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NO. COA01-1403

NORTH CAROLINA COURT OF APPEALS

Filed: 4 June 2002

STATE OF NORTH CAROLINA

v.

ANTON KEVIN PETERSON

Cumberland County
Nos. 98CRS073434-35,
98CRS073246,
98CRS073666,
99CRS053654

On writ of certiorari to review judgment entered 26 July 2000 by Judge B. Craig Ellis in Cumberland County Superior Court. Heard in the Court of Appeals 28 May 2002.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Kathleen U. Baldwin, for the State.

Beaver, Holt, Sternlicht, Glazier, Carlin, Britton & Courie, P.A., by Haral E. Carlin, for defendant-appellant.

HUNTER, Judge.

Anton Kevin Peterson ("defendant") was indicted on two counts of robbery with a dangerous weapon, two counts of common law robbery, two counts of larceny from the person and one count of assault with a deadly weapon inflicting serious injury. On 26 July 2000, defendant pled guilty pursuant to a plea arrangement to two counts of robbery with a dangerous weapon, two counts of larceny from the person, and one count of assault with a deadly weapon inflicting serious injury.

During the sentencing hearing, the following exchange occurred:

[State]: [A]nd I understand that we cannot use his record. I mean his record is lengthy. The state has certified copies of those records from Florida where he is served -- he served a good amount of time for armed robberies which was -- at least two of these cases were the same type, so the state would ask that you consider all of that in making your determination.

[Defense]: And, Your Honor, he has not been convicted of an armed robbery.

[State]: Yes.

After finding a factual basis for each of the pleas and accepting the pleas, the trial court addressed defendant as follows:

[Y]ou have a lengthy record. I find that you, based on it, have 30 prior record points making this prior record level six rather than four. . . .

I do find, again, that there are 30 prior record points making this prior record level six. . . .

The trial court found two aggravating factors outweighed two mitigating factors and then sentenced defendant to an aggravated term of 180 to 225 months' imprisonment. Defendant appealed, and the trial court appointed counsel on 26 July 2000 to perfect the appeal. On 2 July 2001, the trial court removed appellate counsel and appointed substitute appellate counsel. Substitute appellate counsel filed a petition for writ of certiorari, which this Court allowed on 21 August 2001. We remand for resentencing.

Defendant contends the trial court erred in its classification of his out-of-state convictions in determining his prior record level points. He further complains that the trial court failed to require the State to prove his prior convictions by a preponderance

of the evidence. Defendant also argues that the trial court erred in changing his prior record level without conducting a hearing on the issue of prior record level points. The State concedes in its brief that defendant's sentence should be vacated and that the case should be remanded for resentencing. We agree.

The record before this Court is inadequate to support the trial court's determination of defendant's prior record level points and prior record level. "The State bears the burden of proving, by a preponderance of the evidence, that a prior conviction exists and that the offender before the court is the same person as the offender named in the prior conviction." N.C. Gen. Stat. § 15A-1340.14(f) (1999). Although the State during the sentencing hearing referred to having "certified copies of those records from Florida," it does not appear from the record that the State ever offered those certified copies as evidence to the trial court. The only information as to defendant's prior convictions appears to have been the State's prior record level worksheet.

This case is remanded for a resentencing hearing, at which the State shall prove defendant's prior convictions by a preponderance of the evidence using any method permitted under N.C. Gen. Stat. § 15A-1340.14(f) or deemed reliable by the trial court. Furthermore, "[u]nless the State proves by a preponderance of the evidence that the out-of-state felony convictions are substantially similar to North Carolina offenses that are classified as Class I felonies or higher, the trial court must classify the out-of-state convictions as Class I felonies for sentencing purposes." *State v. Hanton*, 140

N.C. App. 679, 690-91, 540 S.E.2d 376, 383 (2000). The State and defendant may both offer additional evidence at the resentencing hearing. See *id.* at 690, 540 S.E.2d at 383. Based on our decision to remand for resentencing, we need not reach defendant's remaining assignment of error as to whether his trial counsel provided ineffective assistance of counsel at the original sentencing hearing.

Remanded for resentencing.

Judges MARTIN and BRYANT concur.

Report per Rule 30(e).