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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-301

Filed: 7 January 2020

Onslow County, Nos. 17CRS053747, 17CRS53749

STATE OF NORTH CAROLINA

v.

ANTHONY DEWAN MOORE, Defendant.

Appeal by Defendant from a judgment entered 31 October 2018 by Judge Charles H. Henry in Onslow County Superior Court. Heard in the Court of Appeals 3 October 2019.

*Attorney General Joshua H. Stein, by Assistant Attorney General William Walton, for the State.*

*The Epstein Law Firm PLLC, by Drew Nelson, for Defendant-Appellant.*

INMAN, Judge.

Defendant Anthony Dewan Moore appeals from a judgment entered following a jury verdict finding him guilty of two counts each of possession of marijuana, selling marijuana, and delivering marijuana. On appeal, Defendant asserts that the trial court erred in allowing the jury to convict him of both selling and delivering marijuana based on the same transactions, arresting judgment on the two delivery

convictions, and sentencing Defendant based on the remaining convictions for selling marijuana. Defendant further argues that the trial court erred in classifying his prior drug paraphernalia convictions as Class 1 misdemeanors, rather than Class 3, in calculating his prior record level at sentencing.

After careful review, we hold that Defendant has failed to demonstrate prejudicial error arising from the erroneous convictions remedied by the arrested judgments. We further hold that the trial court did not err in its classification of Defendant's prior convictions and calculation of his prior record level.

### **I. FACTUAL AND PROCEDURAL HISTORY**

The record below shows the following:

On 7 June 2017, the Jacksonville Police Department conducted a controlled buy of marijuana from Defendant through a confidential informant. Officers conducted a second controlled buy from Defendant through the same confidential informant two days later. As a result of these transactions, Defendant was indicted by grand jury on 13 March 2018 for sixteen felonies, including two counts each of selling marijuana and delivery of marijuana. The grand jury returned an ancillary indictment for habitual felon status that same day. The State later voluntarily dismissed eight of the sixteen drug charges, leaving the habitual felon indictment and two counts each of: (1) manufacturing marijuana; (2) possessing with intent to sell,

manufacture, or deliver marijuana; (3) selling marijuana; and (4) delivering marijuana.

Defendant's case came on for trial on 29 October 2018. At the conclusion of all evidence and following instruction and closing arguments, the jury found Defendant not guilty on both counts of manufacturing marijuana and guilty of the six remaining claims. After the jury returned its verdicts, the trial court arrested judgment on each of the delivery of marijuana convictions, leaving the sale convictions as the basis for proceeding on the habitual felon charge. Defendant then pled guilty to attaining habitual felon status; he also stipulated to several earlier convictions, and that he had reached prior record level 3 based on seven prior-record-level points. The court consolidated Defendant's convictions for judgment and sentenced Defendant to 75 to 102 months imprisonment. Defendant appeals.

## II. ANALYSIS

### *A. The Sale Convictions*

In his first argument, Defendant contends that the trial court erred in: (1) permitting the jury to convict him on two counts of both sale and delivery of marijuana arising from the same two transactions; (2) arresting judgment on the delivery convictions; and (3) sentencing Defendant for sale of marijuana as the more punitive felony. Although we agree with Defendant that he should not have been convicted by the jury of both sale and delivery arising out of the same transactions,

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we disagree with his assertion that he may only be sentenced for the lesser felony of delivery. The proper disposition to rectify such an error—if prejudicial—is to remand with instructions to vacate either the sale or delivery convictions and enter judgment on the other conviction in the trial court’s discretion. *State v. Fleig*, 232 N.C. App. 647, 651, 754 S.E.2d 461, 464 (2014). But, because Defendant cannot show prejudice in this case, we leave the judgment undisturbed.

In *State v. Moore*, 327 N.C. 378, 395 S.E.2d 124 (1990), our Supreme Court held that “[a] defendant may be indicted and tried under [N.C. Gen. Stat.] § 90-95(a)(1) . . . for the transfer of a controlled substance, whether it be by selling the substance, or by delivering the substance, or both[,]” where the sale and delivery charges arose out of the same transaction. 327 N.C. at 382, 395 S.E.2d at 127. But the Court also held that:

[A] defendant may not . . . be convicted under [N.C. Gen. Stat.] § 90-95(a)(1) of both the sale *and* the delivery of a controlled substance arising from a single transfer. Whether the defendant is tried for transfer by sale, by deliver, or by both, the jury in such cases should determine whether the defendant is guilty or not guilty of transferring a controlled substance to another person.

