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NO. COA12-163
NORTH CAROLINA COURT OF APPEALS

Filed: 2 October 2012

STATE OF NORTH CAROLINA

v. Brunswick County
Nos. 09-CRS-52865
LEE ROY JOLLY, JR. 11-CRS-3475

Appeal by defendant from judgment entered in 11-CRS-3475 on 13 September 2011 by Judge Robert F. Floyd in Brunswick County Superior Court. Heard in the Court of Appeals 30 August 2012.

Attorney General Roy Cooper, by Special Deputy Attorney General Buren R. Shields, III, for the State.

Russell J. Hollers, III, for defendant-appellant.

HUNTER, Jr., Robert N., Judge.

Lee Roy Jolly, Jr. ("Defendant") appeals from a judgment sentencing him as a Level III offender for robbery with a dangerous weapon. Defendant argues he is entitled to a new sentencing hearing because the trial court erred in failing to: 1) conduct a formal colloquy pursuant to N.C. Gen. Stat. § 15A-1022.1 before accepting Defendant's admission to the existence

of an aggravating factor; 2) impanel a jury to determine the existence of the aggravating factor at issue, in violation of N.C. Gen. Stat. § 15A-1340.16(a5); and 3) ensure the State provided Defendant with 30 days written notice of its intent to prove a prior record level point under N.C. Gen. Stat. § 15A-1340.14(b)(7), as required by N.C. Gen. Stat. § 15A-1340.16(a6). After careful review, we find no prejudicial error.

I. Factual and Procedural History

On 14 September 2009 and 9 August 2011, a grand jury in Brunswick County returned indictments against Defendant for first degree murder and robbery with a dangerous weapon in connection with the death of Ms. Gladys Myrie. On 2 September 2011, a jury found Defendant guilty on both charges. After the robbery verdict, the prosecution submitted a prior record level worksheet to the trial court. The worksheet listed a prior conviction for second degree arson, a Class G felony, carrying four prior record level points. In addition, the prosecution asserted that Defendant was on probation at the time of the robbery, which necessitated the addition of another record level point pursuant to N.C. Gen. Stat. § 15A-1340.14(b)(7). The trial court then asked defense counsel if he stipulated to Defendant having been on probation at that time. Defense

counsel responded by saying, "I represented Mr. Jolly on the charge, so, yes sir." At no time was Defendant directly addressed concerning the matter. The court then found Defendant to have five prior record level points, and sentenced him as a Level III offender pursuant to the sentencing grid in effect for offenses committed before 1 December 2009. See N.C. Gen. Stat. § 15A-1340.14(c)(3) (2007).¹ Defendant gave oral notice of appeal in open court.

II. Jurisdiction

As Defendant appeals from the final judgment of a superior court, an appeal lies of right to this Court pursuant to N.C. Gen. Stat. § 7A-27(b) (2011).

III. Analysis

Defendant asserts the trial court erred by sentencing him as a Level III offender for the robbery with a dangerous weapon conviction.² Specifically, Defendant argues the court's failure to adhere to three provisions of the Criminal Procedure Act

¹ The General Assembly raised the number of points required to reach Level III status for offenses committed on or after 1 December 2009 from five to six. See N.C. Gen. Stat. § 15A-1340.14(c)(3) (2009).

² The trial court sentenced Defendant separately to life in prison without parole for first degree murder. Defendant does not dispute the validity of that sentence on appeal here.

compels the award of a new sentencing hearing. We address each of Defendant's arguments in turn.³

A. Failure to comply with N.C. Gen. Stat. § 15A-1022.1

Defendant contends the trial court erred by failing to conduct a formal colloquy, as required by N.C. Gen. Stat. § 15A-1022.1, before accepting Defendant's admission of the fact he was on probation at the time of the offense. We agree the trial court erred in not conducting a formal colloquy, but hold Defendant suffered no prejudice as a result of the trial court's error.

