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IN THE COURT OF APPEALS OF NORTH CAROLINA

2022-NCCOA-192

No. COA21-224

Filed 15 March 2022

Mecklenburg County, No. 17 CRS 030256

STATE OF NORTH CAROLINA

v.

MYLEICK SHAWN PATTERSON, Defendant.

Appeal by Defendant from judgment entered 9 November 2020 by Judge William R. Bell in Mecklenburg County Superior Court. Heard in the Court of Appeals 16 November 2021.

Attorney General Joshua H. Stein, by Assistant Attorney General Kerry M. Boehm, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Candace Washington, for defendant-appellant.

MURPHY, Judge.

¶ 1 Defendant argues, and the State concedes, that the trial court erred in determining his prior record level and sentencing him as a Prior Record Level IV offender. If properly calculated at his 9 November 2020 sentencing hearing, Defendant's prior record level totaled only eight points, making him a Prior Record

Level III offender. Consequently, we vacate Defendant's sentence and remand for a new sentencing hearing.

BACKGROUND

¶ 2 Defendant Myleick Patterson previously appealed a sentence in this matter in which we held, *inter alia*, that the trial court erred by sentencing him in the aggravated range, and we remanded for resentencing. *See State v. Patterson*, 269 N.C. App. 640, 646, 839 S.E.2d 68, 73, *disc. rev. denied*, 375 N.C. 491, 847 S.E.2d 420 (2020).

¶ 3 On remand, at the resentencing hearing, the State submitted a prior record level worksheet and records of Defendant's prior convictions to support the worksheet. Neither Defendant nor his counsel stipulated to his prior record level or calculation of points. Part I of the worksheet indicated that Defendant had ten prior record level points consisting of prior convictions for a Class G felony, two Class H/I felonies, and two Class 1 misdemeanors. The trial court sentenced Defendant to a suspended sentence of 8 to 19 months based on its conclusion that Defendant was a Prior Record Level IV offender with ten prior record level points. Defendant appeals.

ANALYSIS

¶ 4 Defendant argues that he is entitled to be resentenced as a Prior Record Level III offender because the trial court erred in determining that he had ten prior record level points, rather than eight prior record level points. The State concedes the trial

court erred in sentencing Defendant as a Prior Record Level IV offender and requests the case be remanded to the trial court for resentencing.

¶ 5 Sentencing errors are preserved for appellate review "even though no objection, exception, or motion has been made in the trial division." N.C.G.S. § 15A-1446(d)(18) (2021); *see State v. Meadows*, 371 N.C. 742, 747-48, 821 S.E.2d 402, 406 (2018) (holding N.C.G.S. § 15A-1446(d)(18) is constitutional). "The determination of an offender's prior record level is a conclusion of law that is subject to *de novo* review on appeal." *State v. Bohler*, 198 N.C. App. 631, 633, 681 S.E.2d 801, 804 (2009) (citing *State v. Fraley*, 182 N.C. App. 683, 691, 643 S.E.2d 39, 44 (2007)), *disc. rev. denied*, 691 S.E.2d 414 (N.C. 2010). In our de novo review, "'[we] consider[] the matter anew and freely substitute[] [our] own judgment for that of the lower tribunal.'" *State v. High*, 271 N.C. App. 771, 773, 845 S.E.2d 150, 152 (2020) (quoting *State v. Williams*, 362 N.C. 628, 632-33, 669 S.E.2d 290, 294 (2008) (citation and marks omitted)).

