

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA06-137

NORTH CAROLINA COURT OF APPEALS

Filed: 21 November 2006

STATE OF NORTH CAROLINA

v.

ANTONIO GARCIA DUARTE

Forsyth County
Nos. 02 CRS 63586,
03 CRS 6165

Appeal by defendant from judgment entered 24 June 2004 by Judge William Z. Wood, Jr., in Forsyth County Superior Court. Heard in the Court of Appeals 13 November 2006.

Attorney General Roy Cooper, by Assistant Attorney General Amy C. Kunstling, for the State.

Nancy R. Gaines for defendant-appellant.

LEVINSON, Judge.

On 24 March 2003, the Forsyth County grand jury indicted Antonio Garcia Durante (defendant) on charges of conspiracy to traffic in cocaine by both transportation and possession and of trafficking in cocaine by both transportation and possession. At a hearing on 26 April 2004, the trial court allowed the State's motion to join a co-defendant and all offenses for trial. As the trial court began hearing evidence regarding a motion to suppress which had been filed by the co-defendant, counsel for defendant stated defendant was adopting the motion at that time. At the conclusion of the hearing and after hearing argument from counsel,

the trial court took the matter under advisement.

On 24 June 2004, defendant pled guilty to lesser-included offenses of the four counts in the indictments pursuant to a plea arrangement. He also pled guilty to a charge of possession with intent to sell and deliver cocaine. According to the transcript of plea, defendant reserved his right to appeal the denial of a motion to suppress. The trial court consolidated the offenses into two judgments and imposed consecutive sentences with a combined term of 105 to 126 months imprisonment. From the trial court's judgments, defendant appealed.

Defendant contends the trial court erred by denying his motion to suppress. He argues the trial court failed to conduct a balancing test under N.C.R. Evid. 403 of the relative probative and prejudicial impact of the evidence found in a co-defendant's vehicle. The record on appeal does not support defendant's argument.

"This Court is bound by the record before it, and in the absence of anything in the record to indicate otherwise, must assume that the trial judge ruled properly on matters before him, correctly applying the applicable law." *State v. Williams*, 304 N.C. 394, 415, 284 S.E.2d 437, 451 (1981). As the appellant, defendant had the duty and responsibility of seeing that the record before this Court was complete. *State v. Alston*, 307 N.C. 321, 341, 298 S.E.2d 631, 644 (1983). The 26 April 2004 transcript contains a statement by defendant's counsel that he was adopting the co-defendant's motion to suppress. In the statement of the

case contained in his brief, defendant described it as a motion to suppress evidence obtained through an illegal search and seizure which the trial court denied in open court on 9 June 2004. Briefs, however, are not a part of the record on appeal. See N.C.R. App. P. 9(a); see also *Ronald G. Hinson Electric, Inc. v. Union County Bd. of Educ.*, 125 N.C. App. 373, 375, 481 S.E.2d 326, 328 (1997).

Aside from defendant's statement in open court that he was adopting his co-defendant's motion to suppress and the reservation of his "right of appeal the denial of his motion to suppress" found in his transcript of plea, the record before this court contains nothing about a motion to suppress by defendant. While the record does contain a motion in limine by defendant, its purpose was to have the trial court prohibit any mention during trial of the State's confidential informant and his activities rather than to suppress evidence found in the co-defendant's vehicle.

Nowhere in the record does there appear an order by the trial court denying a motion to suppress by defendant. Nor is there any record before this Court of the proceedings on 9 June 2004 in which the trial court allegedly made its findings of fact and denied the co-defendant's motion to suppress. This Court cannot review the action of a trial court when that action does not appear of record. See N.C.R. App. P. 9(a)(3)(g) (specifying that the record on appeal in criminal cases shall contain copies of "the judgment, order, or other determination from which appeal is taken"). Accordingly, this appeal is dismissed.

Dismissed.

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Judges TYSON and BRYANT concur.

Report per Rule 30(e).