IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA15-685

Filed: 15 December 2015

Haywood County, Nos. 14 CRS 881, 14 CRS 52633

STATE OF NORTH CAROLINA

v.

JAMES MICHAEL DESPAIN, II.

Appeal by Defendant from judgments entered 6 January 2015 by Judge Gary M. Gavenus in Superior Court, Haywood County. Heard in the Court of Appeals 3 December 2015.

Attorney General Roy Cooper, by Assistant Attorney General Kimberly N. Callahan, for the State.

Jeffrey William Gillette for Defendant-Appellant.

McGEE, Chief Judge.

James Michael Despain, II ("Defendant") pled guilty to felony larceny, felony breaking or entering a motor vehicle, and two counts of misdemeanor attempted breaking and entering a motor vehicle. The trial court sentenced Defendant in the presumptive range to eight to nineteen months' imprisonment for the larceny conviction. The trial court suspended a consecutive presumptive range sentence of six to seventeen months' imprisonment for the remaining convictions, and imposed

twenty-four months of supervised probation. Defendant filed a *pro se* written notice of appeal.

We first address the sufficiency of Defendant's *pro se* notice of appeal. Pursuant to Rule 4 of the North Carolina Rules of Appellate Procedure, notice of appeal in a criminal case "shall designate the judgment or order from which appeal is taken and the court to which appeal is taken[.]" N.C.R. App. P. 4(b) (2014). After entry of judgment, the defendant must also serve copies upon the State within fourteen days. N.C.R. App. P. 4(a)(2).

Defendant acknowledges that he neglected to designate both judgments, identify the court to which he appealed, and provide proof of service of the notice of appeal on the State. Defendant, therefore, has filed a petition for writ of certiorari seeking appellate review in the event his notice of appeal is deemed insufficient. In light of Rule 4 above, we dismiss Defendant's appeal because he failed to file proper notice of appeal. However, in our discretion, we grant Defendant's petition for writ of certiorari for the purpose of reviewing the judgment below. N.C.R. App. P. 21(a)(1) ("The writ of certiorari may be issued in appropriate circumstances by either appellate court to permit review of the judgments and orders of trial tribunals when the right to prosecute an appeal has been lost by failure to take timely action[.]").

Counsel appointed to represent Defendant on appeal asserts that he has been unable to identify any issue with sufficient merit to support a meaningful argument

for relief on appeal and asks that this Court conduct its own review of the record for possible prejudicial error. Counsel has also shown to the satisfaction of this Court that he has complied with the requirements of *Anders v. California*, 386 U.S. 738, 18 L. Ed. 2d 493 (1967), and *State v. Kinch*, 314 N.C. 99, 331 S.E.2d 665 (1985), by advising Defendant of his right to file written arguments with this Court and providing Defendant with the documents necessary for him to do so. Defendant has not filed his own written arguments.

We note that a defendant who pleads guilty has only a limited right of appeal. *See* N.C. Gen. Stat. § 15A-1444(a1), (a2), (e) (2013). After review, we find no prejudicial error in Defendant's judgments and commitments pursuant to section 15A-1444. Therefore, we determine that this appeal is wholly frivolous and affirm the judgments of the trial court.

In addition to seeking review pursuant to *Anders*, counsel directs our attention to the instances in which trial counsel may have rendered ineffective assistance. To support an ineffective assistance of counsel claim, a defendant must show both that his counsel's performance fell below an objective standard of reasonableness and that this deficiency had a probable impact on the outcome of the trial. *State v. Braswell*, 312 N.C. 553, 563, 324 S.E.2d 241, 249 (1985). As counsel concedes, ineffective assistance of counsel claims are not properly before this Court due to Defendant's

limited right of appeal. *See* N.C. Gen. Stat. § 15A-1444. Further, this Court stated in *State v. Stroud*:

> In general, claims of ineffective assistance of counsel should be considered through motions for appropriate relief and not on direct appeal. *See State v. Dockery*, 78 N.C. App. 190, 192, 336 S.E.2d 719, 721 (1985) ("The accepted practice is to raise claims of ineffective assistance of counsel in post-conviction proceedings, rather than direct appeal."); *State v. Ware*, 125 N.C. App. 695, 697, 482 S.E.2d 14, 16 (1997) (dismissing defendant's appeal because issues could not be determined from the record on appeal and stating that to "properly advance these arguments defendant must move for appropriate relief pursuant to G.S. 15A–1415."). A motion for appropriate relief is preferable to direct appeal because in order to
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> > defend against ineffective assistance of counsel allegations, the State must rely on information provided by defendant to trial counsel, as well as defendant's thoughts, concerns, and demeanor. "[O]nly when all aspects of the relationship are explored can it be determined whether counsel was reasonably likely to render effective assistance." Thus, superior courts should assess the allegations in light of all the circumstances known to counsel at the time of representation.
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> *State v. Buckner*, 351 N.C. 401, 412, 527 S.E.2d 307, 314 (2000) (citations omitted).

State v. Stroud, 147 N.C. App. 549, 553-54, 557 S.E.2d 544, 547 (2001). Accordingly, we dismiss any claims for ineffective assistance of counsel without prejudice to Defendant's right to file a motion for appropriate relief in the superior court.

AFFIRMED IN PART; DISMISSED IN PART.

Judges HUNTER, JR. and DILLON concur.

Report per Rule 30(e).