

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA08-837

NORTH CAROLINA COURT OF APPEALS

Filed: 20 January 2009

STATE OF NORTH CAROLINA

v.

Burke County
Nos. 06 CRS 3274-75

ANTHONY LEO WHITE

Appeal by Defendant from judgment entered 4 March 2008 by Judge Robert C. Ervin in Superior Court, Burke County. Heard in the Court of Appeals 30 December 2008.

Attorney General Roy Cooper, by Assistant Attorney General Daniel P. O'Brien, for the State.
Richard Croutharmel for Defendant-Appellant.

McGEE, Judge.

Anthony Leo White (Defendant) contends that the trial court lacked subject matter jurisdiction due to invalid indictments. The State has filed a motion to dismiss Defendant's appeal. Because Defendant has no right to appeal, we grant the State's motion to dismiss.

Defendant was indicted on 1 May 2006 for: (1) possession of drug paraphernalia; (2) possession with intent to manufacture, sell, and deliver a Schedule II controlled substance; (3) manufacture of a Schedule VI controlled substance; and (4) having attained habitual felon status. Pursuant to a plea agreement,

Defendant pled guilty to the three substantive charges and admitted his habitual felon status on 28 February 2007. In exchange for Defendant's guilty plea, the State agreed to the trial court's consolidating the charges into a single judgment and sentencing Defendant in its discretion. The State also agreed to the trial court's continuing judgment for six months to allow Defendant time to cooperate with law enforcement. The trial court sentenced Defendant in the presumptive range to a term of 108 months to 139 months in prison on 4 March 2008. Defendant appeals.

"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, *disc. review denied*, 356 N.C. 442, 573 S.E.2d 163 (2002). A defendant who has pleaded guilty has a right of appeal limited to the following:

1. Whether the sentence is "supported by the evidence." This issue is appealable only if [the defendant's] minimum term of imprisonment does not fall within the presumptive range.
2. Whether the sentence "[r]esults from an incorrect finding of the defendant's prior record level under G.S. 15A-1340.14 or the defendant's prior conviction level under G.S. 15A-1340.21."
3. Whether the sentence "[c]ontains a type of sentence disposition that is not authorized by G.S. 15A-1340.17 or G.S. 15A-1340.23 for the defendant's class of offense and prior record or conviction level."
4. Whether the sentenced "[c]ontains a term of imprisonment that is for a duration not authorized by G.S.15A-1340.17 or G.S. 15A-1340-23 for the defendant's class of offense and prior record or conviction level."

5. Whether the trial court improperly denied [the] defendant's motion to suppress.

6. Whether the trial court improperly denied [the] 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) (internal citations omitted); see also N.C. Gen. Stat. § 15A-1444 (1970). In the present case, Defendant's appeal does not fall within any of the above categories.

Defendant bases his right to appeal on the principle that a lack of subject matter jurisdiction may be raised at any time. However, our Supreme Court has stated that: "While it is true that a defendant may challenge the jurisdiction of a trial court, such challenge may be made in the appellate division only if and when the case is properly pending before the appellate division." *State v. Absher*, 329 N.C. 264, 265 n.1, 404 S.E.2d 848, 849 n.1 (1991). Moreover, this Court has held that *Absher* requires dismissal of an appeal that asserts that a trial court lacked jurisdiction when that argument does not fall within N.C. Gen. Stat. § 15A-1444 and was not an appeal "presented in conjunction with the denial of a motion to withdraw a guilty plea or a motion to suppress evidence." *Jamerson*, 161 N.C. App. at 529, 588 S.E.2d at 547.

In this case, Defendant's argument does not fall within N.C. Gen. Stat. § 15A-1444, nor is Defendant's appeal in conjunction with the denial of a motion to withdraw a guilty plea or the denial of a motion to suppress evidence. Consequently, we conclude that Defendant has no statutory right to appeal, and the State's motion to dismiss is allowed.

However, Defendant is not without relief. Under N.C. Gen. Stat. § 15A-1415(b) (2) (2007), Defendant may assert in a motion for appropriate relief that the trial court lacked jurisdiction over the person of Defendant or over the subject matter of the proceedings. "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." *Jamerson*, 161 N.C. App. at 530, 588 S.E.2d at 547. Therefore, we dismiss Defendant's appeal without prejudice to Defendant's right to file a motion for appropriate relief in the trial court.

Dismissed.

Judges HUNTER and JACKSON concur.

Report per Rule 30(e).