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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-249

Filed: 6 November 2018

Edgecombe County, No. 16 CRS 51837

STATE OF NORTH CAROLINA

v.

JAMES EARL SATTERWHITE, Defendant.

Appeal by Defendant from judgments entered 12 July 2017 by Judge Walter H. Godwin, Jr. in Edgecombe County Superior Court. Heard in the Court of Appeals 4 October 2018.

Attorney General Joshua H. Stein, by Assistant Attorney General Carolyn McLain, for the State.

Charlotte Gail Blake, for defendant-appellant.

HUNTER, JR., Robert N., Judge.

James Earl Satterwhite ("Defendant") appeals following jury verdicts finding him guilty of robbery with a dangerous weapon and false imprisonment. The trial court sentenced Defendant to consecutive terms of 105 to 138 months and 60 days imprisonment, in accordance with Defendant's status as a Level III felony offender. On appeal, Defendant contends the trial court erred in assessing him with an

additional prior record level point for committing the offenses while on probation. We find no error.

I. Factual and Procedural Background

On 6 July 2016, an Edgecombe County Grand Jury indicted Defendant for robbery with a dangerous weapon and second-degree kidnapping. On 30 May 2017, the State filed notice of its intent to prove: (1) Defendant committed the offenses while on pretrial release, an aggravating factor; and (2) Defendant committed the offenses while on probation, which adds a prior record level point for sentencing.

On 10 July 2017, the court called Defendant's case for trial. The State presented evidence tending to show the following. On the morning of 1 July 2016, Defendant robbed Manning's Grocery. He threatened Kathy Nguyen, the store owner, with a hammer and took money from the cash register. He also stole Nguyen's purse, jewelry, gun, and other items. Defendant did not testify on his own behalf or present any evidence. On 12 July 2017, the jury found Defendant guilty of robbery with a dangerous weapon and false imprisonment, a lesser included offense of kidnapping.

Prior to sentencing, the State reminded the court it previously gave notice of its intent to prove Defendant committed the offenses while on pretrial release for other charges and on while on probation. The State arraigned Defendant on those two matters, and Defendant admitted to each as follows:

> THE STATE: So, [defense counsel], as to the aggravating factor that the defendant committed the offense while on pretrial release on another charge, how does the defendant plead to that?
>
> [DEFENSE COUNSEL]: He admits that, Your Honor.
>
> THE STATE: And as to the prior record point that at the time he committed this offense, he was on unsupervised probation in file number 14-CR-53617, does he admit that as well?
>
> [DEFENSE COUNSEL]: He admits that.
>
> THE COURT: All right, and robbery with a dangerous weapon is a Class D, is that correct?
>
> THE STATE: Yes, sir.
>
> THE COURT: And what record level would he be, Level II?
>
> THE STATE: No, he's a Level III because of that extra point.
>
> THE COURT: Okay.

The trial court then conducted the following plea colloquy with Defendant on the aggravating factor:

> THE COURT: . . . Have the charges as to the issue of aggravating factors been explained to you by your attorney and do you understand those and do you understand that the element or the charge that they're using to aggravate the factor is that you committed this offense while you were on pretrial release for another case, do you understand that?
>
> A. Yes, sir.

THE COURT: Have you discussed this issue with your lawyer? Are you satisfied with his legal services?

A. Yes, sir.

. . . .

THE COURT: And do you understand that you have the right to be tried by a jury as to this issue is whether an aggravating factor exists, do you understand that?

A. Yes, sir.

THE COURT: And do you understand that you would have the right to confront, cross-examine witnesses at the determination hearing of the existence of the aggravating factor[?]

A. Yes, sir.

THE COURT: And do you understand that you have a right to have the jury to determine the existence of that aggravating factor and the burden is beyond a reasonable doubt[?]

A. Yes, sir.

THE COURT: And do you understand that by this plea you're waiving your constitutional right to a jury trial to establish that issue of an aggravating factor existing[?]

A. ([Defense counsel] consults with [Defendant].) Yes, sir.

THE COURT: And do you understand that upon your plea of guilty and admitting that there is an aggravating factor existing that there be limitations on your right to appeal?

A. Yes, sir.

THE COURT: And do you understand that you have

admitted and are pleading guilty to the fact that an aggravating factor exists?

A. Yes, sir.

THE COURT: And do you understand that in North Carolina there are three levels of punishment. There is the mitigated range and the aggravated range by which the judge can enter a sentence without a jury.

