

NORTH CAROLINA COURT OF APPEALS

STATE OF NORTH CAROLINA)	
)	
v.)	<u>From Forsyth</u>
)	
AMANDA LEA ROSE)	

STATE'S MOTION TO DISMISS
DEFENDANT'S APPEAL

TO: THE HONORABLE CHIEF JUDGE AND ASSOCIATE JUDGES OF THE NORTH
CAROLINA COURT OF APPEALS

NOW COMES the State of North Carolina, by and through Roy Cooper, Attorney General, and Laura E. Parker, Assistant Attorney General, and moves that this Court dismiss defendant's appeal. In support of this motion, the State shows this Court the following:

PROCEDURAL HISTORY

1. On 10 May 2011, defendant was charged with driving with an expired registration and no operator's license. (R p. 2)
2. On 30 November 2011, a hearing was held before the Honorable V. Bradford Long, Superior Court Judge Presiding. At this hearing, Judge Long heard several "paper writings" filed by the defendant, which he characterized as a "jurisdictional challenge to the right of this court to have personal jurisdiction over you to proceed with this trial." (T p. 46; R pp. 3-9) The court found that "there is no merit to the jurisdictional challenge of the defendant." (T p. 70)
3. Following the hearing, the defendant pled guilty to no

operator's license, a class 2 misdemeanor, and the State dismissed the expired registration charge. (T pp. 88-98) The plea arrangement specified that "the defendant preserves the right to appeal the jurisdictional rulings of this court." (T pp. 92, 95, 102) The court sentenced the defendant as a record level I and remitted the cost. (T p. 103) She received no sentence of imprisonment. (T p. 103)

4. On 9 December 2011, defendant filed a written notice of appeal. (R pp. 67-68) The record on appeal was filed on 23 April 2012 and mailed from the clerk's office on 25 April 2012. Defendant filed a motion for extension of time in which to file defendant's brief on 22 May 2012. This Court allowed the motion on 23 May 2012, requiring defendant's brief to be filed on 25 June 2012.

REASONS WHY DEFENDANT'S APPEAL SHOULD BE DISMISSED

Defendant's appeal should be dismissed. This is so because defendant has no right to appeal the Superior Court's ruling on jurisdiction, nor any of the other proposed issues on appeal, because she pled guilty.

As an initial matter, there is no constitutional right to an appeal. See Abney v. United States, 431 U.S. 651, 656, 52 L. Ed. 2d 651, 657-58 (1977) ("The right of appeal, as we presently know it in criminal cases, is purely a creature of statute; in order to exercise that statutory right of appeal one must come within the terms of [an] applicable statute."). Thus, in North Carolina, in order for a defendant to be entitled to an appeal as a matter of

right, the General Assembly must have provided that the defendant possesses such a right. See State v. Shoff, 118 N.C. App. 724, 725, 456 S.E.2d 875, 876 (1995) (stating that “[t]he right to appeal in a criminal proceeding is purely statutory.”), aff’d, 342 N.C. 638, 466 S.E.2d 277 (1996).

Here, defendant has no statutory right to appeal because she pled guilty pursuant to a plea arrangement, which mooted the only issues she could have properly raised on appeal. N.C.G.S. § 15A-1444(e) (2011). Under N.C.G.S. § 15A-1444, a defendant who has pled guilty has a right to appeal only the following issues: (1) whether the sentence is supported by the evidence (if defendant has been convicted of a felony and the minimum term of imprisonment does not fall within the presumptive range); (2) whether the sentence results from an incorrect finding of the defendant’s prior record level under N.C.G.S. § 15A-1340.14 or the defendant’s prior conviction level under N.C.G.S. § 15A-1340.21; (3) whether the sentence contains a type of sentence not authorized by N.C.G.S. § 15A-1340.17 or § 15A-1340.23 for the defendant’s class of offense and prior record or conviction level; and (4) whether the trial court improperly denied the defendant’s motion to withdraw his guilty plea. State v. Jamerson, 161 N.C. App. 527, 528-29, 588 S.E.2d 545, 546-47 (2003). Under N.C.G.S. § 15A-979(b) (2011) a defendant who has pled guilty may also appeal whether the trial court improperly denied the defendant’s motion to suppress. Id.

Defendant was sentenced on 30 November 2011 by the Honorable V. Bradford Long as a record level I and remitted the cost. (T p.

103) She received no sentence of imprisonment. (T p. 103) Defendant does not seek review of her prior record level, her sentence disposition, or the duration of her sentence. Defendant did not make a motion to withdraw her guilty plea that was denied. Finally, defendant filed no motion to suppress that was denied prior to entering her guilty plea.

