NO. COA09-1390

NORTH CAROLINA COURT OF APPEALS

Filed: 20 July 2010

STATE OF NORTH CAROLINA

v. Stanly County
No. 05 CRS 5906-13
BRIDGETTE LEIGH MABRY 07 CRS 563-65, 50127-29

Appeal by Defendant from judgment entered 1 June 2009 and judicial findings and order entered 15 July 2009 by Judge Mark E. Klass in Superior Court, Stanly County. Heard in the Court of Appeals 23 March 2010.

Attorney General Roy Cooper, by Assistant Attorney General Kathleen N. Bolton, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Daniel R. Pollitt, for Defendant.

McGEE, Judge.

Defendant was indicted in 2005 and 2007 on twenty-two counts of first-degree statutory sex offense and taking indecent liberties with her two minor daughters. A jury convicted Defendant of all counts on 5 September 2007. The trial court imposed a consolidated sentence of 240 to 297 months in prison. Defendant appealed. In an unpublished opinion filed 3 March 2009, our Court vacated eight of Defendant's convictions and remanded the remaining fourteen to the trial court for resentencing. *State v. Mabry*, ___ N.C. App. ___, 673 S.E.2d 800 (2009), N.C. App. LEXIS 220 (2009) (*Mabry I*).

Defendant was resentenced at a hearing conducted 1 June 2009.[1] Defendant's convictions were again consolidated for judgment, and Defendant was sentenced to 230 to 285 months in prison. Defendant entered notice of appeal on 2 June 2009. The trial court entered an *ex parte* order on 15 July 2009, in which it found that Defendant had been convicted of a reportable conviction as defined in N.C. Gen. Stat. § 14-208.6(4). The trial court ordered Defendant, upon release from imprisonment, to register as a sex offender for thirty years. Defendant appeals.

In Defendant's first argument, she contends that the trial court erred by requiring her to register as a sex offender by an order entered *ex parte*, and without any hearing at which Defendant was present. We disagree.

N.C. Gen. Stat. § 14-208.7 (2008) states that any person with a reportable conviction residing in North Carolina must register as a sex offender upon release from prison.

> Article 27A applies to all offenders convicted on or after 1 January 1996 and to all prior offenders released from prison on or after that date. Under N.C. Gen. Stat. § 14-208.7(a) (2003), "[a] person who is a State resident and who has a reportable conviction shall be required to maintain registration with the sheriff of the county where the person resides." North Carolina residents who are released from a penal institution must register with the sheriff of the county in which the offender resides "[w]ithin 10 days

[1]We note that the hearing transcript indicates that the hearing occurred on 6 June 2009. However, that same transcript also indicates that the transcript was requested on 2 June 2009. The judgment from which Defendant appeals is dated 1 June 2009, and so we conclude that the 6 June 2009 date is in error, and that the hearing was held on 1 June 2009.

> of release from a penal institution . . . ." N.C. Gen. Stat. § 14-208.7(a)(1). Registration must be maintained for ten years following release. N.C. Gen. Stat. § 14-208.7(a).[2]

State v. White, 162 N.C. App. 183, 185, 590 S.E.2d 448, 450 (2004). Defendant does not argue that her convictions were not "reportable convictions" as referenced in N.C. Gen. Stat. § 14-208.7, and as defined in N.C. Gen. Stat. § 14-208.6. Defendant only argues that her rights were violated by the trial court's entering the 15 July 2009 order requiring sex offender registration *ex parte*. As is clear from the language of N.C. Gen. Stat. § 14-208.7, the registration requirement is mandatory for all persons convicted of reportable offenses. The requirements for notification to a defendant depend on whether an active sentence is imposed. N.C. Gen. Stat. § 14-208.8 states in relevant part:

> (a) At least 10 days, but not earlier than 30 days, before a person who will be subject to registration under this Article is due to be released from a penal institution, *an official of the penal institution* shall do all of the following:
>
> (1) Inform the person of the person's duty to register under this Article and require the person to sign a written statement that the person was so informed or, if the person refuses to sign the statement, certify that the person was so informed.

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[2]N.C. Gen. Stat. § 14-208.7(a) (2008) states: "Registration shall be maintained for a period of at least 30 years following the date of initial county registration unless the person, after 10 years of registration, successfully petitions the superior court to shorten his or her registration time period under G.S. 14-208.12A."

> (2) Obtain the registration information required under G.S. 14-208.7(b)(1), (2), (5), (6), and (7), as well as the address where the person expects to reside upon the person's release.
>
> (3) Send the Division and the sheriff of the county in which the person expects to reside the information collected in accordance with subdivision (2) of this subsection.
>
> (b) If a person who is subject to registration under this Article does not receive an active term of imprisonment, the court pronouncing sentence shall conduct, at the time of sentencing, the notification procedures specified in subsection (a) of this section.