This Court reviews the calculation of a prior record level *de novo*. *State v. Fraley*, 182 N.C. App. 683, 691, 643 S.E.2d 39, 44 (2007). The State argues Defendant is limited to plain error review in light of his failure to object during the sentencing hearing. However, this Court may review a "sentence imposed [that] was unauthorized at the time imposed, exceeded the maximum authorized by law, was illegally imposed, or is otherwise invalid as a matter of law." N.C. Gen. Stat. § 15A-

³ We note that Defendant does not argue his constitutional rights were violated under *Blakely v. Washington*, 542 U.S. 296 (2004), or any other precedent. "It is not the duty of this Court to supplement an appellant's brief with legal authority or arguments not contained therein." *Goodson v. P.H. Glatfelter Co.*, 171 N.C. App. 596, 606, 615 S.E.2d 350, 358 (2005). Accordingly, we evaluate Defendant's appeal solely on the statutory grounds raised by Defendant.

1446(d)(18) (2011). This review is appropriate "even though no objection, exception, or motion has been made in the trial division." N.C. Gen. Stat. § 15A-1446(d). Furthermore, "[i]t is well established that 'when a trial court acts contrary to a statutory mandate and a defendant is prejudiced thereby, the right to appeal the court's action is preserved, notwithstanding defendant's failure to object at trial.'" *State v. Davis*, 364 N.C. 297, 301, 698 S.E.2d 65, 67 (2010) (quoting *State v. Ashe*, 314 N.C. 28, 39, 331 S.E.2d 652, 659 (1985)).

In calculating a defendant's prior record level, N.C. Gen. Stat. § 15A-1340.14(b)(7) provides that a defendant shall receive one additional prior record level point in the event his current offense was committed while on probation. However, when "the State seeks to establish the existence of a prior record level point under G.S. 15A-1340.14(b)(7), the jury shall determine whether the point should be assessed using the procedures specified in subsections (a1) through (a3) of [Section 15A-1340.16]." N.C. Gen. Stat. § 1340.16(a5). Subsection (a1) of Section 15A-1340.16 reads:

The defendant may admit to the existence of an aggravating factor, and the factor so admitted shall be treated as though it were found by a jury pursuant to the procedures in this subsection. *Admissions of the existence of an aggravating factor must be*

consistent with the provisions of G.S. 15A-1022.1. If the defendant does not so admit, only a jury may determine if an aggravating factor is present in an offense.

N.C. Gen. Stat. § 15A-1340.16(a1) (emphasis added).

Thus, when a defendant admits to the existence of an aggravating factor, the court must comply with the procedures outlined in N.C. Gen. Stat. § 15A-1022.1, which reads in part:

In all cases in which a defendant admits to the existence of an aggravating factor or to a finding that a prior record level point should be found under G.S. 15A-1340.14(b)(7), the court shall comply with the provisions of G.S. 15A-1022(a).⁴ In addition, the court shall address the defendant personally and advise the defendant that:

(1) He or she is entitled to have a jury determine the existence of any aggravating factors or points under G.S. 15A-1340.14(b)(7);

. . . .

N.C. Gen. Stat. § 15A-1022.1(b) (emphasis added).

In the case at bar, the trial court failed to address Defendant personally regarding his probationary status at any point during the relevant portion of his sentencing hearing.

⁴ Section 15A-1022(a) specifies the procedures by which a trial court may accept a plea of guilty to a substantive criminal offense. This section is designed to ensure pleas are knowing and intelligent, and requires the court to determine that the defendant understands the full complement of his rights, including his right to have a jury determine his guilt.

Instead, the trial court merely accepted the oral stipulation of Defendant's counsel to the probation point and the signature of Defendant's counsel on the prior record level worksheet, without informing Defendant of his right to have a jury make the determination that he was, in fact, on probation at the time of the robbery. See N.C. Gen. Stat. § 15A-1022.1(b)(1). In addition, contrary to the directive of Section 15A-1022.1(b), the trial court did not follow any of the procedures contained in Section 15A-1022(a) before accepting counsel's stipulation. See N.C. Gen. Stat. § 15A-1022(a) (requiring that the court conduct a colloquy designed to ensure the defendant understands his rights before pleading guilty to a substantive criminal offense).

