

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA 24-105

Filed 1 October 2024

Cleveland County, No. 22 CRS 362522

STATE OF NORTH CAROLINA

v.

MALIQUE ISHMAEL O'NEIL

Appeal by Defendant from judgment entered 22 August 2023 by Judge Justin N. Davis in the Cleveland County Superior Court. Heard in the Court of Appeals 28 August 2024.

*Attorney General Joshua H. Stein, by Special Deputy Attorney General Heather Haney, for the State.*

*Darren Jackson, for Defendant.*

WOOD, Judge.

Malique Ishmael O'Neil ("Defendant") appeals from a judgment entered upon his guilty plea to trafficking in opium or heroin by possession and trafficking in opium or heroin by transportation. Appellate counsel appointed to represent Defendant is unable to identify any issue with sufficient merit to support a meaningful argument for relief on appeal and asks this Court to conduct its own review of the record for

possible prejudicial error. After careful review, we find no non-frivolous justiciable issue and dismiss the appeal.

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

On 12 December 2022, Defendant was driving a vehicle owned by a passenger in the car. Police officers observed Defendant enter a home that was under surveillance and known as a drug house. After Defendant exited the home, the officers conducted a pretextual traffic stop. During the stop, Defendant initially provided the officers with consent to search the vehicle, but later withdrew his permission. Subsequently, a K-9 was deployed and alerted the officers of drugs inside of the vehicle. The officers performed a search of the vehicle and found over 200 fentanyl pills, which Defendant later admitted belonged to him. A lab subsequently confirmed the pills were fentanyl.

On 23 January 2023, a Cleveland County grand jury indicted Defendant on two counts of felony trafficking of opium or heroin. On 22 August 2023, Defendant entered a guilty plea to both charges pursuant to a plea agreement. At the plea hearing, the trial court reviewed with Defendant the terms of the plea, the charges he faced, and the rights forfeited by pleading guilty. The trial court asked Defendant if the plea was voluntary and if he fully understood his decision, to which Defendant answered affirmatively. Thereafter, pursuant to the plea agreement, the trial court sentenced Defendant to a consolidated judgment of 90 to 120 months of imprisonment. The trial court also imposed a mandatory \$100,000.00 fine and

imposed the lab fee and attorney's fees as a civil judgment.

On 5 September 2023, Defendant entered notice of appeal through counsel. Additionally, Defendant filed a petition for writ of certiorari on 22 February 2024.

## **II. Analysis**

### **A. Appellate Jurisdiction**

Rule 4 of the North Carolina Rules of Appellate Procedure provides that a party is entitled to appeal from a judgment by "filing notice of appeal with the clerk of superior court . . . within fourteen days after entry of the judgment." N.C. R. App. P. 4(a)(2). Here, Defendant's notice of appeal and the attached certificate of service were dated 5 September 2023. The file stamp, completed by the Clerk's office, indicates that it was filed on 6 September 2023. Consequently, Defendant's notice of appeal was filed fifteen days after the entry of judgment, in violation of Rule 4. Moreover, "[a] failure on the part of the appealing party to comply with Rule 4 deprives this Court of jurisdiction to consider his or her appeal." *State v. Hughes*, 210 N.C. App. 482, 484, 707 S.E.2d 777, 778 (2011). Accordingly, Defendant's notice of appeal is deemed untimely.

In his petition for writ of certiorari, Defendant asks this Court to review his appeal. "Pursuant to Rule 21(a)(1) of the Appellate Rules, this Court may, in its discretion, grant a petition for writ of certiorari and review an order or judgment entered by the trial court 'when the right to prosecute an appeal has been lost by failure to take timely action.'" *State v. Holanek*, 242 N.C. App. 633, 640, 776 S.E.2d

225, 231–32 (2015) (citation omitted). This Court has consistently held a petition for writ of certiorari may be granted when “[the] [d]efendant lost [his] right to appeal through no fault of [his] own but rather due to [his] trial counsel's failure to give proper notice of appeal.” *Id.* In the present case, Defendant provided timely notice of appeal on the fourteenth day, but it was untimely filed. This failure was through no fault of his own. Therefore, in our discretion, we grant Defendant’s petition for writ of certiorari and consider the merits of Defendant’s appeal. *See State v. Robinson*, 279 N.C. App. 643, 645, 865 S.E.2d 745, 748 (2021) (granting a petition for writ of certiorari when the defendant failed to file timely notice of appeal and proceeded to an *Anders* review).

### **B. Anders Review**

Defendant’s counsel has filed a brief asking this Court to conduct an independent review of the record to determine if any meritorious issues or reversible error exist. Defendant’s counsel filed the brief pursuant to *Anders v. California*, 386 U.S. 738 (1967), and *State v. Kinch*, 314 N.C. 99, 331 S.E.2d 665 (1985). Defendant’s counsel presents four potential issues: (1) whether the plea was entered into knowingly, voluntarily and intelligently; (2) whether the indictments were sufficient to confer jurisdiction on the trial court; (3) whether there was a sufficient factual basis for the plea; and (4) whether the trial court erred in sentencing Defendant.

Pursuant to *Anders* and *Kinch*, we conduct a full examination of the record to determine whether Defendant’s appeal has merit or is wholly frivolous. *Anders*, 386

U.S. at 744; see also *Kinch*, 314 N.C. at 102–03, 331 S.E.2d at 667. We review the legal points in the record, briefs, and transcripts to determine whether they are wholly frivolous, not to determine their merits. *Kinch*, 314 N.C. at 102–03, 331 S.E.2d at 667 (citing *Anders*, 386 U.S. at 744).

After a full examination of the record and the legal points raised by counsel, we find no issue Defendant could raise with arguable merit. Counsel has shown to the satisfaction of this Court that he has complied with the requirements of *Anders* and *Kinch*, by advising Defendant of his right to file written arguments with this Court and providing him with the documents necessary to his appeal. Defendant has not filed any written arguments with this Court, and a reasonable time for him to do so has passed. After a full review of the record, we conclude that this appeal presents no issue entitling Defendant to relief.

## **II. Conclusion**

Pursuant to our duty under *Anders* and *Kinch*, we have conducted a full and independent review of the record and hold there are no meritorious issues or prejudicial error. We conclude that the appeal is wholly frivolous, and we dismiss the appeal.

DISMISSED.

Judge ARROWOOD and COLLINS concur.

Report per Rule 30(e).