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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-48

Filed: 19 September 2017

Wake County, No. 14 CRS 206568; 1819

STATE OF NORTH CAROLINA

v.

KIM SYDNOR, Defendant.

Appeal by Defendant from judgment entered 23 May 2016 by Judge Paul C. Ridgeway in Wake County Superior Court. Originally heard in the Court of Appeals 16 December 2015, with opinion issued 15 March 2016 remanding the case for resentencing. On 22 March 2016, the State filed a motion requesting this Court to reconsider its opinion filed 15 March 2016. On 29 March 2016, this Court denied the State's motion for reconsideration. After remand and resentencing, Defendant appeals. Heard in the Court of Appeals 24 August 2017.

*Attorney General Joshua H. Stein, by Special Deputy Attorney General Kathryn J. Thomas, for the State.*

*Ward, Smith & Norris, P.A., by Kirby H. Smith, III, for Defendant-Appellant.*

HUNTER, JR., Robert N., Judge.

On 19 November 2014, a jury convicted Kim Sydnor ("Defendant") of assault on a female. Defendant also pled guilty to habitual misdemeanor assault and

attaining the status of an habitual felon. The trial court sentenced Defendant to 88 to 118 months imprisonment and ordered Defendant to pay \$5,000.00 in restitution. Defendant appealed. In an opinion issued 15 March 2016, this Court concluded the trial court erred in calculating Defendant's prior record level. This Court therefore vacated Defendant's sentence and remanded the case for resentencing. This Court also concluded the victim's testimony was too vague to support the award of restitution, and remanded for a new hearing on restitution. Because the trial court at resentencing used assault inflicting serious bodily injury to only establish habitual felon status, and used possession of a firearm by a felon to calculate prior record level, we conclude the trial court did not violate the law of the case doctrine or our mandate in *Sydnor I*.

### **I. Procedural History**

On 24 June 2014, a Wake County Grand Jury returned a four-count indictment against Defendant. Counts one and three charged Defendant with the principal misdemeanor offenses of assault on a female and simple assault. Counts two and four charged Defendant with habitual misdemeanor assault. Each count of habitual misdemeanor assault alleged Defendant had previously been convicted of two assault convictions in the past 15 years: (1) assault on a female on 14 August 2017; and (2) assault inflicting serious bodily injury on 30 May 2007. In a separate indictment, the grand jury indicted Defendant for attaining the status of an habitual felon based on

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three prior felony convictions: (1) sale of counterfeit controlled substance on 10 August 2000; (2) possession of cocaine on 14 March 2003; and (3) assault inflicting serious bodily injury on 30 May 2007.

On 19 November 2014, a jury found Defendant guilty of assault on a female, but not guilty of simple assault. Defendant thereafter pled guilty to one count of habitual misdemeanor assault and to having habitual felon status. At the sentencing phase, the trial court calculated thirteen prior record points, finding Defendant a prior record level IV. The prior convictions used to determine the number of points for Defendant's sentencing level are as follows:

1. Two points for possession of marijuana with intent to distribute in Halifax County, Virginia (Class I) on 18 June 1985;
2. Two points for possession of cocaine in Halifax County, Virginia (Class I) on 18 April 1997;
3. One point for one count misdemeanor possession of drug paraphernalia (Class 1) in Wake County, North Carolina on 20 January 1998;
4. Two points for possession of cocaine (Class I) in Wake County, North Carolina on 10 August 2000;
5. Two points for possession of cocaine (Class I) in Wake County, North Carolina on 14 March 2003;
6. Four points for possession of firearm by felon (Class G) in Wake County, North Carolina on 30 May 2007.

The trial court then calculated a total of 13 points for a prior record level of IV.

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The trial court sentenced Defendant to 88 to 118 months imprisonment. The trial court also ordered Defendant to pay \$5,000.00 in restitution. Defendant appealed.

On appeal, this Court concluded the trial court erred in calculating Defendant's prior record level. *State v. Sydnor*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 782 S.E.2d 910, 914 (2016) ("*Sydnor I*").

This Court reasoned:

In Section I of the sentencing worksheet, the court assigned four points for a single "Prior Felony Class E or F or G Conviction." The only Class E, F, or G felony conviction listed in Section V of the worksheet was defendant's 30 May 2007 conviction for "Assault Inflicting Serious Bodily Injury." Because that same offense was used to support the habitual misdemeanor assault conviction and establish defendant's status as an habitual felon, it could not also be used to determine defendant's prior record level at sentencing . . . Had the conviction been properly excluded, defendant would have been sentenced at a prior record level III instead of IV.

*Id.* at \_\_\_, 782 S.E.2d at 914. This Court therefore vacated and remanded defendant's sentence. *Id.* at \_\_\_, 782 S.E.2d at 915. This Court also concluded the testimony supporting the award of restitution was too vague, and remanded that matter for a new hearing on restitution. *Id.* at \_\_\_, 782 S.E.2d at 915.

