

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA08-1

NORTH CAROLINA COURT OF APPEALS

Filed: 15 July 2008

STATE OF NORTH CAROLINA

v.

Nash County  
No. 07 CRS 50876

GERALD LEWIS HARRIS

# Court of Appeals

Appeal by defendant from judgment entered 2 August 2007 by Judge Quentin T. Sumner in Nash County Superior Court. Heard in the Court of Appeals 30 June 2008.

*Attorney General Roy Cooper, by Assistant Attorney General Catherine F. Coburn, for the State.*

# Slip Opinion

*Betsy J. Wolfenden, for defendant-appellant.*

CALABRIA, Judge.

Defendant entered an *Alford* plea to the charge of larceny of a motor vehicle. See generally *North Carolina v. Alford*, 400 U.S. 25, 27 L. Ed. 2d 162 (1970). As part of his written plea agreement, he agreed to "pay restitution." The trial court sentenced defendant to an active prison term of a minimum of eight months to a maximum of ten months in the North Carolina Department of Correction and ordered defendant to pay restitution in the amount of \$690.00 to Farris Motors of Rocky Mount, North Carolina. The court further recommended that amounts earned by defendant on

work release be applied toward satisfaction of the restitution award. See N.C. Gen. Stat. §§ 15A-1340.36(c), 148-33.2 (2007). From the judgment, defendant appeals.

Defendant's sole assignment of error on appeal is that the trial court erred in imposing restitution without any evidence to support the amount awarded. However, we first address a preliminary issue regarding whether this Court has the authority to hear defendant's appeal. Since defendant pled guilty to larceny of a motor vehicle, pursuant to N.C. Gen. Stat. § 15A-1444 (2007), defendant:

is entitled to appeal as a matter of right the issue of whether his or her sentence is supported by evidence introduced at the trial and sentencing hearing only if the minimum sentence of imprisonment does not fall within the presumptive range for the defendant's prior record or conviction level and class of offense. Otherwise, the defendant is not entitled to appeal this issue as a matter of right but may petition the appellate division for review of this issue by writ of certiorari.

In addition, pursuant to N.C. Gen. Stat. § 15A-1444, where a defendant has entered a guilty plea, the defendant's appeal is limited to whether the sentence imposed 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 or whether the sentence imposed constitutes a type of sentence not authorized by N.C. Gen. Stat. § 15A-1340.17 or N.C. Gen. Stat. § 15A-1340.23 for the defendant's class of offense and prior record or conviction level. N.C. Gen.

Stat. § 15A-1444 (2007); *State v. Jamerson*, 161 N.C. App. 527, 528-29, 588 S.E.2d 545, 546-47 (2003).

The State has moved to dismiss the appeal, on the ground that the issue raised by defendant is not within his limited appeal of right under N.C. Gen. Stat. §§ 15A-979(b), 1444(a1), (a2), (e) (2007), and cannot be reviewed by writ of certiorari under N.C.R. App. P. 21(a)(1) (2008).

We agree with the State that the instant appeal must be dismissed. On appeal, defendant contends that the evidence presented at trial is insufficient to support the amount of restitution ordered by the trial judge. However, while this argument challenges the sufficiency of the evidence, defendant's argument does not involve a presumptive range of sentencing as required under N.C. Gen. Stat. § 15A-1444. Thus, defendant does not present an issue for which he has an appeal as of right.

Where a defendant does not have an appeal of right, our statute provides for defendant to seek appellate review by a petition for writ of certiorari. N.C. Gen. Stat. § 15A-1444(e). However, our appellate rules limit our ability to grant petitions for writ of certiorari 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. N.C.R. App. P. 21(a)(1) (2003). In considering appellate Rule 21 and N.C. Gen. Stat. § 15A-1444, this Court has reasoned that since the appellate rules prevail over conflicting statutes, we are without authority to issue a writ of certiorari except as provided in Rule 21.

*Jamerson*, 161 N.C. App. at 530, 588 S.E.2d at 547. Here, defendant's argument does not fall under the ambit of the situations listed above.

Thus, since defendant has failed to raise any issue cognizable on direct appeal or by writ of certiorari following his *Alford* plea, we are without jurisdiction to review the restitution award. See *id.* However, defendant is not without relief.

Defendant may seek post-trial relief through a motion for appropriate relief. Such relief must be sought in the trial court, under N.C. Gen. Stat. § 15A-1413, since the appellate courts may rule on such a motion under N.C. Gen. Stat. § 15A-1418 only when the defendant has either an appeal of right or a properly pending petition for a writ of certiorari.

*Id.* (citations omitted).

Therefore, we dismiss the appeal without prejudice to defendant's right to file a motion for appropriate relief in the trial court. *Id.*

Dismissed without prejudice.

Chief Judge MARTIN and Judge STROUD concur.

Report per Rule 30(e).