lump sum of $1,522.50 of costs and fines. The oral pronouncement did not delineate the specific costs and fines included in this amount. The written judgment and sentence reflect that $420 of this amount was for statutorily-mandated costs. The remainder was comprised of a $1,050 fine pursuant to section 775.083(1), Florida Statutes, and the associated surcharge of $52.50 pursuant to section 938.04, Florida Statutes.
>
> The fine authorized by section 775.083(1) is discretionary and, thus, it was error for the trial court to impose the $1,050 fine under this statute without specifically pronouncing the fine at the sentencing hearing. *See Reyes*, 655 So. 2d at 116. Because this fine was erroneously imposed, the surcharge under section 938.04, which is based on the amount of fine, must also be reversed. *See Pullam v. State*, 55 So. 3d 674, 675 (Fla. 1st DCA 2011).

Nix, 84 So. 3d at 426. Because the record reflects that the trial court did not orally pronounce the $60.00 fine included in the written Judgment and Sentence, this fine must be stricken from the corrected Judgment and Sentence.

Section 938.04, Florida Statutes, mandates imposition of a five percent surcharge on "any fine for any criminal offense prescribed by law," to be used for the Crimes Compensation Trust Fund. Because the $60.00 fine must be stricken from the corrected Judgment and Sentence, the $3.00 surcharge on the fine imposed pursuant to section 938.04, Florida Statutes, must also be stricken.

CONCLUSION

The appropriate remedy in claim I of this appeal is reversal of Mr. Rosier's conviction for resisting an officer without violence and remand to the trial court for a new trial for that offense if, after a hearing, the trial court determines that he is competent to proceed. The appropriate remedy in claim II of this appeal is remand to the trial court with instructions to that the trial court correct the written cost judgment by striking the $60.00 fine imposed pursuant to section 775.083, Florida Statutes, and the $3.00 surcharge imposed pursuant to section 938.04, Florida Statutes.

Mr. Rosier hereby requests all appropriate relief.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been electronically served, as agreed by the parties, on Trisha Meggs Pate, Assistant Attorney General, counsel for the State of Florida, at crimapptlh@myfloridalegal.com; and has been furnished by U.S. Mail to Appellant Roger Rosier, 2090 Sopchoppy Highway, Sopchoppy, Florida 32358; on this date, May 12, 2017.

CERTIFICATE OF FONT SIZE

I HEREBY CERTIFY that, pursuant to Florida Rule of Appellate Procedure 9.210, this brief was typed in Times New Roman 14 Point.

Respectfully submitted,
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