

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA13-671
NORTH CAROLINA COURT OF APPEALS

Filed: 17 December 2013

STATE OF NORTH CAROLINA

v.

Catawba County
No. 11 CRS 3821

TAMIKA ANQUNETTE HAGGINS

Appeal by defendant from judgments entered 26 November 2012
by Judge F. Donald Bridges in Catawba County Superior Court.
Heard in the Court of Appeals 20 November 2013.

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

Leslie C. Rawls, for defendant-appellant.

CALABRIA, Judge.

Tamika Anqunette Haggins ("defendant") appeals from
judgments entered upon jury verdicts finding her guilty of
possession with intent to sell or deliver ("PWISD") marijuana,
possession of cocaine, possession of a Schedule IV controlled
substance, knowingly maintaining a dwelling for keeping or

selling controlled substances, and attaining the status of an habitual drug offender. We dismiss without prejudice.

On 25 August 2010, a Catawba County Magistrate properly issued a search warrant for defendant's residence located at 1395 15th Avenue Northeast in Hickory, North Carolina ("the residence"). Investigator Wes Gardin ("Investigator Gardin") of the Hickory Police Department ("HPD"), lead investigator for the case, executed the warrant on 26 August 2010 with assistance from other members of the HPD and the Catawba County Sheriff's Office in. Defendant arrived at the residence just prior to law enforcement's entry. The officers detained defendant, knocked on the door, and entered the residence when no one answered. After officers secured the premises, defendant was brought into the residence and read the search warrant. Defendant advised Investigator Gardin that she was the only resident. During the search, law enforcement officers recovered, *inter alia*, approximately 132 grams of marijuana, 1.7 grams of cocaine, and 0.6 grams of alprazolam, a Schedule IV narcotic.

Defendant was arrested and indicted for PWISD cocaine, PWISD marijuana, possession of a Schedule IV controlled substance, intentionally or knowingly maintaining a dwelling for keeping or selling controlled substances, and attaining the

status of an habitual drug offender. Beginning 16 October 2012, defendant was tried by a jury in Catawba County Superior Court. On 18 October 2012, the jury returned verdicts finding defendant guilty of PWISD marijuana, possession of cocaine, possession of a Schedule IV controlled substance, and knowingly maintaining a dwelling for keeping or selling controlled substances. After the second phase of the trial, the jury found that defendant had been previously convicted of possession of cocaine and thus had attained the status of an habitual drug offender. Defense counsel made a motion for a new trial based upon potential juror misconduct, but the trial court denied the motion.

On 26 November 2012, the trial court sentenced defendant to two consecutive terms of a minimum of six months to a maximum of eight months in the North Carolina Division of Adult Correction. The court suspended those sentences and defendant was placed on supervised probation for thirty months. Defendant appeals.

Defendant argues that she received ineffective assistance of counsel at trial. Specifically, defendant contends her counsel was deficient because (1) she was using her smartphone continuously during trial; and (2) she failed to provide competent assistance pursuant to Rule 1.1 of the North Carolina Rules of Professional Conduct.

To establish a claim of ineffective assistance of counsel, defendant must show that (1) defense counsel's performance was deficient and (2) that the deficient performance prejudiced the defense. *State v. Braswell*, 312 N.C. 553, 562, 324 S.E.2d 241, 248 (1985) (quoting *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984)). For the first step, defendant must show that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* Then, in order to demonstrate prejudice, 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." *State v. al-Bayyinah*, 359 N.C. 741, 751, 616 S.E.2d 500, 509 (2005) (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). 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." *State v. Fair*, 354 N.C. 131, 166, 557 S.E.2d 500, 524 (2001). "However, when it appears to the appellate court further development of the facts would be required . . . the proper course is for the Court to dismiss the defendant's [arguments] without prejudice." *State v. Allen*, 360 N.C. 297, 316, 626 S.E.2d 271, 286 (2006).

In the instant case, the record indicates that trial counsel used her smartphone on at least two specific instances during the course of defendant's trial. The first instance occurred during the charge conference, when defense counsel stated that she used her phone's Internet service to search for jury instructions on the issue of constructive possession. The next instance occurred when defense counsel stated that she received a text message alerting her to possible juror misconduct. Specifically, after the verdict, defense counsel received a text message that one of the jurors spoke to defendant's mother during a lunch break. The court conducted an evidentiary hearing on the potential juror misconduct based upon the information from the text message.

While these are the only two instances where the transcript specifically includes a discussion of defense counsel's phone use, the record suggests that defense counsel may have used her

phone on other occasions. For example, in a portion of the transcript, the trial court reprimanded counsel for her phone use, stating that "you've been texting constantly on your cell phone throughout the trial of this case." Consequently, we believe further inquiry beyond the cold record is required to determine whether counsel's use of her smartphone during trial rendered her performance ineffective. Additionally, we believe further factual inquiry is required to determine whether defense counsel's overall performance fell below the required level of competence under Rule 1.1 of the North Carolina Rules of Professional Conduct. As a result, we do not address the merits of these allegations, but rather dismiss these arguments without prejudice to defendant's rights to raise these issues in a subsequent motion for appropriate relief. See *id.*

Dismissed.

Judges HUNTER, Robert C. and HUNTER, JR., Robert N. concur.

Report per Rule 30(e).