¶ 6 In accordance with N.C.G.S. § 15A-1340.14(a), a felony offender's prior record level "is determined by calculating the sum of the points assigned to each of the offender's prior convictions . . . ." N.C.G.S. § 15A-1340.14(a) (2021). Points are assigned based on the class of each of a defendant's prior felony and misdemeanor convictions, *see* N.C.G.S. § 15A-1340.14(b) (2021), and the trial court sentences a defendant as a Level I, Level II, Level III, Level IV, Level V, or Level VI offender based on the number of assigned points. *See* N.C.G.S. § 15A-1340.14(c) (2021). "In

determining the prior record level, the classification of a prior offense is the classification assigned to that offense at the time the offense for which the offender is being sentenced is committed." *Id.*

¶ 7 For felony sentencing, only "Class A1 and Class 1 nontraffic misdemeanor offense[s], impaired driving ([N.C.G.S. §] 20-138.1), impaired driving in a commercial vehicle ([N.C.G.S. §] 20-138.2), and misdemeanor death by vehicle ([N.C.G.S. §] 20-141.4(a2))" may be counted when determining a defendant's prior record level. N.C.G.S. § 15A-1340.14(b)(5) (2021). A defendant is assigned one point for each of his prior qualifying misdemeanor convictions, including Class 1 or Class A1 misdemeanor convictions. *See id.* A misdemeanor conviction classified as a Class 2 or lower offense, however, is not assigned any points. *See id.*

¶ 8 Here, the Record indicates Defendant had been convicted of five misdemeanors at the time of his resentencing. His first conviction was from 11 June 2014 for misdemeanor shoplifting/concealment of goods, which is a Class 3 misdemeanor. *See* N.C.G.S. § 14-72.1(e) (2021). His second conviction was from 4 May 2015 for misdemeanor larceny, a Class 1 misdemeanor. *See* N.C.G.S. § 14-72(a) (2021). His third conviction, another Class 1 misdemeanor, was from 22 May 2017 for possession of a handgun by a minor. *See* N.C.G.S. § 14-269.7(a) (2021). The fourth conviction was from 8 January 2018 for possession of marijuana up to one-half ounce, and the

fifth conviction was from 14 March 2018 for possession of marijuana up to one-half ounce—both Class 3 misdemeanors.[1] *See* N.C.G.S. §§ 90-95(a)(3), 90-95(d)(4) (2021).

¶ 9 Defendant's misdemeanor convictions for possession of marijuana and concealment of goods are Class 3 misdemeanors that are not assigned points. *See* N.C.G.S. § 15A-1340.14(b)(5) (2021); N.C.G.S. § 90-95(d)(4) (2021); N.C.G.S. § 14-72.1(e) (2021). Defendant's misdemeanor convictions for larceny and possession of a handgun by a minor are Class 1 misdemeanors that each count as one prior record level point. *See* N.C.G.S. § 15A-1340.14(b)(5) (2021); N.C.G.S. § 14-269.7(a) (2021); N.C.G.S. § 14-72(a) (2021). As a result, we conclude that Defendant was properly assigned two points for his misdemeanor convictions.

¶ 10 Additionally, a trial court is to assign points for each of a defendant's prior felony convictions. *See* N.C.G.S. § 15A-1340.14(b) (2021).

> If the State proves by the preponderance of the evidence that an offense classified as . . . a felony in [another] jurisdiction is substantially similar to an offense in North Carolina that is classified as a Class I felony or higher, the conviction is treated as that class of felony for assigning prior record level points.

N.C.G.S. § 15A-1340.14(e) (2021). Two points are assigned "[f]or each prior felony

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[1] The State claims that Defendant's convictions for possession of marijuana are properly classified as Class 2 misdemeanors, while Defendant maintains they are Class 3 misdemeanors. *See generally* N.C.G.S. §§ 90-95(d)(4), 90-95(e)(7) (2021). As neither Class 2 nor Class 3 misdemeanors are assigned any points for felony sentencing purposes, we need not resolve this issue and, for purposes of this opinion, treat both as Class 3 misdemeanors.

Class H or I conviction," and four points are assigned "[f]or each prior felony Class E, F, or G conviction . . . ." *See* N.C.G.S. § 15A-1340.14(b) (2021). However, "if an offender is convicted of more than one offense in a single [S]uperior [C]ourt during one calendar week, only the conviction for the offense with the highest point total is used." N.C.G.S. § 15A-1340.14(d) (2021).

