

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA12-311  
NORTH CAROLINA COURT OF APPEALS

Filed: 16 October 2012

STATE OF NORTH CAROLINA

v.

Mecklenburg County  
Nos. 10 CRS 254349  
11 CRS 9421

CORNELIUS SMITH

Appeal by Defendant from judgment entered 11 October 2011 by Judge F. Lane Williamson in Mecklenburg County Superior Court. Heard in the Court of Appeals 8 October 2012.

*Attorney General Roy Cooper, by Assistant Attorney General Larissa S. Williamson, for the State.*

*Bryan Gates for Defendant.*

STEPHENS, Judge.

Defendant Cornelius Smith appeals from judgment entered upon a jury verdict finding him guilty of one count of conspiracy to sell cocaine; in connection with that conviction, Smith stipulated to having attained habitual felon status, and the trial court sentenced him accordingly. Smith gave notice of appeal in open court.

Smith's sole issue on appeal is whether the trial court erred in failing to establish a sufficient record such that Smith's stipulation to attaining habitual felon status could be considered a guilty plea. Specifically, Smith contends that the trial court did not comply with the requirements of N.C. Gen. Stat. § 15A-1022. The State has filed a motion to dismiss Smith's appeal alleging that Smith has no right to appeal this issue under N.C. Gen. Stat. § 15A-1444. Smith has not responded to the State's motion. We agree with the State that Smith's appeal is subject to dismissal. As previously held by this Court, "[h]aving pleaded guilty to being an habitual felon, and not having moved in the trial court to withdraw [that] guilty plea, [a] defendant is not entitled to an appeal of right from the trial court's ruling." *State v. Young*, 120 N.C. App. 456, 459, 462 S.E.2d 683, 685 (1995); *see also* N.C. Gen. Stat. § 15A-1444(e) (2011) (Except under circumstances not present here, "[a] defendant is not entitled to appellate review as a matter of right when he has entered a plea of guilty or no contest to a criminal charge in the superior court."). Because Smith is not entitled to appellate review, we grant the State's motion to dismiss Smith's appeal.

Nevertheless, in his brief on appeal, Smith "requests that [this Court] treat [his] brief as a petition for [certiorari] and grant review of [his] conviction." As previously held by our Supreme Court, while a challenge to the procedures followed in accepting a guilty plea does not fall within the scope of N.C. Gen. Stat. § 15A-1444, a defendant may obtain appellate review of this issue upon grant of a writ of *certiorari*. *State v. Bolinger*, 320 N.C. 596, 601-02, 359 S.E.2d 459, 462 (1987); see also *State v. Carriker*, 180 N.C. App. 470, 471, 637 S.E.2d 557, 558 (2006) (holding that challenge to procedures in accepting guilty plea is reviewable by *certiorari*). Accordingly, we treat Smith's appellate brief and the record on appeal as a petition for writ of *certiorari*, which we allow to review the merits of Smith's appeal.

A superior court judge may not accept a plea of guilty or no contest from a defendant without first addressing the defendant personally and:

- (1) Informing him that he has a right to remain silent and that any statement he makes may be used against him;
- (2) Determining that he understands the nature of the charge;
- (3) Informing him that he has a right to plead not guilty;
- (4) Informing him that by his plea he waives his right to trial by jury

- and his right to be confronted by the witnesses against him;
- (5) Determining that the defendant, if represented by counsel, is satisfied with his representation;
  - (6) Informing him of the maximum possible sentence on the charge for the class of offense for which the defendant is being sentenced, including that possible from consecutive sentences, and of the mandatory minimum sentence, if any, on the charge . . . .

N.C. Gen. Stat. § 15A-1022(a) (2011). A defendant may enter a guilty plea to the charge of attaining the status of habitual felon. *State v. Gilmore*, 142 N.C. App. 465, 471, 542 S.E.2d 694, 699 (2001). However, a defendant's stipulation to habitual felon status without a proper inquiry by the trial court sufficient to support a guilty plea as required by the statute "is not tantamount to a guilty plea." *Id.* at 471-72, 542 S.E.2d at 699; *see also State v. Edwards*, 150 N.C. App. 544, 550, 563 S.E.2d 288, 291-92 (2002) (reversing the defendant's conviction for attaining the status of habitual felon where the defendant stipulated to attaining such status outside the presence of the jury, but the court failed to establish a proper record of a guilty plea).

Here, the trial court conducted the following inquiry into Smith's habitual felon status:

THE COURT: . . . . Now, as we discussed . . . [it] is my understanding that [ ] Smith will stipulate as to the findings for habitual felon status?

[Defense counsel]: Yes, your honor.

THE COURT: I just want to make sure that since he is stipulating to that. He needs to stand up. Mr. Smith, I just want to make sure that you do understand that in the absence of the stipulation you would have the right to have the jury determine the allegations in the indictment of habitual felon status, which would be simply whether in fact you had been convicted of those three prior convictions that are alleged in the indictment beyond a reasonable doubt. Do you understand that?

[Smith]: Yes, sir.

THE COURT: And it's still your intention or you're willing to stipulate that those may be established; is that correct?

[Smith]: Yes, sir.

THE COURT: All right. Thank you[,] Smith. All right. Well, what I would I think propose to do is to -- well, is to first to find that [Smith], having been unanimously convicted by the jury of the underlying felony of felony conspiracy to sell cocaine, that verdict is accepted. And then upon [Smith's] stipulation as to the establishment of the three prior convictions necessary for habitual felon status, will find and order -- enter a finding that he does qualify for habitual felon status.

We conclude that the trial court failed to conduct a proper inquiry as required under section 15A-1022. The trial court

failed to inform Smith of his right to remain silent, confirm that he understood the nature of the habitual felon charge, and determine if he was satisfied with his counsel. See N.C. Gen. Stat. § 15A-1022(a)(1),(2),(5). The trial court also did not inform Smith that he had a right to plead not guilty to the charge of attaining the status of habitual felon, and neglected to explain the maximum and minimum sentence for the underlying offense that would apply with Smith's conviction for attaining habitual felon status. N.C. Gen. Stat. § 15A-1022(3),(6). Accordingly, the trial court failed to establish a sufficient record to support a guilty plea to attaining habitual felon status, and Smith's stipulation thereto was insufficient. Smith's conviction for attaining the status of habitual felon is therefore vacated. Additionally, because Smith's conviction on this charge allowed the trial court to enhance his sentence for his underlying conviction, we reverse and remand for resentencing.

Appeal DISMISSED; petition for writ of *certiorari* GRANTED;  
REVERSED and REMANDED.

Chief Judge MARTIN and Judge ERVIN concur.

Report per Rule 30(e).