

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA05-1152

NORTH CAROLINA COURT OF APPEALS

Filed: 15 August 2006

STATE OF NORTH CAROLINA

v.

EDDIE JUNIOR HOWARD

Pitt County
No. 03 CRS 11305, 16577
04 CRS 12050, 59044-55

Appeal by defendant from judgment entered 11 May 2005 by Judge Jerry R. Tillett in Pitt County Superior Court. Heard in the Court of Appeals 11 April 2006.

Attorney General Roy Cooper, by Assistant Attorney General Richard Bradford, for the State.

Peter Wood for defendant-appellant.

ELMORE, Judge.

Eddie Junior Howard (defendant) was charged with twelve counts of forgery and uttering, and three counts of driving while license revoked. Attorney Donald Stroud was appointed to represent defendant. Defendant entered into a plea agreement with the State. Defendant appeared before Judge Jerry E. Tillett on 11 May 2005. Judge Tillett engaged in a colloquy with defendant regarding his decision to plead guilty to all charges. Defense counsel stated that defendant stipulated to the factual basis and did not object to the prosecutor summarizing the evidence.

The State recited the following factual basis for the charges: Defendant was found to be operating a motor vehicle on a public street or highway at the time his license was revoked on three separate occasions: On 24 August 2003, on 24 November 2003, and on 12 August 2004. With respect to the forgery charges, the person who owned the checks was Willie Ray Acklin. On various dates defendant forged and passed checks to the Country Mart and Piggly Wiggly without the consent or authorization of Mr. Acklin. The restitution worksheet states the total amount involved from both stores was \$6,060.00.

The trial court consolidated six of the forgery and uttering charges into one judgment, the remaining six forgery and uttering charges into another judgment, and the misdemeanor driving while license revoked charges into a third judgment. As to each felony judgment, defendant was sentenced to a minimum of 6 months and maximum of 8 months imprisonment. As to the misdemeanor judgment, defendant was sentenced to 120 days imprisonment. The sentences were suspended, and defendant was placed on supervised probation for a period of 60 months. The trial court also ordered defendant to pay restitution in the amount of \$710.00 to the Country Mart and \$5,350.00 to Piggly Wiggly. The total amount of restitution ordered, including court costs and attorney fees, was \$7,240.50. Defendant entered notice of appeal on 19 May 2005.

Defendant raises six assignments of error on appeal. By his first three assignments of error, defendant contends the trial court erred by accepting his guilty plea, by not conducting a

hearing to determine why he was not satisfied with trial counsel, and by not appointing substitute counsel. By the next three assignments of error, defendant argues the court erred in determining the amount of restitution awarded. Defendant asserts that the trial court committed plain error and prejudicial error. Initially, we note that plain error review is restricted to jury instructions and evidentiary rulings. *State v. Cummings*, 352 N.C. 600, 613, 536 S.E.2d 36, 47 (2000) (citations omitted). Thus, plain error analysis does not apply to defendant's challenges here. Moreover, defendant cannot show a statutory basis for his appeal following a guilty plea. "In North Carolina, a defendant's right to appeal in a criminal proceeding is purely a creation of state statute." *State v. Pimental*, 153 N.C. App. 69, 72, 568 S.E.2d 867, 869 (citing N.C. Gen. Stat. § 15A-1444), *disc. review denied*, 356 N.C. 442, 573 S.E.2d 163 (2002).

Pursuant to Section 15A-1444, a defendant who has pled guilty may appeal only the following issues:

- (1) whether the sentence is supported by the evidence (if the minimum term of imprisonment does not fall within the presumptive range);
- (2) whether the sentence results from an incorrect finding of the defendant's prior record level under N.C. Gen. Stat. § 15A-1340.14 or the defendant's prior conviction level under N.C. Gen. Stat. § 15A-1340.21;
- (3) whether the sentence constitutes a type of sentence not authorized by N.C. Gen. Stat. § 15A-1340.17 or § 15A-1340.23 for the defendant's class of offense and prior record or conviction level;
- (4) whether the trial court improperly denied the defendant's motion to suppress; and
- (5) whether the trial court improperly denied the defendant's motion to withdraw his guilty plea.

State v. Carter, 167 N.C. App. 582, 584, 605 S.E.2d 676, 678 (2004) (citation omitted).

If the defendant's appeal does not fall into one of these categories, the defendant may file a petition for writ of certiorari pursuant to N.C. Gen. Stat. § 15A-1444(e). *Id.*; see also *State v. Rhodes*, 163 N.C. App. 191, 193, 592 S.E.2d , 731, 732 (2004); *State v. Barnett*, 113 N.C. App. 69, 76, 437 S.E.2d 711, 715 (1993). In the case *sub judice*, defendant's appeal does not fit into any of the five categories in section 15A-1444, identified *supra*. Neither has defendant filed a petition for writ of certiorari pursuant to section 15A-1444(e). Thus, this Court lacks jurisdiction to review defendant's appeal regarding the entry of his guilty plea and the award of restitution. See N.C. Gen. Stat. § 15A-1444(e); *State v. Waters*, 122 N.C. App. 504, 505, 470 S.E.2d 545, 546 (1996) (holding that this Court lacks jurisdiction to review the defendant's appeal where none of the exceptions in section 15A-1444 exist and the defendant has not filed a petition for writ of certiorari).

Although we are inclined to treat defendant's brief as a petition for writ of certiorari under section 15A-1444(e) in order to conclude this matter, Rule 21(a)(1) of our Rules of Appellate Procedure restricts our ability to do so. Specifically, our ability to grant a petition for writ of certiorari is limited to the following situations: "(1) defendant lost his right to appeal by failing to take timely action; (2) the appeal is interlocutory; or (3) to review a trial court's denial of a motion for appropriate

relief." *State v. Jamerson*, 161 N.C. App. 527, 529, 588 S.E.2d 545, 547 (2003) (citing N.C.R. App. P. 21(a)(1)). As defendant's appeal herein does not contain any of these circumstances, this Court is without authority to review it. Defendant may, however, file a motion for appropriate relief with the trial court pursuant to N.C. Gen. Stat. § 15A-1413. See *Jamerson*, 161 N.C. App. at 530, 588 S.E.2d at 547; *Waters*, 122 N.C. App. at 505, 470 S.E.2d at 546 (where the defendant has no statutory right of appeal and has not filed a petition for writ of certiorari, the trial court is the appropriate forum for addressing the defendant's post-conviction claims). Accordingly, defendant's appeal is dismissed without prejudice to his right to file a motion for appropriate relief with the superior court.

Dismissed.

Judges WYNN and LEVINSON concur.

Report per Rule 30(e).