NO. COA09-1486

NORTH CAROLINA COURT OF APPEALS

Filed: 20 July 2010

STATE OF NORTH CAROLINA

v. Mecklenburg County
No. 08 CRS 40864

RICHARD POWERS LINCOLN

Appeal by defendant from judgment entered 20 May 2009 by Judge A. Robinson Hassell in Mecklenburg County Superior Court. Heard in the Court of Appeals 19 July 2010.

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

Jon W. Myers for defendant-appellant.

BRYANT, Judge.

Richard Powers Lincoln ("defendant") appeals from judgment dated 20 May 2009 and entered pursuant to a jury verdict finding him guilty of failure to register as a sex offender. The trial court found defendant had a prior record level of III, based on eight prior record points, and sentenced defendant to a term of seventeen to twenty-one months imprisonment. Defendant filed written notice of appeal on 27 May 2009.

At trial the State's evidence tended to show that defendant was required to register as a sex offender due to a prior conviction for committing a sexual offense. Defendant registered

as a sex offender with the Mecklenburg County Sheriff's Department on 28 March 2007, and listed as his address 945 N. College Street in Charlotte, North Carolina. In December 2007, officers of the Charlotte Mecklenburg Police Department and Mecklenburg County Sheriff's Department twice found defendant at the Links Citiside Apartment Complex and learned defendant was living there and not at 945 N. College Street. Defendant admitted that he had been staying with a friend in the apartment complex and also stated that he had previously resided at a motel on Nations Ford Road for approximately seven months.

On appeal defendant's sole argument is that the trial court erred in determining defendant's prior record level because the State failed to prove defendant's out-of-state conviction was substantially similar to a North Carolina offense. We agree.

We first address the State's motion to dismiss defendant's appeal. The State argues defendant's appeal must be dismissed because defendant stipulated to his prior record level and thus the issue he presents on appeal is moot. *See State v. Hamby*, 129 N.C. App. 366, 369-70, 499 S.E.2d 195, 197 (1998) (holding the defendant's admission that her prior record level was II, "mooted the issue[] of whether her prior record level was correctly determined"). However, as we hold below, defendant's stipulation to his prior record level was invalid and ineffective and we deny the State's motion to dismiss defendant's appeal.

In calculating a defendant's prior record level for sentencing purposes, the North Carolina General Statutes provide for the inclusion of out-of-state convictions as follows:

> Except as otherwise provided in this subsection, a conviction occurring in a jurisdiction other than North Carolina is classified as a Class I felony if the jurisdiction in which the offense occurred classifies the offense as a felony, or is classified as a Class 3 misdemeanor if the jurisdiction in which the offense occurred classifies the offense as a misdemeanor. . . . If the State proves by the preponderance of the evidence that an offense classified as either a misdemeanor or a felony in the other jurisdiction is substantially similar to an offense in North Carolina that is classified as a Class I felony or higher, the conviction is treated as that class of felony for assigning prior record level points. . . .

N.C. Gen. Stat. § 15A-1340.14(e) (2009). "[T]he question of whether a conviction under an out-of-state statute is substantially similar to an offense under North Carolina statutes is a question of law to be resolved by the trial court." *State v. Hanton*, 175 N.C. App. 250, 255, 623 S.E.2d 600, 604 (2006). While a stipulation by a defendant is sufficient to prove the existence of defendant's prior convictions which may be used to determine the defendant's prior record level for sentencing purposes, N.C. Gen. Stat. § 15A-1340.14(f) (2009), the trial court's assignment of defendant's prior record level is a question of law, which we review *de novo*. *See State v. Fraley*, 182 N.C. App. 683, 691, 643 S.E.2d 39, 44 (2007). "'Stipulations as to questions of law are generally held invalid and ineffective, and not binding upon the courts, either trial or appellate.'" *Hanton* at 253, 623 S.E.2d at

603 (quoting *State v. Prevette*, 39 N.C. App. 470, 472, 250 S.E.2d 682, 683 (1979)); *see also State v. Palmateer*, 179 N.C. App. 579, 582, 634 S.E.2d 592, 594 (2006) (holding "the stipulation in the worksheet regarding Defendant's out-of-state convictions was ineffective[,]" and remanding the case for resentencing). Further, "[t]his Court has found that the trial court errs if it sentences a defendant based in part on a prior foreign conviction that has not been proven to be substantially similar to the North Carolina equivalent by a preponderance of the evidence." *State v. Lee*, 193 N.C. App. 748, 749, 668 S.E.2d 393, 394 (2008) (citation omitted).

In the instant case, the prior record level worksheet for felony sentencing purposes included in the record on appeal lists two prior convictions for defendant: one North Carolina conviction for taking indecent liberties with a child, a Class F felony, and one Florida conviction for lewd and lascivious acts. The listing for the Florida conviction merely gives the name of the offense and the date of the conviction and does not indicate whether the offense is a felony or a misdemeanor. Additionally, the prior record level worksheet is not signed by any of the parties or the presiding judge.

During sentencing, the State argued defendant's Florida conviction for lewd and lascivious acts is substantially similar to a North Carolina conviction for taking indecent liberties with a child and should be classified as a Class F felony for sentencing purposes. The State further indicated that it had copies of the judgments and commitment forms for each of defendant's convictions,

but there is no indication that they were submitted to the trial court for consideration. The trial court asked if defendant would stipulate that "the record Level III would be appropriate for purposes of sentencing in this case?" Defense counsel initially believed defendant should have a prior record level of II, but after locating the prior record level worksheet, counsel stated, "I believe I found the prior record level sheet and it does state III. We'll stipulate to that at this time." The transcript contains no further reference to the determination of defendant's prior record level by the State, defense counsel, or the trial court.

Defendant's stipulation at sentencing spoke to his prior record level, which is a question of law for the trial court to determine, as opposed to the existence of his prior convictions, which is a question of fact which may be proven by stipulation. Additionally, defendant's prior record level as determined by the trial court is dependant upon an out-of-state conviction, the classification of which for sentencing purposes is again a question of law which must be determined by the trial court. There is nothing in the record to show the State proved by the preponderance of the evidence that defendant's conviction for committing lewd and lascivious acts was substantially similar to any North Carolina offense. Moreover, there is nothing in the record to show the State proved defendant's Florida conviction was for a felony offense, which would automatically be classified as a Class I felony for sentencing purposes. Without the Florida conviction, the record before this Court only supports a finding that defendant

had four prior record points, giving him a prior record level of II. Accordingly, we hold the trial court erred in sentencing defendant as a prior record level III offender, and we remand this case for re-sentencing.

Remanded for resentencing.

Judges HUNTER, Robert C. and STEELMAN concur.

Report per Rule 30(e).