*Id.* at 382-83, 395 S.E.2d at 127. The Court applied the above rule to identify an error in the defendant’s conviction, namely that “[t]he jury . . . was improperly allowed under each indictment to convict the defendant of two offenses—sale and delivery—arising from a single transfer.” *Id.* at 383, 395 S.E.2d at 127.

The verdicts in this case arrive from the same error. Each verdict sheet listed selling marijuana and delivering marijuana as separate counts, and the jury found Defendant guilty of each separate count on the verdict sheets. The jury, therefore, impermissibly convicted Defendant of separate counts of transfer by delivery and transfer by sale arising out of the same transactions.

Defendant points to this error to argue that the sentencing portion of the statute classifying the crime of transfer by sale or delivery contains an ambiguity. Under those provisions, transfer by delivery of marijuana is punished as a Class I felony, while transfer via “sale . . . shall be punished as a Class H felon[y].” N.C. Gen. Stat. § 90-95(b)(2) (2019). Defendant contends the statute is ambiguous in light of the difference in classification because it “provides no guidance concerning how to sentence a defendant who has been convicted on separate counts of selling and delivering the same controlled substance in the same transaction.” Citing the rule of lenity, Defendant posits that his convictions for transfer should have been treated as Class I felonies for delivery rather than Class H felonies for sale, and that he was prejudiced by the entry of the more punitive sentence.

These arguments assume too much. A trial court should not in the proper course of proceedings be presented with the Defendant’s dilemma of “how to sentence a defendant who has been convicted on separate counts of selling and delivering the same controlled substance in the same transaction” because, following *Moore*, a

defendant may *only* be convicted of one offense. 327 N.C. at 382, 395 S.E.2d at 127. Section 90-95(b)(2) does not provide direction to the trial court on how to sentence a defendant when the error identified in *Moore* has been committed; instead, the statute merely delineates the appropriate sentence when a defendant has been properly convicted of transfer by either delivery *or* sale. We will not hold that a statute is ambiguous based on the commission of legal error at trial.<sup>1</sup>

The error identified in *Moore* does not require the trial judge to sentence a defendant under the less severe classification for delivery, and in this case Defendant has not been prejudiced by the trial court's decision to sentence him based on the higher classification for sale. In *Fleig*, this Court remanded a defendant's sentence when he was convicted and sentenced for both sale and delivery of marijuana based on a single transaction in violation of *Moore*. 232 N.C. App. at 651, 754 S.E.2d at 464. We further determined the defendant was prejudiced by the error because the trial court consolidated the two convictions into a single sentence, and, as in *Moore*, we were unable to discern the weight given to the two convictions in the consolidated sentence. *Id.* (citing *Moore*, 327 N.C. at 383, 395 S.E.2d at 127-28. We therefore remanded the case for resentencing and instructed the trial court "to vacate either

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<sup>1</sup> Our analysis does not change simply because Section 90-95(a)(1) creates a single crime of transfer per *Moore* and Section 90-95(b)(2) classifies the crime differently depending on whether the transfer was accomplished by sale or delivery. We see no reason why the General Assembly cannot decide to punish a particular crime more severely depending on whether certain critical facts are proven at trial, and the legislature's decision to do so does not create an ambiguity.

the 1.) sale of marijuana conviction or 2.) delivery of marijuana conviction” so the judgment would “reflect that defendant was convicted of a single count of ‘sale or delivery’ of marijuana.” *Fleig*, 232 N.C. App. at 651, 754 S.E.2d at 464. Nothing in our mandate required the trial court on remand to vacate the more severe conviction, nor does the holding in *Fleig* support a contention that a defendant is prejudiced by the trial court’s decision in its discretion to vacate the lesser of two duplicative convictions.

Although *Fleig* is binding on this Court when prejudice arises from duplicative judgments stemming from the same statutory violation, Defendant cannot show prejudice here, in part because the trial court arrested judgment on the delivery convictions and made clear that it was only considering the convictions for transfer by sale at sentencing:

THE COURT: . . . The court is going to arrest judgment in the delivery of marijuana conviction[s.]

. . . .

So, basically, we’re considering the guilty verdicts for sale of marijuana . . . .

And that is the two convictions which trigger the indictment for being a habitual felon.

. . . .

Okay. And do you understand that [pleading guilty to attaining habitual felon status] would mean that you would be sentenced as a Class D felon for—I mean, you

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would be sentenced for the punishment of a Class D felony, which carries a maximum punishment in each case of 204 months.

