

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA03-424

NORTH CAROLINA COURT OF APPEALS

Filed: 7 September 2004

STATE OF NORTH CAROLINA

v.

Wake County
No. 02 CRS 30639

DONZELLE RUSSELL, JR.

Appeal by defendant from judgment entered 4 October 2002 by Judge Jack W. Jenkins in Wake County Superior Court. Heard in the Court of Appeals 9 August 2004.

Attorney General Roy Cooper, by Special Deputy Attorney General Lars F. Nance, for the State.

Moshera H. Mohamed for defendant-appellant.

TIMMONS-GOODSON, Judge.

On 6 May 2002, the Wake County grand jury indicted defendant on a charge of murder. Defendant subsequently pled guilty on 4 October 2002 pursuant to a plea arrangement to a charge of voluntary manslaughter. The trial court found defendant had a prior record level of II and also found two aggravating factors and five mitigating factors. After finding that those factors counterbalanced each other, the trial court sentenced defendant to a term of 77 to 102 months imprisonment. From the trial court's judgment, defendant appeals.

Defendant contends the trial court erred by imposing a sentence in the aggravated range without making the necessary findings to support the increased sentence. His argument is unpersuasive.

Defendant pled guilty to a charge of voluntary manslaughter, which is a class D felony. N.C. Gen. Stat. § 14-18 (2003). After finding that defendant had a prior record level of II, the trial court sentenced defendant to a minimum term of seventy-seven months imprisonment. The presumptive range of minimum sentence durations for a class D felony at prior record level II is sixty-one to seventy-seven months. N.C. Gen. Stat. § 15A-1340.17(c) (2003). Because defendant's minimum sentence of seventy-seven months is within that presumptive range, the trial court was not required to make findings as to aggravating and mitigating factors. N.C. Gen. Stat. § 15A-1340.16(c) (2003); see *State v. Streeter*, 146 N.C. App. 594, 598, 553 S.E.2d 240, 242 (2001), *cert. denied*, 356 N.C. 312, 571 S.E.2d 211, *cert. denied*, ___ U.S. ___, 154 L. Ed. 2d 1071 (2003).

Although defendant's minimum term of imprisonment overlaps with the lower end of the aggravated range of seventy-seven to ninety-five months imprisonment for this felony class and prior record level, see N.C. Gen. Stat. § 15A-1340.17(c), the trial court was not required to find aggravating factors because defendant's minimum term of imprisonment is within the presumptive range. See *State v. Ramirez*, 156 N.C. App. 249, 259, 576 S.E.2d 714, 721, *disc. review denied*, 357 N.C. 255, 583 S.E.2d 286 (2003). If a

trial court does find aggravating or mitigating factors, as the trial court did here, the decision of whether to deviate from a presumptive term still rests in the trial court's discretion. N.C. Gen. Stat. § 15A-1340.16(a) (2003); *State v. Bivens*, 155 N.C. App. 645, 648, 573 S.E.2d 259, 261-62 (2002), *disc. review denied*, 356 N.C. 680, 577 S.E.2d 895 (2003). Upon our review of the record, we find no abuse of discretion by the trial court. This assignment of error is overruled.

No error.

Judges CALABRIA and ELMORE concur.

Report per Rule 30(e).