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NO. COA 12-205
NORTH CAROLINA COURT OF APPEALS

Filed: 18 December 2012

STATE OF NORTH CAROLINA

v.

Vance County
No. 10 CRS 177, 10 CRS 51064

JEROME VERNON MANSON

On writs of *certiorari* to review judgments entered 27 October 2010 by Judge Ronald L. Stephens in Vance County Superior Court. Heard in the Court of Appeals 30 August 2012.

Attorney General Roy Cooper, by Assistant Attorney General Brenda Eaddy, for the State.

Levine & Stewart, by James E. Tanner III, for defendant-appellant.

ERVIN, Judge.

Defendant Jerome Vernon Manson, Jr., challenges judgments sentencing him to a term of eight to ten months imprisonment based upon his conviction for felonious possession of stolen property; to a consecutive term of eight to ten months imprisonment based upon his conviction for felonious hit and run resulting in bodily harm; to a consecutive term of 120 days imprisonment based upon his convictions for fleeing to elude

arrest and two counts of driving while license revoked, all of which were consolidated for judgment; to a consecutive term of 120 days imprisonment based upon his convictions for four counts of driving while license revoked, all of which were consolidated for judgment; and a final consecutive term of 60 days imprisonment based upon his conviction for driving while impaired. On appeal, Defendant contends that the trial court erred by imposing consecutive misdemeanor sentences in excess of the limits allowed by N.C. Gen. Stat. § 15A-1340.22. After careful consideration of Defendant's challenge to the trial court's judgments in light of the record and the applicable law, we conclude that the trial court's judgments should be affirmed.

I. Factual Background

On 23 June, 19 August, and 28 September 2008, Defendant was cited for driving while license revoked. On the last of these three dates, Defendant also fled for the purpose of attempting to elude arrest when an officer attempted to stop him for speeding. On 15 January 2009, Defendant was cited for driving while license revoked yet again. On 11 February 2010, Defendant was cited for driving while license revoked for a fifth time. Days later, on 13 February 2010, Defendant was stopped for failing to stop at a stop sign. After concluding that Defendant was impaired, the arresting officer also cited him for driving

while impaired and a sixth count of driving while license revoked.

On 24 January 2010, an officer of the Henderson Police Department initiated a traffic stop after witnesses at the local Walmart alerted management that they had seen an African-American male and his friends attempting to steal a laptop. The witnesses identified three individuals in a gray car parked in the neighboring Pizza Hut parking lot as the perpetrators. At the time that the vehicle was stopped, Antoine Clack was driving the vehicle, Defendant was in the front passenger seat, and Mark Crudup was in the rear passenger seat. The vehicle contained more than \$1000 worth of merchandise that had been stolen from Walmart. As a result, Defendant was charged with felonious possession of stolen property.

On 6 April 2010, Defendant drove a blue Cadillac into the side of Cedarhurst Apartments. In addition to damaging the building, Defendant's conduct caused a dresser inside of one of the apartments to fall onto a small child. Although Defendant fled the scene, witnesses identified him as the driver. As a result, Defendant was charged with felonious hit and run causing personal injury.

On 27 October 2010, Defendant entered into a plea agreement with the State under which he agreed to plead guilty to

felonious possession of stolen goods and receive an active sentence of eight to ten months imprisonment; to felonious hit and run causing personal injury and receive a consecutive active sentence of eight to ten months imprisonment; to misdemeanor fleeing to elude arrest and three counts of driving while license revoked, all of which were to be consolidated for judgment, and receive a consecutive active sentence of 120 days imprisonment; to three counts of driving while license revoked, all of which were to be consolidated for judgment, and receive a consecutive active sentence of 120 days imprisonment; and to driving while impaired and receive a consecutive active sentence of sixty days imprisonment. In accordance with this plea agreement, the State agreed to dismiss several other charges that had been lodged against Defendant, including loitering, operating a vehicle with a fictitious tag, operating a vehicle without liability insurance, discharging a weapon, assault with a deadly weapon with the intent to kill, and conspiracy. At the ensuing sentencing hearing, Defendant stipulated to his prior record and agreed that he should be sentenced as a Level III offender for both felony and misdemeanor sentencing purposes. The trial court accepted Defendant's guilty pleas and sentenced him in accordance with the plea agreement.

