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NO. COA03-148

NORTH CAROLINA COURT OF APPEALS

Filed: 16 December 2003

STATE OF NORTH CAROLINA

v. New Hanover County
Nos. 01 CRS 026605
DON EUGENE NIXON, JR. 01 CRS 026608
01 CRS 026609

Appeal by defendant from judgments entered 21 October 2002 by Judge W. Allen Cobb, Jr. in New Hanover County Superior Court. Heard in the Court of Appeals 12 November 2003.

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

Adrian M. Lapas, for defendant-appellant.

TYSON, Judge.

I. Background

Don Eugene Nixon, Jr. ("defendant") entered into a guilty plea to the offenses of trafficking in heroin by manufacturing and trafficking in heroin by possessing more than four grams but less than fourteen grams of heroin, as well as the offense of maintaining a dwelling to keep and deliver a controlled substance ("maintaining a dwelling"). Under the plea agreement, defendant was to receive two (2) consecutive terms of imprisonment of a minimum of seventy (70) months and a maximum of eighty-four (84) months for each trafficking offense. Defendant also stipulated

that he had a prior record "Level V" for the maintaining a dwelling charge and that he would receive a consecutive sentence within the aggravated range of a minimum of ten (10) months and a maximum of twelve (12) months for this offense. As part of the plea agreement, the State agreed to dismiss several other charges against defendant.

On 21 October 2002, the court entered judgment consistent with the terms of the plea. Defendant agreed to a sentence for the maintaining a dwelling conviction that contained a term of imprisonment in the aggravated range, which required the court to make a finding in aggravation. At the sentencing hearing, the court inquired whether defendant had committed this offense while on supervised probation. The State informed the court that defendant was on probation at the time of the incident. The court then asked whether "you submit that as an aggravating factor?" Defense counsel replied, "We stipulate to as [sic] an aggravating factor." The court then stated, "Let the record reflect that the defendant has stipulated he committed the offenses while he was on supervised probation and further stipulates that that is an aggravating factor." Defendant's sentence was imposed consistent with the guilty plea agreement. Defendant appeals.

II. Issue

The issue is whether the trial court erred in sentencing defendant in the aggravated range, based upon his stipulation to a nonstatutory aggravating factor, pursuant to a guilty plea.

III. Aggravating Factors in Structured Sentencing

Defendant argues the trial court erred by finding as a nonstatutory aggravating factor that defendant committed the offense of maintaining a dwelling while on supervised probation. Defendant failed to object at the hearing and has failed to properly preserve this issue for appellate review. N.C.R. App. P 10(b)(1) (2003). In *State v. Degree*, this Court emphasized the requirements for appellate review, stating that, "failure to object to an alleged error in the trial court waives the consideration of such error on appeal." 110 N.C. App. 638, 642, 430 S.E.2d 491, 494 (1993). In *Degree*, we held

defendant failed to object at the sentencing hearing to the trial court's consideration of the nonstatutory aggravating factor. Defendant has failed to give this Court notice of his failure to object at trial, and has also failed to establish that any rule or law would preserve his assignment of error without an objection at trial. He does not argue that the trial court's consideration of the aggravating factor constituted plain error. His right to appellate review on this issue is, therefore, waived.

Id. at 643, 430 S.E.2d at 494. Here, as in *Degree*, defendant waived his right to appellate review by failing to preserve his assignment of error and failing to argue plain error. Defendant stipulated to the finding that he now assigns as error.

N.C. Gen. Stat. § 15A-1340.14(b)(7) (2003) allows the court to consider whether defendant was on probation, parole, or post-release supervision when assigning a prior record level for felony sentencing. N.C. Gen. Stat. § 15A-1340.16(d) lists aggravating factors to be considered by the court. Although probationary status is not specifically enumerated in the statute, N.C. Gen.

Stat. § 15A-1340.16(d)(20) (2003) allows the court to make as a finding "any other aggravating factor reasonably related to the purposes of sentencing."

The court properly considered defendant's stipulated probationary status as an aggravating factor. Defendant's violation of probation was not used in calculating defendant's prior record level for sentencing. Defendant entered into an agreement and stipulated to his prior level based upon his previous convictions. The court did not enter a number, or assign defendant a point, on the worksheet for committing the offense "while on supervised or unsupervised probation, parole, or post-release supervision." The court properly accepted defendant's stipulation that he was on probation as an aggravating factor in sentencing. This assignment of error is dismissed.

IV. Conclusion

Defendant stipulated to his prior record level and the finding of aggravation he now assigns as error. Defendant failed to object at the hearing. The judgment is affirmed.

Affirmed.

Judges MCCULLOUGH and BRYANT concur.

Report per Rule 30(e).