An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA23-783

Filed 5 December 2023

Beaufort County, Nos. 22-CRS-50700, 50702

STATE OF NORTH CAROLINA

v.

MAXWELL DEVON OGLESBY

Appeal by defendant from judgment entered 7 February 2023 by Judge L. Lamont Wiggins in Beaufort County Superior Court. Heard in the Court of Appeals 20 November 2023.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Kristin J. Uicker, for State-appellee.

Office of the Appellate Defender, by Assistant Appellate Defender Kathryn L. VandenBerg and Appellate Defender Glenn Gerding, for defendant-appellant.

PER CURIAM.

Defendant Maxwell Devon Oglesby appeals from a judgment entered upon his guilty plea finding him guilty of possession of marijuana, failure to superintend, and engaging in unlawful conduct at a business serving alcohol. On appeal, defendant contends that the trial court erred in failing to properly determine conditional

discharge pursuant to N.C. Gen. Stat. § 90-96. After careful review, as to the misdemeanor possession of marijuana judgment, we vacate and remand for a new sentencing hearing. We affirm the remaining two judgments.

I. Factual Background and Procedural History

On 13 April 2022, officers with the North Carolina Alcohol Law Enforcement Agency observed defendant Maxwell Devon Oglesby (defendant), the owner and operator of a bar in New Bern, "consuming malt beverages while . . . bartend[ing]," and shortly thereafter, observed defendant "outside in a vehicle smoking marijuana." On 28 November 2022, the Beaufort County grand jury returned true bills of indictment against defendant for (1) possession with intent to sell and deliver marijuana, (2) delivery of marijuana, (3) failure to superintend a business serving alcohol, and (4) unlawful conduct on the premises of a business serving alcohol.

On 7 February 2023, defendant entered a guilty plea in Beaufort County Superior Court for (1) misdemeanor possession of marijuana, (2) misdemeanor failure to superintend and (3) engaging in unlawful conduct at a business serving alcohol. At the sentencing hearing, defense counsel requested that the court "consider a 90-96 on the marijuana charge" so that defendant could "keep that off his record." The trial court immediately denied defendant's request, stating that due to "the agreement in place, the [c]ourt is gonna decline a 90-96 at this time."

Defendant was ordered to serve 45 days in the custody of the Beaufort County Detention Center with a suspended sentence of 18 months, and placed on supervised probation for 18 months pursuant to his misdemeanor possession of marijuana plea. Pursuant to his failure to superintend plea, defendant was ordered to serve 45 days in the custody of the Beaufort County Detention Center, with a suspended sentence of 18 months. Defendant was also sentenced to 30 days in the custody of the Beaufort County Detention Center for his plea of conducting controlled substance activity on an ABC licensed premises, with that sentence suspended for 18 months. The trial court entered judgment on 7 February 2023, and from that judgment, defendant filed timely written notice of appeal.

II. Analysis

A. Standard of review

"Questions of statutory interpretation are questions of law, which are reviewed *de novo* by an appellate court." *State v. Dail*, 255 N.C. App. 645, 647, 805 S.E.2d 737, 739 (2017) (citation and internal quotation marks omitted).

B. Appellate jurisdiction

"Under [N.C. Gen. Stat.] § 15A-1444(e), a defendant who has entered a plea of guilty is not entitled to appellate review as a matter of right, unless the defendant is appealing sentencing issues or the denial of a motion to suppress, or the defendant has made an unsuccessful motion to withdraw the guilty plea." *Id.* (citation and brackets omitted), *see also* N.C. Gen. Stat. § 15A-1444(e) (2021) (stating that a

criminal defendant "is not entitled to appellate review as a matter of right" when the defendant has entered a guilty plea). Moreover, "[a] statute will automatically preserve an issue for appellate review if the statute either: (1) requires a specific act by a trial judge; or (2) leaves no doubt that the legislature intended to place the responsibility on the judge presiding at the trial." *State v. Austin*, 378 N.C. 272, 276, 861 S.E.2d 523, 527 (2021) (citation and internal quotation marks omitted).[1] Finally, a defendant "may petition the appellate division for review by writ of certiorari." *See* N.C.R. App. P. 21(a)(1) (granting our Court authority to issue a writ of certiorari "in appropriate circumstances" to review judgments and orders of trial tribunals).[2]

Here, defendant appeals a sentencing issue, whether the trial court failed to properly determine conditional discharge pursuant to N.C. Gen. Stat. § 90-96, which "entitle[s] [defendant] to appellate review as a matter of right . . . ." *Dail*, 255 N.C. App. at 647, 805 S.E.2d at 739. Consequently, we dismiss defendant's petition for writ of certiorari as moot.

C. Conditional discharge under N.C. Gen. Stat. § 90-96

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[1] As will be discussed below, "the 'shall' language of N.C. Gen. Stat. § 90-96 constitutes a 'mandate to trial judges,' *Dail*, 255 N.C. App. at 649, 805 S.E.2d at 740, and therefore, "automatically preserve[s] [the] issue for appellate review . . . ." *Austin*, 378 N.C. at 276, 861 S.E.2d at 527.

[2] Assuming, *arguendo*, that appellate jurisdiction has not conferred pursuant to N.C. Gen. Stat. § 15A-1444(e) or N.C. Gen. Stat. § 90-96's statutory mandate, out of an abundance of caution, defendant has filed a petition for writ of certiorari, which we, in our discretion, dismiss as moot.

