

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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

NO. COA08-735

NORTH CAROLINA COURT OF APPEALS

Filed: 16 December 2008

STATE OF NORTH CAROLINA

v.

RAYFEALL S. FERGUSON

Mecklenburg County
Nos. 06 CRS 241687,
06 CRS 241691,
06 CRS 235798,
07 CRS 214062

Court of Appeals

Appeal by Defendant from judgments entered 29 October 2007 by Judge David S. Cayer in Mecklenburg County Superior Court. Heard in the Court of Appeals 8 December 2008.

Slip Opinion

Attorney General Roy Cooper, by Assistant Attorney General Yvonne B. Ricci, for the State.

Kimberly P. Hoppin, for Defendant.

ARROWOOD, Judge.

On 29 October 2007, Rayfeall S. Ferguson (Defendant) entered guilty pleas to possession of cocaine, two counts of possession of a firearm by a felon and conspiracy to commit armed robbery. The trial court asked Defendant each question contained in the transcript of plea and Defendant responded in the affirmative to each question. After the prosecutor presented a factual basis for each of the charges, Defendant's counsel informed the court that Defendant admitted his responsibility soon after he was arrested. At sentencing, the trial court found one aggravating factor and one

mitigating factor and determined that the aggravating factor outweighed the mitigating factor. The trial court also stated that Defendant was a "Level IV." The conspiracy and possession offenses were consolidated and Defendant was sentenced as a Class E felon at a prior record level IV to 48 to 67 months imprisonment. As to each count of possession of a firearm the trial court sentenced Defendant as a Class G felon at a prior record level IV to 24 to 29 months imprisonment. Defendant appeals.

Defendant contends his case should be remanded for resentencing because the trial court's determination that he was a prior record level IV was improper under N.C. Gen. Stat. § 15A-1340.14. We agree.

The trial court must "determine the prior record level for the offender pursuant to [N.C.]G.S. [§] 15A-1340.14" before imposing sentence. N.C. Gen. Stat. § 15A-1340.13(b) (2007). The State bears the burden of proving a prior conviction by a preponderance of the evidence. N.C. Gen. Stat. § 15A-1340.14(f) (2007). Prior convictions may be proven by any one of the following methods:

- (1) Stipulation of the parties.
- (2) An original or copy of the court record of the prior conviction.
- (3) A copy of records maintained by the Division of Criminal Information, the Division of Motor Vehicles, or of the Administrative Office of the Courts.
- (4) Any other method found by the court to be reliable.

N.C. Gen. Stat. § 15A-1340.14. In *State v. Jeffery*, 167 N.C. App. 575, 605 S.E.2d 672 (2004), this Court remanded a defendant's case

for resentencing where "the State introduced no evidence of defendant's prior record level other than the worksheet, and defendant did not stipulate to a prior record level III[.]" *Id.* at 582, 605 S.E.2d at 676.

Here, the record contains a Prior Record Level Worksheet signed by Judge Cayer, but not signed by the prosecutor, Defendant, or Defendant's counsel. Neither the prosecutor nor the trial court questioned Defendant or his counsel concerning his prior convictions or the Prior Record Level Worksheet. In fact, the record of the plea hearing contains no colloquy between the Defendant's counsel and the trial court related to either the Defendant's prior convictions, prior record level, or the Prior Record Level Worksheet. We also note that the signed transcript of plea contains no statements referring to Defendant's prior record level or prior convictions. The State agrees that the present case cannot be meaningfully distinguished from the decision in *Jeffery* and asks the court to vacate the judgment and remand Defendant's case for a new sentencing hearing.

Defendant makes an additional argument for resentencing. Specifically, Defendant argues that the trial court erred in assigning a point for all elements in the present offense being included in a prior offense under N.C. Gen. Stat. § 15A-1340.14(b)(6) (2007). Because we vacate the judgment and remand for resentencing on other grounds, we do not reach the merits of these arguments.

Remand for new sentencing hearing.

Judges TYSON and BRYANT concur.

Report per Rule 30(e).