

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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

No. COA22-614

Filed 02 May 2023

Forsyth County, No. 19 CRS 53926

STATE OF NORTH CAROLINA

v.

KEVIN COREY MCRAE

Appeal by Defendant from judgment entered 24 August 2021 by Judge Susan E. Bray in Forsyth County Superior Court. Heard in the Court of Appeals 12 April 2023.

*Attorney General Joshua H. Stein, by Assistant Attorney General Grace R. Linthicum, for the State.*

*Unti & Smith, PLLC, by Sharon L. Smith, for Defendant.*

WOOD, Judge.

On appeal Kevin McRae (“Defendant”) presents a single contention for our review: Did the trial court err in denying two separate motions to suppress because the unlawful extension of his traffic stop violated his Fourth Amendment Rights. Defendant’s notice of appeal fails to meet the mandatory requirements of the North Carolina Rules of Appellate Procedure. In an effort to cure the defects, Defendant

has filed a petition for writ of *certiorari* seeking this Court's review on the merits. In our discretion, Defendant's petition for writ of *certiorari* is denied. Accordingly, Defendant's appeal is dismissed.

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

In the early morning hours of 19 April 2019, Officer Jones of the Winston-Salem Police Department observed a gold-colored vehicle traveling the wrong-way on a one-way street. Officer Jones proceeded to stop the vehicle, and when approaching the driver's side viewed two men in the car. He observed Defendant, the passenger in the vehicle, moving a white tray from his lap while leaning and moving around in the seat of the vehicle. Officer Jones advised Defendant to stop reaching around the vehicle and repeated this request two additional times. Officer Jones requested identification from the driver and Defendant, and they both complied. After reviewing the driver's information, Officer Jones reviewed Defendant's information and discovered that Defendant had a federal warrant for his arrest. In order to verify the arrest warrant, Officer Jones requested confirmation of the warrant through his communications officer.

During this period, Officer Jones received backup at the traffic stop. Based upon Officer Jones' discovery of the driver and Defendant's drug history which included trafficking cocaine and heroin, paired with Defendant's movements in the vehicle and the circumstance of the traffic stop being at one o'clock in the morning in a high-crime area, Officer Jones requested a K-9 unit. While waiting for the K-9-unit,

Officer Jones advised the backup officers to “watch passenger, [because Defendant] was reaching around” when he first approached the vehicle.

Once the K-9 unit arrived, the driver and Defendant were asked to step out of the vehicle and during the exterior sniff of the vehicle the K-9 gave an alert. Officers then searched the vehicle and discovered a digital scale in the center console with a white powder residue. When Officer Jones received confirmation of the federal warrant for Defendant, Defendant was arrested and then searched on site where the traffic stop occurred. During the search, Officer Jones felt a bulge located around Defendant’s inner thigh, and using a gloved hand, he pulled Defendant’s pants open, reached inside and removed a package which he identified as marijuana. Continuing the search of Defendant’s person, Officer Jones felt another bulge located at Defendant’s butt cheeks. Officer Jones placed Defendant in handcuffs, and again using a gloved hand, pulled Defendant’s pants open, reached inside and removed a package containing sixty grams of cocaine.

Defendant was indicted on 27 January 2020 for trafficking in cocaine by possession, trafficking in cocaine by transportation, and possession of marijuana up to one-half ounce. On 15 January 2021, prior to trial, Defendant submitted a motion to suppress evidence based on a lack of reasonable suspicion because the subsequent drug investigation was not related to the initial traffic stop. Defendant argued that the traffic stop was unlawfully extended and, therefore, evidence obtained from the unconstitutional search and seizure should be suppressed.

At a 5 April 2021 suppression hearing, Officer Jones testified that while on patrol, he observed a vehicle commit a traffic violation and subsequently stopped the vehicle. Officer Jones further testified that he pulled the vehicle over at one o'clock in the morning in a high crime area, and that based upon his experience, he viewed Defendant's moving around inside the stopped vehicle similarly to the actions taken when attempting to conceal items. After running the driver's and Defendant's identification, he discovered both men had past drug convictions and Defendant had an outstanding federal arrest warrant. Based upon the evidence presented at the hearing, the trial court concluded that Officer Jones did not unlawfully extend the traffic stop by conducting a background check which identified an outstanding federal warrant and denied Defendant's motion to suppress. Additionally, the trial court concluded that Officer Jones had a reasonable suspicion based on articulable and specific facts to extend the purpose of the traffic stop; namely, because of the time and location of the stop, Defendant's "reaching around in the vehicle and moving in a manner consistent with concealing or disposing of items," and the background check revealing both the history of drug offenses for the occupants in the vehicle and an active federal arrest warrant for Defendant.

On 16 July 2021, Defendant filed a second Motion to Suppress Evidence and argued that conducting a cavity search in a public place incident to his arrest was unlawful. Therefore, Defendant argued that the subsequent evidence should be suppressed. At the hearing held on 19 July 2021, Officer Jones testified that after

confirming the federal warrant was active, he took Defendant into custody and searched him incident to arrest, at which point he felt two separate bulges in Defendant's inner thigh area and buttocks. Officer Jones testified that when he searched Defendant, it was dark outside, Defendant was positioned on the side of the patrol vehicle away from the roadway, and male officers were used to shield Defendant to provide privacy. Officer Jones explained that he did not pull Defendant's pants down, so no genitalia or buttocks were exposed, and that he did not go into Defendant's anal cavity. Officer Jones stated that the search of Defendant's person was conducted roadside due to concerns that the evidence could be lost and the inability to otherwise identify the bulges. On 26 July 2021, the trial court denied Defendant's motion.