On 22 March 2016, the State filed a motion for reconsideration with this Court. Here, the State noted the final line of the worksheet actually listed two felonies: (1) a Class F assault inflicting serious bodily injury; and (2) a Class G possession of firearm

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by a felon. Therefore, the State asserted this Court incorrectly found the only Class E, F, or G felony conviction listed in Section V of the worksheet was Defendant's 30 May 2007 conviction for assault inflicting serious bodily injury. The State contended:

While the "Assault Inflicting Serious Bodily Injury" conviction was used to form one of the predicate felonies in the "Habitual Felon" indictment . . . and as an element of the "Habitual Misdemeanor Assault" charge . . . it was not used in calculating points on the prior record worksheet . . . . The State excluded "Assault Inflicting Serious Bodily Injury" from the calculations on the prior record worksheet. The State included "Possession of a Firearm by a Felon" as the Class G felony which is worth 4 points making the total number of points 13 (with the addition of 4 prior Felony Class H or I convictions (8 points) and 1 prior Class A1 or 1 Misdemeanor Conviction (1 point)).

The State further asserted the record shows the trial court did not "impermissibly count any felony for habitual felon, habitual misdemeanor assault, and prior record purposes." Therefore, the State contended "there is no need to vacate the judgment and remand for resentencing."

In an order entered 29 March 2016, this Court denied the State's motion. The State did not file a petition for discretionary review with the North Carolina Supreme Court to review this Court's decision in this case.

On 23 May 2016, this case came on for resentencing. Here, the State argued this Court erred in its decision finding Defendant to be a prior record level III offender for sentencing purposes. The State argued, as it did in its motion for reconsideration, Defendant was a prior record IV for the purpose of sentencing. The State also

submitted additional restitution evidence, but did not take a specific position on the amount of restitution.

Defendant remained silent on the issue of prior record level and asked the trial court to decline to award restitution based on insufficient causation shown between the events and the evidence as to hospital treatment.

The trial court entered an order vacating Defendant's original sentence, based upon this Court's 15 March 2016 opinion. The trial court then reviewed Defendant's record and determined Defendant had 13 prior record level points and was therefore a record level IV for resentencing. The trial court sentenced Defendant to the same 88 to 118 months imprisonment Defendant received at the original sentencing hearing on 19 November 2014. The trial court also found there was insufficient evidence to award restitution. Defendant gave notice of appeal in open court.

## **II. Standard of Review**

When a Defendant assigns error to the trial court's sentence, the standard of review is "whether [the] sentence is supported by evidence introduced at the trial and sentencing hearing." *State v. Deese*, 127 N.C. App. 536, 540, 491 S.E.2d 682, 685 (1997) (quoting N.C. Gen. Stat. § 15A-1444(a1)).

"[T]his Court's interpretation of its own mandate is properly considered an issue of law reviewable *de novo*." *State v. Watkins*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 783 S.E.2d 279, 282 (2016).

### III. Analysis

Defendant contends the trial court violated the law of the case doctrine when it found Defendant a prior record level IV for resentencing purposes, when this Court mandated Defendant was a prior record III. Our State Supreme Court defines the law of the case doctrine as follows:

[A]s a general rule when an appellate court passes on a question and remands the cause for further proceedings, the questions there settled become the law of the case, both in subsequent proceedings in the trial court and on subsequent appeal, provided the same facts and the same questions which were determined in the previous appeal are involved in the second appeal.

However, the doctrine of the law of the case contemplates only such points as are actually presented and necessarily involved in determining the case. The doctrine does not apply to what is said by the reviewing court, or by the writing justice, on points arising outside of the case and not embodied in the determination made by the Court.

*Freedman v. Payne*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 800 S.E.2d 686, 690 (2017) (quoting *Hayes v. Wilmington*, 243 N.C. 525, 536, 91 S.E.2d 673, 681-82 (1956)). A final ruling by an appellate court, even if the ruling is erroneous, becomes the law of the case. *Prior v. Pruett*, 143 N.C. App. 612, 618, 550 S.E.2d 166, 170 (2001).

Here, Defendant contends this Court's ruling in *Sydnor I* mandated the trial court to find Defendant a prior level III upon resentencing. Defendant's understanding of this Court's mandate in *Sydnor I* is misplaced.

In *Sydnor I*, this Court ruled Defendant's prior conviction for felony assault

inflicting serious bodily injury could be used both as a predicate to establish habitual felon status and to enhance a subsequent charge for misdemeanor assault on a female to habitual misdemeanor assault. *Id.* at \_\_\_, 782 S.E.2d at 914. Additionally, this Court reiterated the rule requiring “[a] prior conviction used to establish habitual felon status . . . may not also be used to determine a defendant’s prior record level at sentencing.” *Id.* at \_\_\_, 782 at 913. Therefore, this Court determined because the trial court used assault inflicting serious bodily injury to support the habitual misdemeanor assault conviction and to establish Defendant’s habitual felon status, it erroneously used it to determine Defendant’s prior record sentencing level. *Id.* at \_\_\_, 782 at 914. This Court reasoned:

In Section I of the sentencing worksheet, the court assigned four points for a single “Prior Felony Class E or F or G Conviction.” The only Class E, F, or G felony conviction listed in Section V of the worksheet was defendant’s 30 May 2007 conviction for “Assault Inflicting Serious Bodily Injury.” Because the same offense was used to support the habitual misdemeanor assault conviction and establish defendant’s status as an habitual felon, it could not also be used to determine defendant’s prior record level at sentencing . . . . Had the conviction been properly excluded, defendant would have been sentenced at a prior record level III instead of IV.

