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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-26

Filed: 2 October 2018

Johnston County, Nos. 14 CRS 55188, 15 CRS 53276

STATE OF NORTH CAROLINA

v.

VAN BUREN KILLETTE, SR.

Appeal by defendant from judgment entered 6 July 2017 by Judge Thomas H. Lock in Johnston County Superior Court. Heard in the Court of Appeals 20 September 2018.

Attorney General Joshua H. Stein, by Assistant Attorney General Nancy Dunn Hardison, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Katy Dickinson-Schultz, for defendant-appellant.

TYSON, Judge.

Van Buren Killette, Sr. (“Defendant”) appeals from a judgment entered upon his guilty plea to two counts of manufacturing methamphetamine. Defendant did not preserve his right to appeal the denial of his suppression motion. We dismiss the appeal.

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I. Factual Background

On 30 September 2014, law enforcement officers assisted with a probation search of Defendant's residence. Defendant's probation officer conducted the search on the basis of tips received by other officers indicating that stolen property and drugs were present at the residence. Upon arrival, officers asked for and received Defendant's consent to search the property. The search resulted in the discovery of stolen property as well as items used to manufacture methamphetamine. Defendant was placed under arrest.

On 18 June 2015, law enforcement officers accompanied department of social services workers to Defendant's residence. Both organizations had received complaints that methamphetamine was being produced and used around children. As the officers approached, they observed individuals running from a mobile home. The officers observed a cloud of smoke coming from the back door that had been left standing open. The officers entered the home to determine whether children were, in fact present, and noticed an active "one-pot" meth lab in the kitchen. Defendant was arrested and subsequently indicted for manufacturing methamphetamine.

II. Procedural Background

Defendant was indicted in 14 CRS 55185 for breaking and entering and larceny occurring in September 2014. He was indicted in 14 CRS 55188 for manufacturing and possession of methamphetamine and its immediate precursor chemicals in

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September 2014. Defendant was indicted in 14 CRS 55189 for maintaining a dwelling for actions occurring in September 2014.

For the actions occurring on 18 June 2015, Defendant was indicted in 15 CRS 53276 for manufacturing methamphetamine, possession of a precursor chemical and conspiracy to manufacture methamphetamine; in 15 CRS 53277, for resisting an officer; and in 17 CRS 00660 for trafficking in methamphetamine.

Defense counsel filed a motion to suppress the items seized in the September 2014 search and the hearing on this motion was held 3 May 2017. At the conclusion of the hearing, the parties consented to the court ruling out of session. The court signed a written order denying Defendant's motion to suppress on 6 July 2017, which was filed 7 July 2017.

Defense counsel also filed a motion to suppress the items seized from the June 2015 search; the hearing on this motion was held 18 May 2017. At the conclusion of this hearing, the trial court orally denied the motion to suppress, and filed a written order memorializing its ruling on 7 June 2017.

On 6 July 2017, Defendant entered an *Alford* plea pursuant to a plea arrangement with the State to the two counts of manufacturing methamphetamine, 14 CRS 55188 and 15 CRS 53276. In exchange, the State dismissed the remaining charges. The trial court consolidated the offenses into one judgment, in accordance with the terms of the plea arrangement. Defendant was sentenced to a term of 120

to 156 months of imprisonment. On 10 July 2017, Defendant filed a handwritten notice of appeal.

Defendant's notice of appeal was filed *pro se* appealing "the decision made in reference to the file number 14 CRS 055188 and 15 CRS 53276." The notice is addressed "To The Clerk of Superior Court" and does not reflect an appeal to this Court or that the notice was served on the State. Nonetheless, appellate entries were completed and counsel was appointed. Defendant's appellate counsel filed a petition for writ of certiorari to allow Defendant to pursue his direct appeal to this Court.

III. Intent to Appeal Denial of Motion to Suppress Evidence

Defendant's sole argument on appeal is that the trial court erred by denying his motion to suppress the evidence obtained from the probation officer's search in September 2014. We do not reach the merits of Defendant's argument and dismiss Defendant's appeal for his failure to preserve this issue when he entered his guilty plea.

[W]hen a defendant intends to appeal from the denial of a suppression motion pursuant to [N.C. Gen. Stat. § 15A-979(b)], he must give notice of his intention to the prosecutor and to the court before plea negotiations are finalized; otherwise, he will waive the appeal of right provisions of the statute.

State v. Tew, 326 N.C. 732, 735, 392 S.E.2d 603, 605 (1990) (citation omitted).

"[N]otice of intent to appeal the denial of a motion to suppress [must] be *specifically* given to the trial court and prosecution prior to the entry of a guilty plea." *State v.*

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Pimental, 153 N.C. App. 69, 74, 568 S.E.2d 867, 870, *disc. review denied*, 356 N.C. 442, 573 S.E.2d 163 (2002).

“[The] 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.” *State v. McBride*, 120 N.C. App. 623, 625, 463 S.E.2d 403, 404 (1995). Moreover, “[t]hat portion of the record on appeal reflecting the proceedings in the trial court must show that appellant has the statutory right to appeal.” *State v. Brown*, 142 N.C. App. 491, 493, 543 S.E.2d 192, 193 (2001).

In this case, no evidence in the record shows Defendant provided notice of his intent to appeal the denial of the motion to suppress prior to pleading guilty. Defendant’s written Transcript of Plea does not indicate his intention to appeal the denial of his motion to suppress. Nothing in the transcript of the proceedings demonstrates Defendant indicated he intended to appeal the denial of his motion to suppress prior to entering his guilty plea. Defendant has waived his right to appeal this issue. *See Tew*, 326 N.C. at 735, 392 S.E.2d at 605.

Acknowledging this failure, Defendant has filed a petition for writ of certiorari in order to provide this Court with an alternative basis to review his argument. He contends that he “was not given an opportunity to indicate his intent to appeal the

denial of his motion to suppress during the hearing because Judge Lock made his ruling out of session.”

Here, the transcript of the hearing and plea indicates all parties were aware the trial court had denied the motion to suppress. Defense counsel reminds Judge Lock that he had heard “the suppression motion on the 2014 case.” After accepting Defendant’s plea and imposing a sentence, the trial court asks the prosecutor to “double-check the court file and make sure that the written order denying the motion to suppress has been signed and tendered.” Defense counsel thanks the court and the prosecutor agreed to do so. Defendant’s plea arrangement preceded entry of his guilty plea and occurred in open session. Defendant failed to give any notice of appeal.

The written plea transcript provided in the record on appeal contains no notation that Defendant reserved his right to appeal the denial of the motion to suppress. At no point did Defendant indicate he wished to appeal the clearly denied motion to suppress the evidence seized in September 2014.

This Court has held that, unless a defendant properly preserves his right to appeal the denial of a motion to suppress, “we lack authority to allow the petition for a writ of certiorari to review the suppression ruling.” *State v. Harris*, 243 N.C. App. 137, 141, 776 S.E.2d 554, 556 (2015).

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Since we dismiss Defendant's appeal for failure to preserve his right to appeal the denial of his motion to suppress, we do not need to address Defendant's request in his petition for writ of certiorari that this Court review his appeal despite the potential appellate rule violations in Defendant's purported written notice of appeal.

IV. Conclusion

Defendant preserved no error entitling him to appeal the judgment entered upon his guilty plea. We dismiss Defendant's appeal and deny the writ of certiorari.

It is so ordered.

DISMISSED.

Judges INMAN and BERGER concur.

Report per Rule 30(e).