

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA06-39

NORTH CAROLINA COURT OF APPEALS

Filed: 3 October 2006

STATE OF NORTH CAROLINA

v.

Guilford County
No. 03 CRS 103572

RYAN LEWIS LITTLE

Appeal by defendant from judgment entered 21 April 2004 by Judge Anderson D. Cromer in Guilford County Superior Court. Heard in the Court of Appeals 29 September 2006.

Attorney General Roy Cooper, by Assistant Attorney General Richard Bradford, for the State.

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

TYSON, Judge.

Ryan Lewis Little ("defendant") appeals from judgment entered after a jury found him to be guilty of possession of a firearm by a felon. We find no error.

I. Background

The State's evidence tended to show on 7 November 2003 at approximately 8:31 a.m., Greensboro Police Officer A.D. Reed ("Officer Reed") responded to a call reporting a "suspicious person" was "casing" the area of Gatewood Avenue and Textile Drive. As Officer Reed drove west on Woodside Drive, he saw defendant, who matched the description of the "suspicious person," standing beside

a shed located one block from the location identified in the call.

Officer Reed stopped his car approximately forty to fifty feet away from defendant and motioned to defendant to come to his patrol car. Defendant complied. As defendant walked toward the car, Officer Reed's microphone fell to the floor of his vehicle and his attention was diverted away from defendant for five to six seconds. Defendant was approximately twenty feet from the patrol car when Officer Reed replaced the microphone and re-established eye contact with defendant.

Officer Reed informed defendant he was investigating the area for a suspicious person in response to a call he had received and that defendant matched the description. Officer Reed asked defendant if he would consent to a search of his person, which defendant granted. At Officer Reed's request, defendant also agreed to wait in the patrol car while Officer Reed investigated the area. Defendant was not under arrest or handcuffed at this time.

Officer Reed walked across the grass to the area where he first noticed defendant standing. The grass was covered with dew and Officer Reed's boots got wet as a result. Officer Reed discovered a loaded .38 caliber revolver within two feet of where he originally observed defendant and in the area where he lost eye contact with defendant. The revolver was dry. The revolver was later confirmed to be stolen.

Although defendant was the only person in the area observed by Officer Reed, officers were unable to determine defendant's

movements prior to Officer Reed's arrival. The police officers used police dogs to search the area around the shed where defendant was first seen by Officer Reed. No other tracks were discovered and the grass around the shed had not been disturbed.

Defendant stipulated to being a convicted felon. The jury found him to be guilty of possession of a firearm by a felon and not guilty of possession of a stolen firearm. Defendant was sentenced to twenty to twenty-four months imprisonment. Defendant filed a petition for a writ of certiorari with this Court on 26 June 2006.

II. Issues

Defendant contends the trial court erred in: (1) denying his *pro se* motion for a continuance in violation of his constitutional right to counsel and (2) denying his motion to dismiss based on insufficiency of the evidence.

Defendant's remaining assignments of error are not addressed in his brief to this Court and are abandoned. N.C.R. App. P. 28(b)(6) (2006).

III. Notice of Appeal - Writ of Certiorari

On 26 June 2006, defendant filed a petition for a writ of certiorari with this Court. We allow this petition.

Rule 4(a) of the North Carolina Rules of Appellate Procedure provides:

Any party entitled by law to appeal from a judgment or order of a superior or district court rendered in a criminal action may take appeal by (1) giving oral notice of appeal at trial, or (2) filing notice of appeal . . . within 14 days after entry of the judgment or

order[.]

N.C.R. App. P. 4(a) (2006). Further, Rule 9(a)(3)(h) of the North Carolina Rules of Appellate Procedure provides that "a copy of the notice of appeal or an appropriate entry or statement showing appeal taken orally" shall be included in the record on appeal. N.C.R. App. P. 9(a)(3)(h) (2006).

Here, neither the trial transcript nor the judgment indicates defendant gave oral notice of appeal after trial. Further, the record on appeal does not contain a written notice of appeal. Although the record includes appellate entries which indicate defendant gave notice of appeal, they were filed on 2 August 2005, approximately fifteen months after entry of the judgment. Even if the appellate entries were filed within fourteen days after entry of the judgment, they are insufficient to preserve a defendant's right to appeal. See *State v. Blue*, 115 N.C. App. 108, 113, 443 S.E.2d 748, 751 (1994) (holding defendant did not preserve his right to appeal his conviction where the record on appeal included appellate entries but did not include a written notice of appeal).

