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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-1271

Filed: 19 June 2018

Cherokee County, Nos. 15 CRS 50801, 50817-21, 50823-24; 16 CRS 226; 17 CRS 445, 1000

STATE OF NORTH CAROLINA

v.

DAVID SHANE BROWN

Appeal by defendant by writ of certiorari from judgments entered 18 April 2017 by Judge William H. Coward in Cherokee County Superior Court. Heard in the Court of Appeals 18 June 2018.

Attorney General Joshua H. Stein, by Assistant Attorney General Yvonne B. Ricci, for the State.

Meghan Adelle Jones, for defendant-appellant.

CALABRIA, Judge.

Defendant appeals by writ of certiorari from judgments entered by the trial court upon his guilty plea. We affirm the judgments in part but remand in part for resentencing regarding the period of supervised probation imposed by the court in file number 17 CRS 445.

I. Factual and Procedural Background

On 18 April 2017, defendant pled guilty to the Class H felonies of obtaining property by false pretenses, breaking or entering, and possession of stolen property; the Class I felony of possession of burglary tools; and seven misdemeanor offenses. The trial court consolidated the offenses into three judgments corresponding to defendant's three Class H felonies and sentenced him as a prior record level ("PRL") III to three consecutive prison terms of 10 to 21 months each. The court suspended the third of the consecutive sentences and ordered defendant to serve 48 months of supervised probation upon his release from incarceration. Defendant filed a *pro se* notice of appeal from the judgments on 15 May 2017, thirteen days after the deadline for giving notice of appeal under N.C.R. App. P. 4(a)(2) had expired.

II. Untimely Appeal

The State filed a motion to dismiss defendant's appeal based on the untimeliness – as well as other formal defects – of his notice of appeal. *See State v. McCoy*, 171 N.C. App. 636, 638, 615 S.E.2d 319, 320 (stating that "compliance with the requirements of Rule 4(a)(2) is jurisdictional and cannot simply be ignored by this Court"), *appeal dismissed*, 360 N.C. 73, 622 S.E.2d 626 (2005). Acknowledging that he filed his notice more than fourteen days after entry of judgment in violation of Rule 4(a)(2), defendant has filed a petition for writ of certiorari as an alternative basis for this Court to review the trial court's judgments. *See* N.C.R. App. P. 21(a)(1)

(allowing review by writ of certiorari "when the right to prosecute an appeal has been lost by failure to take timely action").

"Where a defendant fails to adequately provide notice of appeal, his appeal is subject to dismissal. However, we may still address the merits of a defective appeal pursuant to Rule 21 of the North Carolina Rules of Appellate Procedure where the defendant files a petition for writ of *certiorari*." *State v. McGill*, __ N.C. App. ___, __, 791 S.E.2d 702, 705 (2016), *disc. review denied*, 369 N.C. 534, 797 S.E.2d 12 (2017) . Although defendant's untimely appeal is subject to dismissal, in our discretion, we allow defendant's petition for writ of certiorari.

III. Prior Record Level

Defendant first claims the trial court erred in calculating his PRL by assigning him three PRL points based on the misdemeanor convictions listed on his sentencing worksheet. The discussion of defendant's PRL at sentencing consisted of the following exchange:

> THE COURT: . . . By stipulation of the parties he does have seven points, making him a prior record Level III; is that correct?
>
> [PROSECUTOR]: That's correct, Your Honor.

The prosecutor also presented a PRL worksheet that included the parties' stipulation to the prior convictions and corresponding offense classifications listed in Section V of the worksheet.

