An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA13-296
NORTH CAROLINA COURT OF APPEALS

Filed: 15 October 2013

STATE OF NORTH CAROLINA

v. Person County
Nos. 12 CRS 50170-72
12 CRS 297-99

DENNIS O'KEITH BLACKWELL

Appeal by defendant from judgments entered 19 September 2012 by Judge W. Osmond Smith, III in Person County Superior Court. Heard in the Court of Appeals 30 September 2013.

Attorney General Roy Cooper, by Special Deputy Attorney General Lars F. Nance, for the State.

C. Scott Holmes for defendant-appellant.

HUNTER, Robert C., Judge.

Defendant Dennis O'Keith Blackwell appeals from three judgments imposed upon jury verdicts finding him guilty of three counts of possession with intent to sell and deliver cocaine, three counts of sale of cocaine, three counts of maintaining a vehicle for keeping or selling of controlled substances, and attainment of habitual felon status. The first judgment

consolidated all offenses except two of the counts of maintaining a vehicle for keeping controlled substances and imposed an active term of 127 to 165 months. The second and third judgments, imposed solely upon the remaining convictions of maintaining a vehicle for keeping or selling of controlled substances, imposed active prison terms of 35 to 54 months and 30 to 48 months. The court directed all of the sentences to run consecutively. After careful review, we affirm, in part, and vacate and remand, in part.

The State presented evidence tending to show that on 5, 10, and 17 January 2012, defendant drove to the residence of a paid informant and delivered to the informant a white, rock-like substance subsequently identified as cocaine in quantities of 0.2 grams, 0.4 grams, and 0.4 grams, in exchange for cash from the informant. Defendant drove the same vehicle each day.

Defendant contends the court should have dismissed count II in file number 12 CRS 50171 because of a fatal variance between the indictment and the proof at trial in that the indictment alleged defendant possessed 0.4 grams of cocaine with the intent to deliver while the evidence at trial showed the quantity to be 0.2 grams of the substance involved with the 10 January 2012 transaction. The issue of whether there is a fatal variance

between the indictment and the proof must be specifically argued in a motion to dismiss for insufficient evidence at trial or else appellate review of the issue is waived. *State v. Curry*, 203 N.C. App. 375, 385-86, 692 S.E.2d 129, 138, *appeal dismissed and disc. review denied*, 364 N.C. 437, 702 S.E.2d 496 (2010). Although defendant did make a motion to dismiss in the case at bar, he did not raise any issue as to a variance between the indictment and proof with regard to quantities of the substance. Even if defendant had raised this issue, the variance is not fatal as proof of the quantity of controlled substance possessed is unnecessary to convict one of possession of a controlled substance with intent to sell or deliver in violation of N.C. Gen. Stat. § 90-95(a)(1), the crime with which defendant was charged, as compared to trafficking in violation of N.C. Gen. Stat. § 90-95(h). *See* N.C. Gen. Stat. § 90-95(a)(1) (2011) ("Except as authorized by this Article, it is unlawful for any person: (1) To . . . possess with intent to . . . sell or deliver, a controlled substance"). We therefore dismiss this argument.

Defendant next contends the court erroneously enhanced his sentence as a habitual felon in violation of the constitutional mandate against cruel and unusual punishment. We agree with

defendant that the court committed sentencing error but not on the constitutional basis argued by defendant. We conclude defendant's sentencing on three counts of maintaining a vehicle for the keeping of controlled substances violates the constitutional protection against double jeopardy. Although defendant did not argue or otherwise present this alternative basis for relief in his brief, in the exercise of our discretionary authority pursuant to Appellate Rule 2 to prevent manifest injustice to a party, we excuse defendant's default. *See State v. Hart*, 361 N.C. 309, 315-17, 644 S.E.2d 201, 205-06 (2007) (affirming this Court's discretionary authority to apply Rule 2 to prevent manifest injustice to a party).

It is unlawful in this state "[t]o knowingly keep or maintain any . . . vehicle . . . for the keeping or selling of [controlled substances] in violation of this Article." N.C. Gen. Stat. § 90-108(a)(7) (2011). It is a continuing offense, and only one violation of the statute occurs even though multiple drug transactions may transpire over a course of several days or weeks. *State v. Grady*, 136 N.C. App. 394, 399, 524 S.E.2d 75, 79, *cert. denied*, 352 N.C. 152, 544 S.E.2d 232 (2000). Consequently, multiple punishments for the one

continuing offense violate the constitutional guarantee against double jeopardy. *Id.* at 400, 524 S.E.2d at 79.

In *State v. Calvino*, 179 N.C. App. 219, 223, 632 S.E.2d 839, 843 (2006), an informant entered the defendant's van on two occasions, days apart, and made purchases of cocaine from the defendant. The court entered separate judgments upon two convictions of keeping or maintaining a vehicle for the selling of a controlled substance. *Id.* Citing *Grady* as precedent, and with the State's concurrence, we held that one of the two judgments had to be vacated as a violation of double jeopardy. *Id.*

Similarly, defendant here maintained the same vehicle to transport the controlled substance to the informant's residence during one continuous violation of N.C. Gen. Stat. § 90-108(a)(7). As only one punishable violation of the statute occurred, the judgments entered upon two of the three convictions must be vacated and the matter remanded for resentencing.

AFFIRMED in part; VACATED and REMANDED in part.

Judges BRYANT and McCULLOUGH concur.

Report per Rule 30(e).