

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA11-261
NORTH CAROLINA COURT OF APPEALS

Filed: 6 September 2011

STATE OF NORTH CAROLINA,

v.

Mecklenburg County
No. 07CRS229819

JAQUAN RASEAN WEATHERS

Appeal by defendant from judgment entered 21 September 2010
by Judge James W. Morgan in Superior Court, Mecklenburg County.
Heard in the Court of Appeals 29 August 2011.

*Attorney General Roy A. Cooper, III, by Assistant Attorney
General Richard A. Graham, for the State.*

*Appellate Defender Staples Hughes, by Assistant Appellate
Defender Katherine Jane Allen, for defendant-appellant.*

STROUD, Judge.

Defendant appeals from a judgment entered on a jury verdict finding him guilty of assault inflicting serious injury upon a detention officer in violation of N.C. Gen. Stat. § 14.34.7 (2007). He brings forward two issues: (1) whether the trial court erred by failing to hold a hearing when the effectiveness of assistance of counsel was questioned; and (2) whether the

trial court erred by entering judgment on the conviction as a felony instead of as a misdemeanor. We find no error.

After a recess during defendant's cross-examination of the victim, during defendant's trial, defendant's counsel made a motion for a mistrial on the ground that the prosecutor had not furnished him with all of the victim's medical records. Counsel argued to the court that he could not adequately represent defendant without the missing records. The prosecutor responded that the State did not have those records in its custody and that defendant's counsel had not tried to obtain those records on his own. The prosecutor stated he thought that "there may need to be inquiry as to whether or not [defendant] is, in fact, getting adequate representation." The court denied the motion for a mistrial.

Defendant's counsel then asked to consult with defendant. Counsel reported back to the court that defendant had asked counsel to withdraw from any further representation of defendant. The court asked for a reason, and counsel responded that defendant did not believe counsel could render effective assistance of counsel based upon what had just occurred. Stating it needed to review its notes, the court took a brief recess.

When court reconvened, defendant's counsel stated that defendant did not want counsel to withdraw and that defendant wished for counsel to continue to represent him. The court acknowledged defendant's change of position and asked counsel whether he wanted a subpoena issued for those records or whether he and defendant had decided, "for impeachment purposes, not to send for them." Stating it was a "tactical decision," counsel declined to subpoena the records and resumed cross-examination of the victim.

Defendant contends that the trial court erroneously failed to make an inquiry into the effectiveness of trial counsel at two points: first, when the prosecutor raised concerns about counsel's effectiveness; and second, when counsel moved to withdraw at defendant's request. The record, however, shows that defendant changed his mind about discharging counsel and, consequently, the trial court never ruled upon the issue. "[A] defendant may waive the benefit of statutory or constitutional provisions by express consent, failure to assert it in apt time, or by conduct inconsistent with a purpose to insist upon it." *State v. Gaiten*, 277 N.C. 236, 239, 176 S.E.2d 778, 781 (1970) (citation omitted). "[I]n order for [a defendant] to assert a constitutional or statutory right in the appellate courts, the

right must have been asserted and the issue raised before the trial court. Further, it must affirmatively appear on the record that the issue was passed upon by the trial court." *State v. Young*, 291 N.C. 562, 567, 231 S.E.2d 577, 580 (1977) (citation and quotation marks omitted).

Even if the issue had not been waived, "when faced with a claim of conflict and a request for appointment of substitute counsel, the trial court must satisfy itself only that present counsel is able to render competent assistance and that the nature or degree of the conflict is not such as to render that assistance ineffective." *State v. Thacker*, 301 N.C. 348, 353, 271 S.E.2d 252, 256 (1980). "Once it becomes apparent that the assistance of counsel has not been rendered ineffective, the trial judge is not required to delve any further into the alleged conflict." *State v. Poole*, 305 N.C. 308, 311-12, 289 S.E.2d 335, 338 (1982). "When a convicted defendant complains of the ineffectiveness of counsel's assistance, the defendant must show that the counsel's representation fell below an objective standard of reasonableness." *Strickland v. Washington*, 466 U.S. 668, 687-88, 80 L.Ed. 2d 674, 693 (1984). We find nothing in trial counsel's performance to give the trial court a basis for a belief that counsel's performance fell below

this standard. We hold the court did not err by failing to make any further inquiry into the effectiveness of counsel's assistance.

Defendant's other contention is that the trial court erred by entering judgment on the felony of assaulting a law enforcement officer inflicting serious bodily injury when the jury only found him guilty of assaulting a law enforcement officer inflicting serious injury. Defendant acknowledges that in *State v. Crawford*, 167 N.C. App. 777, 782, 606 S.E.2d 375, 379, *disc. review denied*, 359 N.C. 412, 612 S.E.2d 324 (2005), this Court held to the contrary, but defendant argues "[f]or purposes of preservation for further review," that *Crawford* was wrongly decided. "Where a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court." *In re Appeal from Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989). "While we recognize that a panel of the Court of Appeals may disagree with, or even find error in, an opinion by a prior panel . . . the panel is bound by that prior decision until it is overturned by a higher court." *State v. Jones*, 358 N.C. 473, 487, 598 S.E.2d 125, 134 (2004). Defendant's contention is dismissed.

NO ERROR.

Judges CALABRIA and STEELMAN concur.

Report per Rule 30(e).