

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA06-761

NORTH CAROLINA COURT OF APPEALS

Filed: 20 March 2007

STATE OF NORTH CAROLINA

v.

JANSE ELIOT COOKE

Hoke County  
Nos. 02 CRS 50162  
02 CRS 50163

Appeal by Defendant from judgment entered 19 August 2003 by Judge Jack A. Thompson in Hoke County Superior Court. Heard in the Court of Appeals 8 February 2007.

*Attorney General Roy Cooper, by Assistant Attorney General John G. Barnwell, for the State.*

*Appellate Defender Staples Hughes, by Assistant Appellate Defender Matthew D. Wunsche, for Defendant-Appellant.*

STEPHENS, Judge.

On 19 August 2003, Janse Eliot Cooke ("Defendant") pled guilty to two counts of solicitation to commit first degree murder. The trial court entered judgment that same day, sentencing Defendant within the presumptive range to a term of 168 to 211 months in prison. Defendant did not timely file notice of appeal. On 20 May 2004, Defendant filed a petition for writ of certiorari with this Court alleging that his sentencing worksheet had been erroneously calculated and that he had received ineffective assistance of counsel. Defendant's petition was granted 8 June 2004, and review

was limited to "those issues upon which defendant had a right to direct appeal under N.C. Gen. Stat. § 15A-1444(a2) (2001)."

By his sole assignment of error, Defendant argues that the court erred in adding one point to his prior record level worksheet where Defendant did not stipulate to the basis for the additional point and where the basis for the point was not found by a jury. At Defendant's sentencing hearing, the court assigned Defendant a prior record level VI based on nineteen sentencing worksheet points. Eighteen of the nineteen points were assigned for prior convictions and are not now disputed by Defendant. Pursuant to N.C. Gen. Stat. § 15A-1340.14(b)(7), the court added the nineteenth point because it found that the crimes at issue were committed by Defendant "(a) while on supervised or unsupervised probation, parole, or post-release supervision; or (b) while serving a sentence of imprisonment; or (c) while on escape[.]" This nineteenth point increased Defendant's prior record level from V to VI, thereby enhancing Defendant's term of imprisonment.

Defendant contends that the court's addition of the nineteenth point constituted error under the United States Supreme Court's decision in *Blakely v. Washington*, 542 U.S. 296, 159 L. Ed. 2d 403 (2004). Under the *Blakely* holding, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Id.* at 301, 159 L. Ed. 2d at 412 (quoting *Apprendi v. New Jersey*, 530 U.S. 466, 490, 147 L. Ed. 2d 435, 455 (2000)). This Court has held that a finding

pursuant to N.C. Gen. Stat. § 15A-1340.14(b)(7) which increases a defendant's prior record level violates *Blakely* where the basis for adding the point was not found by a jury, and where the basis was not stipulated to by the defendant. *State v. Shine*, 173 N.C. App. 699, 619 S.E.2d 895 (2005) (defendant's probationary status, used to increase defendant's prior record level pursuant to N.C. Gen. Stat. § 15A-1340.14(b)(7), was required to be submitted to a jury and found beyond a reasonable doubt).

Nevertheless, where a case was final as of the date of the *Blakely* decision, and appeal was granted by writ of certiorari limiting review "to only those issues within defendant's appeal of right pursuant to North Carolina General Statutes, section 15A-1444(a1) and (a2)[,]" this Court will not reach the issue of whether a *Blakely* violation has occurred. *State v. Pender*, \_\_ N.C. App. \_\_, \_\_, 627 S.E.2d 343, 347 (2006). Similarly, where a case "was not pending on direct review and was final at the time the rule in *Blakely* was issued, the rule cannot be retroactively applied to defendant's appeal before this Court by writ of certiorari." *State v. Hasty*, \_\_ N.C. App. \_\_, \_\_, 639 S.E.2d 94, 96 (2007).

We are bound by our decisions in *Pender* and *Hasty*. *In re Civil Penalty*, 324 N.C. 373, 379 S.E.2d 30 (1989). The granting of the writ of certiorari does not affect the date upon which Defendant's case became final. *State v. Coleman*, \_\_ N.C. App. \_\_, \_\_ S.E.2d \_\_, (Feb. 6, 2007) (No. COA06-441). In the absence of timely notice of appeal, Defendant's case became final on 2

September 2003, fourteen days after entry of the judgment. N.C. R. App. P. 4(a). The *Blakely* decision was announced 24 June 2004. Since Defendant's case was final at the time the rule in *Blakely* was issued and is before us by writ of certiorari limiting review to "those issues upon which defendant had a right to direct appeal under N.C. Gen. Stat. § 15A-1444(a2) (2001)[,]" this Court will not reach Defendant's *Blakely* claim. The judgment of the trial court is, therefore,

AFFIRMED.

Judges MCGEE and CALABRIA concur.

Report per Rule 30(e).