NO. COA09-1598

NORTH CAROLINA COURT OF APPEALS

Filed: 2 November 2010

STATE OF NORTH CAROLINA

v.

LEONARD RICKY KELLY,
Defendant.

Wayne County
Nos. 06 CRS 57862
06 CRS 57863
07 CRS 1251

Appeal by defendant from judgment entered 9 April 2009 by Judge Arnold O. Jones, II in Wayne County Superior Court. Heard in the Court of Appeals 29 September 2010.

*Attorney General Roy Cooper, by Assistant Attorney General Floyd M. Lewis, for the State.*

*Jarvis John Edgerton, IV for defendant-appellant.*

HUNTER, Robert C., Judge.

On 5 March 2007, defendant Leonard Ricky Kelly was charged with two counts of felony breaking and entering, two counts of felony larceny after breaking and entering, two counts of felony possession of stolen goods, one count of misdemeanor larceny, one count of misdemeanor possession of stolen goods, and having attained habitual felon status. Defendant was convicted of all charges and the trial court sentenced defendant to 121 to 155 months imprisonment. *State v. Kelly*, 193 N.C. App. 455, 667 S.E.2d 342, 2008 N.C. App. LEXIS 1849, *3, 2008 WL 4630834, *1 (2008) (unpublished). On appeal, this Court (1) upheld defendant's

convictions on both counts of breaking and entering and one count of felony larceny after breaking and entering; (2) reversed the remaining count of felony larceny after breaking and entering and the misdemeanor larceny conviction; (3) arrested judgment on the three counts of possession of stolen goods; and (4) remanded for resentencing. *Id.* at *10-15, 2008 WL 4630834 at *3-6.

At defendant's resentencing, the trial court determined that defendant had 18 prior record points and that defendant was a Level V offender. The trial court consolidated the three remanded convictions — two counts of breaking and entering and one count of larceny after breaking and entering — along with the habitual felon conviction into one judgment, and, again, sentenced defendant to a presumptive-range term of 121 to 155 months imprisonment. Defendant gave notice of appeal in open court.

---

Defendant's sole contention on appeal is that the State failed to meet its burden of proving defendant's prior record level as required by N.C. Gen. Stat. § 15A-1340.14(f) (2009) (providing that "[t]he State bears the burden of proving, by a 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"). The statute sets out four methods for establishing a defendant's prior convictions:

> (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).

Although defendant contends that "none of the statutory means for accepting proof of prior convictions enumerated in N.C. Gen. Stat. § 15A-1340.14(f) were employed in this case[,]" review of the record indicates that defense counsel stipulated to defendant's prior convictions. In *State v. Alexander*, 359 N.C. 824, 830, 616 S.E.2d 914, 918 (2005), the Supreme Court explained that "counsel need not affirmatively state what a defendant's prior record level is for a stipulation with respect to that defendant's prior record level to occur." In other words, "[a] stipulation does not require an affirmative statement and silence may be deemed assent in some circumstances, particularly if the defendant had an opportunity to object and failed to do so." *State v. Wade*, 181 N.C. App. 295, 298, 639 S.E.2d 82, 85 (2007).

At defendant's resentencing hearing, his attorney argued in favor of sentencing defendant in the mitigated range, stating:

> [DEFENSE COUNSEL]: Thank you, your Honor. That's correct; [defendant] was sentenced at the lower end of the presumptive range under Prior Record Level Five, with all the judgments consolidated. In this type of case — and I've consulted with the Appellate Counsel on this. My understanding is he may not receive a sentence in excess of what he got before. The only consideration would be, I guess, the same or a lesser um . . . a lesser sentence.

> I would just note that there was considerable discussion, if you do read the record, and I have, at least, to this part, in looking at the prior cases, all of his — and this would be reflected on that prior record level worksheet — there's certainly some valid points, but they are — they're all old, and I would just note that; that all the felonies that made up the habitual felon [charge] are ah . . . in the 90's, and then the points come from the 90's and the 80's, and even ah, one from ah . . . 1979. Um . . . I think Judge Lanier — ah, there was a question as to one of the — some — one of the points comes from an offense with the same offense date as one of the habitual felons, and I think perhaps he ah . . . discounted that, and that is one reason the plea reached to Level Five, but if you take that out, as well as the ah . . . the possession of marijuana, the 1979 case, which is listed as a Class I felony, you would have 15 points, which would be the bottom of Level Five, but it would still be at — in Level Five, but it would be just barely there, and it's made up by some old misdemeanors, um . . . pertaining to his plea . . . 1, 2, 3, — 4 of the points would come from that. I would ask you to consider, and I think [defendant] would like to make another point on this, but I'll ask you to consider sentencing him in the mitigated range.

Later, in response to the trial court's question as to whether defense counsel was stipulating to defendant's having 15 prior record points, defense counsel stated:

> [DEFENSE COUNSEL]: No, sir, actually. . . . What I did say earlier, that if you look at the record submitted by the State, and don't include the one that has the same date of conviction as one of the habitual felons, and don't include the 1979 marijuana charge; those points would add up to 15. This is the bottom of the Prior Record Level Five.
>
> THE COURT: Okay.
>
> [DEFENSE COUNSEL]: But I do want to say, at least for the record, that there is no stipulation as to that.

Although defense counsel stated that he was not stipulating to defendant's prior record points, he repeatedly referred to defendant's prior record level worksheet and relied on the information in that worksheet in advocating for defendant's being sentenced in the mitigated range. In addition, at no time during the resentencing did defense counsel dispute any of defendant's convictions in the worksheet. These circumstances are sufficient to constitute a stipulation for purposes of N.C. Gen. Stat. § 15A-1340.14(f). *See Wade*, 181 N.C. App. at 299, 639 S.E.2d at 86 (concluding that counsel's failure to object to prior convictions listed on worksheet constituted stipulation); *State v. Hurley*, 180 N.C. App. 680, 685, 637 S.E.2d 919, 923 (2006) (holding stipulation to prior convictions occurred when counsel had opportunity to object, but "rather than doing so, asked for work release"), *disc. review denied*, 361 N.C. 433, 649 S.E.2d 394 (2007); *State v. Cromartie*, 177 N.C. App. 73, 81, 627 S.E.2d 677, 682 (holding counsel stipulated to defendant's prior convictions when counsel acknowledged worksheet, specifically discussed convictions listed in worksheet in effort to "minimize" defendant's prior record, and at no time disputed "any of the convictions on the worksheet"), *disc. review denied*, 360 N.C. 539, 634 S.E.2d 538 (2006).

As the Supreme Court explained in *Alexander*, 359 N.C. at 830, 616 S.E.2d at 918, defendant cannot "have his cake and eat it too." "Defendant cannot use the worksheet during his sentencing hearing to seek a lesser sentence and then have his appellate counsel disavow this conduct on appeal in order to obtain a new sentencing

hearing." *Cromartie*, 177 N.C. App. at 81, 627 S.E.2d at 683. Accordingly, we conclude that defense counsel's oral argument was sufficient to constitute a stipulation as to defendant's prior convictions. There is no dispute that the convictions listed on the worksheet result in a prior record level of V. The trial court's judgment is affirmed.

Affirmed.

Judges CALABRIA and GEER concur.

Report per Rule 30(e).