

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA09-419

NORTH CAROLINA COURT OF APPEALS

Filed: 8 December 2009

STATE OF NORTH CAROLINA

v.

JEREMY CARL BISHOP

Sampson County  
Nos. 06 CRS 51634, 51636  
06 CRS 51643

Appeal by defendant from judgment entered 5 December 2008 by Judge James Hardin in Sampson County Superior Court. Heard in the Court of Appeals 30 November 2009.

*Attorney General Roy Cooper, by Assistant Attorney General Kathleen N. Bolton, for the State.*

*Geoffrey W. Hosford, for defendant-appellant.*

CALABRIA, Judge.

Defendant Jeremy Carl Bishop appeals from judgment entered upon resentencing. For the following reasons we find no error.

Following a jury trial, defendant was convicted of: felonious entering, felonious larceny, and felonious possession of stolen property in both file 06 CRS 51636 and file 06 CRS 51643. Defendant subsequently pled guilty to attaining habitual felon status. Defendant also pled guilty to misdemeanor larceny in file 06 CRS 51634. The State and defendant entered into a plea agreement which provided, "Sentencing will be for 1 habitual felon count at [] the 2 counts will be consolidated. Sentencing will

come from the bottom half of the presumptive range for the appropriate level. Misdemeanor count will run concurrent." Pursuant to the plea agreement, the trial court sentenced defendant to a term of 107 to 138 months imprisonment, which is within the presumptive range for a defendant with a prior record IV convicted of a Class C felony.

On appeal, this Court concluded that the trial court erred by entering judgment for both larceny and felony possession of the same stolen goods in violation of *State v. Perry*, 305 N.C. 225, 235, 287 S.E.2d 810, 816 (1982). Accordingly, this Court arrested judgment on defendant's convictions for felony possession of stolen goods in 06 CRS 51636 and 06 CRS 51643 and remanded for resentencing.

Upon remand, the trial court held a hearing on 1 December 2008. After the State asked for entry of a new judgment, defendant's attorney asked the court to consider as a mitigating factor that "Defendant has a support system in the community." The State asked the court to deny the request and informed the court that when defendant pled guilty to attaining habitual felon status, "there was some agreement that he would be sentenced in the bottom half of the presumptive range and was, in fact, sentenced at the very bottom of the presumptive range." The trial court then stated:

The Court has reviewed the Defendant's prior record level worksheet, finds nine prior record level points. The Defendant qualifies as a level four violator for felony sentencing purposes.

And, so that the record is clear, the Court is sentencing the Defendant for two counts of felony larceny and one status as habitual felon. These are consolidated for judgement [sic] pursuant to the plea arrangement that the Defendant reached with the State of North Carolina.

. . .

The Court is choosing not to make written findings of fact because the sentence I'm going to impose [will] be [in] the presumptive range of sentences authorized by North Carolina law. Further, the court imposes a prison term that's pursuant to a plea arrangement between this Defendant and the State of North Carolina.

The Court, having considered the evidence and the arguments of counsel, imposes the following. The Defendant will be sentenced to serve a minimum of 107 months and a maximum of 138 months in the North Carolina Department of Corrections.

By judgment entered 5 December 2008, the trial court sentenced defendant to the same term of 107 months to 138 months in prison that defendant had received previously.

In his sole assignment of error, defendant contends he was denied a *de novo* resentencing hearing in violation of his due process rights. Defendant asserts "the resentencing court merely adopted the findings of the initial sentencing judge without exercising independent decision-making and imposed the exact same sentence of 107 to 138 months imprisonment." We disagree.

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)). "[O]n resentencing, the trial court must make a new and fresh determination of the

sufficiency of the evidence underlying each factor in aggravation and mitigation, including those factors previously found and affirmed by the appellate court." *State v. Daye*, 78 N.C. App. 753, 755, 338 S.E.2d 557, 559 (1986).

Here, the trial judge at the resentencing hearing heard arguments from defense counsel and the State regarding the mitigating factor, and reviewed defendant's prior record level worksheet and plea agreement. Contrary to defendant's assertion, the trial judge considered the mitigating factor. The trial judge expressly stated that he was "choosing" not to make written findings of fact because he was imposing a presumptive range sentence, and he was imposing a prison term pursuant to the plea agreement. In accordance with this Court's instructions, the trial court held a resentencing hearing and entered a judgment which did not include the possession of stolen property charge.

We conclude the trial court properly conducted a *de novo* proceeding and find no error in the sentencing hearing of 1 December 2008.

No error.

Judges WYNN and STROUD concur.

Report per Rule 30(e).