A. Standard of Review

Under *State v. Mumford*, 364 N.C. 394, 699 S.E.2d 911 (2010) and N.C. Gen. Stat. § 15A-1446(d)(18) (2017), "an argument that '[t]he sentence imposed was unauthorized at the time imposed, exceeded the maximum authorized by law, was illegally imposed, or is otherwise invalid as a matter of law' may be reviewed on appeal even without a specific objection before the trial court." *Mumford*, 364 N.C. at 403, 699 S.E.2d at 917 (quoting N.C. Gen. Stat. § 15A-1446(d)(18)). In *State v. Bohler*, this Court held "[i]t is not necessary that an objection be lodged at the sentencing hearing in order for a claim that the record evidence does not support the trial court's determination of a defendant's prior record level to be preserved for appellate review." *State v. Bohler*, 198 N.C. App. 631, 633, 681 S.E.2d 801, 804 (2009), *disc. review denied*, __ N.C. __, 691 S.E.2d 414 (2010); *but cf. State v. Meadows*, __ N.C. App. __, __, 806 S.E.2d 682, 694 (2017) (reaffirming the general applicability of N.C.R. App. P. 10(a)(1) to sentencing hearings). We assume, *arguendo*, that defendant's argument is preserved for our review despite his stipulation to the information on the sentencing worksheet.

"The determination of an offender's prior record level is a conclusion of law that is subject to *de novo* review on appeal." *Bohler*, 198 N.C. App. at 633, 681 S.E.2d at 804. However, a defendant may stipulate to the existence of his prior convictions for the purpose of establishing his PRL. N.C. Gen. Stat. § 15A-1340.14(f)(1) (2017); *State*

v. Scott, 180 N.C. App. 462, 465-66, 637 S.E.2d 292, 294 (2006), *disc. review denied*, 361 N.C. 367, 644 S.E.2d 560 (2007). Moreover, "[a] stipulation as to the classification of a prior conviction is permissible so long as it does not attempt to resolve a question of law. In the great majority of cases . . ., the stipulation will be valid because it does not concern an issue requiring legal analysis." *State v. Arrington*, __ N.C. App. __, __, 803 S.E.2d 845, 850, *temp. stay allowed*, __ N.C. __, 802 S.E.2d 734 (2017); *see also State v. Wingate*, 213 N.C. App. 419, 420, 713 S.E.2d 188, 190 (2011) ("[I]n this case, the class of felony for which defendant was previously convicted was a question of fact, to which defendant could stipulate, and was not a question of law requiring resolution by the trial court").

B. Analysis

According to Section I of defendant's PRL worksheet, the trial court assigned four PRL points for his 2009 conviction for the Class F felony of trafficking in heroin, *see* N.C. Gen. Stat. § 90-95(h)(4)(a) (2017), and three PRL points for three Class 1 or A1 misdemeanor convictions. In addition to the felony drug trafficking conviction, Section V of the worksheet lists the following additional convictions designated as Class "M":

(1) Larceny, conviction date 18 February 2004;
(2) Purchase Game License While Suspended, conviction date 30 June 2004;
(3) Forgery, conviction date 21 May 2007; and
(4) Drive MV No Insp., conviction date 27 June 2003.

Section III of the worksheet – styled "STIPULATION" – includes the signatures of the prosecutor and defendant's counsel "stipulat[ing] to the information set out in Sections I and V of this form . . . ." *See generally State v. Alexander*, 359 N.C. 824, 830, 616 S.E.2d 914, 918 (2005) (holding "defense counsel's statement to the trial court constituted a stipulation of defendant's prior record level").

Defendant now contends his stipulated convictions do not support a PRL III as a matter of law, because the trial court assigned him "three prior record level points for convictions that were not identified as Class A1 or Class 1 misdemeanors, but rather only as Class 'M[.]' " Observing "there is no 'Class M' misdemeanor offense contemplated" in North Carolina law, defendant argues that "[s]imply indicating 'M' (even perhaps for 'misdemeanor')" on the PRL worksheet does not suffice to assign a PRL point to a prior conviction, "because not all misdemeanor convictions qualify [for PRL points] under felony sentencing." Absent the three erroneously-assigned PRL points, defendant contends he "should have been sentenced as [PRL] II."

