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NO. COA07-506

NORTH CAROLINA COURT OF APPEALS

Filed: 20 November 2007

STATE OF NORTH CAROLINA

v.

Forsyth County  
No. 04 CRS 060931

JANIE LATONYA PERKINS

Appeal by defendant from judgment entered 25 January 2007 by Judge Ronald F. Solvey in Forsyth County Superior Court. Heard in the Court of Appeals 16 November 2007.

*Attorney General Roy Cooper, by Associate Attorney General Catherine F. Jordan, for the State.*

*McAfee Law, P.A., by Robert J. McAfee, for defendant-appellant.*

TYSON, Judge.

Janie LaTonya Perkins ("defendant") appeals from judgment entered after the trial court resentenced her for convictions after a jury found her to be guilty of larceny after breaking and entering pursuant to N.C. Gen. Stat. § 14-72(B)(2) and breaking or entering pursuant to N.C. Gen. Stat. § 14-54(B). We find no error.

#### I. Background

This is defendant's second appeal to this Court. See *State v. Perkins*, \_\_\_ N.C. App. \_\_\_, 638 S.E.2d 591 (2007).

In 2005, defendant was tried on charges of obtaining property by false pretenses, felonious breaking or entering, felonious

larceny, and having the status of being an habitual felon. A jury returned verdicts finding defendant to be guilty of misdemeanor breaking or entering, felony larceny, and obtaining property by false pretenses. After reviewing the verdicts, the trial court stated the verdicts for misdemeanor breaking or entering and felony larceny were "legally inconsistent" and directed the jury to resume deliberations on the charges of misdemeanor breaking or entering and felony larceny. *Id.* at \_\_\_\_, 638 S.E.2d at 595.

The jury returned a new verdict finding defendant to be guilty of felony breaking or entering and felony larceny. The jury also found defendant had attained habitual felon status. The trial court sentenced defendant to 110 to 141 months imprisonment for felony breaking or entering, felony larceny, and habitual felon status. The trial court also sentenced defendant to a consecutive term of 110 to 141 months imprisonment for obtaining property by false pretenses and habitual felon status.

Upon appeal, this Court held the "initial verdict[s] of misdemeanor breaking or entering and felony larceny were not necessarily legally inconsistent[.]" *Id.* at \_\_\_\_, 638 S.E.2d at 594. This Court "vacate[d] defendant's conviction of felony breaking or entering, and remand[ed] for entry of judgment upon the original verdict of misdemeanor breaking or entering and for resentencing." *Id.* at \_\_\_\_, 638 S.E.2d at 599.

The trial court conducted defendant's resentencing hearing on 25 January 2007. The trial court entered judgment against defendant for felony larceny and misdemeanor breaking or entering,

and resentenced defendant within the presumptive range of a Class C felony for an active prison term of a minimum of ninety-three months to a maximum of 121 months. The trial court ordered the sentence imposed upon resentencing to run consecutive to defendant's existing sentence of 110 to 141 months imprisonment for the convictions of obtaining property by false pretenses and attaining habitual felon status . Defendant appeals.

### II. Issue

Defendant argues the trial court erred in resentencing her more severely than the prior sentence in violation of N.C. Gen. State. § 15A-1335.

### III. Resentencing

In defendant's sole assignment of error, she contends the sentence imposed upon resentencing violated N.C. Gen. Stat. § 15A-1335. We disagree.

N.C. Gen. Stat. § 15A-1335 (2005) 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.

Although defendant concedes in her brief that she was not sentenced more severely on remand, she asserts her sentence imposed upon resentencing was "more severe than the prior sentence, less the portion of the prior sentence previously served."

Defendant also acknowledges adverse authority to her argument from this Court in *State v. Dorton*, \_\_\_ N.C. App. \_\_\_, 641 S.E.2d

357 (2007). In *Dorton*, this Court stated “[the] [d]efendant was originally sentenced to 92 to 120 months imprisonment. On resentencing, defendant was ultimately resentenced for the same conviction to 91 to 119 months imprisonment with credit given for the time defendant had already served. Defendant was not, therefore, sentenced more severely at resentencing.” \_\_\_ N.C. App. \_\_\_, 641 S.E.2d 357, 362-63.

Here, defendant was originally sentenced to 110 to 141 months for felony larceny and breaking and/or entering while being an habitual felon. Habitual felon status is a Class C felony. N.C. Gen. Stat. § 14-7.6 (2005). Upon remand, the trial court was limited by the statutory sentencing guidelines set out in N.C. Gen. Stat. § 15A-1340.17(c) and was required by the Structured Sentencing Act to enter judgment on a sentence for the most serious offense in a consolidated judgment. *State v. Tucker*, 357 N.C. 633, 637, 588 S.E.2d 853, 855 (2003).

The trial court was required to sentence defendant as a Class C felon at her prior record level and had no discretion to impose a lesser sentence. *Id.*; N.C. Gen. Stat. § 15A-1340.15(b). The trial court resentenced defendant to ninety-three to 121 months imprisonment, which is at the lowest end of the presumptive range in The Structured Sentencing Act for a Class C felony at defendant’s prior record level. N.C. Gen. Stat. § 15A-1340.17(c). The trial court also gave defendant credit for the time she had served. Like the defendant in *Dorton*, defendant here was not sentenced more severely on remand.

Nevertheless, defendant asserts the trial court was required to sentence her to a minimum of fifty-five to a maximum of seventy and one-half months, half of the original sentence imposed and relies on *State v. Hemby*, 333 N.C. 331, 426 S.E.2d 77 (1993). Defendant's reliance is misplaced. In *Hemby*, our Supreme Court applied The Fair Sentencing Act and held that the defendant's eight-year sentence was "more severe" than the prior eight-year sentence because the number of convictions for which the defendant was resentenced had been reduced. 333 N.C. at 336-37, 426 S.E.2d at 80.

Here, only the class and not the quantity of the convictions changed. The number of defendant's convictions was not reduced and the trial court was required to sentence her as a Class C habitual felon for the most serious offense in a consolidated judgment. This assignment of error is overruled.

#### IV. Conclusion

The trial court properly resentenced defendant on remand. We find no error in the trial court's judgment.

No Error.

Judges GEER and STEPHENS concur.

Report per Rule 30(e).