NO. COA11-29
NORTH CAROLINA COURT OF APPEALS

Filed: 2 August 2011

STATE OF NORTH CAROLINA

v. Brunswick County
No. 09 CRS 50338

STEPHANIE ANNE PRESLEY

Appeal by Defendant from judgment entered 27 August 2010 by Judge Ola M. Lewis in Criminal Superior Court for Brunswick County. Heard in the Court of Appeals 11 May 2011.

Attorney General Roy Cooper, by Assistant Attorney General Jess D. Mekeel for the State.

Richard E. Jester, for Defendant.

HUNTER, JR., Robert N., Judge.

Stephanie Anne Presley ("Defendant") appeals from a jury verdict finding her guilty of driving while impaired. Defendant argues the trial court erred in denying Defendant's motion to dismiss, in finding one grossly aggravating factor during sentencing, and in not properly recording its findings on the AOC-CR-311 sentencing factors form. We find Defendant waived her right to appeal the denial of Defendant's motion to dismiss,

find no error as to the grossly aggravating factor, and remand for correction of a clerical error as to the third issue.

I. Factual and Procedural History

On 17 January 2009, Officer Gary James Rohauer, Jr. ("Officer Rohauer"), a patrolman with the Boiling Spring Lakes Police Department, was on patrol in Boiling Springs. At approximately 12:40 a.m., Officer Rohauer stopped Defendant at the corner of Nassau and East Boiling Springs roads. Officer Rohauer performed three roadside field sobriety tests on Defendant to determine if Defendant was impaired by alcohol. Based on the results of these tests, Officer Rohauer believed Defendant was impaired and placed her under arrest for suspected driving while impaired ("DWI").

Officer Rohauer transported Defendant to the jail where he read Defendant her chemical analysis rights which included notification that her driving privileges would be "revoked immediately for at least 30 days" if she refused to take the test or the test result was .08 or more. After notifying Defendant of her rights, Officer Rohauer performed a breathalyzer test, and judgment shows Defendant's alcohol concentration was .21. Officer Rohauer then brought Defendant before a magistrate and returned to his patrol duties around 2:00 a.m.

While patrolling, Officer Rohauer noticed a taxi cab approach from the direction of the jail, turn onto East Boiling Springs Road, and then turn onto Nassau Road. Approximately ten minutes after seeing the taxi cab, Officer Rohauer approached the area where he had left Defendant's vehicle and observed that Defendant's vehicle's tail lights were on and the vehicle was pulling out onto the road. Knowing this was the same vehicle he stopped earlier in the evening, Officer Rohauer began to follow the vehicle to determine who was driving. Officer Rohauer did not observe anything about the operation of the vehicle that concerned him.

After Officer Rohauer followed the vehicle approximately one eighth of a mile, the driver turned into a driveway and at that time Officer Rohauer observed Defendant driving the vehicle. Officer Rohauer then approached Defendant's vehicle as Defendant was turning off the engine and exiting the vehicle. He asked her "why she was driving, because her license was just recently revoked from Driving While Impaired." Defendant responded that "she needed to get her car back." Officer Rohauer placed Defendant under arrest for driving while her license was revoked ("DWLR").

While explaining to Defendant why she was under arrest, Officer Rohauer observed that she had glassy, bloodshot eyes and

slurred speech. Officer Rohauer drove Defendant to the Brunswick County Detention Center. Based on what he previously observed, "what her alcohol concentration was earlier in the evening," a "moderate odor of alcohol," and "how she was acting," Officer Rohauer charged Defendant with DWI. Officer Rohauer read Defendant the same chemical analysis rights he had read her previously. Defendant took an Intoximeter test and her BAC registered .11.

On 17 January 2009, Defendant was first charged with DWI and subsequently charged with DWLR and a second DWI. Defendant was convicted of the first DWI at a separate hearing and pleaded not guilty to the DWLR and second DWI. The State called Officer Rohauer as its single witness at trial. Defendant put on no evidence at trial and moved for dismissal of the DWLR. The trial court dismissed the DWLR for lack of notice to Defendant that her license had been revoked in violation of N.C. Gen. Stat. § 20-28. Defendant moved for dismissal of the DWI for lack of sufficient evidence. The trial court denied Defendant's motion. At the close of trial, Defendant moved for judgment notwithstanding the verdict. The trial court denied Defendant's motion. At no point during the trial did Defendant make a motion to suppress evidence related to the DWLR charge. A jury found Defendant guilty of DWI. The trial court entered judgment

and imposed a Level Two suspended sentence with an active term of seven days and twenty-four months supervised probation.

II. Jurisdiction and Standard of Review

As Defendant appeals from the final judgment of a superior court, this Court has jurisdiction to hear the appeal pursuant to N.C. Gen. Stat. § 7A-27(b) (2009).

