An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA07-1423

NORTH CAROLINA COURT OF APPEALS

Filed: 7 October 2008

STATE OF NORTH CAROLINA

v.

JERRY LAMONT DUNSTON

Durham County
Nos. 04 CRS 50087
04 CRS 55284
04 CRS 46152
04 CRS 46154

Court of Appeals

Appeal by defendant from judgments entered 22 March 2007 by Judge W. Osmond Smith, III in Durham County Superior Court. Heard in the Court of Appeals 19 May 2008.

Slip Opinion

Attorney General Roy Cooper, by Deputy Director Caroline Farmer, for the State.

William B. Gibson, for defendant-appellant.

CALABRIA, Judge.

After conviction by a jury of second-degree rape, defendant appeals the judgment entered upon his conviction and a previous judgment entered upon his guilty plea which was later withdrawn. The dispositive question before this Court is whether the trial court erred in sentencing defendant more harshly upon his jury conviction than he had previously been sentenced for the same offense upon his guilty plea. We remand for resentencing.

On 21 August 2006, pursuant to a plea agreement, defendant entered an Alford Plea of guilty to second-degree rape in file number 04 CRS 50087 ("50087"), as well as second-degree sexual offense and communicating threats in file number 04 CRS 55284. In Durham County Superior Court, the Honorable Robert H. Hobgood ("Judge Hobgood") determined, and defendant stipulated that his prior record level was a level II. The offenses were consolidated and defendant was sentenced in the mitigated range to a term of a minimum of 60 months to a maximum of 80 months in the North Carolina Department of Correction. On 28 August 2006, defendant filed a motion to vacate the judgment and sentence. He claimed he could not plead guilty to something he had not done and explained the reasons he had done so was to have his girlfriend released from incarceration and returned to her young children. In an order entered 31 August 2006, Judge Hobgood granted the motion, vacated the judgment, set bond conditions, and directed the Assistant District Attorney to set a trial date.

At trial on 22 March 2007, in Durham County Superior Court, a jury returned a verdict finding defendant guilty of second-degree rape. The Honorable W. Osmond Smith, III ("Judge Smith") determined defendant's prior record level was a level III and sentenced defendant to a minimum of 104 months to a maximum of 134 months in the North Carolina Department of Correction. After defendant's conviction for second-degree rape, he pled guilty to second-degree sexual assault and communicating threats pursuant to a plea agreement. In addition, defendant pled guilty to possession

of marijuana with intent to sell or deliver and possession of a controlled substance stemming from an arrest in April 2006. Judge Smith consolidated the offenses and sentenced defendant to a minimum of 104 months to a maximum of 134 months in the North Carolina Department of Correction. Judge Smith ordered the sentence to run concurrently with defendant's prior sentence. From the judgments, defendant appeals.

Although defendant appealed both judgments, defendant's sole argument on appeal pertains only to the second-degree rape portion of his judgment in 50087. Defendant contends the sentence he received in 50087 violates of N.C. Gen. Stat. § 15A-1335 because the sentence exceeds his previous sentence in the judgment that had been vacated after his initial guilty plea.

N.C. Gen. Stat. § 15A-1335 (2007) provides:

> When a conviction or sentence imposed in superior court has been set aside on direct review or collateral attack, the court may not impose a new sentence for the same offense, or for a different offense based on the same conduct, which is more severe than the prior sentence less the portion of the prior sentence previously served.

Id.

The State argues that since defendant sought to withdraw his guilty plea, the trial court's initial sentence was neither set aside on direct appeal nor set aside pursuant to a collateral attack, and therefore N.C. Gen. Stat. § 15A-1335 is inapplicable to the case *sub judice*. However, the Supreme Court has held that "[a] plea of guilty, accepted and entered by the trial court, is the equivalent of conviction." *State v. Brown*, 320 N.C. 179, 210, 358

S.E.2d 1, 22, *cert. denied*, 484 U.S. 970, 98 L. Ed. 2d 406 (1987). In addition, in *State v. Wagner*, 356 N.C. 599, 602, 572 S.E.2d 777, 779 (2002), the Supreme Court held that when a defendant's plea and sentence were set aside, the trial court's subsequent sentence for the defendant's conviction at trial was contrary to N.C. Gen. Stat. § 15A-1335 when defendant's original sentence was less severe for the same offense.

