

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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

NO. COA05-303

NORTH CAROLINA COURT OF APPEALS

Filed: 20 December 2005

STATE OF NORTH CAROLINA

v.

Onslow County
Nos. 03 CRS 56823-24

WILLIE JERMAINE BURGESS

Appeal by defendant from judgment entered 20 October 2004 by Judge W. Allen Cobb, Jr. in Onslow County Superior Court. Heard in the Court of Appeals 19 October 2005.

Attorney General Roy Cooper, by Special Deputy Attorney General Lars F. Nance, for the State.

Jeffrey Evan Noecker for defendant-appellant.

CALABRIA, Judge.

Willie Jermaine Burgess ("defendant") appeals from judgment entered upon jury verdicts of guilty of: (1) possession with intent to sell and deliver cocaine, (2) knowingly maintaining a vehicle for the purpose of unlawfully keeping and selling controlled substances, (3) possession of marijuana, (4) possession of drug paraphernalia, and (5) carrying a concealed weapon. We grant defendant a new trial.

On 14 August 2003, the Jacksonville Police Department ("Jacksonville P.D.") received a tip from an informant, who

Jacksonville P.D. described as confidential and reliable. At trial, detective Timothy Carr ("Carr") of the Narcotics Special Operations Division testified that the informant said a black male with dreadlocks, driving a red Ford pickup truck with a handicap placard hanging from its rearview mirror, was in possession of cocaine. The informant reported the truck was located near Maypatch Road in Onslow County and warned the officers that the man had a small handgun. Jacksonville P.D. dispatched officers to the designated area. Carr and Detective Brown ("Brown") found at the intersection of Maypatch Road and Bell Fork Road a red Ford pickup truck with a handicapped placard hanging from its rearview mirror.

Carr asked another officer, Officer Saulsbury ("Saulsbury"), to stop the driver, who was later determined to be defendant. After stopping defendant, the officers instructed defendant three times to remove his hands from between the seat and the gearshift. Defendant eventually complied, and the officers removed him from the truck. Carr patted down defendant, and defendant consented to a search of his truck. Brown observed what appeared to be crack cocaine on the floor near the driver's seat and found a handgun between the seat and the gearshift. Upon further observation of the cocaine, Carr discovered "ten individual rocks or dosage units of the controlled substance." The officers also found sixteen photographs of defendant with narcotics, guns, and money on a table.

On 14 September 2004, defendant was indicted for: (1) manufacturing cocaine, (2) possession with intent to sell and

deliver cocaine, (3) maintaining a vehicle to keep and sell controlled substances, (4) possessing marijuana, (5) possessing drug paraphernalia, and (6) carrying a concealed weapon. On 20 October 2004, an Onslow County Superior Court jury acquitted defendant of manufacturing cocaine and convicted him of all other offenses. Judge W. Allen Cobb, Jr. consolidated the offenses for judgment and sentenced defendant within the presumptive range to a minimum of 6 months and a maximum of 8 months in the North Carolina Department of Correction. Defendant appeals.

Defendant argues that the trial court erred by not impaneling the jury under N.C. Gen. Stat. § 15A-1216, 15A-1221 (2003). The State responds that defendant waived his right to appellate review of this issue because the purported error was not brought to the attention of the trial court by appropriate and timely objection. See N.C. Gen. Stat. § 15A-1446(a) (2003). See also N.C. R. App. P. 10(b)(1) (2005). The State also presented evidence that the Clerk of Superior Court of Onslow County certified that the jury in this case had been impaneled. In *State v. Stephens*, this Court held that failing to impanel a jury was prejudicial error. We noted that "jeopardy does not attach until the jury is impaneled. This is too critical to the rights of defendant to say it is not prejudicial." 51 N.C. App. 244, 245, 275 S.E.2d 564, 565 (1981). Although defendant failed to raise this issue at trial and the Clerk of Superior Court of Onslow County certified that the jury had been impaneled, the trial transcripts reveal that the jury was

never impaneled. Therefore, in accordance with *Stephens*, we vacate defendant's convictions and grant him a new trial.

Having granted defendant a new trial, we need not address his other arguments on appeal.

New trial.

Judges HUDSON and BRYANT concur.

Report per Rule 30(e).