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NO. COA07-168

NORTH CAROLINA COURT OF APPEALS

Filed: 4 September 2007

STATE OF NORTH CAROLINA

v.

Craven County
No. 02 CRS 57067

JIMMY RAY CLARK

Court of Appeals

On writ of certiorari to review the judgment entered 14 August 2003 by Judge Charles H. Henry in Craven County Superior Court. Heard in the Court of Appeals 20 August 2007.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Lisa Bradley Dawson, for the State.

Slip Opinion

John T. Hall, for defendant-appellant.

JACKSON, Judge.

Jimmy Ray Clark ("defendant") was found guilty of delivery of cocaine, whereupon he admitted his habitual felon status and was sentenced to 121 to 151 months imprisonment. On 11 April 2006, we issued a writ of certiorari for the purpose of reviewing the judgment.

Defendant contends that the trial court erred at sentencing by assigning him seventeen prior record points and a corresponding prior record level V. He asserts that the State did not prove, and

he did not stipulate to, the existence of the prior convictions listed on his prior record level worksheet. We disagree.

The State must prove the existence of convictions used to establish a defendant's prior record level by a preponderance of the evidence. See N.C. Gen. Stat. § 15A-1340.14(f) (2005). The State may meet its burden, *inter alia*, by "[s]tipulation of the parties," or by "[a]ny other method found by the court to be reliable." N.C. Gen. Stat. § 15A-1340.14(f)(1), (4) (2005). It is well-established "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).

When the State relies on a sentencing worksheet to establish a defendant's prior record level, this Court must "look to the dialogue between counsel and the trial court to determine whether defendant stipulated to the prior convictions" listed on the worksheet. *State v. Wade*, __ N.C. App. __, __, 639 S.E.2d 82, 86 (2007). "[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). "[S]ilence 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 (citing *Alexander*, 359 N.C. at 828-29, 616 S.E.2d at 917-18).

After accepting defendant's admission to habitual felon status, the trial court asked to hear from the parties regarding sentencing. Defense counsel acknowledged that defendant was "going away for a long time," but asked the trial court "to impose a sentence at the low end of the presumptive range." The court announced its determination, consistent with defendant's prior record level worksheet, that "the prior record points of Defendant [are] 17, Record Level 5." It then inquired of the parties as follows:

COURT: . . . I assume that none of the convictions alleged in the Bill of Indictment alleging the Habitual Felon were used to tally the number of [prior record] points.

[PROSECUTOR]: That's correct, Your Honor, they were not used.

[DEFENSE COUNSEL]: They were not, Judge. *I reviewed those.*

(Emphasis added). See N.C. Gen. Stat. § 14-7.6 (2005) ("In determining the prior record level, convictions used to establish a person's status as an habitual felon shall not be used."). Based upon these assurances, the trial court announced defendant's sentence and calculated the amount of restitution due for the services of his appointed counsel. The court then offered the parties a final opportunity to be heard:

COURT: Anything further regarding this case?

[PROSECUTOR]: No, sir.

COURT: Anything further, [defense counsel]?

[DEFENSE COUNSEL]: No, sir.

The trial judge also signed the worksheet listing defendant's prior convictions and calculating his seventeen record points and corresponding record level V.

In *State v. Wade*, we upheld the trial court's calculation of the defendant's prior record level based upon a sentencing worksheet and the following exchange between the court and the parties:

COURT: All right. Are you ready to proceed with sentencing, [defense counsel]?

[DEFENSE COUNSEL]: Yes, Your Honor.

COURT: All right.

[PROSECUTOR]: May I approach, Your Honor?

COURT: Yes, sir.

So the State contends his prior record level will be II?

[PROSECUTOR]: That's correct, Your Honor.

COURT: All right. [Defense counsel], I'll hear from you on sentencing, sir.

[DEFENSE COUNSEL]: Your Honor, [defendant] is here this week supported by various members of his extended family. He has no prior conviction approaching this type of incident. He is a young man. He still has a lot maybe to learn and a lot that he can accomplish, and I would ask you to consolidate where appropriate and give him the benefit of a second chance at some point.

COURT: All right. . . .

Wade, __ N.C. App. at __, 639 S.E.2d at 85-86. As in the instant case, the transcript showed that the defendant was made aware of the State's position on his prior record level and the contents of

the worksheet. When provided with "an opportunity to object," however, the defendant instead urged the trial court to find mitigating factors. *Id.* at __, 639 S.E.2d at 86. Because "[a]t no time did defendant object to any of the convictions on the worksheet," we deemed his silence a stipulation for purposes of North Carolina General Statutes, section 15A-1340.14(f)(1). *Id.* (citing *Alexander*, 359 N.C. at 830, 616 S.E.2d at 918).

Following *Wade*, we hold that defendant stipulated to the convictions listed on the sentencing worksheet. After defendant's request for a presumptive sentence, the trial court announced its determination of defendant's seventeen prior record points and record level V. The trial court then asked whether any of the prior convictions used for defendant's prior record level had been used to establish his habitual felon status, in violation of North Carolina General Statutes, section 14-7.6. See N.C. Gen. Stat. § 14-7.6 (2005). Defense counsel replied, "They were not, Judge. I reviewed those." By this response, counsel expressly affirmed his awareness of the prior convictions relied upon by the court in determining defendant's prior record level. Although the transcript does not reflect the State's tender of the sentencing worksheet, the totals announced in open court are consistent with the worksheet signed by the judge. Moreover, because this exchange followed the court's announcement of defendant's prior record points and record level, we believe counsel's lack of objection amounted to a tacit concession to the worksheet's contents and the court's findings. Counsel again raised no objection to defendant's

sentence when offered a final opportunity to be heard. Therefore, we believe defendant's prior convictions were properly established by "[s]tipulation of the parties," pursuant to North Carolina General Statutes, section 15A-1340.14(f)(1). N.C. Gen. Stat. § 15A-1340.14(f)(1) (2005). Accordingly, defendant's argument is overruled.

No error.

Chief Judge MARTIN and Judge CALABRIA concur.

Report per Rule 30(e).