NO. COA01-156

NORTH CAROLINA COURT OF APPEALS

Filed: 5 March 2002

STATE OF NORTH CAROLINA

v. Moore County
Nos. 98 CRS 5873, 10482

COLLINS STEPHANIE WILSON

Appeal by defendant from judgment entered 14 September 2000 by Judge James M. Webb in Superior Court, Moore County. Heard in the Court of Appeals 30 January 2002.

Attorney General Roy Cooper, by Assistant Attorney General Anne M. Middleton, for the State.

Bruce T. Cunningham, Jr., for the defendant-appellant.

WYNN, Judge.

This is defendant's second appeal from his jury convictions of felonious breaking or entering and felonious larceny, and of being an habitual felon. In his previous appeal, this Court found no error in defendant's trial, but granted his motion for appropriate relief regarding sentencing, stating:

> [T]he trial court's judgment "finding defendant guilty of being an habitual felon" and imposing sentence thereon was erroneous and must be vacated. The sentences imposed upon defendant's convictions of felonious breaking or entering and felonious larceny must likewise be vacated and remanded for resentencing. Upon remand, the court shall calculate defendant's proper prior record level pursuant to N.C. Gen. Stat. § 15A-

> 1340.14 (1999) and shall impose sentences upon the "underlying felon[ies] as . . . Class C felon[ies.]"

State v. Wilson, 139 N.C. App. 544, 552, 533 S.E.2d 865, 871, *appeal dismissed and disc. review denied*, 353 N.C. 279, 546 S.E.2d 395 (2000) ("*Wilson I*") (citations omitted). Following remand for resentencing, the trial court followed this Court's mandate and sentenced defendant within the presumptive range. Defendant again appeals; we find no error.

Defendant brings forth five assignments of error. He first argues that the trial court erred, on remand, in denying his motion to dismiss the underlying habitual felon indictment in 98 CRS 10482. However, this Court rejected the same argument by defendant in *Wilson I* and found that the trial court committed no error at trial (holding that "the procedures set forth in the Habitual Felon Act comport with a criminal defendant's federal and state constitutional guarantees"). *Id.* at 550, 533 S.E.2d at 870. Accordingly, we reject this argument and defendant's first two assignments of error.

Defendant next argues that since he presented credible, uncontroverted evidence of two statutory mitigators, the trial court erred in not imposing a sentence in the mitigated range. However, this Court has repeatedly held that "the trial court is required to take 'into account factors in aggravation and mitigation *only* when deviating from the presumptive range in sentencing.'" *State v. Chavis*, 141 N.C. App. 553, 568, 540 S.E.2d 404, 415 (2000) (quoting *State v. Caldwell*, 125 N.C. App. 161, 162,

479 S.E.2d 282, 283 (1997)). *See State v. Campbell*, 133 N.C. App. 531, 542, 515 S.E.2d 732, 739, *disc. review denied*, 351 N.C. 111, 540 S.E.2d 370 (1999) ("a trial court is not required to justify a decision to sentence a defendant within the presumptive range by making findings of aggravation and mitigation," even where evidence of several mitigating, but no aggravating, factors are presented to the court). Furthermore, we note that the outcome would not necessarily be different even had the trial court found the existence of the mitigating factors as advocated by defendant. This Court has held that "upon a finding of one or more mitigating factors and no aggravating factors, the question of whether to reduce the sentence below the presumptive term, and if so, to what extent, is within the trial court's discretion." *State v. Cain*, 79 N.C. App. 35, 51, 338 S.E.2d 898, 907, *disc. review denied*, 316 N.C. 380, 342 S.E.2d 899 (1986).

Defendant cites no authority in support of his final argument; accordingly, that argument (and defendant's assignment of error 4) is deemed abandoned. N.C.R. App. P. 28(b)(6) (2002); *see, e.g., State v. McNeill*, 140 N.C. App. 450, 537 S.E.2d 518 (2000); *State v. Stevenson*, 136 N.C. App. 235, 523 S.E.2d 734 (1999), *disc. review denied*, 351 N.C. 368, 543 S.E.2d 144 (2000).

No error.

Judges HUDSON and THOMAS concur.

Report per Rule 30(e).