

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA08-366

NORTH CAROLINA COURT OF APPEALS

Filed: 4 November 2008

STATE OF NORTH CAROLINA

v.

Cleveland County
No. 06 CRS 002705

SHARRIFF TEE MARTIN

On writ of certiorari to review judgment entered on or after
15 March 2007 by Judge Richard D. Borer in Cleveland County
Superior Court. Heard in the Court of Appeals 31 October 2008.

*Attorney General Roy Cooper, by Assistant Attorney General
Peter A. Regulski, for the State.*

Russell J. Hollers III, for defendant-appellant.

TYSON, Judge.

Shariff Tee Martin ("defendant") appeals from judgment entered after a jury found him to be guilty of assault with a deadly weapon inflicting serious injury pursuant to N.G. Gen. Stat. § 14-32(b). After careful review of the record, briefs and arguments of the parties, we vacate and remand for resentencing.

I. Background

On 15 March 2007, defendant was convicted of assault with a deadly weapon inflicting serious injury. At sentencing, the trial court assigned defendant four prior record points for previous convictions and one point based upon the offense being committed

while defendant was on probation. Defendant stipulated that he was a Level III felon. The trial court sentenced defendant to a minimum of twenty-seven and a maximum of forty-two months imprisonment. On 23 October 2007 this Court allowed defendant's petition for *writ of certiorari* for the purpose of reviewing the judgment entered.

II. Issue

Defendant's sole argument on appeal is that the trial court erred when calculating his prior record level. Defendant argues: (1) no evidence shows he was on probation on the date of the offense and (2) the State failed to prove that his firearm conviction from Virginia was substantially similar to any North Carolina offense.

III. Calculation of Prior Record Level

A. Offenses Committed While on Probation

Defendant first argues the trial court erred when it incorrectly assigned one point for defendant being on probation at the time of the sentencing.

N.C. Gen. Stat. § 15A-1340.14(b)(7) permits a trial court to assign one point for prior record level purposes "if the offense was committed while the offender was on supervised or unsupervised probation, parole, or post-release supervision. . . ." N.C. Gen. Stat. § 15A-1340.14(b)(7) (2007).

During defendant's sentencing hearing, defendant stated that he had been "on probation [in Virginia] since August for the possession of marijuana charge." Upon defendant's admission, the

prosecutor argued that defendant should be assigned a point because he was "on probation right now." Here, the judgment for which defendant was placed on probation in Virginia was entered on 19 July 2006. Defendant committed the offense for which he was convicted on 15 March 2007 before he was placed on probation in Virginia. A defendant is assigned a point pursuant to N.C. Gen. Stat. § 15A-1340.14(b)(7) when he commits the offense while on probation, not if he is on probation at the time of sentencing. According to the record before us, defendant did not commit the offense for which he was convicted while he was on probation. We hold the trial court erred by assigning defendant a point for being on probation on his prior record level pursuant to N.C. Gen. Stat. § 15A-1340.14(b)(7).

B. Virginia Conviction

Defendant further argues that the State failed to prove that his conviction for "brandishing a firearm" from Virginia was substantially similar to any North Carolina offense.

N.C. Gen. Stat. § 15A-1340.14(f)(1) (2007) states proof of prior convictions may be done by stipulation of the parties. When a defendant has a prior out-of-state conviction, the trial court must determine as a matter of law whether that conviction is "substantially similar" to an offense under North Carolina law for the purposes of sentencing. See N.C. Gen. Stat. § 15A-1340.14(e); *State v. Hanton*, 175 N.C. App. 250, 254, 623 S.E.2d 600, 604 (2006); *State v. Palmateer*, 179 N.C. App. 579, 581, 634 S.E.2d 592, 593 (2006).

In the instant case, defendant did not dispute the existence of the out-of-state conviction, but stipulated he was a Level III felon. No determination was made whether the Virginia conviction was substantially similar to any offense in North Carolina before assigning points for the purpose of calculating defendant's prior record level. We vacate and remand this case to the trial court for findings of fact and conclusion of law as to whether defendant's conviction in Virginia for "brandishing a firearm" is "substantially similar" to any offense in North Carolina. N.C. Gen. Stat. § 15A-1340.14(e).

IV. Conclusion

The trial court incorrectly assigned defendant a prior record level point pursuant N.C. Gen. Stat. § 15A-1340.14(b)(7). The trial court failed to make the requisite findings and conclusions in order to assign points for defendant's Virginia conviction. We vacate and remand to the trial court for recalculation of defendant's prior record level and for resentencing not inconsistent with this opinion.

Vacated and remanded for resentencing.

Judges BRYANT and ARROWOOD concur.

Report per Rule 30(e).