We review the trial court's calculation of Defendant's prior record level *de novo*. *State v. Boyd*, __ N.C. App. __, __, 701 S.E.2d 255, 261 (2010). This Court, under a *de novo* standard of review, considers the matter anew and freely substitutes its own judgment for that of the trial court. *State v. Williams*, 362 N.C. 628, 632-33, 669 S.E.2d 290, 294 (2008). A defendant's motion to dismiss should be denied if "there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense." *State v. Scott*, 356 N.C. 591, 595, 573 S.E.2d 866, 868 (2002). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith,* 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980).

The Court "'must consider the evidence in the light most favorable to the State and the State is entitled to every reasonable inference to be drawn from that evidence.'" *State v.*

Saunders, 317 N.C. 308, 312, 345 S.E.2d 212, 215 (1986). Contradictions and discrepancies do not warrant dismissal of the case but are for the jury to resolve. *State v. Benson*, 331 N.C. 537, 544, 417 S.E.2d 756, 761 (1992).

III. Analysis

Defendant brings three issues to us on appeal. First, Defendant contends the trial court erred in denying her motion to dismiss because the State failed to produce sufficient evidence to convict her of the DWI charge. Secondly, Defendant contends the trial court erred during sentencing when it found one grossly aggravating factor that Defendant had been convicted of a prior DWI. As discussed hereinafter, we disagree with both of these contentions. Finally, Defendant identifies a clerical error made by the trial court when it did not properly record its findings on the AOC-CR-311 form. We agree that the trial court erred in filling out the form, and remand for correction of the clerical error.

Defendant argues that once the DWLR was dismissed, the State provided no substantial evidence for Defendant's second DWI arrest. At trial, Officer Rohauer testified that the only reason he stopped Defendant for the second time that evening was because he believed Defendant's license had just been revoked by the magistrate. Thus, Defendant argues that once the DWLR was

dismissed, Officer Rohauer could not have had reasonable suspicion to arrest Defendant for suspected DWI. Defendant contends that without a proper initial arrest, Officer Rohauer's testimony "can't come in" because any evidence obtained after the improper arrest was inadmissible. If Officer Rohauer's testimony was stricken, the State could no longer meet its burden of presenting substantial evidence of the second DWI.

A motion to suppress is a request to exclude evidence from consideration by the trier of fact. N.C. Gen. Stat. § 15A-977 (2009). N.C. Gen. Stat. § 15A-977(a) states in part that

> [a] motion to suppress evidence in superior court made before trial must be in writing and a copy of the motion must be served upon the State. The motion must state the grounds upon which it is made. The motion must be accompanied by an affidavit containing facts supporting the motion.

N.C. Gen. Stat. § 15A-977(a) (2009). A motion to suppress may also be made during trial, in writing or orally, and "may be made in the same manner as when made before trial." N.C. Gen. Stat. § 15A-977(e) (2009). "Defendant has the burden of establishing that the motion was proper in form and timely." *State v. Golden*, 96 N.C. App. 249, 253, 385 S.E.2d 346, 348 (1989) (citing *State v. Holloway*, 311 N.C. 573, 319 S.E.2d 261 (1984)).

Our Supreme Court has held that "a defendant's failure to meet the requirements of N.C. Gen. Stat. § 15A-977 waives his right to contest on appeal the admission of evidence on statutory or constitutional grounds." *Id.* at 253, 385 S.E.2d at 349 (citation omitted). Defendant's Counsel may have intended for the Motion to Dismiss to have the same effects as a motion to suppress. It does not. Defendant did not make the motion in writing and did not serve the motion upon the State in a timely manner. Because Defendant has failed to comply with these statutory requirements, she has therefore waived her right to appeal the denial of the motion on statutory or constitutional grounds.

Defendant further contends the trial court erred during sentencing when it found one grossly aggravating factor that Defendant had been convicted of a prior DWI. We disagree. "The judge may accept any evidence as to the presence or absence of previous convictions that he finds reliable but he shall give prima facie effect to convictions recorded by the Division or any other agency of the State of North Carolina." N.C. Gen. Stat. § 20-179(o) (2009). The State must prove any grossly aggravating factor beyond a reasonable doubt. *Id.*

The State filed form AOC-CR-338 on 14 July 2010, which provided notice to Defendant that the State intended to prove

Defendant was convicted of a prior DWI within seven years of sentencing for the DWI charge at issue. During sentencing, the State handed a worksheet to the trial judge to calculate Defendant's prior record level.[1] A worksheet by itself is "insufficient to satisfy the State's burden in establishing proof of prior convictions." *State v. Eubanks*, 151 N.C. App. 499, 505, 565 S.E.2d 738, 742 (2002) (citation omitted). The State may prove the existence of Defendant's prior conviction via a stipulation of the parties. N.C. Gen. Stat. § 15A-1340.14(f) (2009); *State v. Jeffery*, 167 N.C. App. 575, 580, 605 S.E.2d 672, 675 (2004) (holding a defendant can stipulate to a prior record level through a colloquy between defense counsel and the trial court). A defendant need not make an affirmative statement during sentencing to stipulate to her prior record level if defense counsel had an opportunity to object to the stipulation in question but failed to do so. *State v. Alexander*, 359 N.C. 824, 829, 616 S.E.2d 914, 918 (2005).

