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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA 22-606

Filed 04 April 2023

Carteret County, Nos. 20 CRS 527, 20 CRS 50579-80, 20 CRS 50584-85, 20 CRS 50589-90

STATE OF NORTH CAROLINA

v.

DAVID ALLEN PATTERSON, Defendant.

Appeal by defendant from judgment entered 15 July 2021 by Judge Richard Kent Harrell in Carteret County Superior Court. Heard in the Court of Appeals 21 February 2023.

*Emily Holmes Davis, Assistant Appellate Defender and Glenn Gerding, Appellate Defender, for defendant-appellant.*

*Attorney General Joshua H. Stein, by Assistant Attorney General Asher P. Spiller, for the State.*

FLOOD, Judge.

David Allen Patterson (“Defendant”) appeals from the trial court’s Judgment and Sentencing on the ground that the trial court committed prejudicial error when calculating his prior record level. We hold the trial court erred in determining

Defendant's prior record level for sentencing purposes; therefore, we vacate and remand to the trial court for a new sentencing hearing.

### **I. Facts and Procedural Background**

The case before this Court stems from three separate cocaine buys occurring on 10 December 2019, 19 December 2019, and 6 January 2020. During each transaction, Defendant sold cocaine to an informant who was wearing a body camera.

At the conclusion of the three-day trial, a jury found Defendant guilty of two counts of possession with intent to sell and deliver cocaine, two counts of selling cocaine, and two counts of trafficking. On 15 July 2021, the trial court imposed three concurrent consolidated judgments: (1) 117 to 153 months' imprisonment in 20 CRS 50579; (2) 20 to 33 months' imprisonment in 20 CRS 50584; and (3) 35 to 51 months' imprisonment in 20 CRS 50589. These sentences were based on the State's sentencing worksheet, which indicated Defendant had a prior record level of 6 with 18 points. The worksheet identified twenty-three prior convictions, of which only nine could be used to calculate prior record level.

On 20 July 2021, Defendant filed a *pro se* written notice of appeal. On 11 August 2021, Defendant's indigency status was established, and the Appellate Defender was appointed to represent him on appeal. On 6 October 2022, Defendant filed a petition for writ of certiorari.

### **II. Jurisdiction**

As a preliminary matter, we consider Defendant's petition for writ of certiorari.

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Under North Carolina Rules of Appellate Procedure, this Court may review a trial court's judgment by writ of certiorari "when the right to prosecute an appeal has been lost by failure to take timely action[.]" N.C.R. App. P. 21(a)(1). To appeal a judgment or order in a criminal matter, a defendant must either give oral notice of appeal at trial, or file a notice of appeal with the clerk of superior court within fourteen days after entry of judgment. N.C.R. App. P. 4(a)(1)-(2). The notice of appeal must specify the party taking the appeal, designate the judgment from which the appeal is being taken and the court to which the appeal is taken, and must be served upon the opposing party. N.C.R. App. P. 4(b)-(c). "A writ of certiorari is intended 'as an extraordinary remedial writ to correct errors of law.'" *Button v. Level Four Orthotics & Prosthetics, Inc.* 380 N.C. 459, 2022-NCSC-19 ¶19 (quoting *State v. Simmington*, 235 N.C. 612, 613, 70 S.E.2d 842, 843-44 (1952).

Here, Defendant failed to give oral notice of appeal at trial, serve his notice of appeal on the State, or indicate the court to which his appeal was being taken. After filing his notice of appeal *pro se*, Defendant was appointed counsel who filed a petition for writ of certiorari in the event this Court determined Defendant's right to appeal was waived for failure to comply with the technical requirements of Rule 4 of the North Carolina Rules of Appellate Procedure. The State agrees with Defendant that the trial court incorrectly calculated Defendant's prior record level, bumping him from a prior record level of 5 to 6; accordingly, Defendant was given a longer sentence of imprisonment than he was due. To correct this error, this Court grants Defendant's

petition for writ of certiorari and proceeds with reviewing his appeal. *See* N.C.R. App. P. 21.

### **III. Analysis**

A trial court's prior record level determination is an issue of law preserved for review without objection at trial and reviewed *de novo* on appeal. *State v. Bohler*, 198 N.C. App. 631, 633, 681 S.E.2d 801, 804 (2009); *see also* N.C. Gen. Stat. § 15A-1446(d)(18) (2021).

The sole issue before this Court is whether the trial court erred by sentencing Defendant as having a prior record level of 6 with 18 points when the State's sentencing worksheet showed Defendant as having only a level of 5 with 17 points. We agree with Defendant and the State that Defendant was prejudiced by the miscalculation of his prior record level; he is therefore entitled to a new sentencing hearing.

Prior record levels are determined by totaling the points assigned to each eligible prior conviction proven by the State. N.C. Gen. Stat. §§ 15A-1340.14(a)-(b) (2021). Convictions used to establish habitual felon status as well as convictions for classes two and three misdemeanors are worth zero points in a prior record calculation. N.C. Gen. Stat. §§ 14-7.6, 15A-1340.14(b). If multiple convictions are entered in the same superior court during one calendar week, only the conviction with the most points is used to calculate prior record level. N.C. Gen. Stat. § 15A-1340.14(d).

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After removing the ineligible convictions from Defendant's record, the State's worksheet was left with nine eligible convictions, totaling 17 points, not 18 points. With 17 points, Defendant has a prior record level of 5, not a prior record level of 6. Had the trial court correctly calculated Defendant's prior record level, it would have sentenced Defendant to lesser time in both 20 CRS 50579 and 20 CRS 50584; therefore, the error was prejudicial to Defendant. *See State v. Snelling*, 231 N.C. App. 676, 682, 752 S.E.2d 739, 744 (2014); *see also State v. McNeill*, 158 N.C. App. 96, 99, 580 S.E.2d 27, 28 (2003). For those reasons, we vacate the sentence imposed in both 20 CRS 50579 and 20 CRS 50584 and remand to the trial court to recalculate Defendant's prior record level and resentence him accordingly. *See State v. Patterson*, 2022-NCCOA-192 ¶ 14.

**IV. Conclusion**

The trial court's miscalculation of Defendant's prior record level was a prejudicial error. We vacate the sentence and remand to the trial court for a new sentencing hearing.

VACATED AND REMANDED.

Judges ZACHARY and RIGGS concur.

Report per Rule 30(e).