

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA08-545

NORTH CAROLINA COURT OF APPEALS

Filed: 16 December 2008

STATE OF NORTH CAROLINA

v.

Sampson County
No. 07 CRS 50240

RONALD JOSEPH PEGUES

Court of Appeals

Appeal by defendant from judgment entered 9 January 2008 by Judge Kenneth Crow in Sampson County Superior Court. Heard in the Court of Appeals 8 December 2008.

Attorney General Roy Cooper, by Assistant Attorney General Daniel S. Hirschman, for the State.

Slip Opinion

Richard G. Roose for defendant-appellant.

BRYANT, Judge.

Ronald Joseph Pegues (defendant) appeals from a judgment entered upon a jury verdict finding him guilty of felonious restraint. For the following reasons, we find no error.

Facts

The State's evidence tended to show that Randall Herndon was the owner of Randy's Auto Repair. In February of 2006, defendant and a female companion, Jenelle McNeil (McNeil), brought a Lincoln Towncar to Herndon's repair shop. It was agreed that Herndon would perform the repairs for an estimated cost of \$500. On 14 February

2006, Herndon completed the repairs at a final cost of \$510.08 and Herndon called McNeil to let her know the vehicle was ready. When no one returned to pick up the Towncar, Herndon had it moved to a different part of the yard where the car would not be easily accessible from the road.

Almost a year later, on 4 January 2007, McNeil returned to Herndon's repair shop to pick up the Towncar. Herndon told McNeil that the Towncar would have to be moved from its present location and that the fluids would need to be checked because the vehicle had been stationary for a long time. They agreed that Ms. McNeil would return at 2:00 p.m. to pick up the car. When McNeil returned at 2:00 p.m., she informed Herndon that she wanted to test drive the Towncar before she paid the repair bill. Herndon told her that he would have to ride with her during the test drive. McNeil and Herndon left the shop in the Towncar with McNeil driving and Herndon riding in the front passenger seat.

During the drive, McNeil stopped for a stop sign and a Mercedes Benz vehicle pulled up beside the Towncar. McNeil exited the Towncar and defendant, who was in the Mercedes, got into the driver's seat of the Towncar. Defendant told Herndon that "he's paying the bills, so he's going to make sure it's alright." Defendant initially drove the car in the direction of Herndon's repair shop. As they approached the repair shop, defendant did not slow down. Herndon told Defendant they needed to stop, but defendant continued driving without saying anything. Although Herndon told defendant twice to stop the vehicle so that he could

get out, defendant did not stop. Herndon testified that he was scared because he did not know what was going to happen.

After driving the vehicle for approximately seven miles, defendant stopped at Saint John's Terrace, a housing community in Dunn. Defendant pulled into a parking space, turned the engine off, took the keys out of the ignition, exited the Towncar and went into one of the houses. Herndon exited the Towncar and called his wife on his cell phone. Herndon asked his wife to come get him at Saint John's Terrace. Mrs. Herndon could tell her husband was nervous and asked him what happened. Herndon told his wife he would tell her later. Mrs. Herndon told her husband she was on her way and, after hanging up, phoned the police. At that point, defendant came out of the house and begin talking to people in the parking lot. When Mrs. Herndon arrived she noticed her husband looked "[v]ery very scared." Shortly thereafter, Dunn Police officers arrived. Herndon talked to the police officers and was told to contact the Sampson County Sheriff's Department who would have jurisdiction over his complaint.

At the close of the State's evidence, defendant moved to dismiss the charges against him. The trial court dismissed the charges of first-degree and second-degree kidnapping, but allowed the State to proceed on the lesser included offense of felonious restraint.

Defendant testified on his own behalf that he continued to drive the car because the brakes were making a grinding sound; that Herndon told him that the car might need to be driven some more;

that he drove to Saint John's terrace with the intention of calling his father who was an auto mechanic so that he could inspect the car; and that Herndon did not ask to get out of the car.

At the close of all the evidence, defendant made a motion to dismiss, which was denied. The trial court instructed the jury on felonious restraint and false imprisonment. The jury found defendant guilty of felonious restraint. The trial court sentenced defendant to twenty-one to twenty-six months imprisonment.

In his sole argument on appeal, defendant contends the trial court abused its discretion by denying his counsel's motion to withdraw from representation. The transcript of defendant's trial reflects that when defendant's case was called for trial, the trial court heard arguments regarding the motion to withdraw. Defense counsel informed the court that the attorney-client relationship had been irreparably damaged which would threaten her ability to effectively assist defendant. Defense counsel stated that in preparing for trial, defendant had provided her with a number of witnesses to be subpoenaed, but those witnesses indicated they would not be willing to testify. Additionally, one of the witnesses had informed defense counsel that defendant had "drilled" the witness about what his or her testimony should be at trial; that when the witness responded negatively, defendant "badger[ed] and yell[ed]" at the witness; that defendant was "a constant presence at his or her area of residence;" and that the witness was fearful of defendant.

