

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA12-312  
NORTH CAROLINA COURT OF APPEALS

Filed: 16 October 2012

STATE OF NORTH CAROLINA

v.

Moore County  
No. 09 CRS 54948

JAMES PERRY CAPPS

Appeal by Defendant from judgment entered 14 September 2011 by Judge James M. Webb in Moore County Superior Court. Heard in the Court of Appeals 8 October 2012.

*Attorney General Roy Cooper, by Assistant Attorney General Christopher W. Brooks, for the State.*

*The Law Office of Bruce T. Cunningham, Jr., by Bruce T. Cunningham, Jr., for Defendant.*

STEPHENS, Judge.

After his arrest for driving while impaired, Defendant James Perry Capps was determined to have a blood alcohol concentration of 0.18. Capps was subsequently convicted of the charge in Moore County District Court. Capps appealed to the superior court for a trial *de novo*. Prior to trial in superior court, the State provided notice of its intent to prove the existence of the aggravating factor of having an alcohol

concentration of at least 0.15 within a relevant time after driving. Capps was tried before a jury in Moore County Superior Court, the Honorable James M. Webb presiding. The jury found Capps guilty of driving while impaired and also found beyond a reasonable doubt that "[Capps] had an alcohol concentration of [0.15] or more at the time of the offense or within a relevant time of the driving involved in this offense." The trial court sentenced Capps to 120 days' imprisonment, suspended that sentence, and placed Capps on 18 months' unsupervised probation. Capps appeals.

In his sole argument on appeal, Capps contends that the trial court violated his constitutional rights by trying him "for a crime that he was not charged with committing." Capps asserts that the submission of an aggravating factor to the jury converted his charged offense of driving while impaired into a new offense of "aggravated driving while impaired." Thus, Capps contends, he could not have been tried for "aggravated driving while impaired" unless he was charged with that crime initially. This argument is meritless.

The upshot of Capps' argument is that a defendant's charging document must contain a list of all aggravating factors the State seeks to prove. However, as held previously by our

Supreme Court, "all the elements or facts which might increase the maximum punishment for a crime do not necessarily need to be listed in an indictment." *State v. Hunt*, 357 N.C. 257, 272, 582 S.E.2d 593, 603 (2003) (emphasis added) (internal quotation marks omitted) (quoting *State v. Wallace*, 351 N.C. 481, 528 S.E.2d 326, cert. denied, 531 U.S. 1018, 148 L. Ed. 2d 498 (2000)); see also *State v. Byers*, 175 N.C. App. 280, 294, 623 S.E.2d 357, 365 (noting that the Fifth Amendment would not require aggravators to be pled in a state-court indictment), disc. review denied, 360 N.C. 485, 631 S.E.2d 135 (2006). Thus, under *Hunt*, the fact that Capps was only charged with "non-aggravated" driving while impaired did not preclude the superior court from trying him for that offense and submitting an aggravating factor to the jury. Accordingly, Capps' argument is overruled.

Based on the foregoing, we hold that the superior court did not err by submitting to the jury the aggravating factor alleged by the State.

NO ERROR.

Chief Judge MARTIN and Judge ERVIN concur.

Report per Rule 30(e).