THE DEFENDANT: Yes, sir.

THE COURT: Do you understand that?

And that punishment is possible in those two felony convictions of sale of marijuana. Do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: Okay. Do you now personally plead guilty to those—to that charge, that admission as to the status and the exposure in the two convictions for the sale of marijuana?

THE DEFENDANT: Yes, sir.

....

THE COURT: . . . Okay. The defendant has been found guilty in 17-CRS-53749, sale of marijuana . . . and in 17-CRS-53747 of the felony of sale of marijuana. The court finds he's a Record Level 3 with 7 points.

The court adjudges the defendant to be a habitual felon, to be sentenced as a Class D felon.

The court is going to order that the counts be consolidated for one judgment[.]

Consistent with the above, the written judgment in this case discloses that Defendant was sentenced solely on two violations of N.C. Gen. Stat. § 90-95(a)(1) for transfer by sale based on the two separate transactions shown at trial. Thus, the prejudice identified in *Moore* and *Fleig* is absent here.



In identifying other potential prejudice, and following discussion of the subject at oral argument, we acknowledge that an arrest of judgment at the trial level may not in all circumstances formally extinguish a conviction as a legal matter, and that an arrested judgment may spring back to life in proper circumstances. *See, e.g., State v. Garner*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 798 S.E.2d 755, 759 (2017) (noting that an arrest of judgment based on fatal error on the face of the record results in vacatur of the improper verdict, while a judgment arrested for other reasons like double jeopardy may be reinstated if appropriate following appeal of the related charge). Assuming, *arguendo*, that the trial court’s decision to arrest the two delivery convictions in this case did not vacate Defendant’s convictions for transfer by delivery, Defendant still does not face prejudice. Our holding preserves Defendant’s consolidated judgment and sentence on the two counts of transfer by sale. Per the rationale of *Moore* and *Fleig*, it would be a prejudicial sentencing error for the trial court to revive and sentence Defendant on the convictions for transfer by delivery. *Moore*, 327 N.C. at 382, 395 S.E.2d at 127; *Fleig*, 232 N.C. App. at 651, 754 S.E.2d at 464; *cf. State v. Lynch*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 803 S.E.2d 190, 196 (2017) (Arrowood, J., concurring in part and dissenting in part) (noting that a trial court’s intention to arrest a judgment for transfer by delivery when the defendant was also convicted of transfer by sale based on the same event “appears to be consistent with the interpretation of the law as discussed in *Moore*”).

The arrested judgments also would not prejudice Defendant in any future prior record level calculation or habitual felon analysis, assuming, *arguendo*, that they would be pertinent to those questions at all.<sup>2</sup> The jury’s verdicts convicting Defendant of sale and delivery were delivered in the same week of court and, per subsection 15A-1340.14(d) of our General Statutes, only one such conviction can be used to calculate Defendant’s prior record level. N.C. Gen. Stat. § 15A-1240.14(d) (2019); *see also State v. Fair*, 205 N.C. App. 315, 318-19, 695 S.E.2d 514, 516 (2010) (holding a trial court erred in counting two felony convictions for assault on a female from the same date because “[u]nder subsection (d) only one of these could be counted toward defendant’s point total”). Further, while subsection 15A-1340.14(b)(6) instructs the trial court to add one point to a prior record level calculation “[i]f all the elements of the present offense are included in any prior offense for which the offender was convicted,” N.C. Gen. Stat. § 15A-1340.14(b)(6) (2019), that point would be added should Defendant ever be convicted for transfer of marijuana in the future based on the non-prejudicial convictions for transfer by sale, which we leave undisturbed here. Finally, as

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<sup>2</sup> We note that, under our case law, a conviction need not be reduced to a judgment to be used in the calculation of a defendant’s prior record level. *See, e.g., State v. Canellas*, 164 N.C. App. 775, 777-78, 596 S.E.2d 889, 891 (2004) (holding a prayer for judgment continued on an assault on a female conviction was a prior conviction for purposes of calculating a defendant’s prior record level, and observing that “this Court has ‘interpreted N.C. Gen. Stat. § 15A-1331(b) [defining “conviction” for sentencing purposes] to mean that formal entry of judgment is not required in order to have a conviction’ ” (quoting *State v. Hatcher*, 136 N.C. App. 524, 527, 524 S.E.2d 815, 817 (2000))). We do not resolve the question of whether a conviction on which judgment was arrested for double jeopardy concerns can be used in the calculation of a defendant’s prior record level, as it has not been argued in this appeal. Our examination of the question is limited solely to whether prejudice could possibly result in this case.

evidenced by the portions of the transcript quoted above, Defendant pled guilty to attaining habitual felon status in this case without consideration of the arrested judgments for transfer by delivery.

