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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-853

Filed: 21 March 2017

Lincoln County, No. 15 CRS 050678

STATE OF NORTH CAROLINA

v.

SAMUEL EDWARD BROYLES, JR.

Appeal by defendant from judgment entered 31 March 2016 by Judge James Morgan in Lincoln County Superior Court. Heard in the Court of Appeals 25 January 2017.

Attorney General Joshua H. Stein, by Assistant Attorney General Benjamin J. Kull, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Kathleen M. Joyce, for defendant-appellant.

McCULLOUGH, Judge.

On 31 March 2016, a jury found Samuel Edward Broyles, Jr. (“defendant”), guilty of driving while impaired. On appeal, defendant argues that the trial court erred by finding an aggravating factor and imposing a Level Three punishment. For

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the reasons stated herein, we vacate defendant's sentence and remand for a new sentencing hearing.

I. Background

Procedural History

On 14 February 2015, defendant was cited for impaired driving and leaving the scene of an accident. On 20 August 2015, defendant was found guilty on both charges in Lincoln County District Court. Defendant appealed to the Lincoln County Superior Court.

Defendant was tried before a jury at the 31 March 2016 criminal session of Lincoln County Superior Court, the Honorable James Morgan presiding. The charge of leaving the scene of the accident was dismissed at the close of the State's evidence. On 31 March 2016, a jury found defendant guilty of driving while impaired ("DWI").

Notice Pursuant to N.C. Gen. Stat. § 20-179(a)(1)

Prior to trial, defendant informed the trial court that he was not given notice, pursuant to N.C. Gen. Stat. § 20-179(a)(1), that the State intended to use one or more aggravating factors under subsections (c) or (d) of N.C. Gen. Stat. § 20-179. The trial court stated that it would "deny the motion to just keep it out of evidence. And we will address whether we go into an aggravating factor phase later."

At sentencing, the State attempted to prove two aggravating factors: prior DWI convictions that were more than seven years old pursuant to N.C. Gen. Stat. §

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20-179(d)(5) and that defendant's alcohol concentration was a 0.19 pursuant to N.C. Gen. Stat. § 20-179(d)(1). The State conceded that it had not filed or served on defendant notice of its intent to prove aggravating factors. The trial court ruled that because the State failed to provide defendant prior notice of aggravating factors, it would not consider the 0.19 alcohol concentration. However, the trial court ruled that his "record counts" and accepted as an aggravating factor prior DWI convictions that occurred more than seven years prior.

The trial court found, as a mitigating factor, that defendant "has a safe driving record, having no convictions of any motor vehicle offense for which at least four points are assigned under G.S. 20-16 or for which the defendant's license is subject to revocation within five (5) years of the date of this offense." Weighing the factors, the trial court found that the aggravating factor outweighed the mitigating factor and imposed a Level Three punishment.

Sentence

The trial court imposed a Level Three punishment with a six-month active sentence. The sentence was suspended and defendant was placed on supervised probation for twenty-four months and a \$300.00 fine.

Defendant appeals.

II. Discussion

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Defendant's sole argument on appeal is that the trial court erred by finding an aggravating factor and imposing a Level Three punishment when the State failed to provide defendant with proper notice of its intent to seek an aggravated range sentence for the DWI conviction.

Defendant alleges violation of a statutory mandate which we review *de novo* on appeal. *State v. Williams*, __ N.C. App. __, __, 786 S.E.2d 419, 423 (2016).

Pursuant to N.C. Gen. Stat. § 20-179(a1),

If the defendant appeals to superior court, and the State intends to use one or more aggravating factors under subsections (c) or (d) of this section, the *State must provide the defendant with notice of its intent*. The notice shall be provided no later than 10 days prior to trial and shall contain a plain and concise factual statement indicating the factor or factors it intends to use under the authority of subsections (c) and (d) of this section. The notice must list all the aggravating factors that the State seeks to establish.

N.C. Gen. Stat. § 20-179(a1)(1) (2015) (emphasis added).

Because it is clear that the State failed to provide defendant with the statutorily required notice of its intention to use an aggravating factor under N.C. Gen. Stat. § 20-179(d), the trial court erred by imposing an aggravated sentence. This error was prejudicial because it changed the level of punishment imposed. Accordingly, we must vacate defendant's sentence and remand to the trial court for a new sentencing hearing. *See State v. Reeves*, 218 N.C. App. 570, 576, 721 S.E.2d 317, 322 (2012) (where the trial court failed to provide notice to the defendant of its intent

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to pursue any aggravating factors pursuant to N.C. Gen. Stat. § 20-179(a1)(1), the defendant's sentence as to the driving while impaired charge was vacated and remanded to the trial court for resentencing).

VACATED AND REMANDED.

Judges CALABRIA and INMAN concur.

Report per Rule 30(e).