An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA17-963

Filed: 7 August 2018

Cumberland County, No. 14CRS057611

STATE OF NORTH CAROLINA,

v.

DONALD BLACK, Defendant.

Appeal by defendant from judgment entered on or about 14 November 2016 by Judge W Russell Duke, Jr. in Superior Court, Cumberland County. Heard in the Court of Appeals 7 March 2018.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Derrick C. Mertz, for the State.

Halscott Megaro, P.A., by Patrick Michael Megaro, for defendant-appellant.

STROUD, Judge.

Defendant seeks to appeal the denial of his motion to suppress and later judgment entered on or about 14 November 2016 upon his guilty plea for attempting to traffic heroin by possession and transportation. On 21 November 2016, defendant filed a written notice of appeal from the judgment. The notice of appeal stated: "The defendant gave notice on open court of his intent to appeal including his intent to

appeal the denial of his motion to suppress." But there is no transcript for this Court to verify that defendant did give notice of his intent to appeal the denial of his motion to suppress.

In December of 2017, before this Court, the State moved to dismiss defendant's appeal. The State notes that defendant has not included in the record any evidence of his intent to appeal the denial of the motion to suppress and his plea agreement is lacking any such evidence. The plea transcript notes defendant was asked, "Do you understand that following a plea of guilty or no contest there are limitations on your right to appeal?" Defendant answered, "yes[.]" The plea transcript form does not include any reservation of defendant's right to appeal the order on the motion to suppress.

It is well established that a defendant must reserve his right to appeal the denial of a motion to suppress in a plea agreement made after the trial court's denial of the motion and that the defendant must give the State and the trial court notice of his intent to appeal prior to entry of the plea. *See generally State v. Reynolds*, 298 N.C. 380, 397, 259 SE 2d 843, 853 (1979). As our Supreme Court has noted,

> The plea bargaining table does not encircle a high stakes poker game. It is the nearest thing to arm's length bargaining the criminal justice system confronts. As such, it is entirely inappropriate for either side to keep secret any attempt to appeal the conviction. We therefore hold that, when a defendant intends to appeal from a suppression motion denial pursuant to G.S. 15A-979(b), he must give notice of his intention to the prosecutor and the court *before*

> *plea negotiations are finalized* or he will waive the appeal of right provisions of the statute. We cannot believe that our legislature, in adopting G.S. 15A-979(b), intended any less fair posture for appeal from a guilty plea.

Id. (emphasis added).

Our Court addressed a case in a similar procedural posture to this case in *State v. McBride*:

> In North Carolina, a defendant's right to pursue an appeal from a criminal conviction is a creation of state statute. This Court has an ever-standing obligation to apply the laws governing the right to appeal. This obligation would be rendered illusory if we ignored the very processes which operate to make our system of justice fair as well as efficient.
>
> N.C. Gen. Stat. § 15A–979(b) (1988) allows review of an order finally denying a motion to suppress evidence on appeal from a judgment of conviction, including a judgment entered on a guilty plea. This statutory right to appeal is conditional, not absolute.
>
> *Pursuant to this statute, a defendant bears the burden of notifying the state and the trial court during plea negotiations of the intention to appeal the denial of a motion to suppress, or the right to do so is waived after a plea of guilty*. The rule in this state is that notice must be specifically given. . . .
>
> In the instant case, defendant failed to preserve his right to appeal by not ensuring that his intent to do so was given to the trial court and prosecution, *prior* to finalization of his plea bargain. We have carefully reviewed the entire record and note the absence of any notice whatsoever by defendant of intent to appeal based on the trial court's denial of his motion to suppress.
>
> We do observe that defendant has placed a one page document entitled "Notice of Appeal" in the Record on Appeal, dated 18 May 1994. The document does not certify service to the trial court or to the prosecution, though a

stamp at the top of the page indicates it was filed with the clerk of court in New Hanover County. *This document is not the type of notice required under Reynolds, wherein the burden is placed on the defendant to ensure proper and actual notice of intent to appeal.*

A Notice of Appeal is distinct from giving notice of intent to appeal. Notice of intent to appeal prior to plea bargain finalization is a rule designed to promote a fair posture for appeal from a guilty plea. Notice of Appeal is a procedural appellate rule, required in order to give this Court jurisdiction to hear and decide a case. *The two forms of notice serve different functions, and performance of one does not substitute for completion of the other.*

The United States Supreme Court addressed the propriety of an appeals process nearly identical to ours in *Lefkowitz v. Newsome*, 420 U.S. 283, 43 L.Ed.2d 196 (1975). There the United States Supreme Court noted:

> *Once the defendant chooses to bypass the orderly procedure for litigating his constitutional claims in order to take the benefits, if any, of a plea of guilty, the State acquires a legitimate expectation of finality in the conviction thereby obtained.*

The logic of this appellate rule is based on a straightforward theory. Once a defendant strikes the most advantageous bargain possible with the prosecution, that bargain is incontestable by the state once judgment is final. If the defendant may first strike the plea bargain, "lock in" the State upon final judgment, and then appeal a previously denied suppression motion, it gets a second bite at the apple, a bite usually meant to be foreclosed by the plea bargain itself.

We have previously observed that it is entirely inappropriate for either side to keep secret any attempt to appeal the conviction in circumstances like those before us. The appeals process is not meant to be played like three-card monte, as guessing games in this setting upset basic notions of fairness, and threaten the efficient administration of justice.

This Court is bound by the principle of *stare decisis*,

> which demands that like situations be treated in a consistent manner. In this case, both *Reynolds* and *Tew* have set forth unequivocal rules concerning appeals made subsequent to a plea bargain. Defendant has not complied with those rules.
>
> Dismissed.

120 N.C. App. 623, 624-26, 463 S.E.2d 403, 404-05 (1995), *aff'd per curiam*, 344 N.C. 623, 476 S.E.2d 106 (1996) (emphasis added) (citations and quotation marks omitted).

Just as in *McBride,* defendant here failed to reserve his right to appeal the denial of the motion to suppress in his plea arrangement. *See id.* In defendant's response to the State's motion to dismiss, defendant cites to the transcript of evidence of his intent to appeal, but there are two problems with his citations to the transcript: (1) No transcript has been filed before this Court, and (2) the State agrees that defendant gave oral notice of appeal but the oral notice was *after* the plea agreement was entered. In defendant's response to the motion to dismiss and in his reply brief he could have taken the opportunity to invoke Rule 2 of the Rules of Appellate Procedure and request that this Court review his appeal by the rare exception of suspension of the rules; *see generally* N.C. R. App. P. 2, but he did not do so. "This Court is bound by the principle of *stare decisis*, which demands that like situations be treated in a consistent manner." *McBride*, 120 N.C. App. at 626, 463 S.E.2d at 405. Therefore, we allow the State's motion to dismiss.

DISMISSED.

Judges DAVIS and ARROWOOD concur.

Report per Rule 30(e).