NO. COA06-701

NORTH CAROLINA COURT OF APPEALS

Filed: 1 May 2007

STATE OF NORTH CAROLINA

v. Jackson County
No. 97 CRS 3031

ROBERT CHARLES AUSTIN,
Defendant.

By writ of certiorari, defendant appeals from judgment entered 29 July 1998 by Judge Charles C. Lamm, Jr. in Jackson County Superior Court. Heard in the Court of Appeals 16 April 2007.

Attorney General Roy Cooper, by Assistant Attorney General Michael R. Epperly, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Matthew D. Wunsche, for defendant-appellant.

Robert Austin, pro se, defendant-appellant.

GEER, Judge.

Pursuant to a plea agreement, defendant Robert Charles Austin pled guilty to breaking or entering, larceny, possession of stolen goods, second degree trespass, injury to personal property, shoplifting, driving while impaired, driving while license revoked, failing to heed a blue light or siren, resisting a public officer, habitual impaired driving, and having attained the status of habitual felon. The plea agreement provided that "[a]ll convictions shall be consolidated for judgment into file number

3031, habitual felon, for sentencing." After the trial court determined that defendant had 18 prior record level points and a prior record level V, the court imposed a sentence of 151 to 191 months imprisonment. This Court granted defendant's petition for writ of certiorari on 31 January 2005 to review the trial court's judgment, but limited review to only those issues set forth in N.C. Gen. Stat. § 15A-1444(a1) and (a2) (2005).

Defendant's appellate counsel states that he is "unable to identify an issue with sufficient merit to support a meaningful argument for relief on appeal" and asks this Court to review the record for possible prejudicial error. Counsel has shown to the satisfaction of this Court that he has substantially complied with the requirements of *Anders v. California*, 386 U.S. 738, 18 L. Ed. 2d 493, 87 S. Ct. 1396 (1967), and *State v. Kinch*, 314 N.C. 99, 331 S.E.2d 665 (1985). Counsel advised defendant of his right to file written arguments with this Court and provided him with the documents necessary for him to do so. Defendant filed a *pro se* brief with this Court on 26 September 2006.

In his *pro se* brief, defendant contends that the State failed to prove the existence of any prior convictions pursuant to N.C. Gen. Stat. § 15A-1340.14(f) (2005) and that the trial court, therefore, erred in finding that he had a prior record level V. This issue is properly before us under N.C. Gen. Stat. § 15A-1444(a2).

At sentencing, the State bears the burden of proving defendant's prior convictions by a preponderance of the evidence.

N.C. Gen. Stat. § 15A-1340.14(f). Our General Statutes specify that the State may meet this burden in several ways, including by "[s]tipulation of the parties" and by "[a]ny other method found by the court to be reliable." N.C. Gen. Stat. § 15A-1340.14(f)(1), (4). It is well established, however, "that 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).

"Because a sentencing worksheet was the only proof submitted to the trial court, we look to the dialogue between counsel and the trial court to determine whether defendant stipulated to the prior convictions" that resulted in the prior record level used in sentencing. *State v. Wade*, __ N.C. App. __, __, 639 S.E.2d 82, 86 (2007). During sentencing, the following colloquy occurred:

> THE COURT: Okay. Any information on his prior record level?
>
> [THE PROSECUTOR]: I do, Your Honor, we — the State would be attempting to show that Mr. Austin is Level V for purposes of the habitual felon case, and would be Level III for the misdemeanor sentencing. And I believe, also it would be Level V as to the felony habitual impaired driving cases, Your Honor, which show a 1969 a [sic] conviction for misdemeanor larceny; 1971 a misdemeanor escape; later in 1971 a felony escape; in 1982 there are two separate uttering a forged instrument, one did form the basis of the habitual felon, however, one did not, so we would be using that for an additional two points; in 1984 he was convicted of driving while impaired, driving while permanently revoked, speeding to elude, assault on an officer, hit and run property damage, and failure to stop for blue light and siren, be an additional point for the assault

