An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA17-1049

Filed: 15 May 2018

Iredell County, Nos. 11 CRS 53855, 53915

STATE OF NORTH CAROLINA

v.

LEE-JAMIL KE'RUAN MILLER

Appeal by defendant from judgment entered 4 April 2017 by Judge Lori Hamilton in Iredell County Superior Court. Heard in the Court of Appeals 7 May 2018.

Attorney General Joshua H. Stein, by Assistant Attorney General Brenda Eaddy, for the State.

Joseph P. Lattimore for defendant-appellant.

TYSON, Judge.

Lee-Jamil Ke'Ruan Miller ("Defendant") appeals from a judgment revoking his probation and activating his suspended sentence. We affirm.

I. Background

On 24 May 2012, Defendant pled guilty to assault inflicting serious bodily injury and assault on a female, pursuant to a plea arrangement. The charges were

consolidated and the trial court sentenced Defendant to a term of 16 to 20 months of imprisonment. That sentence was suspended and Defendant was placed on supervised probation for 60 months.

On 30 January 2017, Defendant's probation officer filed a violation report and alleged Defendant had violated the terms of his probation by (1) being charged and convicted for possession with intent to sell or deliver ("PWISD") marijuana and (2) failing to pay his restitution and court costs as directed. Defendant signed the violation report the same day. The violation hearing was scheduled for 7 March 2017.

On 7 March 2017, Defendant executed a waiver of assigned counsel. The case was then continued until 4 April 2017. On that date, Defendant's case was called and he appeared without counsel. The court inquired whether Defendant had retained counsel. Defendant responded he had not had an opportunity "to meet with him yet to pay him so I can have him start on my case." Defendant requested a further continuance, but the trial court denied his request.

The State then asked Defendant whether he admitted to or denied the allegations in the probation violation report, and Defendant replied, "Yes, I admit that I talked to my officer about it." The probation officer informed the court that Defendant was in arrears $20,714.50, and had been convicted of PWISD marijuana. The trial court found Defendant in willful violation of the terms of his probation and

activated his suspended sentence. The next day, Defendant filed a written notice of appeal.

II. Jurisdiction

An appeal of right lies with this Court from a final judgment entered by the superior court pursuant to N.C. Gen. Stat. §§ 7A-27(b)(1) and 15A-1444(a) (2017).

III. Issues

A. Notice of Appeal

As an initial matter, we must determine whether Defendant gave proper notice of appeal. Appellate Rule 4, which governs appeals in criminal cases, states:

> Any party entitled by law to appeal from a judgment or order of a superior or district court rendered in a criminal action may take appeal by:
>
> (1) giving oral notice of appeal at trial, or
>
> (2) filing notice of appeal with the clerk of superior court and serving copies thereof upon all adverse parties within fourteen days after entry of the judgment or order[.]

N.C. R. App. P. 4(a).

Rule 4(b) also requires that a written notice of appeal "shall specify the party or parties taking the appeal; shall designate the judgment or order from which appeal is taken and the court to which appeal is taken[.]" N.C. R. App. P. 4(b). Defendant's appellate counsel acknowledges that Defendant's notice of appeal failed to comply with this rule, because it did not include a certificate of service on the State and did

not identify the court to which appeal is taken. However, this Court has held that neither of these defects deprives this Court of jurisdiction.

The State failed to file a motion to dismiss or otherwise make an objection to the lack of a certificate of service for failure to designate this Court. Rule 4's requirements of a certificate of service and identification of the court to which appeal is taken have been waived. *See State v. Williams*, 235 N.C. App. 201, 204, 761 S.E.2d 662, 664 (2014) ("[W]here the appellee failed, by motion or otherwise, to raise [an] issue as to service of notice in either the trial court or in this Court and has proceeded to file a brief arguing the merits of the case, . . . [the appellee] has waived service of notice [of appeal.]"). This appeal is properly before us. We dismiss Defendant's alternative petition for writ of *certiorari* as moot.

B. Denial of Motion to Continue

Defendant argues that the trial court erred by denying his motion to continue, since it was based on his need to retain counsel. He contends that the trial court's denial of his motion deprived him of his constitutional right to counsel.

