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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA15-992

Filed: 15 March 2016

Wayne County, Nos. 14 CRS 51915, 51918

STATE OF NORTH CAROLINA

v.

REGINALD LAMONT HERRING

Appeal by Defendant from judgments entered 9 April 2015 by Judge Arnold O. Jones II in Wayne County Superior Court. Heard in the Court of Appeals 29 February 2016.

Attorney General Roy Cooper, by Special Deputy Attorney General Neil Dalton, for the State.

Stephen G. Driggers for Defendant.

STEPHENS, Judge.

Factual Background and Procedural History

On 5 January 2015, Defendant Reginald Lamont Herring was indicted by a Wayne County grand jury on one count of driving while license revoked due to an impaired driving revocation and one count of felony driving while impaired. These charges arose from a traffic stop of Herring's vehicle conducted by North Carolina Highway Patrol Trooper Charles Grainger on the night of 9 May 2014 in response to a 911 call from a concerned motorist. After observing Herring driving erratically,

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Trooper Grainger stopped his vehicle for suspicion of driving while impaired. Upon speaking with Herring, Trooper Grainger smelled the odor of malt beverages and noticed that Herring's eyes were red and glassy and his speech was slurred. After Herring twice tested positive according to a portable breath test, Grainger took him to the Wayne County Jail to conduct an Intoximeter test shortly after midnight on 10 May 2014. Grainger, who was certified to administer Intoximeter tests by the Department of Health and Human Services ("DHHS"), subsequently reported that the result of Herring's first breath sample was .25 and the result of his second breath sample was .22. Although the difference between these results exceeded .02, thereby requiring the taking of an additional sample, after seeing the result of his second sample, Herring refused to provide any further breath samples for the Intoximeter. Grainger entered a notation that the third test was refused and formally arrested Herring shortly thereafter.

On 8 April 2015, Herring moved to suppress the results of the Intoximeter test based on purported procedural errors Grainger made while administering it. A hearing on the motion was held the same day in Wayne County Superior Court. During the hearing, Grainger testified that he followed all applicable DHHS requirements for administering the Intoximeter test. After the trial court denied Herring's motion to suppress, Herring entered a plea of not guilty to the charges against him and the matter was continued for trial until the following day. However,

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on 9 April 2015, Herring's trial counsel informed the court that his client wished to plead guilty. After conducting an inquiry of Herring, the trial court accepted his guilty plea to one count of driving while license revoked due to an impaired driving revocation and one count of habitual driving while impaired. The court sentenced Herring to a term of 17 to 30 months imprisonment on the latter conviction, from which Herring gave notice appeal in open court. The court also imposed a sentence of 120 days in the misdemeanor confinement program on the conviction for driving while license revoked due to impaired driving revocation, to be served at the expiration of Herring's term of incarceration.

Toward the close of the sentencing hearing, the prosecutor offered to draft findings of fact for the court's order denying Herring's motion to suppress, explaining, "I think definitely if [Herring has] given notice of appeal I think that I'll need to . . . on a motion to suppress. . . . I have no objection [to] him appealing; I'm just saying that if that issue's going up we'll just need to do findings of fact." The following day, the court held a hearing on the proposed findings of fact for its order. During that hearing, Herring's trial counsel objected to Finding of Fact 14, which provided that "[b]oth times [he administered Herring's Intoximeter test], the chemical analyst, Trooper Grainger, followed the procedures as set forth by the Commission of Health Services in administration of the tests."

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Analysis

Counsel appointed to represent Herring is 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. Herring's counsel has 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 Herring of his right to file written arguments with this Court and providing him with the documents necessary to do so. Herring has not filed any written arguments on his own behalf with this Court, and a reasonable time for him to do so has expired.

In addition, Herring's counsel directs our attention to a potential issue on appeal, namely, whether the trial court erred in denying Herring's motion to suppress the results of his Intoximeter breath tests. As a general matter, the trial court's denial of a criminal defendant's motion to suppress may be appealed when the defendant subsequently pleads guilty. N.C. Gen. Stat. § 15A-979(b) (2013). However, it is well established that the defendant must specifically notify the State and the trial court during plea negotiations of his intention to appeal the denial of his motion to suppress. See *State v. McBride*, 120 N.C. App. 623, 625, 463 S.E.2d 403, 404 (1995), *affirmed per curiam*, 344 N.C. 623, 476 S.E.2d 106 (1996). Where the defendant fails to specifically notify the State and the trial court of his intent to appeal the denial of

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his motion to suppress, “the right to do so is waived after a plea of guilty.” *Id.* In the present case, there is nothing in the record before this Court showing that Herring specifically notified the State or the trial court of his intent to appeal the denial of his motion to suppress, nor has he filed a petition for writ of *certiorari* seeking to bring the trial court’s denial of his motion to suppress within his appeal. The court’s ruling on Herring’s motion to suppress is thus not properly before this Court.

In accordance with *Anders*, we have fully examined the record to determine whether any issues of arguable merit appear therefrom regarding the trial court’s acceptance of Herring’s guilty plea or the criminal judgments entered against him. We have been unable to find any possible prejudicial error and conclude that the appeal is wholly frivolous. Accordingly, the trial court’s judgment is

AFFIRMED.

Judges BRYANT and CALABRIA concur.

Report per Rule 30(e).