NO. COA01-1472

NORTH CAROLINA COURT OF APPEALS

Filed: 01 October 2002

STATE OF NORTH CAROLINA

v.

GEORGE WILLIAM DURAND

Scotland County
Nos. 98 CRS 872
98 CRS 873
98 CRS 874
98 CRS 1132
98 CRS 1133

Appeal by defendant from judgment entered 30 July 2001 by Judge B. Craig Ellis in Scotland County Superior Court. Heard in the Court of Appeals 30 September 2002.

Attorney General Roy Cooper, by Assistant Attorney General Stewart L. Johnson, for the State.

Michael E. Casterline for defendant-appellant.

THOMAS, Judge.

Defendant, George William Durand, moved to suppress physical evidence obtained as a result of a warrantless search of his premises. The trial court denied the motion on 18 April 1999. Defendant then pled guilty on 30 July 2001 to one count of trafficking in marijuana pursuant to a plea agreement. The trial court sentenced defendant to thirty-five to forty-two months imprisonment. Defendant appeals.

Defendant contends the trial court erred by denying his motion

to suppress evidence obtained via a warrantless third party consent search. We do not reach that issue, however. Defendant failed to present a record on appeal from which we can determine that he complied with established case and statutory law mandating that, following denial of a motion to suppress, he give notice of his intent to appeal to the trial court and prosecution before entry of a guilty plea.

"An order finally denying a motion to suppress evidence may be reviewed upon an appeal from a judgment of conviction, including a judgment entered upon a plea of guilty." N.C. Gen. Stat. § 15A-979(b) (1999). However, this statutory right to appeal is conditional and not absolute. *State v. McBride*, 120 N.C. App. 623, 625, 463 S.E.2d 403, 404 (1995), *disc. review allowed in part,* 343 N.C. 126, 468 S.E.2d 790, *aff'd,* 344 N.C. 623, 476 S.E.2d 106 (1996). Under section 15A-979(b), "[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." *Id.* at 625, 463 S.E.2d at 404 (emphasis added). "Notice of *intent* to appeal prior to plea bargain finalization is a rule designed to promote a 'fair posture of appeal from a guilty plea.'" *Id.* at 625, 463 S.E.2d at 405 (quoting *State v. Reynolds*, 298 N.C. 380, 397, 259 S.E.2d 843, 853 (1979), *cert. denied,* 446 U.S. 941, 64 L. Ed. 2d 795 (1980)(emphasis original).

After a careful review of the entire record, we note the absence of any notice by defendant of his intent to appeal based on

the trial court's denial of his motion to suppress. In his brief, defendant claims to have reserved this right in the following three ways: (1) by filing a "Request and Order for Authorizing Transcript of Confidential Proceeding" to "review for consideration of an appeal" dated 20 July 1999; (2) by renewing his motion to suppress at the beginning of defendant's plea hearing held in July of 2001; and (3) by defense counsel stating at the end of defendant's plea hearing that defendant "indicated that in the pursuant appeal – that is, the suppression hearing – that unfortunately, he no longer has private counsel and would like the Court to consider appointing appellant defense for him."

None of these instances, however, show defendant's intent to appeal from the denial of his motion to suppress "during plea negotiations." Defendant's request for the transcript was made a year before defendant pled guilty. While defendant's renewal of his motion to suppress shows defendant's dissatisfaction with the trial court's ruling, it does not show defendant's intent to appeal from the ruling. Finally, defense counsel's mention that defendant needed appellate counsel appointed was made after entry of the guilty plea.

As we stated in *State v. Brown*, 142 N.C. App. 491, 543 S.E.2d 192 (2001):

> "This Court . . . is bound by the record as certified and can judicially know only what appears of record." "It is the appellant's duty and responsibility to see that the record is in proper form and complete." Here, from the record presented, we cannot determine that defendant has complied with the rules concerning appeals made subsequent to a plea

bargain.

Id. at 492-493, 543 S.E.2d at 193 (citations omitted). Based on the record before us, we cannot say that defendant complied with N.C. Gen. Stat. § 15A-979(b). Accordingly, the appeal is dismissed.

DISMISSED.

Judges WALKER and BIGGS concur.

Report per Rule 30(e).