

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA08-817

NORTH CAROLINA COURT OF APPEALS

Filed: 17 February 2009

STATE OF NORTH CAROLINA

v.

Cleveland County
Nos. 06 CRS 53923-24, 4758

CLYDE EDWARD SPENCER

Appeal by Defendant from judgment entered 25 February 2008 by Judge Jesse B. Caldwell in Superior Court, Cleveland County. Heard in the Court of Appeals 4 February 2009.

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

Richard E. Jester for Defendant-Appellant.

Slip Opinion

McGEE, Judge.

Clyde Edward Spencer (Defendant) appeals from judgments and commitments entered upon resentencing. After careful review, we reverse and remand.

Defendant was convicted on 16 November 2006 of: (1) breaking and entering, larceny after breaking and entering, and felonious possession of stolen property in file 06-CRS-53923; and (2) felony larceny and felonious possession of stolen property in file 06-CRS-53924. Defendant also pled guilty to attaining habitual felon status. The trial court consolidated all counts on each individual indictment and entered one judgment on each indictment.

In file 06-CRS-53923, Defendant was sentenced to a term of 133 to 169 months in prison. In file 06-CRS-53924, Defendant was sentenced to a consecutive term of 107 to 138 months in prison. Defendant appealed.

On appeal, our Court concluded that the trial court erred by entering judgment for both larceny and felony possession of the same stolen property in violation of *State v. Andrews*, 306 N.C. 144, 148, 291 S.E.2d 581, 584, *cert. denied*, 459 U.S. 946, 74 L. Ed. 2d 205 (1982) and *State v. Perry*, 305 N.C. 225, 235, 287 S.E.2d 810, 816 (1982). The Court further concluded that a finding that Defendant was a violent habitual felon was a clerical error in the judgments. Accordingly, this Court arrested judgment and vacated Defendant's convictions and sentences for felony possession of stolen property in 06-CRS-53923 and 06-CRS-53924 and remanded for resentencing. The Court further ordered that upon remand the trial court correct the clerical error regarding Defendant's habitual felon status. See *State v. Spencer*, __ N.C. App. __, ___, 654 S.E.2d 69, 74 (2007).

Upon remand, the trial court held a hearing on 25 February 2008. In accordance with this Court's instructions, the trial court corrected the clerical error in the judgments as to Defendant's habitual felon status. However, the trial court entered judgments which still included the possession of stolen property charges. The trial court sentenced Defendant to the same consecutive terms of 133 months to 169 months and 107 months to 138 months in prison that Defendant had received previously. Along

with entry of the amended judgments, the trial court entered the following order intended to explain its actions:

These matters came on for [resentencing] at the order of the North Carolina Court of Appeals, which vacated . . . [D]efendant's two convictions for possession of stolen property in these matters and for the purpose of correcting a clerical error in the original judgment and commitments which contain the finding that . . . [D]efendant was a violent habitual felon.

The Court finds as fact and concludes as a matter of law that this finding in these judgments was through inadvertence and was a clerical error, and had no basis in law or fact.

Wherefore, the [c]ourt this date enters an [amended] judgment and commitment in these cases striking and deleting the findings of violent habitual felon, and re-entering judgment as a habitual felon.

Defendant appeals.

Defendant argues on appeal that while the trial court corrected the clerical errors, it failed to hold a resentencing hearing and continued to erroneously include the possession of stolen property charges in the judgments. Defendant asserts that the trial court should have reconsidered his sentence in light of the possession of stolen property charges being stricken. We agree.

Upon Defendant's prior appeal, this Court remanded for resentencing. A resentencing hearing is a *de novo* proceeding. *State v. Vandiver*, 326 N.C. 348, 355, 389 S.E.2d 30, 35 (1990) (citing *State v. Jones*, 314 N.C. 644, 336 S.E.2d 385 (1985)); see also *State v. Swimm*, 316 N.C. 24, 31, 340 S.E.2d 65, 70 (1986). In

the present case, rather than hold a new sentencing hearing, the trial court corrected only the clerical error and entered an amended judgment. Additionally, the trial court improperly included in its judgment the possession of stolen property charges, which had been arrested. Therefore, this matter must be reversed and remanded for a new sentencing hearing. Upon remand, a *de novo* sentencing hearing is required, and the possession of stolen property charges shall not be included in the judgments.

Reversed and remanded.

Judges HUNTER and JACKSON concur.

Report per Rule 30(e).