NO. COA02-112

NORTH CAROLINA COURT OF APPEALS

Filed: 17 September 2002

STATE OF NORTH CAROLINA

v.

MICHAEL ANTHONY DILWORTH

Guilford County
Nos. 98 CRS 23683-4
98 CRS 65055-8
98 CRS 65210
98 CRS 102191-92
99 CRS 23257

On writ of certiorari from judgment entered 23 April 1999 by Judge Catherine C. Eagles in Superior Court, Guilford County. Heard in the Court of Appeals 26 August 2002.

Attorney General Roy Cooper, by Assistant Attorney General Christopher W. Brooks, for the State.

Terry W. Alford for defendant-appellant.

McGEE, Judge.

Defendant pled guilty on 23 April 1999, pursuant to a plea agreement, to four counts of felony larceny, common law robbery, assault with a deadly weapon with intent to kill inflicting serious injury, and assault with a deadly weapon. Defendant also admitted to attaining the status of habitual felon. The terms of the plea agreement were as follows:

> The State agrees that these cases be consolidated for judgment as an habitual felon. The parties stipulate [to] the fact that the Defendant has 19 prior points and is a level VI offender.

> The Defendant shall be sentenced as a Class C felon to a minimum 168 months, maximum 211 months in the State Department of Correction[]. The Defendant admits that this plea of guilty constitutes a violation of his probation in 95CRS56885 and any other case he is currently on probation in Guilford County. The State agrees that these sentences be invoked and that the Defendant serve these sentences concurrently with the sentence imposed this date. In 98CRS12300, a High Point case, the Defendant elects to serve an active sentence and the State agrees that the sentence imposed in 98CRS12300 run concurrent with the sentence imposed this date.

In accordance with the plea agreement, the trial court consolidated defendant's convictions for judgment and sentenced defendant to a minimum term of 168 months and a maximum term of 211 months. Defendant's sentence is within the presumptive range for a Class C felony at a prior record level of VI. Defendant did not appeal his convictions.

Defendant filed a *pro se* petition for writ of certiorari on 7 August 2001 with this Court requesting a belated appeal. Our Court allowed defendant's petition for the purpose of reviewing the judgment, but limited the review "to those issues upon which defendant had a right to direct appeal under N.C. Gen. Stat. § 15A-1444(a2)(1999)."

Defendant contends the record on appeal does not support his nineteen prior record level points. We agree. N.C. Gen. Stat. § 15A-1340.14 provides that a felony offender's prior record level is to be determined "by calculating the sum of the points assigned to each of the offender's prior convictions." N.C. Gen. Stat. § 15A-1340.14(a) (2001). Subsection (b) discusses "Points":

> (b) Points. – Points are assigned as follows:
>
> (1) For each prior felony Class A conviction, 10 points.
>
> (1a) For each prior felony Class B1 conviction, 9 points.
>
> (2) For each prior felony Class B2, C, or D conviction, 6 points.
>
> (3) For each prior felony Class E, F, or G conviction, 4 points.
>
> (4) For each prior felony Class H or I conviction, 2 points.
>
> (5) For each prior misdemeanor conviction as defined in this subsection, 1 point. For purposes of this subsection, misdemeanor is defined as any Class A1 and Class 1 nontraffic misdemeanor offense[.] . . .

Subsection (c) lists the six prior record levels (I through VI) and their corresponding point totals; Level V is defined as "[a]t least 15, but not more than 18 points[,]" while Level VI is "[a]t least 19 points." N.C. Gen. Stat. § 15A-1340.14(c).

Defendant argues the trial court improperly used one of his convictions obtained in a single calendar week to establish his habitual felon status and then used another separate conviction, obtained during the same week, to determine his prior record level. Defendant concedes "this procedure is allowed pursuant to the holding in *State v. Truesdale*, 123 N.C. App. 639, 473 S.E.2d 670 (1996)." Where one panel of this Court has decided an issue, a subsequent panel is bound by that precedent unless it has been overturned by a higher court. *Heatherly v. Industrial Health Council*, 130 N.C. App. 616, 621, 504 S.E.2d 102, 106 (1998). Accordingly, defendant's argument is without merit.

