

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA05-312

NORTH CAROLINA COURT OF APPEALS

Filed: 17 January 2006

STATE OF NORTH CAROLINA

v.

Alamance County
No. 03 CRS 53676

JERRY DEMETRIUS BOLTON,
Defendant.

Appeal by defendant from judgment entered 1 December 2004 by Judge Evelyn W. Hill in Alamance County Superior Court. Heard in the Court of Appeals 17 November 2005.

Attorney General Roy Cooper, by Assistant Attorney General Christopher W. Brooks, for the State.

Ligon and Hinton, by Lemuel W. Hinton, for defendant-appellant.

HUDSON, Judge.

On 12 May 2003, a grand jury indicted defendant Jerry Demetrius Bolton for first-degree arson and assault with a deadly weapon with intent to kill inflicting serious injury. On 25 September 2003, defendant pled guilty. After defendant stipulated his prior record level and prior record level points, the court sentenced him to consecutive terms of 133 to 169 months in prison on the assault with a deadly weapon with intent to kill inflicting serious injury conviction, and 117 to 150 months on the arson conviction. Defendant appealed, and, in an unpublished opinion,

this Court remanded defendant's case for resentencing, on the grounds that defendant's stipulation to prior out-of-state convictions did not extend to a determination of whether those convictions were substantially similar to North Carolina convictions. *State v. Bolton*, 166 N.C. App. 517, 603 S.E.2d 583 (2004). On 1 December 2004, at resentencing, the court determined that defendant had a prior record level of IV. The court again sentenced defendant to consecutive terms of 133 to 169 months on the assault with a deadly weapon with intent to kill inflicting serious injury conviction, and 117 to 150 months on the arson conviction. Defendant appeals. For the reasons discussed below, we conclude defendant's resentencing was free from error.

At his resentencing hearing, the State submitted certified copies of the following judgments and commitments from the State of North Carolina and the State of New Jersey:

State's exhibit 1-A judgment and commitment from Alamance County in file number 97-CRS-29237 for Class I felony possession of cocaine by Jerry Bolton, a black male born 25 May 1975.

State's exhibit 2-A warrant and judgment from Alamance County in file number 98-CR-4466 for Class I misdemeanor inciting a riot by Jerry Bolton, a black male born 23 May 1975.

State's exhibit 3-A judgment and commitment from Alamance County in file number 98-CRS-23179 for Class H felony possession with intent to sell or deliver cocaine by Jerry Bolton, a black male born 24 May 1972.

State's exhibit 4-A judgment and commitment from Alamance County in file number 98-CRS-53125 for Class I misdemeanor possession of drug paraphernalia by Jerry Bolton, a black male born 23 May 1975.

State's exhibit 5 was not accepted by the court.

State's exhibit 6-A judgment and commitment from the State of New Jersey in file number 2037-11-96 for possession of a controlled dangerous substance (cocaine) by Demetrius Bolton, born 24 May 1972.

State's exhibit 7-Two judgments and commitments from the State of New Jersey in files number 1635-08-91 and 0632-04-92 for possession of a controlled dangerous substance (cocaine) by Demetrius Bolton, born 24 May 1972.

The court received State's exhibits 1-4, 6 and 7 without objection from defendant. Defendant argued that the State failed to prove that the "Demetrius Bolton" described in exhibits 6 and 7 was the same person as defendant as required by N.C. Gen. Stat. § 15A-1340.14 (2003). After hearing arguments and taking judicial notice of an affidavit of indigency in which defendant wrote his name as Jerry Demetrius Bolton, the court ruled that the State had established by a preponderance of the evidence that defendant and "Demetrius Bolton" were the same person. The court also ruled that the New Jersey convictions for possession of a controlled dangerous substance were substantially similar to the North Carolina Class I felony offense of possession of cocaine. The court included both New Jersey convictions in determining defendant's prior record level as IV. The court then sentenced defendant in the presumptive range for each of his convictions.

Defendant first argues that the court erred in finding that defendant is the same person as the one named in the New Jersey judgments. We disagree.

