

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-1170

Filed: 6 June 2017

Watauga County, No. 13CRS050307

STATE OF NORTH CAROLINA

v.

JAMIE DALE JOHNSON

Appeal by defendant from judgment entered 7 July 2016 by Judge Gary Gavenus in Watauga County Superior Court. Heard in the Court of Appeals 18 April 2017.

Attorney General Joshua H. Stein, by Assistant Attorney General Brittany K. Brown, for the State.

Edward Eldred for defendant-appellant.

BRYANT, Judge.

Where there was competent evidence to support the trial court's finding that Tennessee offenses were not Class 3 misdemeanors, the trial court did not abuse its discretion in revoking defendant's probation.

On 7 April 2014, defendant Jamie Dale Johnson pled guilty in Watauga County Superior Court to one felony count of possession of or distribution of meth precursor. Defendant was sentenced to nineteen to thirty-two months of imprisonment. He

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received a suspended sentence of supervised probation for thirty months. Defendant was also ordered to pay court costs totaling \$1,149.50 to the Clerk of Superior Court as a monetary condition of probation.

On 21 January 2016, the State filed a violation report due to defendant's failure to make payment toward his court costs and as a result of defendant committing new criminal offenses on 28 July 2015 in Tennessee. Defendant was found guilty of those offenses—resisting arrest and two counts of assault on a police officer—on 9 December 2015 in Johnson County Tennessee.

On 7 July 2016, the probation violation case was heard in Watauga County Superior Court, the Honorable Gary Gavenus, Judge presiding. The alleged violations before the trial court included failure to make payment toward court costs and commission of criminal offenses in Tennessee on 28 July 2015 of one count of resisting arrest, in violation of Tenn. Code Ann. § 39-16-602, and two counts of misdemeanor assault in violation of Tenn. Code Ann. § 39-13-102. Defendant admitted violating the monetary condition of probation, but denied committing any criminal offenses. The trial court found that defendant violated the condition that he not commit any criminal offenses in any jurisdiction, revoked defendant's probation, and activated his suspended sentence.

Five days later, defendant filed a *pro se*, hand-written document with the Clerk's office, which stated as follows:

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To: Clerk of Court
From: Jamie Dale Johnson
Re: Appeal
Date: July 10th, 2016

I would like to formally request in writing, a notice of appeal. My sentence was handed down on July 7. Please let me know of any actions taken, or any recourse afforded me.

Thank you.
James Johnson

This letter was filed on 12 July 2016, and the next day, the trial court entered Appellate Entries appointing the appellate defender to represent defendant in his appeal to this Court.

On 25 January 2017, defendant filed a petition for writ of certiorari.

Petition for Writ of Certiorari

This Court should issue its writ of certiorari if defendant's right to appeal has been lost by a failure to take timely action. N.C. R. App. P. 21(a)(1) (2017). In order to take an appeal in writing from a judgment of a superior court in a criminal action, notice of appeal must, *inter alia*, (1) "designate the judgment or order from which appeal is taken and the court to which appeal is taken;" and (2) "be signed by counsel of record for the party . . . taking the appeal, or by any such party not represented by counsel of record." N.C. R. App. P. 4(b). Noncompliance with the mandatory provisions of Rule 4 divests this Court of jurisdiction to hear a defendant's direct appeal. *State v. Hughes*, 210 N.C. App. 482, 484, 707 S.E.2d 777, 778 (2011).

Here, defendant's letter to the clerk gives the name of defendant, expresses his desire to appeal his sentence, and is signed by defendant; however, it does not designate the judgment or order from which appeal is taken nor the court to which appeal is taken. Accordingly, this Court is divested of jurisdiction to hear petitioner's direct appeal. *See id.* Nevertheless, in our discretion, we grant defendant's instant petition for writ of certiorari to review the judgments of 7 July 2016. *See State v. McCoy*, 171 N.C. App. 636, 638, 615 S.E.2d 319, 320 (2005) ("While this Court cannot hear defendant's direct appeal [for failure to comply with Rule 4] it does have the discretion to consider the matter by granting a petition for writ of *certiorari*.").

On appeal, defendant contends the judgment revoking probation must be reversed because there was no competent evidence to support the trial court's finding that the Tennessee offenses were not Class 3 misdemeanors. We disagree.

A hearing to revoke a defendant's probationary sentence only requires that the evidence be such as to reasonably satisfy the judge in the exercise of his sound discretion that the defendant has willfully violated a valid condition of probation or that defendant has violated without lawful excuse a valid condition upon which the sentence was suspended. The judge's finding of such a violation, if supported by competent evidence, will not be overturned absent a showing of manifest abuse of discretion.

State v. Young, 190 N.C. App. 458, 459, 660 S.E.2d 574, 576 (2008) (citations omitted).

When a defendant violates his probation conditions, the trial court may revoke his probation. N.C. Gen. Stat. § 15A-1344(a) (2015). “The court may only revoke probation for a violation of a condition of probation under G.S. 15A-1343(b)(1) or G.S. 15A-1343(b)(3a)” *Id.* However, while the trial court can revoke probation and activate a defendant’s suspended sentence if the violations consist of committing a crime, revocation cannot be solely based on the commission of a crime if the only crime committed was a Class 3 misdemeanor. *Id.* § 15A-1344(d) (“[P]robation may not be revoked solely for conviction of a Class 3 misdemeanor.”).

With regard to out-of-state offenses, the “[d]etermination of whether the out-of-state conviction is substantially similar to a North Carolina offense is a question of law involving comparison of the elements of the out-of-state offense to those of the North Carolina offense.” *State v. Sanders*, 367 N.C. 716, 720, 766 S.E.2d 331, 334 (2014) (alteration in original) (quoting *State v. Fortney*, 201 N.C. App. 662, 671, 687 S.E.2d 518, 525 (2010)); see *id.* at 720–21, 766 S.E.2d at 334 (reasoning that because the Tennessee offense of “domestic assault” “does not require the victim to be female or the assailant to be male and of a certain age,” it was not substantially similar to the North Carolina offense of “assault on a female”).

