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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-1224

Filed: 20 June 2017

Forsyth County, No. 14 CRS 742559

STATE OF NORTH CAROLINA

v.

DEMETRIC SHONTEL MCCRAY, Defendant.

Appeal by defendant from judgment entered 21 July 2016 by Judge Susan E. Bray in Forsyth County Superior Court. Heard in the Court of Appeals 30 May 2017.

Attorney General Joshua H. Stein, by Associate Attorney General Cara Byrne, for the State.

Mary McCullers Reece for defendant-appellant.

ELMORE, Judge.

On 18 December 2014, defendant was charged with misdemeanor larceny. He was found guilty of attempted misdemeanor larceny in district court on 21 August 2015. Defendant appealed to superior court, and a jury found him guilty of attempted misdemeanor larceny on 21 July 2016. At sentencing, the trial court determined that defendant had a Prior Conviction Level III with five or more prior convictions. The

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court sentenced defendant to a term of sixty days of imprisonment, suspended, and placed defendant on supervised probation for twelve months. Defendant appeals.

On appeal, defendant solely argues that his sentence must be vacated because the State failed to prove his prior conviction level. Pursuant to N.C. Gen. Stat. § 15A-1340.21(c), prior convictions may be proved by any of the following methods for misdemeanor sentencing purposes:

- (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 Department of Public Safety, 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-1340.21(c) (2015). The State bears the burden of proving the existence of the prior conviction by a preponderance of the evidence. *Id.*

Here, the State submitted a prior record level worksheet to the trial court, which showed that defendant had at least five prior convictions and was therefore a Level III offender for misdemeanor sentencing purposes. However, it is well established that “[t]he State does not satisfy its burden of proving defendant’s prior record level merely by submitting a prior record level worksheet to the trial court.” *State v. Jeffery*, 167 N.C. App. 575, 579, 605 S.E.2d 672, 675 (2004) (citations omitted). The State must provide more than its “ ‘unverified assertion that a defendant was

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convicted of the prior crimes listed on a prior record level worksheet.’ ” *Id.* (quoting *State v. Goodman*, 149 N.C. App. 57, 72, 560 S.E.2d 196, 205 (2002), *rev’d per curiam in part on other grounds*, 357 N.C. 43, 577 S.E.2d 619 (2003)).

In this case, neither defendant nor his counsel signed the stipulation section of the prior record level worksheet. Nonetheless, our Supreme Court has held: “While a stipulation need not follow any particular form, its terms must be definite and certain in order to afford a basis for judicial decision, and it is essential that they be assented to by the parties or those representing them. Silence, under some circumstances, may be deemed assent” *State v. Alexander*, 359 N.C. 824, 828, 616 S.E.2d 914, 917 (2005) (citations omitted) (internal quotation marks omitted). At sentencing, the parties engaged in the following colloquy regarding the determination of defendant’s prior conviction level:

THE COURT: Are you ready for sentencing? Do you have a record level worksheet?

[PROSECUTOR]: Yes, Your Honor. If I may approach.

THE COURT: You may. This will be a Class 2, is that correct, on the attempt?

[DEFENSE COUNSEL]: Yes, Your honor. Your Honor, may I have one moment?

THE COURT: You may.

[PROSECUTOR]: May I approach?

THE COURT: Yes. Is there any disagreement that Mr.

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McCray would be what's called record level III for misdemeanor sentencing?

[DEFENSE COUNSEL]: No, Your Honor.

THE COURT: All right. What do you want to tell me on behalf of your client?

After this exchange, defense counsel immediately began describing mitigating factors to the court.

Defendant argues that his prior conviction level is unsupported because the State offered no proof of his convictions and he did not stipulate to them. The State contends, however, that counsel's failure to lodge an objection can be construed as a stipulation. We agree with the State and find that this case is controlled by *State v. Wade*, 181 N.C. App. 295, 639 S.E.2d 82 (2007). At sentencing, the trial court in *Wade* asked the State to confirm that the defendant had a Prior Record Level II. *Id.* at 298, 639 S.E.2d at 85. The State answered in the affirmative. *Id.* Instead of lodging an objection, defense counsel immediately raised mitigating factors to the trial court. *Id.* at 298, 639 S.E.2d at 86. We held that, under the circumstances, defense counsel's silence constituted a stipulation to be defendant's prior convictions. *Id.* at 299, 639 S.E.2d at 86. We explained:

Because a sentencing worksheet was the only proof submitted to the trial court, we look to the dialogue between counsel and the trial court to determine whether defendant stipulated to the prior convictions which raised his prior record level to II. In the instant case, defendant had an opportunity to object and instead of doing so, began

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describing mitigating factors to the trial court. At no time did defendant object to any of the convictions on the worksheet. We hold that, under the circumstances, this constituted stipulation to defendant's prior convictions.

Id. at 298–99, 639 S.E.2d at 86 (citations omitted); *see also State v. Eubanks*, 151 N.C. App. 499, 505–06, 565 S.E.2d 738, 742–43 (2002) (concluding that the defense counsel's statement that he had no objection to prior record level worksheet "may reasonably be construed as a stipulation by defendant that he had been convicted of the charges listed on the worksheet").

While *Wade* and *Eubanks* involved prior conviction stipulations in felony cases, we see no meaningful distinction between felony sentencing and misdemeanor sentencing in this regard. Like the defendants in *Wade* and *Eubanks*, defendant raised no objection when the trial court reviewed his prior record level worksheet and determined that he had a Prior Conviction Level III. We therefore conclude that defendant's actions constitute a stipulation to his prior convictions for purposes of N.C. Gen. Stat. § 15A-1340.21(c).

NO ERROR.

Judges DIETZ and BERGER concur.

Report per Rule 30(e).