IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-931

Filed: 17 September 2019

Forsyth County, Nos. 15 CRS 5802, 52023

STATE OF NORTH CAROLINA,

v.

TASHA DENISE CODY

Appeal by defendant from judgments entered 11 July 2016 by Judge David L. Hall in Forsyth County Superior Court. Heard in the Court of Appeals 7 August 2019.

Attorney General Joshua H. Stein, by Assistant Attorney General Heather H. Freeman, for the State.

The Epstein Law Firm, PLLC, by Drew Nelson, for defendant-appellant.

BRYANT, Judge.

Where the trial court failed to inquire as to the factual basis for adding an additional point to defendant's prior record level, we vacate defendant's sentence and remand the matter for resentencing. Where defendant failed to preserve for our review her motion to dismiss made at the close of all evidence, we dismiss the issue.

On 21 September 2015, a Forsyth County grand jury indicted defendant Tasha Denise Cody on charges of resisting a public officer, possession with intent to sell and deliver cocaine, and possession of marijuana paraphernalia. Defendant was subsequently indicted for attaining habitual felon status. This matter came on for trial on 4 July 2016 in Forsyth County Superior Court, the Honorable David L. Hall, Judge presiding.

The evidence presented at trial tended to show that on 6 March 2015, law enforcement officers with the Winston-Salem Police Department executed a search warrant for drugs at a residence located at 1414 East Trade Street. A SWAT team made entry into the residence and secured the rooms and occupants of the residence. While SWAT was sweeping the residence for occupants, one law enforcement officer was assigned to watch defendant and her eight year old son as they sat on a bed. As it was cold and the child appeared to be shivering, the officer asked defendant if she had any clothes he could get for the child. Defendant pointed to a pile of clothes. While the law enforcement officer got clothes for the child and helped him to get dressed, he noted that defendant had turned away and picked up something.

> A. At that point, I immediately told her to stop what she was doing, "What are you doing? Stop moving your hands. Show me your hands."

Defendant threw a pill bottle at the officer, saying, "this is what you're looking for." However, the officer also observed that defendant held "multiple rock-like, off white

substances, which [he] believed to be crack cocaine." Defendant dropped the rocks on the floor and immediately tried to crush them, even while struggling with the officer attempting to restrain her. Once defendant was secured, officers searched the room.

> Q. Going back to the defendant's room, was there any -- based on your training and experience, was there any drug paraphernalia that you'd use to smoke or snort crack cocaine?
>
> A. No, there was not.

While officers searched the residence, defendant said, "I've got God on my side, I know I sell weed and dope and all that but he ain't worried about all that." Officers found $218.00 in cash under the mattress and a cell phone in the bedroom. Further testimony revealed that the marijuana paraphernalia discovered in the bedroom: "it was a marijuana bong." "The bong . . . [i]t was actually on the bottom shelf, kind of like an entertainment center type shelf." An officer testified that based on his training and experience, bongs were paraphernalia used to smoke marijuana.

At the close of the State's evidence and again after notifying the trial court defendant would not present evidence, defendant moved to dismiss the charges. The trial court denied both of defendant's motions and submitted the charged offenses to the jury. The jury returned guilty verdicts against defendant on all three substantive charges: possession with intent to sell and deliver cocaine, resisting a public officer, and possession of marijuana paraphernalia. Following the guilty verdicts, defendant pled guilty to attaining habitual felon status. In accordance with the jury verdict and

defendant's plea, the trial court entered a consolidated judgment on the offense of possession with intent to sell and deliver cocaine, possession of marijuana paraphernalia, and attaining habitual felon status and sentenced defendant as a prior record level IV to a term of 80 to 108 months. In a separate judgment entered on the offense of resisting a public officer, the trial court sentenced defendant to an active term of 30 days, to be served consecutively. Defendant appeals.

On appeal, defendant contends that the trial court erred by (I) sentencing defendant as a prior record level IV and (II) by failing to dismiss the charge of possession of marijuana paraphernalia at the close of the evidence.

I

Defendant first argues that the trial court erred by sentencing her with a Level IV prior record level. More specifically, defendant contends that the trial court erred by determining she had achieved a Level IV prior record level, having accumulated ten prior record points. We agree

Preservation

> [A] defendant need not have voiced a contemporaneous objection to preserve her nonconstitutional sentencing issues for appellate review.
>
> [A] [d]efendant's sentencing issues are also preserved by statute. In N.C.G.S. § 15A-1446(d) (2017), the General Assembly enumerated a list of issues it deems appealable without preservation in the trial court. One such issue is

> 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." *Id.* § 15A-1446(d)(18). Although this Court has held several subdivisions of subsection 15A-1446(d) to be unconstitutional encroachments on the rulemaking authority of the Court, subdivision (18) is not one of them.

State v. Meadows, ___ N.C. ___, ___, 821 S.E.2d 402, 406 (2018).

Standard of Review

"[W]hen a defendant assigns error to the sentence imposed by the trial court our standard of review is whether [the] sentence is supported by evidence introduced at the trial and sentencing hearing." *State v. Allen*, ___ N.C. App. ___, ___, 790 S.E.2d 588, 591 (2016) (citations omitted).

Analysis

Pursuant to our General Statutes, section 15A-1340.14 ("Prior record level for felony sentencing"), "[i]f the offense was committed while the offender was on supervised or unsupervised probation, parole, or post-release supervision, or while the offender was serving a sentence of imprisonment, or while the offender was on escape from a correctional institution while serving a sentence of imprisonment, 1 point." N.C. Gen. Stat. § 15A-1340.14(b)(7) (2017).

