NO. COA10-1357
NORTH CAROLINA COURT OF APPEALS

Filed: 6 September 2011

STATE OF NORTH CAROLINA

v. Forsyth County
Nos. 09 CRS 8442, 53278, 53285

MICHAEL LEE GRIFFIN,
Defendant.

Appeal by the State from order and judgment entered 7 June 2010 by Judge James M. Webb in Forsyth County Superior Court. Heard in the Court of Appeals 17 August 2011.

Attorney General Roy Cooper, by Assistant Attorney General Charles E. Reece, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Benjamin Dowling-Sendor, for defendant-appellee.

HUNTER, Robert C., Judge.

The State appeals from an order entered 7 June 2010, granting the trial court's *sua sponte* motion for appropriate relief and vacating Michael Lee Griffin's ("defendant") sentence for having attained the status of a habitual felon. The State also appeals from a judgment entered on the same day sentencing defendant to a term of 10 to 12 months imprisonment. After

careful review, we dismiss the State's appeal.

Background

On 6 July 2009, defendant was indicted for the felony offense of possession of cocaine. On 17 May 2010, defendant was additionally indicted for possession of marijuana up to 1/2 ounce, possession of drug paraphernalia, and for having attained the status of a habitual felon.

On 7 June 2010, defendant pled guilty to the aforementioned charges pursuant to a plea agreement. The plea agreement provided for consolidation of all charges and a sentence within the mitigated range. In accordance with the terms of the plea agreement, the trial court entered a single judgment sentencing defendant to a term of 101 to 131 months imprisonment. However, immediately after entering judgment, the trial court, *sua sponte*, entered an order granting its own motion for appropriate relief. The trial court found that "defendant's sentence as an habitual felon was grossly disproportionate in light of the mitigating factors found at sentencing and the crime committed" and was in "violation of the defendant's rights under the 8th and 14th Amendment[s] to the United States Constitution[.]" Accordingly, the trial court vacated defendant's sentence as a habitual felon. The trial court then sentenced defendant within the presumptive range as a Class I, Level VI felon to a term of 10 to 12 months imprisonment. The State appeals both from the

order entered upon the trial court's own motion for appropriate relief and the subsequent judgment entered.

Discussion

The threshold issue on appeal is whether the State has a right to appeal. We find *State v. Starkey*, 177 N.C. App. 264, 628 S.E.2d 424, *cert. denied*, __ N.C. __, 636 S.E.2d 196 (2006), controlling and conclude that the State has no right of appeal. Consequently, we dismiss the State's appeal.

"The [S]tate's right of appeal in a criminal proceeding is entirely statutory; it had no such right at the common law. Statutes granting a right of appeal to the [S]tate must be strictly construed." *State v. Murrell*, 54 N.C. App. 342, 343, 283 S.E.2d 173, 173-74 (1981), *disc. review denied*, 304 N.C. 731, 288 S.E.2d 804 (1982).

In *Starkey*, 177 N.C. App. at 266, 628 S.E.2d at 425, the defendant was convicted of possession of cocaine and having attained habitual felon status, and the trial court sentenced the defendant to a term of 70 to 93 months imprisonment. However, similar to the case *sub judice*, immediately after entering judgment, the trial court entered an order granting its own motion for appropriate relief. *Id.* The trial court likewise found that defendant's sentence as a habitual felon was "grossly disproportionate in light of the mitigating factors found at sentencing and the crime committed," and was in

violation of the defendant's "rights under the Eighth and Fourteenth Amendments to the United States Constitution." *Id.* Consequently, the trial court vacated the defendant's sentence as a habitual felon and sentenced the defendant to a term of 8 to 10 months imprisonment. *Id.* The State appealed. *Id.*

The dispositive issue on appeal in *Starkey*, as it is in this case, was whether the State had a right to appeal. This Court stated that:

> As the State is appealing the entry of an order granting the trial court's Motion for Appropriate [R]elief and not the judgment entered on the jury verdicts, whether or not the State has a right of appeal to this Court is controlled by Section 15A-1422 of the North Carolina General Statutes. Pursuant to Section 15A-1422(b), the State seeks review of the trial court's grant of relief of a Motion for Appropriate Relief in an appeal regularly taken. *Therefore, for this Court to review the trial court's grant of relief under its Motion for Appropriate Relief, the State must have a right to appeal the underlying judgment in an appeal regularly taken.*

