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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-757

Filed: 21 April 2020

Wake County, Nos. 16CRS220559, 16CRS220721, 16CRS222322, 17CRS3788-93,
17CRS65-66

STATE OF NORTH CAROLINA

v.

SHAUN MAURICE JOHNSON, JR., Defendant.

Appeal by defendant from judgments entered 11 February 2019 by Judge A. Graham Shirley in Wake County Superior Court. Heard in the Court of Appeals 31 March 2020.

Attorney General Joshua H. Stein, by Assistant Attorney General Robert C. Ennis, for the State.

Unti & Smith, PLLC, by Sharon L. Smith, for defendant-appellant.

BERGER, Judge.

On February 11, 2019, Defendant pleaded guilty to twenty-three felony charges and three counts of attaining habitual felon status. The trial court accepted Defendant's plea and sentenced him to 138 to 178 months in prison. On appeal,

Defendant argues that the trial court erred when it calculated his prior record level.

We disagree.

Factual and Procedural Background

Between August and October 2017, Shaun Maurice Johnson, Jr. (“Defendant”) was indicted on twenty-three substantive felonies. Defendant was also indicted on three counts of attaining habitual felon status. In the original habitual-felon indictments, the felonies used to establish Defendant’s habitual-felon status included convictions for (1) accessory after the fact to assault with a deadly weapon with intent to kill (“AWDWIK”) on March 12, 2010; (2) breaking and entering on March 26, 2012; and (3) possession of heroin on September 10, 2013.

On September 11, 2018, the Wake County Grand Jury issued superseding indictments for the habitual felon indictments. The convictions used to establish Defendant’s habitual felon status in the superseding indictments included (1) felony larceny from the person on October 15, 2008; (2) breaking and entering on March 26, 2012; and (3) possession of heroin on September 10, 2013.

On February 11, 2019, Defendant pleaded guilty to all twenty-three felony charges and three counts of attaining habitual felon status as set forth in the superseding indictments. The trial court determined that Defendant had ten points for felony sentencing purposes, which placed Defendant at Prior Record Level IV. In

assessing the ten prior record level points, the trial court used Defendant's conviction for felony accessory after the fact for AWDWIK which was entered on March 12, 2010.

Defendant now appeals arguing that the trial court erred when it considered the judgment entered against Defendant for accessory to AWDWIK. According to Defendant, as a result, he should have been sentenced at Prior Record Level III. We disagree.

Analysis

As an initial matter, Defendant concedes that his *pro se* notice of appeal did not comply with the requirements of Rule 4 of our Appellate Rules of Procedure. Defendant filed a petition for writ of certiorari with this Court, seeking review of the trial court's determination of Defendant's prior record level.

A defendant who has pleaded guilty has a statutory right to appeal alleged errors in the trial court's determination of his prior record level. N.C. Gen. Stat. § 15A-1444(a2)(1) (2019). Under Rule 21(a)(1) of the Appellate Rules, our Court has the authority to grant a petition for certiorari review "when the right to prosecute an appeal has been lost by failure to take timely action." N.C.R. App. P. (21)(a)(1). This Court frequently allows for the issuance of a writ of certiorari where technical defects in a notice of appeal filed by a *pro se* defendant would otherwise eliminate the defendant's right to appeal and the State has not been unfairly prejudiced by the mistake. *See, e.g., State v. Springle*, 244 N.C. App. 760, 763, 781 S.E.2d 518, 521

STATE V. JOHNSON

Opinion of the Court

(2016). Here, the State has not been unfairly prejudiced by Defendant's faulty notice of appeal; therefore, in our discretion, we grant Defendant's petition to review the trial court's determination of his prior record level.

Before sentencing a criminal defendant, the trial court must calculate the defendant's prior record level. N.C. Gen. Stat. § 15A-1340.13(b) (2019). A defendant's prior record level "is determined by calculating the sum of the points assigned to each of the offender's prior convictions." N.C. Gen. Stat. § 15A-1340.14(a) (2019). However, in determining a defendant's prior record level, convictions used to establish the defendant as a habitual felon shall not be used. N.C. Gen. Stat. § 14-7.6 (2019). Where the trial court uses the same convictions used to establish a defendant as a habitual felon in determining the defendant's prior record level, the court has committed reversible error. *State v. Lee*, 150 N.C. App. 701, 704, 564 S.E.2d 597, 599 (2002).

In the instant case, Defendant's original habitual felon indictments all included the conviction for felony accessory after the fact to AWDWIK entered on March 12, 2010. However, on September 11, 2018, superseding indictments were issued, and the conviction for accessory after the fact to AWDWIK was replaced with the conviction for felony larceny from the person on October 15, 2008. On February 11, 2019, Defendant pleaded guilty to three counts of attaining habitual felon status as charged in the superseding indictments. Accordingly, the trial court was permitted

STATE V. JOHNSON

Opinion of the Court

to consider Defendant's conviction for felony accessory to AWDWIK when it calculated his prior record level because accessory AWDWIK was no longer being used to establish Defendant's habitual felon status. Accordingly, Defendant's argument is without merit.

Conclusion

For the reasons stated herein, the trial court did not err when it determined Defendant had ten prior record level points.

AFFIRMED.

Chief Judge McGEE and Judge INMAN concur.

Report per Rule 30(e).