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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-183

Filed: 7 January 2020

Wake County, Nos. 16 CRS 210610-12

STATE OF NORTH CAROLINA

v.

LUKINDA MONIQUE MOORE

Appeal by defendant from judgment entered 9 October 2018 by Judge Rebecca W. Holt in Wake County Superior Court. Heard in the Court of Appeals 2 October 2019.

*Attorney General Joshua H. Stein, by Special Deputy Attorney General Ryan F. Haigh, for the State.*

*Appellate Defender Glenn Gerding, by Assistant Appellate Defender Emily Holmes Davis, for defendant-appellant.*

ZACHARY, Judge.

Defendant Lukinda Monique Moore appeals from the judgment entered upon her 9 October 2018 resentencing. Defendant argues that the trial court failed to properly follow the remand of this Court in *State v. Moore*, No. COA17-1225, 2018 N.C. App. LEXIS 475 (N.C. Ct. App. May 15, 2018) (“*Moore I*”), in that it “refused to conduct a *de novo* hearing on all sentencing issues.” In the alternative, Defendant

argues that the trial court violated her right to be present when the sentence was imposed. After careful review, we affirm.

### **Background**

On 5 April 2017, Defendant was convicted of (1) willfully attempting to evade a tax payment in 2014, (2) willful failure to file an individual tax return for 2013, and (3) willful failure to file an individual tax return for 2012. The trial court consolidated the judgments and sentenced Defendant to a term of 5 to 15 months' imprisonment in the custody of the North Carolina Division of Adult Correction, suspended for a period of 60 months' supervised probation. The trial court also ordered a special probation term of 60 days active sentence in the custody of the Wake County Sheriff, together with payment of \$5,591.00 in restitution and \$372.50 in costs.

Defendant appealed her sentence to this Court, asserting that "the trial court improperly placed her on supervised probation for 60 months without making a statutorily required and specific finding that an extended term of probation was necessary." *Moore I*, 2018 N.C. App. LEXIS 475, at \*3. We agreed, stating: "Pursuant to statute, unless the court makes specific findings that longer or shorter periods of probation are necessary, the length of the original period of probation for offenders such as Defendant shall be not less than 18 nor more than 36 months." *Id.* Accordingly, "[t]he 60-month probationary period ordered by the trial court [was] not supported by specific findings of fact and violat[ed] the statutory mandate of N.C.

Gen. Stat. § 15A-1343.2(d)(4).” *Id.* We therefore vacated the judgment and remanded the case “for the trial court to either impose a probationary period authorized by N.C. Gen. Stat. § 15A-1343.2(d)(4) or to make the required findings that a longer probationary period is necessary.” *Id.* This was the only instruction directed to the trial court.

At the resentencing hearing, Defendant argued that she was entitled to a full resentencing hearing on all issues. The trial court disagreed, and imposed a 36-month period of supervised probation. Defendant timely filed notice of appeal.

On appeal, Defendant argues that the trial court (1) erred by refusing to conduct a *de novo* hearing “on all sentencing issues” and failed to address all sentencing terms, and (2) violated her right to be present when her sentence was imposed.

### **I. Scope of Resentencing on Remand**

Defendant first argues that the trial court erred when it refused to conduct a *de novo* hearing “on all sentencing issues” and failed to address all sentencing terms. Specifically, Defendant contends that the language of this Court’s remand did not limit the scope of resentencing because we did not explicitly state that the case was remanded for sentencing “*for the limited purpose of* imposing an authorized probationary term or making the required finding.” (Emphasis added). We disagree that the omission of such a statement extended the scope of our remand.

“[T]his Court’s interpretation of its own mandate is properly considered an issue of law reviewable *de novo*.” *State v. Watkins*, 246 N.C. App. 725, 730, 783 S.E.2d 279, 282 (2016).

Sentencing remands can be either general or limited in nature, and the scope of a resentencing hearing hinges upon the type of remand at issue:

If a remand is general, the . . . court can resentence the defendant *de novo*, which means the . . . court may redo the entire sentencing process including considering new evidence and issues. When the remand is not general, the . . . court’s resentencing authority is limited to the issue or issues remanded.

*Id.* at 731, 783 S.E.2d at 283 (italics supplied) (quotation marks omitted). In assessing whether an appellate court issued a general or limited resentencing remand, “the plain language of the mandate controls.” *Id.* at 730, 783 S.E.2d at 283. “The key is to consider the specific language used in the context of the entire opinion or order. However, in the absence of an explicit limitation, the remand order is presumptively a general one.” *Id.* at 731, 783 S.E.2d at 283.

