An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA06-1081

NORTH CAROLINA COURT OF APPEALS

Filed: 01 May 2007

STATE OF NORTH CAROLINA

v. Haywood County
No. 05 CRS 52616-18

JACKIE BOIKE WALLACE

Appeal by defendant from judgments entered 12 April 2006 by Judge Zoro J. Guice, Jr. in Haywood County Superior Court. Heard in the Court of Appeals 9 April 2007.

Attorney General Roy Cooper, by Special Deputy Attorney General J. Allen Jernigan, for the State.

James N. Freeman, Jr. for defendant-appellant.

STEELMAN, Judge.

Since the 2003 amendments to Rule 103 of the N.C. Rules of Evidence were declared unconstitutional in *State v. Tutt*, 171 N.C. App. 518, 524, 615 S.E.2d 688, 692-93 (2005), defendant was required to renew her objection to evidence at trial following the denial of her motion to suppress. Since there was no objection at trial, this issue is not preserved for appellate review

The State presented evidence tending to show that on 23 July 2005, Douglas Carver was employed as an auxiliary officer with the Maggie Valley Police Department. Officer Carver received a call to respond to the Hearth and Home Inn. Upon arriving at the Hearth

and Home Inn, Officer Carver spoke to the manager, who reported that she suspected drug activity was taking place in Room 209. Officer Carver knocked on the door of Room 209. A man who identified himself as "Richard Cagle" cracked open the door. Officer Carver explained that he was investigating a tip that drug activity may be occurring in the room. With Cagle's permission, Officer Carver entered the room and saw defendant seated in a chair next to the door and two other persons sitting on a bed. Officer Carver saw copper metal shavings in an ashtray and an open box of baking soda on a night stand. Officer Carver knew that baking soda is commonly used as a "cutting agent in cocaine" and that copper metal shavings are utilized as a filter in a pipe used to smoke crack cocaine. Officer Carver observed a blue book bag next to defendant's leg. Officer Carver asked defendant whether the book bag belonged to her. Defendant responded, "Yes." Officer Carver asked for and received permission from defendant to look inside the bag. Officer Carver found inside the bag bottles of prescription medications labeled in defendant's name, digital scales, plastic baggies, two straws, a small plastic bag containing a small piece of crack cocaine, two clean glass pipes, one glass pipe with smoke residue, and a drug safe disguised as an RC Cola can. Officer Carver screwed off the top of the drug safe and found inside two bags containing methamphetamine. After finding all of these items in the bag, Officer Carver asked defendant whether the items belonged to her. Defendant hung her head down. Officer Carver left the room to speak to another officer. When Officer Carver

returned to the room, defendant stated that "it was hers and nobody else's."

Subsequent chemical analysis confirmed that the substances were 1.7 grams of cocaine base and 39.3 grams of methamphetamine hydrochloride.

Defendant did not present any evidence.

The jury found defendant guilty of the Class F felony of trafficking in methamphetamine, felony possession of cocaine and misdemeanor possession of drug paraphernalia. Defendant received an active sentence of 70-84 months imprisonment on the trafficking charge and a 6-8 month suspended sentence on the remaining charges. Defendant appeals.

Defendant contends the trial court erred by denying her motion to suppress (1) evidence seized as a result of the search of defendant's bag and (2) defendant's statement in response to the officer's inquiry as to whether the bag belonged to her. We disagree.

Defendant's pretrial motion to suppress evidence was heard on 10 April 2006, by Judge Guice and the motion was denied. These matters went to trial on 11-12 April 2006. Defendant never objected to the admission of the evidence of the drugs or the statement when it was offered at trial. A pretrial motion to suppress is a type of motion *in limine*. *State v. Golphin*, 352 N.C. 364, 405, 533 S.E.2d 168, 198 (2000), *cert. denied*, 532 U.S. 931, 149 L. Ed. 2d 305 (2001), *disc. review denied*, 358 N.C. 157, 593 S.E.2d 84 (2004). "A motion *in limine* is insufficient to preserve

for appeal the question of the admissibility of evidence if the defendant fails to further object to that evidence at the time it is offered at trial." *State v. Conaway*, 339 N.C. 487, 521, 453 S.E.2d 824, 845 (1995).

The North Carolina General Assembly amended Rule 103 of the Rules of Evidence to provide that "[o]nce the [trial] court makes a definitive ruling on the record admitting or excluding evidence, either at or before trial, a party need not renew an objection or offer of proof to preserve a claim of error for appeal," effective to rulings made on or after 1 October 2003. N.C. Gen. Stat. § 8C-1, Rule 103(a)(2) (2004). However, this Court held that this amendment to Rule 103 was unconstitutional in that it conflicted with N.C. R. App. P. 10(b)(1) (2005), which requires a party to make a timely request, objection, or motion and obtain a ruling in order to preserve appellate review. *Tutt*, at 524, 615 S.E.2d at 692-93. In *Tutt* and a number of subsequent cases this Court reviewed the trial court rulings upon a motion *in limine* or to suppress even though the party failed to object when the evidence was offered at trial because it would be unfair not to review the ruling when the defendant relied upon a procedural rule that was presumed constitutional at the time the case was tried. *See, e.g., State v. Smith*, ___ N.C. App. ___, ____, 636 S.E.2d 267, 274 (2006). The case at bar, however, was tried on 10 April 2006, long after this Court's decision in *Tutt* was filed on 19 July 2005.

We are thus compelled to conclude that at the time of defendant's trial, defendant was required to have objected to the

admission of the evidence in order to preserve her right to appellate review of the court's order ruling upon a motion to suppress. Defendant did not assign plain error or argue it in her brief, thus plain error review is waived. *See State v. Moore*, 132 N.C. App. 197, 201, 511 S.E.2d 22, 25 (1999). Even had defendant argued plain error, the totality of the circumstances established that defendant's consent to search and subsequent statement were freely and voluntarily given to Officer Carver. *See State v. Wilson*, 155 N.C. App. 89, 97-98, 574 S.E.2d 93, 99 (2002).

Defendant failed to argue the remaining assignments of error in her brief and they are deemed abandoned. N.C.R. App. P. 28(a) (2006).

NO ERROR.

Judges McCULLOUGH and LEVINSON concur.

Report per Rule 30(e).