> on an officer; 1985 escape as a misdemeanor; a separate 1986 escape was as a misdemeanor; 1989 again we used that, let me double check that one, Your Honor, we used the larceny count of that case was the one used for habitual felon status, however, he was also convicted of felonious breaking or entering, and we used that count to enhance the sentencing; he was also convicted of failing to stop for blue light and siren, reckless driving and simple possession at that time; 1992 we did use a felony of sale and delivery of marijuana to enhance — or to make the habitual felon; however, to enhance sentencing he also had a conviction for possession with intent to sell and deliver marijuana; and in 1995 he was convicted of felonious driving while impaired, which would be four points to add to the sentencing record.
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> I have set those out on a separate sheet on top of his record, Your Honor, and as to the — it would be 17 points at that count, and it would be one additional point for the plea being to felonious breaking or entering and larceny, that he did have prior conviction of that same case.
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> THE COURT: Thank You, sir. Mr. Hilty [defense counsel]?
>
> [DEFENSE COUNSEL]: Your Honor, the record does speak for itself. Mr. Austin has been in and out of trouble for quite some time and certainly faced a good bit today and in the future, although, he has elected, although we thought we had some defenses to some of this, at least, to take this plea today.

Based on defendant's accrual of 18 points from prior convictions, the court found "from the evidence and statements of counsel, that the Defendant's a prior record Level V for felony sentencing purposes . . . ."

This Court has held that "[a] stipulation does not require an affirmative statement and silence may be deemed assent in some circumstances, particularly if the defendant had an opportunity to

object and failed to do so." *Wade*, __ N.C. App. at __, 639 S.E.2d at 85. *See also State v. Alexander*, 359 N.C. 824, 829, 616 S.E.2d 914, 918 (2005) ("[D]uring sentencing, a defendant need not make an affirmative statement to stipulate to his or her prior record level . . ., particularly if defense counsel had an opportunity to object to the stipulation in question but failed to do so."). In *Wade*, the Court found a stipulation when "defendant had an opportunity to object and instead of doing so, began describing mitigating factors to the trial court." __ N.C. App. at __, 639 S.E.2d at 86. In *State v. Hurley*, __ N.C. App. __, __, 637 S.E.2d 919, 923 (2006), this Court held sufficient agreement occurred to support the prior record level when "defendant had an opportunity to object and rather than doing so, asked for work release. Defendant did not object to any of the convictions shown on the worksheet at any time during the hearing."

This case is materially indistinguishable from *Wade* and *Hurley*. Defense counsel did not object to the worksheet or any of the convictions set forth by the State, but rather simply said, "the record does speak for itself." *See also Alexander*, 359 N.C. at 830, 616 S.E.2d at 918 (holding that there was sufficient evidence of a stipulation when defense counsel stated to trial judge that "up until this particular case [the defendant] had no felony convictions, as you can see from his worksheet"); *State v. Cromartie*, 177 N.C. App. 73, 81, 627 S.E.2d 677, 682-83 (defense counsel stipulated to prior record level by making specific reference to worksheet and by not disputing its contents), *disc.*

review denied, 360 N.C. 539, 634 S.E.2d 538 (2006). We, therefore, hold that the colloquy between the trial judge and defense counsel constituted a sufficient stipulation under N.C. Gen. Stat. § 15A-1340.14(f), and the trial court committed no error in determining defendant's prior record level.

In accordance with *Anders*, we have also fully examined the record and found no other issues of arguable merit falling within the scope of N.C. Gen. Stat. § 15A-1444(a1) and (a2). Although defendant in his *pro se* brief raises additional arguments, we do not consider them here because they are beyond the limited scope of review established in our order granting defendant's petition for writ of certiorari.

No error.

Judges WYNN and ELMORE concur.

Report per Rule 30(e).