An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA18-316

Filed: 15 January 2019

Randolph County, Nos. 12CRS52202, 13CRS53866, 14CRS51583

STATE OF NORTH CAROLINA

v.

ROBERT BRANDON KAWELO, Defendant.

Appeal by defendant from judgment entered 9 February 2017 by Judge Edwin G. Wilson, Jr., in Randolph County Superior Court. Heard in the Court of Appeals 17 October 2018.

Attorney General Joshua H. Stein, by Associate Attorney General Jessica Helms, for the State.

Morgan & Carter PLLC, by Michelle F. Lynch, for defendant-appellant.

BERGER, Judge.

Factual and Procedural Background

On December 3, 2012, Robert Brandon Kawelo ("Defendant") was indicted for use of a social website by a sex offender. On August 10, 2015, Defendant was indicted for failure to register as a sex offender and fleeing or eluding arrest. On May 2, 2016,

Defendant pleaded guilty to all three offenses pursuant to a plea agreement with the State. Defendant received a suspended sentence, and he was placed on supervised probation for 36 months. On August 19, 2016, Defendant's probation officer filed a violation report for Defendant's failure to comply with the terms and conditions of his probation. According to testimony from the probation officer, Defendant (1) absconded; (2) tested positive for controlled substances on June 16, 2016 and July 1, 2016; (3) did not report for appointments with his supervising officer; and (4) failed to obtain prior approval or provide notice of a change of address. On February 9, 2017, Defendant's probation was subsequently revoked and his suspended sentence activated because he violated the terms of his probation. Defendant filed his notice of appeal on February 13, 2017.

On appeal, Defendant argues (1) that his plea agreement and convictions should be vacated, and in the alternative, (2) that his probation should not have been revoked. Defendant also filed a motion for appropriate relief contemporaneously with his brief, requesting that this court: (1) vacate his conviction for use of a social website by a sex offender; (2) vacate his conviction for all charges in his guilty plea; and (3) vacate his probation revocation because banning registered sex offenders from accessing "a commercial social networking Web site where the sex offender knows that the site permits minor children to become members or to create or maintain personal Web pages" violates the First Amendment and is therefore unconstitutional.

Packingham v. North Carolina, 582 U.S. ___, ___, 198 L. Ed. 2d 273, 278 (2017) (quoting N.C. Gen. Stat. § 14-202.5(a)). We grant Defendant's motion in part and address his arguments below. The State agrees with Defendant that the Motion for Appropriate Relief should be granted and this matter remanded to the trial court.

Analysis

When the charges underlying a plea agreement are found unconstitutional, the plea agreement must be set aside and remanded for further proceedings. *State v. Anderson*, ___ N.C. App. ___, ___, 804 S.E.2d 189, 199 (2017); *see also State v. Rico*, 218 N.C. App. 109, 122, 720 S.E.2d 801, 809 (Steelman, J. dissenting), *rev'd for reasons stated in dissent*, 366 N.C. 327, 734 S.E.2d 571 (2012).

In the present case, Defendant was first indicted on December 3, 2012 for use of a social website by a sex offender. On August 10, 2015, he was further indicted for failing to register as a sex offender and fleeing or eluding arrest. He pleaded guilty to all three charges on May 2, 2016. We vacate Defendant's underlying conviction for use of a social website by a sex offender in light of *Packingham v. North Carolina*. Because vacating the underlying conviction makes the "essential and fundamental terms of the plea agreement [ ] unfulfillable[,]" we also set aside Defendant's plea agreement. *State v. Rico*, 218 N.C. App. at 122, 720 S.E.2d at 809.

Defendant's conviction under Section 14-202.5 of the North Carolina General Statutes should be vacated. The entire plea agreement should be set aside and the

case remanded for disposition on the remaining charges of failing to register as a sex offender and felony fleeing to elude arrest.

Defendant argued in the alternative that the trial court erred in revoking his probation because the evidence did not show that he had absconded. We dismiss this argument as moot. "As a general rule this Court will not hear an appeal when the subject matter of the litigation has been settled between the parties or has ceased to exist." *State v. Black*, 197 N.C. App. 373, 375, 677 S.E.2d 199, 201 (2009) (citation and quotation marks omitted). Here, the subject matter of the litigation has "ceased to exist" because we vacate Defendant's conviction and set aside his plea agreement. Therefore, it is unnecessary to address the merits of this argument.

Conclusion

We grant Defendant's motion for appropriate relief. We vacate Defendant's conviction for use of a social website by a sex offender, set aside his plea agreement, and remand for disposition on the remaining charges of failing to register as a sex offender and felony fleeing to elude arrest. The provisions of Section 15A-1335 of the General Statutes are not applicable on remand.

VACATED AND REMANDED.

Judges STROUD and DILLON concur.

Report per Rule 30(e).