

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA05-1242

NORTH CAROLINA COURT OF APPEALS

Filed: 4 April 2006

STATE OF NORTH CAROLINA

v.

Buncombe County
No. 03 CrS 64517
03 CrS 64520-26

JERRY WAYNE NELSON

Appeal by defendant from judgment entered 16 March 2004 by Judge E. Penn Dameron in Superior Court, Buncombe County. Heard in the Court of Appeals 20 March 2006.

Attorney General Roy Cooper, by Assistant Attorney General Amy C. Kunstling, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Matthew D. Wunsche, for defendant-appellant.

McGEE, Judge.

Jerry Wayne Nelson (defendant) pled guilty on 16 March 2004 to four counts each of attempted first degree sexual offense and taking indecent liberties. The trial court consolidated the convictions for judgment and imposed a sentence within the aggravated range of a minimum term of 192 months and a maximum term of 240 months. As factors in aggravation, the trial court found that (1) defendant took advantage of a position of trust or confidence to commit the offense, and (2) "[t]his involved a course of conduct with repeated occurrences which took place over a period

of three years, which the Court would find a long period of time." Defendant appeals.

In *State v. Allen*, 359 N.C. 425, 439, 615 S.E.2d 256, 266 (2005), our Supreme Court held unconstitutional

portions of the Structured Sentencing Act which require the sentencing judge to consider the existence of aggravating factors not admitted to by a defendant or found by a jury and which permit the judge to impose an aggravated sentence after finding such aggravating factors by a preponderance of the evidence.

As the present appeal was pending at the time of the certification date of the *Allen* opinion, the *Allen* holding applies. *Id.* at 427, 615 S.E.2d at 258. It is undisputed in the case before us that a jury did not find the existence of the aggravating factors. Consequently, the sentence can be upheld only if there is a stipulation or admission by defendant to the existence of the aggravating factors.

The State argues that defendant stipulated to the existence of an aggravating factor by stipulating to the factual basis for the plea. This Court rejected an identical argument in *State v. Corey*, ___ N.C. App. ___, 618 S.E.2d 784, *stay allowed*, ___ N.C. ___, 2005 N.C. LEXIS 971 (2005), and *State v. Meynardie*, ___ N.C. App. ___, 616 S.E.2d 21, *stay allowed*, ___ N.C. ___, 2005 N.C. LEXIS 874 (2005). Those decisions are controlling and, together with *Allen*, mandate that defendant be re-sentenced.

Remanded for resentencing.

Judges WYNN and HUNTER concur.

Report per Rule 30(e).