Defense counsel called the North Carolina State Bar which advised counsel to withdraw or to file a motion to withdraw and to be candid with the tribunal regarding this information. Defense counsel requested that the trial court find that her relationship with defendant was irreparably damaged and that she could not "continue to effectively zealously represent him, given this situation as [she was] familiar with it.'

The court addressed counsel's motion as follows:

THE COURT: Okay. All right. How many trials have you had before, Ms. Hales?

MS. HALES: Three, Your Honor.

THE COURT: To jury?

MS. HALES: Yes, sir.

THE COURT: [] you would agree with me that in your representation to your client that in the event the State is able to get this matter to a jury, after the close of their evidence, it would be your client's decision as to whether or not to testify in his behalf?

MS. HALES: Yes, Your Honor.

THE COURT: Do you also share the opinion that I have that in your capacity as his attorney of record, it would be your decision not his as to whether or not to call any defense witnesses other than your client.

MS. HALES: Yes, Your Honor.

. . .

THE COURT: [] do you know of anything that would call your competence into question?

MS. HALES: No, sir.

Afterwards, defense counsel informed the trial court that defendant's case had been placed on the trial calendar in December

of 2007 and that she prepared for trial after defendant rejected a plea agreement. The following colloquy then occurred between the trial court and defendant's attorney:

THE COURT: All right. All right; is there anything else that you want to say about your motion as to why you cannot competently and zealously represent him, notwithstanding what you found out? I reckon what I'm getting at; let's just assume for a second that I deny it, what reason do you have to tell me right now that you can't go to the mat and fight [the assistant district attorney] tooth and nail to acquit your client?

MS. HALES: Your Honor, first of all, I would attempt to do that, but I would indicate to the Court that I'm afraid for repercussions for myself and the witnesses involved in this case because of the disclosure that I have made to the Court today.

The trial court subsequently addressed defendant. Defendant denied any improper witness contact or witness intimidation. Defendant stated, "I have not talked to none of my witnesses about the case but Christy Westbrook. She's supposed to be in court today. I went to her house. Can't nobody get here." The court denied defense counsel's motion to withdraw from representation.

A ruling on a motion to withdraw is left to the sound discretion of the trial court. *State v. Thomas*, 310 N.C. 369, 375, 312 S.E.2d 458, 461 (1984). The court may deny the motion once it is satisfied "that the 'present counsel is able to render competent assistance and that the nature or degree of the conflict is not such as to render that assistance ineffective.'" *State v. Poole*, 305 N.C. 308, 311, 289 S.E.2d 335, 338 (1982) (citation and quotation omitted). "In order to establish prejudicial error

arising from the trial court's denial of a motion to withdraw, a defendant must show that he received ineffective assistance of counsel." *State v. Thomas*, 350 N.C. 315, 328, 514 S.E.2d 486, 495, cert. denied, 528 U.S. 1006, 145 L. Ed. 2d 388 (1999) (citation omitted). If the defendant does not show prejudice, this Court need not determine if the trial court abused its discretion in denying the motion to withdraw. See *Thomas*, 310 N.C. at 375, 312 S.E.2d at 461.

Here, defendant makes no showing that his counsel rendered constitutionally ineffective assistance at trial. See *Strickland v. Washington*, 466 U.S. 668, 686, 80 L. Ed. 2d 674, 692 (1984). Defendant fails to show "that counsel's performance fell below an objective standard of reasonableness[,]" *Thomas*, 350 N.C. at 328, 514 S.E.2d at 495 (citation omitted), or that counsel's deficiencies "were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Strickland*, 466 U.S. at 687, 80 L. Ed. 2d at 693.

Contrary to defendant's assertion, his counsel's failure to call witnesses is not constitutionally ineffective assistance of counsel. Defense counsel made a reasoned strategy decision, especially given the information counsel received regarding witness intimidation and possible perjury. Where the strategy of trial counsel is "well within the range of professionally reasonable judgments," the action of counsel is not constitutionally ineffective. *Id.* at 699, 80 L. Ed. 2d at 701.

The record shows that counsel for defendant ably

cross-examined and re-crossed the State's witnesses, made appropriate objections throughout the trial, and successfully argued defendant's motion to dismiss. Further, nothing in this record indicates that the calling of defendant's witnesses would have resulted in any different outcome. Accordingly, we hold the trial court did not abuse its discretion in denying defense counsel's motion to withdraw from representation. Defendant's assignment of error is overruled.

No error.

Judges TYSON and Judge ARROWOOD concur.

Report per Rule 30(e).