IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA15-799

Filed: 5 April 2016

Union County, Nos. 14 CRS 54149-50, 54802

STATE OF NORTH CAROLINA

v.

CORIE LEROY THOMAS

Appeal by Defendant from judgment entered 4 February 2015 by Judge Christopher W. Bragg in Union County Superior Court. Heard in the Court of Appeals 14 January 2016.

Attorney General Roy Cooper, by Assistant Attorney General M. Denise Stanford, for the State.

James W. Carter for Defendant.

STEPHENS, Judge.

Defendant Corey Leroy Thomas appeals from the trial court's judgment sentencing him to 17 to 30 months imprisonment following his pleas of guilty to one count of selling cocaine, one count of selling marijuana, and one count of obtaining property by false pretenses. On appeal, Thomas contends that the trial court committed prejudicial error when it determined that he is a Prior Record Level ("PRL") III offender based on its decisions to include one additional point in his PRL

calculation because Thomas was on probation at the time of his offense, and one additional point because all of the elements of his present offense were included in a prior conviction. We hold that, although the trial court did not err in its determination that all of the elements of Thomas's present offense were included in a prior conviction, this case must be remanded for resentencing due to the lack of any evidence in the record that Thomas ever received or waived notice of the State's intent to assign an additional PRL point because he committed the offenses while on probation.

Factual Background and Procedural History

On 8 December 2014, a Union County grand jury handed down four separate indictments against Thomas. The first indictment charged Thomas with one count of possession with intent to sell and deliver marijuana, one count of selling marijuana, and one count of possession of drug paraphernalia; the second indictment charged Thomas with one count of possession with intent to sell and deliver cocaine, one count of selling cocaine, and one count of possession of drug paraphernalia; the third indictment charged Thomas with one count of obtaining property by false pretenses; and the fourth indictment charged Thomas with one count of uttering a forged instrument and one count of larceny of chose in action.

Pursuant to a plea agreement, on 4 February 2015, Thomas entered pleas of guilty to one count of selling marijuana, one count of selling cocaine, and one count of

obtaining property by false pretenses. Under the terms of his plea agreement, the remaining charges against Thomas were dismissed and sentencing was left to the trial court's discretion. According to his PRL worksheet, Thomas had four PRL points arising from two prior Class H felony convictions. The worksheet further provided that Thomas would be assigned an additional two PRL points—bringing his total to 6 points, and thus making Thomas a PRL III offender for felony sentencing purposes—because he committed the offenses for which he was convicted while on probation, and because all the elements of the present offense were included in a prior offense. During the sentencing hearing, Thomas stipulated that he is a PRL III offender, and also admitted to being in willful violation of the terms of his probation. The trial court consolidated all three of Thomas's convictions for sentencing purposes as one class G felony and imposed a term of 17 to 30 months imprisonment, to be served at the conclusion of an 8 to 19 month suspended sentence Thomas had received for a prior conviction, which the court activated after revoking Thomas's probation. Thomas gave written notice of appeal to this Court on 5 February 2015.

Analysis

A. Failure to comply with N.C. Gen. Stat. § 15A-1340.16(a)(6)

Thomas argues first that the trial court erred in assigning him an additional PRL point for being on probation at the time of the offenses for which he was convicted

because the court failed to comply with the procedural requirements set forth in sections 15A-1022.1 and -1340.16 of our General Statutes. We agree.

Typically, this Court reviews alleged sentencing errors to determine

> whether the sentence is supported by evidence introduced at the trial and sentencing hearing. However, the determination of an offender's [PRL] is a conclusion of law that is subject to *de novo* review on appeal. The PRL for a felony offender during sentencing is determined by the sum of the points assigned to each of the offender's prior convictions. A PRL II offender has between 2-5 points, whereas a PRL III offender has at a minimum of 6 and no more than 9 points. A sentencing error that improperly increases a defendant's PRL is prejudicial.

State v. Snelling, 231 N.C. App. 676, 680, 752 S.E.2d 739, 743 (2014) (citations, internal quotation marks, and certain brackets omitted).

Section 15A-1340.14(b)(7) provides that a criminal defendant shall be assigned one additional PRL point "[i]f the offense was committed while the [defendant] was on supervised or unsupervised probation." N.C. Gen. Stat. § 15A-1340.14(b)(7) (2015). Section 15A-1340.16 provides that such probationary sentencing points are to be treated in the same manner as aggravating sentencing factors, which means that

> [t]he State must provide a defendant with written notice of its intent to prove the existence of one or more aggravating factors under subsection (d) of this section or a [PRL] point under [section] 15A-1340.14(b)(7) at least 30 days before trial or the entry of a guilty or no contest plea. A defendant may waive the right to receive such notice. The notice shall list all the aggravating factors the State seeks to establish.

N.C. Gen. Stat. § 15A-1340.16(a6) (2015). A 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 . . . . [but such a]dmissions . . . must be consistent with the provisions of [section] 15A-1022.1." N.C. Gen. Stat. § 15A-1340.16(a1). Section 15A-1022.1 expressly requires the trial court under such circumstances to "determine whether the State has provided the notice to the defendant required by [section] 15A-1340.16(a6) or whether the defendant has waived his or her right to such notice." N.C. Gen. Stat. § 15A-1022.1(a) (2015); *see also Snelling*, 231 N.C. App. at 682, 752 S.E.2d at 744 ("The trial court shall determine if the State provided [the] defendant with sufficient notice or whether [the] defendant waived his right to such notice.").

