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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-743

Filed: 16 July 2019

Hoke County, No. 15 CRS 051909

STATE OF NORTH CAROLINA

v.

BRANDON R. AKINS, Defendant.

Appeal by Defendant from judgment entered 15 August 2017 by Judge Tanya T. Wallace in Hoke County Superior Court. Heard in the Court of Appeals 14 March 2019.

*Attorney General Joshua H. Stein, by Assistant Attorney General Anna Szamosi, for the State.*

*Appellate Defender Glenn G. Gerding, by Assistant Appellate Defender Michele A. Goldman, for defendant-appellant.*

MURPHY, Judge.

Defendant, Brandon R. Akins, was charged with Assault on a Female arising out of an incident on 6 December 2015. After being convicted of that charge in District Court, Defendant appealed to Superior Court. After numerous settings on administrative and trial calendars, Defendant's privately retained counsel moved to

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withdraw, which the trial court granted on 7 August 2017. The Public Defender's Office was appointed to represent Defendant. Defendant next appeared in court represented by the public defender, and the State indicated it was ready to proceed to trial. The trial court asked Defendant whether he wished to proceed to trial or be heard on his previously filed *pro se Motion to Dismiss Speedy Trial*. After consultation with his attorney, Defendant stated that he wanted to proceed to trial and withdrew his motion to dismiss.

The State sought to introduce evidence of previous assaults of the victim by Defendant, and the trial court conducted a hearing on the admissibility of this evidence. The trial court ruled that the evidence was admissible under Rule 404(b) of the North Carolina Rules of Evidence and should not be excluded under Rule 403. The State introduced this evidence without a renewed objection from Defendant's counsel at trial. At the close of the State's evidence, the trial court denied Defendant's motion to dismiss, and Defendant presented his evidence. The jury subsequently convicted Defendant of Assault on a Female, and the trial court entered judgment on 15 August 2017, sentencing Defendant to an active term of 50 days. Defendant gave oral notice of appeal in open court.

On 31 August 2017, Defendant filed a motion for appropriate relief (MAR), alleging ineffective assistance of counsel, obstruction of justice, a speedy trial violation, and perjury. The trial court subsequently entered an order on 1 May 2018

denying Defendant's MAR because it "was filed outside of the ten (10) day time period prescribed by N.C.G.S. [§] 15A-1414 . . . ." Defendant petitions this Court to grant a writ of certiorari to review the denial of his MAR.

**ANALYSIS**

***A. Anders***

Appellate counsel for Defendant submits that "after repeated and close examination of the record, extensive review of relevant law, and consultation with attorneys within the Office of the Appellate Defender, [she] is unable to identify an issue with sufficient merit to support a meaningful argument for relief on direct appeal" and asks us to conduct an independent review of the record for possible prejudicial or plain error. Appellate counsel has shown to our satisfaction that she 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 him with the documents necessary to do so on 25 September 2018. Defendant has not filed any written arguments on his own behalf, and a reasonable time for him to do so has expired.

In accordance with *Anders*, we have fully examined the record to determine whether any issues of arguable merit exist, including, but not limited to, the potential issues identified by counsel in Defendant's brief. We agree with counsel that those

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issues do not establish plain error and are not meritorious. *See generally State v. Hayes*, 350 N.C. 79, 80, 511 S.E.2d 302, 303 (1999). We are unable to identify any plain error in Defendant's trial or the judgment entered upon his convictions.

**B. Petition for Writ of Certiorari**

Defendant also petitions this court to grant a writ of certiorari to review the trial court's order denying his motion for appropriate relief (MAR). We grant Defendant's petition for the limited purpose of vacating the trial court's order.

N.C.G.S. § 15A-1448(a)(3) states: "The jurisdiction of the trial court with regard to the case is divested, except as to actions authorized by G.S. 15A-1453, when notice of appeal has been given and the period described in (1) and (2) has expired." N.C.G.S. § 15A-1448(a)(3) (2017). Defendant gave oral notice of appeal upon judgment, and his subsequent MAR was filed after the ten-day period described in N.C.G.S. § 15A-1414. The trial court was without jurisdiction to consider the motion, and the appropriate remedy was to dismiss Defendant's MAR rather than to deny the motion. Accordingly, the trial court's order should be vacated. As the State notes, Defendant "is not barred from pursuing his [ineffective assistance of counsel] claims" through a subsequent MAR. *See* N.C.G.S. § 15A-1415(b)(3); *State v. House*, 340 N.C. 187, 196-97, 456 S.E.2d 292, 297 (1995).

**CONCLUSION**

For the reasons stated above, we find no plain error.

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NO PLAIN ERROR IN PART; VACATED IN PART.

Chief Judge McGEE and Judge BERGER concur.

Report per Rule 30(e).