

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA03-1265

NORTH CAROLINA COURT OF APPEALS

Filed: 17 August 2004

STATE OF NORTH CAROLINA

v.

Nash County  
99 CRS 7340, 7341

RYLAN ANDERSON

Appeal by defendant from judgments dated 16 May 2003 by Judge Quentin T. Sumner in Superior Court, Nash County. Heard in the Court of Appeals 9 June 2004.

*Attorney General Roy Cooper, by Special Deputy Attorney General Steven M. Arbogast, for the State.*

*Terry W. Alford for defendant-appellant.*

McGEE, Judge.

Rylan A. Anderson (defendant) was indicted in July 1999 for first-degree murder and robbery with a dangerous weapon. Defendant subsequently pled guilty to second-degree murder and robbery with a dangerous weapon. According to the plea agreement, defendant was to be sentenced at the discretion of the trial court, but within the aggravated range of the sentencing guidelines. The trial court imposed consecutive, aggravated sentences of 196-245 months in prison for second-degree murder and 64-86 months in prison for the robbery. Defendant appealed, arguing that, *inter alia*, the trial court had failed to make findings of aggravating and mitigating

factors as required by the Structured Sentencing Act. This Court agreed with defendant and on 15 April 2003, in an unpublished opinion, remanded the case to the trial court for re-sentencing.

Upon remand, the matter was heard on 15 May 2003 in the Superior Court of Nash County before the Honorable Quentin T. Sumner, who had presided over the original sentencing hearing. The case was placed on the "add-on" calendar for that week. Defendant's trial counsel, who had only recently been notified of the re-sentencing hearing, informed the trial court that counsel was not prepared to proceed at that time because counsel had not had time to review the transcript or trial notes from the original sentencing hearing.

The trial court concluded that it would review the transcript of the original sentencing hearing and make findings of aggravation and mitigation. When the trial court resumed on 16 May 2003, the trial court stated that it had reviewed the transcript and had determined defendant's arguments in mitigation, and listed each mitigating factor individually. The trial court then asked defendant, "Is that all you ask for[?]" Defendant's counsel once again stated that counsel had not had time to review a transcript of the original hearing nor to review notes from that hearing. Defendant's counsel stated that as to the mitigating factors, "we're not in a position to answer that yes or no." The trial court again asked whether defendant requested that the trial court consider any additional factors in mitigation. Defendant's counsel responded that they were not prepared to go forward and that there

might be additional mitigating factors that had arisen in the last thirteen months since defendant's original sentencing.

The trial court declined defendant's request to conduct a completely new sentencing hearing and thereafter found all the mitigating factors as requested in the original hearing and three factors in aggravation. The trial court imposed a "sentence from the aggravated range as previously entered in this case. No modification, no amendment further needed or necessary other than the inclusion of these factors in aggravation and mitigation as found." Defendant appeals.

Defendant first argues that the trial court erred in refusing to continue the sentencing hearing to allow defendant adequate time to present evidence of mitigating factors. He notes that counsel for defendant repeatedly informed the trial court that they were unprepared to proceed with the re-sentencing hearing.

At the outset, we note that defendant did not file a written motion to continue with the trial court and he may not now assign as plain error the failure to continue the sentencing hearing. "[P]lain error review is limited to errors in a trial court's jury instructions or a trial court's rulings on admissibility of evidence[.]" *State v. Golphin*, 352 N.C. 364, 460, 533 S.E.2d 168, 230 (2000), *cert. denied*, 532 U.S. 931, 149 L. Ed. 2d 305 (2001), *cert. denied*, 358 N.C. 157, 593 S.E.2d 84 (2004), and neither exception is applicable in this instance.

Even if defendant's counsel's statements to the trial court are considered to be a motion to continue, we conclude the trial

court did not err in denying the motion. "A motion for continuance is ordinarily addressed to the discretion of the trial judge and his ruling thereon is not subject to review absent abuse of discretion." *State v. Cradle*, 281 N.C. 198, 207, 188 S.E.2d 296, 302, *cert. denied*, 409 U.S. 1047, 34 L. Ed. 2d 499 (1972). But, "when [a] motion is based on a right guaranteed by the Federal and State Constitutions, the question presented is one of law and not of discretion, and the decision of the court below is reviewable." *Id.* at 207, 188 S.E.2d at 302. Defendant argues that he was deprived of a fair trial as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Article I, Sections 19, 23 and 24 of the North Carolina Constitution.

