

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA05-947

NORTH CAROLINA COURT OF APPEALS

Filed: 3 October 2006

STATE OF NORTH CAROLINA

v.

Guilford County  
No. 03 CRS 107454

KENTRELL MARSHALL MITCHELL,  
Defendant.

Appeal by defendant from judgment entered 2 November 2004 by Judge John O. Craig, III in Guilford County Superior Court. Heard in the Court of Appeals 11 September 2006.

*Attorney General Roy Cooper, by Assistant Attorney General Barbara A. Shaw, for the State.*

*Irving Joyner for defendant-appellant.*

GEER, Judge.

Defendant Kentrell Marshall Mitchell appeals his conviction for possession of a firearm on educational property. His sole argument on appeal is that his trial counsel provided ineffective assistance of counsel by failing to file a motion to suppress the firearm, which defendant contends was discovered as a result of a search that violated the Fourth Amendment. Because this argument cannot be resolved based on the record alone, we dismiss this appeal without prejudice to the issue being properly raised in a motion for appropriate relief filed in the trial court.

At trial, the State's evidence tended to show the following

facts. On 15 December 2003, defendant was a student at Eastern Guilford High School. James W. Simpson, a Guilford County deputy sheriff serving as the school's resource officer, went to defendant's classroom and asked him to walk to Simpson's office. Deputy Simpson noticed that defendant appeared unusually nervous and, after defendant was seated in a chair, "favor[ed]" the left side of his body. His suspicions aroused, Simpson told defendant that he was going to do a pat down search for the safety of defendant as well as himself. While performing the search, Simpson felt what he thought was the butt of a gun and removed a loaded .22 caliber pistol from defendant's left breast coat pocket. Defendant denied knowledge of the gun and told Simpson that it must be his brother's gun. At trial, defendant claimed that the gun belonged to a friend.

On 2 November 2004, a jury found defendant guilty of possession of a firearm on educational property. The trial court sentenced defendant to a term of six to eight months, which was suspended, and defendant was placed on 36 months supervised probation. Defendant filed a timely appeal.

Defendant's sole contention on appeal is that he was denied effective assistance of counsel because his attorney failed to make a motion to suppress the gun obtained as a result of Simpson's search. With respect to the assertion of ineffective assistance of counsel ("IAC") claims on direct appeal, our Supreme Court has held:

IAC claims brought on direct review will be decided on the merits when the cold record

reveals that no further investigation is required, i.e., claims that may be developed and argued without such ancillary procedures as the appointment of investigators or an evidentiary hearing. This rule is consistent with the general principle that, on direct appeal, the reviewing court ordinarily limits its review to material included in "the record on appeal and the verbatim transcript of proceedings, if one is designated." N.C. R. App. P. 9(a).

*State v. Fair*, 354 N.C. 131, 166, 557 S.E.2d 500, 524 (2001) (internal citation omitted), *cert. denied*, 535 U.S. 1114, 153 L. Ed. 2d 162, 122 S. Ct. 2332 (2002).

More recently, the United States Supreme Court has held that, in most cases, it is preferable for IAC claims to be brought in post-conviction proceedings rather than on direct appeal. *Massaro v. United States*, 538 U.S. 500, 504, 155 L. Ed. 2d 714, 720, 123 S. Ct. 1690, 1694 (2003). The Court explained:

When an ineffective-assistance claim is brought on direct appeal, appellate counsel and the court must proceed on a trial record not developed precisely for the object of litigating or preserving the claim and thus often incomplete or inadequate for this purpose. Under *Strickland v. Washington*, 466 U.S. 668, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984), a defendant claiming ineffective counsel must show that counsel's actions were not supported by a reasonable strategy and that the error was prejudicial. The evidence introduced at trial, however, will be devoted to issues of guilt or innocence, and the resulting record in many cases will not disclose the facts necessary to decide either prong of the *Strickland* analysis. . . . The trial record may contain no evidence of alleged errors of omission, much less the reasons underlying them.

*Massaro*, 538 U.S. at 505, 155 L. Ed. 2d at 720, 123 S. Ct. at 1694.

Here, defendant argues that the more lenient Fourth Amendment

standard applicable to searches in school settings – under *New Jersey v. T.L.O.*, 469 U.S. 325, 341, 83 L. Ed. 2d 720, 734, 105 S. Ct. 733, 742 (1985), and *In re D.D.*, 146 N.C. App. 309, 315, 554 S.E.2d 346, 350-351, *appeal dismissed and disc. review denied*, 354 N.C. 572, 558 S.E.2d 867 (2001) – did not control with respect to Deputy Simpson because he was acting under the direction of a fellow officer who was conducting a general law enforcement investigation related to defendant. In support of this argument, defendant attached in an appendix to his brief pages of transcript from a separate trial involving defendant at which Deputy Simpson testified. The State moved to strike this material as being outside the record, and on 16 November 2005, this Court allowed that motion.

On 14 November 2005, defendant filed a Motion to Amend the Record on Appeal to add to the record the material in the appendix. Defendant's motion asserts: "The information which was included in the appendix to the Appellant's Brief is necessary to present a complete understanding of the factual basis which supports the lone issue involved in this appeal." The transcript excerpts proposed to be added were not, however, part of the proceedings below, and, therefore, are not properly part of the record on appeal.

Since defendant bases his IAC claim on material outside the record, under *Fair* and *Massaro*, the IAC claim must be litigated in a motion for appropriate relief under N.C. Gen. Stat. § 15A-1415 (2005). Accordingly, since the IAC claim is the lone argument on appeal, we dismiss this appeal without prejudice to defendant's

raising this claim in a properly-filed motion for appropriate relief.

Dismissed.

Chief Judge MARTIN and Judge BRYANT concur.

Report per Rule 30(e).