

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA09-1429

NORTH CAROLINA COURT OF APPEALS

Filed: 20 July 2010

STATE OF NORTH CAROLINA

v.

Wake County
Nos. 08 CRS 74099, 85149

FONZIE EUGENE GODWIN

Appeal by defendant from judgment entered 12 June 2009 by Judge A. Leon Stanback in Wake County Superior Court. Heard in the Court of Appeals 19 July 2010.

Attorney General Roy Cooper, by Assistant Attorney General Kimberly D. Potter, for the State.

Anne Bleyman, for defendant-appellant.

BRYANT, Judge.

Fonzie Eugene Godwin ("defendant") appeals from judgment entered upon conviction for felonious speeding to elude arrest and attaining the status of habitual felon. He contends he received ineffective assistance of counsel due to trial counsel's failure to request a continuance upon the introduction of surprise witnesses by the State. We dismiss the appeal without prejudice to defendant's right to file a motion for appropriate relief in superior court based on ineffective assistance of counsel.

On 16 December 2008, defendant was indicted for assault with a deadly weapon on a government official, felonious speeding to

elude arrest, and having attained the status of habitual felon. The indictments were the result of an incident occurring in October 2008. Defendant borrowed a green 1992 Lincoln from Jalisa Devonne Covington, the mother of his child, early that month. On the night of 10 October 2008, around 11:00 p.m., North Carolina State Highway Patrol Trooper J.L. Taylor was stationed on Highway 70 when he saw a westbound green Lincoln traveling at an estimated 75 miles per hour in a 55 mile per hour zone. Trooper Taylor caught up with the vehicle, confirmed that it was speeding, and attempted to execute a traffic stop. The vehicle sped up, however, and at one point exceeded 100 miles per hour as Trooper Taylor gave chase on the highway.

The car exited the highway and proceeded to make several turns onto different streets as the chase continued, not stopping at either a stop sign or a red light, and at one point traveling in the opposite lane of traffic. State Highway Patrol Trooper Matt Young and Lieutenant James Byrd from the Wake County Sheriff's Office joined the chase. The law enforcement officers attempted to execute a rolling road block as the chase continued onto Highway 64. As he passed the vehicle, Trooper Taylor saw that the car had a black male driver and a black male passenger who was wearing a Yankees baseball cap. After Trooper Taylor decelerated in an effort to bring the Lincoln to a stop, the Lincoln swerved and hit Trooper Young's vehicle, then ran off the road and came to a stop.

The driver and the passenger of the Lincoln immediately exited the vehicle and fled on foot. Trooper Taylor saw the driver as he

fled, and identified defendant in court as the driver of the Lincoln. Trooper Young and Lieutenant Byrd also saw the driver and were able to give a physical description of him. Since Trooper Taylor was closer to the passenger, he chased the passenger to a church parking lot where the passenger gave himself up. Meanwhile, Trooper Young chased defendant, but defendant was able to escape into a wooded area.

A K-9 unit was called in to track defendant, and law enforcement officers attempted to set up a perimeter. Defendant was thereafter apprehended in a mobile home park in a mobile home owned by Christine Gruschow, approximately a half mile from the site where the car chase ended. Ms. Gruschow's daughter and defendant's brother Donnie McMillan were also present at the mobile home when defendant was arrested. Ms. Gruschow testified that defendant knocked on her door sometime around 11:30 p.m., asking for a pair of pants. The police arrived about five minutes later and arrested defendant. Ms. Gruschow stated she had seen defendant driving a green Lincoln earlier in the day.

Trooper Young estimated that the damage to his patrol vehicle was \$3,000.00. At the time of the car chase, defendant's driver's license was suspended.

Defendant presented one witness in his defense, his brother Donnie McMillan, who was at the mobile home on the night of the incident when defendant was arrested. Mr. McMillan testified that defendant was at the house on 10 October 2008, having been dropped off around 10:30 or 11:00 in the morning. Defendant was there all

day, until Mr. McMillan and Ms. Gruschow left around 8:00 p.m. Defendant left as well, but when Mr. McMillan and Ms. Gruschow returned around 9:15 p.m., Mr. McMillan saw his brother across the street talking with a neighbor. He testified that defendant came back to the house sometime before 10:00 p.m., and the police showed up sometime before 11:30 p.m., because the 11 o'clock news had not yet ended.

