

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA10-248

NORTH CAROLINA COURT OF APPEALS

Filed: 7 September 2010

STATE OF NORTH CAROLINA

v.

KOREY D. McLEOD,
Defendant.

Moore County
Nos. 08 CRS 54495
08 CRS 54496
08 CRS 6589

Appeal by defendant from judgment entered 27 October 2009 by Judge R. Stuart Albright in Moore County Superior Court. Heard in the Court of Appeals 24 August 2010.

Attorney General Roy Cooper, by Assistant Attorney General Ward Zimmerman, for the State.

Ryan McKaig for defendant-appellant.

HUNTER, Robert C., Judge.

Defendant Korey D. McLeod appeals from the trial court's judgment entered pursuant to defendant's guilty plea to possession of cocaine with intent to sell or deliver ("PWISD cocaine"), possession of a firearm by a felon, and having attained habitual felon status. Defendant's sole argument on appeal is that the trial court erred in denying his motion to suppress evidence seized during his arrest on an outstanding warrant. Because, however, defendant waived his right to appeal the denial of his motion to suppress by failing to give the requisite notice of his intent to appeal the denial of the motion, we dismiss defendant's appeal.

Facts

On 11 May 2008, the Aberdeen Police Department obtained a warrant for defendant's arrest for misdemeanor possession of marijuana and misdemeanor possession of drug paraphernalia. On 26 September 2008, Sergeant Michael Sheppard, with the Aberdeen Police Department, arrested defendant. During the arrest, law enforcement officers discovered what appeared to be two individually wrapped packages of cocaine and a loaded handgun in the car in which defendant was a passenger. Defendant was subsequently indicted with PWISD cocaine, simple possession of cocaine, possession of a firearm by a felon, and being an habitual felon. Defendant filed a pre-trial motion to suppress the evidence seized as a result of his arrest. After conducting a hearing, the trial court entered an order on 27 October 2009, denying defendant's motion to suppress. Defendant then pled guilty to PWISD cocaine, possession of a firearm by a felon, and having attained habitual felon status. The trial court entered judgment pursuant to defendant's plea, consolidated all the convictions into one judgment, and sentenced defendant to a presumptive-range term of 80 to 105 months imprisonment. Defendant gave notice of appeal in open court.

Discussion

Although defendant contends that the trial court erred in denying his motion to suppress, the dispositive issue on appeal is whether defendant properly preserved his right to appeal the denial of his motion. N.C. Gen. Stat. § 15A-979(b) (2009) "allows review of an order finally denying a motion to suppress evidence on appeal

from a judgment of conviction, including a judgment entered on a guilty plea." *State v. McBride*, 120 N.C. App. 623, 625, 463 S.E.2d 403, 404 (1995), *aff'd per curiam*, 344 N.C. 623, 476 S.E.2d 106 (1996). However, "[t]his statutory right to appeal is conditional, not absolute." *Id.* Pursuant to N.C. Gen. Stat. § 15A-979(b), when a defendant intends to appeal from the denial of his motion to suppress, the defendant bears the burden of notifying both the prosecutor and the trial court of the intention to appeal prior to plea negotiations being finalized and the failure to give the required notice of intent constitutes waiver of the right to appeal under N.C. Gen. Stat. § 15A-979. *State v. Tew*, 326 N.C. 732, 735, 392 S.E.2d 603, 605 (1990); *State v. Reynolds*, 298 N.C. 380, 397, 259 S.E.2d 843, 853 (1979), *cert. denied*, 446 U.S. 941, 64 L. Ed. 2d 795 (1980). The notice of intent to appeal must be "specifically given," *McBride*, 120 N.C. App. at 625, 463 S.E.2d at 404 (emphasis omitted), and must be found in the record, *State v. Brown*, 142 N.C. App. 491, 492-93, 543 S.E.2d 192, 193 (2001).

The notice of intent to appeal is distinct from the notice of appeal required by N.C. Gen. Stat. § 15A-1448 (2009) and N.C. R. App. P. 4(a):

Notice of intent to appeal prior to plea bargain finalization is a rule designed to promote a fair posture for appeal from a guilty plea. Notice of Appeal is a procedural appellate rule, required in order to give this Court jurisdiction to hear and decide a case. The two forms of notice serve different functions, and performance of one does not substitute for completion of the other.

McBride, 120 N.C. App. at 625-26, 463 S.E.2d at 405 (internal citations and quotation marks omitted).

Here, defendant gave notice of appeal at the time the trial court rendered its judgment in open court. The record on appeal, however, does not indicate that defendant gave notice of his intent to appeal the denial of his motion to suppress to the State or the trial court prior to the plea negotiations being finalized or the entry of judgment on his plea. Defendant has thus waived his right to appeal the denial of his motion to suppress. *See id.* at 625, 463 S.E.2d at 405 ("In the instant case, defendant failed to preserve his right to appeal by not ensuring that his intent to do so was given to the trial court and prosecution, prior to finalization of his plea bargain. We have carefully reviewed the entire record and note the absence of any notice whatsoever by defendant of intent to appeal based on the trial court's denial of his motion to suppress."). As defendant does not present any contentions to which he has an appeal of right, this Court lacks jurisdiction over defendant's appeal, and we must dismiss his appeal. *See State v. Waters*, 122 N.C. App. 504, 505, 470 S.E.2d 545, 546 (1996) (per curiam) ("Because defendant has no appeal as of right, his notice of appeal was a nullity and this Court has no jurisdiction over his appeal. Thus, the appeal must be dismissed.").

Recognizing his failure to preserve his right to appeal the denial of his motion to suppress, defendant filed with this Court a motion for appropriate relief, asserting that he lost his right

to appeal due to ineffective assistance of counsel. Defendant requests that this Court "enter an order providing appropriate relief based on the deprivation of [defendant's] Sixth and Fourteenth Amendment rights under the United States Constitution[,]" and allow defendant an appeal from the entry of judgment upon his guilty plea.

N.C. Gen. Stat. § 15A-1418(a) (2009) establishes that "a motion for appropriate relief based upon grounds set forth in N.C. Gen. Stat. § 15A-1415 must be made in the appellate division when a case is in that division for appellate review." *Waters*, 122 N.C. App. at 505, 470 S.E.2d at 546; N.C. Gen. Stat. § 15A-1415(b) (3) (2009) (providing that a defendant may assert a motion for appropriate relief on the basis that "[t]he conviction was obtained in violation of the Constitution of the United States or the Constitution of North Carolina"). Because, however, this Court lacks jurisdiction over the appeal in which defendant's motion for appropriate relief has been asserted, we are likewise "without jurisdiction to entertain his motion for appropriate relief, and the motion must be dismissed." *Waters*, 122 N.C. App. at 505, 470 S.E.2d at 546. Dismissal of defendant's motion for appropriate relief, however, does not prejudice his right to file a motion in the trial court asserting the same claims. *Id.*

Dismissed.

Judges BRYANT and STEELMAN concur.

Report per Rule 30(e).