IN THE COURT OF APPEALS OF NORTH CAROLINA

2021-NCCOA-127

No. COA20-370

Filed 6 April 2021

Cherokee County, Nos. 16 CRS 51752, 18 CRS 549

STATE OF NORTH CAROLINA,

v.

JAMES DARREN NELSON, Defendant.

Appeal by Defendant from judgment entered 14 November 2019 by Judge J. Thomas Davis in Cherokee County Superior Court. Heard in the Court of Appeals 10 March 2021.

Attorney General Joshua H. Stein, by Assistant Attorney General Erin E. McKee, for the State.

Sandra Payne Hagood for Defendant.

GRIFFIN, Judge.

¶ 1 Defendant James Darren Nelson ("Defendant") appeals from a judgment entered upon a jury conviction for charges of possession of heroin, possession of drug paraphernalia, and habitual felon status. The trial court sentenced Defendant to 44-65 months on the conviction for possession of heroin as a habitual felon. The court sentenced Defendant based on a calculation of Defendant's prior convictions, which

placed Defendant at prior record level ("PRL") V. Defendant contends that the trial court erred by sentencing him at PRL V, because a correct calculation of his prior convictions would place Defendant at PRL IV. Upon review, we agree. We therefore vacate the trial court's judgment and remand for a new sentencing hearing using the correct PRL.

I. Procedural History

¶ 2 On 5 June 2017 and 23 July 2018, Defendant was indicted on charges of possession of heroin, possession of drug paraphernalia, and habitual felon status. His case was tried on 12 and 13 November 2019 in Cherokee County Superior Court. A jury convicted Defendant of all three charges. The trial court sentenced Defendant to 44-65 months on the conviction for possession of heroin as a habitual felon, with 120 days for misdemeanor possession of drug paraphernalia to run concurrently.

¶ 3 Defendant's counsel filed written notice of appeal on 15 November 2019. As the notice of appeal failed to designate the court to which the appeal was taken, on 3 September 2020 Defendant's counsel filed a Petition for Writ of Certiorari.

II. Factual Background

¶ 4 At sentencing, Defendant stipulated to his prior record. The convictions used to establish Defendant's habitual felon status were not listed on the PRL worksheet. The initial assessment of points for Defendant's PRL was twelve (12): two points from one felony conviction and ten (10) points from misdemeanor convictions. However,

the prosecutor amended this calculation by stating that he had failed to include a second H-level felony and that Defendant should be assessed four points for felonies. Based on the revised calculation, the trial court assessed fourteen (14) total points and concluded that Defendant should be sentenced at PRL V. Defendant's counsel agreed to the sentencing level. The trial court sentenced Defendant to 44-65 months on a class E felony conviction for possession of heroin as a habitual felon, with 120 days for misdemeanor possession of drug paraphernalia to run concurrently.

III. Analysis

¶ 5 Defendant contends that the trial court erred by sentencing him as a PRL V offender. After careful review, we conclude that Defendant should have been assigned only thirteen (13) points, which would qualify him to be sentenced at PRL IV.

A. Appellate Jurisdiction

¶ 6 As a preliminary matter, we must first address appellate jurisdiction. Pursuant to Rule 4(a) of the North Carolina Rules of Appellate Procedure, a defendant may appeal from a judgment in a criminal case by either "(1) giving oral notice of appeal at trial, or (2) filing notice of appeal with the clerk of superior court and serving copies thereof upon all adverse parties within fourteen days after entry of the judgment[.]" N.C. R. App. P. 4(a). "[W]hen a defendant has not properly given

notice of appeal, this Court is without jurisdiction to hear the appeal." *State v. McCoy*, 171 N.C. App. 636, 638, 615 S.E.2d 319, 320 (2005).

¶ 7 In this case, Defendant failed to comply with Rule 4's notice requirement, thereby depriving this Court of jurisdiction to hear his appeal as of right. *Id.* Defendant's Notice of Appeal failed to identify the court to which his appeal was taken. *See* N.C. R. App. P. 4(b) (requiring written notice of appeal to "designate . . . the court to which appeal is taken"). In acknowledgement of this error, however, Defendant has filed a Petition for Writ of Certiorari requesting discretionary review of his appeal. Appellate Rule 21(a) provides that this Court may issue a writ of certiorari "to permit review of the judgments and orders of trial tribunals when the right to prosecute an appeal has been lost by failure to take timely action . . . ." N.C. R. App. P. 21(a)(1).