In sum, we hold that because: (1) Defendant was not prejudiced at sentencing; (2) the existence of the arrested judgments will not prejudice Defendant in any future prior record level calculation; and (3) Defendant has already attained habitual felon status, the error in this case was harmless.

*B. Prior Record Level*

Defendant argues that the trial court erred in calculating his prior record level by treating two prior convictions for possession of drug paraphernalia as Class 1 misdemeanors, even though Defendant stipulated to the calculation and the classification of those convictions. This issue is controlled by *State v. Arrington*, 371 N.C. 518, 819 S.E.2d 329 (2018), and *State v. Green*, \_\_\_ N.C. App. \_\_\_, 831 S.E.2d 611 (2019), and we are compelled to hold that Defendant has failed to demonstrate error in this respect.

The existence of other convictions for purposes of calculating a defendant's prior record level may be proven by stipulation. N.C. Gen. Stat. § 15A-1340.14(f)(1) (2019). When a stipulated conviction could fall into two or more possible offense classifications depending on the facts and a defendant also stipulates that the conviction fell into a particular classification, the trial court may rely on that

stipulation as to classification in calculating the defendant's prior record level. *See Arrington*, 371 N.C. at 524, 819 S.E.2d at 333 (“[W]hen a defendant stipulates to the existence of a prior second-degree murder offense in tandem with its classification as either a B1 or B2 offense, he is stipulating that the facts underlying his conviction justify that classification.”).

Here, Defendant stipulated to several prior convictions, including two misdemeanor convictions for possession of drug paraphernalia occurring prior to 2014. Defendant also stipulated that those two convictions were Class 1 misdemeanors, notwithstanding the fact that, as of 2014, possession of marijuana paraphernalia is classified as a Class 3 misdemeanor, while non-marijuana drug paraphernalia constitutes a Class 1 misdemeanor. *Compare* N.C. Gen. Stat. § 90-113.22A (2019) (possession of marijuana paraphernalia), *with* N.C. Gen. Stat. § 90-113.22 (2019) (possession of non-marijuana drug paraphernalia). Defendant requests remand of his sentence despite the above stipulations based on our holding in *State v. McNeil*, \_\_\_ N.C. App. \_\_\_, 821 S.E.2d 862 (2018), that “[w]here the State fails to prove a pre-2014 possession of paraphernalia conviction was for non-marijuana paraphernalia, a trial court errs in treating the conviction as a Class 1 misdemeanor.” \_\_\_ N.C. App. at \_\_\_, 821 SE.2d at 863.

Defendant's argument was rejected by this Court in *Green*. \_\_\_ N.C. App. at \_\_\_, 831 S.E.2d at 616. The defendant in that case stipulated to a 1994 conviction for

possession of drug paraphernalia, and that conviction was treated by the trial court as a Class 1 misdemeanor in calculating the defendant's prior record level. *Id.* at \_\_\_, 831 S.E.2d at 615. On appeal, the defendant argued that, based on *McNeil*, the trial court's treatment of the prior conviction as a Class 1 misdemeanor was error. We rejected that argument, however, because the defendant in *Green* had stipulated to the conviction's classification while the defendant in *McNeil* had not. *Id.* at \_\_\_, 831 S.E.2d at 616. We applied *Arrington* instead, and held that "just as in *Arrington*, Defendant could and did stipulate that this classification was proper." *Id.* at \_\_\_, 831 S.E.2d at 616 (citing *Arrington*, 371 N.C. at 527, 819 S.E.2d at 335). We are bound by the determination made in *Green*, *In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989), and hold that the trial court did not err in treating Defendant's prior paraphernalia convictions as Class 1 misdemeanors for prior-record-level purposes based on the stipulations in the record.

### III. CONCLUSION

Defendant has demonstrated error in his convictions for both transfer of marijuana via delivery and sale arising out of the same transactions. But, because no prejudice arose from the error, we hold the error was harmless. We further hold that Defendant has failed to demonstrate error arising from the calculation of his prior record level at sentencing.

NO PREJUDICIAL ERROR IN PART; NO ERROR IN PART.

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Judges DIETZ and ZACHARY concur.

Report per Rule 30(e).