

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA06-1342

NORTH CAROLINA COURT OF APPEALS

Filed: 3 July 2007

STATE OF NORTH CAROLINA

v.

Wake County
Nos. 05 CRS 7243; 7245

FERNANDO AQUILAR ESQUIVEL

Court of Appeals

Appeal by defendant from judgments entered 2 February 2006 by Judge Henry W. Hight, Jr., in Wake County Superior Court. Heard in the Court of Appeals 11 June 2007.

Attorney General Roy Cooper, by Assistant Attorney General John P. Scherer, II, for the State.

Slip Opinion

Glover & Petersen, P.A., by James R. Glover, for defendant-appellant.

MARTIN, Chief Judge.

Defendant Fernando Esquivel was charged in a bill of indictment with trafficking in cocaine by delivery and trafficking in cocaine by sale. A jury found defendant guilty as charged. The trial court sentenced defendant to two consecutive sentences of 173 to 219 months imprisonment. Defendant appeals.

The evidence for the State tended to show that on the morning of 29 January 2005, defendant drove a construction van to a pre-arranged location and gave a brick-shaped object containing 993.8

grams of cocaine to a confidential informant in exchange for money. Defendant testified on his own behalf.

Defendant contends the trial court erred in entering judgments against him for trafficking in cocaine by sale and by delivery because the indictments were fatally flawed. The first indictment alleged: "that on or about the 29th day of January, 2005, in the county named above the defendant named above unlawfully, willfully and feloniously did traffic by delivery 400 grams or more of cocaine, a controlled substance which is included in Schedule II of the North Carolina Controlled Substances Act." The second indictment alleged: "that on or about the 29th day of January, 2005, in the county named above the defendant named above unlawfully, wilfully and feloniously did traffic by sale 400 grams or more of cocaine, a controlled substance which is included in Schedule II of the North Carolina Controlled Substances Act." Defendant asserts the indictments do not name the person to whom a sale was allegedly made and do not allege that the name of the purchaser is unknown and, therefore, the judgments must be vacated. We agree.

North Carolina Courts have held that an indictment must state the name of the person to whom the accused allegedly sold narcotics unlawfully when it is known or must allege in the alternative that the name of the person is unknown. See *State v. Calvino*, ___ N.C. App. ___, 632 S.E.2d 839, 842 (2006) (vacating defendant's conviction for sale and delivery of cocaine because indictment was fatally flawed in that it did not state the name of the person to

whom defendant allegedly sold narcotics when the State knew the name of the individual); *State v. Wall*, 96 N.C. App. 45, 49, 384 S.E.2d 581, 583 (1989) ("[A]n indictment for the sale and/or delivery of a controlled substance must accurately name the person to whom the defendant allegedly sold or delivered, if that person is known."); *State v. Martindale*, 15 N.C. App. 216, 218, 189 S.E.2d 549, 550 (1972) (holding the indictment for the unlawful sale of narcotics was improper for failing to state the name of the person to whom defendant allegedly sold narcotics unlawfully or that his name was unknown); *State v. Long*, 14 N.C. App. 508, 510, 188 S.E.2d 690, 691 (1972) (holding the indictment concerning the sale of narcotics was fatally defective and could not sustain judgment because indictment failed to state the name of the person to whom defendant allegedly sold marijuana or that the name of such person was unknown); *State v. Bennett*, 280 N.C. 167, 185 S.E.2d 147 (1971) (arresting judgment based on the indictment charging unlawful sale of narcotics when indictment failed to state sufficient facts because it did not allege the name of the person to whom the sale was made or that his name was unknown). Here, the indictments allege neither the name of the individual to whom defendant allegedly sold or delivered the cocaine in question nor that the name of the individual was unknown.

Although the State acknowledges the holdings in these cases, it contends they were wrongly decided, and argues as such to preserve the issue for further review. We are bound by prior decisions of a panel of this Court, *In the Matter of Appeal from*

Civil Penalty, 324 N.C. 373, 384, 379 S.E.2d 30, 36 (1989), and we vacate defendant's convictions for trafficking in cocaine by sale and by delivery because the indictments were fatally defective.

Vacated.

Judges CALABRIA and JACKSON concur.

Report per Rule 30(e).