

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA07-144

NORTH CAROLINA COURT OF APPEALS

Filed: 4 September 2007

STATE OF NORTH CAROLINA

v.

Yancey County
No. 06 CRS 50642

BILLY WILSON

Appeal by defendant from judgment entered 23 October 2006 by Judge James U. Dooms in Yancey County Superior Court. Heard in the Court of Appeals 20 August 2007.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Derrick C. Mertz, for the State.
Geoffrey W. Heston, for defendant-appellant.

JACKSON, Judge.

On 23 October 2006, Billy Wilson ("defendant") pled guilty to assault inflicting serious bodily injury. In exchange for his plea, the State agreed to dismiss a charge of assault with a deadly weapon inflicting serious injury. Defendant further stipulated to having six prior record level points and being a Level III offender. The plea agreement also included the following:

The State seeks and does not oppose and the Defendant consents to a sentence of a minimum of 21 months, maximum of 26 months, suspended and an intermediate sentence upon such terms and conditions as the court deems just and proper but specifically including a task assessment and completion of the DART Cherry

program.

The State and the Defendant further stipulate, understand and agree that the preceding language is not to be construed as an arrangement concerning sentencing and that this plea is entered pursuant to the provisions of N.C.G.S. 15A-1023(c) and sentencing shall be in the sound discretion of the court.

At the plea hearing, the trial court sentenced defendant to an active term of imprisonment, rather than suspend the sentence as proposed in the plea agreement. Defendant filed timely notice of appeal.

Defendant contends that when the trial court declined to sentence him in accordance with the plea agreement, it should have provided him with the opportunity to withdraw his guilty plea. See N.C. Gen. Stat. § 15A-1024 (2005). Defendant further argues that the trial court, upon deciding not to accept the plea agreement, should have continued the matter until the next session of court. See *id.* We disagree.

Preliminarily, we note that "a challenge to the procedures followed in accepting a guilty plea does not fall within the scope of N.C. Gen. Stat. § 15A-1444 (2003), specifying the grounds giving rise to an appeal as of right." *State v. Carriker*, __ N.C. App. __, __, 637 S.E.2d 557, 558 (2006) (quoting *State v. Rhodes*, 163 N.C. App. 191, 193, 592 S.E.2d 731, 732 (2004)). However, this Court has held that "it is permissible for this Court to review pursuant to a petition for writ of certiorari during the appeal period a claim that the procedural requirements of Article 58 were violated." *Rhodes*, 163 N.C. App. at 194, 592 S.E.2d at 733.

Accordingly, in our discretion, we deny the State's motion to dismiss and allow defendant's petition for writ of certiorari.

On appeal, defendant claims that the trial court erred in not following the procedural safeguards established by North Carolina General Statutes, section 15A-1024. We disagree.

Section 15A-1024 provides that

[i]f at the time of sentencing, the judge for any reason determines to impose a sentence other than provided for in a plea arrangement between the parties, the judge must inform the defendant of that fact and inform the defendant that he may withdraw his plea. Upon withdrawal, the defendant is entitled to a continuance until the next session of court.

N.C. Gen. Stat. § 15A-1024 (2005). As our Supreme Court has explained,

[t]he [] unambiguous language of 15A-1024 discloses that this statute applies in cases in which the trial judge does not reject a plea arrangement when it is presented to him but hears the evidence and at the time for sentencing determines that a sentence different from that provided for in the plea arrangement must be imposed. *Under the express provisions of this statute a defendant is entitled to withdraw his plea and as a matter of right have his case continued until the next term.*

State v. Williams, 291 N.C. 442, 446-47, 230 S.E.2d 515, 517-18 (1976) (emphasis in original).

We conclude, however, that the provisions of section 15A-1024 do not apply in the instant case because the trial court did not reject the plea agreement. The plea agreement plainly and unambiguously stated that there was no arrangement concerning sentencing and that sentencing was left to the discretion of the

trial court. At the plea hearing, the district attorney reiterated the State's position that it did not "oppose" a suspended sentence, but "in the end sentencing is in Your Honor's discretion."

The trial court informed defendant of every right listed in North Carolina General Statutes, section 15A-1022 as well as the maximum possible sentence. The Court also questioned defendant regarding his understanding of the charges and his satisfaction with his counsel before accepting the plea. The trial court then explained to defendant that sentencing would be in the court's discretion, and defendant indicated that he understood and agreed to these terms. North Carolina law is well-settled that where there is ample evidence to support a finding that the guilty plea was fully, knowingly, and voluntarily entered, the acceptance of the plea will not be disturbed on appeal. See *State v. Jackson*, 279 N.C. 503, 504, 183 S.E.2d 550, 551 (1971). Accordingly, we overrule defendant's argument.

Defendant has failed to argue assignment of error number 1 in the record on appeal, and therefore, it is deemed abandoned. See N.C. R. App. P. 28(b)(6) (2006).

No Error.

Chief Judge MARTIN and Judge CALABRIA concur.

Report per Rule 30(e).