

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA04-174

NORTH CAROLINA COURT OF APPEALS

Filed: 5 October 2004

STATE OF NORTH CAROLINA

v.

Alamance County
No. 03 CRS 053676

JERRY DEMETRIUS BOLTON

Appeal by defendant from judgments entered 25 September 2003 by Judge Evelyn W. Hill in Alamance County Superior Court. Heard in the Court of Appeals 4 October 2004.

Attorney General Roy Cooper, by Associate Attorney General Kimberly Elizabeth Gunter, for the State.

Kelly Scott Lee, for defendant-appellant.

TYSON, Judge.

Jerry Demetrius Bolton ("defendant") appeals the trial court's sentence after entering a guilty plea to assault with a deadly weapon with intent to kill inflicting serious injury and first-degree arson. We remand for resentencing.

I. Background

After entry of defendant's guilty plea, the trial court sentenced defendant as a prior record level IV to consecutive terms of 133 to 169 months imprisonment for the assault conviction and 117 to 150 months imprisonment for the arson conviction. Defendant appeals.

II. Issues

Defense counsel brings forward two assignments of error, but presents no arguments in his brief. Defense counsel states that he "is unable to locate any case law in support of the possible assignments of error" and asks this Court to review the record for possible prejudicial error. In his *pro se* supplemental brief, defendant contends the trial court erred in sentencing him as a prior record level IV. Defendant argues the State failed to prove the existence of any prior convictions and failed to show that his New Jersey convictions were substantially similar to corresponding North Carolina offenses pursuant to N.C. Gen. Stat. § 15A-1340.14(e), which deals with the classification of prior convictions from other jurisdictions.

III. Anders Review

Defense counsel has shown to the satisfaction of this Court that he has complied with the requirements of *Anders v. California*, 386 U.S. 738, 18 L. Ed. 2d 493, *reh'g denied*, 338 U.S. 924, 18 L. Ed. 1377 (1967) and *State v. Kinch*, 314 N.C. 99, 331 S.E.2d 665 (1985) by advising defendant of his right to file written arguments with this Court and providing him with documents necessary for him to do so. On 23 June 2004, defendant filed a *pro se* supplemental brief with this Court.

Pursuant to *Anders* and *Kinch*, we must determine from a full examination of defendant's *pro se* supplemental brief and all the proceedings, whether this appeal is wholly frivolous.

IV. Prior Convictions

Our General Statutes provide that proof of prior convictions may be proven by stipulation of the parties. See N.C. Gen. Stat. § 15A-1340.14(f) (2003). “[A] worksheet, prepared and submitted by the State, purporting to list a defendant’s prior convictions is, without more, 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). Oral statements by defense counsel at sentencing regarding a prior record level worksheet may constitute a stipulation to the existence of the convictions listed therein. See *id.* Such a stipulation, however, may not extend to whether out-of-state convictions are substantially similar to corresponding North Carolina felony offenses pursuant to N.C. Gen. Stat. § 15A-1340.14(e). See *State v. Hanton*, 140 N.C. App. 679, 690, 540 S.E.2d 376, 383 (2000).

In *Hanton*, this Court determined that defense counsel’s statement that he did not disagree with the worksheet constituted an admission by defendant that he had been convicted of the other charges appearing on the worksheet submitted by the prosecution. This Court, however, found that “it was not clear that defendant was stipulating that the out-of-state convictions were substantially similar” to felony charges under North Carolina law. *Id.* Because defense counsel’s statement could not be construed as a stipulation to the similarity element, this Court remanded the case for resentencing. *Id.*

Similarly, in *State v. Morgan*, ___ N.C. App. ___, 595 S.E.2d 804 (2004), the defendant was sentenced as a Level IV felon based

on North Carolina and out-of-state prior convictions appearing in a worksheet. During sentencing the following colloquy occurred:

THE COURT: Are we ready for sentencing in this matter?

[THE PROSECUTOR]: Yes.

THE COURT: What are the prior record points of this defendant?

[THE PROSECUTOR]: We have a number of convictions on here. The first time would be a larceny case from 2/25/1983 in New Jersey. The next would be -- no, excuse me. First in time was aggravated assault on a police officer out of New Jersey, that was in 1978, and we have a larceny in 1983 I just mentioned. There was a homicide in the third degree in New Jersey, that was 6/15/1987. We have a felony larceny that was mentioned on the stand from 6/3/93, and we have a 10/1/02 New Hanover County communicating threats. That happened while she was in jail. I also have, as best I can find out, the definition of homicide in New Jersey. I did not find the definition calling this third degree homicide. What I do have on the definition of homicide, manslaughter. It appears that New Jersey makes a distinction between homicide as an intentional act and manslaughter as an unintentional act. I have, therefore, and would contend that the homicide in the third degree cannot be any less than voluntary manslaughter, pursuant to North Carolina law. I don't think it's any more than that, but it certainly can't be any less than that and, as such, it's a Class F point value, assessed as Class F point value. That would give her a total of nine points.

