

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA11-562
NORTH CAROLINA COURT OF APPEALS

Filed: 7 February 2012

STATE OF NORTH CAROLINA

v.

Halifax County
No. 07 CRS 53267

ROBERT GREGORY BOYD

Appeal by defendant from judgment entered 27 January 2011
by Judge J. Carlton Cole in Halifax County Superior Court.
Heard in the Court of Appeals 1 December 2011.

*Attorney General Roy Cooper, by Assistant Attorney General
Kathleen N. Bolton, for the State.*

Ryan McKaig, for Defendant-appellant.

ERVIN, Judge.

Defendant Robert Gregory Boyd appeals from a judgment sentencing him to 21 to 26 months imprisonment based upon his conviction for taking indecent liberties with a child. On appeal, Defendant argues that the trial court erred by failing to conduct an inquiry into whether there was an irreconcilable conflict between Defendant and his trial counsel. After careful consideration of Defendant's challenge to the trial court's judgment in light of the record and the applicable law, we

conclude that Defendant is not entitled to relief from the trial court's judgment.

I. Factual Background

"On 6 August 2007, [Defendant] was indicted on one count of indecent liberties with a minor[.] . . . During the 8 September 2008 term of the Halifax County Superior Court, a jury convicted defendant on this charge. After determining defendant's prior record level of III, the trial court sentenced him to twenty-one to twenty-six months imprisonment. Defendant appealed." *State v. Boyd*, 200 N.C. App. 97, 98, 682 S.E.2d 463, 465 (2009), *disc. rev. denied*, ___ N.C. ___, 691 S.E.2d 414 (2010) (*Boyd I*). On appeal, after upholding Defendant's conviction, we concluded that Defendant should be resentenced. *Boyd I*, 200 N.C. App at 104, 682 S.E.2d at 468-69.

On remand, "Defendant represented himself at the resentencing hearing. At the conclusion of that proceeding, the trial court found that Defendant had six prior record points and should be sentenced as a Level III offender. Based upon these findings, the trial court sentenced Defendant to a minimum of 21 months and a maximum of 26 months imprisonment in the custody of the North Carolina Department of Correction. Defendant noted an appeal to this Court from the trial court's judgment." *State v. Boyd*, ___ N.C. App ___, ___, 697 S.E.2d 392, 394 (2010) (*Boyd II*).

In *Boyd II*, we held that the trial court had erroneously allowed Defendant to represent himself at the resentencing hearing without conducting the inquiry required by N.C. Gen. Stat. § 15A-1242 for the purpose of determining the validity of Defendant's waiver of his right to the assistance of counsel. As a result, we remanded this case to the Halifax County Superior Court for resentencing. *Boyd II*, __ N.C. App at __, 697 S.E.2d at 396.

On 28 July 2010, Defendant appeared before Judge Walter H. Godwin, Jr., for resentencing. At that time, Judge Godwin informed Defendant that he had a right to be represented by counsel at his resentencing hearing and inquired into Defendant's wishes concerning that subject. Although Defendant stated that he wanted to hire private counsel, he refused to sign a written waiver of appointed counsel. As a result, Judge Godwin took judicial notice of Defendant's refusal to waive counsel and, "[o]ut of an abundance of caution," appointed counsel to represent Defendant on the understanding that Defendant's appointed counsel would be allowed to withdraw in the event that Defendant retained private counsel.

On 9 August 2010, Defendant appeared before Judge W. Russell Duke, Jr., in the Halifax County Superior Court. As of that time, Defendant had not employed private counsel. At the

request of Defendant's appointed counsel, who informed Judge Duke that he had not had time to read this Court's prior opinions in Defendant's case, and with Defendant's consent, the resentencing hearing was continued.

On 2 December 2010, Defendant appeared for resentencing in the Halifax County Superior Court before the trial court. On that occasion, Defendant told the trial court that he wanted to "fire" his appointed counsel, who requested leave to withdraw from his representation of Defendant. In light of Defendant's request, the trial court conducted the inquiry required by N.C. Gen. Stat. § 15A-1242. Although Defendant answered the trial court's questions, he repeatedly interrupted the trial court for the purpose of casting aspersions upon the integrity of the judicial system, protesting his innocence of the crime for which he had been convicted, and asking the trial court to "call in the SBI and a special prosecutor." Defendant refused to tell the trial court whether he wanted to proceed *pro se* or be represented by counsel; when asked directly if he wished to waive his right to the assistance of counsel, Defendant responded, "No, sir. I told you I want the SBI and a special prosecutor." At that point, the trial court continued the resentencing hearing and declined to relieve Defendant's

appointed counsel from his responsibility for representing Defendant.