On appeal, defendant argues, and the State concedes, that the trial court "erred in failing to properly determine conditional discharge under [N.C. Gen. Stat.] § 90-96" for the misdemeanor possession of marijuana judgment. We agree.

N.C. Gen. Stat. § 90-96 allows for an alternative sentence, a "conditional discharge," where a criminal defendant is convicted of possession of a controlled substance for the first time. *See* N.C. Gen. Stat. § 90-96(a) (2021). The statute provides in pertinent part that:

> [T]he court shall, without entering a judgment of guilt and with the consent of the person, defer further proceedings and place the person on probation upon such reasonable terms and conditions as it may require, unless the court determines with a written finding, and with the agreement of the District Attorney, that the offender is inappropriate for a conditional discharge for factors related to the offense.

N.C. Gen. Stat. § 90-96(a).

In *State v. Dail*, the trial court denied the defendant's request for a conditional discharge pursuant to N.C. Gen. Stat. § 90-96 because the defendant "has already endured the benefit of dismissal for . . . the other drug-related charges." *Dail*, 255 N.C. App. at 648, 805 S.E.2d at 740. However, "where an eligible first-time offender consents to sentencing under the conditional discharge program, the 'shall' language of N.C. Gen. Stat. § 90-96 constitutes a 'mandate to trial judges,' and that failure to comply with that mandate constitutes reversible error." *Id.* at 649, 805 S.E.2d at 740.

Our Court vacated the judgment of the trial court and remanded the matter for resentencing, noting that "[a]t no point did the State offer any opinion in favor of or against conditional discharge[,]" *id.* at 648, 805 S.E.2d at 740, and that "the burden is on the State to establish that defendant is not eligible for conditional discharge by proving defendant's prior record." *Id.* at 650, 805 S.E.2d at 741. Ultimately, "a trial court *must* place an eligible defendant under a conditional discharge, unless the trial court determines with a written finding, and with the agreement of the District Attorney, that the offender is inappropriate for a conditional discharge for factors related to the offense." *State v. Campbell*, 285 N.C. App. 480, 488, 878 S.E.2d 312, 318 (2022).

Here, as in *Dail*, "defendant contends that he [i]s a first-time offender, and he consented to participation in the conditional discharge program, meaning that the statutory language 'the court *shall*' constituted a mandate that the trial court could not ignore." *Dail*, 255 N.C. App. at 648, 805 S.E.2d at 740. Similarly, "the plea agreement did not contemplate that [] defendant could not be placed on probation pursuant to § 90-96." *Id.* at 649, 805 S.E.2d at 740.

Moreover, our careful review of the transcript reveals that the District Attorney offered no opinion as to whether "the [defendant] [wa]s inappropriate for a conditional discharge for factors related to the offense." *Campbell*, 285 N.C. App. at 488, 878 S.E.2d at 318. During the sentencing hearing, defense counsel noted that defendant's record only "has motor vehicle violations[,]" there are "[n]o type of drug

offenses[,] [n]o type of criminal offenses, . . . I would ask the [c]ourt to possibly consider a 90-96 on the marijuana charge so [defendant] can keep that off his record." **[T 10]** The court immediately declined the 90-96 request, '[b]ased on the agreement in place[,]" without inquiring of the District Attorney whether defendant was "inappropriate for a conditional discharge . . . ." N.C. Gen. Stat. § 90-96(a).

As established in *Dail*, "[t]he trial court *shall* follow the procedure for the consideration of eligibility for conditional discharge as prescribed by statute." *Dail*, 255 N.C. App. at 650, 805 S.E.2d at 741 (emphasis added). Therefore, as to the misdemeanor possession of marijuana judgment, we conclude that the trial court failed to comply with the statutory mandate of N.C. Gen. Stat. § 90-96(a) when it denied defendant's request for conditional discharge without "the agreement of the District Attorney," or "a written finding . . . that the offender is inappropriate for a conditional discharge for factors related to the offense." *Campbell*, 285 N.C. App. at 488, 878 S.E.2d at 318.

Defendant established his eligibility for, and consented to, sentencing under the conditional discharge program; and as "an eligible first-time offender" defendant "consents to sentencing under the conditional discharge program," therefore, "the 'shall' language of N.C. Gen. Stat. § 90-96 constitutes a 'mandate to trial judges,' and th[e] failure to comply with that mandate constitutes reversible error." *Dail*, 255 N.C. App. at 649, 805 S.E.2d at 740. Consequently we "vacate the trial court's judgment [for misdemeanor possession of marijuana], and remand this matter to the trial court

for a new sentencing hearing." *Id.* at 650, 805 S.E.2d at 741. Furthermore, we affirm the remaining two judgments.

III. Conclusion

For the aforementioned reasons, we conclude that the trial court committed reversible error in failing to follow the procedure for consideration of defendant's eligibility for conditional discharge as prescribed by N.C. Gen. Stat. § 90-96(a). The judgment of the trial court is therefore vacated and the matter is remanded for a new sentencing hearing.

AFFIRMED IN PART; VACATED AND REMANDED IN PART.

Panel consisting of: Chief Judge STROUD and Judges STADING and THOMPSON.

Report per Rule 30(e).