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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-101

Filed: 6 November 2018

Onslow County, Nos. 16 CRS 52047-52048

STATE OF NORTH CAROLINA

v.

KENNETH CORNELIUS MATLOCK, Defendant.

Appeal by Defendant from judgment entered 4 October 2017 by Judge Beecher R. Gray in Onslow County Superior Court. Heard in the Court of Appeals 18 September 2018.

Attorney General Joshua H. Stein, by Assistant Attorney General Brent D. Kiziah, for the State.

Julie C. Boyer, for defendant-appellant.

HUNTER, JR., ROBERT N., Judge.

Kenneth Cornelius Matlock ("Defendant") appeals from the trial court's determination of a prior record level V at Defendant's sentencing hearing. Defendant contends the trial court erred in calculating his prior record level because it accepted a stipulation of fifteen points not supported by the evidence presented. We agree, and we remand for resentencing for the following reasons.

I. Factual and Procedural Background

On 2 April 2016, officers with the Jacksonville Police Department arrived at Defendant's home around 5:30 in the morning to serve an order for Defendant's arrest. Because it was raining, Defendant allowed the officers into his home. While inside Defendant's home, the officers noticed drug paraphernalia, including a syringe and a "Chore Boy" (thin pieces of copper wiring woven together into a mesh filter) in the kitchen, and asked Defendant if they could do a search of the immediate area. Defendant consented to a search of the immediate area, and Sergeant Gregory Ehrler ("Sergeant Ehrler") found a black cloth bag in the kitchen trash can. Sergeant Ehrler looked inside the bag, and found a pistol.

After advising Defendant of his Miranda rights, Sergeant Ehrler asked if Defendant was a convicted felon. Defendant admitted he was. Sergeant Ehrler also asked Defendant if he ever used cocaine or crack in the past. Defendant said he had not. Sergeant Ehrler then checked a database to see if the gun he found in the trash can was stolen, and determined it was not. Additionally, Sergeant Ehrler checked another database to see if Defendant had been convicted of any felonies. Sergeant Ehrler discovered Defendant had been convicted of possession of cocaine. The officers then completed a walk-through of Defendant's trailer, determined the trailer was vacant, then arrested Defendant, transporting him to the Onslow County Jail. The officers charged Defendant with one count each of possession of a firearm by a felon,

felony possession of cocaine, and misdemeanor possession of drug paraphernalia. On 15 November 2016, an Onslow County Grand Jury indicted Defendant on these same charges.

Before trial began, the State voluntarily dismissed the charge of possession of cocaine. Defendant pleaded not guilty to the remaining charges of possession of a firearm by a felon (16 CRS 52047) and possession of drug paraphernalia (16 CRS 52048). The jury was selected on 3 October 2017 in the afternoon, and impaneled the following morning.

Prior to trial, Defendant stipulated he was a convicted felon to the trial court based on the indictment's allegation Defendant pled guilty to felony possession of cocaine on 29 January 2005 (05 CRS 50962). Defendant also stipulated his sentence for the previous conviction was an eight- to ten-month sentence, suspended, and twenty-four months supervised probation. Defendant was still on probation at the time of the offense in this case.

Defendant's trial began on 3 October 2017. At trial, the State called two witnesses: Officers John Taylor ("Officer Taylor") and Sergeant Ehrler with the Jacksonville Police Department. Officer Taylor testified he had been employed with the Jacksonville Police Department as a patrol officer for six years at the time of trial. Another officer, Officer Jason Villardo, contacted Officer Taylor while working the night shift to assist in serving an arrest warrant on an individual, later identified as

Defendant on the morning of 2 April 2016. The officers noticed Defendant's moped parked outside his residence on Wilmington Highway. Officer Taylor saw a photograph of Defendant and his address before arriving at his residence.

