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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-125

Filed: 17 July 2018

Iredell County, Nos. 17 CRS 50357, 50611

STATE OF NORTH CAROLINA

v.

JOSHUA ROBERT LAIL

Appeal by defendant from judgments entered 21 July 2017 by Judge Julia Lynn Gullett in Iredell County Superior Court. Heard in the Court of Appeals 16 July 2018.

*Attorney General Joshua H. Stein, by Assistant Attorney General Kimberly N. Callahan, for the State.*

*Unti & Smith, PLLC, by Sharon L. Smith, for defendant-appellant.*

DAVIS, Judge.

Joshua Robert Lail (“Defendant”) appeals from his convictions for assault on a government official, assault on a detention officer inflicting serious bodily injury, and assault on a detention officer inflicting physical injury. After a thorough review of the record and applicable law, we affirm.

**Factual and Procedural Background**

STATE V. LAIL

*Opinion of the Court*

On 23 January 2017, Defendant was arrested for possession of marijuana. During a search incident to his arrest, Defendant kneed and kicked the arresting officer. After his arrest, Defendant was held in the Iredell County Detention Center.

On 5 February 2017, Defendant attempted to throw an unidentified liquid on a detention officer. In response, the officer sprayed Defendant in the face with pepper spray. Defendant was then taken to the showers for decontamination. When the officer attempted to place Defendant in the shower, Defendant initiated an altercation in which he punched the officer, poked him in the eyes, and bit him on the arm. A second officer intervened, and Defendant bent her fingers back, injuring them.

Defendant was indicted for assault on a government official, assault on a detention officer inflicting serious bodily injury, and assault on a detention officer inflicting physical injury. On 21 July 2017, Defendant pled no contest to these three charges in exchange for the State's dismissal of five other pending charges. The trial court consolidated the two assaults on the detention officials into one judgment and sentenced Defendant to a term of 21 to 35 months imprisonment. The court imposed a consecutive sentence of 150 days for the assault on a government official charge. Four days later, Defendant returned to court and attempted to give oral notice of appeal.

**Analysis**

## **I. Appellate Jurisdiction**

As an initial matter, we must determine if Defendant's appeal is properly before this Court. Rule 4(a) of the North Carolina Rules of Appellate Procedure provides that a defendant may appeal from an order or judgment in a criminal action 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[.]" N.C. R. App. P. 4(a). Failure to comply with Rule 4 deprives this Court of jurisdiction to hear the appeal. *State v. McCoy*, 171 N.C. App. 636, 638, 615 S.E.2d 319, 320, *appeal dismissed*, 360 N.C. 73, 622 S.E.2d 626 (2005).

Defendant did not give oral notice of appeal until four days after judgment was entered. Under these circumstances, his oral notice of appeal was not given "at trial" and thus did not comply with Rule 4(a). *State v. Holanek*, 242 N.C. App. 633, 640, 776 S.E.2d 225, 231, *disc. review denied*, 368 N.C. 429, 778 S.E.2d 95 (2015), *cert. denied*, \_\_\_ U.S. \_\_\_, 136 S. Ct. 2493, 195 L. Ed. 2d 824 (2016). Accordingly, this Court lacks jurisdiction over Defendant's appeal as of right. *Id.* at 639, 776 S.E.2d at 231-32.

However, in recognition of the fact that his notice of appeal was in violation of Rule 4, Defendant has also filed a petition for writ of *certiorari*. Pursuant to Rule 21(a)(1) of the Appellate Rules, this Court possesses the authority to grant a petition

for writ of *certiorari* and review an order or judgment entered by the trial court “when the right to prosecute an appeal has been lost by failure to take timely action . . . .” N.C. R. App. P. 21(a)(1).

The State does not contend that it has been misled by Defendant’s failure to serve the notice of appeal. It is within this Court’s discretion to issue a writ of *certiorari* under these circumstances where the appellee has not been misled by the appellant’s mistake. *See State v. Springle*, 244 N.C. App. 760, 763, 781 S.E.2d 518, 521 (2016) (“[A] defect in a notice of appeal should not result in loss of the appeal as long as the intent to appeal can be fairly inferred from the notice and the appellee is not misled by the mistake.” (citation, quotation marks, and ellipsis omitted)).

Thus, in our discretion, we grant Defendant’s petition for writ of *certiorari* and proceed to address the merits of his arguments. *See State v. Rowe*, 231 N.C. App. 462, 466, 752 S.E.2d 223, 226 (2013) (granting defendant’s petition for writ of *certiorari* where he failed to designate the court to which appeal was being taken and did not serve notice of appeal on the State).

## **II. *Anders v. California***

Counsel appointed to represent Defendant submits that she “has not identified any non-frivolous issue to be raised in this appeal.” She asks that this Court conduct its own review of the record for possible prejudicial error. Counsel has shown to the satisfaction of this Court that she has complied with the requirements of *Anders v.*

*California*, 386 U.S. 738, 18 L. Ed. 2d 493 (1967), and *State v. Kinch*, 314 N.C. 99, 331 S.E.2d 665 (1985), by advising Defendant of his right to file written arguments with this Court and providing him with the documents necessary for him to do so. Defendant has not filed any written arguments on his own behalf with this Court, and a reasonable time for him to do so has expired.

In accordance with *Anders*, we have fully examined the record to determine whether any issues of arguable merit appear therefrom, including, but not limited to, the potential issues identified by counsel in Defendant's brief. We agree with counsel that those "are not meritorious issues." We have been unable to find any possible prejudicial error and conclude that Defendant's convictions should be affirmed.

### **Conclusion**

For the reasons stated above, we affirm Defendant's convictions.

AFFIRMED.

Judges CALABRIA and BERGER concur.

Report per Rule 30(e).