Defendant points out that pursuant to section 15A-1022.1,

> (b) In all cases in which a defendant admits . . . to a finding that a prior record level point should be found under G.S. 15A-1340.14(b)(7), the court shall comply with the

> provisions of G.S. 15A-1022(a). In addition, the court shall address the defendant personally and advise the defendant that:
>
> > (1) He or she is entitled to have a jury determine the existence of any aggravating factors or points under G.S. 15A-1340.14(b)(7); and
> >
> > (2) He or she has the right to prove the existence of any mitigating factors at a sentencing hearing before the sentencing judge.
>
> (c) Before accepting an admission to . . . a prior record level point under G.S. 15A-1340.14(b)(7), the court shall determine that there is a factual basis for the admission, and that the admission is the result of an informed choice by the defendant.

Id. § 15A-1022.1(b) and (c).

Here, defendant pled guilty to attaining habitual felon status and stipulated to her prior record level. Defendant's prior record level worksheet attributes to defendant one record level point where "the [current] offense was committed while the offender was: □ on supervised or unsupervised probation, parole, or post-release supervision; □ serving a sentence of imprisonment; or □ on escape from a correctional institution." However, as defendant argues, and the State concedes, the record fails to contain any reference to an inquiry by the trial court in satisfaction of section 15A-1022.1(b) and (c). Thus, one record level point should be stricken from the trial court's calculated total, bringing defendant's total record level points to nine.

With nine record level points, defendant is entitled to be sentenced with a Level III prior record level. Accordingly, we vacate defendant's consolidated judgment sentencing her as a prior record level IV and remand the matter for resentencing.

II

Next, defendant argues that the trial court erred by failing to dismiss the charge of possession of marijuana paraphernalia, as the State failed to provide substantial evidence demonstrating that defendant intended to use the alleged paraphernalia. We dismiss this argument.

"A general motion to dismiss requires the trial court to consider the sufficiency of the evidence on all elements of the challenged offenses, thereby preserving the arguments for appellate review." *State v. Walker*, ___ N.C. App. ___, ___, 798 S.E.2d 529, 531, *review denied*, 369 N.C. 755, 799 S.E.2d 619 (2017).

> [However,] [i]t is well established that the law does not permit parties to swap horses between courts in order to get a better mount before an appellate court. Consequently, when a defendant presents one argument in support of her motion to dismiss at trial, she may not assert an entirely different ground as the basis of the motion to dismiss before this Court.

State v. Chapman, 244 N.C. App. 699, 714, 781 S.E.2d 320, 330 (2016) (citations omitted). *See id.* at 713, 781 S.E.2d at 330 (declining to reach the merits of the defendant's argument where before the trial court, the defendant moved to dismiss the charged offense on the basis that evidence as to the element of a dangerous

weapon was insufficient but on appeal, argued there was insufficient evidence the defendant's actions were made knowingly); *see also Walker*, ___ N.C. App. at ___, 798 S.E.2d at 531–32 (dismissing the defendant's arguments on sufficiency of the evidence—specifically intent—where the defendant failed to present a general challenge to the sufficiency of the evidence before the trial court, instead arguing a specific element, attempt).

Here, before the trial court, defendant made a motion to dismiss at the close of the State's evidence and renewed that motion upon notifying the court defendant would not present evidence.

> [Defense counsel]: Yes, Your Honor. I would be making a motion to dismiss.
>
> . . . .
>
> I would be arguing that as a matter of law that the evidence doesn't support the possession with the intent to sell and deliver. I think the Court looks at packaging, money, paraphernalia and what not, Your Honor. I would be saying that in this particular case the weight is not such that it's a --necessarily an amount that you would use in commerce. We're only looking at a weight of 41 hundredths of a gram. There is some money involved from under the mattress but that is not an unusually large amount. And it's in found in an area that she does not have easy access to, so it's not like she's making change. And looking at the denominations, Your Honor, I don't think that's one that would necessarily indicate that there's been commerce in her home.
>
> I will tell you that the crack cocaine was found on her -- or near her, which would also be indicative of personal use. I would also submit that there were thing[s]

> in the home or in her bedroom with which she could ingest it, Your Honor. So I would be asking that the intent to sell and deliver – the possession with the intent to sell and deliver not go to the jury but that it go to the jury on possession.

In arguing her motion to dismiss, defendant focused the attention of the trial court on the charge of possession with intent to sell and deliver cocaine. Defendant did not address the offense of possession of marijuana paraphernalia argued before this Court. Thus, we hold this issue is not preserved for our review.

Defendant requests that should we hold the issue not preserved, we invoke Rule 2 to suspend the Rules of Appellate Procedure and address the merits of her argument. This we decline to do. *See State v. Campbell*, 369 N.C. 599, 603, 799 S.E.2d 600, 602–03 (2017) ("Rule 2 relates to the residual power of our appellate courts to consider, *in exceptional circumstances*, significant issues of importance in the public interest or to prevent injustice which appears manifest to the Court *and only in such instances*." (quoting *Steingress v. Steingress*, 350 N.C. 64, 66, 511 S.E.2d 298, 299–300 (1999))). Accordingly, we dismiss this issue.

DISMISSED IN PART; VACATED IN PART AND REMANDED.

Judges STROUD and DIETZ concur.

Report per Rule 30(e).