

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA07-1396

NORTH CAROLINA COURT OF APPEALS

Filed: 17 June 2008

STATE OF NORTH CAROLINA

v.

Henderson County
No. 06-CR-57665

DAVID PAUL CANNON III

Appeal by defendant from judgment entered 13 August 2007 by Judge David K. Fox in Henderson County District Court. Heard in the Court of Appeals 9 June 2008.

Attorney General Roy Cooper, by Associate Attorney General Oliver G. Wheeler, for the State.

Annick Lenoir Peek, for defendant appellant.

McCULLOUGH, Judge.

Defendant appeals pursuant to N.C. Gen. Stat. § 7A-272(d) (2007) from a judgment entered by a district court judge. Defendant was originally charged by warrant with larceny from the person and possession/consumption of a malt beverage while being twenty years of age. He was subsequently charged by information pursuant to § 7A-272(c) (1) with larceny from the person. Defendant pled guilty to both offenses. The court found that defendant had two prior record level points, thereby placing him at prior record Level II. The court entered judgments on 13 August 2007 imposing active imprisonment for durations of six to eight months for

larceny from the person and ten days for possession of a malt beverage. Defendant, *pro se*, filed notice of appeal to this Court on 16 August 2007 from the judgment imposing the sentence of six to eight months.

Defendant contends the court erred in finding and concluding that defendant's prior record level is Level II. He argues the finding is not supported by evidence. We disagree.

A felony offender's prior record level is determined by calculating the sum of the points assigned to each of the offender's prior convictions that the court finds to have been proved. N.C. Gen. Stat. § 15A-1340.14(a) (2007). Proof of a prior conviction may be accomplished by stipulation of the parties, court records of the prior convictions, copies of records maintained by selected state agencies, or "[a]ny other method found by the court to be reliable." N.C. Gen. Stat. § 15A-1340.14(f)(4). Statements of the defendant's attorney acknowledging the defendant's prior criminal history may constitute the requisite stipulation. *State v. Alexander*, 359 N.C. 824, 830, 616 S.E.2d 914, 918 (2005).

A single conviction of a misdemeanor or a felony is all that is required to classify a defendant at prior record Level II. See N.C. Gen. Stat. § 15A-1340.14(b)(5) (a conviction of a misdemeanor results in a minimum of one prior record level point); N.C. Gen. Stat. § 15A-1340.14(c)(2) (a defendant is classified at prior record Level II with at least one but not more than four prior record level points). Defendant's counsel stated to the court that

on 12 May 2007 defendant "was placed on probation out of Jackson County for felony charges." Defendant himself alluded to a sentence imposed in another county while he answered under oath the court's questions seeking to determine the voluntariness of the plea. Based upon this evidence, a conclusion may be drawn that defendant has at least one criminal conviction, carrying at least one prior record level point. We hold the foregoing evidence supports the court's finding that defendant's prior record level is Level II.

Defendant's remaining contention is that the court erred by accepting the plea to possession of a malt beverage because there is no factual basis for the plea. He concedes that he does not have a right to appeal this conviction, and he requests this Court to issue a writ of certiorari to consider this issue. We decline to issue the writ. Even if defendant had a right to appeal and had actually given notice of appeal from this judgment, defendant failed to preserve the issue for appellate review by neglecting to raise it in the trial court. *See State v. Kimble*, 141 N.C. App. 144, 147, 539 S.E.2d 342, 345 (2000) (holding the defendant could not challenge on appeal the factual basis for a plea without first having raised the issue in the court below), *disc. review denied*, 353 N.C. 391, 548 S.E.2d 150 (2001).

No error.

Judges HUNTER and STEELMAN concur.

Report per Rule 30(e).