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NO. COA10-1530  
NORTH CAROLINA COURT OF APPEALS

Filed: 4 October 2011

STATE OF NORTH CAROLINA,

v. Buncombe County  
No. 10CRS000196-203,  
DANIEL LEE MARTINEZ, 09CRS011996-997  
Defendant.

Appeal by defendant from judgments entered on or about 4 October 2010 by Judge Bradley B. Letts in Superior Court, Buncombe County. Heard in the Court of Appeals 17 August 2011.

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

*William B. Gibson, for defendant-appellant.*

STROUD, Judge.

On or about 5 April 2010, defendant was indicted for, *inter alia*, driving while impaired, reckless driving to endanger, driving while licensed revoked, possession of marijuana up to ½ ounce, speeding, four counts of assault with a deadly weapon inflicting serious injury, four counts of aggravated serious injury by motor vehicle. On or about 4 October 2010, defendant pled guilty to all of the charges above. The trial court

entered judgments upon defendant's convictions, and defendant appeals.

#### I. Sentencing Points

On appeal, defendant contends that the State incorrectly calculated his prior record level points, so that he was sentenced at a higher record level than he should have been. The State has filed a motion to dismiss defendant's appeal because "defendant stipulated to his prior record level points and the defendant stipulated to his prior record level." Both in its motion to dismiss and its brief the State contends that defendant waived his right to make any arguments pursuant to N.C. Gen. Stat. § 15A-1444 due to his stipulation to his prior record level points.

Defendant's plea arrangement provides, "[t]he defendant and the State stipulate the defendant has 9 points for felony sentencing." Furthermore, during defendant's plea hearing he agreed that he had "nine points for felony sentencing[.]" The trial court also stated, "The Court can see Mr. Martinez does have a prior history that has him being at Level IV for sentencing purposes. Ms. Allison, does your client stipulate to the contents of the felony worksheet showing your client has nine points for sentencing purposes?" to which defendant's

attorney responded, "Yes."

While defendant clearly stipulated to his prior record points and record level and "a stipulation by a defendant may be sufficient to prove the defendant's prior record level, the trial court's assignment of a prior record level is a conclusion of law, which we review *de novo*. Stipulations as to questions of law are generally held invalid and ineffective, and not binding upon the courts, either trial or appellate[.]" *State v. Williams*, 200 N.C. App. 767, 771, 684 S.E.2d 898, 901 (2009) (citations, quotation marks, and brackets omitted). Accordingly, the State's motion to dismiss is denied.

We now turn to the merits of defendant's appeal. Defendant received prior record points for a prior conviction for "HIT/RUN PROP. DAMAGE[.]" Defendant argues that "it was error for the trial court to allow the 'hit/run prop. damage' prior conviction listed in the sentencing worksheet to be used to establish a prior record point under N.C.G.S. 15A-1340.14(b)(5)." (Original in all caps.) Defendant contends that his case should be remanded for him to be resentenced with a correct prior record level of III. The State concedes that defendant's "stipulation is not supported":

Specifically, it appears that the offense of misdemeanor Hit and Run under N.C.G.S. § 20-

166(c) was improperly included in the defendant's prior record level calculation. N.C.G.S. § 20-166(c) (2009); N.C.G.S. § 15A-1340.14(b)(5) (2009). Here, the offense of misdemeanor Hit and Run is a traffic offense under Chapter Twenty of our General Statutes, and therefore, is excluded from use in prior record level point calculations. N.C.G.S. § 20-166(c); N.C.G.S. § 15A-1340.14(b)(5). Accordingly, the evidence before the trial court at the time of the guilty plea and sentencing hearing does not support a prior record level of Level 'IV.'

. . . .  
Based on the record before this Court, there was [sic] insufficient offenses listed on the defendant's worksheet to support the defendant's stipulation to his nine prior record level points. Because the record before this Court does not support the defendant's prior record level calculation, this case should be remanded to the trial court for a new sentencing hearing.

We agree that defendant's judgment must be remanded for a new sentencing hearing. See N.C. Gen. Stat. §§ 15A-1340.14(b)(5); 20-166(c)(1) (2009).

## II. Conclusion

For the foregoing reasons, we deny the State's motion to dismiss and remand defendant's judgment for resentencing. As we are remanding the judgment we need not address defendant's other issue on appeal.

REMANDED.

Judges HUNTER, Robert C. and HUNTER, JR., Robert N. concur.

Report per Rule 30(e).