

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA02-70

NORTH CAROLINA COURT OF APPEALS

Filed: 3 December 2003

STATE OF NORTH CAROLINA

v.

Mecklenburg County
No. 97 CRS 20372

ANGELO LOPEZ CUNNINGHAM

On writ of certiorari to review judgment dated 18 March 1998 by Judge Jesse B. Caldwell, III in Mecklenburg County Superior Court. Heard in the Court of Appeals 12 November 2002.

Attorney General Roy Cooper, by Assistant Attorney General Lisa C. Glover, for the State.

James L. Goldsmith, Jr. for defendant appellant.

GREENE, Judge.

Angelo Lopez Cunningham (Defendant) appeals, upon a writ of certiorari issued by this Court on 12 March 2001, for a review of a sentence imposed on 18 March 1998 consistent with a jury verdict finding him guilty of robbery with a dangerous weapon.

After the jury returned its unanimous verdict, the trial court proceeded directly to sentencing. At the sentencing hearing, the State argued Defendant had three prior North Carolina misdemeanor convictions in: June 1988 of misdemeanor larceny; March 1989 of misdemeanor larceny; and April 1991 of misdemeanor unauthorized use of a motor vehicle. The State also contended Defendant had three

prior South Carolina felony convictions in: April 1989 of grand theft auto; December 1991 of grand larceny; and June 1993 of distribution of crack cocaine within a half mile of a school. Based on these prior convictions, the State contended Defendant had accrued nine "prior record points" for purposes of sentencing him for the current offense, which placed him at prior record level IV.

Defendant did not challenge the proffer of the three misdemeanor convictions and admitted being convicted of distribution of crack cocaine within a half mile of a school. Defendant did state, however, he had not been convicted of either grand theft auto or grand larceny. Without these two convictions, Defendant argued, his correct prior record level was III. As proof of Defendant's prior convictions, the State then submitted to the trial court a "record check." This "record check" contains the heading "DCI - Record" and lists various identifying characteristics of Defendant including name, height, weight, fingerprint identification numbers, hair color, eye color, date of birth, race, scars and tattoos, and social security and F.B.I. identification numbers. The "record check" shows Defendant was convicted in South Carolina of both grand theft auto and grand larceny and also contains the convictions not challenged by Defendant. Defendant did not object to the submission of the "record check" and made no further argument in support of his position. Based on the information in the record check, the trial court found the existence of all the prior offenses argued by the State and calculated Defendant to have nine prior record points

placing him at prior record level IV.¹ The trial court sentenced Defendant within the level IV presumptive range for robbery with a dangerous weapon, a class D felony, to a term of 100 to 129 months.

The dispositive issue is whether Defendant properly preserved his argument on appeal that the "record check" is not competent evidence to prove Defendant's prior convictions.

Defendant contends he should not have been sentenced at prior record level IV because the "record check" was not competent evidence of the prior convictions and could not be considered by the trial court. Accordingly, Defendant argues he is entitled to a new sentencing hearing.

If a defendant does not object at the time evidence of a prior conviction is submitted to the trial court, the defendant waives any argument that the evidence is not competent to prove a prior conviction. *State v. Mack*, 87 N.C. App. 24, 33, 359 S.E.2d 485, 491 (1987); N.C.R. App. P. 10(b)(1). A defendant may, however, argue on appeal that the evidence, even though competent, is insufficient to prove the prior conviction without making an objection at trial. *Id.*

In this case, Defendant did not object when the "record check" was submitted to the trial court as proof of Defendant's prior convictions. Defendant has, therefore, waived any argument that

¹One point was given for each of the misdemeanor convictions, for a total of three points. See N.C.G.S. § 15A-1340.14(b)(5) (2001). The South Carolina felony convictions were treated as Class I felonies and counted for two points each for a total of six points. See N.C.G.S. § 15A-1340.14(e) (2001).

the "record check" was not competent proof of his prior convictions.² Further, as Defendant does not assign as error, or argue in his brief to this Court, that the "record check" constitutes insufficient evidence to prove his prior convictions, we do not address this issue. See N.C.R. App. P. 10(a), 28(a). Thus, Defendant failed to comply with the appellate rules by properly preserving his arguments for appeal. See *Marsico v. Adams*, 47 N.C. App. 196, 197, 266 S.E.2d 696, 698 (1980) (failure to comply with rules regarding preservation of questions for appellate review subjects appeal to dismissal). Accordingly, the appeal is dismissed.

Dismissed.

Chief Judge EAGLES and Judge MARTIN concur.

Report per Rule 30(e).

²Even if Defendant had not waived the issue of the competency of the "record check," this argument has no merit. See *State v. Rich*, 130 N.C. App. 113, 115-16, 502 S.E.2d 49, 51 (1988) (computerized printout with the heading "DCI - Record" and containing various identifying characteristics of the defendant was held to be a copy of a Division of Criminal Information record and competent to prove prior convictions).