*Id.* at \_\_\_, 782 S.E.2d at 914. Therefore, in *Sydnor I*, this Court explicitly required Defendant’s prior offense of assault inflicting serious bodily injury to not be used to determine Defendant’s record level if that offense was also used to support the convictions for habitual misdemeanor assault and habitual felon status. *Id.* at \_\_\_,

782 S.E.2d at 915. Based on this reasoning, this Court vacated Defendant's sentence and remanded for resentencing without further specific instruction. *Id.* at \_\_\_, 782 S.E.2d at 915.

In the context of resentencing remands, this Court has followed the rationale of the Sixth Circuit:

If a remand is general, the district court can resentence the defendant *de novo*, which means the district court may redo the entire sentencing process including considering new evidence and issues. When the remand is not general, the district court's resentencing authority is limited to the issue or issues remanded.

*State v. Watkins*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 783 S.E.2d 279, 283 (2016) (quoting *United States v. O'Dell*, 320 F.3d 674, 679 (6<sup>th</sup> Cir. 2003)) (citations, quotation marks, and brackets omitted). In interpreting resentencing remands:

The key is to consider the specific language used in the context of the entire opinion or order. However, in the absence of an explicit limitation, the remand order is presumptively a general one.

*Id.* at \_\_\_, 783 S.E.2d at 283 (quoting *United States v. Campbell*, 168 F.3d 263, 267-68 (6<sup>th</sup> Cir. 1999) (citation omitted). This *de novo* sentencing default rule is in accord with North Carolina precedent. *See e.g.*, *State v. Paul*, 231 N.C. App. 448, 449, 752 S.E.2d 252, 253 (2013) ("Should this Court find a sentencing error and remand a case to the trial court for resentencing, that hearing shall generally be conducted *de novo*.")) (citation omitted).

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At resentencing, the trial court carefully reviewed the prior record worksheet to make sure it correctly calculated Defendant's prior record level:

TRIAL COURT: So you have one Class G felony, which is four points and that is the firearm – possession of firearm by a felon; is that correct?

[THE STATE]: Yes, sir.

TRIAL COURT: And that was used – what purpose was that felony used?

[THE STATE]: Just firearm by felon.

TRIAL COURT: All right. Then on that same day, assault inflicting serious bodily injury.

[THE STATE]: Yes, sir.

TRIAL COURT: And that was used for both – both the habitual misdemeanor assault and habitual felon status?

[THE STATE]: Yes, sir. And that's why you see the HMA and HF next to those lines to denote that.

TRIAL COURT: All right. And then we have four class I felonies, which are possession of marijuana with intent to sell and distribute, 1985; possession of cocaine, 1997; possession of cocaine in File Number 98 CRS 55707, and possession of cocaine, one count was used with habitual felon indictment and one count was used for points.

[THE STATE]: Yes, sir.

TRIAL COURT: And that was on March 14<sup>th</sup>, 2003?

[THE STATE]: Yes, sir.

TRIAL COURT: And then we have Class A misdemeanor,

which is two counts of possession of – well, I guess the resisting an officer. I'm, not familiar which – which one of those. I see.

[THE STATE]: It's the paraphernalia, the resisting is a class 2.

TRIAL COURT: All right. So one – assessed one point for the misdemeanor.

[THE STATE]: One class one.

TRIAL COURT: All right. So none of those six offenses were either used for either habitual felon or habitual misdemeanor assault?

[THE STATE]: That's correct.

TRIAL COURT: And that comes up with 13 prior record points, which makes this defendant a prior record level 4.

Here, the evidence showed the prior felony conviction used to establish a Class G felony was possession of firearm by a felon, not assault inflicting serious bodily injury. This Class G felony, possession of firearm by a felon, contributed four points to Defendant's prior record level. When added to Defendant's other prior record level points, Defendant's points totaled 13 for a record level IV. At the hearing, Defendant remained silent on this issue.

Because the trial court did not use Defendant's felony conviction for assault inflicting serious bodily injury to determine Defendant's record level, we conclude the trial court did not violate this Court's mandate in *Sydnor I*.

### **III. Conclusion**

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Under our *de novo* review of *Sydnor I*, we conclude this Court held the trial court erred when it counted assault inflicting serious bodily injury in its calculation of Defendant's prior record level. This Court based its conclusion in *Sydnor I* on the rule prohibiting a prior conviction to be used for establishing both a habitual felon status and prior record level for sentencing. Because the trial court at resentencing used assault inflicting serious bodily injury to only establish habitual felon status, and used possession of a firearm by a felon to calculate prior record level, we conclude the trial court did not violate the law of the case doctrine or our mandate in *Sydnor I*.

NO ERROR.

Judges DILLON and ARROWOOD concur.

Report per Rule 30(e).