Defendant acknowledges that N.C. Gen. Stat. § 15A-1340.14 governs a court's determination of recidivist status and provides that:

The State bears the burden of proving, by a preponderance of the evidence, that a prior conviction exists and that the offender before the court is the same person as the offender named in the prior conviction. The original or a copy of the court records or a copy of the records maintained by the Division of Criminal Information, the Division of Motor Vehicles, or of the Administrative Office of the Courts, bearing the same name as that by which the offender is charged, is prima facie evidence that the offender named is the same person as the offender before the court, and that the facts set out in the record are true. For purposes of this subsection, "a copy" includes a paper writing containing a reproduction of a record maintained electronically on a computer

N.C. Gen. Stat. § 15A-1340.14(f) (2003). Because the New Jersey judgments listed the defendant's name as Demetrius Bolton, rather than Jerry Bolton and lists a different birthdate than some of the North Carolina judgments, defendant here contends that the judgments were insufficient as a matter of law to support the court's prior record level determination.

We note that during defendant's previous sentencing hearing in this case, he stipulated to the existence of all of the convictions at issue here, including those from New Jersey. See *State v. Bolton*, __ N.C. App. __, 603 S.E.2d 583 (2004). "Stipulations are judicial admissions which, unless limited as to time or application, continue in full force for the duration of the controversy." *Fox v. Fox*, 114 N.C. App. 125, 131, 441 S.E.2d 613, 617 (1994) (emphasis in original). Defendant's appeal of his first

sentence was predicated solely on insufficiency of the evidence to show that the out-of-state convictions were substantially similar to North Carolina offenses; he did not challenge the existence of the convictions or the identity of the defendant who committed them. Defendant did not limit his stipulations to the convictions when made, nor did he specifically withdraw them at the resentencing hearing. This Court, in its review of defendant's first sentencing hearing established the stipulations as binding for the duration of this case. We overrule this assignment of error.

Defendant next argues that the determination of his prior record level by a preponderance of the evidence violated his Fifth, Sixth and Fourteenth Amendment rights. We disagree.

Defendant did not object to the trial court's determination on constitutional grounds. "Appellate courts will not consider constitutional questions that were not raised and decided at trial." *State v. Youngs*, 141 N.C. App. 220, 229, 540 S.E.2d 794, 800 (2000), *disc. review denied*, 353 N.C. 397, 547 S.E.2d 430 (2001).

Defendant also argues that he received ineffective assistance of counsel. We disagree.

Defendant contends that his trial counsel rendered ineffective assistance by failing to demand that his prior convictions be determined beyond a reasonable doubt. The two-part test for demonstrating ineffective assistance of counsel is well-established:

First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Strickland v. Washington, 466 U.S. 668, 687, 80 L.Ed. 2d 674, 693 (1984); see also *State v. Braswell*, 312 N.C. 553, 562, 324 S.E.2d 241, 248 (1985). As discussed below, the statute which permits the existence of prior convictions to be determined by a preponderance of the evidence complies with constitutional requirements. Accordingly, defendant can meet neither prong of the *Strickland* test. We overrule this assignment of error.

Defendant also argues that the trial court committed structural error by failing to have a jury determine his prior record level by a preponderance of the evidence rather than beyond a reasonable doubt. We disagree.

In *Allen*, the Supreme Court determined that *Blakely* errors are structural errors, and accordingly, are reversible *per se*. *Allen*, 359 N.C. at 444, 615 S.E.2d at 269. However, the *Allen* Court noted that *Blakely*

affects only those portions of the Structured Sentencing Act which require the sentencing judge to consider the existence of aggravating factors not admitted to by a defendant or found by a jury and which permit the judge to impose an aggravated sentence after finding such aggravating factors by a preponderance of the evidence.

Allen, 359 N.C. at 439, 615 S.E.2d at 266. Accordingly, the court's determination of defendant's prior record level based on prior convictions pursuant to N.C. Gen. Stat. § 15A-1340.14(f) is not error under *Allen* or *Blakely*. This assignment of error is overruled.

Affirmed.

Judges TYSON and LEVINSON concur.

Report per Rule 30(e).