

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA05-1122

NORTH CAROLINA COURT OF APPEALS

Filed: 2 May 2006

STATE OF NORTH CAROLINA

v.

Vance County
Nos. 98 CRS 3500, 4750

LUCIUS DEMOND NIX

On writ of certiorari from the judgments dated 22 and 23 May 2000 by Judge Thomas D. Haigwood in Vance County Superior Court. Heard in the Court of Appeals 27 March 2006.

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

Appellate Defender Staples S. Hughes, by Assistant Appellate Defender Barbara S. Blackman, for defendant.

BRYANT, Judge.

On 24 September 1998, Lucius Demond Nix (defendant) pled guilty pursuant to a plea agreement to two counts of second degree murder, one count of first degree kidnapping with a felony firearm enhancement, and one count of robbery with a dangerous weapon. Sentencing was continued. The trial court's judgments against defendant were dated 22 May 2000 (98 CRS 4750) and 23 May 2000 (98 CRS 3500).

First, the trial court found as an aggravating factor the murders committed by defendant were done with "premeditation and deliberation." Accordingly, the trial court sentenced defendant

from the aggravated range of punishment to two consecutive terms of 196 to 245 months imprisonment. Defendant was sentenced to a consecutive term of 133 to 169 months imprisonment for the kidnapping conviction with the felony firearm enhancement. Finally, defendant was sentenced to a concurrent term of sixty-four eighty-six months imprisonment for robbery. On 30 December 2003, this Court allowed defendant's petition for writ of certiorari granting him a belated appeal.

On appeal, defendant argues the trial court erred by: (I) sentencing him in the aggravated range and (II) enhancing his kidnapping sentence.

I

Defendant first contends the trial court erred in sentencing him in the aggravated range because the aggravating factor was not submitted to the jury. We agree.

In *State v. Allen*, 359 N.C. 425, 615 S.E.2d 256 (2005), our Supreme Court concluded that, pursuant to *Apprendi v. New Jersey*, 530 U.S. 466, 490, 147 L. Ed. 2d 435, 455 (2000) and *Blakely v. Washington*, 542 U.S. 296, 159 L. Ed. 2d 403 (2004): "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed presumptive range must be submitted to a jury and proved beyond a reasonable doubt." *Allen*, 359 N.C. at 437, 615 S.E.2d at 265 (citing *Blakely*, 542 U.S. at 302-303, 159 L. Ed. 2d at 413-14; *Apprendi*, 530 U.S. at 490, 147 L. Ed. 2d at 455; N.C.G.S. §§ 15A-1340.13, 15A-1340.14, 15A-1340.16,

15A-1340.17). Here, the trial court, not the jury, found as a non-statutory aggravating factor in each murder conviction that the crimes were committed with premeditation and deliberation. The trial court's finding of this aggravating factor increased defendant's sentence above the statutory maximum allowed by his guilty pleas to second degree murder. Accordingly, in light of our Supreme Court's decision in *Allen*, this matter must be remanded for resentencing.

II

Defendant next argues the trial court erred by enhancing his kidnapping sentence based upon a judicially found firearm enhancement. However, this argument is not properly before the Court. On 9 December 2003, defendant filed a petition for writ of certiorari with this Court seeking a belated appeal of the four judgments in this case. This Court granted the petition in part, limiting appellate review to the two murder convictions. This Court did not allow certiorari as to defendant's conviction for kidnapping. Thus, we are without jurisdiction to review the assignment of error. Furthermore, to the extent that the Court were to treat the issue as a petition for writ of certiorari, the petition must be denied because the Court has already denied defendant's request for a belated appeal. See *In the Matter of Appeal from Civil Penalty*, 324 N.C. 373, 379 S.E.2d 30 (1989) ("Where a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher

court."); see also *State v. Winnex*, 66 N.C. App. 280, 282, 311 S.E.2d 594, 596 (1984) (Court without jurisdiction to consider defendant's argument where defendant's petition for writ of certiorari had been rejected by another panel of the Court). Accordingly, defendant's assignment of error is dismissed.

Remanded for resentencing in part, dismissed in part.

Chief Judge MARTIN and Judge GEER concur.

Report per Rule 30(e).