Defendant also argues the trial court improperly added a prior record level point for the South Carolina misdemeanor conviction of theft of a vehicle. He asserts that because South Carolina classifies the conviction as a misdemeanor, North Carolina should treat the conviction as a Class 3 misdemeanor which does not carry prior record level points pursuant to N.C. Gen. Stat. § 15A-1340.14 (e). Section 15A-1340.14(e) provides:

> (e) Classification of Prior Convictions From Other Jurisdictions – Except as otherwise provided in this subsection, a conviction occurring in a jurisdiction other than North Carolina is classified as a . . . Class 3 misdemeanor if the jurisdiction in which the offense occurred classifies the offense as a misdemeanor. . . . If the State proves by the preponderance of the evidence that an offense classified as a misdemeanor in the other jurisdiction is substantially similar to an offense classified as a Class A1 or Class 1 misdemeanor in North Carolina, the conviction is treated as a Class A1 or Class 1 misdemeanor for assigning prior record level points.

N.C. Gen. Stat. § 15A-1340.14 (e)(2001).

The record on appeal does not show that the State presented evidence that the South Carolina misdemeanor conviction was "substantially similar to an offense classified as a Class A1 or Class 1 misdemeanor in North Carolina." Accordingly, it was error to assign the one record level point under N.C. Gen. Stat. § 15A-1340.14(b)(5). However, because each sentencing hearing in a particular case is a *de novo* proceeding, *see State v. Jones,* 314 N.C. 644, 336 S.E.2d 385 (1985), upon remand, the State may present evidence to support the classification of the South Carolina misdemeanor as a Class A1 or Class 1 misdemeanor.

Defendant argues the trial court used more than one conviction obtained during the same session of court in calculating his prior record level in violation of N.C. Gen. Stat. § 15A-1340.14(d). Defendant first argues that the misdemeanor larceny conviction in 96 CR 14675 and the felony forgery and uttering in 95 CRS 56885 both have a conviction date of 7 April 1997. N.C.G.S. § 15A-1340.14(d) provides:

> (d) Multiple Prior Convictions Obtained in One Court Week. – For purposes of determining the prior record level, if 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. If an offender is convicted of more than one offense in a single session of district court, only one of the convictions is used.

N.C. Gen. Stat. § 15A-1340.14(d)(2001).

The only document which shows the dates of both offenses as being 7 April 1997 is defendant's worksheet. Defendant has not included the judgment and commitment in 95 CRS 56885. Therefore, based on the record before this Court, we cannot say the trial court improperly included two convictions on 7 April 1997 when it calculated defendant's prior record level points. As noted above each sentencing hearing in a particular case is a *de novo* proceeding, *see Jones*, 314 N.C. 644, 336 S.E.2d 385; therefore, defendant may present evidence of the actual conviction date for 95 CRS 56885 upon remand of his case to the trial court.

Defendant also asserts, and the State agrees, two convictions obtained on 7 July 1989 were included in the calculation of defendant's prior record points. Based on the record before this

Court, the actual conviction date of the forgery and uttering conviction in 89 CRS 31044 was "7/7/89." Defendant, however, also received points for the larceny conviction obtained on the same date in 89 CRS 25227. This was error under N.C. Gen. Stat. § 15A-1340.14(d)(2001).

Defendant next argues, and the State agrees, the trial court improperly used the Class H felony of obtaining property by false pretense in 89 CRS 32463 to calculate defendant's prior record level because the State dismissed this conviction on 7 July 1989. The State also agrees with defendant that the trial court treated defendant's misdemeanor larceny in 96 CRS 43663 as a class H felony when it calculated defendant's prior record level. Based on the inclusion of these offenses alone, it appears the trial court added improper points to defendant's prior record level calculation. Accordingly, we remand this case for resentencing.

Defendant finally contends he received ineffective assistance of counsel. Because this Court allowed defendant's writ of certiorari to review only "those issues upon which defendant had a right to direct appeal under N.C. Gen. Stat. § 15A-1444(a2)(1999)[,]" we do not address defendant's argument that he received ineffective assistance of counsel based on defendant's stipulations to his prior record level. This decision does not prejudice defendant's right under N.C. Gen. Stat. § 15A-1415 (2001) to file a motion for appropriate relief in the trial court, which is the preferred forum for addressing his claim. *See State v. Milano,* 297 N.C. 485, 496, 256 S.E.2d 154, 160 (1979) (ineffective

representation claim is normally raised in post-conviction proceedings at trial level, where the defendant may be granted a hearing on the matter with the opportunity to introduce evidence), *overruled on other grounds, State v. Grier,* 307 N.C. 628, 300 S.E.2d 351 (1983).

Remanded for re-sentencing.

Judges WYNN and CAMPBELL concur.

Report per Rule 30(e).