In construing the procedural requirements established under section 15A-1340.16(a6), this Court concluded in *Snelling* that "[t]he statute is clear that unless [the] defendant waives the right to such notice, the State must provide [the] defendant with advanced written notice of its intent to establish . . . a probation point pursuant to [section] 15A-1340.14(b)(7)." *Id.* The defendant in *Snelling* challenged the trial court's conclusion that he was a PRL III offender based on its determination that he should receive an additional point for having been on probation when he committed the offense. *See id.* On appeal, we observed that the trial court "never determined whether the statutory requirements of [section] 15A-1340.16(a6) were met" and that "there [was] no evidence in the record to show that the State provided

sufficient notice of its intent to prove the probation point." *Id.* We therefore held that the trial court had erred and remanded the defendant's case for a new sentencing hearing based on our conclusion that "[t]his error was prejudicial because the probation point raised [the] defendant's PRL from a PRL II to a PRL III." *Id.*

The present facts are virtually indistinguishable from those at issue in *Snelling*. There is no indication in the record before us that Thomas was ever provided with advanced written notice pursuant to section 15A-1340.16(a6) of the State's intent to assign an additional PRL point because he committed the offenses while on probation. Nor is there any indication in the transcript from the sentencing hearing that the trial court made the required determination under section 15A-1022.1(a) that the State provided the requisite notice to Thomas, or whether Thomas waived his right to such notice. Furthermore, here, as in *Snelling*, the additional probationary PRL point raised Thomas from a PRL II to PRL III offender, thereby increasing the sentence he faced.

In urging this Court to reach a different result, the State argues that we should construe Thomas's failure during the sentencing hearing to object to the lack of any statutorily required notice, coupled with his stipulation that he was a PRL III and was also on probation at the time of the offense, to have operated as a waiver of his right to notice. We note first that this Court has repeatedly recognized that, "[a]lthough a stipulation by [a] defendant may be sufficient to prove [the] defendant's

[PRL], the trial court's assignment of a [PRL] is a conclusion of law, which we review *de novo*." *State v. Mack*, 188 N.C. App. 365, 380, 656 S.E.2d 1, 12 (2008) (citation omitted). Moreover, "[s]tipulations as to questions of law are generally held invalid and ineffective, and not binding upon the courts, either trial or appellate. . . ." *State v. Prush*, 185 N.C. App. 472, 480, 648 S.E.2d 556, 561 (2007) (citations and internal quotation marks omitted), *disc. review denied*, 362 N.C. 369, 663 S.E.2d 855 (2008).

The State attempts to bolster its argument that Thomas waived his right to notice through reliance on our decision in *State v. Marlow*, 229 N.C. App. 593, 747 S.E.2d 741, *appeal dismissed*, 367 N.C. 279, 752 S.E.2d 493 (2013). In *Marlow*, we rejected an argument by a defendant—who had been convicted following a jury trial and stipulated during his sentencing hearing that he was a PRL II offender based on a prior conviction for possession of drug paraphernalia while on probation—that the trial court erred in sentencing him as a PRL II offender before conducting the statutorily mandated colloquy set forth in section 15A-1022.1(b). *Id.* at 601, 747 S.E.2d at 747-48. In so holding, we explained that although a trial court is "usually required to follow the procedural requirements when a [PRL] point is found under [section] 15A-1340.14(b)(7), [section] 15A-1022.1(e) excepts such requirements when the context clearly indicates that they are inappropriate." *Id.* at 601, 747 S.E.2d at 748 (citations and internal quotation marks omitted). We concluded that the colloquy required by section 15A-1022.1(b)—which would have informed the defendant that

he was entitled to have a jury determine the existence of probation points and other aggravating factors, as well as the right to prove the existence of any mitigating factors—"would have been inappropriate and unnecessary" under the circumstances. *Id.* at 602, 747 S.E.2d at 748. Specifically, we found that the defendant had stipulated to his PRL after reviewing the matter with his counsel, who "had the opportunity to inform [the] defendant of the repercussions of conceding certain prior offenses" and provided the defendant with "the opportunity to interject had he not known such repercussions." *Id.* Based on those findings, and the fact that the defendant "neither objected nor hesitated when asked" about his prior convictions, we concluded: "With such a routine determination as to whether [the] defendant was convicted of possession of drug paraphernalia while on probation for another offense, we see no reason to have engaged in an extensive colloquy with [the] defendant." *Id.*

The State's reliance on *Marlow* here is misplaced. In the present case, rather than complaining that the trial court merely failed to conduct a colloquy pursuant to section 15A-1022.1, Thomas challenges his sentence based on the fact that there is no evidence in the record that he was ever provided the notice required by section 15A-1340.16(a6) of the State's intent to seek an additional PRL point pursuant to section 15A-1340.14(b)(7), or that he ever waived his rights to such notice. Indeed, our decision in *Snelling* is instructive insofar as it amply demonstrates this important distinction. The defendant in *Snelling* made an argument similar to the one this

