

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA06-319

NORTH CAROLINA COURT OF APPEALS

Filed: 3 October 2006

STATE OF NORTH CAROLINA

v.

Guilford County  
Nos. 04 CRS 68256-7

DARIUS CHRISGERALD MIMS

Appeal by defendant from judgments entered 27 April 2005 by Judge L. Todd Burke in Guilford County Superior Court. Heard in the Court of Appeals 11 September 2006.

*Attorney General Roy Cooper, by Assistant Attorney General Gary A. Scarzafava, for the State.*

*Allen W. Boyer for defendant-appellant.*

CALABRIA, Judge.

Darius Chrisgerald Mims ("defendant") appeals from an order of the trial court revoking his probation. We dismiss without prejudice.

On 20 August 2004, defendant pled guilty pursuant to a plea agreement to trafficking by possessing 28-200 grams of cocaine and to conspiracy to traffick 28-200 grams of cocaine. The trial court sentenced defendant to two consecutive terms of a minimum of 35 months and a maximum of 42 months in the North Carolina Department of Correction, suspended the sentences, and placed defendant on supervised probation.

On 8 April 2005, a probation officer filed violation reports, alleging that defendant had violated his probation for both convictions by testing positive for cocaine, leaving his residence without permission, and failing to provide evidence of substance abuse treatment. For the trafficking offense, the report also alleged that defendant had violated his probation by failing to pay ordered costs and probation supervision fees. The Guilford County Superior Court held a probation violation hearing on 19 April 2005, and defendant admitted all violations except leaving his residence, therefore, the trial court struck this violation.

At the hearing, Probation Officer Hall ("Hall") testified that "[m]y recommendation is from my supervisor. If the Court does not deem to revoke him, to place him in the DART 90-day program; have him remain on house arrest until that will be available." The assistant district attorney then asked the court to activate defendant's sentences. Defendant's attorney responded that she spoke with probation supervisor Kristen Coulston ("Coulston"), who "indicated that she wanted [defendant] to get some help. She wanted him to go to the 90-day drug program, the DART Program[,] and she wanted him to be on house arrest." Defendant's attorney asked the court to "take the recommendation of the probation officer" and continue probation. After considering the matter, the trial court determined that defendant willfully violated the terms of his probation, revoked defendant's probation, and activated his suspended sentences, to run concurrently. Defendant appeals.

Defendant's sole argument on appeal is that he received

ineffective assistance of counsel because his counsel failed to call Coulston as a witness. Defendant argues that although counsel informed the court that supervisor Coulston "wanted defendant to be on house arrest," counsel did not present any direct testimony from Coulston regarding her recommendation to continue probation. Specifically, defendant argues that if counsel had submitted this evidence, the trial court would have continued his probation. Thus, defendant argues that his counsel's performance was so deficient and unreasonable that it amounted to ineffective assistance of counsel.

Defendant acknowledges in his brief that the preferred method for raising a claim of ineffective assistance of counsel is by a motion for appropriate relief. See *State v. Dockery*, 78 N.C. App. 190, 192, 336 S.E.2d 719, 721 (1985) ("The accepted practice is to raise claims of ineffective assistance of counsel in post-conviction proceedings, rather than direct appeal"). This Court has held,

[a] motion for appropriate relief is preferable to direct appeal because in order to defend against ineffective assistance of counsel allegations, the State must rely on information provided by defendant to trial counsel, as well as defendant's thoughts, concerns, and demeanor. Only when all aspects of the relationship are explored can it be determined whether counsel was reasonably likely to render effective assistance.

*State v. Stroud*, 147 N.C. App. 549, 554, 557 S.E.2d 544, 547 (2001) (quotations and citations omitted). This Court will review a defendant's ineffective assistance of counsel claims "brought on direct review . . . [only] 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." *State v. Fair*, 354 N.C. 131, 166, 557 S.E.2d 500, 524 (2001). A careful review of the record, briefs, and contentions of the parties in this case fails to establish that defendant's claim of ineffective assistance of counsel can be determined without further investigation. Thus, we dismiss this appeal without prejudice to defendant's right to reassert his claims by filing a motion for appropriate relief in superior court. See *id.*, 354 N.C. at 167, 557 S.E.2d at 525.

Dismissed without prejudice.

Chief Judge MARTIN and Judge JACKSON concur.

Report per Rule 30(e).