

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA11-1509
NORTH CAROLINA COURT OF APPEALS

Filed: 19 June 2012

STATE OF NORTH CAROLINA

v.

Guilford County

Nos. 11 CRS 66888, 66890, 66891

NACOREE SATAUN UPCHURCH

Appeal by defendant from judgments entered 22 July 2011 by Judge Steve A. Balog in Guilford County Superior Court. Heard in the Court of Appeals 22 May 2012.

Attorney General Roy Cooper, by Assistant Attorney General Perry J. Pelaez for the State.

Jon W. Myers for defendant-appellant.

STEELMAN, Judge.

Where defendant asserts ineffective assistance of counsel, but the record contains insufficient facts to support that claim, we dismiss it without prejudice.

I. Factual and Procedural Background

On 8 December 2010 two Greensboro police officers were in the parking area of a restaurant, waiting to meet a third officer for lunch. They observed a Ford Mustang operated by Amy

Sinclair, with Anthony Long as a passenger, enter the parking area. Shortly thereafter, a Nissan truck operated by Nacoree Sataun Upchurch (defendant) entered the parking area. Long and defendant met in the truck, where defendant delivered a rectangular box to Long. Long hid the box under his coat upon leaving the truck. Suspicious that they had just witnessed a drug transaction, the officers followed the Mustang and stopped it. A drug dog alerted to the presence of drugs, and cocaine was found in the box.¹

On 7 March 2011, defendant was indicted for felony maintaining a vehicle for keeping and selling a controlled substance, conspiracy to possess 200-400 grams of cocaine, and trafficking in cocaine by delivery of 200-400 grams. On 22 July 2011, a jury found defendant guilty of all three charges. The charges were consolidated for judgment, and defendant was sentenced to an active term of imprisonment of 70-84 months.

Defendant appeals.

¹ The criminal case against Long is also pending on appeal before this Court. *State v. Long*, COA11-1363.

II. Ineffective Assistance of Counsel

In his only argument on appeal, defendant contends that he received ineffective assistance of counsel. We disagree.

A. Standard of Review

It is well established that ineffective assistance of counsel claims "brought on direct review will be decided on the merits when the cold record reveals that no further investigation is required, i.e., claims that may be developed and argued without such ancillary procedures as the appointment of investigators or an evidentiary hearing." Thus, when this Court reviews ineffective assistance of counsel claims on direct appeal and determines that they have been brought prematurely, we dismiss those claims without prejudice, allowing defendant to bring them pursuant to a subsequent motion for appropriate relief in the trial court.

State v. Thompson, 359 N.C. 77, 122-23, 604 S.E.2d 850, 881 (2004) (citations omitted).

To prevail on a claim of ineffective assistance of counsel, a defendant must first show that his counsel's performance was deficient and then that counsel's deficient performance prejudiced his defense. Deficient performance may be established by showing that counsel's representation fell below an objective standard of reasonableness. Generally, to establish prejudice, a defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

State v. Allen, 360 N.C. 297, 316, 626 S.E.2d 271, 286 (citations omitted) (internal quotation marks omitted); *see also Strickland v. Washington*, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 693 (1984).

B. Analysis

Defendant contends that his counsel was ineffective by not challenging the search of the Mustang, where the cocaine was discovered.

Based upon the record before us, we cannot ascertain whether defendant can prevail under either of the two prongs of the *Strickland* test. We therefore dismiss his appeal without prejudice to the filing of a motion for appropriate relief before the trial court.

We further note that defendant was not present at the time of the search of the Mustang, and apparently had no possessory interest in the vehicle. Thus, he may not have standing to contest the search of the vehicle. *State v. Greenwood*, 301 N.C. 705, 707-08, 273 S.E.2d 438, 440 (1981); *see also Rakas v. Illinois*, 439 U.S. 128, 134, 58 L. Ed. 2d 387, 395 (1978).

III. Conclusion

This appeal is dismissed without prejudice to defendant's right to file a motion for appropriate relief in the trial court.

DISMISSED.

Judges MCGEE and ERVIN concur.

Report per Rule 30(e).