

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA12-597
NORTH CAROLINA COURT OF APPEALS

Filed: 6 November 2012

STATE OF NORTH CAROLINA

v. Buncombe County
Nos. 11 CRS 345
KIM ARTHUR BAILEY 11 CRS 52339

Appeal by defendant from judgment entered 5 December 2011 by Judge Sharon Tracey Barrett in Buncombe County Superior Court. Heard in the Court of Appeals 22 October 2012.

Attorney General Roy Cooper, by Special Deputy Attorney General Karen A. Blum, for the State.

Daniel F. Read for defendant appellant.

McCULLOUGH, Judge.

On 5 December 2011, defendant pled guilty to assault inflicting serious bodily injury and to having attained habitual felon status. The trial court sentenced defendant in the mitigated range to a term of 101 to 132 months' imprisonment. On 13 December 2011, defendant filed written notice of appeal.

Defendant first contends the trial court erred by sentencing him to a maximum term of 132 months when the correct maximum term is 131 months. The State concedes and we agree.

The applicable version of section 15A-1340.17 allowed a maximum sentence of 131 months for a minimum sentence of 101 months. N.C. Gen. Stat. § 15A-1340.17 (2009).¹ Here, the trial court sentenced defendant to a maximum term of 132 months' imprisonment. The trial court erred in doing so. Accordingly, we remand for entry of a maximum sentence of 131 months.

Defendant next contends the trial court erred by finding as fact that he was an habitual breaking and entering status offender. Defendant specifically contends "there was nothing in the record or the evidence about breaking and entering." The State concedes and we agree.

Defendant pled guilty to having attained habitual felon status. The trial court "adjudged [defendant] to be a habitual felon to be sentenced as a Class C felon pursuant to Article II of Chapter 14 of the general statutes[.]" However, the trial

¹ N.C. Gen. Stat. § 15A-1340.17 was amended in 2011 by Session Law 2011-192. The amendment became effective on 1 December 2011 and applied to offenses committed on or after that date. Under the amended statute, a minimum sentence of 101 months has a corresponding maximum sentence of 134 months. Justice Reinvestment Act of 2011, 2011 N.C. Sess. Laws 192, § 2.(f)(j). In this case, the date of offense of 1 March 2011 is prior to the effective date of the amendment.

court checked box 4 instead of box 3 on the Judgment and Commitment form. "When, on appeal, a clerical error is discovered in the trial court's judgment or order, it is appropriate to remand the case to the trial court for correction because of the importance that the record "speak the truth."" *State v. Smith*, 188 N.C. App. 842, 845, 656 S.E.2d 695, 696-97 (2008) (quoting *State v. Linemann*, 135 N.C. App. 734, 738, 522 S.E.2d 781, 784 (1999) (quoting *State v. Cannon*, 244 N.C. 399, 403, 94 S.E.2d 339, 342 (1956))). Accordingly, we remand for correction of the clerical error.

Finally, defendant contends the trial court committed constitutional error by sentencing him as an habitual felon. Specifically, defendant contends his sentence of 101 months minimum "for a minor domestic crime and for someone with a primary history in the previous two decades of property and drug crime, was clearly excessive."

"[U]nder N.C.G.S. § 15A-1444(e), a defendant who has entered a plea of guilty is not entitled to appellate review as a matter of right, unless the defendant is appealing sentencing issues or the denial of a motion to suppress, or the defendant has made an unsuccessful motion to withdraw the guilty plea." *State v. Pimental*, 153 N.C. App. 69, 73, 568 S.E.2d 867, 870

(2002). Defendant's contention that his sentence constitutes cruel and unusual punishment is not an issue for which defendant has an appeal of right. A defendant, however, "may petition the appellate division for review by writ of certiorari." N.C. Gen. Stat. § 15A-1444(e) (2011). In this case, defendant requests that this Court grant certiorari to review the issue.

Our Supreme Court has held that "our legislature has acted within constitutionally permissible bounds in enacting legislation designed to identify habitual criminals and to authorize enhanced punishment as provided." *State v. Todd*, 313 N.C. 110, 118, 326 S.E.2d 249, 253 (1985). "It is highly unusual for the sentence in a non-capital case to be so disproportionate that it violates the Eighth Amendment." *State v. Ledwell*, 171 N.C. App. 314, 321, 614 S.E.2d 562, 567 (2005). We decline to grant certiorari to review this issue.

Remanded for entry of the correct maximum sentence and for correction of the clerical error regarding defendant's habitual offender status.

Judges HUNTER (Robert C.) and CALABRIA concur.

Report per Rule 30(e).