An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-1103

Filed: 15 May 2018

Cabarrus County, No. 13 CRS 56014

STATE OF NORTH CAROLINA

v.

MARK DWAYNE DANCY, Defendant.

Appeal by Defendant from Judgment and Commitment entered 19 July 2016 by Judge Julia Lynn Gullett in Cabarrus County Superior Court. Heard in the Court of Appeals 19 April 2018.

Attorney General Joshua H. Stein, by Assistant Attorney General Thomas M. Woodward, for the State.

Sean P. Vitrano for Defendant Appellant.

INMAN, Judge.

Mark Dwayne Dancy ("Defendant") appeals from a judgment and commitment following a jury verdict in which Defendant was found guilty of driving while impaired and his plea of guilty to felony habitual impaired driving. Defendant argues that the four-year delay between his initial arrest and his trial violated his Sixth Amendment right to a speedy trial, and that his trial counsel's failure to assert the

speedy trial violation below violated his right to effective assistance of counsel. After careful review, we dismiss Defendant's appeal without prejudice to him asserting his ineffective assistance of counsel claim in a Motion for Appropriate Relief before the trial court.

Factual and Procedural History

The evidence at trial tended to show the following:

On 1 February 2012, Claudine McClamrock ("McClamrock") was sitting in her parked car when she was struck on the passenger side from behind by a silver vehicle. The silver vehicle continued down the road a short distance and parked on the side of the road. McClamrock confronted the man she believed to be the driver and who was later identified as Defendant. Defendant was standing by his vehicle, holding the driver's side mirror. He ignored McClamrock. A passerby from the grocery store called the police.

Officer Eddie Ashworth ("Officer Ashworth") of the Kannapolis Police Department arrived on scene approximately fifteen minutes later. Officer Ashworth found Defendant seated in the driver's seat of the silver vehicle and recognized him from previous incidents of driving while impaired. Officer Ashworth did not detect the odor of alcohol inside of the vehicle but observed Defendant's eyes were "droopy" and that Defendant's speech was slurred.

While attempting to obtain identification from Defendant, Officer Ashworth asked how Defendant came to where he was; Defendant responded that he was there to pick up two girls from a funeral. Officer Ashworth continued to question Defendant about the funeral to which Defendant responded it was for "that boy that died." Defendant later changed his story and said he was waiting for his mother who was at the bank.

Officer Ashworth instructed Defendant to stay seated in the vehicle while the officer finished his crash report. Defendant proceeded to turn on the vehicle ignition but was quickly told by Officer Ashworth to keep the vehicle off. Defendant complied for a few minutes, but then turned the vehicle on a second time.[1] Defendant said he wanted to listen to the radio, and later said that the radiator might be damaged and he was trying to ensure the vehicle would still work for his mother. The vehicle was owned by Defendant's mother, Shirley Mann ("Mann").

After completing the crash report, Officer Ashworth asked Defendant to perform a series of standardized field sobriety tests. Defendant exhibited all signs of impairment during the horizontal gaze nystagmus test, failed the "walk and turn" test, and failed the one leg stand test. Officer Ashworth then asked Defendant to perform a portable breath test. The results of the breath test were negative.

[1] The State does not argue on appeal that all elements of the driving while impaired offense were established when Defendant turned on the ignition of the vehicle in the presence of a law enforcement officer.

As a result of Defendant's performance on the standardized field sobriety tests, Officer Ashworth concluded that Defendant's ability to drive a motor vehicle was appreciably impaired. He advised Defendant of his rights and placed him under arrest for driving while impaired. Defendant was taken to the hospital where he consented to having a blood draw and was later released. The blood test was submitted and received by the Triad Regional Crime Laboratory on 6 February 2012. The results came back nearly two years later, on 28 January 2014, and showed at the time of arrest the only substance in Defendant's system was Ambien.