THE COURT: Mr. Davis?

[THE PROSECUTOR]: Your Honor, if I can approach and hand that up to the court.

[DEFENSE COUNSEL]: Your Honor, I have gone over this with my client. We would contend that was an unintentional homicide. My client described that to me and, again, we don't have the equivalency here. We would contend it's

unintentional. It would make it, perhaps, a lesser charge in terms of points that we assign.

THE COURT: So that you're contending that [Defendant] is a level three?

[DEFENSE COUNSEL]: Yes.

THE COURT: Rather than a level four?

[DEFENSE COUNSEL]: Yes.

[THE PROSECUTOR]: I have handed to the court -- you may want to mark it for identification purposes, but I have handed to the court, as best I can find, the definition from New Jersey law from that period of time and, like I said, I've looked at it. I cannot find anything they call homicide in the third degree, but if you look through those definitions, homicide is a voluntary act and, if you go on through those definitions, they've got manslaughter defined as a reckless -- so, again, I would contend anything defined in New Jersey as a homicide would be an intentional act and couldn't be any less than voluntary manslaughter. That's my argument. I would also --

THE COURT: Let counsel approach the bench, please.

(AN OFF-THE RECORD BENCH CONFERENCE WAS HELD.)

[DEFENSE COUNSEL]: I will defer to the court. My obligation is to give you what information I have, and I've done that, and whatever the court feels is appropriate, I have no --

THE COURT: Of course, sir. I was just looking at the statute. It appears to the court that involuntary manslaughter is a Class F. So if -- and the worksheet shows that prior conviction, homicide conviction, up in New Jersey as --

[THE PROSECUTOR]: I counted it for F.

THE COURT: You've already counted it F; therefore the court is going to find that the prior record points of the defendant are nine.

Id. at ____, 595 S.E.2d at 810-11. This Court concluded defendant's attorney "conceded the existence of the convictions by arguing that Defendant should be sentenced at a level III on the basis of her prior record." *Id.* at ____, 595 S.E.2d at 811. Citing *Hanton*, this Court further concluded that comments made by defendant's attorney could not be interpreted as a stipulation that the out-of-state offenses were substantially similar to offenses in North Carolina since the State presented no evidence that the out-of-state misdemeanor offenses were substantially similar to offenses classified as Class A1 or 1 misdemeanors in North Carolina. *Id.* (citing *Hanton*, 140 N.C. App. at 690, 540 S.E.2d at 383). This Court held that the trial court erred in sentencing defendant based upon the prior record level worksheet assigning her prior out-of-state misdemeanor convictions as Class A1 or 1 misdemeanor convictions, and remanded the case for resentencing. *Morgan*, ____ N.C. App. at ____, 595 S.E.2d at 811.

Likewise, the State here did not present evidence that the out-of-state offenses were substantially similar to offenses in North Carolina. During sentencing, the State submitted a prepared worksheet listing the purported prior convictions of defendant. The worksheet showed defendant had been convicted of possession of cocaine, possession of a handgun without a permit, and possession of a controlled substance in New Jersey. The worksheet assigned six points, as a Class I felony, for these convictions. After the trial court accepted the worksheet, the following exchange occurred:

[PROSECUTOR]: And do you stipulate and agree for sentencing purposes that [defendant's] a prior Record Level Four, and 13 points? I think I previously notified you it was 14, but I found a point that I should not have added.

COURT: You don't want to agree that it's fewer points?

[DEFENSE COUNSEL]: I do want to agree that it's few points.

THE COURT: If you don't want to agree it's fewer points, we'll go with 14.

[DEFENSE COUNSEL]: We would so stipulate.

THE COURT: I'm willing.

[PROSECUTOR]: I just went back and noticed that I had a date wrong.

THE COURT: I would do it for you. No other lawyer.

[DEFENSE COUNSEL]: A number of the convictions are out of state and that always gives me just a brief pause.

As in *Morgan*, the comments of defendant's attorney constituted a stipulation as to the existence of the prior convictions listed on the worksheet. The stipulation, however did not extend to whether the New Jersey convictions were substantially similar to corresponding North Carolina felony offenses.

V. Conclusion

We remand defendant's case for a resentencing hearing, at which the State shall prove defendant's prior convictions by a preponderance of the evidence using any method permitted under N.C. Gen. Stat. § 15A-1340.14(f). The State and defendant may both offer additional evidence at the resentencing hearing. *Hanton*, 140 N.C. App. at 690, 540 S.E.2d at 383. Based on our decision to

remand for resentencing, we need not reach defendant's remaining assignment of error asserting his trial counsel provided ineffective assistance of counsel at the original sentencing hearing.

Remand for resentencing.

Judges WYNN and GEER concur.

Report per Rule 30(e).