

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-1379

Filed: 15 May 2018

Davie County, Nos. 13 CRS 50224, 14 CRS 358

STATE OF NORTH CAROLINA

v.

DOUGLAS EUGENE CURLEE

Appeal by defendant from judgment entered 19 July 2017 by Judge Jeff Carpenter in Davie County Superior Court. Heard in the Court of Appeals 7 May 2018.

Attorney General Joshua H. Stein, by Assistant Attorney General Lewis W. Lamar, Jr., for the State.

Irons & Irons, P.A., by Ben G. Irons, II, for defendant-appellant.

TYSON, Judge.

Douglas Eugene Curlee (“Defendant”) appeals from a judgment entered upon his convictions for larceny from a merchant and attaining habitual felon status. We vacate Defendant’s sentence and remand for a new sentencing hearing.

I. Background

Defendant was indicted on the charge of larceny from a merchant on 7 October 2013, and was indicted on the charge of attaining habitual felon status on 19 May 2014. At trial, the jury found Defendant guilty of both charges. On 29 February 2016, the trial court sentenced Defendant to an active term of 103 to 136 months' imprisonment. On appeal, this Court reversed the judgment of the trial court. *State v. Curlee*, __ N.C. App. __, 795 S.E.2d 266 (2016). The State elected to retry Defendant upon the same indictments.

On 19 July 2017, a jury found Defendant guilty of larceny from a merchant. Defendant then pled guilty to attaining habitual felon status. The trial court sentenced Defendant to 115 to 150 months' imprisonment. Defendant gave notice of appeal in open court.

II. Jurisdiction

Jurisdiction lies in the Court on appeal from a final judgment of the superior court pursuant to N.C. Gen. Stat. § 7A-27(b) (2017) and N.C. Gen. Stat. § 15A-1444(a) (2017).

Defendant has filed a petition for writ of *certiorari* as an alternative basis for appellate review in recognition that, by pleading guilty to attaining habitual felon status, he may lack a statutory right to present his issue on direct appeal. *See* N.C. Gen. Stat. § 15A-1444(a2) (2017) (listing the sentencing issues a defendant who pled guilty or no contest is entitled to appeal as a matter of right).

STATE V. CURLEE

Opinion of the Court

When a defendant is convicted by a jury of the substantive offenses and subsequently pleads guilty to attaining habitual felon status, the defendant need only seek a writ of *certiorari* for appellate review of issues specifically relating to the habitual felon charge. *See, e.g., State v. Young*, 120 N.C. App. 456, 458-59, 462 S.E.2d 683, 684-85 (1995) (reviewing defendant's issue related to the substantive offense for which he was found guilty, then reviewing through the writ of *certiorari* defendant's issue related to the habitual felon charge to which he pled guilty); *State v. Farrior*, 117 N.C. App. 429, 431-33, 451 S.E.2d 332, 333 (1994) (same). Defendant's appeal of the length of his sentence is properly before us. We dismiss as moot Defendant's petition for writ of *certiorari*.

III. Issue

Defendant contends that the trial court erred in sentencing him on retrial to a lengthier prison term than he received at his first trial.

IV. Analysis

N.C. Gen. Stat. § 15A-1335 provides, in pertinent part, that “[w]hen a conviction or sentence imposed in superior court has been set aside on direct review or collateral attack, the court may not impose a new sentence for the same offense . . . which is more severe than the prior sentence less the portion of the prior sentence previously served.” N.C. Gen. Stat. § 15A-1335 (2017). *See State v. Wagner*, 356 N.C. 599, 572 S.E.2d 777 (2002) (sentence of 135 to 175 months’ imprisonment for

attempted possession of cocaine was contrary to N.C. Gen. Stat. § 15A-1335 when the defendant's original sentence was only 101 to 131 months' imprisonment for the same offense.); *State v. Daniels*, 203 N.C. App. 350, 691 S.E.2d 78 (2010) (sentence of 370 to 453 months' imprisonment for first-degree rape violated N.C. Gen. Stat. § 15A-1335 because it exceeded the defendant's original sentence of 307 to 378 months' imprisonment). The State concedes the trial court erred in imposing upon Defendant a more severe sentence after his conviction upon retrial.

V. Conclusion

Section 15A-1335 is directly applicable to the issue before us. Since the trial court imposed a more severe sentence on retrial, after Defendant's previous conviction was "set aside on direct review" for the same offenses, we are compelled to vacate Defendant's sentence and remand for resentencing. The new sentence may not exceed the original sentence imposed of 103 to 136 months' imprisonment, "less the portion of the prior sentence previously served." N.C. Gen. Stat. § 15A-1335.

The judgment appealed from is vacated and this cause is remanded to the superior court for a new sentencing hearing in accordance herewith. *It is so ordered.*

VACATED AND REMANDED.

Judges ELMORE and ZACHARY concur.

Report per Rule 30(e).