On 24 August 2021, Defendant pleaded guilty to all charges. In exchange, the State agreed to "stand silent at sentencing." The trial court consolidated Defendant's charges into trafficking by transportation, sentenced him to a mandatory thirty-five to fifty-one months' incarceration and assessed a \$50,000 fine as a civil judgment.

## **II. Appellate Jurisdiction**

On 29 August 2021, Defendant submitted a letter, *pro se*, to the trial court asking to "appeal the 35-51 month[s] plea deal[.]" Defendant's letter was filed on 16 September 2021. The notice is addressed to a trial court judge rather than the Clerk of Court, states that Defendant wished to appeal from the sentence imposed rather than from the trial court's final judgment, and does not reflect that the notice was

served on the State. However, appellate entries were completed on 3 October 2021 and appellate counsel was appointed for Defendant on 3 November 2021.

In addition to Defendant's violations of Rule 4 of the Rules of Appellate Procedure, we note Defendant has failed to preserve his right to appeal the trial court's suppression rulings pursuant to N.C. Gen. Stat. § 15A-979(b). While N.C. Gen. Stat. § 15A-979(b) "allows review of an order finally denying a motion to suppress evidence on appeal from a judgment of conviction, including a judgment entered on a guilty plea[,] [t]his statutory right to appeal is conditional, not absolute." *State v. McBride*, 120 N.C. App. 623, 625, 463 S.E.2d 403, 404 (1995), *aff'd per curiam*, 344 N.C. 623, 476 S.E.2d 106 (1996); N.C. Gen. Stat. § 15A-979(b). Our Supreme Court has held that when "a defendant intends to appeal from the denial of a suppression motion . . . , he must give notice of his intention to the prosecutor and to the court before plea negotiations are finalized; otherwise, he will waive the appeal of right provisions of the statute." *State v. Tew*, 326 N.C. 732, 735, 392 S.E.2d 603, 605 (1990) (citation omitted). This preservation of a right to appeal from the denial of a motion to suppress, despite pleading guilty, must "either include in the plea transcript a statement reserving the right to appeal the motion to suppress or orally advise the trial court and the prosecutor before the conclusion of plea negotiations that the defendant intends to appeal the denial of the motion to suppress." *State v. Robinson*, 383 N.C. 512, 518 n.1, 881 S.E.2d 260, 264 n.1 (2022) (citation omitted). Here, Defendant gave no such notification or advisement in the plea agreement or

during the plea process so as to reserve the right to appeal the motions. Therefore, Defendant has waived his right to appeal the denial of his two motions to suppress.

In light of these deficiencies, Defendant's appellate counsel filed a petition for writ of *certiorari* to allow Defendant to pursue his direct appeal to this Court. In his petition, Defendant argues that this Court "has previously allowed defendants' petitions for writs of *certiorari* to review the denial of suppression motions where the defendant's attorney indicated an intent to appeal the denial of a suppression motion prior to the entry of a plea but failed to enter notice of appeal from the underlying [j]udgment" and cites to *State v. Sutton*, 232 N.C. App. 667, 754 S.E.2d 464 (2014), *State v. Jackson*, 249 N.C. App. 642, 791 S.E.2d 505 (2016), and *State v. Smith*, 246 N.C. App. 170, 783 S.E.2d 504 (2016) to support his contention. However, none of the cases to which Defendant cites address his unique circumstances: Defendant did not give notice of his intention to appeal the denial of his motion to suppress to the State or to the trial court before his plea was finalized; and Defendant's notice of appeal did not indicate that he was appealing from the final judgment.

Rule 21 of our Rules of Appellate Procedure states in relevant part, that the

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). A petition for a writ of *certiorari* must show merit or that error was probably committed below. *In re Snelgrove*, 208 N.C. 670, 672, 182 S.E. 335, 336 (1935). Further, “*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) (citation omitted).

After a careful review of Defendant’s petition, we conclude Defendant has failed to demonstrate merit or show that error was committed at the trial court below. *See State v. Killette*, 381 N.C. 686, 691, 873 S.E.2d 317, 320 (2022); *State v. Campola*, 258 N.C. App. 292, 302-03, 812 S.E.2d 681, 689 (2018) (holding that based on the totality of the circumstances including the police officer’s training; defendant’s evasive and nervous behavior after noticing the police officer; defendant’s prior criminal history; and defendant’s presence in an area known for criminal activity during the course of a traffic stop; an officer may prolong a traffic stop to investigate a reasonable suspicion of illegal drug activity without violating the vehicle passenger’s Fourth Amendment rights).

### **III. Conclusion**

Therefore, in our discretion, Defendant’s petition for writ of *certiorari* is denied. *See State v. Ross*, 369 N.C. 393, 400, 794 S.E.2d 289, 293 (2016) (holding that this Court “may choose to grant such a writ to review some issues that are meritorious but not others for which a defendant has failed to show good or sufficient cause.”). Accordingly, the appeal is dismissed.



STATE V. MCRAE

*Opinion of the Court*

DISMISSED.

Judges GORE and STADING concur.

Report per Rule 30(e).