

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e) (3) of the North Carolina Rules of Appellate Procedure.

NO. COA02-581

NORTH CAROLINA COURT OF APPEALS

Filed: 31 December 2002

STATE OF NORTH CAROLINA

v. Forsyth County
Nos. 98 CRS 053196, 053202,
EMERY McARTHUR 053220, and 99 CRS 057956

Appeal by defendant from amended judgment dated 5 October 1999 by Judge Peter M. McHugh in Forsyth County Superior Court. Heard in the Court of Appeals 30 December 2002.

Attorney General Roy Cooper, by Assistant Attorney General J. Philip Allen, for the State.

Russell J. Hollers, III for defendant appellant.

GREENE, Judge.

Emery McArthur (Defendant) appeals from a judgment dated 5 October 1999 entered consistent with his guilty plea to possession of heroin, two counts of sale of heroin, two counts of possession with intent to sell and or deliver heroin, possession with intent to sell and or deliver cocaine, and maintaining a dwelling to keep controlled substances. Defendant also pleaded guilty to attaining the status of habitual felon. After accepting Defendant's guilty plea, the trial court determined Defendant had seven prior record points and was a Class C felon with a prior record level of III.

The trial court entered a consolidated judgment and committed Defendant to a minimum term of 144 months and a maximum term of 182 months imprisonment.

The dispositive issue is whether the trial court incorrectly calculated Defendant's prior record level by including convictions also used to establish Defendant was a habitual felon.

Defendant argues, and the State concedes, the trial court erred in sentencing Defendant at prior record level III because two of the three convictions used to establish his habitual felon status were also used to determine his prior record level. We agree.

"In determining [a defendant's] prior record level, convictions used to establish a person's status as an habitual felon shall not be used." N.C.G.S. § 14-7.6 (2001). This Court stated in *State v. Bethea* that N.C. Gen. Stat. § 14-7.6

recognizes that there are two independent avenues by which a defendant's sentence may be increased based on the existence of prior convictions. A defendant's prior convictions will either serve to establish a defendant's status as an habitual felon pursuant to G.S. 14-7.1 or to increase a defendant's prior record level pursuant to G.S. 15A-1340.14(b)(1)-(5). G.S. 14-7.6 establishes clearly, however, that the existence of prior convictions may not be used to increase a defendant's sentence pursuant to both provisions at the same time.

State v. Bethea, 122 N.C. App. 623, 626, 471 S.E.2d 430, 432 (1996).

In this case, Defendant's habitual felon indictment alleged he

was a habitual felon based on the following three felony convictions: (1) 1977 forgery conviction in Forsyth County case number 77 CRS 20964; (2) 1980 sale and delivery of cocaine conviction in Forsyth County case number 80 CRS 16610; and (3) a 1991 possession of cocaine conviction in Forsyth County case number 90 CRS 30653. Defendant's prior record level worksheet shows Defendant had previously been convicted of: (1) misdemeanor larceny on 11 July 1988 (Class M1); (2) possession of cocaine on 30 August 1990 (Class I felony); (3) forgery on 30 June 1977 (Class H felony); and misdemeanor larceny on 5 October 1982 (Class M1).

A review of the record shows Defendant's convictions for the 1977 forgery conviction (77 CRS 20964) and the 1991 possession of cocaine conviction (90 CRS 30653), which were listed on the habitual felon indictment, were improperly used to determine Defendant had four prior record level points. Because each felony was worth two points, see N.C.G.S. § 15A-1340.14(b)(4) (2001), Defendant should have been found to have only three total prior record level points and a level II status. Accordingly, Defendant's sentence is vacated and this case is remanded for resentencing.

We note Defendant pled guilty to possession with intent to sell and deliver heroin in case number 99 CRS 3204, but the judgment incorrectly reflects a conviction for possession of heroin. This case must, therefore, be remanded to correct the judgment and make it consistent with Defendant's guilty plea. See *State v. Durham*, 74 N.C. App. 121, 124, 327 S.E.2d 312, 315 (1985).

Remanded for resentencing and correction of judgment.

Judges TIMMONS-GOODSON and TYSON concur.

Report per Rule 30(e).