

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA23-231

Filed 19 September 2023

Henderson County, Nos. 20CRS53541-45, 53549, 21CRS247-48

STATE OF NORTH CAROLINA

v.

DOMINIQUE LAMAR FORE, Defendant.

Appeal by defendant from judgments entered 2 September 2022 by Judge Peter B. Knight in Henderson County Superior Court. Heard in the Court of Appeals 29 August 2023.

*Attorney General Joshua H. Stein, by Assistant Attorney General Elizabeth B. Jenkins, for the State.*

*Drew Nelson, for defendant-appellant.*

PER CURIAM.

On 2 September 2022, Dominique Lamar Fore (“Defendant”) pled guilty to felony fleeing to elude arrest; misdemeanor resisting a public officer; possession of drug paraphernalia; felony possession with intent to manufacture, sell, or deliver a Schedule II controlled substance; felony possession of a Schedule II controlled substance; possession of a stolen motor vehicle; driving with a revoked license while subject to an impaired revocation; trafficking in opium or heroin by possession; and

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being a habitual felon. That same day, the trial court sentenced Defendant to the bottom of the mitigated range of 76 to 104 months' imprisonment, with eight days of credit for pretrial confinement. Defendant gave oral notice of appeal.

Defendant argues the trial court erred by (1) denying Defendant his constitutional right to due process, and (2) improperly interpreting North Carolina's jail-credit statute, N.C. Gen. Stat. § 15-196.1 (2021). We will not consider the merits of Defendant's first argument, and the Record is insufficient to address his second argument.

Defendant has filed a petition for writ of certiorari ("PWC"), as Defendant pled guilty to the charges at issue. *See* N.C. Gen. Stat. § 15A-1444. As Defendant has failed to "show merit or that error was probably committed below[.]" we dismiss his PWC. *State v. Grundler*, 251 N.C. 177, 189, 111 S.E.2d 1, 9 (1959).

It is well established that "[t]he theory upon which a case is tried in the lower court must control in construing the record and determining the validity of exceptions[.]" and "a constitutional question which is not raised and passed upon in the trial court will not ordinarily be considered on appeal." *State v. Hunter*, 305 N.C. 106, 112, 286 S.E.2d 535, 359 (1982). Here, Defendant made no allegation at the trial level of his due process rights being violated when the orders for his arrest were issued on 20 September 2021, and Defendant was not served with these orders until 1 September 2022. Rather, Defendant's trial argument strictly concerned statutory interpretation. As Defendant did not raise this constitutional question at the trial

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level, and it is not the theory upon which Defendant was tried, we will not consider it on appeal. *See id.* at 112, 286 S.E.2d at 359.

As to Defendant’s argument concerning the jail-credit statute, N.C. Gen. Stat. § 15-196.1, this Court has explained, “the appropriate procedure to address this issue is to first seek relief in the trial court under N.C. Gen. Stat. § 15-196.4[,] . . . [so that] the defendant has an opportunity to build a record that will afford meaningful appellate review of the issue.” *State v. Galloway*, 271 N.C. App. 469, 471, 844 S.E.2d 326, 328 (2020). The Record shows Defendant was incarcerated in Buncombe County Jail from 23 February 2021 until 1 September 2022 and Defendant argues, pursuant to N.C. Gen. Stat. § 15-196.1, he should have been given credit for this time spent incarcerated. Per the appropriate procedure, we will not address this issue and dismiss it “*without prejudice* so that [Defendant] may, if he chooses, seek relief in the trial court and then, if necessary, return to this Court with an appropriate record.” *Galloway*, 271 N.C. App. at 471, 844 S.E.2d at 328 (emphasis in original); *see* N.C. Gen. Stat. § 15-196.4 (2021).

DISMISSED.

Panel consisting of:

Judges ZACHARY, HAMPSON, and FLOOD

Report per Rule 30(e).