However, in cases of the aggravated range, you would have to have a jury to determine whether or not a[n] aggravating factor exists before the judge could go to the aggravated range to enter an aggravated punishment and that the maximum punishment for a Class D felon, Level III of which your record level is the maximum punishment for this charge would be 138 months. Do you understand that?

A. Yes, sir.

THE COURT: And do you now personally admit and plead guilty to the fact that there are aggravating factors in existence of that aggravating factor[?]

A. ([Defense counsel] consults with [Defendant].) Yes, sir.

THE COURT: And were you, in fact, on pretrial release at the time this robbery occurred?

A. Yes, sir.

THE COURT: And further, have you admitted to the existence of the aggravating factor as I will list it here, that you were on pretrial release at the time this crime occurred?

A. Yes, sir.

[THE COURT]: And do you stipulate and agree that there [is] evidence to support that factor beyond a reasonable

> doubt and have you agreed that the Court may accept your admission to these factors and do you understand that you are waiving any notice – well, have you agreed that the state has provided you with notice about these aggravating factors?
>
> A. Yes, sir.

In support of the aggravating factor, the State entered into evidence a judgment showing Defendant's conviction and bond papers showing his release for four crimes committed in 2015. The State also introduced into evidence, without objection, another judgment, which showed Defendant was on probation at the time of the offenses:

> THE STATE: And I'd also like to mark or have marked as State's Exhibit 2 for sentencing purposes, the certified document from the clerk's office demonstrating that the defendant was on unsupervised probation for the offense of assault on a female and injury to personal property as of August 19th, 2015, which he received a sentence of 60 days which was suspended.
>
> He was placed on unsupervised probation for 60 months on August 19th, 2015 which would, of course, mean he was on unsupervised probation at the time of this offense.

The trial court found:

> upon consideration of the record proper, the evidence, the factual presentation offered, answers of the defendant, statements of the lawyers for both sides, I find that there is a factual basis for the entry of the admission as to the aggravating factors and sentencing point, that the defendant is satisfied with his lawyer, that the defendant is competent to stand trial.

Defendant executed a Transcript of Plea form, admitting to the existence of the aggravating factor that he was on pretrial release at the time he committed the offenses. On the Prior Record Level worksheet, Defendant also stipulated he committed the offenses while on probation. The existence of the aggravating factor and additional prior record level point raised Defendant's felony prior record level from Level II to Level III. The trial court sentenced Defendant to consecutive terms of 105 to 138 months and 60 days imprisonment, consistent with the aggravated range for a Level III felony offender. Defendant gave oral notice of appeal.

II. Jurisdiction

Defendant has an appeal of right to this Court pursuant to N.C. Gen. Stat. §§ 7A-27(b) and 15A-1444(a) (2017).

III. Standard of Review

This Court reviews a trial court's sentence for "whether the sentence is supported by evidence introduced at the trial and at the sentencing hearing." *State v. Myers,* 238 N.C. App. 133, 136, 766 S.E.2d 690, 692 (2014) (citation omitted). However, the determination of Defendant's prior record level is a conclusion of law, which we review *de novo*. *State v. Bohler*, 198 N.C. App. 631, 633, 681 S.E.2d 801, 804 (2009) (citation omitted). Additionally, "[a]lleged statutory errors are questions of law . . . and as such, are reviewed *de novo*." *State v. Mackey*, 209 N.C. App. 116, 120, 708 S.E.2d 719, 721 (2011) (citations omitted).

IV. Analysis

A. N.C. Gen. Stat. § 15A-1022.1 Colloquy Requirement

Defendant first argues the trial court erred in sentencing him at prior record Level III because his admission to a prior record level point did not meet the plea colloquy requirements of N.C. Gen. Stat. § 15A-1022.1 (2017).

Under N.C. Gen. Stat. § 15A-1340.14(b)(7), a trial court may add one prior record level point "[i]f the offense was committed while the offender was on supervised or unsupervised probation[.]" N.C. Gen. Stat. § 15A-1340.14(b)(7) (2017). Defendant is entitled to a jury determination on whether the additional point should be assessed. N.C. Gen. Stat. § 15A-1022.1(b). Defendant may also waive his right to a jury determination and admit "to a finding that a prior record level point should be found[,]" in accordance with procedures set out in N.C. Gen. Stat. § 15A-1022.1. *Id.* N.C. Gen. Stat. § 15A-1022.1(b) requires the trial court to address Defendant personally and advise him of, *inter alia*, his right to have a jury determine the existence of the prior record level point. N.C. Gen. Stat. § 15A-1022.1(b). The court must also determine there is a factual basis for the admission and such admission is the result of an informed choice by Defendant. N.C. Gen. Stat. § 15A-1022.1(c). The court must comply with the provisions of section 15A-1022.1 "unless the context clearly indicates that they are inappropriate." N.C. Gen. Stat. § 15A-1022.1(e).