In the instant case, this Court’s remand in *Moore I* explicitly limited the scope of resentencing “to *either* impose a probationary period authorized by N.C. Gen. Stat. § 15A-1343.2(d)(4) *or* . . . make the required findings that a longer probationary period is necessary.” *Moore I*, 2018 N.C. App. LEXIS 475, at \*3 (emphasis added). This was the only directive contained in the opinion. Defendant raised no additional challenges to her sentence. Accordingly, the trial court properly concluded the remand in *Moore*

*I* was “narrowly drawn” and indicated that it was necessary to impose a probationary period pursuant to N.C. Gen. Stat. § 15A-1343.2(d)(4) or to make the required finding that a longer probationary period was necessary.

Defendant is not, and was not, entitled to a *de novo* sentencing hearing on this ground.

## **II. Right to be Present at Sentencing**

Defendant next argues that she is entitled to a new sentencing hearing because the trial court violated her right to be present when the sentence was imposed. In particular, Defendant contends that “the written resentencing judgment imposed sentencing terms never pronounced by the trial court in [Defendant’s] presence.” We disagree.

It is well established that a defendant has the right to be present when her sentence or judgment is announced. *See State v. Pope*, 257 N.C. 326, 330, 126 S.E.2d 126, 129 (1962) (noting that “[t]he right to be present at the time sentence or judgment is pronounced is a common law right, separate and apart from the constitutional or statutory right to be present at the trial”). When a written sentencing order contains a substantive change from that which was announced at the sentencing hearing, the defendant is entitled to a new sentencing hearing. *See State v. Crumbley*, 135 N.C. App. 59, 67, 519 S.E.2d 94, 99 (1999) (holding that a substantive change in the defendant’s sentence was made outside of the defendant’s

presence where the “legal effect” of the oral judgment was for prison sentences to run concurrently, but the written judgment “specifically provided” prison sentences to run consecutively).

Defendant suggests that because this Court remanded this matter for resentencing, the trial court was required to re-announce the *entire* sentence in open court on remand, and that its failure to do so amounts to a violation of her common law right to be present. Defendant has failed to cite any authority supporting this proposition.

Following the limited remand issued by this Court in *Moore I*, the trial court imposed a 36-month period of supervised probation in Defendant’s presence. This was the only “new” provision of Defendant’s sentence. The remaining terms of Defendant’s sentence were outside of the scope of the limited remand and were announced in Defendant’s presence at her original sentencing hearing.

In taking judicial notice of our records pertaining to *Moore I*, we note that the transcript of Defendant’s initial sentencing hearing includes the pronouncement of all sentencing terms in Defendant’s presence:

[f]rom the presumptive range, minimum 5 months, maximum 15 months in the custody of the North Carolina Department of Public Safety, suspended for 60 months with 60 days active confinement and thereafter suspended with supervised probation. Conditions of probation: [t]hat she pay restitution to the North Carolina Department of Revenue in the amount of \$5,591 . . . [and] [t]hat [defendant] pay the costs of [c]ourt.

*See In re Williamson*, 67 N.C. App. 184, 185, 312 S.E.2d 239, 240 (1984) (holding that the North Carolina Court of Appeals “can take judicial notice of its own records”).

Moreover, Defendant has abandoned her argument by failing to provide any statutory authority or case law in support of her proposition that the trial court was required to re-announce her original sentence—in its entirety—in open court at her resentencing hearing. *See State v. Velazquez-Perez*, 233 N.C. App. 585, 595, 756 S.E.2d 869, 876 (“Failure to cite to supporting authority is a violation of Rule 28(b)(6) of the North Carolina Rules of Appellate Procedure, and constitutes abandonment of [the] argument.”), *appeal dismissed and disc. review denied*, 367 N.C. 509, 758 S.E.2d 881 (2014). Nevertheless, we note that during Defendant’s resentencing hearing, the trial court also announced that “*the judgment is in the same force an* [sic] *effect* except for now it’s a 36 months term of probation, supervised probation that can become unsupervised after 18 months if you have paid all the monies and are otherwise in compliance.” (Emphasis added). This, combined with the trial court’s initial pronouncement of Defendant’s sentencing terms, was more than sufficient to ensure that Defendant’s common law right to be present when her sentence was announced was fully satisfied.

### **Conclusion**

For these reasons, the judgment entered upon resentencing is affirmed.

AFFIRMED.

STATE V. MOORE

*Opinion of the Court*

Judges MURPHY and ARROWOOD concur.

Report per Rule 30(e).