

NO. 290P11

THIRTIETH-A DISTRICT

SUPREME COURT OF NORTH CAROLINA

STATE OF NORTH CAROLINA

v.

ISAAC HUTCHISON BIRCH

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From Davidson

STATE'S MOTION TO DISMISS
DEFENDANT'S NOTICE OF APPEAL

SUPREME COURT OF NORTH CAROLINA

STATE OF NORTH CAROLINA

v.

ISAAC HUTCHISON BIRCH

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STATE'S MOTION TO DISMISS
DEFENDANT'S NOTICE OF APPEAL

**TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF
THE NORTH CAROLINA SUPREME COURT:**

NOW COMES the State of North Carolina by and through the undersigned attorneys, and pursuant to N.C.G.S. § 7A-30 and N.C. R. App. P. 14, respectfully requests that this Court dismiss Defendant's Notice of Appeal. In support of this request, the State shows unto the Court as follows:

STATEMENT OF THE CASE

On 26 March 2010, Isaac Hutchison Birch ("defendant") was charged with driving while impaired ("DWI") and failing to operate his vehicle's headlamps. (R. pp. 2, 3, 6). Defendant's case was heard in Macon County Superior Court on 1 and 2 June 2010, during which time the Honorable Bradley B. Letts, Superior Court Judge presiding, attempted to ascertain whether defendant desired appointed counsel or preferred to waive his right to counsel. (T. pp. 1-16). After defendant eventually waived counsel (T. pp. 9-14) and his objection to the legitimacy of the State of North Carolina and to the court's jurisdiction over him was overruled (T. p. 29), defendant's case was heard on 30 September 2010 before the Honorable Mark E. Powell, Superior Court Judge Presiding. (R. pp. 122-25). A jury found defendant guilty of DWI (T. p.

72; R. p. 121), and the court imposed a Level Five punishment of sixty days imprisonment, suspended on twelve months unsupervised probation. (T. pp. 74-75; R. pp. 124-25). Defendant gave timely notice of appeal. (T. p. 75).

The settled Record on Appeal was filed on 9 March 2011, docketed on 14 March 2011, and mailed to the parties on 15 March 2011. (R. pp. 1, 137). On 14 April 2011, defendant filed a motion for an extension of time to file his brief, in which he sought an additional sixty days to file his brief. By Order entered 14 April 2011, the Court of Appeals allowed defendant's motion in part, extending the time for filing by thirty days to 16 May 2011. Defendant filed his brief on 17 May 2011, and the State filed a motion to strike and dismiss. Defendant filed a response to the State's motion, and by Order entered 19 May 2011, the court denied the State's motion and deemed defendant's brief timely filed.

On 15 June 2011, the State filed its brief along with a second motion to dismiss based upon a jurisdictional defect in the Record on Appeal – specifically, that the Record failed to contain a district court judgment or any indication of a plea entered in district court establishing jurisdiction in superior court. *See State v. Banks*, 241 N.C. 572, 573, 86 S.E.2d 76, 77 (1955) (per curiam). By Order entered 28 June 2011, the Court of Appeals allowed the State's motion and dismissed the appeal, taxing defendant with the costs of the appeal. A copy of the Order is attached hereto.

STATEMENT OF THE FACTS

At approximately 2:27 a.m. on 26 March 2010, Officer Matthew Breedlove ("Officer Breedlove") of the Franklin Police Department was in his marked patrol car in an alleyway off West Main Street in the Town of Franklin when he observed a truck driving westbound on West Main Street without its headlights or taillights on. (T. pp. 40-44, 48). Officer Breedlove followed the truck and activated his blue lights, but the truck did not initially show any intention of stopping. (T. p. 42). After

traveling one-half to three-quarters of a mile and passing several areas where it could safely pull off the road, the truck eventually pulled into a parking lot. (T. p. 43).

Officer Breedlove approached the vehicle and observed defendant in the driver's seat. (T. p. 44). After requesting his license and registration, Officer Breedlove asked defendant why he did not stop sooner. (T. p. 44). Defendant, who had a glazed look in his eyes, produced his license and registration and responded "the street was narrow." (T. pp. 44-45, 60). Officer Breedlove then told defendant he observed him driving in the dark without headlights, to which defendant stated "it was his right to drive without headlights." (T. p. 45). Officer Breedlove detected a strong odor of alcohol coming from defendant's breath and asked defendant if he had been drinking, to which defendant admitted, "Not a lot since 10:30." (T. pp. 45-46).

