

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA09-455

NORTH CAROLINA COURT OF APPEALS

Filed: 22 December 2009

STATE OF NORTH CAROLINA

v.

Mecklenburg County
Nos. 07 CRS 240070-71

ANTONIO MARTINEZ

Appeal by defendant from judgment entered 27 May 2008 by Judge Linwood O. Foust in Mecklenburg County Superior Court. Heard in the Court of Appeals 7 December 2009.

Attorney General Roy Cooper, by Assistant Attorney General Stanley G. Abrams, for the State.

Richard E. Jester, for defendant-appellant.

CALABRIA, Judge.

Antonio Martinez ("defendant") appeals from a judgment entered upon his guilty plea to two counts of trafficking in heroin. Defendant contends that trial counsel rendered ineffective assistance by failing to file a timely motion to suppress evidence, and that, because of counsel's ineffective assistance, the trial court erred when it quashed his motion to suppress. We dismiss the appeal without prejudice to defendant's right to file a motion for appropriate relief in superior court based on ineffective assistance of trial counsel.

On 4 September 2007, the Mecklenburg County grand jury returned two indictments for trafficking in heroin against defendant. On 11 February 2008, the State served notice on defendant's attorney that it intended to utilize evidence obtained through a warrantless search. On 27 May 2008, defendant filed a motion to suppress evidence seized from his vehicle or person as a result of an allegedly unlawful detention. In response, the State filed a motion to quash defendant's motion to suppress. The State argued that the motion to suppress was not timely because defendant did not file it within ten days of receipt of the State's notice of intent to introduce evidence, as required by N.C. Gen. Stat. § 15A-976(b) (2007).

On 27 May 2008, a hearing on defendant's motion to suppress was conducted in Mecklenburg County Superior Court. After hearing the arguments of counsel, but without hearing any testimony or receiving other evidence relating to the substance of the suppression motion, the trial court found that defendant was served with notice of the State's intent to introduce the seized evidence more than ten days before defendant filed his motion to suppress, and allowed the State's motion to quash defendant's motion to suppress.

Defendant then pled guilty to two counts of trafficking in heroin and informed the trial court that he wished to preserve his right to appeal the suppression issue. At the plea hearing, the State summarized the factual basis necessary to support the plea. Officers saw an apparently unoccupied car parked, but running, in

a high crime area. When officers approached the car to investigate, they found defendant and a woman sleeping inside. An officer woke defendant, who was unable to provide a driver's license or other identification. Defendant consented to a search, and officers found two bags in his pockets that contained 4.9 and 4.5 grams of heroin. Officers found another 1.2 gram bag in the car, and \$1,182 in defendant's wallet. The trial court accepted the plea and consolidated the two counts into one judgment. Defendant was sentenced to a minimum of 70 months to a maximum of 84 months in the North Carolina Department of Correction. Defendant appeals.

Defendant argues that (1) trial counsel rendered ineffective assistance by failing to file the motion to suppress within the time period mandated by N.C. Gen. Stat. § 15A-976(b), and (2) the trial court erred in allowing the State's motion to quash the motion to suppress due to trial counsel's ineffectiveness. We dismiss these assignments of error.

To prevail on a claim of ineffective assistance of counsel, a defendant must make two showings:

First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a *trial whose result is reliable*.

State v. Braswell, 312 N.C. 553, 562, 324 S.E.2d 241, 248 (1985) (citation omitted).

"In general, claims of ineffective assistance of counsel should be considered through motions for appropriate relief and not on direct appeal." *State v. Stroud*, 147 N.C. App. 549, 553, 557 S.E.2d 544, 547 (2001). "A motion for appropriate relief is preferable to direct appeal because in order to defend against ineffective assistance of counsel allegations, the State must rely on information provided by defendant to trial counsel, as well as defendant's thoughts, concerns, and demeanor." *Id.* at 554, 557 S.E.2d at 547 (citation omitted).

In the instant case, we cannot properly evaluate defendant's claim of ineffective assistance of counsel on direct appeal because no evidentiary hearing was held on defendant's motion to suppress. Thus, it is not possible for this Court to surmise on the face of the record whether defendant was prejudiced by counsel's failure to file the motion to suppress within the allotted time. For the same reason, we cannot say that the trial court committed prejudicial error when it allowed the State's motion to quash. Accordingly, we dismiss this appeal without prejudice to defendant's right to file a motion for appropriate relief in superior court based on an allegation of ineffective assistance of trial counsel. *See State v. Kinch*, 314 N.C. 99, 106, 331 S.E.2d 665, 669 (1985).

Dismissed.

Judges WYNN and STROUD concur.

Reported per Rule 30(e).