On the first day of trial, Monday, 8 June 2009, the State requested that Jalisa Devonne Covington be allowed to testify, as she was the owner of the car involved in the high speed chase. The prosecutor had only become aware of Ms. Covington as a potential witness during the lunch recess that day. Ms. Covington was discovered late in the investigation due to an error in resolving a discrepancy in the registration of the vehicle. Therefore, the State was not able to identify her as a potential witness prior to trial.

Defense counsel objected to the appearance of Ms. Covington as a witness and noted that he was not aware of this person and that her appearance would be prejudicial to defendant. The trial court determined in its discretion to allow Ms. Covington to testify. The court stated to defense counsel, "if you want to ask for a continuance of the trial to give you time to investigate the matter further, I will entertain that motion, but I will permit her to testify." After a brief moment with defendant, defense counsel stated, "I don't believe I need time to investigate her I don't know what - what good it would do for me to further

investigate this, so . . . I am not requesting any additional time."

The trial continued on 8 and 9 June 2009 and at the end of the day on 9 June, the State rested. Due to a conflict with the trial judge, the case was not heard on 10 June. When court resumed on Thursday, 11 June, the State asked to reopen its case and call an additional witness who had only become known to the State the previous day, Christine Gruschow. Defense counsel knew of Ms. Gruschow, having interviewed her several months prior to trial. However, he argued that the State should not be allowed to reopen its case, and objected to an appearance by that witness. Defense counsel stated that he had proceeded with a particular defense strategy and did not pursue certain pretrial motions based on the fact that the State did not indicate Ms. Gruschow would be a witness. The trial court decided to allow Ms. Gruschow to testify.

After deliberations, the jury convicted defendant of felonious speeding to elude arrest and acquitted defendant of assault with a deadly weapon on a government official. Defendant pleaded guilty to having attained habitual felon status. The trial court entered judgment and sentenced defendant to a term in the mitigated range of a minimum of 110 months and a maximum of 141 months imprisonment. From the judgment entered, defendant appeals.

Defendant's sole argument on appeal is that he received ineffective assistance of counsel for his counsel's failure to move for a continuance each time after the State introduced a surprise witness. Defendant contends that the motions would likely have

been granted given the trial judge's offer to defense counsel to "entertain" a motion to continue after the State declared its intention to introduce the first surprise witness. He asserts that there is a reasonable probability that the result of the trial would have been different since the trial would have started at a different point in time and the State would not have had time off in the middle of the trial to discover new evidence. Finally, defendant argues that his counsel made certain trial decisions based solely on the State's pre-trial disclosed discovery and witnesses, including the decision not to file a motion to suppress, which indicates counsel's failure to fully test the State's case.

To prevail on a claim of ineffective assistance of counsel, a defendant must make two showings:

First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a *trial whose result is reliable*.

State v. Braswell, 312 N.C. 553, 562, 324 S.E.2d 241, 248 (1985) (citation omitted).

"In general, claims of ineffective assistance of counsel should be considered through motions for appropriate relief and not on direct appeal." *State v. Stroud*, 147 N.C. App. 549, 553, 557 S.E.2d 544, 547 (2001), *cert. denied*, 356 N.C. 623, 575 S.E.2d 758 (2002). "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." *Id.* at 554, 557 S.E.2d at 547 (citation omitted). The matter may be addressed on direct appeal 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), *cert. denied*, 535 U.S. 1114, 153 L. Ed. 2d 162 (2002).

In the present case, we are unable to properly assess defendant's claims of ineffective assistance of counsel on direct appeal where it is unclear the extent of counsel's knowledge of either one of the surprise witnesses, or how their appearance affected counsel's strategy. The transcript of the trial indicates that trial counsel knew nothing of the first surprise witness, Ms. Covington, but had previously interviewed the second witness, Ms. Gruschow. However, the record does not reveal "all the circumstances known to counsel at the time of representation." *State v. Buckner*, 351 N.C. 401, 412, 527 S.E.2d 307, 314 (2000). Without such information, we are unable to evaluate whether counsel's actions during trial fell below an objective standard of reasonableness, particularly where the basis of defendant's claims involve speculating what counsel might have done or how the trial might have changed had a continuance been requested and granted.

Therefore, it appears that further investigation may be required to fully resolve the issues raised by defendant.

Accordingly, we dismiss this appeal without prejudice to defendant's right to file a motion for appropriate relief in superior court based on an allegation of ineffective assistance of counsel. *See State v. Kinch*, 314 N.C. 99, 106, 331 S.E.2d 665, 669 (1985).

Dismissed.

Judges HUNTER, Robert C. and STEELMAN concur.

Report per Rule 30(e).