

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA08-350

NORTH CAROLINA COURT OF APPEALS

Filed: 16 December 2008

STATE OF NORTH CAROLINA

v. Robeson County  
Nos. 05 CRS 50311  
KENT HAMMONDS, 05 CRS 50312  
Defendant. 05 CRS 50313

Appeal by defendant from judgments entered 30 October 2007 by  
**Court of Appeals**  
Judge Robert F. Floyd, Jr. in Robeson County Superior Court. Heard  
in the Court of Appeals 17 November 2008.

*Attorney General Roy Cooper, by Assistant Attorney General  
Catherine E. Jordan, for the State.*  
**Slip Opinion**  
*Richard Croutharmel for defendant-appellant.*

GEER, Judge.

Defendant Kent Hammonds appeals from the judgments entered on his pleas of guilty to larceny after breaking and entering, breaking or entering a motor vehicle, and breaking and/or entering. Defendant contends that the trial court erred in accepting his guilty plea to the larceny charge because the State did not present a factual basis for the allegation that the larceny occurred after a breaking and entering. The State has moved to dismiss the appeal, and we agree that defendant is not entitled to an appeal as a matter of right on this issue. We, therefore, grant the State's motion. Defendant has, however, filed a petition for writ of

certiorari. Pursuant to *State v. Bolinger*, 320 N.C. 596, 601-02, 359 S.E.2d 459, 462 (1987), we exercise our discretion to allow that petition. We conclude, however, that the trial court did not err in accepting defendant's guilty plea.

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On 9 May 2005, the Robeson County Grand Jury returned indictments charging defendant with first degree burglary, larceny after breaking and entering, breaking or entering a motor vehicle, misdemeanor larceny, breaking and/or entering, and felony larceny. The State subsequently also obtained habitual felon indictments.

On 30 October 2007, defendant agreed to plead guilty to the charges of breaking or entering a motor vehicle, larceny after breaking and entering, breaking or entering, and felony larceny. In return, the State agreed to dismiss the three charges of attaining the status of habitual felon and the charges of first degree burglary and misdemeanor larceny. Pursuant to the plea agreement, defendant was to be sentenced to one active sentence of nine to 11 months imprisonment followed by three consecutive sentences of 20 to 24 months imprisonment. The trial court sentenced defendant in accordance with the plea agreement.

Defendant's sole argument on appeal is that the trial court erred in accepting his guilty plea as to the charge of larceny after a breaking and entering because the State's factual basis did not include that the larceny was pursuant to a breaking or entering. A criminal defendant alleging that his guilty plea is not supported by an adequate factual basis does not have an appeal

of right to this Court. See *id.* at 601, 359 S.E.2d at 462 (holding that "defendant is not entitled as a matter of right to appellate review of his contention that the trial court improperly accepted his guilty plea"); N.C. Gen. Stat. §§ 15A-979(b), -1444(a1), (a2), (e) (2007) (outlining specific instances in which a defendant has an appeal of right after entering a guilty plea). The State's motion to dismiss this appeal for lack of jurisdiction is, therefore, well-taken. Accordingly, we allow that motion.

In *Bolinger*, however, the Supreme Court further held that when a defendant contends that a trial court improperly accepted his guilty plea, he "may obtain appellate review of this issue only upon grant of a writ of certiorari." 320 N.C. at 601, 359 S.E.2d at 462. Although the defendant in *Bolinger* had not petitioned for writ of certiorari, the Supreme Court nonetheless "[chose] to review the merits of defendant's contention." *Id.* at 602, 359 S.E.2d at 462.

As this Court recognized in *State v. Rhodes*, 163 N.C. App. 191, 193-94, 592 S.E.2d 731, 732-33 (2004), this Court's opinions in *State v. Dickson*, 151 N.C. App. 136, 137-38, 564 S.E.2d 640, 640-41 (2002), and *State v. Pimental*, 153 N.C. App. 69, 76-77, 568 S.E.2d 867, 872, *disc. review denied*, 356 N.C. 442, 573 S.E.2d 163 (2002), cannot overrule *Bolinger*. Only the Supreme Court can revisit that holding. See *Rhodes*, 163 N.C. App. at 194, 592 S.E.2d at 733 ("[U]nder *Bolinger* and consistent with N.C. Gen. Stat. § 15A-1027, 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."). Based on *Bolinger* and *Rhodes*, we choose to exercise our discretion to allow defendant's petition for writ of certiorari and review the merits of his contentions. See also *State v. Agnew*, 361 N.C. 333, 643 S.E.2d 581 (2007) (reviewing, pursuant to petition for discretionary review, Court of Appeals' decision on direct review regarding whether trial court erred in accepting guilty plea without sufficient factual basis).

