

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA06-1109

NORTH CAROLINA COURT OF APPEALS

Filed: 17 April 2007

STATE OF NORTH CAROLINA

v.

Mecklenburg County
Nos. 03CRS255518-19
05CRS64469

JIMMY LEON NICHOLSON

Appeal by defendant from judgments entered 1 February 2006 by Judge David S. Cayer in Mecklenburg County Superior Court. Heard in the Court of Appeals 2 April 2007.

Attorney General Roy A. Cooper, III, by Special Deputy Attorney General Kathleen M. Waylett, for the State.

Glenn Gerding for defendant-appellant.

HUNTER, Judge.

On 12 January 2004, the Mecklenburg County grand jury indicted defendant on charges of robbery with a dangerous weapon and assault with a deadly weapon with intent to kill inflicting serious injury. In a subsequent indictment on 10 October 2005, defendant was charged with possession of a firearm by a felon, and the indictment alleged that the underlying felony for this offense was a 24 May 2002 conviction for possession of a firearm by a felon. A jury found defendant guilty of all charges on 30 January 2006.

During sentencing, the State produced a sentencing worksheet to be used by the trial court in calculating defendant's prior record level. Included among the prior convictions listed on the worksheet was the 24 May 2002 conviction for possession of a firearm by a felon. The offense is a Class G felony to which four prior record points are assigned. After the trial court determined that defendant had ten prior record points and classified him at prior record level IV, it imposed three consecutive presumptive-range sentences having a combined term of 270 to 343 months imprisonment. From the trial court's judgments, defendant appeals. After a careful review of the record and briefs, we affirm.

In his sole argument on appeal, defendant contends the trial court erred by using the 2002 conviction in calculating his prior record level. He argues the 2002 conviction which was first used as an element of his 2006 conviction for possession of a firearm by a felon could not then be used in determining his prior record level. Defendant complains such a "double counting" is a violation of his constitutional right to due process and of double jeopardy. We disagree.

Defendant relies primarily upon *State v. Gentry*, 135 N.C. App. 107, 519 S.E.2d 68 (1999), in which the question presented was whether the three prior DWI convictions used to prove an element of the offense of habitual driving while impaired could then be used again to add points to that defendant's prior record level and thereby increase her sentence. In analyzing the issue, this Court noted that "our legislature recognized [in N.C. Gen. Stat. § 14-

7.6] the basic unfairness and constitutional restrictions on using the same convictions both to elevate a defendant's sentencing status to that of an habitual felon, and then to increase his sentencing level." *Id.* at 111, 519 S.E.2d at 70. This Court then concluded that the "legislature did not intend that the convictions which elevate a misdemeanor driving while impaired conviction to the status of the felony of habitual driving while impaired, would then again be used to increase the sentencing level of the defendant." *Id.* at 111, 519 S.E.2d at 70-71.

Defendant's case is distinguishable from *Gentry*. The underlying 2002 felony which was an element of defendant's most recent offense of possession of a firearm by a felon was not used to elevate his sentencing status. The trial court therefore did not err by using the four prior record points attributable to defendant's 2002 conviction to increase his sentencing level. See *State v. Hyden*, 175 N.C. App. 576, 580-81, 625 S.E.2d 125, 128 (2006). Nor does mere reliance upon the 2002 conviction as the underlying felony for the 2006 conviction implicate double jeopardy concerns. Defendant was not prosecuted or punished again for the underlying 2002 conviction, but rather he was convicted and punished only for his most recent act of unlawfully possessing a firearm. See *State v. Crump*, ___ N.C. App. ___, ___, 632 S.E.2d 233, 236 (2006).

Defendant failed to set out his remaining assignments of error in his brief. Because he has neither cited any authority nor stated any reason or argument in support of those assignments of error, they are deemed abandoned. N.C.R. App. P. 28(b)(6). Defendant received a fair trial, free from prejudicial error.

No error.

Chief Judge MARTIN and Judge McGEE concur.

Report per Rule 30(e).