On 18 July 2011, Defendant filed a petition seeking the issuance of writ of *certiorari* in order to permit appellate review of the trial court's judgments in the cases in which Defendant was convicted of committing felony offenses. This Court granted Defendant's petition on 3 August 2011. On 25 July 2012, Defendant filed an additional petition for writ of *certiorari* seeking review of the trial court's misdemeanor judgments.¹ In the exercise of our discretion, we conclude that

¹In his brief, Defendant does not advance any argument challenging the sentences that the trial court imposed upon him based upon his felony convictions. As we understand the assertions made in Defendant's second *certiorari* petition, Defendant decided not to pursue his challenges to the felony sentences imposed upon him by the trial court because his final felony sentence expired on 12 December 2011, rendering the felony sentencing issue which he originally sought to raise moot, and because Defendant could have received the same sentence even if his prior record level had been calculated correctly given that the minimum sentence actually imposed upon him in the felony case was within the presumptive range for both potentially applicable prior record levels. In addition, given that the transcript of plea indicates that Defendant agreed to the felony sentences which were imposed upon him by the trial court, that the plea hearing transcript indicates that Defendant's trial counsel acknowledged that the applicable felony and misdemeanor prior offense levels were not in dispute, and that the material upon which Defendant intended to rely in challenging his felony sentences does not appear to have been contained in the trial record, it is not clear that Defendant would have been entitled to relief on direct appeal had he persisted in asserting his challenges on appeal to the felony sentences imposed upon him by the trial court.

Defendant's second *certiorari* petition should be granted and will proceed to review his claims on the merits.²

II. Legal Analysis

In his brief, Defendant contends that the trial court imposed consecutive misdemeanor sentences upon him in excess of the limitations on the length of imprisonment established by N.C. Gen. Stat. § 15A-1340.22.³ More particularly, Defendant asserts that the combined length of the three consecutive misdemeanor sentences imposed upon him by the trial court, including his sentence for driving while impaired, exceeds the maximum allowable cumulative sentence by sixty days. We do not find Defendant's argument persuasive.⁴

²Although Defendant has completed service of the challenged misdemeanor sentences, we need not address the extent to which his challenge to those sentences has been rendered moot given that the State has not sought dismissal of Defendant's appeal on mootness grounds and our conclusion that Defendant's challenge to his misdemeanor sentences lacks substantive merit.

³Although Defendant argues in his brief that the trial court erroneously utilized a simple assault conviction to calculate his prior offense level for felony sentencing purposes, he concedes that correction of this alleged error would not necessitate resentencing. As a result, we need not address this aspect of Defendant's challenges to the trial court's judgments any further.

⁴Defendant also argues that the trial court erred by sentencing him for six counts of driving while license revoked on the grounds that "there was no reference to [one of the counts of driving while license revoked] in the plea colloquy." As a result of the fact that Defendant has not advanced any specific argument or sought any specific relief based upon this contention, we lack the authority to address this issue further.

N.C. Gen. Stat. § 15A-1340.22(a) provides that:

If the court elects to impose consecutive sentences for two or more misdemeanors and the most serious misdemeanor is classified in Class A1, Class 1, or Class 2, the cumulative length of the sentences of imprisonment shall not exceed twice the maximum sentence authorized for the class and prior conviction level of the most serious offense. Consecutive sentences shall not be imposed if all convictions are for Class 3 misdemeanors.

N.C. Gen. Stat. § 15A-1340.22(a) (2011). Determining whether the misdemeanor sentences imposed upon Defendant by the trial court exceed those authorized by N.C. Gen. Stat. § 15A-1340.22(a) requires resolution of an issue of law of the sort which this Court reviews *de novo*. *State v. Remley*, 201 N.C. App. 146, 152, 686 S.E.2d 160, 163 (2009).

Consistently with the plea agreement between Defendant and the State, the trial court imposed three consecutive misdemeanor sentences. The first misdemeanor sentence, which stemmed from Defendant's convictions for fleeing to elude arrest and two counts of driving while license revoked, was for a term of 120 days imprisonment. The second misdemeanor sentence, which stemmed from Defendant's convictions for four additional counts of driving while license revoked, also involved a term of 120

Viar v. N.C. Dep't of Transp., 359 N.C. 400, 402, 610 S.E.2d 360, 361 (2005) (stating that "[i]t is not the role of the appellate courts . . . to create an appeal for an appellant").

days imprisonment. Finally, the third misdemeanor sentence, which resulted from Defendant's conviction for driving while impaired, involved a term of 60 days imprisonment. The cumulative length of the sentences imposed upon Defendant under the trial court's judgments amounted to 300 days imprisonment.

