NO. COA06-711

NORTH CAROLINA COURT OF APPEALS

Filed: 17 April 2007

STATE OF NORTH CAROLINA

v. Rutherford County
No. 05 CRS 55044

KENNETH TRACY OWENS

Appeal by defendant from judgment entered 3 January 2006 by Judge Laura A. Powell in Rutherford County District Court. Heard in the Court of Appeals 9 April 2007.

Attorney General Roy Cooper, by Special Deputy Attorney General Ted R. Williams, for the State.

James N. Freeman, Jr., for defendant-appellant.

ELMORE, Judge.

On 3 January 2006, Kenneth Tracy Owens (defendant) pled guilty to one count of felony fleeing to elude arrest. On the same day, the trial court sentenced defendant to eight to ten months' imprisonment. Defendant appeals. For the reasons discussed below, we find no error.

In a bill of information dated 3 January 2006, it was alleged that defendant was fleeing and attempting to elude a law enforcement officer while operating a motor vehicle. Defendant waived return of a bill of indictment and, on 3 January 2006, he

pled guilty to one count of felony fleeing to elude arrest in Rutherford County District Court. At the plea hearing, the trial court reviewed the transcript of plea with defendant, including the terms of the plea agreement between defendant and the State. The prosecutor summarized the factual basis for the plea and defense counsel was given the opportunity to respond. Thereafter, the trial court accepted defendant's plea and sentenced him as a prior record level III offender.

In his sole argument on appeal, defendant contends that the State failed to provide sufficient evidence of his prior convictions as required by N.C. Gen. Stat. § 15A-1340.14(f). We disagree.

"The State bears the burden of proving, by a preponderance of the evidence, that a prior conviction exists[.]" N.C. Gen. Stat. § 15A-1340.14(f) (2005). "There is no question 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). However, a prior conviction may be proved by one of the following four ways: "(1) Stipulation of the parties[;] (2) An original or copy of the court record of the prior conviction[;] (3) A copy of records maintained by the Division of Criminal Information, the Division of Motor Vehicles, or of the Administrative Office of the Courts[;] (4) Any other method found

by the court to be reliable." N.C. Gen. Stat. § 15A-1340.14(f) (2005).

Our Supreme Court has held that "during 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." *State v. Alexander*, 359 N.C. 824, 829, 616 S.E.2d 914, 918 (2005). Thus, depending on the circumstances, a defense counsel's statements and/or inaction during sentencing may represent a stipulation to the defendant's prior record level. *See, e.g., id.* at 830, 616 S.E.2d at 918 (concluding defendant stipulated to convictions listed on State's worksheet where his counsel "specifically directed the trial court to refer to the worksheet to establish that defendant had no prior felony convictions" and his counsel made statements indicating "not only that [he] was cognizant of the contents of the worksheet, but also that he had no objections to it."); *State v. Mullican*, 329 N.C. 683, 686, 406 S.E.2d 854, 855 (1991) (concluding defendant stipulated to finding of aggravating factors where defense counsel "made a statement which was consistent with the statement of the prosecuting attorney" and declined "invitation . . . to object" when "the prosecuting attorney said he would summarize the State's evidence with the permission of the defendant. . . .").

In this case, the following exchange occurred during sentencing:

> BY [THE DISTRICT ATTORNEY]: . . . Your Honor, we have a four-sequence (inaudible). I believe him to be a Level III for purposes of felony judgment. It has been stipulated that III – that that's an accurate reflection of his (inaudible) record (inaudible) suspension.
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> BY THE COURT: Is there anything on a factual basis?
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> BY [DEFENSE COUNSEL]: No, Your Honor. But if I may, just briefly, Mr. Owens suffers from some mental and emotional problems. . . .

On appeal, defendant acknowledges there is some assertion by the district attorney that the parties had stipulated to defendant's prior record level. Defendant, however, argues that there was no signed stipulation by his counsel and the prior record level worksheet was not signed by his counsel. Further, defendant asserts that the above exchange indicates that his trial counsel did not indicate that she stipulated to the accuracy of the convictions on the worksheet that supported a prior record level of III.

We initially note there is no requirement that a stipulation of the parties be in writing. *See Alexander*, 359 N.C. at 829-30, 616 S.E.2d at 918; *Mullican*, 329 N.C. at 686, 406 S.E.2d at 855. Here, defense counsel did not object either to the district attorney's representation that the parties had stipulated that defendant was "a Level III for purposes of a felony judgment," or to the trial court's later conclusion that defendant "has five prior (inaudible) Level III." Under these circumstances, we conclude defense counsel's conduct at sentencing "constituted a

stipulation of defendant's prior record level pursuant to N.C. Gen. Stat. § 15A-1340.14(f)(1)." *See Alexander*, 359 N.C. at 830, 616 S.E.2d at 918. Thus, we further conclude that defendant's sentence was imposed based upon a proper finding of his prior record level.

No error.

Judges WYNN and GEER concur.

Report per Rule 30(e).