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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-121

Filed: 15 August 2017

Brunswick County, Nos. 15 CRS 53759, 16 CRS 20

STATE OF NORTH CAROLINA

v.

MILTON CALONIE MORRIS

Appeal by defendant from judgment entered 17 August 2016 by Judge Ola M. Lewis in Brunswick County Superior Court. Heard in the Court of Appeals 31 July 2017.

*Attorney General Joshua H. Stein, by Assistant Attorney General Carolyn McLain, for the State.*

*Winifred H. Dillon, for defendant-appellant.*

CALABRIA, Judge.

Milton Calonie Morris (“defendant”) appeals from a judgment entered upon his guilty plea to felony sale and delivery of heroin; felony possession with intent to sell and deliver heroin; misdemeanor possession of drug paraphernalia; and attaining the status of a habitual felon. We affirm the court’s judgment but remand for correction of clerical errors.

**I. Background**

On 29 July 2015, Detective Jared Zeller (“Detective Zeller”) of the Brunswick County Sheriff’s Office drug enforcement unit used a confidential informant to conduct a controlled buy of heroin from defendant at a Walmart in Leland, North Carolina. Detective Zeller gave the informant, Jamie Burton (“Burton”), \$350 in marked currency for the purchase. Burton drove to the Walmart in his own vehicle, and Detective Zeller followed him in an unmarked police car. Equipped with a video recording device on his shirt, Burton entered the Walmart while Detective Zeller waited in the parking lot. Another officer, Agent Adrian Phelps (“Agent Phelps”), was posted inside of the store for surveillance, and he witnessed Burton talking with defendant. About five minutes later, Burton exited the Walmart, got into Detective Zeller’s vehicle, and handed him at least twenty small bags of what was later identified as heroin.

Agent Phelps attempted to follow defendant after Burton left the store, but he lost sight of him. Shortly after, officers spotted defendant leaving the Walmart and followed him in his vehicle to a nearby gas station. The officers stopped defendant at the gas station approximately ten minutes after the transaction occurred inside of the Walmart. Defendant was found in possession of \$250 of the \$350 in marked bills that were used during the controlled drug buy. Defendant was arrested and subsequently indicted on charges of possession with intent to sell and deliver heroin,

sale and delivery of heroin, possession of drug paraphernalia, and attaining the status of a habitual felon.

Defendant's case came on for trial in Brunswick County Superior Court on 15 August 2016. Prior to trial, Burton was killed in a motor vehicle accident. Defendant moved to suppress the videotape recording from the camera that Burton had worn during the controlled buy, arguing that admission would violate his constitutional right to confront and cross-examine an unavailable witness. The trial court denied defendant's motion.

Prior to the close of the State's evidence, on 17 August 2016, defendant entered into a plea agreement with the State, pleaded guilty to the charged offenses, and admitted his status as a habitual felon. However, defendant did not inform the court and the State that he intended to appeal the denial of his suppression motion during the plea negotiations, nor did he file a notice of intent to appeal the ruling before entering his guilty plea. The trial court sentenced defendant to 97 to 129 months in the custody of the North Carolina Division of Adult Correction.

On 24 August 2016, defendant filed with the trial court a handwritten, *pro se* notice of appeal, requesting review of his "conviction and sentence" and the denial of his motion to suppress. On 1 May 2017, defendant's court-appointed appellate counsel petitioned this Court to issue its writ of certiorari to review the ruling on his motion to suppress, despite defendant's failure to preserve the issue for appeal. On

12 May 2017, the State filed a response requesting that defendant's "petition be dismissed or denied."

## **II. Issues on Appeal**

### **A. Appeal from Denial of Motion to Suppress**

Although a defendant may appeal the denial of a suppression motion after pleading guilty, *see* N.C. Gen. Stat. § 15A-979(b) (2015), "[t]his statutory right . . . is conditional, not absolute." *State v. McBride*, 120 N.C. App. 623, 625, 463 S.E.2d 403, 404 (1995), *aff'd*, 344 N.C. 623, 476 S.E.2d 106 (1996). "Pursuant to this statute, a defendant bears the burden of notifying the state and the trial court during plea negotiations of the intention to appeal the denial of a motion to suppress, or the right to do so is waived after a plea of guilty." *Id.* "The rule in this state is that notice must be *specifically* given." *Id.*