¶ 8 This Court has previously granted petitions for writ of certiorari where, as here, "Defendant lost [his] right to appeal through no fault of [his] own but rather due to [his] trial counsel's failure to give proper notice of appeal." *State v. Holanek*, 242 N.C. App. 633, 640, 776 S.E.2d 225, 232 (2015) (granting a criminal defendant's petition for writ of certiorari where the defendant lost her right to appeal solely because her defense counsel neglected to provide oral notice of appeal at trial). In the instant case, although Defendant's counsel failed to designate the court to which appeal was taken, Defendant intended to appeal the judgment to this Court. *See*

State v. Smith, 246 N.C. App. 170, 175, 783 S.E.2d 504, 508 (2016) ("In light of the fact [that] Defendant intended to appeal the judgment, we exercise our discretion and allow the petition for writ of certiorari [under N.C. R. App. P. 21(a)(1)]."). "We therefore dismiss [his] appeal, exercise our discretion to grant Defendant's petition for writ of certiorari, and proceed to address the merits of [his] arguments." *Holanek*, 242 N.C. App. at 640, 776 S.E.2d at 232.

B. Preservation

¶ 9 Defendant did not object to the determination of his PRL at sentencing. However, an objection is not required to preserve a sentencing error for appellate review. *State v. Canady*, 330 N.C. 398, 401-02, 410 S.E.2d 875, 878 (1991). Additionally, this issue is preserved by statute. N.C. Gen. Stat. § 15A-1446(d)(18) (2019) (allowing appeal without objection when "[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"); *see also State v. Meadows*, 371 N.C. 742, 747-48, 821 S.E.2d 402, 406 (2018) (holding that the defendant's sentencing issues were preserved by section 15A-1446(d)(18)).

C. Sentencing Error

1. Standard of Review

¶ 10 A trial court's determination of a defendant's PRL for sentencing purposes is subject to *de novo* review. *State v. Bohler*, 198 N.C. App. 631, 633, 681 S.E.2d 801,

804 (2009). "Under a *de novo* review, [this C]ourt considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *State v. Williams*, 362 N.C. 628, 632-33, 669 S.E.2d 290, 294 (2008) (citations and internal quotation marks omitted).

2. Defendant's Stipulation

¶ 11 Defendant stipulated to the PRL worksheet. The State may prove the existence of prior convictions by stipulation of the parties. *See State v. Arrington*, 371 N.C. 518, 522, 819 S.E.2d 329, 332 (2018); N.C. Gen. Stat. § 15A-1340.14(f).

¶ 12 Defendant's stipulation is effective as to the existence of the prior convictions but is not binding as to the PRL itself, which involves a question of law. *See Arrington*, 371 N.C. at 524, 819 S.E.2d at 333. ("Once a defendant makes this stipulation, the trial court then makes a legal determination by reviewing the proper classification of an offense so as to calculate the points assigned to that prior offense."); *see also State v. Prevette*, 39 N.C. App. 470, 472, 250 S.E.2d 682, 683 (1979) ("Stipulations as to questions of law are generally held invalid and ineffective, and not binding upon the courts[.]").

3. Calculation of Defendant's PRL

¶ 13 A sentencing court determines a defendant's PRL by adding the points attributed to each of the defendant's prior convictions. N.C. Gen. Stat. § 15A-1340.14(a). Here, Defendant's PRL worksheet contains a total of thirty-three (33)

prior convictions. We must first determine which convictions were eligible for inclusion in Defendant's PRL calculation.

¶ 14 Defendant was previously convicted of fifteen (15) class H felonies. Because none of the felonies used to calculate Defendant's habitual felon status appear on the PRL worksheet, all of these felonies are potentially countable. *See* N.C. Gen. Stat. § 14-7.6 ("In determining the prior record level, convictions used to establish a person's status as an habitual felon shall not be used.").

¶ 15 Defendant has three countable class H felony convictions. These countable felony convictions are possession of stolen goods (Macon 16 CRS 50691), larceny after breaking and entering (Cherokee 92 CRS 1920), and possession of a stolen motor vehicle (Cherokee 92 CRS 1005).

¶ 16 Defendant's other class H felony convictions are not countable. Defendant was convicted of twelve (12) class H felonies on 23 May 1994 in Cherokee County Superior Court; because these convictions were all made during a single calendar week in the same Superior Court, only the offense with the highest point total is counted. *See* N.C. Gen. Stat. § 15A-1340.14(d) ("[I]f an offender is convicted of more than one offense in a single superior court during one calendar week, only the conviction for the offense with the highest point total is used."). Defendant was also convicted of two class H felonies in Cherokee County Superior Court on 28 October 1992, but only one of these convictions is countable. *See id*.

