

NO. COA14-736
NORTH CAROLINA COURT OF APPEALS

Filed: 3 February 2015

STATE OF NORTH CAROLINA

v. Mecklenburg County
No. 12CRS232555

THOMAS LEE ROYSTER,
Defendant.

Appeal by defendant from judgment entered on 8 November 2013 by Judge Linwood O. Foust in Superior Court, Mecklenburg County. Heard in the Court of Appeals 4 November 2014.

Attorney General Roy A. Cooper, III, by Assistant Attorney Generals Michael E. Bulleri and Kimberly N. Callahan, for the State.

Assistant Public Defender Julie Ramseur Lewis, for defendant-appellant.

STROUD, Judge.

Thomas Lee Royster ("defendant") appeals from a judgment entered upon a plea agreement in which he pled guilty to felonious possession of marijuana. Defendant argues that the trial court erred in ordering him to forfeit \$400. We dismiss the appeal.

I. Background

Around 3:00 p.m. on 23 July 2012, while in a marked police

car, Officers Shawn Soloman and Justin Coleman observed defendant driving in the parking lot of a Charlotte hotel. Officer Soloman observed that defendant had a rigid posture, avoided making eye contact with him, and appeared to be pretending to use a cell phone. Officer Soloman checked the North Carolina Division of Motor Vehicle's records and discovered that defendant's vehicle had an inspection violation and that its tag had expired. After defendant exited his vehicle, Officer Soloman approached him on foot and asked him for his driver's license. Defendant responded that his driver's license was in his vehicle and walked back to his vehicle.

Defendant searched for his driver's license with the driver's side door open. After defendant presented his driver's license, Officer Soloman detected a slight odor of marijuana but could not localize it at that point. Officer Soloman returned to the police car with defendant's driver's license, and Officer Coleman walked over to the driver's side door of defendant's vehicle. A breeze began blowing and then Officer Coleman noticed a strong odor of unburned marijuana coming from defendant's vehicle. After Officer Coleman informed Officer Soloman of the odor, Officer Soloman asked defendant for consent to search his vehicle, and defendant consented. During the

search, behind the glove box Officer Coleman discovered a bag of fresh, green marijuana and a digital scale with a green leafy substance on it. When they searched defendant, the officers also discovered and seized \$400 in cash. Officer Soloman arrested defendant.

On or about 10 December 2012, a grand jury indicted defendant for possession of a controlled substance, possession of drug paraphernalia, and possession with intent to sell or deliver a controlled substance. See N.C. Gen. Stat. §§ 90-95(a)(1), (d)(4), -113.22 (2011). On 11 April 2013, defendant moved to suppress the evidence of marijuana. After a hearing on 25 July 2013, the trial court orally denied the motion. At a hearing on 8 November 2013, defendant pled guilty of felony possession of marijuana pursuant to a plea agreement. See *id.* § 90-95(d)(4). In the plea agreement, the State dismissed the remaining charges, and defendant reserved his right to appeal the trial court's order denying his motion to suppress. On 8 November 2013, pursuant to the plea agreement, the trial court sentenced defendant to four to fourteen months' imprisonment but suspended the sentence and placed defendant on twenty-four months' supervised probation.

At the 8 November hearing, the prosecutor requested that

defendant forfeit the \$400 in cash that the officers had seized. Although the record is unclear, it appears that the trial court ordered that defendant forfeit the \$400 pursuant to N.C. Gen. Stat. § 90-112(a)(2) (2013).

At the 8 November hearing, defendant's counsel stated that he "strongly believe[s] on the face of the law that [defendant] will prevail on appeal." The trial court also noted at the hearing that defendant had reserved his right to appeal the court's order denying his motion to suppress. But defendant never gave notice of appeal.

At a hearing on 23 January 2014, defendant's counsel mistakenly stated that he had already given notice of appeal. The State did not contradict defendant's counsel's statement. The trial court then appointed a public defender to represent defendant on appeal.

II. Jurisdiction

Defendant acknowledges that he failed to give timely notice of appeal but urges that we grant his petition for writ of *certiorari*, because he lost his right to appeal due to "failure to take timely action[.]" See N.C.R. App. P. 21(a)(1). Defendant does not argue another basis for granting his petition.

In criminal cases, a party entitled to appeal a judgment must take appeal by either (1) giving oral notice of appeal at trial; or (2) filing written notice of appeal with the clerk of superior court and, within fourteen days, serving copies of that notice on all adverse parties. N.C.R. App. P. 4(a); *State v. Gardner*, ___ N.C. App. ___, ___, 736 S.E.2d 826, 829 (2013). But when a party loses his right to appeal due to "failure to take timely action," we may issue, in our discretion, a writ of *certiorari* to permit review "in appropriate circumstances[.]" N.C.R. App. P. 21(a)(1); see also *Gardner*, ___ N.C. App. at ___, 736 S.E.2d at 829.

