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IN THE COURT OF APPEALS OF NORTH CAROLINA

2021-NCCOA-384

No. COA20-553

Filed 20 July 2021

Forsyth County, Nos. 18 CRS 1284; 18 CRS 1287-88; 18 CRS 54103; 18 CRS 54122-23; 18 CRS 55337-39; 19 CRS 890; 19 CRS 2048

STATE OF NORTH CAROLINA

v.

BRANDON HELMS, Defendant.

Appeal by defendant from judgment entered 10 December 2019 by Judge David L. Hall in Forsyth County Superior Court. Heard in the Court of Appeals 26 May 2021.

*Joshua H. Stein, Attorney General, by Special Deputy Attorney General Neil Dalton, for the State-appellee.*

*Glenn Gerding, Appellate Defender, by Assistant Appellate Defender Nicholas C. Woomer-Deters, for defendant-appellant.*

GORE, Judge.

¶ 1

Defendant Brandon Helms appeals from judgment entered upon a plea of guilty pursuant to *Alford*. On appeal, defendant argues the trial court erred in denying his motion to suppress. Defendant further argues the terms of his plea were unfulfillable because he could not be lawfully sentenced for a class B1 incest felony

on an indictment that charged Class F incest. Additionally, defendant argues the trial court violated his right to be present at sentencing. Defendant also argues the trial court erred in sentencing him at a class B1 offense instead of a class E offense. Finally, defendant argues the trial court erred by imposing lifetime satellite-based monitoring (“SBM”). On 7 October 2020, defendant filed a petition for writ of certiorari. For the following reasons, we dismiss defendant’s appeal and deny defendant’s petition for writ of certiorari.

### I. Background

¶ 2

On 8 May 2018, defendant was arrested following a visit by Child Protective Services (“CPS”) to a home marked for demolition, which defendant and his family were living in and defendant had allegedly been hired to repair, and a subsequent traffic stop by law enforcement. On 24 September 2018, defendant was indicted in Forsyth County for multiple sex crimes against a child including incest, statutory rape of a child fifteen years of age or younger, indecent liberties with a child, sex act by a substitute parent or custodian, and misdemeanor contributing to the delinquency of a juvenile. On 8 October 2018, defendant was indicted in Guilford County for statutory rape of a child fifteen years of age or younger. On 13 May 2019, defendant was indicted in Guilford County for statutory rape of a child who is fifteen years of age or younger, incest, child abuse—sex act upon a child, and sexual activity

by a substitute parent or custodian. Venue for the Guilford County indictments was transferred to Forsyth County.

¶ 3

On 10 October 2019, defendant filed a motion to suppress all physical evidence seized and any statements made that arose from the 8 May 2018 CPS visit and subsequent traffic stop by law enforcement. A hearing on the motion to suppress was held on 28 October 2019, and the trial court orally denied defendant's motion that day.

¶ 4

Jury selection began in defendant's case on 29 October 2019. Before the selection of the jury had been finalized defendant indicated to the court he would be willing to enter an *Alford* plea if he were allowed to briefly speak to the alleged co-defendant, Marcy Lynn Helms, his wife. That day defendant entered an *Alford* plea for all counts charged. The trial court sentenced defendant to five sentences of 200 to 300 months and one sentence of 60 to 132 months, all of which are to be served consecutively. The trial court also entered six orders imposing lifetime SBM, one for each of the six judgments.

¶ 5

Following sentencing, defendant gave oral notice of his intent to appeal the denial of his motion to suppress. Defendant did not file a written notice of appeal.

## II. Discussion

¶ 6 Defendant filed a petition for writ of certiorari, requesting this Court grant appellate review because defendant failed to give proper notice of appeal for all five issues he raised on appeal. We deny defendant’s petition for writ of certiorari.

¶ 7 North Carolina Rules of Appellate Procedure allow this Court to issue a writ of certiorari “in appropriate circumstances . . . to permit review of the judgments and order 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) (2020). Certiorari is a discretionary writ, only to be issued “for good and sufficient cause shown.” *State v. Gantt*, 271 N.C. App. 472, 474, 844 S.E.2d 344, 346 (2020) (internal citations omitted). “A petition for the writ must show merit or that error was probably committed below.” *Id.* The decision of whether to issue the writ of certiorari rests within the discretion of this Court and is not a matter of right. *Id.* at 474–75, 844 S.E.2d at 346.

*A. Motion to Suppress*

¶ 8 North Carolina statutory law grants a conditional right to appeal an order denying a motion to suppress evidence, even when the defendant pleads guilty. N.C. Gen. Stat. § 15A-979(b) (2020); *State v. Pimental*, 153 N.C. App. 69, 74, 568 S.E.2d 867, 870 (2002). In order to properly appeal under § 15A-979(b) a defendant who enters a guilty plea must (1) give notice of his intent to appeal the motion to suppress before entering the plea and (2) appeal the final judgment of conviction. *See State v. Miller*, 205 N.C. App. 724, 725, 696 S.E.2d 542, 543 (2010) (dismissing defendant’s

appeal because, despite preserving his right to appeal by filing a written notice of appeal, defendant failed to appeal from his final judgment as § 15A-979(b) required).

