

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

NO. COA02-578

NORTH CAROLINA COURT OF APPEALS

Filed: 5 November 2002

STATE OF NORTH CAROLINA

v.

Pasquotank County
No. 01 CRS 51440

ALVIN STEVENSON JOHNSON, JR.,
Defendant.

Appeal by defendant from judgments entered 17 January 2002 by Judge Quentin T. Sumner in Pasquotank County Superior Court. Heard in the Court of Appeals 21 October 2002.

Attorney General Roy Cooper, by Assistant Attorney General Joan M. Cunningham, for the State.

Paul T. Cleavenger, for defendant-appellant.

HUDSON, Judge.

On 1 October 2001, a grand jury in Pasquotank County indicted defendant on charges of possession with intent to sell and deliver cocaine, maintaining a dwelling for keeping and selling controlled substances, misdemeanor possession of marijuana, and possession of drug paraphernalia. At trial, the State introduced evidence tending to show the following: On 5 September 2001, officers received information from a confidential informant about drugs and individuals in room 109 of the Whistling Pines Motel. Officers determined that defendant had been renting the room since 3

September 2001.

After conducting surveillance of the room for a period of time and obtaining a search warrant, officers entered the room and observed defendant, another man and a woman. Officers seized ten rocks of crack cocaine, marijuana in a sandwich bag, clear plastic wrappers, and a clear straw with burnt ends. They also seized a pager belonging to defendant and \$250.00 in currency from the socks defendant was wearing. Defendant did not introduce any evidence. He did not move to dismiss the charges for insufficiency of the evidence either at the conclusion of the State's evidence or at the close of all the evidence.

After the trial court submitted the felony charges of possession with intent to sell and deliver cocaine and of maintaining a dwelling for keeping and selling controlled substances to the jury, the jury found defendant to be guilty as charged. The trial court calculated on the prior record level worksheet that defendant had nine prior record level points, which included a point because "all the elements of the present [possession] offense are included in any prior offense for which the [defendant] was convicted" N.C. Gen. Stat. § 15A-1340.14(b)(6) (2001). After determining on the basis of the nine prior record points that defendant was a level IV for sentencing purposes, the trial court imposed consecutive sentences of eleven to fourteen months for the possession offense and of eight to ten months for the maintaining a dwelling offense. From the trial court's judgments, defendant appeals.

In his first argument, defendant contends the trial court erred by sentencing him at prior record level IV for the offense of maintaining a dwelling for the keeping and selling of controlled substances. He argues, and the State concedes, that the trial court erred in calculating his prior record level for the maintaining a dwelling offense.

The trial court properly included an additional prior record point for the possession offense, because all of the elements of that offense were included in a prior offense. See N.C. Gen. Stat. § 15A-1340.14(b)(6) (2001). But by utilizing the same prior record level worksheet to determine the prior record level for the maintaining a dwelling offense, the trial court erroneously included that same additional prior record point. Since the additional prior record point should not have been included for the maintaining a dwelling offense, defendant would have only eight prior record level points and a corresponding prior record level of III for sentencing purposes. See N.C. Gen. Stat. § 15A-1340.14(c)(3) (2001). The sentence for the maintaining a dwelling offense is therefore vacated, and the cause is remanded to the trial court for resentencing.

In his remaining argument, defendant contends the evidence was not sufficient to support his conviction for possession with intent to sell or deliver a controlled substance. However, our review of the record reveals that defendant failed to move to dismiss the action for insufficiency of the evidence. "[I]f a defendant fails to move to dismiss the action or for judgment as in case of nonsuit

at the close of all the evidence, he may not challenge on appeal the sufficiency of the evidence to prove the crime charged." N.C. R. App. P. 10(b)(3). This argument is therefore dismissed.

No error as to judgment for possession with intent to sell and deliver cocaine.

Vacated as to judgment for maintaining a dwelling for keeping and selling controlled substances and remanded for resentencing.

Chief Judge EAGLES and Judge MCCULLOUGH concur.

Report per Rule 30(e).