

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA01-984

NORTH CAROLINA COURT OF APPEALS

Filed: 21 May 2002

STATE OF NORTH CAROLINA

v.

Cabarrus County
Nos. 98 CRS 13646
98 CRS 15645

ROBERT JULIUS FOUST

Appeal by defendant from judgment entered 1 February 2001 by Judge James C. Davis in Cabarrus County Superior Court. Heard in the Court of Appeals 13 May 2002.

Attorney General Roy Cooper, by Special Deputy Attorney General Thomas D. Zweigart, for the State.

Hartsell, Hartsell, & White, P.A., by H. Jay White, for defendant-appellant.

TYSON, Judge.

I. Facts

Robert Julius Foust ("defendant") was found guilty by a jury of possession of a firearm by a convicted felon and stipulated to being a habitual felon. Defendant offered evidence but did not testify. The trial court sentenced him in the presumptive range to a term of 121 to 155 months imprisonment based on defendant's prior record level of V. Defendant appeals from the judgment. Neither the trial transcript nor the record on appeal filed by defendant

reflects his entry of timely notice of appeal. N.C.R. App. P. 9(a)(3)(h) (2001). Pursuant to N.C.R. App. P. 2 (2001), we deem it "not in the public interest to dismiss defendant's appeal[,] and shall address its merits. *State v. Blue*, 115 N.C. App. 108, 113, 443 S.E.2d 748, 751 (1994).

II. Issues

A. Habitual Felons Act

Defendant challenges the constitutionality of the Habitual Felons Act as applied in this case. He argues that the sentence imposed is "grossly disproportionate" to his crime and constitutes cruel and unusual punishment. Defendant's sentence is enhanced both for his habitual felon status and for his prior record level under structured sentencing. Defendant does not allege that his prior convictions were double-counted to confer habitual felon status and prior record points. N.C. Gen. Stat. § 14-7.6 (1999).

Defendant did not raise his constitutional claim to the trial court and has not assigned plain error on appeal. N.C.R. App. P. 10(b)(1), (c)(4) (2001). The courts of this state have repeatedly affirmed the constitutionality of the recidivist provisions of both the Habitual Felons Act and structured sentencing. *State v. Todd*, 313 N.C. 110, 326 S.E.2d 249 (1985) (holding the Habitual Felons Act does not violate constitutional principles of equal protection, double jeopardy, or cruel and unusual punishment); *State v. Brown*, 146 N.C. App. 299, 302, 552 S.E.2d 234, 236 (2001) (finding that "the Habitual Felons Act used in conjunction with structured sentencing did not violate the defendant's double jeopardy

protections"). Defendant fails to allege facts suggesting an improper application of the law by the trial court. Defendant was sentenced within the applicable presumptive range for his offense and defendant "has failed to show an abuse of discretion, procedural misconduct, unfairness, injustice, or conduct offensive to the public sense of fair play." *State v. Hodge*, 112 N.C. App. 462, 468, 436 S.E.2d 251, 255 (1993) (citing *State v. Aldridge*, 76 N.C. App. 638, 334 S.E.2d 107 (1985) (thirty year sentence for possession of stolen goods as an habitual felon did not constitute cruel and unusual punishment)).

B. Admission of Statement

Defendant asserts that the trial court erred in admitting a statement he made to police after his arrest. Defendant made no motion to suppress this evidence below, did not object to its introduction at trial, and has not assigned plain error on appeal. This error has not been preserved for our review. *State v. Golphin*, 352 N.C. 364, 405, 533 S.E.2d 168, 198 (2000); N.C.R. App. P. 10(b)(1), (c)(4); see also N.C. Gen. Stat. § 15A-975 (1999). This assignment of error is dismissed.

No error.

Judges GREENE and HUDSON concur.

Report per Rule 30(e).