An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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

2021-NCCOA-260

No. COA20-630

Filed 1 June 2021

Davidson County, Nos. 16 CRS 55047-48

STATE OF NORTH CAROLINA

v.

KEON LASHAWN PHIFER

Appeal by defendant from judgment entered 18 February 2020 by Judge R. Stuart Albright in Davidson County Superior Court. Heard in the Court of Appeals 13 April 2021.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Martin T. McCracken, for the State.

Leslie C. Rawls for the defendant.

ARROWOOD, Judge.

¶ 1 Keon Lashawn Phifer ("defendant") appeals from judgment entered 18 February 2020 following his guilty plea to trafficking in opium and possession of drug paraphernalia. For the following reasons, we dismiss defendant's appeal.

I. Background

¶ 2 On 30 January 2017, a Davidson County grand jury indicted defendant on charges of trafficking in opium or heroin by possession of more than 14 grams but less than 28 grams, trafficking in opium or heroin by transport, possession with intent to sell and deliver heroin, and possession of drug paraphernalia.

¶ 3 On 22 January 2020, defendant made a motion to suppress physical evidence seized when he was stopped on the grounds that the search and seizure were illegal. The motion to suppress was heard on 14 February 2020. The evidence and testimony presented at the hearing tended to show as follows.

¶ 4 On 7 September 2016, police officers with the Taylorsville Police Department observed a black car pull into the driveway of a house they were surveilling. Detective Adam Kallfelz ("Detective Kallfelz") testified that he observed a white female approach the vehicle from the house to speak to the driver for a minute or two. Detective Kallfelz testified that based on his training and experience, as well as a prior citizen complaint of potential drug activity related to the black car, he believed that the behavior was consistent with a sale of narcotics. The officers began to follow the vehicle, with Detective Kallfelz observing that the right rear break light was not operating and a rear tire was very low on air; Detective Kallfelz also observed the car cross over the center line. Based on these observations, the officers initiated a traffic stop.

¶ 5 When Detective Kallfelz approached the vehicle, he made contact with

defendant, who was driving the vehicle, and immediately smelled a strong odor of marijuana emanating from the car and defendant and noticed pieces of marijuana on defendant's shirt. Officers asked defendant to exit the vehicle and he was subsequently detained in handcuffs and searched. Detective Kallfelz testified that in the course of the search, a large bulge was felt in defendant's boxer briefs. Detective Travis Clodfelter ("Detective Clodfelter") conducted a second search, which involved searching defendant's buttocks and private areas. While searching between defendant's legs, Detective Clodfelter felt a very hard ball that he considered an obvious foreign object, and after a second or two Detective Clodfelter grabbed the ball. Because the officers were unable to move defendant to continue the search, they waited for several other units to provide further assistance. After additional officers arrived, the officers surrounded defendant with other vehicles and opened the doors so that defendant was shielded from public view. Detective Kallfelz then pulled down defendant's pants to search in his underwear and underneath his groin. Detective Kallfelz recovered a bag of marijuana and a hard substance that tested positive for heroin. Detective Kallfelz noted that he recovered approximately 19.5 grams of heroin and 1.5 grams of marijuana.

¶ 6 After the motion to suppress was denied, defendant pleaded guilty to all charges. On 17 February 2020, defendant was sentenced to a combined term of 98 to 139 months imprisonment. After sentencing, defendant gave oral notice of appeal

from "the motion portion." The trial court noted on the appellate entry that the notice of appeal was from the denial of the motion to suppress only. On 17 September 2020, defendant filed petition for *writ of certiorari*.

II. Discussion

¶ 7 Defendant contends that the trial court erred in denying his motion to suppress because the strip search of defendant was unreasonable *per se* and that counsel's failure to challenge the strip search as unconstitutional constituted ineffective assistance of counsel. Because the oral notice of appeal was insufficient to confer appellate jurisdiction, defendant also petitions for *writ of certiorari* to review the merits.

A. Appellate Jurisdiction

¶ 8 Upon a guilty plea, a defendant has the right to appeal an order denying a motion to suppress evidence so long as it is "an appeal from a judgment of conviction." N.C. Gen. Stat. § 15A-979(b) (2019). "In order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context." N.C.R. App. P. 10(a)(1). If the defendant merely appeals the denial of his motion, rather than the final judgment, this Court lacks jurisdiction over the appeal. *State v. Horton*, 264 N.C. App. 711, 714, 826 S.E.2d 770, 773 (2019) (citation omitted).

¶ 9 *Writ of certiorari* may be issued "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). "*Certiorari* is a discretionary writ, to be issued only for good and sufficient cause shown." *State v. Grundler*, 251 N.C. 177, 189, 111 S.E.2d 1, 9 (1959), *cert. denied*, 362 U.S. 917, 4 L. Ed. 2d 738 (1960). "A petition for the writ must show merit or that error was probably committed below." *Id.* "This Court will not consider arguments based upon matters not presented to or adjudicated by the trial court. Even alleged errors arising under the Constitution of the United States are waived if [the] defendant does not raise them in the trial court." *State v. Haselden*, 357 N.C. 1, 10, 577 S.E.2d 594, 600 (citations and internal quotation marks omitted), *cert. denied*, 540 U.S. 988, 157 L. Ed. 2d 382 (2003).

¶ 10 In the present case, defendant failed to present the trial court with a timely request, objection, or motion, and instead gave oral notice of appeal only from the denial of the motion to suppress. At the trial level, defendant argued that the seizure was the product of an illegal stop and arrest on the grounds that the stop was made without reasonable suspicion and the arrest was without probable cause. Defendant did not present any argument with respect to whether an illegal or unconstitutional strip search occurred.

¶ 11 Furthermore, defendant's petition does not show merit or that error was probably committed below. In *State v. Smith*, our Supreme Court held in a *per curiam*

opinion that a reasonable search occurred where an officer used a police vehicle to shield the defendant from public view during a search of the defendant's person. 342 N.C. 407, 464 S.E.2d 45 (1995). Our Supreme Court adopted the reasoning of Judge Walker's dissent from this Court's opinion concluding that the officers took

> the necessary and reasonable precautions to prevent the public exposure of defendant['s] . . . private areas. While there may have been less intrusive means of conducting the search . . . the availability to those less intrusive means does not automatically transform an otherwise reasonable search into a Fourth Amendment violation.

State v. Smith, 118 N.C. App. 106, 118, 454 S.E.2d 680, 687 (1995) (Walker, J. concurring in part and dissenting in part). In this case, the officers' actions were analogous to those approved of in *Smith*. Accordingly, we hold that defendant has failed to preserve this issue for appellate review and has failed to show that error was probably committed below. In view of the fact that the officer's actions were not an unreasonable search, counsel's failure to specifically raise this issue did not constitute ineffective assistance of counsel. Therefore, we deny defendant's petition for *writ of certiorari* and dismiss his appeal.

III. Conclusion

¶ 12 For the forgoing reasons, we dismiss defendant's appeal.

DISMISSED.

Chief Judge STROUD and Judge JACKSON concur.

Report per Rule 30(e).