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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-695

Filed: 21 March 2017

Madison County, Nos. 13 CRS 050637; 13 CRS 050638

STATE OF NORTH CAROLINA

v.

SAMMY LEWIS HENSLEY

Appeal by defendant from judgments entered 4 December 2015 by Judge Robert G. Horne in Madison County Superior Court. Heard in the Court of Appeals 25 January 2017.

Attorney General Joshua H. Stein, by Special Deputy Attorney General M. A. Kelly Chambers, for the State.

Michael E. Casterline for defendant-appellant.

McCULLOUGH, Judge.

On 4 December 2015, a jury found Sammy Lewis Hensley (“defendant”), guilty of three counts of engaging in a sexual act with a person of the age of 14 or 15 years at the time of the offense and three counts of engaging in vaginal intercourse with a person of the age of 14 or 15 at the time of the offense. Defendant was sentenced as a prior record level IV offender to three consecutive terms of 365 to 498 months. On

appeal, defendant argues that the trial court erred by sentencing him as a prior record level IV. For the reasons stated herein, we vacate the sentence of the trial court and remand for a new sentencing hearing.

I. Background

On 12 November 2013, defendant was indicted in case number 13 CRS 050637 for three counts of engaging in a sexual act with a person of the age of 14 years at the time of the offense. Defendant was also indicted in case number 13 CRS 050638 for three counts of engaging in vaginal intercourse with a person of the age of 14 years at the time of the offense. The State later moved to amend the indictments and change the victim's age to "14 or 15" years old without objection from the defense. The two cases, 13 CRS 050637 and 050638, were consolidated for trial. Defendant's first trial ended in a mistrial.

Defendant's second trial began during the 30 November 2015 criminal session of Madison County Superior Court, the Honorable R. Gregory Horne presiding. On 4 December 2015, a jury found defendant guilty on all counts.

After the verdicts were read and jurors dismissed, but prior to sentencing in 13 CRS 050637-38, the trial court judge addressed a charge against defendant in case number 13 CRS 050557. In 13 CRS 050557 defendant was charged with failure to register as a sex offender. Defendant pled guilty to failing to register as a sex offender. The trial court found that defendant had ten prior record points; nine points

for prior convictions and one point for being on probation when the offenses were committed. Defendant stipulated that he was a prior record level IV and the trial court sentenced him as such. Defendant was sentenced to 25 to 39 months in 13 CRS 050557, to run concurrently with sentencing imposed in 13 CRS 050637-38. Thereafter, the trial court sentenced defendant to three consecutive terms of 365 to 498 months in 13 CRS 050637-38.

Defendant appeals.

II. Discussion

Defendant's sole argument on appeal is that the trial court erred in sentencing him as a prior record level IV because it failed to comply with the notice requirements of N.C. Gen. Stat. § 15A-1340.16.

N.C. Gen. Stat. § 15A-1340.14(b)(7) allows the trial court to assign one prior record level point "[i]f the offense was committed while the offender was on supervised or unsupervised probation[.]" N.C. Gen. Stat. § 15A-1340.14(b)(7) (2015) (hereinafter referred to as the "probation point"). However, N.C. Gen. Stat. § 15A-1340.16(a6) provides that:

The State must provide a defendant with written notice of its intent to prove the existence of . . . a prior record level point under G.S. 15A-1340.14(b)(7) at least 30 days before trial or the entry of a guilty or no contest plea. A defendant may waive the right to receive such notice.

N.C. Gen. Stat. § 15A-1340.16(a6) (2015).

Defendant argues that the present case is controlled by our ruling in *State v. Snelling*, 231 N.C. App. 676, 752 S.E.2d 739 (2014), and we agree. *In the Matter of Appeal from Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989) (“Where a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court.”).

In *Snelling*, the parties stipulated that the defendant had six prior record level points, one of them being a probation point, and that defendant was a prior record level III. *Snelling*, 231 N.C. App. at 681, 752 S.E.2d at 744. Despite the defendant’s stipulation before the trial court to the number of prior record level points and prior record level, our Court held that

The statute [N.C. Gen. Stat. § 15A-1340.16(a6)] is clear that unless defendant waives the right to such notice, the State must provide defendant with advanced written notice of its intent to establish . . . a probation point pursuant to N.C. Gen. Stat. 15A-1340.14(b)(7). . . .

Here the trial court never determined whether the statutory requirements of N.C. Gen. Stat. § 15A-1340.16(a6) were met. Additionally, there is no evidence in the record to show that the State provided sufficient notice of its intent to prove the probation point. Moreover, the record does not indicate that defendant waived his right to receive such notice. Thus, the trial court erred by including the probation point in its sentencing of defendant as a [prior record level] III. This error was prejudicial because the probation point raised defendant's [prior record level] from a [prior record level] II to a [prior record level] III.

Id. at 682, 752 S.E.2d at 744.

Similarly, in defendant's case, there is no indication in the record that the trial court made a determination that the statutory requirements of N.C. Gen. Stat. § 15A-1340.16(a6) were met. There is nothing in the record to demonstrate that defendant received written notice of the State's intent to prove the probation point or that he waived his right to receive such notice. Under *Snelling*, defendant's stipulations do not serve as a waiver of his right to notice pursuant to N.C. Gen. Stat. § 15A-1340.16(a6). Therefore, the trial court erred by including the probation point in its sentencing of defendant as a prior record level IV. This error was prejudicial because it raised defendant's prior record level from a III to IV. Accordingly, we vacate defendant's sentence and remand to the trial court for a new sentencing hearing.

III. Conclusion

The trial court committed prejudicial error by including the probation point in sentencing defendant as a prior record level IV offender without determining whether the statutory requirements pursuant to N.C. Gen. Stat. § 15A-1340.16(a6) were met. As such, we vacate defendant's sentence and remand to the trial court for resentencing in accordance with this opinion.

VACATED AND REMANDED.

Judges CALABRIA and INMAN concur.

Report per Rule 30(e).