"[W]hen a defendant has not properly given notice of appeal, this Court is without jurisdiction to hear the appeal." *State v. McCoy*, 171 N.C. App. 636, 638, 615 S.E.2d 319, 320, *appeal dismissed*, 360 N.C. 73, 622 S.E.2d 626 (2005). Accordingly, we are compelled to dismiss defendant's appeal. See *Id.* at 638, 615 S.E.2d at 320 ("Rule 27(c) of the Rules of Appellate Procedure prohibits this Court from granting defendant an extension of time to file his notice of appeal since compliance with the requirements

of Rule 4(a)(2) is jurisdictional and cannot simply be ignored by this Court.”)

While this Court cannot hear defendant’s direct appeal, we have discretion to consider the matter by granting a petition for writ of certiorari. “The writ of certiorari may be issued in appropriate circumstances by either appellate court to permit review of the judgments and orders of trial tribunals when the right to prosecute an appeal has been lost by failure to take timely action” N.C.R. App. P. 21(a)(1) (2006). We allow defendant’s petition and address the merits of his assignments of error.

IV. Motion to Continue

A. Request for New Counsel

Defendant first contends the trial court erred in denying his *pro se* motion for a continuance in violation of his constitutional right to counsel. We disagree.

During the morning defendant’s trial was set to begin that afternoon, defendant requested a continuance to afford him an opportunity to hire his own counsel. Defendant informed the trial court he was unhappy with his court-appointed counsel because counsel had only met with defendant on one occasion at which time they discussed a plea bargain offered by the State. The trial judge asked defense counsel if he was prepared to go forward with trial. Counsel responded in the affirmative. The trial court did not immediately rule on defendant’s motion. Rather, the trial court directed defendant to meet with his court-appointed attorney

for approximately thirty minutes. After meeting with his attorney, the following exchange occurred between the trial court and defendant:

THE COURT: Mr. Little, you've had a chance to talk to Mr. Troutman. Do you still wish to have other counsel?

THE DEFENDANT: Yes, your honor.

THE COURT: All right. Tell me why.

THE DEFENDANT: Because, your honor, I feel as if he doesn't have a chance on this case. I've spoken with him about it. He feels the same way.

. . . .

THE DEFENDANT: I'd like to have my own attorney. Is that possible?

THE COURT: Let me ask you this, sir? Can you afford one?

THE DEFENDANT: Yes, sir.

THE COURT: Well, was Mr. Troutman hired or was he court-appointed?

THE DEFENDANT: He was court-appointed.

THE COURT: How long have you been in jail?

THE DEFENDANT: I've been in jail since November 7.

THE COURT: Now, how has your financial situation changed to the better since you've been in jail.

THE DEFENDANT: I want to speak with my grandmother and grandfather.

THE COURT: Have they come to visit you since you've been in jail?

THE DEFENDANT: Yes, sir.

THE COURT: Why didn't you speak with them

about hiring an attorney?

THE DEFENDANT: Really, I thought I had a chance with Mr. Troutman.

. . . .

THE COURT: Sir, I'm going to deny your motion for new counsel, and I'm going to deny your request for a continuance. If there is a witness that you need to have subpoenaed, that Mr. Troutman is unable to find out about until just about 30 minutes ago, I may reconsider a motion to continue. But unless there is something I can put my hands around to continue this, I'm not going to do it. So we'll start at two o'clock.

B. Standard of Review

"[A] motion for continuance is ordinarily left to the sound discretion of the trial court 'whose ruling thereon is not subject to review absent an abuse of such discretion.'" *State v. Bunch*, 106 N.C. App. 128, 131, 415 S.E.2d 375, 377 (quoting *State v. Branch*, 306 N.C. 101, 104, 291 S.E.2d 653, 656 (1982)), *disc. rev. denied*, 332 N.C. 149, 419 S.E.2d 575 (1992). Even where the motion to continue potentially raises a constitutional issue, its denial results in a new trial only when the defendant shows "that the denial was erroneous and also that his case was prejudiced as a result of the error.'" *Bunch*, 106 N.C. App. at 131-32, 415 S.E.2d at 377 (quoting *Branch*, 306 N.C. at 104, 291 S.E.2d at 656).