In response to Defendant's argument, the State directs our attention to Section 15A-1022.1(e), which states:

The procedures specified in this Article for the handling of pleas of guilty are applicable to the handling of admissions to aggravating factors and prior record points under G.S. 15A-1340.14(b)(7), *unless the context clearly indicates that they are inappropriate.*

N.C. Gen. Stat. § 15A-1022.1(e) (emphasis added). In interpreting the statute, the State argues this language "provide[s] . . . flexibility and discretion to the trial

court" in determining the necessity of applying the safeguards of Section 15A-1022.1, such that its requirements are "expressly conditional in application." We find the State's argument unpersuasive. The language of Section 15A-1022.1(e) concerns the "procedures specified in this Article for the handling of pleas of guilty," and makes them applicable to the sort of probation point admissions at issue in this case. As discussed above, these procedures "for the handling of pleas of guilty" are contained in Section 15A-1022. Section 15A-1022.1(e) makes no reference to the procedures contained in Section 15A-1022.1(b). Thus, to the extent Section 15A-1022.1(e) provides the trial court with some discretion in applying procedural safeguards, it does so only with respect to the measures enumerated in Section 15A-1022.

Nevertheless, in order to obtain a new sentencing hearing, Defendant bears the burden of demonstrating the trial court's error was prejudicial. See N.C. Gen. Stat. §§ 15A-1442(6), 15A-1443(a). There is nothing in the record to suggest trial counsel's stipulation was erroneous, and Defendant makes no showing that he was not on probation at the time of the offense.⁵

⁵ Defendant does contend that trial counsel's stipulation was "likely erroneous," and points to an Offender Information Report attached to his brief. In addition to being inconclusive, this

In fact, testimony elicited at trial indicates Defendant himself believed he was on probation at the time of the offense. Specifically, Captain Sam Davis testified Defendant indicated "he was on probation and had a 7:00 p.m. curfew" at the time of the murder. Defendant has failed to meet his burden of demonstrating prejudice, and thus we do not hold that an "error of law was committed by the trial court to the prejudice of the defendant" such that a new hearing is required. N.C. Gen. Stat. § 15A-1442(6).

B. Failure to Impanel a Jury

Secondly, Defendant asserts the trial court's failure to impanel a jury during sentencing to determine his probationary status constitutes error *per se*. Defendant directs our attention to Section 15A-1340.16(a5) which, as noted above, mandates that "[i]f the State seeks to establish the existence of a prior record level point under G.S. 15A-1340.14(b)(7), the jury shall determine whether the point should be assessed . . ." N.C. Gen. Stat. § 15A-1340.16(a5). However, Defendant only quotes half of subsection (a5), which goes on to read ". . .

Report is not in the record. See N.C. R. App. P. 9(a); *West v. G. D. Reddick, Inc.*, 48 N.C. App. 135, 137, 268 S.E.2d 235, 236 (1980), *rev'd on other grounds*, 302 N.C. 201, 274 S.E.2d 221 (1981) (citation omitted) ("Matters discussed in a brief but not found in the record will not be considered by this Court").

using the procedures specified in subsections (a1) through (a3) of this section." *Id.* As discussed in Part A, *supra*, subsection (a1) explains that:

The defendant may admit to the existence of an aggravating factor, and the factor so admitted shall be treated as though it were found by a jury pursuant to the procedures in this subsection. Admissions of the existence of an aggravating factor must be consistent with the provisions of G.S. 15A-1022.1.

N.C. Gen. Stat. § 15A-1340.16(a1).

When read in its entirety, it is clear Section 15A-1340.16 does not mandate a jury be impaneled during sentencing in every case in which the State seeks to prove a prior record level point under Section 15A-1340.14(b)(7). Rather, a Defendant may admit his probationary status at the time of the offense, so long as the court complies with the procedural safeguards contained in Section 15A-1022.1, as discussed above. Thus, Defendant's argument that the trial court *must* impanel a jury, and that the trial court erred by failing to do so, is without merit.

C. Failure to provide 30-day written notice

Finally, Defendant asserts the State did not comply with N.C. Gen. Stat. § 15A-1340.16(a6), which requires that "[t]he State must provide a defendant with written notice of its intent

to prove the existence of . . . a prior record level point under G.S. 15A-1340.14(b)(7) at least 30 days before trial or the entry of a guilty or no contest plea." The record suggests the State gave no notice to Defendant of its intent to prove the probation point.

However, "[a] defendant may waive the right to receive such notice." N.C. Gen. Stat. § 15A-1340.16(a6). Under the facts of this case, Defendant's failure to object to the lack of notice at the sentencing hearing, coupled with his counsel's stipulation, operates as a waiver of this statutory right. Defendant's argument in this respect is overruled.

No error in part; no prejudicial error in part.

Judges ERVIN and MCCULLOUGH concur.

Report per Rule 30(e).