NO. COA05-1296

NORTH CAROLINA COURT OF APPEALS

Filed: 5 July 2006

STATE OF NORTH CAROLINA

v. Gaston County
Nos. 03 CRS 55035
SANDRA DRAWDY COOPER 02 CRS 54985

Appeal by defendant from judgments entered 4 April 2005 by Judge W. Robert Bell in Gaston County Superior Court. Heard in the Court of Appeals 19 June 2006.

Attorney General Roy Cooper, by Assistant Attorney General Brian Paxton, for the State.

Duncan B. McCormick, for defendant appellant.

McCULLOUGH, Judge.

Defendant appeals from judgments entered upon revocation of her probation. In 02 CRS 54985, we find no prejudicial error and affirm the judgment. In 03 CRS 55035, we affirm but remand for the purpose of correcting an error in the number of prior record points assigned to defendant on the judgment.

On 6 October 2004, defendant pled guilty to one count of financial identity fraud and four counts each of forgery and uttering a forged instrument. For her offense of financial identity fraud in 03 CRS 55035, the trial court sentenced defendant to a suspended prison term of sixteen to twenty months and placed

her on supervised probation for two years. The court consolidated the forgery and uttering counts into a second judgment under file number 02 CRS 54985 and imposed a consecutive suspended sentence of six to eight months, plus two years of supervised probation.

In probation violation reports signed 21 December 2004, defendant was charged by her probation officer with absconding supervision. At her revocation hearing, defendant admitted the violations and asked only that her sentences "be run concurrently and that [she] receive all credit for time served." In its judgments revoking probation, the trial court activated defendant's suspended sentences and ordered that they be served consecutively, as originally imposed.

On appeal, defendant first claims that the trial court erred in assigning her a prior record point in the judgment entered in 03 CRS 55035, based upon a finding that all the elements of her offense were included in one of her prior convictions under N.C. Gen. Stat. § 15A-1340.14(b)(6) (2005). While defendant shows possible merit to her claim, we decline to review this sentencing issue because it is not properly before this Court on appeal from the judgment revoking her probation.

"When appealing from an order activating a suspended sentence, inquiries are permissible only to determine whether there is evidence to support a finding of a breach of the conditions of the suspension, or whether the condition which has been broken is invalid because it is unreasonable or is imposed for an unreasonable length of time." *State v. Noles*, 12 N.C. App. 676,

678, 184 S.E.2d 409, 410 (1971). "'Questioning the validity of the original judgment where sentence was suspended on appeal from an order activating the sentence is . . . an impermissible collateral attack.'" *See State v. Rush*, 158 N.C. App. 738, 741, 582 S.E.2d 37, 39 (2003) (quoting *Noles*, 12 N.C. App. at 678, 184 S.E.2d at 410). We have recognized only two exceptions to the rule proscribing collateral attacks on a sentence upon activation, each of which involve constitutional violations not at issue here. Our courts have held that "when a court activates a suspended prison sentence, defendant may, upon appeal of such activation, raise the claim that he was unconstitutionally denied counsel at his original trial." *State v. Neeley*, 307 N.C. 247, 250, 297 S.E.2d 389, 392 (1982). Similarly, this Court has allowed a defendant to challenge her sentence upon activation, if the suspended sentence was "unconstitutionally aggravated" in violation of the right to a jury trial under *Blakely v. Washington*, 542 U.S. 296, 159 L. Ed. 2d 403, *reh'g denied*, 542 U.S. 961, 159 L. Ed. 2d 851 (2004), and *State v. Allen*, 359 N.C. 425, 615 S.E.2d 256 (2005). *State v. McMahan*, __ N.C. App. __, __, 621 S.E.2d 319, 322 (2005), *stay granted*, ___ N.C. ___, 625 S.E.2d 550 (2005).

Here, defendant could have challenged the trial court's assessment of a record point under N.C. Gen. Stat. § 15A-1340.14(b)(6) and its calculation of her prior record level on appeal from the judgment imposing her suspended sentence in October of 2004. *See* N.C. Gen. Stat. § 15A-1444(a2)(1) (2005). Having failed to appeal her sentence when imposed, she may not

collaterally attack it now. Accordingly, we dismiss defendant's assignment of error challenging the evidence supporting the trial court's finding under N.C. Gen. Stat. § 15A-1340.14(b)(6).

To the extent defendant separately assigns error to the assessment of a record point pursuant to N.C. Gen. Stat. § 15A-1340.14(b)(6) as a violation of her Sixth Amendment rights under *Blakely* and *Allen*, we note our recent holding "that neither *Blakely* nor *Allen* preclude[s] the trial court from assigning a point in the calculation of one's prior record level where 'all the elements of the present offense are included in [a] prior offense.'" *State v. Poore*, __ N.C. App. __, __, 616 S.E.2d 639, 642 (2005) (quoting N.C. Gen. Stat. § 15A-1340.14(b)(6)). Therefore, any sentencing error under N.C. Gen Stat. § 15A-1340.14(b)(6) was non-constitutional and thus not properly considered in the instant appeal.

Defendant asserts an additional, constitutional error by the sentencing court in the calculation of her record level. She avers the court violated her right to a jury trial under *Blakely* and *Allen* by assigning her a point under N.C. Gen. Stat. § 15A-1340.14(b)(7), based upon the finding that she committed her offenses while on parole, probation or post-release supervision, while serving a prison sentence, or while on escape from a prison sentence. Although it appears the trial court erred in assessing a prior record point under this subsection, we conclude that the error was harmless.

This Court recently held that a finding under N.C. Gen. Stat.

§ 15A-1340.14(b)(7) must be made by a jury before such a finding may be used to enhance a defendant's prior record level. *State v. Wissink*, ___ N.C. App. ___, 617 S.E.2d 319, 325, *stay granted by* ___ N.C. ___, 620 S.E.2d 527 (2005).

However, if the point assigned under N.C. Gen. Stat. § 15A-1340.14(b)(7) in violation of *Wissink* is subtracted, defendant would remain a record level III, albeit with five record points rather than six. *See* N.C. Gen. Stat. § 15A-1340.14(c)(6) (2004). Accordingly, she suffered no prejudice from the error. *See State v. Adams*, 156 N.C. App. 318, 324, 576 S.E.2d 377, 382, *disc. review denied*, 357 N.C. 166, 580 S.E.2d 698 (2003).

Defendant has not addressed her remaining assignments of error in her brief to this Court. Pursuant to N.C. R. App. P. 28(b)(6), we deem them abandoned.

Because the *Blakely* error in the calculation of defendant's prior record level was harmless, we affirm the trial court's judgments. However, in light of a possible second error in defendant's record level calculation in 03 CRS 55035, which might be raised in some future proceeding, we remand to the trial court for correction of the judgment in 03 CRS 55035. On remand, the court should subtract the prior record point improperly assessed under N.C. Gen. Stat. § 15A-1340.14(b)(7).

Case No. 02 CRS 54985 - Affirmed.

Case No. 03 CRS 55035 - Affirmed; remanded for correction of judgment.

Judges HUDSON and STEELMAN concur.

Report per Rule 30(e).