Defendant's sole argument on appeal is that the trial court erred in ordering him to forfeit \$400, in contravention of N.C. Gen. Stat. § 90-112(a)(2) (discussing forfeitures under the North Carolina Controlled Substances Act). Defendant argues that his appeal is taken pursuant to N.C. Gen. Stat. §§ 7A-27(b), 15A-979(b), 15A-1444, and 15A-1446(d)(18) (2013). But N.C. Gen. Stat. § 7A-27(b) does not provide a route for appeals from guilty pleas, and N.C. Gen. Stat. § 15A-979(b), which grants a defendant who pleads guilty the right to appeal an order denying his motion to suppress, is inapplicable here because defendant does not appeal the trial court's denial of

his motion to suppress. See N.C. Gen. Stat. §§ 7A-27(b), 15A-979(b); *State v. Mungo*, 213 N.C. App. 400, 401, 713 S.E.2d 542, 543 (2011). N.C. Gen. Stat. § 15A-1444, defendant's next basis for appeal, provides in pertinent part:

(a1) A defendant who has been found guilty, or entered a plea of guilty or no contest to a felony, 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.

(a2) A defendant who has entered a plea of guilty or no contest to a felony or misdemeanor in superior court is entitled to appeal as a matter of right the issue of whether the sentence imposed:

(1) Results 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;

(2) Contains 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; or

(3) Contains 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.

. . . .

(d) Procedures for appeal to the appellate division are as provided in this Article, the rules of the appellate division, and Chapter 7A of the General Statutes. The appeal must be perfected and conducted in accordance with the requirements of those provisions.

(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. If an indigent defendant petitions the appellate division for a writ of certiorari, the presiding superior court judge may in his discretion order the preparation of the record and transcript of the proceedings at the expense of the State.

. . . .

(g) Review by writ of certiorari is available when provided for by this Chapter, by other rules of law, or by rule of the appellate division.

N.C. Gen. Stat. § 15A-1444. Defendant does not challenge on appeal the trial court's determination that his sentence falls within the presumptive range. Defendant thus has no right to appeal under N.C. Gen. Stat. § 15A-1444(a1). *Id.* § 15A-

1444(a1); *Mungo*, 213 N.C. App. at 403, 713 S.E.2d at 544. Additionally, defendant has no right to appeal under N.C. Gen. Stat. § 15A-1444(a2), because defendant's sole argument on appeal does not concern any of the three issues listed in subsection (a2). See N.C. Gen. Stat. § 15A-1444(a2). Defendant does not contend that the trial court violated N.C. Gen. Stat. §§ 15A-1340.14, -1340.17, -1340.21, or -1340.23; rather, defendant argues that the trial court violated N.C. Gen. Stat. § 90-112(a)(2) of the Controlled Substances Act. See *id.* §§ 15A-1340.14, -1340.17, -1340.21, -1340.23, 90-112(a)(2) (2013). Accordingly, we hold that defendant has no right to appeal this issue of forfeiture. See N.C. Gen. Stat. § 15A-1444(e); *Mungo*, 213 N.C. App. at 404, 713 S.E.2d at 545; *State v. Jamerson*, 161 N.C. App. 527, 529, 588 S.E.2d 545, 547 (2003); *State v. Nance*, 155 N.C. App. 773, 774-75, 574 S.E.2d 692, 693-94 (2003).

Defendant's reliance on *State v. Davis* is misplaced. 206 N.C. App. 545, 551, 696 S.E.2d 917, 921 (2010). There, the defendant's sentence fell outside of the presumptive range, thus satisfying N.C. Gen. Stat. § 15A-1444(a1). *Id.* at 548, 696 S.E.2d at 919-20. In contrast, here, defendant's sentence falls within the presumptive range.

Defendant finally contends that N.C. Gen. Stat. § 15A-

1446(d)(18) provides a right to appeal this issue of forfeiture. N.C. Gen. Stat. § 15A-1446, which is entitled "Requisites for preserving the right to appellate review" provides in pertinent part:

(a) Except as provided in subsection (d), error may not be asserted upon appellate review unless the error has been brought to the attention of the trial court by appropriate and timely objection or motion. No particular form is required in order to preserve the right to assert the alleged error upon appeal if the motion or objection clearly presented the alleged error to the trial court.

. . . .

(d) Errors based upon any of the following grounds, which are asserted to have occurred, may be the subject of appellate review even though no objection, exception or motion has been made in the trial division.

. . . .

(18) The sentence imposed was unauthorized at the time imposed, exceeded the maximum authorized by law, was illegally imposed, or is otherwise invalid as a matter of law.

N.C. Gen. Stat. § 15A-1446. We hold that subsection (d) does not create a right of appeal; rather, it lists various issues which may be preserved for appellate review absent an objection. See *id.* § 15A-1446(d); *State v. Mumford*, 364 N.C. 394, 402-03, 699 S.E.2d 911, 917 (2010) (discussing subsection (d)(18)). In

other words, although defendant has not waived the issue of forfeiture, he has no right to appeal it under section 15A-1446(d)(18). Having reviewed all of defendant's bases for appeal, we hold that defendant never had a right to appeal the issue of forfeiture.

Because defendant never had a right to appeal the issue of forfeiture, we hold that he did not lose his right to appeal due to "failure to take timely action[.]" See N.C.R. App. P. 21(a)(1). Because defendant did not lose his right to appeal due to "failure to take timely action," we deny defendant's petition for writ of *certiorari*. See *id.*; N.C. Gen. Stat. § 15A-1444(e); *Mungo*, 213 N.C. App. at 404, 713 S.E.2d at 545; *Jamerson*, 161 N.C. App. at 529-30, 588 S.E.2d at 547; *Nance*, 155 N.C. App. at 775, 574 S.E.2d at 693-94.

III. Conclusion

For the foregoing reasons, we deny defendant's petition for writ of *certiorari* and dismiss defendant's appeal.

DISMISSED.

Judges CALABRIA and McCULLOUGH concur.