

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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

NO. COA11-130
NORTH CAROLINA COURT OF APPEALS

Filed: 6 September 2011

STATE OF NORTH CAROLINA

v.

Hoke County
No. 10 CRS 50195

KIRKLAND LEANDER SMALLS

Appeal by defendant from judgment entered 20 August 2010 by Judge Richard T. Brown in Hoke County Superior Court. Heard in the Court of Appeals 22 August 2011.

Attorney General Roy Cooper, by Assistant Attorney General Amy Kunstling Irene, for the State.

J. Edward Yeager, Jr., for defendant-appellant.

MARTIN, Chief Judge.

On 20 August 2010, defendant pled guilty to larceny by employee. The terms of defendant's plea provided he would receive a suspended sentence of 15 to 18 months imprisonment and be placed on 36 months of supervised probation. The trial court entered a judgment consistent with the terms of defendant's plea agreement. On the written judgment, the trial court did not check the box labeled: "The defendant gives notice of appeal

from the judgment of the trial court to the appellate division. Appeal entries and any conditions of post conviction release are set forth on form AOC-CR-350." The transcript of the plea hearing does not indicate that defendant gave oral notice of appeal, nor does the record on appeal contain a written notice of appeal. On 20 August 2010, however, the trial court entered appellate entries and appointed the Appellate Defender to represent defendant on appeal.

Defendant appeals.

Pursuant to Rule 4 of the North Carolina Rules of Appellate Procedure, to appeal a criminal conviction, a defendant "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." N.C.R. App. P. 4(a). "[W]hen a defendant has not properly given notice of appeal, this Court is without jurisdiction to hear the appeal." *State v. McCoy*, 171 N.C. App. 636, 638, 615 S.E.2d 319, 320, *appeal dismissed*, 360 N.C. 73, 622 S.E.2d 626 (2005) (citing *State v. McMillian*, 101 N.C. App. 425, 427, 399 S.E.2d 410, 411 (1991)). "[C]ompliance with the requirements of Rule 4(a)(2) is

jurisdictional and cannot simply be ignored by this Court.” *Id.* (citing *O’Neill v. Bank*, 40 N.C. App. 227, 230, 252 S.E.2d 231, 233-34 (1979)).

In this case, petitioner did not file written notice of appeal, nor did he give oral notice of appeal in open court at the conclusion of his plea hearing. Furthermore, the judgment does not indicate that defendant gave notice of appeal; this Court has recently held that appellate entries alone do not constitute sufficient evidence to establish that a defendant gave notice of appeal. *State v. Hughes*, ___ N.C. App. ___, ___, 707 S.E.2d 777, 778-79 (2011). Accordingly, we are without jurisdiction to hear the appeal and must dismiss it.

Additionally, defendant’s appellate counsel has submitted a brief 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), informing this Court that counsel has been unable to locate any appealable issues in defendant’s case. At the conclusion of counsel’s *Anders* brief, counsel requests that this Court treat the brief as a petition for writ of certiorari should we determine that defendant does not have a right to appeal. The brief, however, does not comply with N.C.R. App. P. 21(c), requiring that a writ of certiorari must include a

statement of the reasons why the writ should issue. Therefore, we decline to treat it as a petition for writ of certiorari. See *McCoy*, 171 N.C. App. at 639, 615 S.E.2d at 321 (holding that the Rules of Appellate Procedure are mandatory and failure to comply with Rule 21 subjects a petition to dismissal). Accordingly, we dismiss defendant's appeal.

Dismissed.

Judges HUNTER, JR. and THIGPEN concur.

Report per Rule 30(e).