On the merits, the State contends that defendant failed to preserve this issue because he did not raise the issue of the sufficiency of the factual basis before the trial court. Rule 10(b)(1) of the North Carolina Rules of Appellate Procedure provides: "In order to preserve a question for appellate review, a party must have presented to the trial court a timely request, objection or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context."

This Court has previously declined, based on Rule 10(b)(1), to address the issue of the sufficiency of the factual basis for a guilty plea. See *State v. Canady*, 153 N.C. App. 455, 458, 570 S.E.2d 262, 265 (2002) ("In the case before us, after the State presented the factual basis for the plea, defendant stipulated that there was a factual basis for the entry of the plea. After acceptance of the plea by the trial court, defendant neither objected to the trial court's finding that there was a sufficient factual basis for the plea, nor did defendant object to the

acceptance of his plea by the trial court. The record does not show that defendant ever moved to withdraw his plea. Thus, . . . defendant's first through fourth assignments of error are not properly before this Court."); *State v. Kimble*, 141 N.C. App. 144, 147, 539 S.E.2d 342, 344-45 (2000) (holding that issue of sufficiency of factual basis for guilty plea "which was not raised before the trial court, is therefore not properly before this Court"), *disc. review denied*, 353 N.C. 391, 548 S.E.2d 150 (2001).

Defendant, however, points to *Agnew*, 361 N.C. at 334-35, 643 S.E.2d at 582, in which the Supreme Court considered the issue of the sufficiency of the factual basis for a guilty plea even though the defendant had stipulated to a factual basis before the trial court. The defendant in *Agnew* had, however, moved in the trial court to withdraw his guilty plea in part based on the insufficiency of the evidence to support the plea. *Id.*

Assuming *arguendo* that *Agnew* permits us to address the merits of his contention, we nonetheless find that the circumstances in this case are distinguishable from those in *Agnew* and that the trial court did not err in accepting defendant's guilty plea. In *Agnew*, the Supreme Court held that "guilty pleas must be substantiated in fact as prescribed by [N.C. Gen. Stat. § 15A-1022(c) (2005)]." *Id.* at 335, 643 S.E.2d at 583. The "five sources [of information regarding the factual basis for the plea] listed in the statute are not exclusive," and a trial court may consider any information properly brought to its attention. *Id.* at 336, 643 S.E.2d at 583. The Court found the information in *Agnew*

insufficient to establish a factual basis when the State made no presentation of the factual basis prior to the trial court's accepting the plea, and the trial court had before it only (1) an indictment that "simply stated the charge and did not provide any further factual description of defendant's particular alleged conduct," (2) the defendant's stipulation that there was a factual basis, and (3) the defendant's transcript of plea. *Id.* at 337, 643 S.E.2d at 584. The Court held that "the transcript, defense counsel's stipulation, and the indictment taken together did not contain enough information for an independent judicial determination of defendant's actual guilt in the instant case." *Id.*

In this case, the indictment did not merely state the charge, but rather specifically alleged that defendant broke and entered Gertrude Locklear's house located at 5339 Prospect Road, Maxton, North Carolina, with the intent to commit larceny and that defendant in fact committed the intended larceny by stealing Ms. Locklear's purse. The State gave a factual basis prior to the trial court's acceptance of the plea and with respect to the charge of larceny after breaking and entering stated specifically: "[O]n the 13th of January, 2005, the defendant did unlawfully steal, take and carry away a lady's purse containing 300 dollars, driver's license, insurance card, several other personal property items belonging to Gertrude Locklear having a value of 400 dollars." Defendant's counsel then expressly stipulated that there was a factual basis for each of the charges. Since the indictment

contained a sufficiently specific description of defendant's alleged behavior, and defendant stipulated that there was a factual basis for the guilty plea to the charge in the indictment, the trial court had sufficient information upon which to make the determination that there was a factual basis for defendant's guilty plea. We, therefore, conclude that the trial court did not err in accepting defendant's guilty plea.

Affirmed.

Judges WYNN and ELMORE concur.

Report per Rule 30(e).