

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA12-609  
NORTH CAROLINA COURT OF APPEALS

Filed: 6 November 2012

STATE OF NORTH CAROLINA

v. Montgomery County  
Nos. 10 CRS 51852  
PORFIRIO DIAZ BALDWIN 11 CRS 50161

Appeal by defendant from judgment entered 2 November 2011 by Judge V. Bradford Long in Montgomery County Superior Court. Heard in the Court of Appeals 22 October 2012.

*Attorney General Roy Cooper, by Assistant Attorney General Donna D. Smith, for the State.*

*Linda B. Weisel for defendant appellant.*

McCULLOUGH, Judge.

Porfirio Diaz Baldwin ("defendant") appeals from a judgment consistent with his plea of guilty to forgery and intimidating a witness. Defendant contends the trial court erred in calculating his prior record level and ordering him to pay restitution. We agree and remand for resentencing and a new restitution hearing.

On 2 November 2011, defendant pled guilty to forgery and intimidating a witness. The plea agreement provided in part

that "the charges shall be consolidated into Class H Felony. Defendant shall receive supervised probation and pay restitution." At sentencing, the State tendered a prior record level worksheet which contained two prior offenses: (1) 2005 attempted trafficking in cocaine, a Class G felony; and (2) 1997 attempted financial card theft, a Class 1 misdemeanor. The worksheet assigned four points to the Class G felony and two points to the Class 1 misdemeanor, for a total of six prior record level points and a corresponding prior record level III.

By written judgment entered 2 November 2011, the trial court consolidated the charges and sentenced defendant as a Class H, level III felon to a term of ten to twelve months' imprisonment. The court suspended the sentence, placed defendant on supervised probation for twenty-four months, and ordered defendant to serve an active term of ten days in jail. The court also ordered defendant to pay \$40.00 in restitution. On 14 December 2011, the trial court signed Appellate Entries in defendant's case. Defendant's appeal followed, along with a 21 June 2012 petition for writ of certiorari.

#### I. Notice of Appeal

Rule 4 of the North Carolina Rules of Appellate Procedure governs how and when appeals may be taken in criminal cases.

Pursuant to Rule 4(a),

[a]ny party entitled by law to appeal from a judgment or order of a superior or district court rendered in a criminal action may take appeal by

(1) giving oral notice of appeal at trial, or

(2) filing notice of appeal with the clerk of superior court . . . within fourteen days after entry of the judgment or order[.]

N.C.R. App. P. 4(a) (2011). "[W]hen a defendant has not properly given notice of appeal, this Court is without jurisdiction to hear the appeal." *State v. McCoy*, 171 N.C. App. 636, 638, 615 S.E.2d 319, 320 (2005); *see also State v. Hughes*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 707 S.E.2d 777, 779 (2011) ("[T]he fact that the record contains appellate entries does not, without more, suffice to show that Defendant properly appealed from the trial court's judgment to this Court."). The transcript of defendant's hearing reveals that defendant did not give oral notice of appeal and the record on appeal shows that defendant filed an untimely *pro se* notice of appeal on 30 November 2011. Because defendant did not give proper notice of appeal, we lack jurisdiction to hear the appeal and must dismiss defendant's appeal.

Defendant, however, acknowledges his failure to comply with

N.C.R. App. P. 4(a) and has petitioned this Court to issue a writ of certiorari to review his judgment. Defendant asks this Court to apply Rule 21(a)(1), which allows this Court to issue a writ of certiorari "in appropriate circumstances" to permit review of a trial court's order "when the right to prosecute an appeal has been lost by failure to take timely action . . . or for review pursuant to N.C.G.S. § 15A-1422(c)(3) of an order of the trial court denying a motion for appropriate relief." N.C.R. App. P. 21(a)(1) (2011). In our discretion, we grant defendant's petition pursuant to Rule 21(a)(1) and address his arguments below.

## II. Prior record level

Defendant contends the trial court erred by sentencing him as a prior record level III offender when his Class 1 misdemeanor conviction should have been assigned only one point. The State concedes this argument, and we agree.

This Court reviews the calculation of a prior record level *de novo*. *State v. Fraley*, 182 N.C. App. 683, 691, 643 S.E.2d 39, 44 (2007). Here, the offense of attempted misdemeanor financial card theft was improperly assigned two points for a Class H or I felony conviction. The offense of attempted misdemeanor financial card theft is a misdemeanor Class 1

offense and therefore should have been assigned 1 point. See N.C. Gen. Stat. § 15A-1340.14(b)(5) (2011). When the superfluous point is deducted from defendant's total, he becomes a prior record level II offender, rather than a level III offender. See N.C. Gen. Stat. § 15A-1340.14(c). Accordingly, the trial court erred in sentencing defendant as a level III offender, and this matter is remanded to the trial court for resentencing.

### III. Restitution

Defendant contends the trial court's restitution order was erroneous because it relied on an unsigned restitution worksheet from an unrelated case. Defendant did not object to the award of restitution at trial. However, this issue is preserved for appellate review by statute. See *State v. Shelton*, 167 N.C. App. 225, 233, 605 S.E.2d 228, 233 (2004) ("While defendant did not specifically object to the trial court's entry of an award of restitution, this issue is deemed preserved for appellate review under N.C. Gen. Stat. § 15A-1446(d)(18).").

The State concedes the error here. Our Courts have repeatedly held that the restitution amount requested by the State must be supported by "evidence adduced at trial or at sentencing." *State v. Wilson*, 340 N.C. 720, 726, 459 S.E.2d

192, 196 (1995). Here, the restitution worksheet is neither signed nor dated by the trial court, contains an unrelated district court case number, and incorrectly names the party to which the restitution is to be disbursed. In addition, there was no evidence presented to support the restitution amount. Because the trial court erred in ordering defendant to pay \$40.00 in restitution, we vacate the trial court's restitution order and remand for rehearing on the issue.

No error in part; remand in part for a new sentencing hearing; vacate and remand in part for a new restitution hearing.

Judges HUNTER (Robert C.) and CALABRIA concur.

Report per Rule 30(e).