Here, defendant moved for a continuance stating he felt his court-appointed counsel was unprepared because defendant and counsel had only met once, at which time a plea bargain offered by the State was discussed. Defendant also informed the trial court that he wanted to hire his own counsel. In response to the trial

court's inquiry, defendant's court-appointed counsel informed the trial court that he was prepared to go forward with the trial. Before ruling on the motion, the trial court instructed defendant to meet with his counsel for thirty minutes to discuss his case. Although defendant argues he and counsel disagreed about whether he should have accepted the plea bargain offered by the State and some other issues relating to his case, our Supreme Court has stated that "[i]n the absence of a conflict which presents . . . a Sixth Amendment problem, the trial court has discretion to decide whether to grant a continuance during the course of trial for the substitution of counsel, and that decision will be reversed only if the court has abused its discretion." *State v. Sweezy*, 291 N.C. 366, 372, 230 S.E.2d 524, 529 (1976). Here, defendant has failed to show that any conflict between him and his counsel presents a Sixth Amendment issue or that the trial court abused its discretion in denying defendant's motion. Under these circumstances, defendant also failed to show the trial court abused its discretion in denying his motion to continue. This assignment of error is overruled.

C. Prejudice

Defendant also failed to establish he was prejudiced by the trial court's denial of his motion to continue. Defendant has not argued his court-appointed counsel was ineffective in representing him at trial. Counsel cross-examined witnesses, presented a defense, and argued on defendant's behalf. The jury found defendant not guilty on one of the two charges pending against him.

This assignment of error is overruled.

V. Motion to Dismiss

Next, defendant contends the trial court erred by denying his motion to dismiss based on insufficiency of the evidence. We disagree.

A motion to dismiss should be denied if there is substantial evidence: "(1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense." *State v. Barnes*, 334 N.C. 67, 75, 430 S.E.2d 914, 918 (1993). When reviewing a motion to dismiss based on insufficiency of the evidence, this Court must:

view the evidence in the light most favorable to the State, giving the State the benefit of all reasonable inferences. Contradictions and discrepancies do not warrant dismissal of the case but are for the jury to resolve Once the court decides that a reasonable inference of defendant's guilt may be drawn from the circumstances, then it is for the jury to decide whether the facts, *taken singly or in combination*, satisfy [it] beyond a reasonable doubt that the defendant is actually guilty.

Id. at 75-76, 430 S.E.2d at 918-19 (internal quotations omitted). The test for sufficiency of the evidence remains, whether the evidence is direct or circumstantial or both. *Id.* at 75, 430 S.E.2d at 918-19. "In borderline or close cases, our courts have consistently expressed a preference for submitting issues to the jury" *State v. Hamilton*, 77 N.C. App. 506, 512, 335 S.E.2d 506, 510 (1985), *disc. rev. denied*, 315 N.C. 593, 341 S.E.2d 33 (1986) (quotations omitted).

Defendant was charged with possession of a firearm by a felon

in violation of N.C. Gen. Stat. § 14-415.1. This statute provides it is unlawful for "any person who has been convicted of a felony to purchase, own, possess, or have in his custody, care, or control any firearm or any weapon of mass death and destruction as defined in G.S. 14-288.8(c)." N.C. Gen. Stat. § 14-415.1(a) (2005). Defendant stipulated to and does not challenge his status as a convicted felon. His sole contention on appeal is the evidence was insufficient for the jury to find he possessed the firearm. He argues because no one saw him in possession of the revolver, and since he complied with Officer Reed's requests, there was insufficient evidence he possessed the revolver.

"Possession may either be actual or constructive. When the defendant, while not having actual possession, . . . has the intent and capability to maintain control and dominion over the [property], he has constructive possession of the item." *State v. Glasco*, 160 N.C. App. 150, 156, 585 S.E.2d 257, 262 (internal quotation omitted), *disc. rev. denied*, 357 N.C. 580, 589 S.E.2d 356 (2003). "This Court has previously emphasized that constructive possession depends on the totality of the circumstances in each case. No single factor controls, but ordinarily the questions will be for the jury." *Id.* at 156-57, 585 S.E.2d at 262.

Considering the evidence in the light most favorable to the State and giving the State the benefit of every reasonable inference that may be drawn, Officer Reed discovered a loaded .38 caliber revolver within two feet of the area where defendant was located, when Officer Reed originally observed defendant, and in

the same area where he lost eye contact with defendant. Although dew was present on the grass and Officer Reed's boots got wet as a result of the dew, the revolver was dry. Further, police officers did not find tracks or evidence that other individuals had been in the area where the gun was discovered. The State presented sufficient evidence to carry the case to the jury. The trial court properly denied defendant's motion to dismiss. This assignment of error is overruled.

VI. Conclusion

Defendant has failed to show the trial court abused its discretion in denying his motion for new counsel or to continue. The trial court did not err in denying defendant's motion to dismiss. Defendant received a fair trial free from prejudicial errors he preserved, assigned, and argued.

No Error.

Judges BRYANT and LEVINSON concur.

Report per Rule 30(e).