Officer Breedlove then asked defendant to exit the truck, but defendant hesitated and questioned Officer Breedlove. (T. p. 46). Officer Breedlove explained he needed to determine defendant's level of impairment, and defendant remarked that Officer Breedlove "might as well go ahead and give him the ticket because he was not blowing." (T. pp. 46-47). After defendant exited the truck, Officer Breedlove continued to smell alcohol about defendant's breath. (T. p. 46). Defendant refused to submit to the Alco-Sensor and field sobriety tests (T. p. 48), and Officer Breedlove placed defendant under arrest for DWI. (T. pp. 50-51).

Officer Breedlove transported defendant to the Macon County Detention Center, and at 2:55 a.m., Officer Breedlove, a certified chemical analyst, read defendant his chemical analysis rights. (T. pp. 51-55). Defendant refused to sign the rights form, refused to contact a witness, refused to submit to the test, and exhibited a "rebellious" and "disorderly" demeanor. (T. pp. 55-59; R. pp. 10, 120).

Defendant did not present any evidence at trial. (T. p. 53).

**REASONS WHY DEFENDANT'S NOTICE OF
APPEAL SHOULD BE DISMISSED**

On 13 July 2011, defendant filed a Notice of Appeal to this Court. For the following reasons, this Court should dismiss the Notice of Appeal.¹

“There is no constitutional right to an appeal under the United States Constitution for a convicted criminal. The right to appeal in a criminal proceeding is purely statutory.” *State v. China*, 150 N.C. App. 469, 473, 564 S.E.2d 64, 68 (2002), *appeal dismissed and disc. rev. denied*, 356 N.C. 683, 577 S.E.2d 899 (2003). Therefore, “in order to exercise that statutory right of appeal one must come within the terms of the applicable statute. . . .” *State v. Jones*, 67 N.C. App. 413, 313 S.E.2d 264 (1984) (omission in original) (quoting *Abney v. United States*, 431 U.S. 651, 656, 52 L. Ed. 2d 651, 658 (1977)).

Pursuant to N.C.G.S. § 7A-30 and Rule 14 of the Rules of Appellate Procedure, an appeal of right lies only from a “decision of the Court of Appeals rendered in a case (1) [w]hich directly involves a substantial question arising under the Constitution of the United States or of this State, or (2) [i]n which there is a dissent.” N.C.G.S. § 7A-30; *see also* N.C. R. App. P. Rule 14(a), (b).

Here, as a preliminary matter, defendant has no right to appeal because there has been no “decision” by the Court of Appeals. The court allowed the State’s motion and dismissed the appeal without issuing an opinion on the issues raised by defendant. Defendant had ample opportunity to correct the jurisdictional defect in the Record on Appeal, but chose only to invoke Rule 2 of the Rules of Appellate Procedure. As defendant made no attempt to fix the jurisdictional defect and

¹To the extent defendant’s Notice of Appeal is, in actuality, a petition for discretionary review, defendant has failed to argue, much less demonstrate, that any of the criteria in N.C.G.S. § 7A-31 and Rule 15 of the Rules of Appellate Procedure are satisfied, and therefore, as a petition for discretionary review, defendant’s filing similarly should be dismissed.

Appellate Rules violations, the Court of Appeals dismissed, without opinion, his appeal. Because there was no “decision,” *see generally Black’s Law Dictionary* 414 (7th ed. 1999) (defining “decision”), the Order dismissing defendant’s appeal is not appealable to this Court, and defendant’s Notice of Appeal should be dismissed.

Nevertheless, assuming *arguendo* the Order below qualifies as a “decision” under N.C.G.S. § 7A-30, defendant’s Notice of Appeal should be dismissed because the Order did not include a dissent or involve a substantial constitutional question. In his Notice of Appeal, defendant contends the issue presented on appeal – *i.e.*, the legitimacy of the State of North Carolina – “is based upon a constitutional claim.” However, the merits of defendant’s appeal to the Court of Appeals are not before this Court. The question, if even properly before this Court at all, is whether the Court of Appeals’ Order dismissing the appeal involves a substantial constitutional question. Defendant makes no argument that the Order itself involves a constitutional question and, instead, repeats the arguments in his Court of Appeals brief. In fact, defendant makes no argument that the court’s Order was even in error, and it is well-established that this Court can only review a decision of the Court of Appeals for an “error of law.” N.C. R. App. P. 16(a). Regardless, it is axiomatic that defendant’s violations of Rule 9 of the Appellate Rules and his failure to include in the Record documentation demonstrating if, how, and when the superior court derived jurisdiction from the district court are not constitutional questions, much less “substantial” constitutional questions. Accordingly, because defendant has not contended that the Order itself dismissing his appeal was in error and involved a substantial constitutional question, defendant’s Notice of Appeal must be dismissed.

