NO. COA11-462
NORTH CAROLINA COURT OF APPEALS

Filed: 6 December 2011

STATE OF NORTH CAROLINA

v. Wake County
No. 08 CRS 8004

AMANDA BAILEY CULROSS

Appeal by Defendant from judgment entered 16 September 2010 by Judge R. Allen Baddour in Superior Court, Wake County. Heard in the Court of Appeals 11 October 2011.

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

Guy J. Loranger for Defendant.

McGEE, Judge.

Amanda Bailey Culross (Defendant) was convicted of driving while impaired and was sentenced at punishment level four on 16 September 2010. Defendant appeals.

Defendant argues that the trial court, based upon its finding of an aggravating factor, erred by sentencing her at level four because the State had failed to provide proper notice of its intent to use the aggravating factor in violation of N.C.

Gen. Stat. § 20-179(a1)(1). After review, we remand for resentencing.

I. Factual Background

The Cary Police Department cited Defendant on 9 February 2008 for driving while impaired (DWI) and for failure to reduce speed to avoid a collision. Defendant was found guilty of both offenses in Wake County District Court on 17 April 2009. The district court found no aggravating, or grossly aggravating, factors but did find two mitigating factors pursuant to N.C. Gen. Stat. § 20-179(e): (1) that Defendant had a safe driving record and (2) that after being charged with impaired driving, Defendant voluntarily submitted herself to a mental health facility for an assessment and voluntarily participated in treatment recommended by the facility. Based on this determination, the district court imposed level five punishment. Defendant appealed the judgment of the district court to superior court.

At trial, Defendant was found guilty of DWI and failure to reduce speed. During the sentencing phase, the State asked the trial court to find the aggravating factor that Defendant's driving was "especially reckless[,]" under N.C. Gen. Stat. § 20-179(d)(2). The trial court found that aggravating factor. The State also stipulated to the two mitigating factors that had

been found by the district court. After making the above findings, the trial court concluded that the one aggravating factor was substantially counterbalanced by the two mitigating factors and imposed level four punishment.

II. Preservation of Issue

As a preliminary matter, we must address the State's argument that Defendant failed to preserve this issue for appellate review because she did not object to the aggravating factor. The State argues that Defendant's appeal must be dismissed. We disagree.

We note that Defendant is challenging the sentence imposed by the trial court, based on the trial court's finding of an aggravating factor for which the State did not give Defendant notice of its intent to pursue. "Our Supreme Court has held that an error at sentencing is not considered an error at trial for the purpose of Appellate Rule 10(b)(1)." *State v. Chivers*, 180 N.C. App. 275, 278, 636 S.E.2d 590, 593 (2006); *see State v. Canady*, 330 N.C. 398, 402, 410 S.E.2d 875, 878 (1991). Accordingly, though Defendant did not preserve the issue by motion or objection, the issue is nevertheless preserved for appellate review. *See, e.g. State v. Owens*, ___ N.C. App. ___, ___, 695 S.E.2d 823, 828 (2010) ("Although [the] defendant did not preserve this issue by motion or objection, 'an error at

sentencing is not considered an error at trial for the purpose of N.C. Rule 10(b)(1) of the North Carolina Rules of Appellate Procedure.'").

In its brief, the State contends that the rule applied in *Owens*, i.e. that a Defendant need not preserve errors during sentencing by objection or motion, is based on this Court's misinterpretation of our Supreme Court's opinion in *Canady*, *supra*. The State's argument is misplaced, however. Whether a misinterpretation or not, this Court has "repeatedly applied *Canady* to reject contentions that a challenge to a sentence on appeal is precluded by a failure to object below." *State v. Freeman*, 185 N.C. App. 408, 421, 648 S.E. 2d 876, 885, (2007) (Geer, J., concurring in part, dissenting in part), *appeal dismissed*, 362 N.C. 178, 657 S.E.2d 663, *reconsideration denied*, 362 N.C. 178, 657 S.E.2d 666 (2008). "Where a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court." *In the Matter of Appeal from Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989). Further, "[w]hile we recognize that a panel of the Court of Appeals may disagree with, or even find error in, an opinion by a prior panel . . . the panel is bound by that prior decision until it is overturned

by a higher court." *State v. Jones*, 358 N.C. 473, 487, 598 S.E.2d 125, 134 (2004).

Therefore, despite Defendant's failure to object to the State's not providing proper notice of its intent to prove an aggravating factor under N.C. Gen. Stat. § 20-179(a1)(1), whether the trial court's finding of the aggravating factor at sentencing was error is an issue that is preserved without objection.

III. Standard of Review

Defendant alleges a violation of a statutory mandate, and "[a]lleged statutory errors are questions of law." *State v. Mackey*, ___ N.C. App. ___, ___, 708 S.E.2d 719, 721 (2011). A question of law is reviewed *de novo*. *State v. Fraley*, 182 N.C. App. 683, 691, 643, S.E.2d 39, 44 (2007). Under the *de novo* standard, the Court "'considers the matter anew and freely substitutes its own judgment' for that of the lower" court. *State v. Williams*, 362 N.C. 628, 632-33, 669 S.E.2d 290, 294 (2008) (citation omitted).

IV. Discussion

Pursuant to N.C. Gen. Stat. § 20-179(a1)(1), if a defendant appeals a DWI conviction to superior court and the State intends to use one or more aggravating factors under N.C. Gen. Stat. § 20-179(c) or (d), then the State is required to "provide the

defendant with notice of its intent . . . no later than 10 days prior to trial." N.C. Gen. Stat. § 20-179(a1)(1) (2009). In the present case, the record reveals that the State failed to provide notice to Defendant of its intent to pursue any aggravating factors. In its brief, the State does not argue that notice was provided, but argues instead that Defendant failed to preserve this issue for appeal. As we have discussed above, we disagree.

The State also argues that "by [Defendant's] own actions and the actions of her attorney, [Defendant] effectively stipulated to the factual existence of the aggravating factor." In its brief, the State cites *State v. Wade*, 181 N.C. App. 295, 298, 639 S.E.2d 82, 85 (2007), and argues that a "stipulation does not require an affirmative statement and silence may be deemed assent in some circumstances, particularly if the defendant had an opportunity to object and failed to do so." However, reviewing the record on appeal, we find no circumstances that suggest Defendant stipulated to the challenged aggravating factor, thereby waiving the requirement of notice. It is evident that the State failed to provide Defendant with the statutorily required notice of its intention to use an aggravating factor under N.C. Gen. Stat. § 20-179(d). We must therefore vacate Defendant's sentence and remand to the

trial court for resentencing. *See Mackey*, ___ N.C. App. at ___, 708 S.E.2d at 722 ("Accordingly, we hold that the trial court erred by sentencing defendant in the aggravated range based upon the State's failure to provide proper written notice to defendant. We therefore reverse the sentence of the trial court as to defendant's convictions of discharging a weapon into an occupied property and remand to the trial court for resentencing.").

Remanded for resentencing.

Judge HUNTER, Robert C. and CALABRIA concur.

Report per Rule 30(e).