NO. COA12-235
NORTH CAROLINA COURT OF APPEALS

Filed: 18 September 2012

STATE OF NORTH CAROLINA

v. Iredell County
Nos. 09 CRS 056823-24,
09 CRS 056831-33

WILLIAM DARRELL WELTON, JR.

Appeal by Defendant from judgments entered 18 July 2011 by Judge Joe Crosswhite in Superior Court, Iredell County. Heard in the Court of Appeals 28 August 2011.

Attorney General Roy Cooper, by Assistant Attorney General Kimberly Grande, for the State.

Don Willey for Defendant-Appellant.

McGEE, Judge.

William Darrell Welton, Jr. (Defendant) pleaded guilty to seven counts of assault with a firearm on a law enforcement officer, four counts of assaulting a government official with a deadly weapon, two counts of attempted first-degree burglary, one count of assault with a deadly weapon with intent to kill or cause serious injury, one count of felony speeding to elude, and

one count of assaulting a government official. These offenses were committed on 25 August 2009. Pursuant to Defendant's plea agreement, the charges were consolidated "into one class C felony and four class E felonies[,] each consecutive to the other." Defendant's plea agreement further provided that Defendant would receive an active sentence of 116 to 149 months' imprisonment for assault with a deadly weapon with intent to kill or cause serious injury, "followed by four . . . sentences of 34-50 months each[.]" The trial court determined that Defendant had a prior record level of III and sentenced Defendant as set forth in his plea agreement. Defendant appeals the trial court's determination of his prior record level.

Defendant argues on appeal that the trial court erred in sentencing him as a prior record level III offender. Defendant contends the State failed to prove by a preponderance of the evidence that Defendant's prior out-of-state conviction for "petit larceny" was substantially similar to North Carolina's crime of misdemeanor larceny. At the sentencing hearing, Defendant stipulated to the existence of his prior conviction for petit larceny in New York and that petit larceny was substantially similar to misdemeanor larceny in North Carolina.

This issue is controlled by this Court's decision in *State v. Palmateer*, 179 N.C. App. 579, 634 S.E.2d 592 (2006). In

Palmateer, the defendant stipulated to the existence and classification of prior out-of-state convictions. *Id.* at 581, 634 S.E.2d at 593. This Court observed that "'the 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.'" *Id.* (quoting *State v. Hanton*, 175 N.C. App. 250, 255, 623 S.E.2d 600, 604 (2006)). This Court then observed that "'[s]tipulations as to questions of law are generally held invalid and ineffective, and not binding upon the courts, either trial or appellate.'" *Id.* (citation omitted). This Court therefore concluded that "the stipulation in the worksheet regarding [d]efendant's out-of-state convictions was ineffective" and remanded the case for resentencing. *Id.* at 582, 634 S.E.2d at 594 (citation omitted).

Regarding whether a prior out-of-state conviction is substantially similar to a North Carolina offense, this Court has consistently held in accordance with the principle that stipulations are ineffective. *See State v. Burgess*, ___ N.C. App. ___, ___, 715 S.E.2d 867, 871 (2011) ("This Court has repeatedly held a defendant's stipulation to the substantial similarity of offenses from another jurisdiction is ineffective because the issue of whether an offense from another

jurisdiction is substantially similar to a North Carolina offense is a question of law."); *accord State v. Bohler*, 198 N.C. App. 631, 636-37, 681 S.E.2d 801, 806 (2009).

Thus, in the present case, Defendant's stipulation regarding the similarity of his out-of-state conviction to a North Carolina conviction was ineffective. We must therefore address whether the State offered sufficient evidence to support the trial court's finding of substantial similarity.

N.C. Gen. Stat. § 15A-1340.14(e) (2011) governs the classification of out-of-state convictions for the purpose of prior record level determinations. N.C.G.S. § 15A-1340.14(e) provides:

> 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 offender proves by the preponderance of the evidence that an offense classified as a felony in the other jurisdiction is substantially similar to an offense that is a misdemeanor in North Carolina, the conviction is treated as that class of misdemeanor for assigning prior record level points. 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. If the State proves by the preponderance of the evidence that an offense classified as a misdemeanor in the other jurisdiction is substantially similar to an offense classified as a Class A1 or Class 1 misdemeanor in North Carolina, the conviction is treated as a Class A1 or Class 1 misdemeanor for assigning prior record level points.

