

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA05-1639

NORTH CAROLINA COURT OF APPEALS

Filed: 18 July 2006

STATE OF NORTH CAROLINA

v.

Caldwell County
No. 05 CRS 5179

MILTON TYRONE SCOTT,
Defendant.

Appeal by defendant from judgment entered 4 August 2005 by Judge Preston Cornelius in the Superior Court in Caldwell County. Heard in the Court of Appeals 10 July 2006.

Attorney General Roy Cooper, by Assistant Attorney General Christopher W. Brooks, for the State.

Winifred H. Dillon, for defendant-appellant.

HUDSON, Judge.

Defendant appeals from a judgment finding him in criminal contempt of court and sentencing him to thirty days of imprisonment. Because the trial court failed to provide defendant with summary notice and an opportunity to be heard as required by N.C. Gen. Stat. § 5A-14(b) (2006), we reverse.

On 7 November 2000, defendant pled guilty to three counts of common-law robbery, admitted his habitual felon status as to the robbery charged in 00 CRS 4488, and stipulated to a prior record level of VI. His written plea agreement provided that he would receive a consolidated prison sentence of 26 to 32 months for two

of the robbery counts, and would be sentenced as an habitual felon for the robbery in 00 CRS 4488 to a term of 150 to 189 months, "to run at [the] expiration of any other sentences." An additional provision of the agreement, which was separately initialed by defendant and his counsel, stated as follows: "All sentences to run consecutive to each other [and] to any sentences Mr. Scott [is] now serving." The trial court entered judgments in accordance with defendant's plea agreement, sentencing him to active prison terms of 26 to 32 months and 150 to 189 months, and ordering that the sentences be served consecutive to each other and "at the expiration of all sentences which the defendant is presently obligated to serve."

On 29 July 2004, defendant filed a motion for appropriate relief based on several claims, including ineffective assistance of counsel. Defendant asserts that counsel failed to conduct an adequate investigation of his case, coerced his guilty plea with threats of an all-white jury if he went to trial, advised him that he would receive concurrent sentences under his plea, and refused his request to withdraw his guilty plea in open court. By orders entered 14 September 2004 and 24 February 2005, the trial court summarily dismissed several claims raised in the motion for appropriate relief but found that defendant was entitled to an evidentiary hearing on the ineffective assistance of counsel claims.

At the evidentiary hearing on 1 August 2005, after receiving testimony from defendant, his mother, his appointed counsel, and

counsel's law partner, the trial court denied defendant's motion for appropriate relief. In findings announced in open court and subsequently reduced to writing in an order entered 24 August 2005, the judge determined that defendant's guilty plea "was the informed choice of the defendant and was made voluntarily and understand[ing]ly," that defendant knew the difference between concurrent and consecutive sentences at the time of his plea hearing, "that at no time did the defendant indicate that he wished to withdraw any plea or to have a jury trial," and that his counsel's performance "was not deficient in any way[.]" In addition to denying the motion for appropriate relief, the judge announced that he was finding defendant in criminal contempt of court, as follows:

The Court will further find that this defendant's filing of this MAR motion borders on contempt in that this is an interference of the lawful process by having made false statements under oath. That there was no basis for the filing of . . . this MAR . . . , and it's cost taxpayers of this state money and time and court resources to respond to a frivolous MAR in which this defendant has made false statements resulting in substantial interference of the court's processes by taking up court time and resources. And [this] Court finds him to be in criminal contempt and will for reasons set forth . . . in the defendant's presence . . . attach a thirty-day sentence to run at the expiration of any sentence he may be presently serving[.]

Defendant argues, and the State agrees, that the trial court erred by finding defendant in criminal contempt without affording him at least "summary notice of the charges and a summary opportunity to respond" as required by N.C. Gen. Stat. § 5A-14(b).

We agree. As quoted above, the trial court found defendant in contempt for filing a frivolous motion for appropriate relief and/or for making false statements under oath at the evidentiary hearing on the motion. A finding of indirect criminal contempt, which would punish actions committed outside of the court's presence, would require a plenary hearing upon notice to defendant, as provided by N.C. Gen. Stat. § 5A-15 (2006). See, e.g., *Cox v. Cox*, 92 N.C. App. 702, 706, 376 S.E.2d 13, 16 (1989). Even assuming that the court held defendant in direct criminal contempt for giving false testimony in the court's presence, the applicable statute provides for summary contempt proceedings, as follows:

(a) The presiding judicial official may summarily impose measures in response to direct criminal contempt when necessary to restore order or maintain the dignity and authority of the court and when the measures are imposed substantially contemporaneously with the contempt.

(b) *Before imposing measures under this section, the judicial official must give the person charged with contempt summary notice of the charges and a summary opportunity to respond* and must find facts supporting the summary imposition of measures in response to contempt. The facts must be established beyond a reasonable doubt.

N.C. Gen. Stat. § 5A-14 (emphasis added). Moreover, subject to two exceptions not at issue here, a court may not sentence a contemnor to prison unless the contemptuous "act or omission was preceded by a clear warning by the court that the conduct is improper." N.C. Gen. Stat. § 5A-12(b) (2) (2006).

Because defendant was not given summary notice and an opportunity to respond before being found in criminal contempt of

court, we must reverse the trial court's judgment. See *Peaches v. Payne*, 139 N.C. App. 580, 586-87, 533 S.E.2d 851, 854-55 (2000) (citing *State v. Verbal*, 41 N.C. App. 306, 307, 254 S.E.2d 794, 795 (1979)). In light of our holding on this issue, we need not address defendant's remaining assignments of error.

Reversed.

Judges MCCULLOUGH and STEELMAN concur.

Report per Rule 30(e).