This Court provided guidance on when following the procedures mandated by N.C. Gen. Stat. § 15A-1022.1 may be "inappropriate" under the circumstances. First, in *State v. Marlow*, defendant argued the trial court erred in assessing an additional prior record level point without conducting the statutorily mandated plea colloquy. 229 N.C. App. 593, 601, 747 S.E.2d 741, 747 (2013). We disagreed with defendant's argument and held conducting a plea colloquy would have been "inappropriate and unnecessary" because of the following: (1) defendant's stipulation to his prior record level; (2) defense counsel's opportunity to "inform defendant of the repercussions of conceding certain prior offenses[;]" and (3) defendant's opportunities "to interject had he not known such repercussions." Under the circumstances, such a "routine determination" of whether defendant was on probation at the time he committed the offense did not require an extensive colloquy. *Id.* at 602, 747 S.E.2d at 748.

We reached a similar holding in *State v. Snelling*, 231 N.C. App. 676, 752 S.E.2d 739 (2014). In *Snelling*, defendant alleged the trial court erred in sentencing him as a prior record Level III because the court failed to comply with the provisions of N.C. Gen. Stat. § 15A-1022.1. *Id.* at 680, 752 S.E.2d at 743. The trial court did not advise defendant of his right to have a jury decide the existence of a prior record level point for being on probation when he committed certain offenses. *Id.* at 678, 752 S.E.2d at 742. This Court held the trial court did not err because adhering to the statutory procedures would have been inappropriate given the context. *Id.* at 681-82,

752 S.E.2d at 743-44. Our Court cited to the following in support of our holding: (1) defendant's stipulation to being on probation; (2) both the prosecutor and defense counsel signed the prior record level worksheet, agreeing to the additional point; (3) at trial, defendant admitted he was on probation; and (4) the trial court spoke during sentencing about defendant being on probation, and defendant did not object or challenge the court's statements. *Id.* at 681-82, 752 S.E.2d at 743-44. Accordingly, we concluded the determination of defendant's additional prior record level point was "routine and a non-issue" and found no error. *Id.* at 682, 752 S.E.2d at 744.

The present case is factually similar to both *Marlow* and *Snelling*. Defendant, through his defense counsel, admitted during the sentencing hearing to committing the offenses while on probation and pretrial release for different crimes. Defendant also stipulated to being on probation on the prior record level worksheet. Moreover, defense counsel had the opportunity to inform Defendant of the consequences of conceding to the prior record level point, as counsel took time to confer with Defendant multiple times. Even if defense counsel had not been able to inform Defendant of the repercussions, Defendant attended the hearing and could have sought clarification himself, if needed. However, Defendant did not object to or challenge the assessment of the prior record level point when the trial court spoke about Defendant being on probation. Defendant also did not object when the prosecutor presented evidence in support of the prior record level point. Similar to

defendant in *Snelling*, "[d]espite [D]efendant's numerous opportunities to oppose the finding of the probation point, he did not."[1] *Id.* at 682, 752 S.E.2d at 744.

Under these circumstances, we conclude the determination of the prior record level point was merely routine. Accordingly, we hold the trial court did not commit reversible error in sentencing Defendant as a Level III felony offender without following section 15A-1022.1 procedures.[2] Although we find no reversible error, we strongly advise trial courts to adhere to statutorily mandated procedures and make less use of the N.C. Gen. Stat. § 15A-1022.1(e) exception.

B. Factual Basis for the Prior Record Level Point

Defendant next argues the trial court erred in assessing the prior record level point without the necessary factual basis. Defendant specifically contends the judgment the prosecutor offered as proof of Defendant being on probation was not sufficient because the State failed to show he voluntarily pled guilty or whether the State previously obtained the plea in violation of his right to counsel.

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[1] Defendant argues his case is distinguishable from *Snelling* because, unlike defendant in *Snelling*, he did not testify to being on probation. However, our case law does not require a defendant to testify to an aggravating factor or prior record level point in order for a trial court to permissibly forgo conducting a plea colloquy. *See Marlow*, 229 N.C. App. at 601-02, 747 S.E.2d at 747-48.

