NO. COA01-1194

NORTH CAROLINA COURT OF APPEALS

Filed: 21 May 2002

STATE OF NORTH CAROLINA

v. Wake County
No. 00CRS75861

DEBBIE HARRIS

Appeal by defendant from judgment entered 14 May 2001 by Judge Abraham Penn Jones in Wake County Superior Court. Heard in the Court of Appeals 13 May 2002.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Claud R. Whitener, III, for the State.

James M. Bell for defendant-appellant.

HUNTER, Judge.

Debbie Harris ("defendant") pled guilty to one count of felony larceny in January 2001. Judge Donald W. Stephens imposed a suspended sentence of nine to eleven months' imprisonment and placed defendant on supervised probation for a period of thirty-six months. A report filed 29 March 2001 charged defendant with several probation violations, including missed curfews, failure to participate in court-ordered drug treatment, and testing positive for cocaine on three occasions. Defendant admitted these violations at a hearing on 14 May 2001. Judge Jones revoked probation and activated defendant's sentence. Defendant gave

notice of appeal in open court. We affirm but remand for corrections in the judgment.

Counsel appointed to represent defendant on appeal has filed an *Anders* brief indicating that he is unable to identify an issue with sufficient merit to support a meaningful argument for relief on appeal. He asks that this Court conduct its own review of the record for possible prejudicial error. Counsel has filed documentation with the Court showing that he has complied with the requirements of *Anders v. California*, 386 U.S. 738, 18 L. Ed. 2d 493, *reh'g denied*, 388 U.S. 924, 18 L. Ed. 2d 1377 (1967), and *State v. Kinch*, 314 N.C. 99, 331 S.E.2d 665 (1985), by advising defendant of her right to file written arguments with the Court and providing her with a copy of the documents pertinent to her appeal. Defendant has filed no additional arguments of her own with this Court, and a reasonable time for such arguments has passed.

In accordance with *Anders*, we have fully examined the record to determine whether any issues of arguable merit appear therefrom and whether the appeal is wholly frivolous. Although we conclude that the appeal is frivolous, we have found two clerical errors on the written judgment which warrant correction. First, a handwritten "x" on the judgment erroneously indicates that "[i]n the original Judgment Suspending Sentence, the Court sentenced the defendant . . . from the minimum durations based upon the Findings of Aggravating and Mitigating Factors." Judge Stephens' original judgment clearly reflects that defendant's suspended sentence was within the presumptive range and was made without findings as to

aggravating and mitigating factors. Second, the instant judgment provides for an active sentence of seven to nine months, which would be from the mitigated range for defendant's class of offense and prior record level. *See* N.C. Gen. Stat. § 15A-1340.16(c) (1999). The hearing transcript reveals Judge Jones' intention to activate the sentence originally imposed upon defendant, as follows: "[T]he sentence of the Honorable Donald Stephens imposed on 1-5-01 is hereby activated. The defendant is sentenced to a term in the North Carolina Department of Corrections of not less than 9, nor more than 11 months." While we believe the record conclusively establishes this discrepancy as a clerical error, we note that a trial court may not substitute a mitigated sentence for a presumptive sentence when revoking a defendant's probation. *See* N.C. Gen. Stat. § 15A-1344(d1) (1999).

We affirm the decision of the trial court but remand with instructions to correct the judgment "by striking the unsupported notation that the trial court rendered findings of factors in aggravation and mitigation," *State v. Hilbert*, 145 N.C. App. 440, 446, 549 S.E.2d 882, 886 (2001), and by correcting the recorded commitment to reflect the sentence of nine to eleven months announced in open court. *See State v. Lawing*, 12 N.C. App. 21, 23, 182 S.E.2d 10, 11-12 (1971).

Affirmed; remanded with instructions.

Judges MARTIN and BRYANT concur.

Report per Rule 30(e).