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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-905

Filed: 18 August 2020

Craven County, Nos. 16 CRS 50713-14, 17 CRS 103

STATE OF NORTH CAROLINA

v.

COREY D. ROBERSON, Defendant

Appeal by Defendant from judgments entered 2 April 2019 by Judge Imelda J. Pate in Craven County Superior Court. Heard in the Court of Appeals 9 June 2020.

*Attorney General Joshua H. Stein, by Assistant Attorney General Nicholas R. Sanders, for the State.*

*Richard J. Costanza for defendant-appellant.*

BERGER, Judge.

On April 1, 2019, Corey D. Roberson (“Defendant”) pleaded guilty to possession with intent to sell or deliver cocaine, possession of drug paraphernalia, possession of a firearm by a felon, and attaining habitual felon status. Defendant was sentenced to 58 to 82 months in prison. On April 3, 2019, Defendant’s counsel appeared in open court to enter notice of appeal. Defendant filed a petition for writ of certiorari on

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November 13, 2019, seeking appellate review pursuant to *Anders v. California*, 386 U.S. 738, 87 S. Ct. 1396 (1967) and *State v. Kinch*, 314 N.C. 99, 331 S.E.2d 665 (1985). Defendant subsequently filed a *pro se* statement alleging ineffective assistance of counsel.

Factual and Procedural Background

On February 26, 2016, Detective Phillip Kilgore (“Det. Kilgore”) with the Havelock Police Department, acting in cooperation with Carteret County Sheriff’s Office, recovered approximately one ounce of cocaine from Kristina Ayers (“Ayers”). Ayers identified Defendant as her cocaine supplier.

Det. Kilgore confirmed Defendant’s identity and learned that he had an active warrant. While conducting surveillance on Defendant, an officer with the New Bern Police Department observed Defendant drive through a red light at an intersection. The officer initiated a traffic stop. Defendant was arrested for driving while license revoked and for an outstanding warrant.

Defendant gave voluntary consent for officers to search his vehicle, during which an officer recovered a nine-millimeter semiautomatic pistol and a plastic bag containing a white powdery substance. The State Crime Lab conducted testing and analysis on the substance and confirmed it to be 13.04 grams of cocaine hydrochloride.

Defendant was indicted for possession with intent to sell or deliver cocaine, possession of drug paraphernalia, possession of a firearm by a felon, and attaining

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habitual felon status. On April 1, 2019, Defendant filed a motion to suppress all evidence obtained from his vehicle. The trial court denied Defendant's motion. Defendant entered a no contest plea to the charges of possession with intent to sell or deliver cocaine, possession of a firearm by a felon, possession of drug paraphernalia, and attaining habitual felon status. The plea agreement did not indicate that Defendant was retaining his right to appeal the denial of his motion to suppress. The charges were consolidated into one judgment, and Defendant received a sentence in the mitigated range. The following day, Defendant's counsel appeared in open court to enter oral notice of appeal "specifically and only for the suppression motion."

Analysis

Defendant concedes that he failed to preserve his right to appeal. Defendant did not comply with Rule 4 of the North Carolina Rules of Appellate Procedure, which provides in pertinent part:

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 or within fourteen days after a ruling on a motion for appropriate relief made during the fourteen-day period following entry of the judgment or order.

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N.C. R. App. P. 4(a)(1)-(2). “Compliance with the requirements for entry of notice of appeal is jurisdictional.” *State v. Oates*, 366 N.C. 264, 266, 732 S.E.2d 571, 573 (2012) (citation omitted). “A jurisdictional default . . . precludes the appellate court from acting in any manner other than to dismiss the appeal.” *Dogwood Dev. & Mgmt. Co. v. White Oak Transp. Co.*, 362 N.C. 191, 197, 657 S.E.2d 361, 365 (2008) (citations omitted). Here, Defendant did not satisfy the requirements of Rule 4.

In addition, Defendant sought to appeal the trial court’s denial of his motion to suppress but did not comply with the additional requirements of N.C. Gen. Stat. § 15A-979. “This statutory right to appeal is conditional, not absolute.” *State v. McBride*, 120 N.C. App. 623, 625, 463 S.E.2d 403, 404 (1995). “Pursuant to this statute, a defendant bears the burden of notifying the state and the trial court during plea negotiations of the intention to appeal the denial of a motion to suppress, or the right to do so is waived after a plea of guilty.” *Id.* at 625, 463 S.E.2d at 404 (citation omitted). “The rule in this [S]tate is that notice must be *specifically* given.” *Id.* at 625, 463 S.E.2d at 404 (emphasis in original) (citations omitted). Here, Defendant did not preserve his right to appeal the trial court’s denial of the motion to suppress because he failed to provide notice prior to entering a plea.

“Defendant’s failure to file proper notice of appeal would necessitate the dismissal of his appeal despite this Court’s recognition of defendant’s right to appeal in this matter.” *State v. Robinson*, 249 N.C. App. 568, 572, 791 S.E.2d 862, 865 (2016).

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However, appellate counsel for Defendant filed a petition for writ of certiorari asking this Court to permit appellate review pursuant to *Anders* and *Kinch*.

*Anders* review is appropriate when a “manifest injustice would occur if the Defendant is denied any appellate review, based on errors of counsel, especially if appellate counsel overlooked a meritorious issue in this case.” *See Anders*, 386 U.S. 738, 87 S. Ct. 1396; *Kinch*, 314 N.C. 99, 331 S.E.2d 665. This Court is within its discretion to allow a petition for writ of certiorari “to permit review of the judgments and orders of trial tribunals *when the right to prosecute an appeal has been lost by failure to take timely action . . .*” N.C. R. App. P. 21(a)(1) (emphasis added). In our discretion, we grant Defendant’s petition for writ of certiorari to allow for *Anders* review of issues Defendant had the right to appeal but lost through failure to take timely action. *See State v. Brooks*, 204 N.C. App. 193, 195, 693 S.E.2d 204, 206 (2010).

Appellate counsel for Defendant acknowledges that there is no “meritorious issue that could support a meaningful argument for relief on appeal” and requests that this Court “examine the record on appeal for possible prejudicial error and to determine whether counsel overlooked any meritorious issues.” “This is tantamount to a conclusion that the appeal is wholly frivolous.” *Kinch*, 314 N.C. at 102, 331 S.E.2d at 666. “Counsel has shown to the satisfaction of this Court that he has complied with the requirements of *Anders v. California*, and *State v. Kinch*, by advising Defendant of his right to file written arguments with this Court and

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providing him with the documents necessary to do so.” *State v. Mayo*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 823 S.E.2d 656, 659 (2019).

In accordance with *Anders*, we have fully examined the record to determine whether any issues of arguable merit appear therefrom. We have been unable to find any possible prejudicial error and conclude that the appeal is wholly frivolous. Accordingly, we find no error.

Defendant also requests in his *pro se* argument review to determine if he was provided ineffective assistance of counsel. We dismiss Defendant’s claim of ineffective assistance of counsel without prejudice for him to file an appropriate motion with the trial court. *See State v. Todd*, 369 N.C. 707, 712, 799 S.E.2d 834, 838 (2017).

NO ERROR IN PART, DISMISSED IN PART.

Judges ZACHARY and BROOK concur.

Report per Rule 30(e).