[2] Assuming the trial court did err, Defendant is still not entitled to a new sentencing hearing because he fails to show the error prejudiced him. It is Defendant's burden to show the error was prejudicial "such that there exists a reasonable possibility that a different result could have or would have been reached had the error not occurred." *State v. Salvetti*, 202 N.C. App. 18, 27, 687 S.E.2d 698, 704 (2010) (quotation marks and citation omitted). Defendant did not meet his burden because he failed to show defense counsel's stipulation was erroneous and he was not on probation at the time he committed the offense. Absent such a showing, there is no reasonable possibility the trial court would have reached a different result had it conducted a plea colloquy on the prior record level point. *See State v. Edmonds*, 236 N.C. App. 588, 597-600, 763 S.E.2d 552, 558-60 (2014).

In support of his argument, Defendant points to N.C. Gen. Stat. § 15A-980, which provides:

> (a) A defendant has the right to suppress the use of a prior conviction that was obtained in violation of his right to counsel if its use by the State is to impeach the defendant or if its use will:
>
> > (1) Increase the degree of crime of which the defendant would be guilty; or
> >
> > (2) Result in a sentence of imprisonment that otherwise would not be imposed; or
> >
> > (3) Result in a lengthened sentence of imprisonment.
>
> (b) A defendant who has grounds to suppress the use of a conviction in evidence at a trial or other proceeding as set forth in (a) must do so by motion made in accordance with the procedure in this Article. A defendant waives his right to suppress use of a prior conviction if he does not move to suppress it.

N.C. Gen. Stat. § 15A-980(a)-(b) (2017). Under the statute, it is Defendant's burden—not the State's—to prove by a preponderance of the evidence the prior conviction was obtained in violation of his right to counsel. N.C. Gen. Stat. § 15A-980(c). Specifically, Defendant "must prove that at the time of the conviction he was indigent, had no counsel, and had not waived his right to counsel." *Id.*

Here, Defendant not only failed to meet his burden of proof, Defendant failed to even object or move to suppress the evidence of the prior conviction during

sentencing. He is, therefore, precluded from raising the issue on appeal.[3] N.C. Gen. Stat. § 15A-980(b); *State v. Porter*, 326 N.C. 489, 510, 391 S.E.2d 144, 158 (1990) (citation omitted) ("A defendant may waive the right to suppress evidence of such [prior] convictions if he fails to make a motion to suppress."). *See also State v. Thompson*, 309 N.C. 421, 426-28, 307 S.E.2d 156, 160-61 (1983) (holding defendant who allowed the State to introduce evidence of a conviction without objecting or making a motion to suppress was precluded from raising the issue on appeal).

Defendant's argument the State failed to show he voluntarily pled guilty to the prior conviction similarly fails. In rejecting similar arguments in the past, this Court held, "[t]he State does not bear the burden of proving the validity of a plea of guilty in a prior criminal matter before it may be used to impeach the defendant or to aggravate his sentence." *State v. Smith*, 96 N.C. App. 235, 239, 385 S.E.2d 349, 351 (1989). Rather, it is Defendant's burden, and he failed to meet it by offering no proof his plea was not voluntary.[4] *See Hester*, 111 N.C. App. at 115, 432 S.E.2d at 174

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[3] Defendant also argues his 60-month probation sentence was invalid because the trial court went above the range prescribed under N.C. Gen. Stat. § 15A-1343.2(d) (2017). He contends the trial court failed to make the required specific finding that a longer period of probation was necessary in order to go above the statutorily mandated period. Defendant essentially attempts to collaterally attack the sentence for this prior conviction. However, any post-conviction challenge must follow the proper procedural channels.

[4] Defendant's argument additionally fails for lack of legal basis. We recognized in *Smith* that there is a clear distinction between Defendant's right to counsel and his right to enter guilty pleas knowingly and voluntarily. 96 N.C. App. at 239, 385 S.E.2d at 351. Thus, N.C. Gen. Stat. § 15A-980 "may not necessarily be available as a means of suppressing prior convictions based upon allegedly involuntary or unknowing guilty pleas." *State v. Hester*, 111 N.C. App. 110, 115, 432 S.E.2d 171, 174 (1993). Defendant has not cited to any other statute in support of his argument, and this Court has not found any North Carolina law supporting this position.

(holding defendant failed to meet his burden where "[n]othing in the record affirmatively indicates that the requisite waivers of rights were not obtained before defendant pled guilty in the earlier cases").

V. Conclusion

For the reasons stated above, we hold the trial court did not err in assessing Defendant with the prior record level point for committing the offenses while on probation, and we find no error in the judgments.

NO ERROR.

Judges DAVIS and MURPHY concur.

Report per Rule 30(e).