IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-455

Filed: 6 December 2016

Hertford County, Nos. 14 CRS 51495-96; 15 CRS 14, 101

STATE OF NORTH CAROLINA

v.

THEODORE ROOSEVELT SPIVEY, Defendant.

Appeal by Defendant from judgments entered 9 November 2015 by Judge Quentin T. Sumner in Hertford County Superior Court. Heard in the Court of Appeals 17 November 2016.

Attorney General Roy Cooper, by Assistant Attorney General John A. Payne, for the State.

Kimberly P. Hoppin for Defendant-Appellant.

INMAN, Judge.

Theodore Roosevelt Spivey ("Defendant") pleaded guilty to two counts of felony breaking or entering and was found guilty by a jury of attaining habitual felon status as to each count. The trial court sentenced him as an habitual felon with a prior record level ("PRL") V to consecutive prison terms of 111 to 146 months each. Defendant filed a timely *pro se* notice of appeal on a form provided by the Hertford County Detention Center. After careful review, we reverse and remand.

Defendant has since filed a petition for writ of certiorari as an alternative basis for review of the trial court's judgments, in the event this Court finds his notice of appeal fatally defective. He acknowledges his notice lacked proof of service upon the State and did "not fully identify the judgments or the venue from which or to which [he] appeals." *See* N.C.R. App. P. 4(a)(2), (b)-(c). In *State v. Ragland*, 226 N.C. App. 547, 739 S.E.2d 616 (2013), however, we concluded that neither of these defects warranted a dismissal of the defendant's appeal. *Id.* at 552-53, 739 S.E.2d at 620 (relying on *Hale v. Afro-Am. Arts Int'l, Inc.*, 335 N.C. 231, 232, 436 S.E.2d 588, 589 (1993) and *Phelps Staffing, LLC v. S.C. Phelps, Inc.*, 217 N.C. App. 403, 410, 720 S.E.2d 785, 791 (2011)).

Here, as in *Ragland*, "the State has not raised the issue of lack of service of the notice of appeal by motion or otherwise and has participated without objection in the appeal by filing its brief." *Id.* at 552, 739 S.E.2d at 620. Moreover, "defendant's intent to appeal is plain, and since this Court is the only court with jurisdiction to hear defendant's appeal, it can be fairly inferred defendant intended to appeal to this Court." *Id.* at 553, 739 S.E.2d at 620. We conclude Defendant's appeal is properly before us and dismiss his petition for writ of certiorari as moot. *Id.*

Defendant claims the trial court erred in sentencing him as a PRL V based on the convictions listed on his sentencing worksheet. Specifically, he challenges the court's use of his 1992 conviction for "Att. Purchase Cocaine" in Virginia to assign

him one PRL point, absent any evidence the offense is substantially similar to a Class A1 or Class 1 misdemeanor in North Carolina. *See* N.C. Gen. Stat. § 15A-1340.14(e) (2015). Without this point, the worksheet reflects just thirteen PRL points and a corresponding PRL IV. *See* N.C. Gen. Stat. § 15A-1340.14(b)-(c) (2015). The State concedes the error identified by Defendant and deems it "appropriate" that we remand the cause for a new sentencing hearing.

Under Structured Sentencing, the State may prove the fact of a defendant's prior convictions, *inter alia*, by "[s]tipulation of the parties." N.C. Gen. Stat. § 15A-1340.14(f)(1) (2015). However, "[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. Prevette*, 39 N.C. App. 470, 472, 250 S.E.2d 682, 683 (1979). "Although defendant's stipulation as to prior record level is sufficient" to prove the prior convictions used to establish his PRL, "the trial court's assignment of [a PRL] to defendant [is a] . . . conclusion of law, which we review *de novo*." *State v. Fraley*, 182 N.C. App. 683, 691, 643 S.E.2d 39, 44 (2007).

Defendant's PRL worksheet lists his Virginia conviction for "Att. Purchase Cocaine" as a Class 1 misdemeanor resulting in one PRL point. Defendant's counsel signed the worksheet, stipulating to the convictions listed thereon.

Under N.C. Gen. Stat. § 15A-1340.14(e), a defendant's out-of-state convictions are treated as follows:

> Except as otherwise provided in this subsection, a conviction occurring in a jurisdiction other than North Carolina . . . is classified as a Class 3 misdemeanor if the jurisdiction in which the offense occurred classifies the offense as a misdemeanor. . . . 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.

Id. A Class 3 misdemeanor conviction confers no PRL points under N.C. Gen. Stat. § 15A-1340.14(b). Accordingly, the default rule in N.C. Gen. Stat. § 15A-1340.14(e) effectively excludes a defendant's out-of-state misdemeanors from his PRL calculation. If the State proves that an out-of-state misdemeanor conviction is substantially similar to a Class A1 or Class 1 misdemeanor in North Carolina, the conviction will result in one PRL point. *See* N.C. Gen. § 15A-1340.14(b)(5).

"Substantial similarity is a question of law, and the defendant cannot validly stipulate to the State's characterization of the laws being compared." *State v. Sanders*, 225 N.C. App. 227, 229, 736 S.E.2d 238, 240 (2013); *see also State v. Sanders*, 367 N.C. 716, 720, 766 S.E.2d 331, 334 (2014) ("[D]etermination of whether the out-of-state conviction is substantially similar to a North Carolina offense is a question of law involving comparison of the elements of the out-of-state offense to those of the North Carolina offense." (internal quotation marks omitted)). "[F]or a party to meet its burden of establishing substantial similarity of an out-of-state offense to a North

Carolina offense by the preponderance of the evidence, the party seeking the determination of substantial similarity must provide evidence of the applicable law." *Sanders*, 367 N.C. at 719, 766 S.E.2d at 333.

The State presented no evidence that Defendant's Virginia conviction for "Att. Purchase Cocaine" is substantially similar to a Class A1 or Class 1 misdemeanor in North Carolina. Therefore, we agree with the parties that the trial court erred in assigning defendant a PRL point for this offense. *See Sanders*, 225 N.C. App. at 229, 736 S.E.2d at 240. We remand for resentencing. *Id.* at 232, 736 S.E.2d at 241.

REMANDED FOR RESENTENCING.

Judges STROUD and TYSON concur.

Report per Rule 30(e).