An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA08-425

NORTH CAROLINA COURT OF APPEALS

Filed: 21 October 2008

STATE OF NORTH CAROLINA

v. Pitt County
No. 03 CRS 8431

BILLY EDWARDS GRIMES

On writ of *certiorari* to review the order entered 23 October 2008 by Judge W. Russell Duke, Jr. in Pitt County Superior Court. Heard in the Court of Appeals 24 September 2008.

Court of Appeals

Attorney General Roy A. Cooper, III, by Assistant Attorney General Elizabeth F. Parsons, for the State.

Slip Opinion

North Carolina Prisoner Legal Services, Inc., by Hoang V. Lam, for defendant-appellant.

JACKSON, Judge.

Billy Edwards Grimes ("defendant") appeals the manner in which his conviction for felony breaking and entering and status as an habitual felon is recorded with the Department of Correction ("DOC"). For the reasons stated below, we affirm.

On 8 March 2004, defendant pled guilty to one count of felony breaking and entering of a motor vehicle, one count of felony breaking and entering, and two counts of habitual felon. Pursuant to the agreement, defendant's charges were to be consolidated; he was to be sentenced at the minimum of the mitigated range; and all

other pending charges were to be dropped. Defendant was serving an active sentence on another charge at the time he pled guilty.

After addressing defendant regarding his plea, the trial court ordered: 1) the sentence be imposed pursuant to a plea bargain, 2) defendant be sentenced to a term of imprisonment of 101 to 131 months in the custody of DOC, 3) the sentence begin that day, 4) defendant pay costs and attorney's fees, 5) defendant be afforded substance abuse treatment, and 6) he be afforded work release, when eligible.

Defendant's sentence was recorded on the judgment and commitment form as: 1) imposed pursuant to a plea agreement as to sentence and 2) for a minimum term of 101 months and a maximum term of 131 months. The court recommended: 1) sentence to begin that day, 2) payment of costs and attorney's fees from work release earnings or as a condition of post release supervision, 3) substance abuse treatment, and 4) work release when eligible.

DOC recorded defendant's sentence as beginning on 21 August 2012, when an unrelated sentence was projected to end. On or about 29 November 2004, defendant filed a "Motion for Express Judgment" asking the trial court to order his sentence begin as of the date of conviction. The motion was served on the prosecutor in the case, but not on DOC or the Attorney General's office. By order filed 18 February 2005, the trial court directed that defendant's sentence begin on 8 March 2004.

On 14 April 2005, DOC filed a motion to stay the 18 February order, as a similar case was then pending before the North Carolina

Supreme Court. The trial court granted a stay on 27 April 2005. Subsequently, defendant filed a motion to reconsider, and DOC responded.

On 23 October 2007, the trial court entered an order pursuant to its own motion for reconsideration, in light of the North Carolina Supreme Court's decision in *State v. Ellis*, 361 N.C. 200, 639 S.E.2d 425 (2007) – the case pursuant to which the stay had been granted. The order lifted the stay and vacated the 18 February 2005 order. Defendant filed a petition for writ of *certiorari* with this Court on 28 January 2008, which was allowed by order filed 8 February 2008.

Defendant first argues that the trial court's finding of fact that the judgment did not state whether the sentence was to be concurrent or consecutive is not supported by competent evidence. We disagree.

The 23 October 2007 order reconsidered the trial court's prior decision regarding defendant's "Motion for Express Judgment" which may best be characterized as a motion for appropriate relief. As such, the trial court's findings of fact "are binding if they are supported by competent evidence and may be disturbed only upon a showing of manifest abuse of discretion." *State v. Wilkins*, 131 N.C. App. 220, 223, 506 S.E.2d 274, 276 (1998) (citing *State v. Pait*, 81 N.C. App. 286, 288-89, 343 S.E.2d 573, 575 (1986)). "Those findings, so supported, are binding on this Court, even though there is evidence to the contrary." *State v. Moore*, 316 N.C. 328, 333, 341 S.E.2d 733, 737 (1986) (citing *State v. Davis*,

290 N.C. 511, 541, 227 S.E.2d 97, 115 (1976)). "However, the trial court's conclusions are fully reviewable on appeal." *Wilkins*, at 223, 506 S.E.2d at 276 (citation omitted).