In *Wagner*, the defendant pled guilty to "the offense of attempted possession of cocaine as an habitual felon." *Id.* at 600, 572 S.E.2d at 778. The trial court then sentenced defendant to a minimum of 101 months to a maximum of 131 months' confinement. *Id.* Defendant subsequently "filed a motion for appropriate relief asserting that his record level had been improperly calculated as a level VI when in fact his criminal history resulted in a level V for sentencing purposes." *Id.* The trial court "vacated and set aside defendant's guilty plea and the judgment entered thereon." *Id.* After the trial court set aside defendant's plea and sentence, "a jury found defendant guilty of attempt to possess cocaine, felonious possession of drug paraphernalia, and being an habitual felon." *Id.* at 600-01, 572 S.E.2d at 778. The trial court subsequently sentenced defendant to serve two consecutive sentences of a minimum of 135 months to a maximum of 171 months imprisonment. *Id.* On appeal, the Supreme Court explained N.C. Gen. Stat. § 15A-1335 as follows: "[p]ursuant to this statute a defendant whose sentence has been successfully challenged cannot receive a more severe sentence for the same offense or conduct on remand." *Id.* at

602, 572 S.E.2d at 779. The *Wagner* Court then determined that since the trial court imposed a more severe sentence for defendant's conviction at trial for the same offense he initially pled guilty to, the statute was applicable to the case and the trial court's second sentence was contrary to the mandate of N.C. Gen. Stat. § 15A-1335. *Id.* at 602, 572 S.E.2d at 779.

In the instant case, as in *Wagner*, defendant sought to vacate his judgment and the trial court subsequently entered an order vacating defendant's judgment. After the trial court vacated defendant's judgment, a jury returned a verdict finding defendant guilty of 50087 and the trial court sentenced defendant for 50087, the same offense for which defendant initially entered a guilty plea. As such, we determine the instant case falls under the purview of N.C. Gen. Stat. § 15A-1335 and now address the merits of the case.

Pursuant to his initial plea agreement for the offenses in 50087 and 55284, defendant received a mitigated term of 60 to 80 months imprisonment as a record level II offender. After defendant's guilty plea and sentence were set aside, a jury returned a guilty verdict for the offense in 50087. The trial court then sentenced defendant to a minimum of 104 months to a maximum of 134 months in the North Carolina Department of Correction. Clearly, the latter sentence imposed by the trial court "is more severe than the prior sentence" imposed for the same offense. N.C. Gen. Stat. § 15A-1335. Therefore, we remand the judgment to the trial court for resentencing.

While we remand this matter for resentencing, we note that the trial court must only impose a new sentence for 50087. Defendant acknowledges in his brief to this Court that he only is appealing the judgment imposed in 50087. Defendant, however, argues that this judgment affects the latter judgment imposed pursuant to defendant's second guilty plea, and that if we remand 50087 for resentencing, the trial court will have to determine how to resentence defendant in the three other cases for which defendant entered a guilty plea. We disagree.

Defendant refers to the following assignment of error as the basis for his argument on appeal:

> The [t]rial [c]ourt (the Hon. Osmond W. Smith, III) committed reversible error by imposing a sentence in 04 CRS 50087 in excess of the sentence which was originally imposed upon [d]efendant's guilty plea (by the Hon. Robert H. Hobgood) and which was set aside on [d]efendant's motion to vacate the judgment resulting from that plea, in violation of the statutory mandate set forth in N.C.G.S. [§] 15A-1335.

This assignment of error makes no reference to the trial court's judgment imposed pursuant to defendant's second guilty plea. "Our scope of appellate review is limited to those issues set out in the record on appeal." *State v. Hamilton*, 351 N.C. 14, 22, 519 S.E.2d 514, 519 (1999), *cert. denied*, 529 U.S. 1102, 146 L. Ed. 2d 783 (2000). Thus, since defendant failed to assign error to the sentence imposed in 55284, he has failed to properly preserve this issue for appellate review and therefore our holding pertains only to the judgment in 50087.

Accordingly, we remand 50087 to the trial court for resentencing.

Remanded for resentencing.

Judge STROUD concurs.

Chief Judge MARTIN concurs in the result.

Report per Rule 30(e).