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[1]This record level worksheet is not included in the appellate record. The burden is on Defendant to include a copy of the worksheet in the record in order to assist the appellate court in reviewing assignments of error. *State v. Bell*, 166 N.C. App. 261, 266, 602 S.E.2d 13, 16-17 (2004) (internal quotation marks and citations omitted). This Court is bound by the record before it, and absent anything to indicate otherwise, we will assume the trial judge correctly applied the law and ruled appropriately. *Id.* This omission is not at issue on appeal.

The State handed the previously mentioned worksheet to the trial judge and the following discussion took place:

> THE COURT: Okay. Madame Clerk – Anything as to the level from the State of North Carolina?
>
> [THE PROSECUTOR]: Your Honor, we would submit that one grossly aggravating factor, which is the conviction from the first D.W.I.
>
> . . .
>
> [DEFENSE COUNSEL]: I think what Madame D.A. is saying is Level Two, one prior. I don't know that the court has any opportunity for deviation or not.
>
> THE COURT: Madame D.A., these grossly aggravating factors do not have to be [f]ound by - - -
>
> [THE PROSECUTOR]: The only one – I pulled the aggravating factor for the one's that – and the only one that it said, was that – the only one that you can consider is the prior conviction, Judge.
>
> THE COURT: All right.
>
> [THE PROSECUTOR]: And I'll find that somewhere. Okay. Mr. Stiller, this is my question. Has Ms. Presley had an evaluation?
>
> [DEFENSE COUNSEL]: Yes, ma'am. Completed all her classes for the first D.W.I. She hasn't done anything in regards to this one.
>
> THE COURT: Okay.

This conversation is similar to the conversation in *Alexander,* where this Court held that making a reference to the defendant's prior record level worksheet constituted a stipulation to the defendant's prior record level. 359 N.C. at

830, 616 S.E.2d at 918. In *Alexander*, the defense counsel referenced the worksheet when he said, "[U]p until this particular case he had no felony convictions, as you can see from his worksheet." *Id*. This court found the "reference" in *Alexander* to be a stipulation.

Here, counsel for Defendant clarified the State's discussion of Defendant's record level when he said, "I think what Madame D.A. is saying is Level Two, one prior. I don't know that the court has any opportunity for deviation or not." Thus, Defense Counsel's clarification serves the same purpose as the "reference" in *Alexander* and is a stipulation because it shows "not only that defense counsel was cognizant [of the prior charge], but also that he had no objections to it." *Id*.

Defense counsel also stated that Defendant had completed all of her classes for her first DWI. This is a clear statement recognizing that Defendant had a prior DWI conviction and is a stipulation. Defense counsel's failure to object to the worksheet, cognizance of Defendant's prior charge, and colloquy with the trial court indicates a stipulation by defense counsel to Defendant's prior DWI. Because defense counsel stipulated to Defendant's record, we conclude the trial court correctly found a grossly aggravating factor in that Defendant had been

convicted of a DWI offense within seven years of the commission of the instant DWI.

Lastly, Defendant contends the trial court made a clerical error when it did not properly record its findings on the AOC-CR-311 sentencing factors form. Specifically, the trial court failed to mark block 1(c) on the AOC-CR-311 form indicating its finding at the sentencing hearing that Defendant had one prior DWI conviction within seven years preceding the sentencing for the instant DWI. We agree that this was a clerical error.

"When, on appeal, a clerical error is discovered in the trial court's judgment or order, it is appropriate to remand the case to the trial court for correction because of the importance that the record 'speak the truth.'" *State v. Smith,* 188 N.C. App. 842, 845, 656 S.E.2d 695, 696 (2008) (citations omitted). A clerical error is "'[a]n error resulting from a minor mistake or inadvertence, [especially] in writing or copying something on the record, and not from judicial reasoning or determination.' " *State v. Lark*, 198 N.C. App. 82, 95, 678 S.E.2d 693, 702-03 (2009) *review denied*, 363 N.C. 808, 692 S.E.2d 111 (2010) (quoting *State v. Jarman,* 140 N.C. App. 198, 202, 535 S.E.2d 875, 878 (2000)). We find this to be an inadvertent error and the case should be remanded for correction of the AOC-CR-311 sentencing factors form.

IV. Conclusion

We conclude Defendant waived her right to contest on appeal the admission of evidence obtained subsequent to the unlawful stop on statutory or constitutional grounds and the trial court properly found the grossly aggravating factor of a prior DWI conviction during sentencing. However, the trial court did not properly record its findings on the AOC-CR-311 form and the case should be remanded for correction of the clerical error.

No error. Remand for clerical error.

Judges STEELMAN and STEPHENS concur.

Report per Rule 30(e).