An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA17-723

Filed: 18 September 2018

Rutherford County, Nos. 13CRS918; 13CRS50379; 09CRS54450

STATE OF NORTH CAROLINA,

v.

DAVID KENNETH FOWLER, Defendant.

Appeal by defendant from an order entered 7 October 2014 by Judge J. Thomas Davis in Rutherford County Superior Court. Heard in the Court of Appeals 30 November 2017.

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

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Kathryn L. VandenBerg, for defendant-appellant.

BERGER, Judge.

David Kenneth Fowler ("Defendant") filed a host of post-conviction motions, including a Motion for Appropriate Relief ("MAR"), which was granted in his favor on October 7, 2014. Defendant filed a Petition for Writ of Certiorari, and on November 30, 2016 this Court granted Defendant's petition to review the trial court's October 7,

2014 order ("the Order"). Defendant contends the trial court erred because it was required (1) to set aside Defendant's plea bargain when it granted his MAR, and (2) to allow Defendant to vacate his plea. We disagree.

Factual and Procedural Background

On June 10, 2013, Defendant was indicted for multiple offenses by the Rutherford County Grand Jury as set forth below.

13 CRS 50255	Break or Enter a Motor Vehicle Misdemeanor Larceny
13 CRS 50256	Break or Enter a Motor Vehicle Misdemeanor Larceny
13 CRS 50292	Breaking and Entering Larceny Possession of Stolen Goods
13 CRS 50379	Attempt to Obtain Property by False Pretenses
13 CRS 50380	Obtaining Property by False Pretenses Uttering Forged Instrument
13 CRS 50381	Obtaining Property by False Pretenses Uttering Forged Instrument
13 CRS 50382	Obtaining Property by False Pretenses Uttering Forged Instrument
13 CRS 50383	Financial Card Theft
13 CRS 50384	Misdemeanor Larceny

13 CRS 918 Habitual Felon

On September 5, 2013, Defendant pleaded guilty to multiple felonies and attaining habitual felon status under the following terms:

> Defendant will plead to all felonies (except the [possession of stolen goods charge]) and the habitual enhancement. Defendant will receive an active habitual sentence in File 13 CRS 50379, Att. OPBFP [of] 80-108 [months]. The remaining felonies will not be habitualized, but will be sentenced at the top end of the presumptive range, to run consecutive to each other and file 13 CRS 50379. These sentences will be suspended, and Defendant will be placed on supervised probation for 5 years, to begin following Defendant's completion of his sentence in file 13 CRS 50379. [Terms of probation are listed.]

On July 28, 2014, Defendant filed an MAR concerning the habitual felon indictment in file number 13 CRS 918, alleging a defect in an underlying felony. Defendant's motion focused exclusively on the habitual felon indictment, and he contended the trial court lacked jurisdiction on the underlying felony due to an invalid waiver of indictment and bill of information. In his MAR, Defendant asked the trial court to:

> 1.) Appoint counsel to advise and represent the Defendant pursuant to G.S. 15A-1420(e)(4); G.S. 15A-1421; G.S. 7A-450-51.
> 2.) Grant an evidentiary hearing on all the factual issues pursuant to G.S. 15A-1420(c)(1) and (4) in order to correct defendants [sic] sentencing according to law.
> 3.) Dismiss[ ] any or all charges with prejudice, pursuant to G.S. 15A-1417(a)(2), or in the alternative resentence the Defendant to the underlying offense.

> 4.) Any other appropriate relief pursuant to G.S. 15A-1417(a)(4).

The State conceded the alleged error, and the trial court granted the MAR on October 7, 2014. The Order vacated judgments in the underlying felony (09 CRS 54450), the purportedly flawed habitual felon indictment (13 CRS 918), and the obtaining property by false pretenses judgment enhanced with the habitual felon indictment (13 CRS 50379). The trial court ordered that Defendant be appointed counsel and resentenced in 13 CRS 50379 as a Class H felon. Defendant did not request relief or otherwise allege error concerning the remainder of his sentence. The State did not appeal or otherwise seek review of the Order.

On November 17, 2014, the trial court resentenced Defendant to a term of 10-21 months in file number 13 CRS 50379, and Defendant was released on credit for time served. Defendant remained on probation under the terms and conditions of the original plea until his probation was revoked on May 4, 2016.

On November 7, 2016, Defendant filed a Petition for Writ of Certiorari for review of the Order, and another panel of this Court allowed Defendant's petition.

Defendant is procedurally barred from review of the November 17, 2014 judgment ("the Judgment"), and Defendant's arguments concerning the Judgment are not properly before us. Defendant confuses and conflates entry of the Order granting his MAR and his appeal from the Order with resentencing and entry of the Judgment. The Order granted Defendant's request for a resentencing hearing and

scheduled the resentencing hearing to take place. Resentencing and entry of the Judgment are beyond the scope of our review in this appeal.

Analysis

The following pertinent relief is available upon granting an MAR: new trial, dismissal of the charges, or any other appropriate relief. N.C. Gen. Stat. § 15A-1417(a) (2017). "If resentencing is required, the trial division may enter an appropriate sentence." N.C. Gen. Stat. § 15A-1417(c). There is no requirement that a trial court invalidate a plea arrangement at the time it grants an MAR. We also note that, for the purposes of review on appeal, "[a] defendant is not prejudiced by the granting of relief which he has sought." N.C. Gen. Stat. § 15A-1443(c) (2017).

Here, the trial court granted the relief requested by Defendant. Pursuant to the Order, Defendant was appointed counsel; his MAR was granted without an evidentiary hearing; the habitual felon indictment (13 CRS 918) was vacated, as was the judgment in the underlying felony with the purportedly defective indictment (09 CRS 54450); and judgment was also vacated on the attempted obtaining property by false pretenses charge (13 CRS 50379).

Because the Order granted the relief sought by Defendant, we affirm.

AFFIRMED.

Judges HUNTER and INMAN concur.

Report per Rule 30(e).