When Officer Taylor knocked on Defendant's front door, he "heard a voice from the other side of the door say, 'Who is it?' " The officers announced themselves as the "Jacksonville Police Department." Before Defendant responded, Officer Taylor heard a "thud," and it sounded "like something was being dropped on the ground." Defendant opened the door. Officer Taylor asked Defendant if they could come inside, and Defendant consented. Officer Taylor noticed the man who opened the front door matched Defendant's photograph he checked before arriving at the residence. Officer Taylor described the following upon entering Defendant's residence:

> [Officer Taylor:] We went inside, and the TV was on. I specifically remember, because there was pornography playing on the television. The house was unkempt. In plain view, in the kitchen, there was a syringe and Chore Boy on the counter, which I know, through my training and experience, to be drug paraphernalia, as crack users will frequently take Chore Boy – it's like a –
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> [Defense Counsel:] Objection.
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> [The Court:] Overruled.
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> [Officer Taylor:] It's like a metal – it's a filter used to smoke crack. They'll put it inside the crack pipe to keep from inhaling the crack into their throat. Sergeant Ehrler was also on scene, and he came in the door behind us, and we kind of told him what was going on. Said, hey, we've got, you know, some drug stuff in plain view, and he asked if he

> could do a search of the immediate area, to make sure there was no narcotics in the kitchen.

The Chore Boy was burnt and had an ashy substance on it, indicating drug use. The officers searched the kitchen area, and Officer Ehrler found a pistol inside the trash can. Officer Taylor identified the gun as a .22 caliber revolver, which was loaded. After unloading the pistol and searching the residence, the officers arrested Defendant and took him to the Onslow County Jail. The State introduced the Chore Boy recovered at the scene. Officer Taylor identified the Chore Boy as the same one the officers found in the kitchen. Without objection, the trial court admitted the evidence and published it to the jury. The State introduced a pistol, identified as collected on 2 April 2016 at 6:00 a.m. from Defendant's residence. Without objection, the trial court admitted the pistol as evidence and published it to the jury. Officer Taylor identified the pistol as a possible explanation for the "thud" he heard before entering the residence.

The State next called Officer Ehrler to the stand. Officer Ehrler, a seven-year veteran of the Jacksonville Police Department, identified where Defendant lived, Triangle Mobile Home Park, as a dangerous area. Officer Ehrler responded to the area as a backup officer to assist with serving the warrant. Once he reached the residence, Officer Ehrler went to the back door to make sure no one fled the residence once Officers Taylor and Villardo knocked at the front door. Officer Ehrler went around to the front of the residence once the other two officers were let in, and noticed

the same drug paraphernalia Officer Taylor noticed. Upon noticing the drug paraphernalia, Officer Villardo placed Defendant in handcuffs on a nearby chair while the officers secured the immediate area. Defendant told Officer Ehrler the drug paraphernalia belonged to a female friend of his who had been at the residence earlier that morning. Officer Ehrler verbally informed Defendant of his Miranda rights, and asked Defendant if they could search the kitchen area. Defendant consented. At that time, Officer Ehrler searched the trash can in the kitchen about "five to ten foot away from the front door" and found the pistol wrapped in a black cloth. Officer Ehrler asked Defendant if he was a convicted felon, to which Defendant denied. After some time, Officer Ehrler asked again, and Defendant admitted he was. Officer Ehrler corroborated the previously introduced physical evidence, confirming it to be the drug paraphernalia found in Defendant's residence.

At the close of the State's evidence, Defendant moved to dismiss on the grounds the State did not introduce sufficient evidence of actual possession or constructive possession of the drug paraphernalia or pistol. The trial judge denied Defendant's motion. Defendant did not offer any evidence and Defendant did not testify. The judge then addressed Defendant asking if it was Defendant's choice not to testify in his own defense. Defendant renewed his motion to dismiss. The judge again denied Defendant's motion. After the trial court held a charge conference to determine the jury instructions, the trial court judge sent the jury to deliberate. The trial court

received two questions from the jury during deliberations concerning actual possession and the need for a unanimous verdict. The trial court also received two "comments" from the jury stating a particular juror was upset and crying in deliberations because she "can't agree with them." The trial court reread the jury instructions concerning the element of possession, explained Defendant's presumption of innocence, and the need for a unanimous verdict. The trial court sent the jury back to deliberate, and the jury returned unanimous verdicts of guilty to possession of a firearm by a felon, and misdemeanor possession of drug paraphernalia.

