

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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

2022-NCCOA-79

No. COA21-301

Filed 1 February 2022

Buncombe County, No. 08 CRS 55533

STATE OF NORTH CAROLINA,

v.

BRIAN KEVIN LEWIS, Defendant.

Appeal by Defendant from judgment entered 18 August 2020 by Judge Steven R. Warren in Buncombe County Superior Court. Heard in the Court of Appeals 30 November 2021.

*Attorney General Joshua H. Stein, by Assistant Attorney General Robert J. Pickett, for the State.*

*Appellate Defender Glenn Gerding, by Assistant Appellate Defender Katherine Jane Allen, for Defendant-Appellant.*

WOOD, Judge.

¶ 1

Defendant Brian Lewis (“Defendant”) appeals from a judgment entered upon his *Alford* plea.<sup>1</sup> Appellate counsel for Defendant filed an *Anders* brief, and

---

<sup>1</sup> “[A]n Alford plea is a guilty plea.” *State v. Tysinger*, 275 N.C. App. 344, 352, 853 S.E.2d 189, 195 (2020) (citation and emphasis omitted); *see also State v. Taylor*, 374 N.C. 710, 719 n.3, 843 S.E.2d 46, 52, n.3 (2020). “[A]n Alford plea constitutes a guilty plea in the same way that a plea of nolo contendere or no contest is a guilty plea.” *Id.* at 353, 853 S.E.2d at 195 (quoting *State ex re. Warren v. Schwarz*, 219 Wis.2d 615, 631, 579 N.W.2d 698, 706 (1998) (internal quotation marks and emphasis omitted)).

Defendant filed a *pro se* brief and petition for writ of certiorari. After careful review of the record and applicable law, we conclude Defendant’s appeal is wholly frivolous.

### **I. Factual and Procedural Background**

¶ 2 On April 23, 2008, at approximately 10:45 p.m., Defendant called the Buncombe County Sheriff’s Office to report his wife (“the decedent”) had shot herself. When law enforcement officers arrived, they found Defendant “outside sobbing and inside the residence they found a white female fully clothed sitting in an upright position on a sofa.” The decedent “had a pistol in her right hand with both her right and left hand in her lap.”

¶ 3 After “speak[ing] with law enforcement on a couple of occasions . . . [Defendant] admitted that he shot his wife.” In an interview with the Sheriff’s Office, Defendant stated “he had a gun and was walking towards his wife when [he] tripped on the rug near the couch and shot her.” Defendant alleged the decedent was suicidal so he “had gone and retrieved the gun and was going to give it to her and she wanted to kill herself.” However, Defendant conceded that she would not have shot herself. Defendant later admitted that he staged the crime scene to make it look as though the decedent had committed suicide. The autopsy revealed that the decedent died from a gunshot wound to her head. The gunshot wound was to the upper right frontal area of her skull, there was no sign of stippling, and there was no exit wound. The decedent also had bruising on both wrists and above the left eye.

¶ 4

On December 1, 2008, Defendant was charged by information<sup>2</sup> with one count of second-degree murder and one count of possession of a firearm by a felon.<sup>3</sup> The State asserted that Defendant had 13 prior record level points and was a prior record level IV. On December 1, 2008, Defendant entered an *Alford* plea to second degree murder and possession of a firearm by a felon. Defendant's plea was accepted, and the trial court sentenced him to a minimum of 204 months and a maximum of 254 months incarceration.

¶ 5

On January 8, 2019, Defendant filed a *pro se* motion for appropriate relief ("MAR"). Defendant sought to have his plea and sentence set aside and that either the charges be dismissed or he be afforded a new trial or new plea agreement. Defendant's MAR was denied without a hearing on March 12, 2019. Thereafter, Defendant filed a petition for writ of certiorari with this Court. On May 29, 2019, this Court entered an order in which it found that a MAR necessitates an evidentiary hearing and remanded to the trial court.

¶ 6

On July 19, 2019, the trial court appointed an attorney to assist Defendant in

---

<sup>2</sup> Pursuant to N.C. Gen. Stat. § 15A-644(b), a defendant may be tried upon an information that "contain[s] everything required of an indictment," except for the signature of the foreman of a grand jury. N.C. Gen. Stat. § 15A-644(b) (2020). The defendant must also waive the requirement of an indictment under N.C. Gen. Stat. § 15A-642(c). N.C. Gen. Stat. § 15A-644(b). Here, the information complies with N.C. Gen. Stat. § 15A-644(b), in that it contains the requirements of an indictment and Defendant's waiver of "the finding and return of a Bill of Indictment."