Thus, the burden is on the State to prove by a preponderance of the evidence that an out-of-state conviction is substantially similar to a Class A1 or Class 1 misdemeanor in North Carolina. In the present case, the State presented the following to the trial court:

> [The State:] We had a prior -- I had prepared a prior record level work sheet showing him at a prior record Level Three with six points and that includes convictions for petit larceny. Conviction date 10-16, 2001 out of New York. I have that as a Class One misdemeanor, and I think [Defendant's Counsel] said that he would stipulate and agree that that is substantially similar to our misdemeanor larceny, thus giving him one point for felony sentencing. Is that correct?
>
> [Defendant's Counsel]: I would, your Honor. That's not my issue with that conviction, but I certainly acknowledge that petit larceny and misdemeanor larceny, certainly look like they add up.

The record contains copies of New York's statute governing driving while impaired, of which Defendant had two prior convictions. The record also contains a copy of a page from the

New York Criminal Law Handbook which details the "Defense of Infancy." This exhibit was relevant to an issue involving whether Defendant was a juvenile at the time of his prior conviction for petit larceny. The prior conviction worksheet lists one prior conviction of "pettit [sic] larceny[,]" but does not include a statute number for the New York crime of petit larceny.

In *Burgess*, this Court noted that:

> Although the State presented the trial court with Exhibit 3, printed copies of out-of-state statutes purportedly serving as the basis for the nine out-of-state convictions the State used in computing defendant's prior record level, the "out-of-state crimes [on the State's worksheet] were not identified by statutes," but "only by brief and non-specific descriptions" and "could arguably describe more than one specific South Carolina and [Florida] crime," which makes it unclear whether those statutes were the basis for defendant's convictions.

Burgess, ___ N.C. App. at ___, 715 S.E.2d at 870. The Court in *Burgess*

> emphasize[d] that "copies of the . . . statutes [from another jurisdiction], *and comparison of their provisions to the criminal laws of North Carolina*, [a]re sufficient to prove by a preponderance of the evidence that the crimes of which defendant was convicted in those states were substantially similar to classified crimes in North Carolina for purposes of G.S. § 15A-1340.14(e)."

Id. at ___, 715 S.E.2d at 870 (citation omitted). The Court in *Burgess* ultimately held that the State had failed to prove the substantial similarity between the defendant's out-of-state convictions and a Class A1 or Class 1 misdemeanor because the State had failed to present sufficient evidence. *Id.* The Court noted that "[t]he State and defendant may offer additional evidence at the resentencing hearing." *Id.*

Likewise, in *State v. Wright*, ___ N.C. App. ___, 708 S.E.2d 112, *disc. review denied*, 710 S.E.2d 10, ___ S.E.2d ___ (2011), "the State provided evidence that [d]efendant was convicted of 'robbery 3rd degree' under Ct. Gen. Stat. § 53a-136, but did not provide evidence of the New York statute under which [d]efendant was convicted." *Id.* at ___, 708 S.E.2d at 126. This Court noted that "the State neither provided copies of the applicable Connecticut and New York statutes, nor provided a comparison of their provisions to the criminal laws of North Carolina." *Id.* Further, this Court observed that "the trial court did not analyze or determine whether the out-of-state convictions were substantially similar to North Carolina offenses." *Id.* This Court held that "[s]ince the State failed to demonstrate the substantial similarity of [d]efendant's out-of-state convictions to North Carolina crimes and since the trial court failed to determine whether the out-of-state convictions were

substantially similar to North Carolina offenses, we must remand for resentencing." *Id.*

In the present case, as in *Burgess* and *Wright*, we conclude the State failed to prove by a preponderance of the evidence whether the out-of-state convictions were substantially similar to North Carolina offenses. The State failed to present even a copy of the New York statute governing petit larceny or to argue that it was substantially similar to misdemeanor larceny in North Carolina. Rather, the trial court and the State appear to have accepted Defendant's stipulation and ceased to present evidence on what they understood to be a resolved issue. We therefore conclude that, by accepting Defendant's stipulation and assigning one point for Defendant's petit larceny conviction without conducting its own analysis based on proof offered by the State regarding substantial similarity to a North Carolina offense, the trial court erred.

In the present case, the trial court found that Defendant had five prior record level points. Prior to its amendment effective 1 December 2009 and applicable to offenses committed on or after that date, N.C.G.S. § 15A-1340.14(c) provided that, for felony purposes, prior record level III was assigned for individuals with five to eight points. See Act of August 28, 2009, ch. 555, sec. 1, 2009 N.C. Sess. Laws. 555. If the one

point assigned, based on Defendant's conviction for petit larceny, is removed, Defendant would classify as a prior record level II. Therefore, the trial court's error in the present case was prejudicial to Defendant. Under the holdings of *Wright* and *Burgess*, we must remand for resentencing.

Remanded for resentencing.

Judges BEASLEY and THIGPEN concur.

Report per Rule 30(e).