According to Defendant, the most serious offense for which he was sentenced was either driving while license revoked or fleeing to elude arrest, both of which are Class 1 misdemeanors. Defendant was subject to a possible maximum sentence of 120 days for either of those offenses based upon his status as a Level III offender for misdemeanor sentencing purposes. In addition, Defendant maintains, in reliance upon N.C. Gen. Stat. § 14-3,⁵ that driving while impaired should be classified as a Class 2 misdemeanor because the maximum sentence to which he was subject based upon his conviction for committing that offense was no greater than six months. As a result, Defendant argues that the maximum total term of imprisonment which could have been imposed upon him consistently with N.C. Gen. Stat. § 15A-1340.22(a) was 240 days, so that the trial court erred by sentencing him to a cumulative total of 300 days imprisonment based upon his misdemeanor convictions.

⁵N.C. Gen. Stat. § 20-138.1 does not contain any language providing that a conviction for driving while impaired should be treated as a conviction for any particular class of misdemeanor.

The fundamental flaw in Defendant's argument stems from his failure to properly account for the fact that the Structured Sentencing Act, of which N.C. Gen. Stat. § 15A-1340.22(a) is a part, does not apply to driving while impaired convictions. As N.C. Gen. Stat. § 15A-1340.10, which is entitled "Applicability of structured sentencing," expressly states, "[t]his Article applies to criminal offenses in North Carolina, other than impaired driving under G.S. 20-138.1" N.C. Gen. Stat. § 15A-1340.10. Thus, given that N.C. Gen. Stat. § 15A-1340.10 and N.C. Gen. Stat. § 15A-1340.22(a) are both contained in Article 81B of Chapter 15A of the North Carolina General Statutes, N.C. Gen. Stat. § 15A-1340.22(a) has no application to the imposition of sentences based upon convictions for driving while impaired, which are governed instead by N.C. Gen. Stat. § 20-179. N.C. Gen. Stat. § 20-138.1(d); *see State v. Phair*, __ N.C. App. __, 731 S.E.2d 275, 2012 N.C. App. Lexis 1009, at *9-*10 (2012) (unpublished) (holding that the use of a contemporaneous conviction for fleeing to elude arrest as an aggravating factor for driving while impaired for sentencing purposes did not violate N.C. Gen. Stat. § 15A-1340.16 because impaired driving sentences are not subject to the limitations set out in the Structured Sentencing Act). N.C. Gen. Stat. § 20-179 does not limit the length of consecutive sentences stemming from one or

more driving while impaired convictions. As a result, since Defendant's driving while impaired sentence is not subject to the sentence duration limits set out in N.C. Gen. Stat. § 15A-1340.23, the fact that Defendant received a consecutive sentence based upon his driving while impaired conviction has no bearing upon the extent to which the trial court did or did not comply with N.C. Gen. Stat. § 15A-1340.22(a).

As Defendant has correctly noted, the maximum sentence for the most serious offense (aside from driving while impaired) for which Defendant was convicted is 120 days imprisonment, so that the maximum cumulative sentence which could have lawfully been imposed upon Defendant consistently with N.C. Gen. Stat. § 15A-1340.22(a) is 240 days imprisonment.⁶ As we have already noted, the trial court sentenced Defendant to 120 days imprisonment based upon his convictions for fleeing to elude arrest and two counts of driving while license revoked and to a consecutive term of 120 days imprisonment based upon his convictions for four additional counts of driving while license revoked, resulting in a total term of 240 days imprisonment. Therefore,

⁶Although the State contends that the maximum permissible length of Defendant's sentence would be twelve months, on the theory that driving while impaired should be defined as a Class 1 misdemeanor pursuant to N.C. Gen. Stat. § 14-3, we need not address the validity of the State's contention given our determination that N.C. Gen. Stat. § 15A-1340.22 has no application to driving while impaired sentences.

since the total length of the non-driving while impaired misdemeanor sentences imposed upon Defendant by the trial court did not exceed twice the maximum sentence to which Defendant was exposed given the class of non-driving while impaired misdemeanor for which Defendant was convicted and his prior record level, the trial court's judgments are, in fact, consistent with the limitations upon misdemeanor sentences imposed by N.C. Gen. Stat. § 15A-1340.22(a) and should not be disturbed.

III. Conclusion

Thus, for the reasons set forth above, we conclude that Defendant's challenge to the misdemeanor sentences imposed by the trial court lacks merit. As a result, the trial court's judgments should be, and hereby are, affirmed.

AFFIRMED.

Judges ROBERT N. HUNTER, JR. and MCCULLOUGH concur.

Report per Rule 30(e).