¶ 11 Here, the Record reveals Defendant had been convicted of five felonies at the time of his resentencing. The first conviction was from 3 September 2015 for possession with intent to sell or deliver ("PWISD") marijuana, which is a Class I felony. *See* N.C.G.S. §§ 90-95(a)(2), 90-95(c) (2021). The second conviction, another Class I felony, was also from 3 September 2015 for PWISD marijuana. *See id.* The third and fourth convictions were also from 3 September 2015 for two counts of sale of marijuana, Class H felonies. *See* N.C.G.S. §§ 90-95(a)(1), 90-95(b)(2) (2021). Finally, the fifth conviction was from 16 January 2020 for the federal offense of possession of a firearm by a felon in violation of 18 U.S.C. § 922(g)(1).

¶ 12 As Defendant was convicted of four felonies in a single Superior Court during one calendar week, only the conviction with the highest point total is included in Defendant's prior record level calculation. N.C.G.S. § 15A-1340.14(d) (2021). That conviction is Defendant's Class H felony conviction for sale of marijuana, which counts as two prior record level points. *See* N.C.G.S. § 15A-1340.14(b)(4) (2021).

Defendant should have only been assigned a total of two points for his four North Carolina felony convictions, not four.

¶ 13 Further, the State presented a copy of a federal judgment documenting that Defendant was previously convicted of the federal offense of possession of a firearm by a felon in violation of 18 U.S.C. § 922(g)(1). We have previously held this offense is substantially similar to North Carolina's felony for possession of a firearm by a felon in violation of N.C.G.S. § 14-415.1(a). *See State v. Riley,* 253 N.C. App. 819, 827, 802 S.E.2d 494, 500 (2017) ("[T]he federal offense of being a felon in possession of a firearm is substantially similar to the North Carolina offense of possession of a firearm by a felon, a Class G felony."). Defendant does not dispute that his federal conviction for possession of a firearm by a felon was properly treated as a Class G felony and counted as four prior record level points. *See* N.C.G.S. § 15A-1340.14(b)(3) (2021). As a result, we conclude Defendant should have been assigned a total of six points for his felony convictions, not eight.

¶ 14 Defendant's prior record level calculation should have included two points for his prior misdemeanor convictions and only six points for his prior felony convictions, resulting in a total of eight prior record level points, not ten. Our statutes require felony offenders with eight prior record level points, like Defendant, to be sentenced as a Prior Record Level III offender. *See* N.C.G.S. § 15A-1340.14(c)(3) (2021) ("The prior record levels for felony sentencing are . . . Level III—[a]t least 6, but not more

than 9 points."). The trial court erroneously found Defendant had ten prior record level points and sentenced him as a Prior Record Level IV offender. *See* N.C.G.S. § 15A-1340.14(c)(4) (2021) ("The prior record levels for felony sentencing are . . . Level IV—[a]t least 10, but not more than 13 points."). This error was prejudicial to Defendant as it increased his prior record level from Level III to Level IV. *See State v. Snelling*, 231 N.C. App. 676, 680, 752 S.E.2d 739, 743 (2014) ("A sentencing error that improperly increases a defendant's [prior record level] is prejudicial."). We vacate the sentence imposed and, like in prior cases, remand to the trial court for resentencing to recalculate Defendant's prior record level and sentence him accordingly. *See, e.g.*, *State v. Fair*, 205 N.C. App. 315, 319, 695 S.E.2d 514, 516-17 (2010) ("The trial court erred in determining [the] defendant's sentencing level. This matter must be remanded for resentencing.").

CONCLUSION

¶ 15 The trial court committed prejudicial error in sentencing Defendant as a Prior Record Level IV offender. We vacate Defendant's sentence and remand to the trial court for a new sentencing hearing.

VACATED AND REMANDED FOR RESENTENCING.

Judges DILLON and GORE concur.

Report per Rule 30(e).