NO. COA08-606

NORTH CAROLINA COURT OF APPEALS

Filed: 16 December 2008

STATE OF NORTH CAROLINA

v. Mecklenburg County
No. 06 CRS 229547

GARY WAYNE JONES

Appeal by defendant from judgment entered 1 November 2007 by Judge Richard D. Boner in Mecklenburg County Superior Court. Heard in the Court of Appeals 8 December 2008.

Attorney General Roy Cooper, by Special Deputy Attorney General Ted R. Williams, for the State.

Jon W. Myers, for Defendant.

ARROWOOD, Judge.

Gary Jones (Defendant) was convicted of possession of cocaine. On appeal, Defendant contends that the trial court erroneously included an out-of-state felony conviction in his prior record level without making a finding that it was for an offense substantially similar to a North Carolina felony. We find no prejudicial error.

On 26 February 2007, the Mecklenburg County grand jury returned an indictment against Defendant for possession of a schedule II controlled substance.

The State's evidence tended to show that on 22 June 2006, the water department closed a Charlotte street to work on the water lines. Officer Roland Mackel was assigned to control traffic at the intersection. When Defendant drove on the wrong side of the street to avoid "road closed" barriers, Officer Mackel stopped his car. Officer Mackel approached Defendant's car and, through an open window, saw what appeared to be two individually wrapped packages of crack cocaine on the front passenger seat. Officer Mackel handcuffed Defendant and told him he was under arrest. After he arrested Defendant, Officer Mackel searched Defendant's car and found a nine-millimeter handgun on the seat. Defendant was transported to the police department, and he asked Officer Mackel, "if there was anything he could do to work off the cocaine charges . . . ." Crime lab chemist Anthony Aldridge testified that the substance in Defendant's car was 0.27 grams of cocaine.

Defendant testified that the cocaine belonged to a stranger who rode in his car shortly before Officer Mackel stopped him. Defendant agreed to give the man a ride across town, but the man got out of Defendant's car just before he reached the closed intersection. Defendant did not notice if the man left anything in his car, and did not notice the cocaine until Officer Mackel stopped him.

Defendant made motions to dismiss at the end of the State's evidence and after the presentation of all the evidence. The trial court denied both motions. The jury found Defendant guilty of possession of cocaine. The State's prior record level worksheet

indicates that Defendant has a prior South Carolina conviction for possession of less than one gram of crack cocaine. That prior conviction was classified as a Class I felony for sentencing and constituted two of defendant's four prior record level points. The other two points came from prior convictions for North Carolina misdemeanors. Defendant stipulated that his prior record level was II. The trial court found that Defendant had a prior record level of II, and imposed a term of six to eight months in prison. The trial court suspended the sentence and imposed thirty months of supervised probation, including fifty days in the custody of the Mecklenburg County Sheriff.

Defendant's sole argument on appeal is that the trial court erred during sentencing because it failed to make a finding that the out-of-state felony conviction was for an offense substantially similar to a North Carolina felony offense. Although it appears that the trial court failed to make such a finding, we find that any error did not affect Defendant's prior record level calculation and was harmless.

N.C. Gen. Stat. § 15A-1340.14(e)(2007) dictates that out-of-state felony convictions may be included in a defendant's prior record level calculation as felonies if they are "substantially similar" to a felony offense in North Carolina. "[W]hether an out-of-state offense is substantially similar to a North Carolina offense is a question of law that must be determined by the trial court. . . ." *State v. Hanton*, 175 N.C. App. 250, 254, 623 S.E.2d 600, 604 (2006). "This Court applies a harmless error analysis to

improper calculations of prior record level points." *State v. Lindsay*, 185 N.C. App. 314, 315, 647 S.E.2d 473, 474 (2007)(citing *State v. Bethea*, 173 N.C. App. 43, 61, 617 S.E.2d 687, 698 (2005); *State v. Smith*, 139 N.C. App. 209, 219-20, 533 S.E.2d 518, 524 (2000)).

Here, although it appears that the trial court failed to make the required finding before including the out-of-state conviction in Defendant's prior record level, the error did not prejudice Defendant. In addition to the South Carolina offense, Defendant's prior record level calculation included two North Carolina misdemeanor offenses. Defendant stipulated to his prior record at trial and has not raised any challenge to the North Carolina offenses on appeal, and those offenses constituted two of Defendant's four prior record points. Thus, even taking away the points assigned to the out-of-state conviction, Defendant would have two prior record points. As a result, Defendant's prior record level would still be II. *See* N.C. Gen. Stat. § 15A-1340.14(c)(2)(2007). Accordingly, we find that Defendant has failed to demonstrate that he was prejudiced by any error in the calculation of his prior record level.

No Prejudicial Error.

Judges TYSON and BRYANT concur

Reported per Rule 30(e).