¶ 17 Defendant was previously convicted of eighteen (18) misdemeanors, of which seven are countable. The countable misdemeanor convictions are possession of drug paraphernalia (Cherokee 17 CR 50848), possession of stolen goods/property (Cherokee 16 CR 51668), breaking or entering (Cherokee 15 CR 50065), misdemeanor larceny (Cherokee 14 CR 50219), misdemeanor larceny (Haywood 12 CR 52508), possession of drug paraphernalia (Cherokee 10 CR 51141) and communicating threats (Cherokee 06 CR 50480).

¶ 18 Defendant's other misdemeanor convictions are not countable as points for sentencing. First, five of these convictions fall below Class A1 or 1 misdemeanors and may not be counted. N.C. Gen. Stat. § 15A-1340.14(b)(5). Second, two of the misdemeanors are traffic-related and may not be counted. *Id.* Third, on 18 March 2014, Defendant was convicted in Cherokee County District Court of misdemeanor larceny in both 14 CR 50219 and 14 CR 50220; because both convictions occurred in a single session of district court, only one of the convictions may be counted. N.C. Gen. Stat. § 15A-1340.14(d) ("If an offender is convicted of more than one offense in a single session of district court, only one of the convictions is used."). Finally, Defendant's four misdemeanor convictions from 9 and 10 September 2015 (15 CR 50065, 14 CR 50806, 14 CR 50933, and 15 CR 50065) should together add only one point, because three of the convictions occurred in a single session of district court, *see id.*, and because 15 CR 50065 contained two separate charges (joined in a single

pleading) for which Defendant was convicted on two consecutive days. Because N.C. Gen. Stat. § 15A-1340.14 does not specifically address how joined charges which are pleaded to on separate days should be treated, the rule of lenity requires that we construe the statute so as to not increase the penalty against Defendant. *See State v. West*, 180 N.C. App. 664, 669-70, 638 S.E.2d 508, 512 (2006) (citation omitted) (relying on the rule of lenity and holding "that the assessment of a defendant's prior record level using joined convictions would be unjust and in contravention of the intent of the General Assembly"); *see also State v. Watlington*, 234 N.C. App. 601, 608-09, 759 S.E.2d 392, 396-97 (2014) (applying *West* to joined convictions that were obtained in separate court sessions). Therefore, the two convictions from 15 CR 50065 should be treated as having been reached on the same day.

¶ 19 The Defendant should have received thirteen (13) total points for sentencing. Defendant's three countable class H felonies are assessed at two points each, resulting in six points. N.C. Gen. Stat. § 15A-1340.14(b)(4). Defendant's seven countable misdemeanor convictions are assessed at one point each, resulting in seven points. N.C. Gen. Stat. § 15A-1340.14(b)(5). This leaves Defendant with thirteen (13) points total, which places him at PRL IV. N.C. Gen. Stat. § 15A-1340.14(c)(4).

4. Trial Court's Calculation Errors

¶ 20 The trial court counted only two class H felonies, rather than three. The trial court counted ten (10) misdemeanors, rather than seven. These calculations yielded

an incorrect total of fourteen (14) points, which placed Defendant at PRL V. *See* N.C. Gen. Stat. § 15A-1340.14(c)(5).

¶ 21 The Defendant should have received only thirteen (13) total points, placing him at PRL IV. *See* N.C. Gen. Stat. § 15A-1340.14(c)(4). Because the trial court's miscalculation of fourteen (14) total points resulted in a higher sentence than that which is allowed for Defendant's correct record level, the error was not harmless. *See State v. Rollins*, 221 N.C. App. 572, 582, 729 S.E.2d 73, 80 (2012) (reversing and remanding for a new sentencing hearing where correct point calculation placed defendant in a lower PRL category). Defendant was sentenced to 44-65 months on his class E felony conviction at PRL V, whereas the maximum presumptive sentence for a PRL IV class E felony conviction is 38-58 months. N.C. Gen. Stat. § 15A-1340.17(c), (e). Defendant is entitled to a new sentencing hearing applying the correct record level.

IV. Conclusion

¶ 22 For the above reasons, we vacate the judgment and remand for a new sentencing hearing using the correct PRL.

VACATED AND REMANDED.

Judges DILLON and HAMPSON concur.

Report per Rule 30(e).