¶ 9

Here, defendant gave oral notice of his intent to appeal the denial of his motion to dismiss after the trial court announced his sentence. Further, he did not file a written notice of appeal or indicate he was appealing his final judgment as § 15A-979(b) requires. Defendant failed to satisfy both requirements to properly raise his conditional right to appeal under § 15A-979(b). We deny the petition for writ of certiorari as to this issue.

*B. Sentencing*

¶ 10

Defendant raises two arguments pertaining to sentencing: (1) that the terms of his plea were unfulfillable because he could not be lawfully sentenced for Class B1 incest on an indictment that charged Class F incest and (2) that the court erred by sentencing defendant at a Class B1 offense instead of a Class E offense. Defendant would have a statutory right to appeal his sentence, without having objected at trial, under § 15A-1446(d)(18), however, Defendant failed to file a notice of appeal. Therefore, he has petitioned for a writ of certiorari as to these issues.

¶ 11

Neither of these arguments are persuasive. The Class B1 incest charge that defendant references in Section II of his opening brief is not one of the five B1 felonies he received an active sentence for. In fact, the only charge from the indictment at issue which defendant was given an active sentence for was a Class D felony.

Regarding defendant's second sentencing argument, the trial court recited a Class E felony listed on the indictment then announced a sentence that corresponded with the length of a Class B1 felony sentence; however, the indictment included a Class B1 felony. It appears clear from the record that this error was a *lapsus linguae* where the trial court simply read the incorrect charge off the indictment. A *lapsus linguae* where the defendant is not prejudiced does not warrant disruption on appeal. *See Pimental*, 153 N.C. App. at 80, 568 S.E.2d at 874. Defendant has not shown good or sufficient cause, or that reversible error was probably committed below. We also deny the petition for writ of certiorari as to these issues.

¶ 12 Defendant also petitions for certiorari with regards to his argument that he had a right to be present at sentencing. A criminal defendant has a common law right to be present at the time his sentence is imposed, and when any substantive changes are made to the sentence. *State v. Crumbley*, 135 N.C. App. 59, 66, 67, 519 S.E.2d 94, 99 (1999); *State v. Pope*, 257 N.C. 326, 330, 126 S.E.2d 126, 130 (1962). However, here the trial court announced defendant's active sentences and their corresponding charges with defendant present and then asked the clerk to consolidate the remaining charges into the announced sentence. Defendant argues his rights were violated when the clerk consolidated the remaining charges out of his presence. Defendant has not shown good or sufficient cause for us to grant the writ as to this issue; to the extent

any error may have occurred defendant was not prejudiced. We deny defendant's petition for writ of certiorari as to this issue.

*C. Satellite-Based Monitoring*

¶ 13 Finally, defendant argues the trial court erred by imposing lifetime SBM because the State failed to demonstrate that imposition of lifetime SBM did not constitute a reasonable search under the Fourth Amendment. Defendant did not file notice of appeal as to this issue, as required by Rule 3 of our Rules of Appellate Procedure; therefore, he petitions for certiorari.

¶ 14 At sentencing, defendant made no argument that imposing SBM would be unconstitutional, and his only objection to SBM pertained to the timing of the SBM order. “[C]onstitutional errors not raised by objection at trial are deemed waived on appeal.” *State v. DeJesus*, 265 N.C. App. 279, 291, 827 S.E.2d 744, 753 (2019) (citations omitted). In order to consider defendant's unpreserved constitutional argument, we would need to grant certiorari and invoke Rule 2 of the N.C. Rules of Appellate Procedure. *See id.* Rule 2 allows this Court to suspend any of the Rule of Appellate Procedure, including the Rules regarding notice of appeal, if doing so would “prevent manifest injustice to a party, or [] expedite decision in the public interest . . . .” N.C.R. App. P. 2. “This Court must be cautious in our use of Rule 2 not only because it is an extraordinary remedy intended solely to prevent manifest injustice, but also because inconsistent application of Rule 2 itself leads to injustice when some

similarly situated litigants are permitted to benefit from it but others are not.” *DeJesus*, 265 N.C. App at 292, 827 S.E.2d at 753. Defendant failed to properly preserve his constitutional argument at trial and failed to file notice of appeal as to this issue, thus defendant has committed two procedural errors. We deny the petition for writ of certiorari. However, despite the insurmountable procedural deficiencies on appeal, we recognize defendant’s claim may have merit due to the lack of evidence presented by the State at sentencing. Therefore, we deny the petition for writ of certiorari without prejudice as to this issue so that defendant may pursue a motion for appropriate relief with the trial court.

### III. Conclusion

¶ 15 For the reasons stated herein, defendant’s petition for writ of certiorari is denied and his appeal is dismissed. The petition for writ of certiorari is denied with prejudice as to the motion to suppress and sentencing arguments. The petition for writ of certiorari is denied without prejudice as to the SBM argument.

DENIED AND DISMISSED.

Judges DILLON and CARPENTER concur.

Report per Rule 30(e).