

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA06-460

NORTH CAROLINA COURT OF APPEALS

Filed: 06 March 2007

STATE OF NORTH CAROLINA

v.

Forsyth County
Nos. 00 CRS 40391, 57553,
57958, 01 CRS 4207

MICHAEL JUNIOR COOPER

Appeal by defendant from judgment entered 7 December 2005 by Judge L. Todd Burke in Forsyth County Superior Court. Heard in the Court of Appeals 6 December 2006.

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

Anne Bleyman, for defendant-appellant.

STEELMAN, Judge.

This is the third time that these cases have darkened the door of this Court. In the first appeal, *State v. Cooper*, 154 N.C. App. 521, 572 S.E.2d 442 (2002), this Court found no error in defendant's trial, but remanded for resentencing. In the second appeal, *State v. Cooper*, 169 N.C. App. 457, 612 S.E.2d 446 (2005), this Court again remanded this case to the trial court for resentencing. In each of the prior judgments, the trial court found that defendant was a prior felony record level V, based upon fifteen prior felony record points. Our second opinion directed

that defendant be resentenced and that the trial court do two things: (1) consolidate all offenses into one felony judgment in accordance with the terms of defendant's original plea bargain; and (2) exclude from the computation of defendant's prior felony record level those offenses that were the basis for an offense of habitual misdemeanor assault, making defendant a prior felony record level IV.

It is clear from the transcript of the proceedings that counsel and the trial court understood that defendant was being sentenced at a prior felony record level IV. However, the judgment states that defendant was sentenced at a prior felony record level V, based upon fifteen prior felony record level points. The trial court imposed a sentence of 133-169 months imprisonment, a sentence at the top of the presumptive range for a level IV offender. Defendant appeals.

In his first argument, defendant contends that the trial court did not hold a *de novo* sentencing hearing. We disagree. We review this assignment of error pursuant to a writ of certiorari.

Defendant correctly points out that a resentencing hearing requires the trial court to make a new and fresh consideration of the evidence relevant to a defendant's sentence. *State v. Hemby*, 333 N.C. 331, 335, 426 S.E.2d 77, 79 (1993) (citing *State v. Mitchell*, 67 N.C. App. 549, 551, 313 S.E.2d 201, 202 (1984)). The record reveals that the trial court heard fully from counsel for defendant, who argued for a mitigated range sentence based upon the asserted non-statutory mitigating factor that defendant had been a

model prisoner during his incarceration. Defendant availed himself of educational opportunities in prison, had two children, and wanted to be out of prison to see them graduate. Further, the trial court granted defendant's request to personally address the trial court, hearing his plea that "I'd just like to get a break, it's that cut, dry and simple." The trial judge then asked if there was anything further from defendant, and was told "No, sir."

While the trial court did inappropriately remark at the beginning of the hearing that it was inclined to sentence defendant at the top end of the presumptive range, and in fact it did so, we hold that the trial court did afford defendant and his counsel an opportunity to be heard, and did consider their arguments prior to imposing a sentence. This assignment of error is without merit.

In his second argument, defendant contends that the trial court improperly determined his prior felony record level. We disagree, but remand this case for correction of a patent clerical error.

A thorough review of the record in this case clearly shows that the trial court understood this Court's prior mandate to sentence defendant at a prior felony record level IV. Defendant was sentenced for two convictions for being an habitual felon, along with several other lesser felonies. The sentence of 133-169 months imprisonment was consistent for a consolidated judgment for two Class C habitual felon charges at a prior felony record level IV, from the presumptive range. It is clear from the record that the judgment erroneously states that defendant was sentenced at a

prior felony record level V, based on fifteen prior record level points.

We affirm the sentence imposed by the trial court as being a proper presumptive range sentence for a prior record level IV, but remand for correction of the judgment as to the prior felony record level and points.

It is the duty of the trial court to insure that judgments accurately reflect its rulings before affixing its signature to a judgment.

AFFIRMED, REMANDED FOR CORRECTION OF CLERICAL ERROR.

Judges McGEE and BRYANT concur.

Report per Rule 30(e).