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NO. COA01-1497

NORTH CAROLINA COURT OF APPEALS

Filed: 15 October 2002

STATE OF NORTH CAROLINA

v.

New Hanover County
No. 99 CRS 1723

VICTOR FRANCISCO VALLADARES

Appeal by defendant from judgment entered 26 July 2001 by Judge Ernest B. Fullwood in New Hanover County Superior Court. Heard in the Court of Appeals 30 September 2002.

Attorney General Roy Cooper, by Special Deputy Attorney General Jonathan P. Babb, for the State.

Robert T. Newman, Sr., for defendant appellant.

BIGGS, Judge.

On 21 October 1999, Victor Francisco Valladares (defendant) was convicted of three counts of trafficking in heroin in 99 CRS 1721, 99 CRS 1722, and 99 CRS 1723. He was also convicted of one count of possession of heroin with intent to sell or deliver in 99 CRS 1720. The trial court consolidated the four offenses into two judgments (hereafter "Judgment 1" and "Judgment 2"). In Judgment 1, the court consolidated the two heroin trafficking counts in 99 CRS 1721 and 99 CRS 1723, sentencing defendant to the mandatory term of 70 - 84 months imprisonment. See N.C.G.S. § 90-95(h)(4)(a)

(1999). In Judgment 2, the court consolidated the third trafficking count in 99 CRS 1722 with the possession charge in 99 CRS 1720, imposing a second consecutive prison sentence of 70 - 84 months. On appeal, this Court found no error as to Judgment 2. *State v. Valladares*, 143 N.C. App. 570, 547 S.E.2d 861 (2001) (unpublished opinion). As to Judgment 1, this Court found no error in the conviction for possession of heroin in 99 CRS 1723, but vacated defendant's conviction for trafficking in heroin by manufacture in 99 CRS 1721. *Id.*

The cause was remanded to the trial court, which held a re-sentencing hearing on 26 July 2001. Defendant argued that the court should consolidate the remaining trafficking offense from Judgment 1 into Judgment 2. The trial court concluded that it had no authority to revisit Judgment 2, which had been affirmed in all respects on appeal. The trial court determined that only the remaining offense from Judgment 1, 99 CRS 1723, was before it on remand. Because the sentence for trafficking in heroin was prescribed by statute, see N.C.G.S. § 90-95(h)(4)(a) (1999), the trial court entered judgment in 99 CRS 1723, imposing a 70 - 84 month sentence. This sentence was to run consecutively to defendant's sentence in Judgment 2, as required by N.C.G.S. § 90-95(h)(6) (1999).

On appeal, defendant claims the trial court erred by failing to conduct a *de novo* resentencing proceeding as to all three of his convictions. Defendant argues that the court's failure to recognize its own authority and discretion on remand to consolidate

the offenses from both Judgment 1 and Judgment 2 resulted in a denial of his constitutional right to due process and equal protection.

We note initially that defendant did not raise his due process or equal protection claims in the trial court. "Constitutional questions which are not raised and passed upon at trial will not be considered on appeal." *State v. Gainey*, 355 N.C. 73, 105, 558 S.E.2d 463, 484 (2002) (citing *State v. Benson*, 323 N.C. 318, 322, 372 S.E.2d 517, 519 (1988)).

Defendant avers that both Judgment 1 and Judgment 2 were before the trial court on remand from our decision vacating the conviction in 99 CRS 1721 contained in Judgment 1. In light of the Supreme Court's decision in *State v. Hemby*, 333 N.C. 331, 333-34, 426 S.E.2d 77, 78 (1993), we disagree.

The defendant in *Hemby* was convicted of eight indictments, which were consolidated for sentencing into three judgments. The First Judgment covered the offenses alleged in indictments A, B, and C; the Second Judgment covered indictments D, E, and F; and the Third Judgment covered indictments G and H. *Id.* at 333, 426 S.E.2d at 78. On appeal, this Court upheld defendant's convictions but found sentencing errors in the first two judgments. "The Court of Appeals upheld the two-year sentence imposed for indictments G and H, but it vacated and remanded for resentencing indictments A, B, C, D, E and F." *Id.* On remand, the trial court did not revisit the Third Judgment, finding that "indictments G and H were not subject to resentencing since the . . . sentence on these

indictments had been upheld on appeal." *Id.* at 334, 426 S.E.2d 78. On appeal after re-sentencing, the Supreme Court held that the trial court erred by sentencing defendant to a more severe sentence than he had initially received. The Supreme Court in *Hemby* remanded to the trial court for yet another sentencing hearing. However, remand was expressly limited to those indictments which had been before the trial court on re-sentencing. Excluded from re-sentencing by the Supreme Court was the Third Judgment, which contained the convictions in indictments G and H and had been upheld in all respects in defendant's original appeal. *Id.* at 337, 426 S.E.2d at 80.

In this case, Judgment 2 was affirmed on appeal as to both the convictions consolidated therein and the sentence imposed by the trial court. Therefore, as with the Third Judgment in *Hemby*, Judgment 2 was not before the trial court at defendant's re-sentencing hearing because it had been affirmed in all respects on appeal. The re-sentencing hearing conducted after defendant's conviction in 99 CRS 1720 was vacated concerned only the remaining conviction from Judgment 1, 99 CRS 1723. The trial court correctly determined that it was without authority to revisit Judgment 2.

Defendant cites *State v. Ransom*, 80 N.C. App. 711, 343 S.E.2d 232 (1986), for the proposition that re-sentencing proceedings are conducted *de novo*, leaving the trial court free to change the manner in which it originally consolidated offenses for judgment. In *Ransom*, however, all of the defendant's convictions were consolidated into a single judgment prior to remand. On remand,

therefore, all of the convictions contained in this lone judgment were before the court for re-sentencing. *Ransom* does not contradict the principle reflected in *Hemby* that only a judgment that has been disturbed on appeal is before the trial court on remand. Defendant's reliance on *Ransom* is misplaced.

We agree with the trial court that it lacked the authority to re-sentence defendant on Judgment 2 based on our decision vacating a conviction in Judgment 1. Judgment 2 was affirmed in all respects on appeal and, therefore, was not before the trial court on remand. We note that defendant's sentence on remand in 99 CRS 1720 was compelled by the provisions of the drug trafficking statute, N.C.G.S. § 90-95 (h) (4) (a), (6). Therefore, the fact that defendant received the same sentence after one of the two consolidated convictions in Judgment 1 was vacated did not violate the provisions of N.C.G.S. § 15A-1335 (1999). See *State v. Holt*, 144 N.C. App. 112, 547 S.E.2d 148 (2001), *disc. review dismissed as improvidently allowed*, 355 N.C. 347, 560 S.E.2d 793 (2002).

No error.

Judges WALKER and THOMAS concur.

Report per Rule 30(e).