IN THE COURT OF APPEALS OF NORTH CAROLINA

2022-NCCOA-582

No. COA21-711

Filed 16 August 2022

Burke County, Nos. 19 CRS 943, 52866

STATE OF NORTH CAROLINA

v.

PHENG LEE

Appeal by defendant from judgments and order entered 24 May 2021 by Judge Robert C. Ervin in Burke County Superior Court. Heard in the Court of Appeals 25 May 2022.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Olga E. Vysotskaya de Brito, for the State.

Linda B. Weisel for defendant.

DIETZ, Judge.

¶ 1 Defendant Pheng Lee appeals the criminal judgments and civil restitution order entered on his guilty plea to two counts of second degree murder. Lee argues that there was insufficient evidence to support the restitution award and that the trial court mistakenly found that he had one prior record level point instead of zero points—a determination that did not impact Lee's prior record level or the sentence

he received.

¶ 2 As explained below, we find no prejudicial error in the criminal judgments but vacate the civil judgment awarding restitution and remand for further proceedings on that issue.

Facts and Procedural History

¶ 3 In October 2019, Lee shot and killed two people at their home. The State charged Lee with two counts of first degree murder. Lee later pleaded guilty to two counts of second degree murder pursuant to a plea agreement.

¶ 4 Following a sentencing hearing, the trial court entered judgments indicating that Lee fell within Prior Record Level I with one prior record level point. Consistent with the plea agreement, the court sentenced Lee to two consecutive terms of 192 to 243 months in prison, at the bottom of the presumptive range for Prior Record Level I. The trial court also ordered Lee to pay $14,877.39 in restitution.

¶ 5 Lee did not timely appeal the entry of judgment, but attempted to appeal through an improper "Pro Se Motion for a Case Appeal" that included numerous procedural defects. Lee later petitioned for a writ of certiorari, asking this Court to review the appeal despite the untimeliness and defects of his *pro se* notice of appeal. Because, as explained below, Lee has asserted a potentially meritorious argument, we allow the petition in the exercise of our discretion and issue a writ of certiorari to review the merits of Lee's appeal. *See* N.C. R. App. P. 21; *State v. Grundler*, 251 N.C.

177, 189, 111 S.E.2d 1, 9 (1959).

Analysis

I. Restitution Award

¶ 6 Lee first argues that the trial court erred by ordering him to pay $14,877.39 in restitution because there was no competent evidence in the record to support that award.

¶ 7 A judgment ordering restitution "must be supported by evidence adduced at trial or at sentencing." *State v. Mumford*, 364 N.C. 394, 403, 699 S.E.2d 911, 917 (2010). A "restitution worksheet, unsupported by testimony or documentation, is insufficient to support an order of restitution." *State v. Mauer*, 202 N.C. App. 546, 552, 688 S.E.2d 774, 778 (2010). The defendant may stipulate to the amount of restitution, removing the State's burden to support the requested award with evidence, but "a stipulation's terms must nevertheless be definite and certain in order to afford a basis for judicial decision, and it is essential that they be assented to by the parties or those representing them." *State v. Replogle*, 181 N.C. App. 579, 584, 640 S.E.2d 757, 761 (2007).

¶ 8 Here, it is undisputed that the State presented no documentary evidence or testimony to support the amount of restitution requested. But the State contends that no evidence was needed because Lee stipulated to the amount of restitution "in open court" during the proceeding.

¶ 9 We are not persuaded that the record supports this contention. In the plea agreement, Lee did *not* check the box stating that he "stipulated to restitution . . . in the amounts set out" in the restitution worksheet. At the sentencing hearing, after the court stated that it was going to award the requested $14,877.39 in restitution, Lee's trial counsel stated, "we just ask that that be a civil judgment."

¶ 10 The State contends that this was a stipulation to the requested restitution award. But in context, we cannot say that this was a "definite and certain" stipulation by Lee. At the hearing, the trial court initially announced that it "will tax restitution in the amount of $877.39" without any discussion of a stipulation from Lee. Then, the transcript indicates that there was an "Off the record discussion." The trial court then indicated, "We are back on the record," and the following exchange occurred between the court and the parties:

> THE COURT: We are back on the record. The interpreter is still sworn. Madam Clerk indicated that the Court may not have correctly related the restitution figure.
>
> [PROSECUTOR]: I think the total requested was about $14,000. I didn't know if the Court had adjusted that.
>
> THE COURT: The number was supposed to be $14,877.39. So the Court would propose to award that amount in lieu of the number that was spoken in open court.
>
> [DEFENSE COUNSEL]: Your Honor, we just ask that that be a civil judgment.
>
> THE COURT: Right. Well, that's going to be a civil

judgment, and the reality is I doubt it will ever be paid.

¶ 11 From this exchange, we cannot say that Lee's counsel intended to stipulate to the $14,877.39 restitution amount. It is equally plausible that Lee and his counsel, at that point in the proceeding, believed that the trial court already had made the decision to award the requested restitution and was simply correcting a clerical error that initially caused the trial court to read the restitution amount as $877.39 instead of $14,877.39. Thus, the record does not contain a "definite and certain" stipulation necessary to support the restitution. *Replogle*, 181 N.C. App. at 584, 640 S.E.2d at 761. We therefore vacate the award of restitution and remand for further proceedings on this issue.

II. Prior Record Level Point

¶ 12 Lee next argues that he is entitled to resentencing because the trial court incorrectly determined that he had one prior record level point on the judgment forms.

¶ 13 "The determination of an offender's prior record level is a conclusion of law that is subject to *de novo* review on appeal." *State v. Green*, 266 N.C. App. 382, 385, 831 S.E.2d 611, 614 (2019). At the plea hearing and sentencing, the State and defense counsel stipulated that Lee did not have any felony sentencing points and that Lee "is a prior record Level I with zero points." The record supports this determination. But on the judgment forms, the trial court indicated that Lee had one prior record

level point.

¶ 14 Although this listing of one prior record level point was incorrect, it is not an error that entitles Lee to resentencing. When a defendant is sentenced at the proper prior record level, but the trial court miscalculated the record level points, the defendant is "not prejudiced" by the error. *See State v. Chivers*, 180 N.C. App. 275, 281–82, 636 S.E.2d 590, 595 (2006). Thus, when "the correct calculation of defendant's prior record points does not affect the determination of his prior record level, the error is harmless." *State v. Blount*, 209 N.C. App. 340, 347, 703 S.E.2d 921, 926 (2011).

¶ 15 Here, the miscalculation of Lee's prior record points on the judgment forms did not impact the calculation of his prior record level because Prior Record Level I applies to offenders with "not more than 1 point." N.C. Gen. Stat. § 15A-1340.14(c). As a result, the trial court's calculation of one point rather than zero points did not impact the sentence imposed by the trial court. We therefore find no prejudicial error and affirm the trial court's judgments.

Conclusion

¶ 16 For the reasons explained above, we affirm the trial court's criminal judgments but vacate the civil judgment of restitution and remand for further proceedings on that issue.

AFFIRMED IN PART; VACATED IN PART AND REMANDED.

Judges WOOD and GORE concur.

Report per Rule 30(e).