N.C. Gen. Stat. § 14-208.8 (2008) (emphasis added). Defendant received an active sentence and, therefore, N.C. Gen. Stat. § 14-208.8(b) does not apply. N.C. Gen. Stat. § 14-208.8 imposes no duty upon the trial court to inform Defendant of the sex offender registration requirement. This duty falls to the North Carolina Department of Correction, pursuant to N.C. Gen. Stat. § 14-208.8(a). Because there is no statutory requirement that the trial court inform Defendant that she must register as a sex offender upon release, and because Defendant does not contend that she was released without the proper notification, Defendant has shown no error by the trial court. Furthermore, because registration was mandatory for Defendant, Defendant cannot demonstrate any prejudice. This argument is without merit.

In Defendant's second argument, she contends that the trial court erred in entering the 15 July 2009 *ex parte* order that required registration out of session and without jurisdiction. We disagree.

Having held that the trial court had no statutory obligation to inform Defendant of her duty to register as a sex offender upon her release, Defendant cannot demonstrate any prejudice resulting from the entry of the trial court's 15 July 2009 order. This argument is without merit.

Defendant's third argument likewise fails because it relies on an alleged error regarding the 15 July 2009 order. Therefore, Defendant cannot demonstrate any prejudice. This argument is without merit.

In Defendant's fourth argument, she contends that the trial court erred in assigning Defendant a prior record level of II upon resentencing. We agree.

"'For all intents and purposes [a] resentencing hearing is *de novo* as to the appropriate sentence.'" *State v. Hagans*, 188 N.C. App. 799, 802, 656 S.E.2d 704, 706 (2008) (citation omitted); *see also State v. Hargett*, 157 N.C. App. 90, 98-99, 577 S.E.2d 703, 708 (2003). The trial court, in support of its initial sentence, entered a prior record level worksheet dated 5 September 2007 in which it calculated Defendant as a prior record level II. In its amended 1 June 2009 judgment, following the resentencing hearing, the trial court again determined Defendant was a prior record level II. However, the trial court failed to include a prior record level worksheet with its judgment. Nor did the trial court include any other basis, in its judgment or at the resentencing hearing, upon which this Court can determine the grounds for the trial court's determination that Defendant was a prior record level II

for sentencing. "The prior record level of a felony offender is determined by calculating the sum of the points assigned to each of the offender's prior convictions that the court . . . finds to have been proved in accordance with this section." N.C. Gen. Stat. § 15A-1340.14(a) (2009). We hold the trial court erred in failing to provide any basis for determining Defendant was a prior record level II for her resentencing. We therefore remand to the trial court for resentencing consistent with this holding.

In Defendant's sixth and seventh arguments, she contends the trial court erred by using a misdemeanor larceny conviction, for which Defendant received a prayer for judgment continued (PJC), as the basis for elevating her prior record level from a prior record level I to a level II. We disagree.

We address this argument because Defendant may decide to raise it again on resentencing. However, as Defendant acknowledges, our Court has previously addressed this issue in *State v. Graham*, 149 N.C. App. 215, 220-21, 562 S.E.2d 286, 289 (2002), and has determined that a PJC granted for a conviction does not prevent the trial court from using that conviction when calculating Defendant's prior record level. Defendant's sixth and seventh arguments are without merit.

In Defendant's fifth argument, she contends the trial court erred in admitting hearsay testimony, in refusing to allow Defendant to "rebut aggravation and present mitigation," and in failing to "sufficiently review the original trial record." We disagree.

> There is a presumption that the judgment of a court is valid and just. The burden is upon appellant to show error amounting to a denial of some substantial right. A judgment will not be disturbed because of sentencing procedures unless there is a showing of abuse of discretion, procedural conduct prejudicial to defendant, circumstances which manifest inherent unfairness and injustice, or conduct which offends the public sense of fair play.

State v. Pope, 257 N.C. 326, 335, 126 S.E.2d 126, 133 (1962).

At the 1 June 2009 resentencing hearing, Defendant simply asked the trial court to "give [Defendant] a lesser sentence than she originally received." At the original 5 September 2007 sentencing hearing, the trial court found no aggravating or mitigating factors and made no findings of fact because it sentenced Defendant to an active term of 240 to 297 months, which was in the presumptive range. At the 1 June 2009 resentencing hearing, the trial court reduced Defendant's sentence to an active term of 230 to 285 months, the lowest possible presumptive range sentence Defendant could receive.[3] The trial court therefore granted Defendant's request for a reduction in the length of her sentence. Even assuming *arguendo* that the trial court committed the errors Defendant contends in this argument at the 1 June 2009 resentencing hearing, because Defendant received the relief she requested, Defendant cannot show that she was prejudiced. *Id.* This argument is without merit.

Judgment vacated and case remanded for resentencing.

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[3]Structured sentencing ranges have since been modified by the General Assembly, but the modifications do not apply to Defendant's case. *See* N.C. Gen. Stat. § 15-1340.17 (2009) and notes on the effects of the amendments.

Judges GEER and ERVIN concur.

Report per Rule 30(e).