

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA12-514
NORTH CAROLINA COURT OF APPEALS

Filed: 20 November 2012

STATE OF NORTH CAROLINA

v.

Durham County
No. 11 CRS 2900

STEVEN PRUNER

Appeal by defendant from judgment entered 1 December 2011 by Judge Carl R. Fox in Durham County Superior Court. Heard in the Court of Appeals 26 September 2012.

Attorney General Roy Cooper, by Assistant Attorney General Joseph L. Hyde, for the State.

North Carolina Institute for Constitutional Law, by Jeanette K. Doran and Tyler Younts, for defendant-appellant.

CALABRIA, Judge.

Steven Pruner ("defendant") appeals from a judgment entered upon a jury verdict finding him guilty of violating a regulation for a food establishment. We find no error.

I. Background

Defendant independently owned and operated two hot dog pushcarts in Durham, North Carolina. On 13 April 2011,

defendant was selling hot dogs near Duke University Hospital. Franklin Mason Gardner ("Gardner") of the Durham County Health Department received a complaint that an individual was operating a hot dog cart in that location without a permit.

After he arrived at defendant's location, Gardner approached defendant and determined that he did not have a permit for one of his hot dog carts. Gardner contacted law enforcement, who issued defendant a citation for operating the cart without a permit in violation of N.C. Gen. Stat. § 130A-248(b) (2011).

On 8 June 2011, defendant was found guilty of operating a food establishment without a permit in Durham County District Court. The court ordered defendant to pay a fine in the amount of \$150. Defendant appealed to the superior court.

Prior to trial *de novo* in Durham County Superior Court, defendant filed, *inter alia*, a motion to dismiss the charge against him. In his motion, defendant argued that N.C. Gen. Stat. § 130A-248(c1), which required defendant to enter into a commissary agreement regarding the cart prior to obtaining a permit ("the commissary regulation"), violated his constitutional right to earn a livelihood. The trial court did not explicitly deny defendant's motion, but allowed the case to

continue to trial. On 1 December 2011, a jury returned a verdict finding defendant guilty of violating a regulation for food establishments that had been adopted by the State of North Carolina. The trial court sentenced defendant to 45 days in the custody of the Durham County Sheriff. That sentence was suspended and defendant was placed on 12 months of unsupervised probation. Defendant appeals.

II. Right to Work

Defendant argues that the trial court erred in denying his motion to dismiss because the requirements of N.C. Gen. Stat. § 130A-248 (2011) violate his constitutional right to work and to enjoy the fruits of his labors. We disagree.

A. Preservation

Initially, we address the State's contention that defendant failed to preserve this issue for appellate review. Defendant filed a motion to dismiss pursuant to N.C. Gen. Stat. § 15A-954 (a)(1) and argued it before the trial court prior to trial. During defendant's argument, the trial court engaged in a dialog with defendant regarding whether defendant should have challenged the commissary regulation by filing a civil action. At the end of defendant's argument, the trial court stated:

THE COURT: That's not what the purpose of that statute is. That statute is just -- no

one is denying you the right to work. What they're saying is the right to operate this particular cart is conditioned on certain requirements that you disagree with. They're not saying you can't operate. They're saying you can't operate until you comply with the requirements of that particular statute. That's true of any restaurant. Any restaurant has to obtain a permit. Any restaurant has to comply with the health code regulations. What I'm saying to you is you aren't challenging that in the proper forum.

The trial court never entered a formal ruling on defendant's motion to dismiss. Rule 10(a)(1) of the Rules of Appellate Procedure states that

[i]n order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context. *It is also necessary for the complaining party to obtain a ruling upon the party's request, objection, or motion.*

N.C.R. App. P. 10(a)(1) (2011) (emphasis added). Since defendant did not obtain an actual ruling from the trial court on his motion to dismiss, he has waived his right to appellate review of that motion. See *State v. Dorsett*, 272 N.C. 227, 229, 158 S.E.2d 15, 17 (1967) (refusing to review a motion to quash defendant's warrants as unconstitutionally vague when the trial court "expressly declined to rule on this question").

