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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA24-885

Filed 5 March 2025

Davidson County, No. 23CRS225646

STATE OF NORTH CAROLINA

v.

DEREK LEE WILSON, Defendant.

Appeal by defendant from judgment entered 23 May 2024 by Judge David L. Hall in Davidson County Superior Court. Heard in the Court of Appeals 12 February 2025.

*Attorney General Joshua H. Stein, by Assistant Attorney General Allison C. Hawkins, for the State.*

*Jason Christopher Yoder for defendant-appellant.*

PER CURIAM.

Defendant Derek Lee Wilson appeals from the trial court's judgment, imposing upon him a suspended sentence of 150 days' imprisonment. On appeal, Defendant argues the trial court, in calculating Defendant's prior record level, erroneously counted a prior conviction for operating a motor vessel without a valid identification number. The State concedes prejudicial error. Upon review, we conclude the trial

court miscalculated Defendant's prior record level, prejudicing him, and therefore reverse and remand the trial court's misdemeanor judgment for resentencing.

### **I. Factual and Procedural Background**

On 10 July 2023, Defendant was indicted for intimidating a witness and violating a domestic violence protective order ("DVPO"). On 23 May 2024, after a hearing before the trial court, a jury found Defendant guilty of both counts. When sentencing Defendant for intimidating a witness, a Class G felony, the trial court found that Defendant had three prior convictions—amounting to a prior record level II—and sentenced Defendant to 12 to 24 months' imprisonment. When sentencing Defendant for violating a DVPO, a Class A1 misdemeanor, the trial court found on the prior record level worksheet that Defendant had five prior convictions—amounting to a prior conviction level III—and sentenced Defendant to 150 days' imprisonment. The 150-day sentence was suspended for 18 months of supervised probation, to commence upon Defendant's release from his 12 to 24-month sentence. When calculating Defendant's prior record level, the trial court counted Defendant's prior 2009 conviction for operating a motor vessel without a valid identification number as a misdemeanor, which resulted in tallying five prior misdemeanor offenses for Defendant, resulting in his being assigned a level III prior record level. Defendant timely appealed.

### **II. Jurisdiction**

This Court has jurisdiction to review an appeal from a final judgment of a

superior court, pursuant to N.C.G.S. §§ 7A-27(b) (2023) and 15A-1444 (2023).

An argument that “[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” may be reviewed on appeal even without a specific objection before the trial court. N.C.G.S. § 15A-1446(d)(18) (2023). Thus, Defendant’s argument to this effect is preserved as a matter of law.

### **III. Analysis**

On appeal, Defendant argues the trial court erred in sentencing him to 150 days’ imprisonment for a Class A1 misdemeanor, because Defendant’s prior conviction of operating a motor vessel without a valid identification number was classified as an infraction at the time of Defendant’s sentencing hearing, and therefore should not have been counted for misdemeanor sentencing purposes. We agree.

This Court reviews de novo a trial court’s assignment of a defendant’s prior record level. *See State v. Bivins*, 292 N.C. App. 129, 131 (2024). “Under a de novo review, th[is C]ourt considers the matter anew and freely substitutes its own judgment for that of the lower tribunal.” *State v. Biber*, 365 N.C. 162, 168 (2011) (citation and internal quotation marks omitted).

In determining the prior record level for misdemeanor sentencing, a prior offense may be included in the trial court’s calculation only “if it is either a felony or a misdemeanor at the time the offense for which the offender is being sentenced is

committed.” N.C.G.S. § 15A-1340.21(b) (2023).

Here, Defendant was convicted of operating a motor vessel with an invalid identification number on 17 August 2009. At that time, the offense was a statutory misdemeanor. *See* N.C.G.S. § 75A-18 (2009). In 2013, however, the General Assembly reclassified this offense as an infraction. *See* 2013 N.C. Sess. Laws 360 § 18B.15(e); *see also* N.C.G.S. § 75A-18(a) (2023). Per North Carolina statutes, when Defendant committed the current offenses for which he was sentenced, the crime of operating a motor vessel with an invalid identification number was an infraction. *See* N.C.G.S. § 75A-18(a). Accordingly, as this prior offense constituted neither a felony nor misdemeanor as required under N.C.G.S. § 15A-1340.21(b), the trial court should not have included the conviction in its calculation of Defendant’s prior record level, and its inclusion of such was in error. We therefore reverse and remand the trial court’s misdemeanor judgment, for resentencing.

#### **IV. Conclusion**

Upon review, we conclude the trial court’s inclusion of Defendant’s prior conviction of operating a motor vessel without a valid identification number when calculating Defendant’s prior record level was in error because the prior conviction was classified as an infraction at the time of Defendant’s sentencing hearing, and therefore should not have been counted for sentencing purposes. We therefore reverse the trial court’s judgment, and remand to the trial court for resentencing.

STATE V. WILSON

*Opinion of the Court*

REVERSED and REMANDED.

Panel consisting of Chief Judge DILLON, Judge COLLINS, and Judge FLOOD.

Report per Rule 30(e).