

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA11-391  
NORTH CAROLINA COURT OF APPEALS

Filed: 20 September 2011

STATE OF NORTH CAROLINA

v. Guilford County  
No. 09 CRS 80073  
DAMION MAURICE SPENCER 09 CRS 24524

Appeal by defendant from judgment entered 15 October 2010 by Judge Lindsay R. Davis, Jr., in Guilford County Superior Court. Heard in the Court of Appeals 6 September 2011.

*Attorney General Roy Cooper, by Assistant Attorney General Alexandra M. Hightower, for the State.*

*Don Willey for defendant-appellant.*

HUNTER, JR., Robert N., Judge.

Defendant Damion Maurice Spencer appeals from a judgment consistent with a jury verdict finding him guilty of possession of a firearm by a felon and his guilty plea to habitual felon status. Defendant contends the trial court erred in sentencing him as a prior record level V offender. We find no error.

Defendant was indicted on possession of a firearm by a felon and attaining habitual felon status. For the offense of

possession of a firearm by a felon, the indictment alleged that defendant was convicted of possession of a firearm by a felon on 16 March 2000. Prior to trial, defendant stipulated in writing and orally that he had been convicted of a felony on 16 March 2000.

Defendant was tried before a jury in October 2010. After a jury rendered its verdict and defendant pled guilty to attaining habitual felon status, the trial court proceeded to sentencing. The State tendered a prior record level worksheet which indicated that defendant was a Level V offender based upon 17 prior record level points, which included four points assigned for the 2000 possession of a firearm by a felon. The trial court sentenced defendant to 132 months to 168 months imprisonment, which is within the presumptive range for a Class C felon at a prior record level V. Defendant appeals.

Defendant contends the trial court erred in sentencing him as a Level V offender when his prior record level calculation included the underlying 2000 felony for his current conviction for possession of a firearm by a felon. We disagree.

"It shall be unlawful for any person who has been convicted of a felony to purchase, own, possess, or have in his custody, care, or control any firearm[.]" N.C. Gen. Stat. § 14-415.1(a)

(2009). "While N.C. Gen. Stat. § 14-415.1 has characteristics of a recidivist statute, a plain reading of the statute shows it creates a new substantive offense." *State v. Wood*, 185 N.C. App. 227, 236, 647 S.E.2d 679, 687, *disc. review denied*, 361 N.C. 703, 655 S.E.2d 402 (2007). "Possession of a firearm by a felon is a separate substantive offense from the defendant's prior felony upon which his status as a felon was based." *State v. Goodwin*, 190 N.C. App. 570, 578, 661 S.E.2d 46, 51 (2008) (citing *Wood*, 185 N.C. App. at 236, 647 S.E.2d at 687), *disc. review denied*, 363 N.C. 133, 675 S.E.2d 664 (2009), *cert. dismissed*, 364 N.C. 437, 702 S.E.2d 499 (2010).

Here, because possession of a firearm by a felon is a substantive offense rather than a sentencing enhancement, the trial court did not improperly use defendant's 2000 conviction "to elevate defendant's sentencing status . . . and then to increase his sentencing level.'" *Id.* (quoting *State v. Gentry*, 135 N.C. App. 107, 111, 519 S.E.2d 68, 70 (1999)). Further, defendant was not prosecuted or punished again for the 2000 conviction, but was convicted and punished only for the current unlawful act of possessing a firearm. See *State v. Crump*, 178 N.C. App. 717, 721-22, 632 S.E.2d 233, 236 (2006), *disc. review denied, appeal dismissed*, 361 N.C. 431, 648 S.E.2d 851 (2007).

Accordingly, the trial court properly sentenced defendant as a Level V offender.

No error.

Judges MARTIN and THIGPEN concur.

Report per Rule 30(e).