

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA02-141

NORTH CAROLINA COURT OF APPEALS

Filed: 5 November 2002

STATE OF NORTH CAROLINA

v.

KENNETH LAMONT FISHER,  
Defendant.

Forsyth County  
Nos. 99 CRS 54130  
00 CRS 12498

Appeal by defendant from judgment entered 17 August 2000 by Judge Richard L. Doughton in Forsyth County Superior Court. Heard in the Court of Appeals 21 October 2002.

*Attorney General Roy Cooper, by Assistant Attorney General Joyce S. Rutledge, for the State.*

*Robert T. Newman, Sr., for defendant-appellant.*

HUDSON, Judge.

Defendant was charged with possession of cocaine and having attained the status of habitual felon. The State's evidence tends to show that while responding to a noise complaint on 10 December 1999, Officers C.K. Redmon and Daniel Russell of the Winston-Salem Police Department observed defendant and another man fighting in the street. The officers stopped their police cruiser and approached the men. Officer Redmon separated the two men and handcuffed them. He subsequently frisked defendant and "found a small glass object, which [he] recognized to be a crack pipe" in

defendant's sock. Officers Redmon and Russell learned that defendant had been assaulting the other man. Both officers accompanied defendant to the hospital for treatment of a cut received during the altercation with the other man, whereupon they observed a plastic bag fall from defendant's pants leg. The bag contained a green leafy vegetable matter, which Officer Redmon recognized to be marijuana. Defendant thereafter refused to be treated by any doctors and was transported by Officers Redmon and Russell to the downtown detention facility. An inventory of the contents of defendant's pockets yielded a substance later identified as crack cocaine.

The jury found defendant guilty of possession of cocaine. After the Clerk of Court testified as to defendant's three previous felony convictions, the jury also found that defendant had attained the status of habitual felon. The trial court sentenced defendant to 105 to 135 months' imprisonment. Defendant appeals.

By his first five assignments of error, defendant argues that he received ineffective assistance of counsel and therefore, was entitled to the dismissal of all charges against him. At the outset, however, we note that defendant appears to have "prematurely asserted" his ineffective assistance of counsel claim." *State v. Stroud*, 147 N.C. App. 549, 556, 557 S.E.2d 544, 548 (2001) (quoting *State v. Fair*, 354 N.C. 131, 167, 557 S.E.2d 500, 525 (2001), cert. denied, 122 S. Ct. 2332, 153 L. Ed. 2d 162 (2002)). The "accepted practice" is to raise claims of ineffective assistance of counsel in post-conviction proceedings, rather than

on direct appeal. *State v. Dockery*, 78 N.C. App. 190, 192, 336 S.E.2d 719, 721 (1985). As defendant's argument concerns potential questions of trial strategy and counsel's impressions, an evidentiary hearing available through a motion for appropriate relief is the best mechanism to examine and determine these issues. See *Stroud*, 147 N.C. App. at 556, 557 S.E.2d at 548. Accordingly, we dismiss these assignments of error without prejudice to defendant's right to file a motion for appropriate relief in the superior court. See *id.*; see also *State v. Ware*, 125 N.C. App. 695, 697, 482 S.E.2d 14, 16 (1997) (dismissing the defendant's appeal where the issues could not be determined from the record on appeal and noting that to "properly advance these arguments, defendant must move for appropriate relief pursuant to G.S. 15A-1415[ ]").

We move then to defendant's remaining assignments of error by which he argues that the North Carolina Habitual Felon Act violates the United States and North Carolina Constitutions. We disagree.

Defendant acknowledges that he has not preserved these assignments of error for appellate review in accordance with N.C. R. App. P. 10. He asks that we review these assignments of error, pursuant to our authority under N.C. R. App. P. 2, "to prevent manifest injustice." However, even if the Court chose to review these errors, defendant cannot show merit to his position. As conceded by defendant in his brief, "many cases have upheld the use of the Habitual Felon [Act]." We conclude that the cases referenced by defendant as authority for his argument are readily

distinguishable. Moreover, existing precedent shows no constitutional infirmity in this state's Habitual Felon Act. See *State v. Todd*, 313 N.C. 110, 117-19, 326 S.E.2d 249, 253-54 (1985) (upholding the constitutionality of the Habitual Felon Act); *State v. Brown*, 146 N.C. App. 299, 301, 552 S.E.2d 234, 235 (citing *Todd* in upholding the Habitual Felon Act), *disc. review denied*, 354 N.C. 576, 599 S.E.2d 186 (2001), *cert. denied*, 122 S. Ct. 2305, 152 L. Ed. 2d 1061 (2002); see also *State v. Wilson*, 139 N.C. App. 544, 550, 533 S.E.2d 865, 870 ("[T]he procedures set forth in the Habitual Felon Act comport with a criminal defendant's federal and state constitutional guarantees."), *disc. review denied*, 353 N.C. 279, 546 S.E.2d 394 (2000), *cert. denied*, \_\_ S. Ct. \_\_ (Oct. 5, 2002); *State v. Parks*, 146 N.C. App. 568, 572, 553 S.E.2d 695, 697 (2001) ("North Carolina appellate courts have repeatedly upheld the use of [the Habitual Felon Act and Structured Sentencing Act] together, as long as different prior convictions justify each."), *disc. review denied*, 355 N.C. 220, 560 S.E.2d 355 (2002), *cert. denied*, \_\_ S. Ct. \_\_ (Oct. 7, 2002). These assignments of error are, therefore, overruled.

In sum, defendant's ineffective assistance of counsel claim is dismissed without prejudice to defendant's right to file a motion for appropriate relief in the superior court. We find no merit to his other arguments.

No error.

Chief Judge EAGLES and Judge MCCULLOUGH concur.

Report per Rule 30(e).