Finally, to the extent the Court of Appeals dismissed defendant’s appeal as a sanction under Rule 34 for failing to fully comply with Rule 9 – as opposed to simply dismissing the case for lack of jurisdiction – defendant has no right to appeal to this

Court. Pursuant to Rule 16(a) of the Appellate Rules, “[r]eview by the Supreme Court after a determination by the Court of Appeals, whether by appeal of right or by discretionary review, is to determine whether there is *error of law* in the decision of the Court of Appeals.” N.C. R. App. P. 16(a) (emphasis added). Pursuant to Rule 34, “[a] court of the appellate division *may*, on its own initiative or motion of a party, impose a sanction,” up to and including dismissal. N.C. R. App. P. 34(a), (b) (emphasis added). To the extent the Court of Appeals’ Order dismissing defendant’s appeal was discretionary, it was not a question of law, as it is well-settled that discretionary rulings do not present questions of law. *See, e.g., In re Will of Buck*, 350 N.C. 621, 625, 516 S.E.2d 858, 860-61 (1999) (“Like any other ruling left to the discretion of a trial court, the trial court’s appraisal of the evidence and its ruling on whether a new trial is warranted due to the insufficiency of evidence is not to be reviewed on appeal as presenting a question of law.”); *Britt v. Allen*, 291 N.C. 630, 636, 231 S.E.2d 607, 612 (1977) (“A contention based on a question of law is not presented by an exception to the court’s discretionary order setting aside a verdict.”); *Braid v. Lukins*, 95 N.C. 123, 125 (1886) (noting that an order “made in the exercise of discretionary power” – as opposed to an order that “presents questions of law” – is “not reviewable here”). Therefore, to the extent the dismissal was a discretionary sanction, defendant has no right to appeal. Accordingly, the State respectfully submits that this Court should dismiss Defendant’s Notice of Appeal.

CONCLUSION

In sum, there is no basis for additional review by this Court, particularly when the decision below was an order of dismissal and not an opinion, and the order itself involves no substantial constitutional question or error of law. Accordingly, the State respectfully requests this Court dismiss defendant’s Notice of Appeal.

Respectfully submitted, this the 14th day of July, 2011.

Roy Cooper
ATTORNEY GENERAL

/s/ ELECTRONICALLY SUBMITTED

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No. 11-299

STATE OF NORTH CAROLINA

V

ISAAC HUTCHISON BIRCH

ORDER

The following order was entered:

The motion filed in this cause on the 15th of June 2011 and designated 'Second Motion to Dismiss' is allowed. Appeal dismissed. Defendant-appellant to pay costs.

And it is considered and adjudged further, that the Defendant-appellant, Isaac Hutchison Birch, do pay the costs of the appeal in this Court incurred, to wit, the sum of Fifty Two Dollars and 25/100 (\$52.25), and execution issue therefor.

By order of the Court this the 28th of June 2011.

WITNESS my hand and official seal this the 28th day of June 2011.

John H. Connell
Clerk, North Carolina Court of Appeals

Copy to:

Mr. Isaac Hutchison Birch, Attorney at Law, For Birch, Isaac Hutchison
Mr. Jess D. Mekeel, Assistant Attorney General, For State of North Carolina
Hon. Victor H. Perry, Clerk of Superior Court

CERTIFICATE OF SERVICE

I, Jess D. Mekeel, Assistant Attorney General, hereby certify that I have this day served the foregoing **STATE'S MOTION TO DISMISS DEFENDANT'S NOTICE OF APPEAL** upon Defendant by placing a copy of same in the United States Mail, first class postage prepaid, addressed as follows:

Isaac Hutchison Birch
462 Judd Duvall Lane
Franklin, North Carolina 28734

This the 14th day of July, 2011.

/s/ ELECTRONICALLY SUBMITTED
Jess D. Mekeel
Assistant Attorney General