We conclude that defendant's stipulation to the information on the sentencing worksheet supports the trial court's determination of a PRL III. In *Arrington*, we held that "a stipulation regarding the offense class of a prior conviction is permissible when the stipulation resolves a *factual* ambiguity regarding the specific prior offense for which the defendant had actually been convicted." *Arrington*, __ N.C. App. at __, 803 S.E.2d at 850; *accord Wingate*, 213 N.C. App. at 421, 713 S.E.2d at 190. A fair

reading of defendant's PRL worksheet compels the conclusion that the designation "Class 'M' " in Section V denotes a misdemeanor offense, as opposed to a felony.[1]

For purposes of defendant's appeal, it suffices to observe that the misdemeanor forms of larceny and forgery are Class 1 exclusively. *See* N.C. Gen. Stat. §§ 14-72(a), 14-122.1(c) (2017). Although defendant points to the various *felony* forms of these offenses, the existence of these *more serious* crimes – which would yield *more* PRL points than the misdemeanor forms – is immaterial to the issue before us. Moreover, any ambiguity as to whether defendant's prior convictions were misdemeanors or felonies is resolved by his stipulation. *See Arrington*, __ N.C. App. at __, 803 S.E.2d at 850. Defendant's stipulation to prior convictions for *misdemeanor* larceny and *misdemeanor* forgery supports the trial court's assignment of two PRL points, one for each of these Class 1 misdemeanors. N.C. Gen. Stat. § 15A-1340.14(b)(5); *see also Wingate*, 213 N.C. App. at 421, 713 S.E.2d at 190.

By adding the two PRL points for defendant's prior convictions of misdemeanor larceny and misdemeanor forgery to the four PRL points resulting from his stipulated conviction of Class F felony heroin trafficking, the total of six PRL points is sufficient to support defendant's PRL III as found by the trial court. N.C. Gen. Stat. § 15A–

[1] We note N.C. Gen. Stat. § 14-3 (2017) establishes a general rule that "any misdemeanor for which no specific classification and no specific punishment is prescribed by statute shall be punishable as a Class 1 misdemeanor." Under § 14-3, if the listed convictions were in fact unclassified misdemeanors, each such "nontraffic" offense would result in 1 PRL point as a Class 1 misdemeanor. *See* N.C. Gen. Stat. § 15A-1340.14(b)(5).

1340.14(c)(3). Therefore, any error with regard to the seventh PRL point assigned by the court is harmless as a matter of law. *State v. Blount*, 209 N.C. App. 340, 347, 703 S.E.2d 921, 926 (2011) ("As the correct calculation of defendant's prior record points does not affect the determination of his [PRL], the error is harmless"); *State v. Smith*, 139 N.C. App. 209, 220, 533 S.E.2d 518, 524 (holding that error in calculating points is harmless if it does not affect the ultimate PRL determination), *appeal dismissed*, 353 N.C. 277, 546 S.E.2d 391 (2000). Defendant's argument is overruled.

IV. Period of Probation

Defendant next claims the trial court erred in case number 17 CRS 445 by imposing a 48-month period of supervised probation—in excess of the 36-month presumptive maximum term in N.C. Gen. Stat. § 15A-1343.2(d)(4) (2017)—without making the "specific findings" required by N.C. Gen. Stat. § 15A-1343.2(d). Citing our decision in *State v. Branch*, 194 N.C. App. 173, 669 S.E.2d 18 (2008), the State concedes the error.

We agree that defendant's period of probation must be reduced, since it is not supported by the written findings and exceeds the presumptive maximum mandated by N.C. Gen. Stat. § 15A-1343.2(d). Accordingly, we remand defendant's case to the trial court for resentencing or for entry of findings of fact for an explanation of the necessity of a longer probationary period. *See Branch*, 194 N.C. App. at 179, 669 S.E.2d at 22.

AFFIRMED IN PART; REMANDED FOR RESENTENCING IN PART.

Judges DAVIS and BERGER concur.

Report per Rule 30(e).