IV. Standard of Review

> We review a trial court's resolution of a motion to continue for abuse of discretion. When a motion to continue raises a constitutional issue, however, the trial court's ruling thereon involves a question of law that is fully reviewable on appeal by examination of the particular circumstances presented in the record. Even when the motion raises a constitutional issue, denial of the motion is grounds for a new trial only upon a showing that the denial was

> erroneous and also that [defendant] was prejudiced as a result of the error.

State v. Morgan, 359 N.C. 131, 143, 604 S.E.2d 886, 894 (2004) (internal quotation marks and citations omitted), *cert. denied*, 546 U.S. 830, 163 L. Ed. 2d 79 (2005).

V. Analysis

"A defendant must be granted a reasonable time in which to obtain counsel of his own choosing, and must be granted a continuance to obtain counsel of his choosing where, through no fault of his own, he is without counsel." *State v. Montgomery*, 138 N.C. App. 521, 524, 530 S.E.2d 66, 68 (2000). Defendant's right to counsel may be forfeited by willful conduct on his part that results in the absence of counsel. *See State v. McFadden*, 292 N.C. 609, 615, 234 S.E.2d 742, 746-47 (1977). Conduct that may result in forfeiture includes a defendant's failure to secure private counsel in a reasonable time. *See State v. Sampley*, 60 N.C. App. 493, 496, 299 S.E.2d 460, 462, *disc. review denied*, 308 N.C. 390, 302 S.E.2d 257 (1983). "[I]f an indigent defendant chooses to proceed with private counsel, he loses the right to appointed counsel." *Montgomery*, 138 N.C. App. at 524, 530 S.E.2d at 69 (citation omitted).

Defendant received and signed for a copy of his violation report on 30 January 2017. Approximately five weeks later, on 7 March 2017, Defendant executed a waiver of appointed counsel in open court. His case was continued for an additional four weeks, until 4 April 2017. Defendant's case was called for hearing, and the following colloquy transpired:

> [THE STATE]: Your Honor, next is Lee Miller, Probation calendar, previously marked absent, but he's obviously here now. Mr. Miller signed a waiver of his right to assigned counsel on March 7th before the Honorable Lynn Gullett. His case was continued until today. Mr. Miller, have you hired an attorney or do you wish to represent yourself?
>
> [DEFENDANT]: I talked to my attorney, but I haven't got to meet with him yet to pay him so I can have him start on my case. I was just wanting to ask for a continuance.
>
> THE COURT: How long has this been pending?
>
> [THE STATE]: It looks like the first court date was March 7th. The Violation Report was filed January 30th.
>
> THE COURT: Mr. Miller, you have had a month to get your attorney here. I'm going to deny your motion to continue. Are we ready to proceed?

This exchange reflects Defendant had failed to secure retained counsel, despite having four weeks since his initial appearance, waiver and continuance, and approximately nine weeks since he had received and signed for notice of his violations. When asked about this failure, Defendant gave only a vague answer, stating, "I talked to my attorney, but I haven't got to meet with him yet to pay him so I can have him start on my case." Defendant did not name the attorney he had spoken with, or provide any explanation for why he had been unable to secure the attorney's services earlier, or why counsel was not present during his request for a continuance. Defendant's arguments are overruled.

VI. Conclusion

Based upon these circumstances, we hold Defendant had "a reasonable time" in which to procure counsel, but failed to do so. *See Sampley*, 60 N.C. App. at 496, 299 S.E.2d at 462 (holding that a period of approximately one month constituted "a fair opportunity to secure counsel of [one's] own choice."). Defendant forfeited his right to have counsel present at the probation violation hearing through his waiver and his own volitional conduct. *See id*.

The trial court did not err by denying Defendant's motion to continue and immediately proceeding to conduct the probation violation hearing without giving Defendant an additional continuance to have counsel present. The trial court's judgment revoking Defendant's probation is affirmed. *It is so ordered*.

AFFIRMED.

Judges ELMORE and ZACHARY concur.

Report per Rule 30(e).