On 27 January 2011, a resentencing hearing was held before the trial court. At that time, Defendant's appointed counsel informed the trial court that Defendant was primarily concerned about the validity of his conviction and that Defendant had been released from incarceration on 31 July 2010 after completing the service of his sentence. When the prosecutor attempted to introduce a worksheet for the purpose of establishing Defendant's prior record level, Defendant interrupted and complained that certain convictions shown on that worksheet should not be considered in connection with the determination of his prior record level. Following this interruption, the prosecutor submitted certified copies of Defendant's prior convictions and requested the trial court to find that Defendant had six prior convictions, a figure that excluded the convictions about which Defendant had complained. After Defendant continued to interrupt the proceedings, the trial court ordered that he be taken into custody. Later that day, the trial court entered a judgment sentencing Defendant to 21 to 26 months imprisonment and noted that, given the credit for time served to which Defendant was entitled, he had already served

his sentence. Defendant noted an appeal to this Court from the trial court's judgment.

II. Motion to Dismiss

The only issue that Defendant seeks to raise on appeal is the extent, if any, to which error occurred at his resentencing hearing. As we have already noted, the trial court's judgment was imposed on 27 January 2011, about six months after Defendant had been released from custody because he had completed serving his entire sentence. On 12 July 2011, the State filed a motion seeking the dismissal of Defendant's appeal on the grounds that, since Defendant had finished serving his sentence, any challenge to the proceedings which occurred at his resentencing hearing had become moot.

Generally, "this Court will not hear an appeal when the subject matter of the litigation . . . has ceased to exist." Once a defendant is released from custody, "the subject matter of [that] assignment of error has ceased to exist and the issue is moot." However, "when the terms of the judgment below have been fully carried out, if collateral legal consequences of an adverse nature can reasonably be expected to result therefrom, then the issue is not moot[.]"

State v. Stover, 200 N.C. App. 506, 509, 685 S.E.2d 127, 130 (2009) (quoting *In re Swindell*, 326 N.C. 473, 474-75, 390 S.E.2d 134, 135 (1990), and *State v. Black*, 197 N.C. App. 373, 375-76, 677 S.E.2d 199, 201 (2009) (quoting *In re Hatley*, 291 N.C. 693,

694, 231 S.E.2d 633, 634 (1977)). Thus, the ultimate issue raised by the State's motion to dismiss is the extent, if any, to which Defendant is subject to collateral consequences as the result of the length of the sentence imposed upon him at the resentencing hearing.

Although Defendant filed a response to the State's dismissal motion in which he advanced arguments stemming from his continued objections to the validity of his conviction, he did not identify any collateral consequence stemming solely from the length of his sentence of the type necessary to preclude a finding of mootness. As the Supreme Court has clearly noted, "[i]t is not the role of the appellate courts . . . to create an appeal for an appellant." *Viar v. N.C. Dept. of Transp.*, 359 N.C. 400, 402, 610 S.E.2d 360, 361 (2005). Using similar logic, this Court has held that, when the record establishes that the defendant has completed serving his active term of imprisonment and "has not argued to the Court any collateral adverse legal consequences that may result from the length of [that] sentence," the issue of whether the defendant's sentence was lawfully imposed is moot. *Stover*, 200 N.C. App. at 509-10, 685 S.E.2d at 130-31. In view of the fact that Defendant failed to identify any collateral consequence stemming solely from the length of his active sentence in responding to the State's

dismissal motion, we are bound by our previous decision in *Stover*. *In re Appeal from Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 36 (1989) (stating that, "[w]hen a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court") (citations omitted). As a result, Defendant's appeal should be, and hereby is, dismissed.

DISMISSED.

Judges BEASLEY and THIGPEN concur.

Report per Rule 30(e).