<sup>3</sup> Defendant was previously convicted of a felony in Florida in 1999.

filing an amended MAR. The amended MAR, filed on August 19, 2019, alleged, among other things, that trial counsel provided ineffective assistance of counsel by stipulating to Defendant's erroneously calculated prior record points, and that Defendant's plea entry was not knowing, intelligent, and voluntary.

¶ 7

The evidentiary hearing for Defendant's MAR occurred over three dates: July 28, August 5, and August 17, 2020. Defendant's MAR was granted in part and denied in part. Defendant's MAR was granted in part because his prior record level was erroneously calculated. The State dismissed the charge of possession of a firearm by a felon after it conceded that Defendant's prior convictions would not satisfy the elements of that offense. Thereafter, Defendant entered a new plea to second degree murder, and a new judgment was entered against him. Defendant stipulated to having eight prior record points and a prior record level III and was sentenced to a minimum 204 months and a maximum 254 months incarceration. Defendant timely gave oral notice of appeal in open court.

## II. Discussion

¶ 8

Counsel appointed to represent Defendant on appeal has filed a brief pursuant to *Anders v. California*, 386 U.S. 738, 87 S. Ct. 1396, 18 L. Ed. 2d 493 (1967), indicating she "is unable to identify an issue with sufficient merit to support a meaningful argument for relief on appeal." Accordingly, appellate counsel asks this Court to conduct its own review of the record for possible error.

¶ 9 Counsel has demonstrated to this Court’s satisfaction that she has complied with the requirements of *Anders* 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 a copy of the documents pertinent to his appeal. Thus, Defendant’s allegations that his post-conviction and appellate counsel provided ineffective assistance of counsel is without merit

¶ 10 Under N.C. Gen. Stat. § 15A-1444, a defendant who enters a plea of guilty or no contest to a felony is entitled to appeal “the issue of whether his sentencing is supported by evidence introduced at the trial and sentencing hearing only if the minimum sentence of imprisonment does not fall within the presumptive range of the defendant’s prior record level . . .” or

(1) Results from an incorrect finding of the defendant’s prior record level under [N.C. Gen. Stat. §] 15A-1340.14 or the defendant’s prior conviction level under [N.C. Gen. Stat. §] 15A-1340.21;

(2) Contains a type of sentence disposition that is not authorized by [N.C. Gen. Stat. §] 15A-1340.17 or [N.C. Gen. Stat. §] 15A-1340.23 for the defendant’s class of offense and prior record or conviction level; or

(3) Contains a term of imprisonment that is for a duration not authorized by [N.C. Gen. Stat. §] 15A-1340.17 or [N.C. Gen. Stat. §] 1340.23] for the defendant’s class of offense and prior record or conviction level.

N.C. Gen. Stat. § 15A-1444(a1)-(a2) (2020). Subsection (e) of Section 15A-1444 provides, in relevant part, “[e]xcept as provided in subsections (a1) and (a2) of this

section . . . and except when a motion to withdraw a plea of guilty or no contest has been denied, the defendant is not entitled to appellate review as a matter of right.” N.C. Gen. Stat. § 15A-1444(e). A defendant who has lost an appeal as of right may file a petition for writ of certiorari with this Court, seeking review on the merits.

¶ 11 Here, Defendant filed a *pro se* brief with this Court, titled “Supplement Brief and Writ of Certiorari for Defendant,” but fails to argue any of the exceptions contained in Section 15A-1444(a1) or (a2) apply to the facts of his case. Defendant’s arguments are limited solely to the alleged ineffective assistance of trial counsel; the unlawful conviction of possession of a firearm by a felon, which was dismissed at Defendant’s MAR hearing; the ineffective assistance of his post-conviction and appellate counsel; and the imposition of attorney fees.

¶ 12 Although Defendant, his counsel, and the State correctly note in their respective briefs that the trial court did not address Defendant by name in its colloquy about attorney fees, *see State v. Friend*, 257 N.C. App. 516, 523, 809 S.E.2d 902, 907 (2018) (“trial courts should ask defendants—personally, not through counsel—whether they wish to be heard on the issue” of attorney fees), the fee award concerned previous counsel, not Defendant’s counsel at the time of sentencing. Thus, the holding from *Friend* does not apply. Accordingly, we find no error in the attorneys’ fees judgment.

### III. Conclusion

STATE V. LEWIS

2022-NCCOA-79

*Opinion of the Court*

¶ 13 In accordance with *Anders* and *Kinch*, we have examined the record to determine whether any issues of arguable merit appear to exist and have found none.

NO ERROR.

Judges DIETZ and MURPHY concur.

Report per Rule 30(e).