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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA23-895

Filed 3 September 2024

Iredell County, No. 20CRS50955

STATE OF NORTH CAROLINA

v.

GARY KARAMIKIAN

Appeal by Defendant from judgment entered 22 February 2023 by Judge William A. Long Jr., in Iredell County Superior Court. Heard in the Court of Appeals 14 August 2024.

Attorney General Joshua H. Stein, by Deputy General Counsel South A. Moore, for the State-Appellee.

Clarke S. Martin for Defendant-Appellant.

COLLINS, Judge.

Defendant Gary Karamikian petitions this court for a writ of certiorari to review a judgment entered upon a jury's guilty verdict of possession of a firearm by a convicted felon. Defendant concedes that no notice of appeal appears in the record. Defendant also concedes that he failed to preserve his constitutional arguments for our review but asks this Court to invoke Rule 2 to review those arguments. In the

alternative, Defendant argues that he received ineffective assistance of counsel. In our discretion, we deny Defendant's petition for writ of certiorari and dismiss his appeal without prejudice to him filing a motion for appropriate relief in the trial court.

I. Background

Defendant was indicted on 26 August 2020 for possession of a firearm by a felon. Prior to trial on 21 February 2023, Defendant's motion to suppress was heard and denied; the case proceeded to trial. The jury found Defendant guilty, and the trial court sentenced Defendant to 14-26 months of imprisonment, suspended for 36 months of supervised probation. The trial court signed Appellate Entries on 2 March 2023 and the Appellate Defender was appointed to represent Defendant. Defendant filed a petition for writ of certiorari contemporaneously with his opening brief.

II. Discussion

A. Appellate Jurisdiction

"[A]ny party entitled by law to appeal a judgment or order of a superior or district court rendered in a criminal action may take appeal by: (1) giving oral notice of appeal at trial or (2) filing notice of appeal with the clerk of superior court and serving copies thereof upon all adverse parties within fourteen days after entry of the judgment or order" N.C. R. App. P. 4(a). Completed Appellate Entries, even if they reflect the defendant gave notice of appeal, are insufficient to satisfy the requirements of Rule 4. *State v. Hughes*, 210 N.C. App. 482, 485, 707 S.E.2d 777, 778-779 (2011). This Court does not have jurisdiction to consider appeals where the

record lacks oral or written notice of appeal. *Id.* at 484, 707 S.E.2d at 778. A jurisdictional default precludes the Court from acting other than to dismiss the appeal. *Id.*

Recognizing that “the record lacks notice of appeal – either written or oral – as required by N.C. R. App. P. 4[.]” Defendant filed a petition for a writ of certiorari. This Court has discretion to allow a petition for a writ of certiorari “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). However, a writ of certiorari is not intended as a substitute for a notice of appeal. *State v. Bishop*, 255 N.C. App. 767, 769, 805 S.E.2d 367, 369. (2017). Instead, “an appellate court may only consider certiorari when the petition shows merit, meaning that the trial court probably committed an error at the hearing.” *State v. Ricks*, 378 N.C. 737, 738, 862 S.E.2d 835, 837 (2021).

B. Unpreserved Constitutional Error

Defendant argues that the trial court erred by denying his motion to suppress because the search violated his Fourth Amendment rights and that N.C. Gen. Stat. § 14-415.1 is unconstitutional as applied to him. Defendant concedes that he has failed to preserve for our review the issues he now raises.

“[T]o 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). “It is well settled that an error, even one of constitutional magnitude, that defendant does not bring to the trial court’s attention is waived and will not be considered on appeal. *State v. Bell*, 359 N.C. 1, 28, 603 S.E.2d 93, 112 (2004). Furthermore, “[c]onstitutional issues not raised and passed upon at trial will not be considered for the first time on appeal.” *State v. Lloyd*, 354 N.C. 76, 86-87, 552 S.E.2d 596, 607 (2001).

C. Rule 2

In addition to petitioning the Court for a writ of certiorari in an attempt to cure his jurisdictional defect, Defendant requests this Court invoke Rule 2 of the Rules of Appellate Procedure to reach the unpreserved merits of his constitutional arguments.

Our Court may invoke Rule 2 and suspend any part of the appellate rules “[t]o prevent manifest injustice to a party, or to expedite the decision in the public’s interest.” N.C. R. App. P. 2. “Rule 2 must be applied cautiously,” and it may only be invoked “in exceptional circumstances.” *State v. Hart*, 361 N.C. 309, 315, 644 S.E.2d 201, 205 (2007).

Defendant here is not “different from other defendants who failed to preserve their constitutional arguments in the trial court[,]” *Bishop*, 255 N.C. App. at 770, 805 S.E.2d at 370, and has not demonstrated to this Court that this case presents an exceptional circumstance which justifies invoking Rule 2. We thus decline to invoke Rule 2 to address Defendant’s unpreserved constitutional arguments.

D. Ineffective Assistance of Counsel

In the alternative, Defendant argues he received ineffective assistance of counsel because his trial counsel failed to raise at trial the constitutional arguments he now presents on appeal.

“To prevail on a claim of ineffective assistance of counsel, a defendant must first show that his counsel’s performance was deficient and then that counsel’s deficient performance prejudiced his defense.” *State v. Allen*, 360 N.C. 297, 316, 626 S.E.2d 271, 286 (2006). “Generally, to establish prejudice, a defendant must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Id.*

Ineffective assistance of counsel claims brought on direct review will only be decided on the merits when the cold record reveals that no further investigation is required. *State v. Thompson*, 359 N.C. 77, 122-23, 604 S.E.2d 850, 881 (2004). Here, the claims cannot be decided on the existing appellate record and we dismiss those claims without prejudice to Defendant’s ability to raise them in a motion for appropriate relief in the trial court. *Id.* at 123, 604 S.E.2d at 881.

III. Conclusion

In our discretion, we deny Defendant’s petition for a writ of certiorari and dismiss his appeal without prejudice to his filing a motion for appropriate relief in the trial court.

DISMISSED.

Judges MURPHY and FLOOD concur.

STATE V. KARAMIKIAN

Opinion of the Court

Report per Rule 30(e).