

Criminal Procedure Pleas

[State v. Zubienga](#), ___ N.C. App. ___, ___ S.E.2d ___ (Dec. 30, 2016). (1) Over a dissent, the court held that it had jurisdiction to consider the defendant's appeal under G.S. 15A-1444(e). After the trial court announced the sentence in open court, defense counsel indicated that the defendant would like to strike her plea because she would like "to take it to trial." The court declined to strike the plea and the defendant appealed. The court held that notwithstanding *State v. Carriker*, 180 N.C. App. 470 (2006), under G.S. 15A-1444(e) and *State v. Dickens*, 299 N.C. 76 (1980), a defendant has a right to appeal when a motion to withdraw a guilty plea has been denied. (2) The trial court did not err by denying the defendant's post-sentence motion to withdraw her guilty plea. On appeal the defendant argued that the trial court erred by denying her motion because the plea agreement and plea colloquy contained no indication that a fine would be imposed as part of her punishment. In fact a fine of \$1000 was imposed. The court noted that under G.S. 15A-1024, if at the time of sentencing a judge decides to impose a sentence other than that provided for in a plea arrangement, the judge must inform the defendant of that fact and inform the defendant that he may withdraw the plea. If however the sentence imposed is consistent with the plea agreement, the defendant is entitled to withdraw his plea after sentencing only upon a showing of manifest injustice. Here, the plea agreement specified only three things: the crime to which the defendant would plead guilty; the charges that would be dismissed; and the defendant's prior record level and number of prior record level points. The plea agreement did not contain any specific terms regarding the sentence. Thus, the court found itself unable to conclude that the trial court imposed a sentence other than that provided for in the plea arrangement. Having determined that the sentence was not inconsistent with the plea agreement and that the defendant was not entitled to relief under G.S. 15A-1024 the court went on to conclude that no manifest injustice supported granting the post-sentence motion to withdraw the guilty plea. Here, the defendant provided no specific reason in support of her motion to withdraw, except that she had decided she would like to take her case to trial.

Sentencing

[State v. Zubienga](#), ___ N.C. App. ___, ___ S.E.2d ___ (Dec. 30, 2016). The trial court did not err by ordering the defendant to pay a \$1000 fine as part of her sentence upon a conviction for assault by strangulation. North Carolina statutes provide that a person who has been convicted of a crime may be ordered to pay a fine as provided by law and that unless otherwise provided the amount of the fine is in the discretion of the court. The court noted that there is no statutory provision specifically addressing the fine amount that may be imposed for the offense at issue. Accordingly, the amount is left to the trial court's discretion. Here, the court found itself unable to identify any basis for determining that the fine was an abuse of discretion or otherwise unlawful. The court specifically rejected the defendant's argument that the fine violated the prohibition on excessive fines under the Eighth Amendment.

[State v. Lail](#), ___ N.C. App. ___, ___ S.E.2d ___ (Dec. 30, 2016). In this second-degree murder case, the trial court did not err by sentencing the defendant as a Class B1 felon. The defendant argued that the trial court erred because the jury returned a general verdict that failed to specify whether he had been found guilty of a Class B1 or B2 felony. The State proceeded under a deadly weapon implied malice theory arising from the defendant's alleged use of a butcher knife to slash the victim's throat. The trial judge instructed the jury on the definitions of express malice and deadly weapon implied malice (B1 second-degree murder) but not on depraved heart malice (B2 second-degree murder). The jury returned a general verdict second-degree murder. The court held that since the jury was not presented with evidence supporting a finding of depraved heart malice, its general verdict was unambiguous and the B1

sentence was proper. It noted however that where the jury is presented with both B2 depraved heart malice and a B1 malice theory a general verdict would be ambiguous. It stated: "in this situation, trial judges . . . should frame a special verdict requiring the jury to specify which malice theory supported its second-degree murder verdict." In the course of its ruling the court also noted that depraved heart malice is not limited to driving while intoxicated homicide cases.