The trial court conducted a hearing after the verdict to determine the prior record level for Defendant. One prior conviction occurred in Virginia, and because the trial court did not have the statute or elements of the particular offense of "robbery," it was counted as a Class I felony.

The trial court calculated Defendant's prior record level as a prior record level V for felony sentencing with fifteen points. The trial court determined Defendant accumulated fifteen points for the following reasons: two prior felony Class H or I convictions with two points per conviction, culminating in four points; nine prior Class A1 or 1 misdemeanor convictions with one point per conviction, culminating in nine points; the presence of all elements of the offense for which the jury convicted Defendant in a prior offense, which added an additional point; and, Defendant

committed the offense while on supervised or unsupervised probation, parole, or post-release supervision, which added one more point. When added together, the four points from Defendant's prior two Class H or I convictions, the nine points from Defendant's' prior nine Class A1 or 1 misdemeanor convictions, and the two additional points from elements present in prior convictions and Defendant's probation, the total number of points amounts to fifteen points. The trial court consolidated the charge of possession of drug paraphernalia under the Class G felony of possession of a firearm by a felon. The trial court sentenced Defendant to an active sentence of twenty to thirty-three months, with credit for one day spent in confinement. Defendant gave oral notice of appeal.

II. Standard of Review

"The determination of an offender's prior record level is a conclusion of law that is subject to *de novo* review on appeal." *State v. Bohler*, 198 N.C. App. 631, 633, 681 S.E.2d 801, 804 (2009) (citation omitted). "Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *State v. Williams*, 362 N.C. 628, 632-633, 669 S.E.2d 290, 294 (2008) (citations and quotation marks omitted).

III. Analysis

Defendant argues the trial court erred by (1) assigning four points to his prior record level: two points for drug paraphernalia charges occurring in 2007 and 2010;

(2) one point for the presence of all elements of the offense for which Defendant was convicted in prior offenses; and, (3) one point for Defendant being on supervised or unsupervised probation, parole, or post-release supervision. We agree.

Pursuant to N.C. Gen. Stat. § 15A-1340.14(a), the trial court determines the prior record level "by calculating the sum of the points assigned to each of the offender's prior convictions that the court . . . finds to have been proved in accordance with this section." N.C. Gen. Stat. § 15A-1340.14(a) (2017). Section 1340.14 provides the following to assign prior record level points, in pertinent part:

> (b) Points. – Points are assigned as follows:
> (1) For each prior felony Class A conviction, 10 points.
> (1a) For each prior felony Class B1 conviction, 9 points.
> (2) For each prior felony Class B2, C, or D conviction, 6 points.
> (3) For each prior felony Class E, F, or G conviction, 4 points.
> (4) For each prior felony Class H or I conviction, 2 points.
> (5) For each prior misdemeanor conviction as defined in this subsection, 1 point. For purposes of this subsection, misdemeanor is defined as any Class A1 and Class 1 nontraffic misdemeanor offense . . . .
> (6) If all the elements of the present offense are included in any prior offense for which the offender was convicted, whether or not the prior offense or offenses were used in determining prior record level, 1 point.
> (7) If the offense was committed while the offender was on supervised or unsupervised probation, parole, or post-release supervision, or while the offender was serving a sentence of imprisonment, or while the offender was on escape from a correctional institution while serving a sentence of imprisonment, 1 point.

