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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-531

Filed: 19 May 2020

Iredell County, No. 18 CR 051013

STATE OF NORTH CAROLINA

v.

AHKYTRA DENISE GREEN, DEFENDANT

Appeal by Defendant from judgment entered 1 November 2018 by Judge Lawrence D. Graham in District Court, Iredell County. Heard in the Court of Appeals 3 December 2019.

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

*Appellate Defender Glenn Gerding, by Assistant Appellate Defender Katherine Jane Allen, for Defendant.*

McGEE, Chief Judge.

Ahkytra Denise Green (“Defendant”) appeals from the trial court’s 1 November 2018 judgment convicting her of felony habitual larceny pursuant to a plea agreement. Defendant contends that she was wrongly sentenced as a prior record level IV, when she should have been sentenced as a prior record level III. Defendant

STATE V GREEN

*Opinion of the Court*

acknowledges that her attempted notice of appeal from the 1 November 2018 judgment “did not comply with N.C. R. App. P. 4 because it did not identify the correct court to which the appeal is taken, nor was it filed and served upon the district attorney. Accordingly, her right to appeal pursuant to N.C. Gen. Stat. § 15A-270.1 was most likely waived.” Defendant filed a petition for writ of certiorari on 26 June 2019, requesting this Court to address the merits of her appeal despite her defective notice of appeal. We grant Defendant’s petition for writ of certiorari but determine that even if she was sentenced under the incorrect prior record level, on these facts she cannot demonstrate prejudice. We therefore find no prejudicial error.

I. Factual and Procedural Background

Defendant was charged with, inter alia, one count of felony habitual larceny for shoplifting \$319.81 worth of children’s clothing from an Old Navy department store in Mooresville on 22 February 2018. Defendant pleaded guilty to felony habitual larceny in District Court on 1 November 2018 as part of a plea agreement. As part of that agreement, the State dismissed the remaining charges pending against Defendant, and Defendant stipulated that she would “be sentenced as a [Prior Record] Level IV.” The trial court sentenced Defendant to a term of nine to twenty months, as a Prior Record Level IV, pursuant to her plea arrangement.

II. Analysis

STATE V GREEN

*Opinion of the Court*

Defendant contends that under N.C. Gen. Stat. § 14-72(b)(6) (2017), the trial court incorrectly used four of her prior convictions to both raise her sentencing status and to increase her prior record level. In North Carolina, “[l]arceny of goods of the value of more than one thousand dollars (\$1,000) is a Class H felony”; but “where the value of the property or goods is not more than one thousand dollars (\$1,000), [larceny] is a Class 1 misdemeanor.” N.C.G.S. § 14-72(a). Larceny is also a felony “without regard to the value of the property in question” where a defendant’s history shows a “habit” for larcenous conduct through past conviction for “any offense of larceny . . . at least four times.” N.C.G.S. § 14-72(b)(6). Although Defendant was charged with larceny of a total of \$329.81 worth of goods – less than \$1,000.00 – she was charged with a Class H felony pursuant to N.C. Gen. Stat. § 14-72(b)(6) because her record showed at least four prior larceny convictions. *Id.* But for consideration of her prior larceny offenses, Defendant’s crime would have been a misdemeanor. The trial court then used the same four prior larceny convictions, along with two additional convictions, to determine that Defendant was a prior record level IV for sentencing. Defendant argues that this use of her prior convictions for both purposes constituted error, and the error was prejudicial, because absent the four prior convictions that were used to elevate her charge to a felony, her prior record level would have only been a prior record level III.

Defendant was sentenced to 9 months minimum, the lowest presumptive range sentence for a Class H felony at a prior record level IV. The highest minimum sentence for a Class H felony at prior record level III is 10 months. Therefore, Defendant's minimum sentence of 9 months is within the presumptive range for a Class H felony for a prior record level III and a prior record level IV. This Court has held that a defendant cannot show prejudice resulting from application of an incorrect prior record level if the actual sentence given to the defendant falls within the presumptive range of the correct prior record level:

The State concedes the mathematical error in [the d]efendant's prior record level calculation, but argues the error was harmless. *See State v. Lindsay*, 185 N.C. App. 314, 315, 647 S.E.2d 473, 474 (2007) ("This Court applies a harmless error analysis to improper calculations of prior record level points." (citations omitted)). Our precedent compels us to agree. "[T]his Court repeatedly has held that an erroneous record level calculation does not prejudice the defendant if the trial court's sentence is within the presumptive range at the correct record level." *State v. Ballard*, \_\_ N.C. App. \_\_, \_\_, 781 S.E.2d 75, 79 (2015), *disc. review denied*, 368 N.C. 763, 782 S.E.2d 514 (2016) (citing *State v. Ledwell*, 171 N.C. App. 314, 321, 614 S.E.2d 562, 567 (2005)); *see also State v. Rexach*, 240 N.C. App. 90, 772 S.E.2d 13, 2015 WL 1201250, at \*2 (2015) (unpublished) ("An error in the calculation of a defendant's prior record level points is deemed harmless if the sentence imposed by the trial court is within the range provided for the correct prior record level.")).

*State v. Harris*, 255 N.C. App. 653, 663, 805 S.E.2d 729, 736 (2017).

STATE V GREEN

*Opinion of the Court*

Because Defendant could have been sentenced to a minimum sentence of nine months and a maximum sentence of twenty months had the trial court sentenced her at a prior record level of III, our precedent precludes this Court from affording any relief. Therefore, Defendant cannot demonstrate prejudice resulting from the alleged sentencing error.

NO PREJUDICIAL ERROR.

Judges DIETZ and ZACHARY concur.

Report per Rule 30(e).