

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA13-88
NORTH CAROLINA COURT OF APPEALS

Filed: 15 October 2013

STATE OF NORTH CAROLINA

v.

Henderson County
No. 11 CRS 702596

ERIC LEE MOTT

Appeal by defendant from judgment entered 25 July 2012 by Judge Mark E. Powell in Henderson County Superior Court. Heard in the Court of Appeals 28 August 2013.

Attorney General Roy Cooper, by Assistant Attorney General Kathryne E. Hathcock, for the State.

Law Office of Mark L. Hayes, by Mark L. Hayes, for defendant-appellant.

HUNTER, Robert C., Judge.

Eric Lee Mott (Adefendant@) appeals from judgment entered after a jury found him guilty of driving while license revoked. Defendant contends the trial court erred in failing to dismiss the unlicensed driving charge when no evidence supported a finding that defendant's license was revoked at the time he received the citation, and defendant was deprived of the

effective assistance of counsel for his trial attorney's failure to make a motion to dismiss for lack of such evidence. Defendant also contends that the trial court erred in failing to dismiss the unlicensed driving charge when no evidence supported a finding that defendant had actual or constructive notice of a revocation, and that defendant was deprived effective assistance of counsel for his trial attorney's failure to make a motion to dismiss for lack of that evidence. However, because the issues were not properly preserved for appeal, we dismiss.

Background

The State's evidence tended to establish the following facts: On 15 May 2011, around midnight, four troopers and a supervisor from the North Carolina State Highway Patrol set up a driver's license checkpoint in Henderson County. As the evening progressed, two of the troopers and the supervisor left the checkpoint, leaving Trooper Grady McGraw ("Trooper McGraw") and Trooper Anthony Hill ("Trooper Hill") remaining at the checkpoint.

Sometime after midnight, defendant approached the checkpoint driving a blue Ford Ranger pickup truck with an expired Michigan license plate. Trooper McGraw asked for defendant's driver's license, and defendant provided Trooper

McGraw with a laminated notarized document not issued by the North Carolina Department of Motor Vehicles, which contained a photograph of defendant. Trooper McGraw told defendant that the document was not a driver's license and asked defendant to pull his vehicle off to the side of the road; defendant complied. Trooper McGraw photographed the document with his cell phone and handed the document to Trooper Hill, who then took over the investigation. Defendant never produced a state-issued driver's license. Trooper Hill returned to his vehicle to check defendant's driving status in the DMV/DCI mobile data terminal, and discovered defendant's North Carolina driver's license was suspended. Trooper Hill subsequently issued defendant a citation for driving while license revoked and failing to register a vehicle.

At trial, Trooper McGraw and Trooper Hill testified as to the facts set forth above. The State also submitted a copy of the citation issued to defendant, a copy of Trooper McGraw's cell phone photograph of the laminated notarized document defendant provided the troopers at the checkpoint, and defendant's North Carolina Division of Motor Vehicles Record, containing copies of letters dated 7 September 2010 notifying defendant of his license suspension.

Defendant was found guilty of both charges on 10 October 2011 in Henderson County District Court and gave notice of appeal to the Superior Court. On 25 July 2012 defendant was tried in Henderson County Superior Court before a jury. The trial court dismissed the no registration charge on its own motion, and a jury returned a guilty verdict on the driving with license revoked charge. Defendant never made a motion to dismiss for lack of evidence that his license was revoked or that he had notice of such revocation. The court sentenced defendant to twenty days in jail and \$1,192.50 in costs and fines. Defendant gave oral notice of appeal through counsel in open court.

Grounds for Appeal

A defendant in a criminal case waives the issue of insufficiency of evidence to prove the crime charged on appeal unless he moved to dismiss the action at trial. N.C. R. App. P. 10(a)(3) (2013); *State v. Richardson*, 341 N.C. 658, 676-77, 462 S.E.2d 492, 504 (1995). "[W]aiver . . . arises out of a party's failure to properly preserve an issue for appellate review." *Dogwood Dev. & Mgmt. Co. v. White Oak Transp. Co.*, 362 N.C. 191, 194-95, 657 S.E.2d 361, 363 (2008). "[A] party's failure to properly preserve an issue for appellate review ordinarily

justifies the appellate court's refusal to consider the issue on appeal." *Id.* at 195-96, 657 S.E.2d at 364. However, this Court may still review the merits if the issue is of significant importance to the public interest or to prevent manifest injustice. N.C. R. App. P. 2 (2013). The exercise of Rule 2 was intended for use in rare occasions or exceptional circumstances. *Reep v. Beck*, 360 N.C. 34, 38, 619 S.E.2d 497, 500 (2005) (citing *Blumenthal v. Lynch*, 315 N.C. 571, 578, 340 S.E.2d 358, 362 (1986)); see also *Steingress v. Steingress*, 350 N.C. 64, 66, 511 S.E.2d 298, 299-300 (1999) (noting that Rule 2 should only be used in "exceptional circumstances").

Defendant does not contest that he did not preserve these issues on appeal by failing to move to dismiss at trial. Rather, he urges this Court to invoke Rule 2 to reach the merits of his appeal. However, we find any ambiguity of evidence at trial does not give rise to the "rare occasion" or "exceptional circumstance" contemplated by Rule 2 that would allow this Court to consider the issues, and therefore we decline to review.

If we were to address the merits, we would find that the trial court did not err. Trooper Hill's testimony and the citation issued to defendant, corroborated by defendant's North Carolina driving record, all sufficiently indicate that

defendant's license was suspended at the time he was stopped. The State's submission of copies of the North Carolina Division of Motor Vehicles letters dated 7 September 2010 were sufficient for a jury to find defendant had notice that his license was suspended. Therefore, we find that the testimony and evidence was sufficient for these issues to go to the jury. Because there was no error by the trial court and the outcome of the trial would not change had defendant's counsel made a motion to dismiss for lack of evidence, defendant was not denied effective assistance of counsel.

Conclusion

Because defendant waived the issues on appeal, we decline to review.

DISMISSED.

Judges GEER and McCULLOUGH concur.

Report per Rule 30(e).