

NORTH CAROLINA COURT OF APPEALS

STATE OF NORTH CAROLINA)	
)	
v.)	<u>From MACON</u>
)	
ISAAC HUTCHISON BIRCH)	

SECOND MOTION TO DISMISS

TO: THE HONORABLE CHIEF JUDGE AND ASSOCIATE JUDGES OF THE NORTH CAROLINA COURT OF APPEALS

The State of North Carolina, by and through the undersigned, respectfully requests this Court dismiss defendant's appeal. In support of this motion, the undersigned shows as follows:

PROCEDURAL HISTORY

1. At approximately 2:30 a.m. on 26 March 2010, Isaac Hutchison Birch ("defendant") was arrested and charged with driving while impaired ("DWI").
2. Defendant's case was heard at the 30 September 2010 Criminal Session of Macon County Superior Court, the Honorable Mark E. Powell, Judge presiding. (T. vol. V).
3. At the conclusion of the trial, a jury found defendant guilty of DWI (R. p. 121; T. p. 72), and the trial court imposed a Level Five punishment of sixty (60) days imprisonment, suspended on twelve (12) months unsupervised probation. (R. pp. 124-25).
4. Defendant gave timely notice of appeal. (T. p. 75).
5. Both at trial and now on appeal, defendant has proceeded *pro se*.

6. On 6 December 2010, the transcripts were delivered, and on 28 January 2011, defendant served on the State the proposed record on appeal. (R. p. 137).

7. The settled Record on Appeal was filed on 8 March 2011, docketed on 14 March 2011, and mailed to the parties on 15 March 2011. (R. p. 1).

8. On 14 April 2011, defendant filed a motion for an extension of time, seeking an additional sixty (60) days.

9. On 14 April 2011, the Court allowed in part defendant's motion, granting an extension of thirty (30) days and providing that defendant shall file his brief on or before 16 May 2011.

10. On 17 May 2011, Defendant filed his brief, and the State filed a motion to strike and dismiss later that same day.

11. Defendant filed a response to the State's motion, and by Order entered 19 May 2011, this Court denied the State's motion and deemed defendant's brief timely filed.

12. The State has filed its brief contemporaneous with the filing of the instant motion.

REASONS WHY THE APPEAL SHOULD BE DISMISSED

A defendant's right to appeal a conviction is "purely statutory." *State v. Shoff*, 118 N.C. App. 724, 725, 456 S.E.2d 875, 876, appeal dismissed, 340 N.C. 572, 460 S.E.2d 328, *aff'd*, 342 N.C. 638, 466 S.E.2d 277 (1996). Therefore, in order for a defendant to have an appeal as a matter of right, the North Carolina General Statutes must dictate that the defendant has such

a right. Moreover, an appeal must be filed pursuant to our Rules of Appellate Procedure.

Here, the State respectfully requests this Court dismiss defendant's appeal based upon the jurisdictionally insufficient Record on Appeal. Because the Record before this Court fails to contain vital documents required under the appellate rules for proper review by this Court, defendant's appeal should be dismissed.

It is well-established that "[i]t is the appellant's duty and responsibility to see that the record is in proper form and complete." *State v. Alston*, 307 N.C. 321, 341, 298 S.E.2d 631, 644-45 (1983). The Appellate Rules provide the Record on Appeal "shall contain," *inter alia*: (1) "copies of all warrants, informations, presentments, and indictments upon which the case has been tried in any court"; (2) "copies of the verdict and of the judgment"; (3) "copies of docket entries or a statement showing all arraignments and pleas"; and (4) "copies of all other papers filed" that "are necessary for an understanding of all issues presented on appeal." N.C. R. App. P. 9(a)(3).

Here, the Record on Appeal fails to contain the judgment entered in district court or any indication of a plea entered in district court establishing jurisdiction in superior court. A copy of the DWI citation is included in the Record on Appeal but is devoid of any indication of defendant's plea or the district court's verdict, judgment, and sentence. (R. p. 2). Because of this jurisdictional deficiency, the appeal is subject to dismissal.

See *State v. Banks*, 241 N.C. 572, 573, 86 S.E.2d 76, 77 (1955) (per curiam) ("The record fails to disclose jurisdiction in the court below. As that court was without jurisdiction, in so far as this record discloses, we have none. *Therefore, the appeal must be dismissed.*" (emphasis added) (internal quotation marks and citation omitted)); see also *State v. Byrd*, 4 N.C. App. 672, 674, 167 S.E.2d 522, 524 (1979).

WHEREFORE, the State respectfully requests that defendant's the appeal be dismissed.

Electronically submitted, this the 15th day of June 2011.

Roy Cooper
ATTORNEY GENERAL

/s/ ELECTRONICALLY SUBMITTED
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY I have this day served the foregoing SECOND MOTION TO DISMISS upon DEFENDANT by placing a copy of the 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 15th day of June 2011.

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