Finding of fact number 3 states:

> The 8 March 2004 consolidated judgment in this case imposes a sentence of 101 to 131 months. Although Defendant was already serving other sentences, the judgment does not state whether the sentence imposed should be consecutive or concurrent. The judgment states as a recommendation on page two, "Sentence began today."

This finding of fact is supported by the judgment and commitment form which does not disclose definitively whether the sentence was to be served at the expiration of his other sentences – as proscribed by statute – or concurrent with defendant's other sentences. Although there is evidence that the trial court declared in open court that "the [c]ourt orders that the sentence begin today[,]" the trial court also "ordered" substance abuse treatment and work release, which similarly were noted on the judgment and commitment form as mere "recommendations." This finding of fact is supported by competent evidence and we can discern no abuse of discretion.

Defendant argues that as in *State v. Miller*, 183 N.C. App. 158, 643 S.E.2d 677, 2007 N.C. App. LEXIS 870 (2007), an unpublished opinion, the trial court's pronouncement in open court that the sentence was to "begin today" was recorded on the second page of the judgment and commitment form as a recommendation. He contends that, as in *Miller*, in light of the pronouncement, the judgment unambiguously imposed a concurrent sentence. However, the

case is distinguishable and it is well-established that unpublished opinions are not binding upon this Court. *See United Services Automobile Assn v. Simpson*, 126 N.C. App. 393, 396, 485 S.E.2d 337, 339, *disc. rev. denied*, 347 N.C. 141, 492 S.E.2d 37 (1997).

Defendant next argues that the trial court erred in concluding that it lacked the authority to order DOC to record his sentence as concurrent. We disagree.

Defendant contends that pursuant to *Hamilton v. Freeman*, 147 N.C. App. 195, 554 S.E.2d 856 (2001), *appeal dismissed, disc. rev. denied*, 355 N.C. 285, 560 S.E.2d 803 (2002), DOC is to record a sentence as concurrent if the judgment so indicates, even if the state law requires consecutive sentencing. *Id.* at 199-200, 204, 554 S.E.2d at 858-59, 861. However, the order upheld in *Hamilton* further required DOC to notify the sentencing judge, among others, "that because the sentence and judgment do not accord with state law, the judgment must be vacated.". *Id.* at 200, 554 S.E.2d at 859. Further, *Hamilton* concerned sentences in which the judgment and commitment form clearly indicated that the sentence was to run concurrently. *Id.* at 198, 554 S.E.2d at 858. As the trial court here found, defendant's judgment and commitment form was not clear. Absent a clear directive, the trial court could not order DOC to record defendant's sentence as beginning the day of conviction.

Pursuant to *State v. Wall*, 348 N.C. 671, 502 S.E.2d 585 (1998), a defendant who negotiates a plea agreement which includes an agreement that the sentence will run concurrent to any other sentence he is actively serving, though such concurrent sentence

would violate state law, is entitled to receive the benefit of his bargain; however, he is not entitled to specific performance. He may withdraw his plea and either proceed to trial or attempt to negotiate a new plea agreement that is in conformity with state law. *Id.* at 676, 502 S.E.2d at 588.

Although defendant's plea included an agreement as to sentence, he did not bargain for the sentence to run concurrently with the sentence he was actively serving at the time. He bargained for it to be at the low end of the mitigated range. Even if defendant had negotiated for his sentence to run concurrently, pursuant to *Wall*, such an "illegal" plea is not enforceable via specific performance.

The Supreme Court, in *Ellis*, reiterated that when a defendant bargains for a concurrent sentence when such sentence violates state law,, he "is entitled to his choice of two remedies: (1) '[h]e may withdraw his guilty plea and proceed to trial on the criminal charges'; or (2) '[h]e may also withdraw his plea and attempt to negotiate another plea agreement that does not violate'" state law. *Ellis*, 361 N.C. at 206, 639 S.E.2d at 429 (quoting *Wall*, 348 N.C. at 676, 502 S.E.2d at 588). However, as stated previously, defendant in this case did not bargain for a concurrent sentence.

Because there is competent evidence to support the trial court's finding of fact that defendant's judgment does not state whether the sentence imposed should be consecutive or concurrent, and the ambiguity prevented the trial court from ordering the

relief sought, defendant's arguments are without merit. Therefore, the trial court's order is affirmed.

Affirmed.

Judges STEELMAN and STROUD concur.

Report per Rule 30 (e).