

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA02-12

NORTH CAROLINA COURT OF APPEALS

Filed: 01 October 2002

STATE OF NORTH CAROLINA

v.

Mitchell County
Nos. 01 CRS 1129-43

TIMOTHY RAY ALLEN

Appeal by defendant from judgments entered 5 September 2001 by Judge James L. Baker in Mitchell County Superior Court. Heard in the Court of Appeals 30 September 2002.

Attorney General Roy Cooper, by Assistant Attorney General Christine M. Ryan, for the State.

Leslie C. Rawls, for defendant-appellant.

THOMAS, Judge.

Pursuant to a plea agreement, defendant pled guilty to seven counts of first-degree sex offense, seven counts of indecent liberties, and one count of attempted statutory sex offense. The trial court entered three separate judgments sentencing defendant to 255-315 months for one count each of first-degree sexual offense. The trial court consolidated all of the remaining counts and imposed a fourth sentence of 255-315 months, with all sentences to run consecutively.

Defendant, *pro se*, filed timely notice of appeal. The court appointed counsel to represent defendant on appeal.

Contemporaneous with the filing of a brief on defendant's behalf, counsel filed a petition for a writ of certiorari. Counsel acknowledged in the petition that defendant did not have a right to appeal. The State subsequently filed a motion to dismiss the appeal, but in our discretion, we elect to allow the petition and review the issue raised in defendant's brief.

By his sole assignment of error, defendant argues the trial court erred by accepting his plea without an adequate factual basis. He claims the evidence failed to establish the ages of the victims and therefore the age element of the offenses was not satisfied. We disagree.

It is established by N.C. Gen. Stat. § 15A-1022(c) that the trial court may not accept a plea of guilty or no contest unless the court finds the existence of a factual basis for the plea. N.C. Gen. Stat. § 15A-1022(c) (1999). The statute lists five sources from which this determination may be made: (1) a statement of the facts by the prosecutor; (2) a written statement by the defendant; (3) a presentence report; (4) sworn testimony, including reliable hearsay; and (5) a statement of the facts by defense counsel. *Id.*; *State v. Atkins*, 349 N.C. 62, 95-96, 505 S.E.2d 97, 118 (1998), *cert. denied*, 526 U.S. 1147, 143 L. Ed. 2d 1036 (1999). These sources are not exclusive; the court may consider any information properly brought to its attention in determining whether a factual basis exists. *State v. Dickens*, 299 N.C. 76, 79, 261 S.E.2d 183, 185 (1980). However, the material considered by the court in making this determination must appear in the record so

the appellate court can determine whether the plea has been properly accepted. *State v. Sinclair*, 301 N.C. 193, 198, 270 S.E.2d 418, 421 (1980). The defendant's failure to object to the prosecutor's summary of the evidence or otherwise to bring the issue of lack of a factual basis to the attention of the trial judge may result in waiver of appellate review. *State v. Kimble*, 141 N.C. App. 144, 147, 539 S.E.2d 342, 344-45 (2000), *disc. rev. denied*, 353 N.C. 391, 548 S.E.2d 150 (2001).

In this case, the transcript of the plea hearing shows defendant's counsel stipulated that there is a factual basis for the plea and that the prosecutor could summarize the evidence. After hearing the prosecutor narrate evidence of the acts forming the basis of each charge, the trial judge directed the prosecutor's attention to the age element of the offenses. The prosecutor confirmed defendant's date of birth, 17 March 1972, and the court acknowledged that it had reviewed the victims' dates of birth or ages stated in the indictments. The indictments, which are in the record, either list the dates of birth of the victims or state the victims were within the proscribed age ranges at the times of the offenses. Defendant did not object to this method of proof or to any perceived lack of a factual basis for the plea after the prosecutor completed his summarization of the evidence.

We conclude the record supports the court's determination that there is a factual basis for the plea. Accordingly, we find no error.

NO ERROR.

Judges WALKER and BIGGS concur.

Report per Rule 30(e).