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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-26

Filed: 5 July 2017

Pitt County, No. 14 CRS 53250

STATE OF NORTH CAROLINA

v.

JASON TRAVON PETERSON

Appeal by defendant from judgment entered 22 August 2016 by Judge Jeffery Foster in Pitt County Superior Court. Heard in the Court of Appeals 19 June 2017.

*Attorney General Joshua H. Stein, by Assistant Attorney General Joseph L. Hyde, for the State.*

*Anne Bleyman for defendant.*

DIETZ, Judge.

Defendant Jason Travon Peterson appeals from a judgment entered by the trial court after a resentencing hearing. He argues that he was denied his constitutional right to counsel at resentencing. The State concedes error on appeal and, as explained below, we agree. We therefore vacate Peterson's sentence and remand for a new sentencing hearing.

### **Facts and Procedural History**

On 6 July 2015, Peterson pleaded guilty to two counts of obtaining property by false pretenses in Pitt County Superior Court. Peterson’s plea agreement provided that he would receive consecutive sentences, and that the State would dismiss additional charges then pending against him. The trial court calculated Peterson’s prior record level as III and sentenced him to two consecutive terms of 10 to 21 months in prison. Peterson did not appeal.

Roughly a year later, Peterson filed a *pro se* document with the trial court challenging one of his sentences as “unlawful/invalid” due to a mistake in his prior record level. Peterson contended that his prior convictions should have resulted in a prior record level of IV rather than III.<sup>1</sup> Construing the document as a motion for appropriate relief, the trial court granted it and ordered a new sentencing hearing.

At his resentencing hearing on 22 August 2016, Peterson appeared *pro se*. He stipulated to a prior record level of IV and presented evidence in support of two mitigating factors. After hearing from both parties, the trial court resentenced Peterson within the applicable presumptive range to an active prison term of 10 to 21 months consecutive with his existing 10 to 21 month sentence—the same sentence he received initially. Peterson timely appealed.

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<sup>1</sup> While recognizing that the error in his prior record level had “benefited” him, Peterson sought resentencing as a prior record level IV in order to present evidence of mitigating factors and to argue in favor of an intermediate punishment or placement in the advanced supervised release program.

**Analysis**

Peterson claims the trial court committed structural error by depriving him of his constitutional right to counsel at resentencing. *See* U.S. Const. amends. VI, XIV; N.C. Const. art. I, § 23; *see also* N.C. Gen. Stat. §§ 7A-451(a)(1), 15-4, 15A-1242 (2015). He “concedes that the constitutional issue raised does not fall within the grounds for appeal” from a judgment entered upon a guilty plea as provided by N.C. Gen. Stat. § 15A-1444(a1) and (a2) (2015). As a result, Peterson filed a petition for a writ of certiorari asking this Court to review the issue.

The State responded by indicating that it did not oppose Peterson’s petition for a writ of certiorari. The State also conceded that the record on appeal contains no indication that Peterson waived his right to counsel at resentencing and, therefore, “it appears the matter should be remanded for resentencing.” In our discretion, we issue a writ of certiorari to review the error conceded by the State.

This case is controlled by *State v. Rouse*, 234 N.C. App. 92, 757 S.E.2d 690 (2014). In *Rouse*, the defendant pleaded guilty and was sentenced, but later received a new sentencing hearing. The defendant appeared at the resentencing without counsel and the court did not inform him of his right to counsel. *Id.* at 93, 757 S.E.2d at 692. The defendant appealed from his resentencing, claiming “only that the failure to provide him with counsel at resentencing violated his constitutional and statutory rights.” *Id.* at 94, 757 S.E.2d at 692.

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On appeal, this Court held that a defendant's Sixth Amendment rights apply at a resentencing because a sentencing hearing involves "a threat of imprisonment." *Id.* at 95, 757 S.E.2d at 692. The Court also held that the failure to afford a defendant his Sixth Amendment right to counsel at a resentencing hearing is a structural error that "is not dependent upon harmless error analysis; rather, such errors are reversible *per se.*" *Id.* (citation and quotation marks omitted). Accordingly, as the State concedes, we must vacate the trial court's judgment and remand for a new sentencing hearing in which Peterson is afforded his right to counsel (or a knowing and voluntary waiver of that right) under the Sixth Amendment.

**Conclusion**

We vacate the trial court's judgment following resentencing and remand for a new sentencing hearing.

VACATED AND REMANDED FOR RESENTENCING.

Judges ELMORE and BERGER concur.

Report per Rule 30(e).