

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA05-1587

NORTH CAROLINA COURT OF APPEALS

Filed: 7 November 2006

STATE OF NORTH CAROLINA

v.

Mecklenburg County
No. 03 CRS 7055

HENRY LOUIS NICHOLSON

Appeal by defendant from judgment ordered on 09 September 2005 and entered 16 September 2005 by Judge Richard D. Boner in Mecklenburg County Superior Court. Heard in the Court of Appeals 18 September 2006.

Peter Wood, for Defendant-Appellant.

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

ELMORE, Judge.

The State moved to dismiss this appeal on 31 January 2006. Defendant timely responded and petitioned for writ of certiorari. For the reasons set forth below, we grant the State's motion to dismiss and deny defendant's petition for writ of certiorari.

On 14 October 2003, defendant was convicted of Assault with a Deadly Weapon with Intent to Kill Inflicting Serious Injury in Mecklenburg County Superior Court. The Honorable Marcus L. Johnson sentenced defendant to a term of imprisonment in the aggravated range. Defendant appealed and this Court affirmed the conviction

but remanded for resentencing, holding that the trial court erred in finding an aggravating factor.

At the resentencing hearing, the Honorable Richard Boner sentenced defendant to a term of imprisonment within the presumptive range. During the hearing, defendant requested new counsel. Judge Boner denied this request. Additionally, the tape recording of the hearing inadvertently stopped for a brief period of time, rendering the transcript incomplete. Defendant assigns as error the denial of his request for new counsel, the failure of the trial court to conduct a hearing regarding his request for new counsel, and the failure of the trial court to provide a complete transcript.

In North Carolina, a defendant may appeal a conviction as a matter of right only by statute. *State v. Shoff*, 118 N.C. App. 724, 725, 456 S.E.2d 875, *appeal dismissed*, 340 N.C. 572, 460 S.E.2d 328, *aff'd*, 342 N.C. 638, 466 S.E.2d 277 (1995) (citing *Abney v. United States*, 431 U.S. 651, 656, 52 L. Ed. 2d 651, 658 (1977)). The relevant statute in North Carolina states:

[a] defendant who has been found guilty . . . is entitled to appeal **as a matter of right** the issue of whether his or her sentence is supported by evidence introduced at the trial and sentencing hearing **only** if the minimum sentence of imprisonment does not fall within the presumptive range for the defendant's prior record or conviction level and class of offense. Otherwise, the defendant is not entitled to appeal this issue as a matter of right but may petition the appellate division for review of this issue by writ of certiorari.

N.C. Gen. Stat. § 15A-1444(a1) (2003) (emphasis added).

This court has already affirmed defendant's conviction. *State v. Nicholson*, 169 N.C. App. 390, 610 S.E.2d 433 (2005). Defendant was resentenced in the presumptive range. Defendant has no appeal as a matter of right and we decline to grant defendant's petition for writ of certiorari.

Dismissed.

Chief Judge MARTIN and Judge JACKSON concur.

Report per Rule 30(e).