

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

NO. COA13-487
NORTH CAROLINA COURT OF APPEALS

Filed: 15 October 2013

STATE OF NORTH CAROLINA

v.

Sampson County
Nos. 10 CRS 52636, 52386-87,
704864, 3226, 3232

JONATHAN CONLANGES BOYKIN

Appeal by defendant from judgments entered 12 December 2012 by Judge Andrew Robinson Hassell in Sampson County Superior Court. Heard in the Court of Appeals 14 October 2013.

Attorney General Roy Cooper, by Assistant Attorney General Christopher W. Brooks, for the State.

Michael J. Reece, for defendant-appellant.

CALABRIA, Judge.

Jonathan Conlanges Boykin ("defendant") appeals from judgments entered upon jury verdicts finding him guilty of driving while impaired ("DWI"), simple assault, assault on a government official; resisting, delaying, or obstructing a public officer, careless and reckless driving, motorcycle helmet violation, and failure to heed a blue light and siren. We remand for resentencing.

On 8 October 2010, Deputy J.M. Faircloth ("Deputy Faircloth") of the Sampson County Sheriff's Office was on patrol when he noticed defendant driving a scooter. Deputy Faircloth followed defendant to a NAPA store parking lot, where the defendant pulled in and stopped. Deputy Faircloth approached defendant and observed that defendant had red, glassy eyes, a strong odor of alcohol coming from his breath, and a three pack of sixteen-ounce Budweiser on the floor of the scooter. Defendant had no registration or insurance for the scooter.

Deputy Faircloth attempted to administer a portable breath test, but defendant declined, stating, "Hell no. I'm not going to jail tonight." Defendant then returned to his scooter and drove away, ignoring Deputy Faircloth's demand for him to stop.

Deputy Faircloth followed defendant in his patrol car and defendant continued to evade him. At one point, defendant drove his scooter in circles around Deputy Faircloth's patrol car while it was stopped. Eventually, Deputy Faircloth was able to tackle defendant. Defendant then fought with Deputy Faircloth before again trying to flee.

Deputy Faircloth and another officer continued to pursue defendant, but were unsuccessful in their attempts to subdue him with their Tasers. Defendant continued to fight until one of

the officers used his baton on him. Defendant was then successfully taken into custody.

As a result of his altercations with defendant, Deputy Faircloth sustained injuries to his nose, face, and leg, as well as burns to the back of his neck and head which he sustained by being pinned against defendant's scooter during the struggle. Deputy Faircloth missed almost a month of work due to his leg injury and eventually required MRIs to determine whether he had sustained a muscle injury in his leg.

On 4 April 2011, defendant was indicted for habitual DWI, two counts of assault on a government official, motorcycle helmet violation, resist, delay and obstruct a public officer ("RDO"), careless and reckless driving, and failure to heed a blue light and siren. Defendant was tried by a jury in Sampson County Superior Court. On 29 November 2013, the jury returned verdicts finding defendant guilty of DWI, assault on a government official, simple assault, RDO, careless and reckless driving, a motorcycle helmet violation, and failure to heed a blue light and siren. -

In the sentencing phase of the trial, the State and defendant stipulated to defendant's prior convictions. Based upon these convictions, the trial court determined that defendant was a record level IV for felony sentencing purposes.

The trial court consolidated all of defendant's misdemeanor convictions into a single judgment and sentenced defendant to a term of 150 days in the North Carolina Division of Adult Correction ("DAC"). Since defendant previously admitted to three prior DWI convictions, the trial court sentenced defendant for habitual impaired driving to a consecutive term of a minimum of 20 months to a maximum of 24 months in the DAC. Defendant appeals.

The appellate counsel appointed to represent defendant has been unable to identify any issue with sufficient merit to support a meaningful argument for relief on appeal and asks that this Court conduct its own review of the record for possible prejudicial error. Counsel has also shown to the satisfaction of this Court that he has complied with the requirements of *Anders v. California*, 386 U.S. 738, 18 L. Ed. 2d 493 (1967), and *State v. Kinch*, 314 N.C. 99, 331 S.E.2d 665 (1985), by advising defendant of his right to file written arguments with this Court and providing him with the documents necessary for him to do so.

Defendant has filed *pro se* written arguments with this Court in which he claims his due process rights under the Fifth and Fourteenth Amendments were violated when his blood was drawn for testing without his consent five minutes prior to the execution of the warrant authorizing the blood draw. Defendant,

however, failed to preserve this argument for appellate review by raising this constitutional issue before the trial court. *State v. Lloyd*, 354 N.C. 76, 86-87, 552 S.E.2d 596, 607 (2001) ("Constitutional issues not raised and passed upon at trial will not be considered for the first time on appeal.").

Pursuant to *Anders*, we have fully examined the record to determine whether any issues of arguable merit appear therefrom. In its brief, the State concedes that the trial court erred in determining defendant's prior record level. Specifically, the State notes that defendant's prior record level worksheet includes four offenses with the same date of conviction. On 12 January 2006, defendant was convicted of two counts of possession of a stolen motor vehicle, one count of DWI, and one count of eluding arrest in a motor vehicle with three or more aggravating factors. When determining a prior record level pursuant to N.C. Gen. Stat. § 15A-1340.14(d), "if an offender is convicted of more than one offense in a single superior court during one calendar week, only the conviction for the offense with the highest point total is used." N.C. Gen. Stat. § 15A-1340.14(d) (2011). Consequently, only one of defendant's convictions from 12 January 2006 could be used to calculate his prior record level. Under a proper calculation, defendant should only have been assigned nine prior record level points,

which corresponds with a prior record level III for purposes of felony sentencing. As a result, we must vacate defendant's judgment for habitual impaired driving and remand for resentencing.

In reaching our conclusion, we assume, as the State appears to concede, that defendant's prior record level worksheet includes a clerical error. Specifically, defendant's DWI conviction on 12 January 2006 is listed as occurring in Cleveland County. However, as noted by the State, that conviction shares the same file number as one of defendant's convictions for possession of a stolen motor vehicle which occurred in Cumberland County. Since the chances of defendant being convicted of unrelated offenses with the same file number in two different counties on the same date is essentially nil, we will assume defendant was convicted of DWI in Cumberland County. This is consistent with defendant's habitual impaired driving indictment, which lists a conviction for DWI on 12 January 2006 in Cumberland County Superior Court.¹

¹ Since this conviction provided the basis for the habitual impaired driving enhancement, it could not also be used to calculate defendant's prior record level. See *State v. Gentry*, 135 N.C. App. 107, 111, 519 S.E.2d 68, 70-71 (1999). Thus, there are two independent statutory provisions which forbid using defendant's 12 January 2006 DWI conviction to calculate his prior record level.

Since defendant's prior record level is affected by the deletion of the erroneously counted DWI conviction, the error must be corrected. Accordingly, defendant's sentence is vacated and the matter is remanded to the trial court for a new sentencing hearing. See *State v. McNeill*, 158 N.C. App. 96, 99, 580 S.E.2d 27, 29 (2003).

Remanded for resentencing.

Judges STEELMAN and STROUD concur.

Report per Rule 30(e).