

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA08-1399

NORTH CAROLINA COURT OF APPEALS

Filed: 8 December 2009

STATE OF NORTH CAROLINA

v.

Forsyth County
No. 07 CRS 61388

FAISAL CHAUDHARY,

Defendant.

Appeal by defendant from judgment entered 6 June 2008 by Judge William Z. Wood, Jr., in Forsyth County Superior Court. Heard in the Court of Appeals 6 May 2009.

Don Willey for defendant.

Attorney General Roy Cooper, by Assistant Attorney General Kathryne E. Hathcock, for the State.

ELMORE, Judge.

Faisal Chaudhary (defendant) seeks review of the trial court's decision to sentence him as a prior record level II offender. If the sentence is upheld, defendant seeks review of the effectiveness of the representation he received from his trial counsel during the sentencing phase.

On the evening of 16 November 2007, Deputy J.E. Moore witnessed defendant cross the center line seven times in the course of a minute while driving on Olivet Church Road in Forsyth County. Deputy Moore initiated a stop of defendant's vehicle and

administered two alco-sensor tests and a series of field sobriety tests. When defendant did not perform to required standards, Deputy Moore placed him under arrest. Defendant's blood alcohol level at the time of his driving was calculated to be 0.09.

Defendant was indicted for driving while license revoked (DWLR), driving while impaired (DWI), and habitual impaired driving. A jury found defendant guilty of the DWLR and DWI charges, and defendant stipulated to his three prior impaired driving convictions; those convictions constitute the elements of the charge of habitual impaired driving. He also stipulated that his driver's license was revoked on the date of the offense and that he knew that his license was revoked at that time. Defendant was found to have a prior record level of II and was sentenced in the presumptive range to nineteen to twenty-three months' imprisonment for the charge of habitual impaired driving and 120 days for the DWLR charge. Defendant immediately entered notice of appeal.

Defendant first contends that the trial court committed error by sentencing defendant as a prior record level II instead of level I. We disagree.

In order to be classified as prior record level II, a defendant must have "[a]t least 1 but not more than 5 points." N.C. Gen. Stat. 15A-1340.14 (c) (2) (2007). The trial court awarded one prior record level point to defendant pursuant to N.C. Gen. Stat. § 15A-1340.14 (b) (6) ("all the elements of the present offense are included in any prior offense for which the offender was

convicted") and a second prior record level point pursuant to N.C. Gen. Stat. § 15A-1340.14(b)(7) ("the offense was committed while the offender was on supervised or unsupervised probation, parole, or post-release supervision, or while the offender was serving a sentence of imprisonment, or while the offender was on escape from a correctional institution while serving a sentence of imprisonment"). Defendant contends that both points found by the trial court were erroneously awarded.

When a point is erroneously given but the removal of the point would not change the level of the defendant, such an error is harmless. *State v. Allah*, 168 N.C. App. 190, 195, 607 S.E.2d 311, 315 (2005). Stipulation by the parties is one of the four ways to prove prior convictions for point calculation. N.C. Gen. Stat. 15A-1340.14(f) (2007); see *State v. Bethea*, 173 N.C. App. 43, 60-61, 617 S.E.2d 687, 698 (2005) (finding no error where the defendant stipulated to his prior record level and "presented no contrary information to the court").

The record is unclear as to the factual basis for the point given for defendant being on "supervised or unsupervised probation, parole, or post-release supervision or while the offender was serving a sentence of imprisonment, or while offender was on escape from a correctional institution while serving a sentence of imprisonment[.]" N.C. Gen. Stat. § 15A-1340.14(b)(7) (2007). However, the question is moot, given that defendant's counsel stipulated to defendant having a prior record level II during sentencing, stating:

Mr. Cochran: The three prior DWI's. He would be a level two. I'll sign that and ---

The Court: Would you sign that, Mr. Ball, or your client?

Mr. Ball: Yes, sir.

Defendant's trial counsel also signed the prior record level worksheet, which constituted a stipulation that defendant should be awarded a prior record level point pursuant to N.C. Gen. Stat. § 15A-1340.14(b)(7) and that he should be sentenced as a level II offender. Thus, the trial court did not err, and defendant was properly sentenced as a prior record level II and defendant's claim is overruled.

Defendant also contends that he was not given proper notice that prior record level points were going to be used. We disagree.

The State is required to "provide a defendant with written notice of its intent to prove the existence of . . . a prior record point under G.S. 15A-1340.14(b)(7) at least 30 days before trial or the entry of a guilty or no contest plea. A defendant may waive the right to receive such notice." N.C. Gen. Stat. 15A-1340.16(a6) (2007). The record indicates that the State provided defendant with a copy of the sentencing worksheet in a plea offer filed on 18 February 2008; nothing in the record contradicts this. Defendant was therefore provided proper notice because the worksheet was filed consistently with the required thirty-day period and listed what prior record points the State sought to use. Defendant's argument is therefore overruled.

Defendant next contends that defense counsel provided ineffective assistance by stipulating to a prior record level II. We disagree.

In order to establish an ineffective assistance of counsel claim, defendant must show that counsel's performance fell below an objective standard of reasonableness and that the error was so serious that a reasonable probability exists that the result reached in the trial court would have been different. *Strickland v. Washington*, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 693 (1984). In the case before us, defense counsel's stipulation to a prior level II did not affect the outcome of the sentencing because there is no showing that what defense counsel stipulated to was not correct. Defendant has not shown that he did not have at least one prior record point, which placed him at a level II. No reasonable probability of a different result existed because the proper result was reached. Therefore, defendant's contention is overruled.

Affirmed.

Judges STROUD and ERVIN concur.

Report per Rule 30(e).