N.C. Gen. Stat. § 15A-1334(a) (2003) explicitly provides that a defendant, only "upon a showing which the judge determines to be good cause, [may] obtain a continuance of [a] sentencing hearing." "'Continuances should not be granted unless the reasons therefor are fully established. Hence, a motion for a continuance should be supported by an affidavit showing sufficient grounds.'" *Cradle*, 281 N.C. at 208, 188 S.E.2d at 303 (citations omitted). On appeal, a defendant "must specifically demonstrate how his case would have been better prepared had the continuance been granted or show that he was materially prejudiced by the denial of the motion." *State v. Smith*, 155 N.C. App. 500, 505, 573 S.E.2d 618, 622 (2002), *disc. review denied*, 357 N.C. 255, 583 S.E.2d 287 (2003). Defendant failed to present to the trial court any specific justification for a continuance and only speculated to the trial court that there

might be additional evidence in mitigation that might be discovered. After a thorough review of the record and transcripts, we find no indication that defendant was deprived of his constitutional rights. Further, we conclude the trial court did not abuse its discretion in declining to grant a continuance had there, in fact, been a motion. This assignment of error is without merit.

Defendant next contends that the trial court erred in refusing to conduct a new sentencing hearing, complete with the presentation of evidence, upon remand from this Court. Defendant assigns as error the trial court's decision to simply read the transcript of the original hearing and issue its findings in mitigation and aggravation accordingly.

This Court has recognized that each sentencing hearing is a *de novo* proceeding and, that upon re-sentencing, the trial court must make a "new and fresh determination of the sufficiency of the evidence underlying each factor in aggravation and mitigation, including those factors previously found and affirmed by the appellate court." *State v. Daye*, 78 N.C. App. 753, 755, 338 S.E.2d 557, 559 (1986). Such an independent determination may require "no more than a review of the record and transcript of the trial or original sentencing hearing, at least when no additional evidence is offered at the [re-sentencing] hearing." *Id.*; see also *State v. Abbott*, 90 N.C. App. 749, 751, 370 S.E.2d 68, 69 (1988).

In the case before this Court, neither the State nor defendant offered additional evidence. The trial court asked defendant

multiple times whether its assessment of the factors offered in mitigation were correct and whether defendant had anything additional to add. Defendant indicated to the trial court only that there might be additional evidence in mitigation that was yet to be discovered. Because defendant only hinted at the possibility of new evidence, and based on our holding in *Daye*, we find the trial court did not err in reviewing the transcript of the prior sentencing hearing and then making findings of mitigating and aggravating factors. Defendant's assignment of error is overruled.

In his final argument, defendant contends that the trial court failed to give due consideration to the mitigating factors and ultimately abused its discretion in failing to exercise its discretion. In effect, defendant argues that the trial court simply sentenced defendant to the same punishment as in the original hearing without giving renewed consideration to any mitigating factors. We disagree.

Our Supreme Court concluded that "a sentencing judge need not justify the weight he or she attaches to any factor." *State v. Parker*, 315 N.C. 249, 258, 337 S.E.2d 497, 502 (1985). The weighing process is within the trial court's sound discretion and will not be overturned unless "'manifestly unsupported by reason,' or 'so arbitrary that it could not have been the result of a reasoned decision.'" *Id.* at 258-59, 337 S.E.2d at 502-3 (citation omitted). As we noted, the trial court did not err in re-sentencing defendant after reviewing the transcript of the prior sentencing hearing. The fact the trial court imposed the same

sentence as in the original sentencing hearing is not a basis for this Court to disturb the trial court's decision. Defendant bargained for a sentence in the aggravated range and the trial court complied with the plea agreement in re-sentencing. We conclude defendant's assignment of error is without merit.

Affirmed.

Judges McCULLOUGH and ELMORE concur.

Report per Rule 30(e).