Court rejected in *Marlow*—essentially, that he was prejudiced by the trial court's failure to conduct the statutorily mandated colloquy set forth in section 15A-1022.1—and we expressly relied on *Marlow* to reject that argument. 231 N.C. App. at 681, 752 S.E.2d at 744. Yet although the circumstances presented in *Snelling* made "the determination of [the] defendant's probation point . . . routine and a non-issue," thereby rendering such a colloquy unnecessary and inappropriate, we nevertheless held that the lack of any evidence the defendant was ever afforded notice pursuant to section 15A-1340.16(a6) amounted to prejudicial error sufficient to require a new sentencing hearing. *Id.* at 682-83, 752 S.E.2d at 744. Similarly here, as in *Snelling*, given the lack of any evidence in the record that Thomas ever received the statutorily mandated notice or that he waived his right to such notice, we hold that the trial court erred in its determination that Thomas is a PRL III offender based on its assignment of an additional PRL point pursuant to section 15A-1340.14(b)(7).

B. Additional PRL point pursuant to N.C. Gen. Stat. § 15A-1340.14(b)(6)

Thomas argues next that the trial court also erred in adding a point to his PRL calculation based on all the elements of the present offense being included in a prior offense. We disagree.

"If an offender is convicted of more than one offense at the same time, the court may consolidate the offenses for judgment and impose a single judgment for the consolidated offenses." N.C. Gen. Stat. § 15A-1340.15(b) (2015). Such a judgment

"shall contain a sentence disposition specified for the class of offense and [PRL] of the most serious offense." *Id.* Moreover, a trial court may assign an additional PRL point to a defendant "[i]f all the elements of the present offense are included in any prior offense for which [he] was convicted[.]" N.C. Gen. Stat. § 15A-1340.14(b)(6).

In the present case, Thomas pled guilty to selling cocaine, selling marijuana, and obtaining property by false pretenses. The trial court consolidated these convictions for sentencing pursuant to section 15A-1340.15(b) and properly imposed a sentence based on Thomas's most serious offense—selling cocaine, a class G felony—with an additional point added to his PRL calculation pursuant to section 15A-1340.14(b)(6) in light of its determination that all the elements of Thomas's present offense are included in a prior offense for which Thomas had been convicted, namely, selling marijuana.

Thomas contends the trial court erred in its determination that all the elements of his present offense, selling cocaine, are included in his prior conviction for selling marijuana. Specifically, Thomas argues that although both offenses are prohibited under section 90-95(a)(1) of our General Statutes, which bars the knowing sale of a controlled substance, *see* N.C. Gen. Stat. § 90-95(a)(1) (2015), their essential elements differ because the identity of the controlled substance constitutes an essential element of the offense. In light of our holding in *State v. Williams*, 200 N.C.

App. 767, 684 S.E.2d 898 (2009), in which we rejected a virtually identical argument, we conclude that Thomas's argument is unavailing.

In *Williams*, we explained:

> To prove sale and/or delivery of a controlled substance, the State must show a transfer of a controlled substance by either sale or delivery, or both.
>
> In this case, [the d]efendant pled guilty to delivery of a controlled substance, identified as cocaine, in violation of [section] 90-95(a)(1). Cocaine is included in Schedule II of the North Carolina Controlled Substances Act. [The d]efendant was previously convicted of delivery of a controlled substance, marijuana, in violation of [section] 90-95(a)(1). Marijuana is included in Schedule VI of the North Carolina Controlled Substances Act.
>
> While delivery of a Schedule II controlled substance is punishable under [section] 90-95(b)(1) and delivery of a Schedule VI controlled substance is punishable under [section] 90-95(b)(2), . . . , the statutory provision for punishing delivery of cocaine differently from delivery of marijuana does not change the nature of the crime; the elements of proof remain the same. Thus, . . ., for purposes of [section] 15A-1340.14(b)(6), it matters not under what provision of [section] 90-95 [the d]efendant's prior conviction for delivery of a controlled substance was punishable. Accordingly, we conclude that the trial court properly determined [the d]efendant's [PRL].

Id. at 772-73, 684 S.E.2d at 901-02 (citations and internal quotation marks omitted).

The issues raised by Thomas's argument here are indistinguishable from the issue we decided in *Williams*, and it is well established that, "[w]here a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent

panel of the same court is bound by that precedent, unless it has been overturned by a higher court." *In re Appeal from Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989) (citation omitted). We therefore hold that the trial court did not err in assigning an additional point to Thomas's PRL calculation pursuant to section 15A-1340.14(b)(6). Nevertheless, in light of our prior determination that the trial court committed prejudicial error in assigning an additional PRL point to Thomas pursuant to section 15A-1340.14(b)(7), the court's judgment must be vacated and Thomas's case must be remanded for a new sentencing hearing.

NO ERROR IN PART; VACATED AND REMANDED FOR NEW SENTENCING HEARING.

Judges HUNTER, JR., and INMAN concur.

Report per Rule 30(e).