In the instant case, defendant was charged and convicted in Tennessee with resisting arrest and two counts of assault on a police officer. On 28 July 2015, two deputies with the Mountain City Police Department were dispatched to conduct a

welfare check on April Hubbard, who had texted her mother asking the police to come get her. When the officers arrived, Hubbard told them that defendant had not allowed her to leave the residence, he had been physically abusive toward her, and had choked her the day before. After safely removing a young boy from the residence, the officers found defendant on a bed in a back bedroom and ordered him to put his arms behind his back. Defendant resisted both officers “in a very aggressive [sic] way.” At one point, after “deliver[ing] the chemical spray to [defendant], he took his fist and struck [one of the deputies] in the face.” After the officers used both chemical spray and their batons, defendant submitted.

On 9 December 2015, Judge William B. Hawkins of the General Sessions Court of Johnson County Tennessee found defendant guilty of resisting arrest and two counts of misdemeanor assault against an officer. The document listed each offense as a Class A misdemeanor in Tennessee. Defendant was sentenced to thirty days in jail and supervised probation for eleven months and twenty-nine days in Tennessee.

A. Resisting Arrest

The elements of the offense of [resisting a public officer] are:

- 1) that the victim was a public officer;
- 2) that the defendant knew or had reasonable grounds to believe that the victim was a public officer;
- 3) that the victim was discharging or

attempting to discharge a duty of his office;

4) that the defendant resisted, delayed or obstructed the victim in discharging or attempting to discharge a duty of his office; and

5) that the defendant acted willfully and unlawfully, that is intentionally and without justification or excuse.

State v. Sinclair, 191 N.C. App. 485, 488–89, 663 S.E.2d 866, 870 (2008) (quoting *State v. Dammons*, 159 N.C. App. 284, 294, 583 S.E.2d 606, 612 (2003)). In North Carolina, “[i]f any person shall willfully and unlawfully resist, delay or obstruct a public officer in discharging or attempting to discharge a duty of his office, he shall be guilty of a Class 2 misdemeanor.” N.C. Gen. Stat. § 14-223 (2015).

In Tennessee, the crime of resisting arrest occurs when an individual

[i]ntentionally prevent[s] or obstruct[s] anyone known to the person to be a law enforcement officer, or anyone acting in a law enforcement officer’s presence and at such officer’s direction, from effecting a stop, frisk, halt, arrest or search of any person, including the defendant, *by using force against the law enforcement officer or another*.

State v. Adams, 238 S.W.3d 313, 326 (Tenn. Ct. App. 2005) (emphasis added) (quoting Tenn. Code Ann. § 39-16-602(a)). Notably, the use of force is a necessary element of the Tennessee offense of resisting arrest, which is not a necessary element of the North Carolina Class 2 misdemeanor of resisting arrest. *See id.* But see *State v. Cornell*, 222 N.C. App. 184, 187, 729 S.E.2d 703, 706 (2012) (“The touchstone of the

inquiry [regarding the element of “resistance”] is orderliness,’ even where ‘no actual violence or force was used by [defendant].’” (quoting *Bostic v. Rodriguez*, 667 F. Supp. 2d 591, 610 (E.D.N.C. 2009)); *Sinclair*, 191 N.C. App. 485, 488–89, 663 S.E.2d 866, 870 (citation omitted).

The lack of a requirement of “force” in the North Carolina offense of resisting arrest indicates that the Tennessee offense of resisting arrest of which defendant was convicted is more serious than the same offense in North Carolina, a Class 2 misdemeanor. Accordingly, because the Tennessee and North Carolina crimes are not only substantially similar, *cf. Sanders*, 367 N.C. at 720–21, 716 S.E.2d at 334, but also because the Tennessee crime is arguably a more serious one, the trial court properly concluded that it was not a Class 3 misdemeanor.

B. Assault on a Police Officer

In North Carolina, a defendant is guilty of assault on a State officer if there is (1) an assault (2) on a government official in the actual or attempted discharge of his duties. *State v. Cogdell*, 165 N.C. App. 368, 377, 599 S.E.2d 570, 575 (2004). “[A]ny person who commits [such an] assault . . . is guilty of a Class A1 misdemeanor if, in the course of the assault . . . he or she: . . . [a]ssaults an officer or employee of the State . . . when the officer . . . is discharging or attempting to discharge his official duties[.]” N.C. Gen. Stat. § 14-33(c)(4) (2015).

In Tennessee, “[a] person commits aggravated assault who, with intent to cause physical injury to any public employee . . . causes physical injury to the employee while the public employee is performing a duty within the scope of the public employee’s employment” Tenn. Code Ann. § 39-13-102(d) (2014). Such an assault is a “Class A misdemeanor[.]” *Id.* § 39-13-102(e)(1)(A)(i).

In the instant case, the Tennessee judgment indicates that while the deputies were attempting to subdue and arrest defendant, defendant “took his fist and struck Deputy Guinn in the face.” The crime of assaulting an officer is a Class A1 misdemeanor in North Carolina, and the Tennessee equivalent of that offense is substantially similar to the corresponding North Carolina offense. Therefore, the trial court properly concluded that defendant’s convictions for two counts of misdemeanor assault in Tennessee did not constitute Class 3 misdemeanors and did not abuse its discretion in revoking defendant’s probation. We affirm the judgment of the trial court.

AFFIRMED.

Judges STROUD and DAVIS concur.

Report per Rule 30(e).