

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA11-145
NORTH CAROLINA COURT OF APPEALS

Filed: 20 September 2011

STATE OF NORTH CAROLINA

v.

Buncombe County
No. 10 CRS 000040

LATARA DESHEA HURST,
Defendant.

Appeal by defendant from judgment entered 1 September 2010 by Judge James L. Baker, Jr. in Buncombe County Superior Court. Heard in the Court of Appeals 29 August 2011.

Attorney General Roy Cooper, by Assistant Attorney General Seth P. Rosebrock, for the State.

Leslie C. Rawls, for defendant-appellant.

MARTIN, Chief Judge.

Defendant Latara Hurst attempts to appeal from a judgment sentencing her to a minimum term of 96 months and a maximum term of 125 months imprisonment in the custody of the North Carolina Department of Correction. Judgment was entered upon jury verdicts finding her guilty of uttering a forged instrument and having attained the status of habitual felon. On the written judgment, 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" is not checked. The transcript from the trial does not indicate that defendant gave oral notice of appeal, and the record on appeal contains no written notice of appeal. However, the trial court did make appellate entries in Form AOC-CR-350 on 10 September 2010 reciting that "defendant has given Notice of Appeal to the N.C. Court of Appeals." The trial court also appointed the Appellate Defender.

Defendant appeals.

According to Rule 4 of the North Carolina Rules of Appellate Procedure:

(a) Any party entitled by law to appeal from 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[.]

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. App. 73, 622 S.E.2d 626 (2005) (citing *State v. McMillian*, 101 N.C. App. 425, 427, 399 S.E.2d 410, 411 (1991)).

Defendant argues that because the trial court included appellate entries on 10 September 2010, "[t]he court and all parties have acted in a manner indicating that [defendant] appealed and she clearly intended to appeal." "Although the record includes appellate entries . . . which indicate through boilerplate that defendant gave notice of appeal, mere appellate entries are insufficient to preserve the right to appeal." *In re Me.B., M.J., Mo.B.*, 181 N.C. App. 597, 600, 640 S.E.2d 407, 409 (2007) (citing *State v. Blue*, 115 N.C. App. 108, 113, 443 S.E.2d 748, 751 (1994)). Therefore, because the record does not indicate that defendant gave a written notice of appeal, and the transcript does not indicate that defendant gave an oral notice of appeal as required by Appellate Rule, we lack jurisdiction to consider defendant's appeal.

Defendant has also petitioned this Court to issue a writ of certiorari to review the judgment of the trial court. As

defendant notes, the Rules of Appellate Procedure allow review by writ of certiorari "in appropriate circumstances . . . to permit review of the judgments and order 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)(1).

However, "[a] party is entitled to a writ of *certiorari* when—and only when—the failure to perfect the appeal is due to some error or act of the court or its officers, and not any fault or neglect of the party or his agent.'" *State v. Angel*, 194 N.C. 715, 716-17, 140 S.E. 727, 728 (1927) (citation omitted); see also *Johnson v. Taylor*, 257 N.C. 740, 743, 127 S.E.2d 533, 535 (1962) ("[C]ertiorari may not be used as a substitute for an appeal expressly provided for by law, unless the right of appeal has been lost through no fault of the petitioner."). To this end, two things "should be made to appear on application for *certiorari*: First, diligence in prosecuting the appeal . . . and, second, merit, or that probable error was committed on the hearing." *State v. Moore*, 210 N.C. 686, 691, 188 S.E. 421, 424 (1936) (citing *Angel*, 194 N.C. at 716-17, 140 S.E. at 728). Defendant's petition does not fulfill either of these two requirements.

The petition does not provide any explanation or excuse for defendant's failure to give notice of appeal. She does not allege that her neglect was excusable, nor that the right to appeal was lost through no fault of her own. The petition does not contain any affidavit in support of the petition, nor is there any allegation that the defendant's trial counsel failed to advise her of her appellate rights. As such, defendant has not shown that her right to appeal was lost through no fault of her own.

Additionally, the North Carolina Supreme Court has held that the petition "must show merit or that error was probably committed below." *State v. Grundler*, 251 N.C. 177, 189, 111 S.E.2d 1, 9 (1959) (citing *In re Snelgrove*, 208 N.C. 670, 182 S.E. 335, 336 (1935)), *cert denied*, 362 U.S. 917, 4 L. Ed. 2d 738 (1960). Defendant's petition in this case does not allege error below. Thus, the petition for certiorari must be denied and the appeal dismissed.

Dismissed.

Judges BRYANT and CALABRIA concur.

Report per Rule 30(e).