

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA10-182

NORTH CAROLINA COURT OF APPEALS

Filed: 7 September 2010

STATE OF NORTH CAROLINA

v.

Rowan County
No. 04 CRS 54741

MAURICE ALEXANDER ROBINSON,
Defendant.

Appeal by defendant from judgment entered 28 February 2007 by Judge Kimberly S. Taylor in Rowan County Superior Court. Heard in the Court of Appeals 24 August 2010.

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

William B. Gibson for the defendant-appellant.

HUNTER, Robert C. Judge.

On 4 October 2004, defendant was indicted for felonious restraint. On 31 July 2006, defendant was also indicted for having attained habitual felon status. The charges were joined for trial along with misdemeanor charges of communicating threats and unauthorized use of a motor vehicle. The matter was tried at the 27 February 2007 session of Rowan County Superior Criminal Court. A jury found defendant guilty of felonious restraint, communicating threats, and unauthorized use of a motor vehicle. Thereafter, the jury was advised that there would be a second phase to determine whether defendant had attained habitual felon status and defendant

was arraigned on that charge. However, after some discussion about plea negotiations, the State announced it would dismiss the habitual felon charge.

At the time of his trial, defendant had other pending charges, including felonious breaking or entering and felonious larceny after breaking or entering, and another charge of having attained habitual felon status. Defendant and the State entered into a plea agreement. The plea agreement provided that defendant would plead guilty to felonious breaking or entering, felonious larceny after breaking or entering, and to the felonious restraint charge, of which the jury had already convicted defendant. Defendant stipulated that two aggravating factors existed. In addition, defendant stipulated that he was a Level IV offender for felony sentencing purposes and that he was a Level III offender for misdemeanor sentencing purposes. Defendant received an aggravated sentence of 31 to 38 months imprisonment for felonious restraint; aggravated consecutive sentences of 14 to 17 months each for the breaking and entering and larceny charges; and consecutive sentences of 120 days each for the misdemeanors.

On 19 March 2009, defendant filed a petition for writ of *certiorari* with this Court. On 6 April 2009, this Court issued a writ of *certiorari* to review the judgment entered in 04 CRS 54741.

On appeal, defendant argues he must be granted a new trial on the felonious restraint charge because he was not afforded effective assistance of counsel. Defendant specifically argues trial counsel was deficient because he failed to: (1) argue on

behalf of his oral motion to continue the trial on the basis that, having just been retained, he could not have been adequately prepared to try the case; (2) keep prejudicial Rule 404(b) evidence out of the testimonial record, by opening the door to such evidence during cross-examination of a State's witness; (3) preserve the record by making a motion to dismiss the charge at the close of the State's evidence, at the close of all the evidence, or after return of the jury verdict before entry of judgment; and (4) request the trial court to question defendant to ensure that his decision not to put on evidence was made knowingly and voluntarily. Defendant has also sought certiorari in the event his arguments are beyond the basis of appellate jurisdiction contended.

"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. Nevertheless, "[ineffective assistance of counsel] claims brought on direct [appeal] will be decided on the merits 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 this case, we find defendant's ineffective assistance claims are more properly raised in a motion for appropriate relief. Accordingly, we dismiss defendant's appeal without prejudice to defendant's right to assert his claim in the superior court in the form of a motion for appropriate relief. *State v. Clark*, 159 N.C. App. 520, 531, 583 S.E.2d 680, 687 (2003).

Appeal dismissed.

Judges BRYANT and STEELMAN concur.

Report per Rule 30(e).