

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA08-598

NORTH CAROLINA COURT OF APPEALS

Filed: 18 November 2008

STATE OF NORTH CAROLINA

v.

Orange County  
No. 05 CRS 053413

HENRY ATKINS JENNINGS

On writ of certiorari to review judgment entered on or after 5 September 2006 by Judge Orlando Hudson in Orange County Superior Court. Heard in the Court of Appeals 17 November 2008.

*Attorney General Roy Cooper, by Assistant Attorney General Derrick C. Mertz, for the State.*

*Appellate Defender Staples Hughes, for defendant-appellant.*

TYSON, Judge.

Henry Atkins Jennings ("defendant") appeals judgment entered after he pleaded guilty to: (1) second-degree murder pursuant to N.C. Gen. Stat. § 14-17; (2) two counts of possession with intent to sell or distribute cocaine pursuant to N.C. Gen. Stat. § 90-95(a); and (3) possession of a firearm by felon pursuant to N.C. Gen. Stat. § 14-415.1. We affirm in part and remand in part for correction of clerical error.

I. Background

On 5 September 2006, pursuant to a plea agreement, defendant pleaded guilty to second-degree murder, possession of a firearm by

a felon, and two counts of possession with intent to sell or deliver cocaine. In the plea agreement, defendant stipulated to the existence of the aggravating factor that he committed the offense while on pre-trial release on another charge. The trial court accepted the stipulation and found no factors in mitigation. The trial court consolidated the charges and sentenced defendant in accordance with the specific terms of the plea agreement to an aggravated term of a minimum of 300 to maximum 369 months imprisonment. This Court granted defendant's petition for *writ of certiorari* on 19 September 2007.

## II. Issue

Defendant's sole argument is that the trial court erred when it failed to make a proper oral or written finding of his prior record level.

## III. Prior Record Level Findings

Defendant notes that the trial court made no findings when it entered judgment in open court. Defendant additionally notes that the written judgment shows that he had four prior record level points, resulting in a prior record level of II. Defendant argues that his sentence far exceeds the highest permissible sentence for a Class B2, Level II felon. Defendant also argues that although he signed a stipulation to his prior record level, this did not excuse the court from making a valid finding of his prior record level. We disagree.

N.C. Gen. Stat. § 15A-1340.14 (2005) provides that the State bears the burden of proving, by the preponderance of the evidence,

that "a prior conviction exists and that the offender before the court is the same person as the offender named in the prior conviction." A defendant's prior convictions may be proven by any of the following methods:

- (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); *see also State v. Riley*, 159 N.C. App. 546, 555-56, 583 S.E.2d 379, 386 (2003).

Here, the prosecutor and defense counsel entered into a stipulation regarding the contents of the prior record level worksheet. The prior record level worksheet disclosed that defendant had ten prior record level points for a prior record level of IV. Defendant's prior record level was proven by stipulation pursuant to N.C. Gen. Stat. § 15A-1340.14(f)(1). *See State v. Spencer*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 654 S.E.2d 69, 74 (2007) (signed stipulation on form AOC-CR-600 found sufficient to prove the defendant's prior record level). By stipulating to his prior record level, the issue of whether the trial court erred by failing to make findings concerning his prior record level is moot. *State v. Hamby*, 129 N.C. App. 366, 369-70, 499 S.E.2d 195, 197 (1998).

We additionally note that there is a clerical error in the judgment. Although defendant stipulated that he had ten prior

record level points and was a level IV felon, the judgment reflects a total of four points and a prior record level of II. Defendant's sentence is within the aggravated range for a Class B2, Level IV felon. See N.C. Gen. Stat. § 15A-1340.17 (2005). We conclude the error was merely clerical and does not require resentencing. This matter is remanded for correction of the clerical error.

III. Conclusion

The trial court did not err in failing to make findings of fact concerning defendant's prior record level where defendant stipulated to the record level.

Affirmed in part and Remanded in Part for Correction of Clerical Error.

Judges BRYANT and ARROWOOD concur.

Report per Rule 30(e).