

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA05-1149

NORTH CAROLINA COURT OF APPEALS

Filed: 3 October 2006

STATE OF NORTH CAROLINA

v. Avery County
Nos. 03 CRS 50824
03 CRS 1081

DAVID BORK,
Defendant.

Appeal by defendant from judgments entered 7 July 2004 by Judge James Downs in Avery County Superior Court. Heard in the Court of Appeals 11 September 2006.

Attorney General Roy Cooper, by Assistant Attorney General Patricia A. Duffy, for the State.

Stephen W. Kearney for defendant-appellant.

GEER, Judge.

Defendant David Bork appeals from his convictions in superior court for the misdemeanor offenses of driving while impaired in violation of N.C. Gen. Stat. § 20-138.1 (2005) and driving without an operator's license in his possession in violation of N.C. Gen. Stat. § 20-7(a) (2005). Because we are unable to determine from the record on appeal whether the superior court had jurisdiction over defendant's case, we are compelled to dismiss this appeal.

The statement in the printed record regarding the organization of the trial tribunal states only: "Defendant David Bork entered notice of appeal from the judgment of the court in open court

during the July 6, 2004 session of Criminal Superior Court for the County of Avery, the Honorable James U. Downs, Superior Court Judge presiding." The record before this Court does not contain the judgment in district court or entries showing an appeal of that judgment to superior court.

District courts have exclusive original jurisdiction of all misdemeanors. *State v. Felmet*, 302 N.C. 173, 174-75, 273 S.E.2d 708, 710 (1981). A superior court's jurisdiction over the trial of a misdemeanor is derivative and "arises only upon appeal from a conviction of the misdemeanor in district court." *Id.* A superior court has no jurisdiction to try a defendant on a criminal summons for a misdemeanor charge unless the defendant was tried and convicted in district court and then appealed that judgment for a trial *de novo* in superior court. *State v. Hall*, 240 N.C. 109, 111, 81 S.E.2d 189, 190-91 (1954).

Our Supreme Court explained in *Felmet* that a record on appeal in a criminal case that originated in district court must include the judgment in district court and entries showing an appeal of that judgment to superior court. 302 N.C. at 176, 273 S.E.2d at 711 ("These items should have been included in the record on appeal in this case but were not. Defendant had the duty to see the record on appeal was properly compiled."). When, because those items are omitted, "the record is silent and the appellate court is unable to determine whether the court below had jurisdiction, the appeal should be dismissed." *Id.* Because, based on the record before us, we are unable to determine whether the superior court

had jurisdiction, *Felmet* requires that we dismiss the appeal *ex mero motu*. *Id.* See also *State v. Hunter*, 245 N.C. 607, 609, 96 S.E.2d 840, 841 (1957) ("What disposition was made of these cases in the inferior court or how they reached the Superior Court is not made to appear [in the record]. This alone is sufficient to require a dismissal of the appeal.").

Dismissed.

Chief Judge MARTIN and Judge BRYANT concur.

Report per Rule 30(e).