> . . .
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> (f) Proof of Prior Convictions. – A prior conviction shall be proved by any of the following methods:
> (1) Stipulation of the parties.
> (2) An original or copy of the court record of the prior conviction.
> (3) A copy of records maintained by the Department of Public Safety, the Division of Motor Vehicles, or of the Administrative Office of the Courts.
> (4) Any other method found by the court to be reliable.
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> The State bears the burden of proving, by a preponderance of the evidence, that a prior conviction exists and that the offender before the court is the same person as the offender named in the prior conviction.

N.C. Gen. Stat. § 15A-1340.14(b), (f) (2017).

"[A] sentencing worksheet coupled with statements by counsel may constitute a stipulation by the parties to the prior convictions listed therein." *State v. Hinton*, 196 N.C. App. 750, 752, 675 S.E.2d 672, 674 (2009) (citation omitted). 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) (citations omitted); *State v. McLaughlin*, 341 N.C. 426, 441, 462 S.E.2d 1, 8 (1995).

> While a stipulation by a defendant is sufficient to prove the existence of the defendant's prior convictions, which may be used to determine the defendant's prior record level for sentencing purposes, the trial court's assignment of defendant's prior record level is a question of law. [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. Wingate, 213 N.C. App. 419, 420, 713 S.E.2d 188, 189 (2011) (internal citations and internal quotation marks omitted). In this case, the trial court erroneously assigned four points for Defendant's felony sentencing. This erroneous assignment of these points resulted in an incorrect prior record level, and prejudiced Defendant.

The trial court added two additional sentencing points to Defendant's prior record level based on two separate convictions for possession of drug paraphernalia and possession of cocaine on 2 April 2016. The sentencing worksheet does not indicate if the paraphernalia was marijuana based or other paraphernalia, but the trial court calculated each prior conviction for possession of drug paraphernalia as a Class 1 misdemeanor.

"In determining the prior record level, the classification of a prior offense is the classification assigned to that offense at the time the offense for which the offender is being sentenced is committed." N.C. Gen. Stat. § 15A-1340.14(c). "Our courts have repeatedly held that the accuracy of a prior conviction worksheet may be stipulated to pursuant to N.C. Gen. Stat. § 15A-1340.149(f)(1)." *Wingate*, 213 N.C. App. at 420, 713 S.E.2d at 190.

In 2015, the General Assembly changed the classification of possession of marijuana paraphernalia to a Class 3 misdemeanor, but retained all other forms of drug paraphernalia as a Class 1 misdemeanor. *See* 2014 Sess. Law 119 § 3. This

change became effective 1 December 2014. In this case, the date of the offense is 2 April 2016. Therefore, Defendant's prior drug paraphernalia charges require further findings to determine whether they should be classified as Class 1 or Class 3 misdemeanors for felony sentencing purposes. The trial court made no determination the paraphernalia in those charges was marijuana paraphernalia or other drug paraphernalia. Because the trial court did not make further determinations whether Defendant's prior convictions involved marijuana paraphernalia or other drug paraphernalia, the trial court incorrectly assigned Defendant two prior record level points.

The trial court assigned one additional point for sentencing Defendant under N.C. Gen. Stat. § 15A-1340.14(b)(6). Section 1340.14(b)(6) states "[i]f all the elements of the present offense are included in any prior offense for which the offender was convicted, whether or not the prior offense or offenses were used in determining prior record level, 1 point." N.C. Gen. Stat. § 15A-1340.14(b)(6).

Apart from the difference in the previous and current statutes for drug paraphernalia discussed in the section above, the trial court consolidated the conviction of drug paraphernalia into the conviction for possession of a firearm by a felon for sentencing purposes.

"[I]f 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 to calculate a prior record level." *State v. Prush*, 185 N.C. App. 472, 479, 648 S.E.2d 556, 560 (2007) (citation and internal quotation marks omitted); *see also* N.C. Gen. Stat. § 15A-1340.14(d).

