An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-367

Filed: 18 October 2016

Mecklenburg County, Nos. 14 CRS 208667-68

STATE OF NORTH CAROLINA

v.

TIMOTHY DALE HENDRICKS, Defendant.

Appeal by defendant from judgment entered 2 November 2015 by Judge Carla Archie in Mecklenburg County Superior Court. Heard in the Court of Appeals 7 September 2016.

Attorney General Roy Cooper, by Assistant Attorney General Charlene Richardson, for the State.

Jeffrey William Gillette for defendant-appellant.

ENOCHS, Judge.

Defendant Timothy Dale Hendricks appeals from a guilty plea taken after the denial of his motion to suppress evidence seized during a search of his person. Because we are procedurally barred from reaching the merits of Defendant's appeal, we must dismiss.

Factual Background

On 4 March 2014, Officer J.C. Smith, of the Charlotte-Mecklenburg Police Department, received information about large heroin sales in the area of Charlotte to which he was assigned. Officer Smith's assignment was to a special focus mission team that targeted street level drug violations. While he had not been given any Be On the Look-Out (BOLO's) for any individuals involved in drug violations, Officer Smith decided to ride through the Brookshire Boulevard Corridor, I-85, and Hoskins Road area before his shift began at 3:00 p.m. to see if there was any drug transaction activity.

Officer Smith was stopped at a traffic light on Brookshire Boulevard when he saw a conversion van parked in front of an Exxon gas station, parallel with Brookshire and perpendicular to Hoskins Road. The white van was facing Hoskins Road and Officer Smith could see there was someone in the driver's seat and also two passengers in the rear seats. The van was parked by itself and Officer Smith did not see anyone leave or approach the van. Based on Officer Smith's training and experience, he believed the van was parked in a manner frequently used by heroin dealers in the vicinity.

Officer Smith drove his marked patrol car into the gas station parking lot and passed the van. He parked behind the van so as not to block its path of travel and approached on foot. He did not initiate his lights or sirens, neither did he run the van's license tag, nor activate his dashboard camera. Officer Smith quickly

approached the van so that he could catch it before it left or before the occupants could destroy any narcotics.

Upon his approach to the vehicle, Officer Smith noticed the occupants were making "erratic" movements. Officer Smith was in full uniform, badge visible, and gun visible but holstered. Once he reached the driver's window, he requested identification from the van's occupants. As they looked for identification, Officer Smith conversed with the driver and noticed a small blue balloon that was broken open and lying on the van's floor near the driver's foot. Based on his training and experience, Officer Smith knew that drug dealers package heroin in similar balloons.

Officer Smith did not want to detain the occupants or search the van alone, so he called for back-up and continued his conversation with the occupants while he waited. Another officer arrived shortly thereafter and took up a position behind the rear door of the van.

Officer Smith asked for consent to search the van. The driver said that the van was not his, but gave Officer Smith consent to search. Once the driver, identified as Defendant, exited the van, Officer Smith searched him and found a small quantity of heroin in his pants pocket. Officer Smith arrested Defendant for possession of heroin and possession of drug paraphernalia.

On 2 March 2015, Defendant filed a Motion to Suppress, which was heard by the Honorable Carla Archie on 2 November 2015. Testimony during the hearing

established all of the evidence outlined above. The trial court denied the motion finding that (1) Officer Smith had information about large heroin sales in the neighborhood of Brookshire; (2) the officer did not initiate lights or sirens, but pulled into the gas station parking lot so as not to block the van's exit; (3) while approaching the van, Officer Smith saw erratic movement within the van; and (4) Officer Smith stood at the front of the van, at the driver's window, spoke casually, asked for identification, and noticed the small blue balloon. The court concluded that the contact between Officer Smith and Defendant was voluntary and that there was no show of force that would convert the contact into a stop or seizure until the point that the officer noticed the small balloon. The trial court further concluded that once Officer Smith saw the small balloon, he had reasonable suspicion to believe that criminal activity was afoot based upon the totality of the circumstances, and that on this basis, he could detain Defendant.

Following the denial of the motion to suppress, but prior to sentencing, Defendant's counsel informed the court that "I have to talk to my client about his appellate rights and what he wants to do. I believe he may want to do an Alford plea and reserve his right to appeal." The court took a recess to give defense counsel time to confer with Defendant. After the recess, Defendant entered an Alford plea (without any plea negotiation with the prosecutor) to possession of heroin and possession of drug paraphernalia. Following the plea colloquy, the trial court sentenced Defendant

to a suspended sentence of 18 months with supervised probation and drug treatment. Defense counsel then indicated that "I'm trying to inquire as to whether [Defendant] wants to appeal the motion, the decision on denial of the motion to suppress." He then gave notice of appeal.

Analysis

N.C. Gen. Stat. § 15A-979(b) (2015) provides that an order denying a motion to suppress evidence can be reviewed upon an appeal from a guilty plea. However, *State v. Reynolds*, 298 N.C. 380, 397, 259 S.E.2d 843, 853 (1979), held that "when a defendant intends to appeal from a suppression motion denial pursuant to G.S. 15A-979(b), he must give notice of his intention to the prosecutor and the court before plea negotiations are finalized or he will waive the appeal of right provisions of the statute." Furthermore, the notice of intent to appeal the ruling on a motion to suppress must be specifically given. *State v. McBride*, 120 N.C. App. 623, 625, 463 S.E.2d 403, 405 (1995), *aff'd per curiam*, 344 N.C. 623, 476 S.E.2d 106 (1996).

The evidence in the record shows that Defendant did not specifically give notice of appeal as required by *Reynolds*. Following the denial of the suppression motion, Defendant's counsel said that he planned to talk with his "client about his appellate rights and what he wants to do." He also informed the trial court that his client "may want to do an Alford plea and reserve his right to appeal." However, Defendant's

counsel never specifically informed the trial court that he would be appealing the denial of the motion to suppress.

N.C. Gen. Stat. § 15A-979(b) 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. "This statutory right to appeal is conditional, not absolute." *McBride*, 120 N.C. App. at 625, 463 S.E.2d at 404. Pursuant to this statute, a defendant bears the burden of notifying the state and the trial court during plea negotiations of the intention to appeal the denial of a motion to suppress, or the right to do so is waived after a plea of guilty. *Reynolds*, 298 N.C. at 397, 259 S.E.2d at 853. The rule in this state is that notice must be specifically given. *State v. Tew*, 326 N.C. 732, 735, 392 S.E.2d 603, 605 (1990); *accord State v. Walden*, 52 N.C. App. 125, 126-27, 278 S.E.2d 265, 266 (1981).

Under *Tew* and *McBride*, Defendant's appeal is procedurally barred. While this is an unfortunate outcome because Defendant's arguments on appeal were compelling, we are bound by precedent. This Court cannot overrule decisions of the Supreme Court because it has no such authority, and has the responsibility to follow their decisions unless otherwise ordered by that Court. *State v. Alldred*, ___ N.C. App. ___, ___, 782 S.E.2d 383, 384 (2016). Furthermore, "[w]here a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel

of the same court is bound by that precedent, unless it has been overturned by a higher court." *In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989).

Conclusion

Because Defendant did not give specific notice of his intent to appeal to the State and the trial court before pleading guilty, he is unable to challenge the denial of his suppression motion. Therefore, this Court cannot reach the merits and must dismiss the appeal.

DISMISSED.

Judges ELMORE and ZACHARY concur.

Report per Rule 30(e).