

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA02-310

NORTH CAROLINA COURT OF APPEALS

Filed: 15 October 2002

STATE OF NORTH CAROLINA

v.

Johnston County
No. 01 CRS 50549

ERIC RANDALL JONES

Appeal by defendant from amended judgment entered 2 October 2001 by Judge Knox V. Jenkins, Jr., in Johnston County Superior Court. Heard in the Court of Appeals 7 October 2002.

Attorney General Roy Cooper, by Assistant Attorney General Christopher W. Brooks, for the State.

James M. Bell, for defendant appellant.

McCULLOUGH, Judge.

On 8 May 2001, defendant, Eric Randall Jones, pled guilty pursuant to a plea agreement to robbery with a dangerous weapon in exchange for an active sentence of 48 to 65 months, consolidation with a charge of misdemeanor larceny, and dismissal of other pending charges. The trial court sentenced defendant in accordance with the terms of the plea agreement to a minimum term of 48 months and a maximum term of 65 months.

On 13 July 2001, the Combined Records section of the North Carolina Department of Correction notified the Johnston County Clerk of Superior Court that the judgment was incorrect, in that

the corresponding maximum term for a minimum term of 48 months was 67 months, not 65 months. The matter came before the Johnston County Superior Court "for resentencing" on 2 October 2001. Defendant's counsel appeared for the hearing and stated that defendant objected to increasing the maximum term on the ground that it amounted to double jeopardy. Counsel also stated that he appeared for the hearing even though he had not been given notice because he saw the matter on the trial calendar. He objected to any resentencing without notice to defendant. Noting that defendant's counsel handwrote on the transcript of plea the terms and conditions of the plea, including the language that defendant would receive a sentence of 48 to 65 months, the trial court declared that defendant could not "take advantage of an error on behalf of his own lawyer." The trial court resentenced defendant to a minimum term of 48 months and a maximum term of 67 months, and defendant appealed.

The trial court ordinarily has the power to correct clerical errors so its records may be accurate. *State v. Dixon*, 139 N.C. App. 332, 337, 533 S.E.2d 297, 302 (2000). Nonetheless, our appellate courts have held that, when the trial court imposes a sentence mandated by a plea agreement, it may not correct or amend the sentence without affording the defendant the opportunity to be heard and to withdraw the plea. In *State v. Wall*, 348 N.C. 671, 502 S.E.2d 585 (1998), the defendant negotiated a plea agreement providing that a sentence for burglary would run concurrently with a sentence the defendant was already serving. *Id.* at 674, 502

S.E.2d at 587. This agreement was made in contravention of N.C. Gen. Stat. § 14-52, which provided that any sentence for burglary "shall" run consecutive to any sentence the defendant was serving. The trial court originally sentenced the defendant in accordance with the plea agreement, but subsequently amended the judgment to conform with N.C. Gen. Stat. § 14-52. *Id.* at 673, 502 S.E.2d at 587. The Supreme Court held that, although the defendant was not entitled to specific performance of an illegal agreement, he was entitled to the opportunity to withdraw his plea. *Id.* at 676, 502 S.E.2d at 588. The Court vacated the judgment of the superior court and remanded the matter for further proceedings. *Id.*

In *Hamilton v. Freeman*, 147 N.C. App. 195, 554 S.E.2d 856 (2001), *appeal dismissed, disc. review denied*, 355 N.C. 285, 560 S.E.2d 803 (2002), the North Carolina Department of Correction modified inmates' sentences (entered pursuant to plea agreements) in a manner that did not comply with statutory provisions. *Id.* at 198, 554 S.E.2d at 858. In accordance with *Wall*, this Court held that the inmates were not entitled to specific performance of the plea agreements but were entitled to return to court to regain the position they held before entry of the plea agreements. *Id.* at 206, 554 S.E.2d at 862.

Based upon the foregoing authorities and the State's concurrence, we conclude that the judgment must be vacated and the matter remanded for a hearing at which defendant is present and is afforded an opportunity to replead.

Vacated and remanded.

Chief Judge EAGLES and Judge HUDSON concur.

Report per Rule 30(e).