Here, defendant concedes that he did not notify the trial court or the State that he intended to appeal the denial of his motion to suppress. Nevertheless, he contends that his right to appeal the ruling "has been lost by failure to take timely action," and accordingly urges this Court to allow his petition for writ of certiorari. N.C.R. App. P. 21(a)(1). However, we have "held that when a defendant pleads guilty without first notifying the State of the intent to appeal a suppression ruling, the defendant has *not* failed to take timely action, and thus this Court is without authority to grant a writ of certiorari." *State v. Harris*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 776 S.E.2d 554, 555 (2015)

(emphasis added) (citation and internal quotation marks omitted). “Rather, as in other cases involving a guilty plea, the right to appeal was lost because the defendant pleaded guilty, thereby waiving the right to appeal.” *Id.* Consequently, we dismiss defendant’s appeal of the denial of his suppression motion and deny his petition for writ of certiorari. *Id.*

**B. *Anders* Review**

Counsel appointed to represent defendant on appeal has filed a brief pursuant to *Anders v. California*, 386 U.S. 738, 18 L. Ed. 2d 493 (1967), indicating that after careful review, she “is unable to identify any issue with sufficient merit to support a meaningful argument for relief on appeal, and concludes that this appeal is wholly frivolous.” She asks this Court to conduct its own review of the record for possible prejudicial error. Counsel has filed documentation with the Court showing that she has complied with the requirements of *Anders* 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 the Court and providing him with a copy of the documents pertinent to his appeal.

Defendant has not filed any written documents on his own behalf with this Court, and a reasonable time for him to do so has expired. In accordance with *Anders*, we have fully examined the record and are unable to find any prejudicial error. We have, however, identified two clerical errors within defendant’s prior record level worksheet.

First, the worksheet indicates that on 16 March 2006, defendant was convicted in New Hanover County of possession of drug paraphernalia and maintaining a dwelling, both Class 1 misdemeanors. N.C. Gen. Stat. §§ 90-113.22(b), 90-108(b). In calculating defendant's prior record level, the trial court improperly assessed defendant one sentencing point for each of these convictions. Pursuant to N.C. Gen. Stat. § 15A-1340.14(d), only one of these convictions should have been used. *See* N.C. Gen. Stat. § 15A-1340.14(d) (providing that "if an offender is convicted of more than one offense in a single superior court during one calendar week, only the conviction for the offense with the highest point total is used[,] and "[i]f an offender is convicted of more than one offense in a single session of district court, only one of the convictions is used").

Second, the trial court assessed defendant an additional sentencing point pursuant to N.C. Gen. Stat. § 15A-1340.14(b)(7). The court may assign one point under certain circumstances:

[i]f the offense was committed while the offender was on supervised or unsupervised probation, parole, or post-release supervision, or while the offender was serving a sentence of imprisonment, or while the offender was on escape from a correctional institution while serving a sentence of imprisonment . . . .

N.C. Gen. Stat. § 15A-1340.14(b)(7). However, the trial court failed to select any of three boxes available on the prior record level worksheet that would indicate the reason why defendant was assigned the additional sentencing point.

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*Opinion of the Court*

Although we have determined that the trial court erred in assessing defendant two sentencing points, these errors did not affect the calculation of defendant's prior record level. The trial court assigned defendant a prior record level of VI based on 23 sentencing points. Pursuant to N.C. Gen. Stat. § 15A-1340.14(c)(6), offenders who have "[a]t least 18 points" are sentenced at a prior record level VI. Therefore, even after subtracting the two erroneous points from the trial court's calculation, defendant's prior record level remains the same.

Nevertheless, "[w]hen, on appeal, a clerical error is discovered in the trial court's judgment or order, it is appropriate to remand the case to the trial court for correction because of the importance that the record speak the truth." *State v. Smith*, 188 N.C. App. 842, 845, 656 S.E.2d 695, 696 (2008) (citation and internal quotation marks omitted). Accordingly, we affirm the trial court's judgment but remand for the limited purpose of correcting the aforementioned clerical errors.

AFFIRMED; REMANDED FOR CORRECTION OF CLERICAL ERRORS.

Judges TYSON and MURPHY concur.

Report per Rule 30(e).