

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA06-508

NORTH CAROLINA COURT OF APPEALS

Filed: 19 December 2006

STATE OF NORTH CAROLINA

v.

Henderson County
No. 05 CR 52246

JAMES CARROLL FOSTER

Appeal by defendant from judgment entered 2 September 2005 by Judge David K. Fox in Henderson County District Court. Heard in the Court of Appeals 2 November 2006.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Michael D. Youth, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Katherine Jane Allen, for defendant-appellant.

JACKSON, Judge.

James Carroll Foster ("defendant") appeals the trial court's sentence after entering a guilty plea to possession of methamphetamine. We remand for resentencing.

On 2 September 2005, defendant appeared before the Honorable David Fox to enter a plea of guilty to possession of methamphetamine. At the hearing, defendant was represented by Mitchell Brewer and the State by Thomas Brittain.

The terms of the plea agreement were as follows: "Defendant will plead guilty to possession of schedule II - defendant will receive a suspended sentence on condition that he receive intensive

probation for 6 months with drug and search clauses. All other conditions are up to the judge - fines, etc."

During the guilty plea hearing, after Prosecutor Brittain gave a factual basis for the offense, he stated, "Your Honor has the point sheet in front of you, and he agrees and stipulates that that's an accurate reflection of his prior record; is that correct, Mr. Brewer?" Defense counsel replied, "Yes, sir."

The prosecutor prepared the Prior Record Level Worksheet. Neither the prosecutor nor the defense signed the stipulation portion of the worksheet. The Prior Record Level Worksheet listed nine prior convictions, three of which were from South Carolina. The South Carolina convictions were listed as Class H felonies.

The trial court sentenced defendant to a term of five to six months in the custody of the Department of Correction. Defendant's sentence was suspended, and he was placed on twenty-four months of supervised probation. Defendant appeals from his sentence.

In his assignments of error on appeal, defendant asserts that his prior record level was calculated incorrectly. Specifically, defendant argues that the State failed to prove the nature of the prior out-of-state convictions listed on his sentencing worksheet, either by evidence or by stipulation. See N.C. Gen. Stat. § 15A-1340.14(e) (2005).

In determining a defendant's prior record level, the State must prove that a prior conviction exists. See N.C. Gen. Stat. § 15A-1340.14(f) (2005). Proof of prior convictions may be proven by stipulation of the parties. *Id.* However, this exception merely

applies to the existence of prior convictions, not the nature of out-of-state convictions. See *State v. Hanton*, __ N.C. App. __, __, 623 S.E.2d 600, 604 (2006).

North Carolina General Statutes section 15A-1340.14(e) (2005) "governs the classification of prior convictions from out-of-state, based on whether the out-of-state conviction is 'substantially similar' to an offense in North Carolina." *State v. Palmateer*, __ N.C. App. __, __, 634 S.E.2d 592, 593 (2006). The rules governing proof of prior convictions, found under North Carolina General Statutes, section 15A-1340.14(f) (2003), are disparate from those governing whether out-of-state convictions are substantially similar to North Carolina convictions. In a recent case, the "parties stipulated that the information on the worksheet was accurate, 'including the classification and points assigned to any out-of-state convictions[.]' Based on this stipulation, the trial court found that [d]efendant had six points for a prior record level of III." *Palmateer*, __ N.C. App. at __, 634 S.E.2d at 593. However, despite a clear stipulation specifically referencing the out-of-state convictions, this Court remanded for resentencing. Clearly "'the question of whether a conviction under an out-of-state statute is substantially similar to an offense under North Carolina statutes is a question of law to be resolved by the trial court.'" *Id.* (quoting *Hanton*, __ N.C. App. at __, 623 S.E.2d at 604). In addition, "'[s]tipulations as to questions of law are generally held invalid and ineffective, and not binding upon the courts, either trial or appellate.'" *Id.* (quoting *Hanton*, __ N.C.

App. at __, 623 S.E.2d at 603). As "[w]e are bound by prior decisions of a panel of this Court," *Id.* at __, 634 S.E.2d at 594 (citing *In the Matter of Appeal from Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989)), we must remand defendant's case for resentencing.

Remanded for resentencing.

Judges GEER and LEVINSON concur.

Report per Rule 30(e).