In this case, the trial court consolidated Defendant's convictions for possession of drug paraphernalia and possession of a firearm by a felon into the more serious offense of possession of a firearm by a felon. Possession of a firearm by a felon is a Class G felony. N.C. Gen. Stat. § 14-415.1 (2017); *see also* N.C. Gen. Stat. § 15A-1340.17. Possession of drug paraphernalia is a Class 1 misdemeanor. N.C. Gen. Stat. § 90-113.22(a)-(b) (2017); N.C. Gen. Stat. § 15A-1340.23.

The trial court erred by adding the additional point because the trial court consolidated Defendant's convictions into the possession of a firearm by a felon conviction without a qualifying prior conviction. Accordingly, the trial court erred by assigning one point for the presence of all elements of the offense for which the jury convicted Defendant in prior offenses.

The trial court assigned one additional point for sentencing Defendant pursuant to N.C. Gen. Stat. § 15A-1340.14(b)(7). Section 1340.14(b)(7) states "[i]f the offense was committed while the offender was on supervised or unsupervised probation, parole, or post-release supervision . . . 1 point." N.C. Gen. Stat. § 15A-1340.14(b)(7). In order to assign an additional point under this provision, "[t]he State

must provide a defendant with written notice of its intent to prove the existence of the prior record point . . . ." N.C. Gen. Stat. § 15A-1340.14(b).

N.C. Gen Stat. § 15A-1340.16, in pertinent part, states:

> (a) Generally, Burden of Proof. – The court shall consider evidence of aggravating or mitigating factors present in the offense that make an aggravated or mitigated sentence appropriate, but the decision to depart from the presumptive range is in the discretion of the court. The State bears the burden of proving beyond a reasonable doubt that an aggravating factor exists, and the offender bears the burden of proving by a preponderance of the evidence that a mitigating factor exists.
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> . . .
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> (a6) Notice of Intent to Use Aggravating Factors or Prior Record Level Points. – The 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 prior record level point under G.S. 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(a), (a6).

This Court has established "[t]he prior record level worksheet that the State had provided to Defendant in discovery did not constitute written notice of the State's intent to prove that Defendant had committed the offense for which he was being sentenced while on probation." *State v. Crook*, ___ N.C. App. ___, ___, 785 S.E.2d 771, 780 (2016) (citation omitted).

In this case, no evidence exists in the record to show the State provided written notice to Defendant. The State in its brief concedes it did not provide Defendant notice of its intent to utilize this additional point. However, the State asks this Court to determine whether Defendant waived his right to notice because Defendant stipulated he was on probation, and because Defendant at no point objected to the consideration of his probationary status in sentencing. The trial court did not ask Defendant about his right to waive notice, as required by N.C. Gen. Stat. § 15A-1340.16. Because the State did not provide Defendant with notice of its intent to use the additional point and Defendant did not waive his right to such notice, the trial court erred in assigning this extra point.

The trial court prejudiced Defendant by including four additional sentencing points in error to determine his prior record level. The trial court calculated Defendant's prior record level at fifteen points, resulting in a prior record level V designation for sentencing purposes. *See* N.C. Gen. Stat. § 15A-1340.14(c)(5). Accordingly, the trial court sentenced Defendant to a mandatory active sentence of twenty to thirty-three months in the Department of Adult Corrections.

Without the inclusion of the four points, Defendant would have only eleven points; thus, qualifying Defendant as having a prior record level IV. *See* N.C. Gen. Stat. § 15A-1340.14(c)(4). Under a prior record level IV, the trial court could not give Defendant a mandatory active sentence. Instead, Defendant would have the

possibility of an intermediate or active sentence. Because correcting the errors above would reduce Defendant's prior record level from a level V to a level IV, the trial court's determination prejudiced Defendant. We therefore remand the case to the trial court for resentencing.

REMANDED FOR RESENTENCING.

Judges BRYANT and ARROWOOD concur.

Report per Rule 30(e).