

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA07-1297

NORTH CAROLINA COURT OF APPEALS

Filed: 20 May 2008

STATE OF NORTH CAROLINA

v.

Cleveland County
No. 05 CRS 58215

RENALDO NEHEMIAH SMITH

Appeal by defendant from judgment entered 4 June 2007 by Judge Richard D. Boner in Cleveland County Superior Court. Heard in the Court of Appeals 5 May 2008.

Attorney General Roy Cooper, by Assistant Attorney General Charles E. Resce, for the State.
Christine B. Wunsche for defendant appellant.

McCULLOUGH, Judge.

On 12 December 2005, defendant was indicted by a grand jury for first-degree murder. On 4 June 2007, defendant pled guilty to second-degree murder pursuant to a plea agreement which provided for a sentence of a minimum term of 132 months and a maximum term of 168 months. Within one day of the entry of the judgment, defendant sent a *pro se* letter to the trial court attempting to appeal his guilty plea. On 20 June 2007, defendant, through his trial counsel, filed a Motion for Appropriate Relief (MAR) asking that his guilty plea be withdrawn. On 2 July 2007, trial court conducted a hearing on the MAR. Against the advice of counsel,

defendant asked that he be permitted to withdraw his MAR and give notice of appeal. In response, the trial court dismissed the MAR and ruled that defendant's 4 June 2007 letter would be deemed his *pro se* notice of appeal. Defendant's appeal is now before us.

In defendant's appellate brief, defense counsel represents that she has been unable to identify any issues that, in her opinion, have sufficient merit to support an argument and, consequently, submits the appellant's brief pursuant to *Anders v. California*, 386 U.S. 738, 18 L. Ed. 2d 493 (1967), *reh'g denied*, 88 U.S. 924, 18 L. Ed. 2d 1377 (1967), and *State v. Kinch*, 314 N.C. 99, 331 S.E.2d 665 (1985).

By letter dated 28 November 2007, defense counsel informed defendant that in her opinion she was unable to find error in his trial and that defendant could file his own arguments with this Court, if he so desired. Copies of the transcripts, the record on appeal, and the brief filed by counsel were sent to defendant. Accordingly, we hold that defendant's counsel has substantially complied with the holdings in *Anders* and *Kinch*.

On 6 November 2007, defendant filed a *pro se* brief in this Court raising three issues for our review. We first note that a defendant's right to appeal in a criminal proceeding is derived from state statute. *State v. Pimental*, 153 N.C. App. 69, 72, 568 S.E.2d 867, 869 (2002), *disc. review denied*, 356 N.C. 442, 573 S.E.2d 163 (2002). Because defendant pled guilty, the issues he may appeal are limited by N.C. Gen. Stat. § 15A-1444 (2007) to the following: (1) whether a sentence with a minimum duration that

falls outside of the statutory presumptive range is supported by the evidence; (2) whether the sentence results from an incorrect finding of defendant's prior record level under N.C. Gen. Stat. § 15A-1340.14 (2007) or defendant's prior conviction level under N.C. Gen. Stat. § 15A-1340.21 (2007); (3) whether the sentence is of a type or duration not authorized by N.C. Gen. Stat. § 15A-1340.17 (2007) or N.C. Gen. Stat. § 15A-1340.23 (2007) for defendant's class of offense and prior record or conviction level; (4) whether the trial court improperly denied defendant's motion to suppress; and (5) whether the trial court improperly denied defendant's motion to withdraw his guilty plea. *State v. Jamerson*, 161 N.C. App. 527, 528-29, 588 S.E.2d 545, 546-47 (2003).

Defendant first contends that the trial court failed to properly advise him of the nature of the charge of second-degree murder, such that his guilty plea was not knowing and voluntary. However, defendant does not have an appeal as a matter of right to challenge the trial court's acceptance of his guilty plea absent a denial of a motion to withdraw his plea. N.C. Gen. Stat. § 15A-1444 provides in pertinent part as follows:

(e) Except as provided in subsections (a1) and (a2) of this section and G.S. 15A-979, and except when a motion to withdraw a plea of guilty or no contest has been denied, the defendant is not entitled to appellate review as a matter of right when he has entered a plea of guilty or no contest to a criminal charge in the superior court, but he may petition the appellate division for review by writ of certiorari.

Id. Therefore, because defendant's motion to withdraw his guilty plea was dismissed by the trial court at his own request, defendant is not entitled to appellate review of this issue.

We also conclude that we lack jurisdiction to consider the merits of the remaining two claims raised by defendant. Specifically, defendant asserts that (1) he received ineffective assistance of trial counsel and (2) that the indictment failed to properly indict him for first-degree murder. As neither of these claims fall within the exceptions enumerated in N.C. Gen. Stat. § 15A-1444, defendant may not raise them in his appeal. *State v. Hawkins*, 110 N.C. App. 837, 839, 431 S.E.2d 503, 505 (1993) (holding that a defendant who pled guilty could not raise the issue of lack of jurisdiction due to a defective indictment on appeal from the judgment), *overruled on other grounds by State v. Cheek*, 339 N.C. 725, 729, 453 S.E.2d 862, 864 (1995).

Finally, in accordance with *Anders*, we have fully examined the record to determine whether any issues of arguable merit appear therefrom. Finding no possible prejudicial error, we affirm the judgment of the trial court.

No error.

Judges HUNTER and STEELMAN concur.

Report per Rule 30(e).