An arrest warrant was issued on 9 December 2013, while the blood test was still pending, and was served on Defendant on 10 September 2015, the day he was released from an unrelated prison sentence. On 2 November 2015, Defendant was indicted for driving while impaired, along with an enhancing indictment to habitual driving while impaired for having three prior driving while impaired convictions.

At trial, Defendant testified that on the day of the accident, the vehicle was being driven not by him but by a neighbor, Dennis Miller ("Miller"). Defendant claimed Miller had dropped him off at a nearby grocery store before the accident, and that Defendant arrived at the accident scene on foot after Miller left the scene. Neither Officer Ashworth nor McClamrock saw Miller at the scene of the incident. Miller, however, was unable to testify because he died prior to the commencement of

Defendant's trial. On 19 July 2016, the jury returned a verdict finding Defendant guilty of driving while impaired.

Between the time of the accident and Defendant's trial he was arrested and convicted on another habitual driving while impaired charge in Rowan County, and served an active sentence from 19 September 2013 to 10 September 2015.

As a result of Defendant's stipulation to being convicted of driving while impaired three times prior to the 2012 accident, and Defendant's previous habitual driving while impaired conviction on 19 September 2013, Defendant was sentenced to a prison term of 28 to 43 months. Defendant did not give timely notice of appeal in open court or in writing.

On 2 February 2017, Defendant filed a Petition for Writ of Certiorari with this Court. Defendant's petition was allowed, and Defendant was deemed indigent and provided appellate counsel.

Analysis

1. Speedy Trial

Defendant did not raise the constitutional issue of his right to a speedy trial below. Ordinarily such a failure results in waiver of Defendant's ability to raise the issue on appeal. Defendant has requested this Court invoke Rule 2 of the North Carolina Rules of Appellate Procedure to allow consideration on the merits.

Rule 2 permits this Court to suspend the Rules of Appellate Procedure so as "[t]o prevent manifest injustice to a party, or to expedite decision in the public interest . . . ." N.C. R. App. P. Rule 2 (2017). The North Carolina Supreme Court has held that Rule 2 "must be invoked cautiously," and should be reserved only for exceptional circumstances. *Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co.*, 362 N.C. 191, 196, 657 S.E.2d 361, 364 (2008) (internal quotation marks and citations omitted).

This case does not present the extraordinary circumstances necessary for the invocation of Rule 2. While the more than four-year delay between Defendant's initial arrest and his trial could give rise to a rebuttable presumption of unreasonable delay, *see State v. Hammonds*, 141 N.C. App. 152, 159, 541 S.E.2d 166, 172-73 (2000), the State provided an appropriate explanation for a large portion of that delay, which, in combination with Defendant's failure to raise the issue below and no clear demonstration of prejudice, leads us, in our discretion, to decline to invoke Rule 2, and to dismiss this portion of Defendant's appeal.

2. Ineffective Assistance of Counsel

Defendant also argues that he was denied his constitutional right to effective assistance of counsel because his trial counsel failed to bring a motion to dismiss for a violation of Defendant's right to a speedy trial.

Generally, ineffective assistance of counsel claims are raised in post-conviction proceedings and not on direct appeal. *See, e.g., State v. Fair*, 354 N.C. 131, 166, 557

S.E.2d 500, 524-25 (2001). Such claims may be reviewed on direct appeal when the cold record reveals that no further factual development is necessary to resolve the issue. *Id.* at 166, 557 S.E.2d 524-25 (citation omitted). Here, the record is insufficient to properly resolve Defendant's ineffective assistance of counsel claim, and we therefore dismiss this portion of Defendant's appeal without prejudice to Defendant's right to file a Motion for Appropriate Relief.

Conclusion

For the foregoing reasons, we decline to invoke Rule 2 to review Defendant's speedy trial appeal and dismiss Defendant's ineffective assistance of counsel claim without prejudice.

DISMISSED.

Judges DAVIS and MURPHY concur.

Report per Rule 30(e).