Id. at 266-67, 628 S.E.2d at 425 (emphasis added) (internal citation omitted). This Court further stated that "[w]hether an appeal by the State of criminal judgments is regularly taken is governed by Section 15A-1445 of the North Carolina General Statutes." *Id.* (citation and quotation marks omitted). N.C. Gen. Stat. § 15A-1445 (2009) provides in pertinent part that unless the rule against double jeopardy prohibits further

prosecution, the State may appeal where the trial court has entered a decision or judgment dismissing criminal charges, or the "sentence imposed . . . [c]ontains a term of imprisonment that is for a duration not authorized by G.S. 15A-1340.17 or G.S. 15A-1340.23 for the defendant's class of offense and prior record or conviction level[.]" N.C. Gen. Stat. § 15A-1445(a)(1) and (3).

Upon review of the defendant's case in *Starkey*, this Court reasoned that:

> The relief granted by the trial court might be considered to have effectively dismissed defendant's charge of having attained the status of an habitual felon or imposed an unauthorized prison term in light of defendant's status as an habitual felon. *However, it is the underlying judgment and not the order granting this relief from which the State must have the right to take an appeal*.

Starkey, 177 N.C. App. at 267, 628 S.E.2d at 426 (emphasis added). In *Starkey*, the underlying judgment, which is the original judgment entered upon the jury verdict, did not dismiss a charge against the defendant, nor was the term of imprisonment imposed unauthorized by law. *Id.* ("The State does not argue *and we do not find* that the underlying judgment dismisses a charge against defendant or that the term of imprisonment imposed was not authorized." (emphasis added)). Thus, this Court concluded that the State's appeal was not "regularly taken," and dismissed

the appeal. *Id.* In the instant case, as in *Starkey*, the underlying judgment did not dismiss a charge against defendant, nor was the term of imprisonment unauthorized by law. Thus, the State's appeal is likewise one not regularly taken.

The State argues that, unlike in *Starkey*, it is now appealing from the judgment entered after the motion for appropriate relief was granted. The State is correct in noting that the State did not appeal the second judgment in *Starkey*; however, the Court in *Starkey* clearly stated that the appeal must be regularly taken from the *underlying judgment* — the original judgment. *Id.* Moreover, the second judgment does not, on its face, dismiss a charge against defendant, nor is the term of imprisonment imposed unauthorized by law. As stated in *Starkey*, it is the order granting the *sua sponte* motion for appropriate relief, not the judgments, that contains the purported errors as a matter of law and the State does not have a right of appeal from that order. *See id.*

We are bound by *Starkey*; however, as I stated in my concurrence in that case, the trial court's order granting its motion for appropriate relief "contradicts settled case law regarding Eighth Amendment challenges to habitual felon sentences and was therefore erroneous." *Id.* at 268, 628 S.E.2d at 426 (Hunter, J., concurring) (citing *State v. Todd*, 313 N.C. 110, 117-19, 326 S.E.2d 249, 253-55 (1985); *State v. McDonald*,

165 N.C. App. 237, 241-42, 599 S.E.2d 50, 52-53, *disc. review denied*, 359 N.C. 195, 608 S.E.2d 60 (2004), *cert. denied*, 544 U.S. 988, 161 L. Ed. 2d 748 (2005); *State v. Clifton*, 158 N.C. App. 88, 95-96, 580 S.E.2d 40, 45-46, *cert. denied*, 357 N.C. 463, 586 S.E.2d 266 (2003); *State v. Hensley*, 156 N.C. App. 634, 638-39, 577 S.E.2d 417, 421, *disc. review denied*, 357 N.C. 167, 581 S.E.2d 64 (2003)). Based on the foregoing, the State's appeal is dismissed.[1]

Dismissed.

Judges STROUD and HUNTER, Robert N., Jr. concur.

Report per Rule 30(e).

[1] As I pointed out in my concurrence in *Starkey*, this issue may be subject to review by our Supreme Court pursuant to its constitutional authority. N.C. Const. art. IV, § 12, cl. 1; *see State v. Stanley*, 288 N.C. 19, 26, 215 S.E.2d 589, 594 (1975) ("This Court will not hesitate to exercise its rarely used general supervisory authority when necessary to promote the expeditious administration of justice."). In its petition for *certiorari*, the State cited this ground, among others, but the petition was denied by our Supreme Court in that case.