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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA15-1184

Filed: 15 March 2016

Cabarrus County, No. 14 CRS 53466

STATE OF NORTH CAROLINA

v.

LANCE FOSTER FURR, JR.

Appeal by Defendant from judgment entered 11 May 2015 by Judge A. Robinson Hassell in Cabarrus County Superior Court. Heard in the Court of Appeals 29 February 2016.

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

James N. Freeman, Jr., for Defendant.

STEPHENS, Judge.

Factual Background and Procedural History

On 23 July 2014, officers from the Concord Police Department were dispatched to the Jackson Park Short Stop convenience store to respond to a reported breaking and entering in progress by a male and female driving a pickup truck. After arriving on the scene and noticing that the store's windows were broken, the officers initiated a traffic stop of a pickup truck matching the description provided. The driver of the

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pickup truck was identified as Defendant Lance Foster Furr, Jr. In the bed of the pickup truck, the officers found burglary tools including a pick, a tire iron, and screwdrivers, all in plain view. Furr's female companion, who was not charged, told the officers that she and Furr went to the Short Stop to break in and steal items, that Furr actually did break into the store and went inside, and that Furr came back outside shortly after the store's alarm system went off.

On 8 September 2014, Furr was indicted by a Cabarrus County grand jury on one count of breaking and/or entering, and one count of possession of burglary tools. On 11 May 2015, Furr pleaded guilty pursuant to a plea agreement to felonious breaking and/or entering and possession of burglary tools. The trial court accepted Furr's plea, consolidated his convictions for judgment, and sentenced Furr to a term of 9 to 20 months imprisonment. Furr gave notice of appeal in open court.

Analysis

Counsel appointed to represent Furr 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 Furr of his right to file

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written arguments with this Court and providing him with the documents necessary to do so.

In addition, Furr's counsel directs our attention to two potential issues on appeal. First, counsel suggests that the trial court was without jurisdiction to sentence Furr because the indictment charging him was fatally deficient. "An indictment is fatally deficient when it fails on its face to allege all of the essential elements of the offense." *State v. Pender*, __ N.C. App. __, __, 776 S.E.2d 352, 357 (2015) (citation and internal quotation marks omitted). However, an indictment is not facially invalid "as long as it notifies an accused of the charges against him sufficiently to allow him to prepare an adequate defense and to protect him from double jeopardy." *State v. McKoy*, 196 N.C. App. 650, 656, 675 S.E.2d 406, 411 (citation omitted), *appeal dismissed and disc. review denied*, 363 N.C. 586, 683 S.E.2d 215 (2009). Although a criminal defendant who pleads guilty generally waives his right to appellate review, *see* N.C. Gen. Stat. § 15A-1444 (2013), we have recognized that "notwithstanding the proper methods to raise the question of the sufficiency of a bill of indictment . . . if the offense is not sufficiently charged in the indictment, this Court, *ex mero motu*, will arrest the judgment" because the trial court acquires no subject matter jurisdiction from a fatally defective indictment and where a court erroneously assumes jurisdiction, "a trial and conviction are a nullity." *State v. Frink*, 177 N.C. App. 144, 146, 627 S.E.2d 472, 473 (2006) (citations and internal quotation

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marks omitted). “The issue of subject matter jurisdiction may be raised at any time, and may be raised for the first time on appeal.” *Id.* at 147, 627 S.E.2d at 473 (citations omitted). In the present case, Furr’s counsel has not provided any specific argument to support his assertion that the indictment against Furr was fatally deficient. Moreover, our review of the record demonstrates that the indictment is proper on its face. This argument is without merit.

Furr’s counsel also requests that this Court treat Furr’s brief as a petition for writ of *certiorari* in order to review “whether the sentence imposed is supported by the evidence.” As Furr’s counsel candidly concedes, this is not an appealable issue pursuant to section 15A-1444 of our General Statutes, given that Furr was sentenced within the presumptive range for his prior record level. *See* N.C. Gen. Stat. § 15A-1444(a1) (providing that a defendant who pleads guilty is entitled to appeal as a matter of right the issue of whether his sentence is supported by the evidence “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”). Nevertheless, this Court “does have the authority pursuant to North Carolina Rule of Appellate Procedure 21(a)(1) to treat [Furr’s] purported appeal as a petition for writ of *certiorari* and grant it in our discretion.” *Luther v. Seawell*, 191 N.C. App. 139, 142, 662 S.E.2d 1, 3 (2008) (citation and internal quotation marks omitted). Rule 21 of our Rules of Appellate Procedure provides that a writ of *certiorari*

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may be issued in appropriate circumstances . . . 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, or when no right of appeal from an interlocutory order exists, or for review pursuant to [section] 15A-1422(c)(3) of an order of the trial court ruling on a motion for appropriate relief.

N.C.R. App. P. 21(a)(1). However, the present case does not provide any such scenario. Because this case does not fall within the purview of Rule 21(a) and Furr's counsel has not offered any specific argument in his brief to support his claim that the sentence imposed is not supported by the evidence, we decline to exercise our discretion to treat Furr's attempted appeal as a petition for writ of *certiorari*.

Furr has not filed any written arguments on his own behalf with this Court and a reasonable time in which he could have done so has passed. In accordance with *Anders*, we have fully examined the record to determine whether any issues of arguable merit appear therefrom. We have been unable to find any possible prejudicial error and conclude that the appeal is wholly frivolous. Consequently, the trial court's judgment is

AFFIRMED.

Judges BRYANT and CALABRIA concur.

Report per Rule 30(e).