

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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-764

No. COA22-583

Filed 15 November 2022

Wilkes County, No. 19CRS322

STATE OF NORTH CAROLINA

v.

THEODORE ANTONIO FERGUSON, Defendant.

Appeal by defendant from judgment entered 8 November 2021 by Judge John O. Craig III in Wilkes County Superior Court. Heard in the Court of Appeals 18 October 2022.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Daniel P. O'Brien and Assistant Attorney General Benjamin Szany, for the State-appellee.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Katy Dickinson-Schultz, for defendant-appellant.

GORE, Judge.

¶ 1

Defendant, Theodore Antonio Ferguson, appeals from the trial court's judgment and sentence imposed upon a plea of no contest to aggravated felony death by motor vehicle. Defendant concedes his notice of appeal is defective. In the exercise of our discretion, we deny his petition for writ of certiorari and dismiss his appeal.

I.

¶ 2

On 3 September 2019, a Wilkes County grand jury returned a true bill indicting defendant for aggravated felony death by motor vehicle, reckless driving to endanger, driving while impaired, driving while license revoked, and second-degree murder.

¶ 3

On 8 November 2021, defendant entered a plea of no contest to aggravated felony death by motor vehicle. In exchange for defendant's plea, the State dismissed the other charges pending against him, and agreed that defendant would be sentenced to a term of 84 to 113 months' imprisonment to run concurrently with the 125-month federal sentence defendant was already serving. Defendant stipulated to his record level, and the trial court entered judgment sentencing defendant in the agreed upon range.

¶ 4

Defendant signed his *pro se* notice of appeal on 23 November 2021. The clerk's office received and file-stamped his notice on 3 December 2021. Defendant's notice of appeal does not specify which court he is appealing to, and defendant did not include a certificate of service indicating he served his notice of appeal on the State.

¶ 5

After the trial court issued appellate entries, the State filed a motion to dismiss defendant's appeal with the trial court based on defects in defendant's notice of appeal. The trial court did not hold a hearing or rule on the State's motion to dismiss the appeal before defendant filed his record on appeal with this Court.

¶ 6 On 22 July 2022, defendant filed a petition for writ of certiorari and an appellate brief with this Court pursuant to *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).

II.

¶ 7 Rule 4 of the North Carolina Rules of Appellate Procedure requires a party filing written notice of appeal from a judgment rendered in a criminal action to “fil[e] notice of appeal . . . and serv[e] copies thereof upon all adverse parties within fourteen days after entry of the judgment” N.C.R. App. P. 4(a)(2). When a party files written notice of appeal under Rule 4, it must also designate “the court to which appeal is taken.” N.C.R. App. P. 4(b).

¶ 8 Here, defendant’s *pro se* written notice of appeal was not timely filed and does not designate the court to which appeal is taken. Additionally, defendant did not serve notice of appeal on the State within the required time and there is no certificate of service for his notice of appeal appearing in the record. *See* N.C.R. App. P. 4(c). The State did not waive these requirements. Defendant’s notice of appeal fails to comply with the requirements of Appellate Rule 4, and thus, deprives this Court of subject matter jurisdiction. *See, e.g., State v. Gantt*, 271 N.C. App. 472, 474, 844 S.E.2d 344, 346 (2020); *State v. Hughes*, 210 N.C. App. 482, 485, 707 S.E.2d 777, 779 (2011); *State v. McCoy*, 171 N.C. App. 636, 638, 615 S.E.2d 319, 321 (2005). Accordingly, we cannot consider this matter on direct appeal.

III.

¶ 9

Defendant also filed a petition for writ of certiorari contemporaneously with his brief requesting appellate review pursuant to N.C. Gen. Stat. § 15A-1444(g) and N.C.R. App. P. 21. Under Appellate Rule 21,

[t]he writ of certiorari may be issued in appropriate circumstances by either appellate court 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*, or when no right of appeal from an interlocutory order exists, or for review pursuant to N.C.G.S. § 15A-1422(c)(3) of an order of the trial court ruling on a motion for appropriate relief.

N.C.R. App. P. 21(a)(1) (emphasis added). However, “[a] petition for the writ must show merit or that error was probably committed below. Certiorari is a discretionary writ, to be issued only for good and sufficient cause shown.” *Gantt*, 271 N.C. App. at 474, 844 S.E.2d at 346 (quotation marks and citation omitted).

¶ 10

In the present case, defendant pled no contest to a felony and has a limited statutory right to appeal. See N.C. Gen. Stat. § 15A-1444(a2) (2021). Further, defense counsel filed a brief with this Court pursuant to *Anders* and *Kinch*, stating she has carefully reviewed the record and is unable to identify any non-frivolous issues to raise on appeal. While a defendant seeking *Anders* review is permitted to identify issues that might arguably support a request for relief, defendant has not identified any issue that he has a statutory right to appeal, or which was not mooted

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by his plea. *See, e.g., State v. Hamby*, 129 N.C. App. 366, 369-70, 499 S.E.2d 195, 197 (1998) (citations omitted) (A defendant’s admissions during plea negotiations “mooted the issues of whether [their] prior record level was correctly determined, whether the type of sentence disposition was authorized[,] and whether the duration of [their] prison sentence was authorized.”).

¶ 11 Here, defendant stipulated to his prior record level, and the trial court sentenced him to the low end of the aggravated range as agreed upon in his plea. There is no indication that defendant filed, or that the trial court denied, a motion to suppress or withdraw the plea. Defendant concedes the trial court sentenced him within the range required by statute. Moreover, a petition for writ of certiorari must show merit, or that error was likely committed below, and a request for *Anders* review is “tantamount to a conclusion that the appeal is wholly frivolous.” *Kinch*, 314 N.C. at 102, 331 S.E.2d at 666. Therefore, we decline to issue our writ of certiorari in this case.

IV.

¶ 12 For the foregoing reasons, we lack jurisdiction to consider defendant’s arguments on direct appeal. In the exercise of our discretion, we decline to issue our writ of certiorari. Defendant’s appeal is dismissed.

DISMISSED.

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Judges DIETZ and CARPENTER concur.

Report per Rule 30(e).