Defendant has not filed a petition for writ of certiorari with this Court and has no right to do so. Certiorari is to be issued "in appropriate circumstances" to permit review of a judgment of the trial court "when the right to prosecute an appeal has been lost by failure to take timely action, or when no right of appeal from an interlocutory order exists, or for review pursuant to N.C.G.S. § 15A-1422(c) (3) of an order of the trial court denying a motion for appropriate relief." N.C. R. App. P. 21(a) (1) (2011). Defendant has not lost the right to prosecute the appeal by failure to take timely action. Judge Long's ruling was not an interlocutory order. Nor has defendant filed a motion for appropriate relief that has been denied. This Court has concluded "that since the appellate rules prevail over conflicting statutes, we are without authority to issue a writ of certiorari except as provided in Rule 21." Jamerson, 161 N.C. App. at 529, 588 S.E.2d at 547

"[W]hile it is true that a defendant may challenge the jurisdiction of a trial court, such challenge may be made in the appellate division only if and when the case is properly pending before the appellate division.'" Jamerson, 161 N.C. App. at 529,

588 S.E.2d at 547 (quoting State v. Absher, 329 N.C. 264, 265 & n.1, 404 S.E.2d 848, 849 & n.1 (1991)). As defendant's case is not properly pending before this Court, either by appeal or by writ of certiorari, her jurisdictional challenge is prohibited.

Defendant is not without available remedy. N.C.G.S. § 15A-1415(b) (2) (2011) permits a defendant to assert in a motion for appropriate relief that the trial court lacked personal or subject matter jurisdiction.

This appeal should furthermore be dismissed as the defendant has violated numerous appellate rules. This Court has frequently held that the Rules of Appellate Procedure "are mandatory, not directory, and must be uniformly enforced." State v. Farrell, 3 N.C. App. 196, 199-200, 164 S.E.2d 388, 390 (1968). It is well-established that "[i]t is the appellant's duty and responsibility to see that the record is in proper form and complete." State v. Alston, 307 N.C. 321, 341, 298 S.E.2d 631, 644-45 (1983). The Rules of Appellate Procedure provide that the Record on Appeal "shall contain," inter alia: (1) "copies of all warrants, informations, presentments, and indictments upon which the case has been tried in any court"; (2) "copies of docket entries or a statement showing all arraignments and pleas"; (3) "copies of the verdict and of the judgment, order, or other determination from which appeal is taken"; (4) "any agreement, notice of approval, or order settling the record on appeal"; and (5) "copies of all other papers filed" that "are necessary for an understanding of all issues presented on appeal." N.C. R. App. P.

9(a)(3).

Here, the Record on Appeal fails to contain the judgment entered in district court. A copy of the front of the defendant's citation is included in the Record on Appeal but is devoid of any indication of defendant's plea or the district court's verdict, judgment, and sentence. (R p. 2) Because of this jurisdictional deficiency, the appeal is subject to dismissal. See State v. Banks, 241 N.C. 572, 573, 86 S.E.2d 76, 77 (1955) (per curiam) ("The record fails to disclose jurisdiction in the court below. As that court was without jurisdiction, in so far as this record discloses, we have none. Therefore, the appeal must be dismissed." (emphasis added) (internal quotation marks and citation omitted)); see also State v. Byrd, 4 N.C. App. 672, 674, 167 S.E.2d 522, 524 (1979).

Defendant has further failed to include a certified copy of the Superior Court judgment from which the appeal is taken, an agreement, notice of approval, or order settling the record on appeal, and the transcript of plea that was entered. The record on appeal is replete with pleadings, motions, affidavits, and other papers that do not show the date on which they were filed. (R pp. 2, 5-9, 10-58, 64-66); N.C. R. App. P. 9(b)(3) (2011). Finally, there is no documentation that the Record on Appeal has been settled as required by N.C. R. App. P. 11 (2011).

Defendant's failure to comply with the Rules of Appellate Procedure should result in a dismissal of her appeal. See N.C. R. App. P. 25(b) (2011) (stating that the Court may impose a sanction on a party for failure to substantially comply with the appellate

rules).

WHEREFORE, the State moves that this Court dismiss defendant's appeal.

Respectfully submitted this 25th day of May, 2012.

ROY COOPER
ATTORNEY GENERAL

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the foregoing **STATE'S MOTION TO DISMISS DEFENDANT'S APPEAL** upon defendant by placing same in the United States Mail, first class postage prepaid, addressed as follows:

Amanda Lea Rose
9097 Concord Church Rd.
Lewisville, NC 27023

This 25th day of May, 2012.

Electronically Submitted
Laura E. Parker
Assistant Attorney General