B. Rule 2

Nonetheless, "Appellate Rule 2 specifically gives either court of the appellate division the discretion to suspend or vary the requirements or provisions of any of [the] rules in order [t]o prevent manifest injustice to a party, or to expedite decision in the public interest." *State v. Hart*, 361 N.C. 309, 315, 644 S.E.2d 201, 204-05 (2007) (internal quotations and citation omitted). In the instant case, in light of the constitutional nature of defendant's argument, his good faith effort to raise the issue before the trial court, and the fact that defendant was convicted and received a criminal sentence, we believe it is appropriate to utilize Rule 2 to address the merits of defendant's argument.

C. Level of Scrutiny

Initially, defendant contends that the commissary regulation is subject to strict scrutiny review. In support of his argument, defendant notes that our Supreme Court has previously held that "[t]he right to conduct a lawful business or to earn a livelihood is regarded as fundamental." *Roller v. Allen*, 245 N.C. 516, 518-19, 96 S.E.2d 851, 854 (1957) (quoting *McCormick v. Proctor*, 217 N.C. 23, 31, 6 S.E.2d 870, 876 (1940) (Stacy, C.J., concurring)).

While defendant correctly quotes the holding of our Supreme Court in *Roller*, his argument that this Court must apply strict scrutiny to the commissary regulation is contrary to Supreme Court precedent. In *Treants Enterprises, Inc. v. Onslow County*, the Court established the following framework to review constitutional challenges based upon the right to earn a livelihood:

Article I, section 1 places among the inalienable rights of the people, "life, liberty, the enjoyment of the fruits of their own labor, and the pursuit of happiness." Section 19 of the same article provides that no person shall be "deprived of his life, liberty, or property, but by the law of the land." A single standard determines whether the [challenged] ordinance passes constitutional muster imposed by both section 1 and the "law of the land" clause of section 19: the ordinance must be rationally related to a substantial government purpose. This is the requirement article I, section 1 imposes on government regulation of trades and business in the public interest.

320 N.C. 776, 778-79, 360 S.E.2d 783, 785 (1987) (emphasis added). Thus, we are bound by precedent to review defendant's challenge to the commissary regulation under the rational basis standard. See *Cannon v. Miller*, 313 N.C. 324, 327 S.E.2d 888 (1985).

D. Rational Basis

Defendant argues that the commissary regulation fails rational basis review. Specifically, defendant contends that the requirement is not rationally related to the government's legitimate interest in food safety.

Under the rational basis standard, our "[i]nquiry is . . . twofold: (1) is there a proper governmental purpose for the statute, and (2) are the means chosen to effect that purpose reasonable?" *Poor Richard's, Inc. v. Stone*, 322 N.C. 61, 64, 366 S.E.2d 697, 699 (1988). In the instant case, defendant does not dispute that the commissary regulation satisfies the first part of the rational basis test. Defendant concedes that the government has a legitimate interest in the safety of food that is sold to the public. Thus, our sole determination is whether the "means chosen to effect that purpose [are] reasonable[.]" *Id.*

At trial, the State provided testimony from Health Department General Inspection Supervisor Mark Meyer ("Meyer"). According to Meyer, the commissary regulation ensures that pushcart operators, who are required to use the commissary at least once per day, have a fixed location to wash, rinse, and sanitize their utensils, to prepare their food, and to store and refrigerate their food. Meyer further explained that the State

requires a pushcart vendor to have access to these sanitary commissary facilities, which are inspected by the State, in order to ensure that the vendors themselves are sanitary.

Meyer's testimony demonstrates that the commissary regulation, which ensures that pushcart operators have access to sanitary food preparation and storage facilities, provides a reasonable means to effectuate the government's interest in food safety. Consequently, the regulation survives rational basis review. Defendant's argument is overruled.

III. Conclusion

Since defendant failed to obtain a ruling on his motion to dismiss, he waived appellate review of that issue. Nonetheless, in our discretion, we utilize Rule 2 to reach the merits of defendant's argument. The commissary regulation is rationally related to the government's interest in food safety, and therefore, the regulation is constitutional under the rational basis test. Defendant received a fair trial, free from error.

No error.

Judges ELMORE and STEPHENS concur.

Report per Rule 30(e).