

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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.

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA20-272

Filed: 17 November 2020

Duplin County, No. 18 CRS 51760

STATE OF NORTH CAROLINA

v.

ELLIOT ANTHONY WRIGHT

Appeal by Defendant from Judgment entered 10 September 2019 by Judge Charles H. Henry in Duplin County Superior Court. Heard in the Court of Appeals 3 November 2020.

Attorney General Joshua H. Stein, by Assistant Attorney General Alex R. Williams, for the State.

Drew Nelson for defendant-appellant.

HAMPSON, Judge.

Factual and Procedural Background

Anthony Elliot Wright (Defendant) appeals from Judgment entered 10 September 2019 upon a jury verdict finding him guilty of Felony Fleeing to Elude Arrest. The Record reflects the following:

STATE V. WRIGHT

Opinion of the Court

On 1 October 2018, Defendant was indicted on charges of, *inter alia*, Felony Fleeing to Elude Arrest. Defendant's case came on for trial on 3 September 2019, and on 9 September 2019 the jury returned a verdict finding Defendant guilty of Felony Fleeing to Elude Arrest. The trial court released the jury and proceeded to the sentencing phase of the trial.

During sentencing, the State presented a Prior Record Level Worksheet showing Defendant had a prior record level of IV based off its calculation Defendant had ten prior-record-level points. Of the ten points, nine points were for prior convictions. A tenth point was included on Defendant's Prior Record Level Worksheet because the State alleged the offense was committed while Defendant was "on supervised or unsupervised probation, parole, or post-release supervision." Defendant stipulated to his prior record level as shown on his Prior Record Level Worksheet, and the trial court proceeded to sentence Defendant as a prior record level IV to an active sentence of ten to twenty-one months. Defendant gave Notice of Appeal in open court.

Issue

The sole issue on appeal is whether the trial court erred in adding a tenth prior-record-level point to Defendant's prior-record-level calculation without first determining whether the State provided Defendant requisite notice under N.C. Gen. Stat. § 15A-1340.16(a6).

Analysis

“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). “It is not necessary that an objection be lodged at the sentencing hearing in order for a claim that the record evidence does not support the trial court’s determination of a defendant’s prior record level to be preserved for appellate review.” *State v. Crook*, 247 N.C. App. 784, 796, 785 S.E.2d 771, 780 (2016) (citations and quotation marks omitted).

“[A] trial court sentencing a felony offender may assess one prior record level point ‘[i]f the offense was committed while the offender was on supervised or unsupervised probation, parole, or post-release supervision[.]’ ” *State v. Wilson-Angeles*, 251 N.C. App. 886, 899, 795 S.E.2d 657, 668 (2017) (citing N.C. Gen. Stat. § 15A-1340.14(b)(7) (2015)). Under N.C. Gen. Stat. §15A-1340.16(a6), however, “[t]he State *must* provide a defendant with written notice of its intent to prove the existence of . . . a prior record level point under [N.C. Gen. Stat. §] 15A-1340.14(b)(7) at least 30 days before trial or the entry of a guilty or no contest plea.” N.C. Gen. Stat. §15A-1340.16(a6) (2019) (emphasis added); see *State v. Snelling*, 231 N.C. App. 676, 682, 752 S.E.2d 739, 744 (2014) (“[Section §15A-1340.16(a6)] is clear that unless defendant waives the right to such notice, the State must provide defendant with advanced written notice of its intent to establish: . . . a probation point pursuant to N.C. Gen.

Stat. 15A-1340.14(b)(7).” (citations omitted). “The trial court shall determine if the State provided defendant with sufficient notice or whether defendant waived his right to such notice.” *Snelling*, 231 N.C. App. at 682, 752 S.E.2d at 744 (citation omitted).

In the present case, the State concedes it did not provide Defendant written notice as required by Section 15A-1340.16(a6) and, therefore, the trial court erroneously included a tenth prior-record-level point in Defendant’s prior-record-level calculation. This additional point raised Defendant’s prior record level for sentencing purposes to a IV instead of a III. The inclusion of this tenth point without proper notice was error. Consistent with this Court’s prior holdings, we vacate Defendant’s sentence and remand this case for Defendant to be resentenced as a prior record level III offender. *See Wilson-Angeles*, 251 N.C. App. at 903, 795 S.E.2d at 670; *Snelling*, 231 N.C. App. at 683, 752 S.E.2d at 744.

Conclusion

Accordingly, for the foregoing reasons, the trial court’s Judgment is vacated and this matter is remanded for resentencing in accordance with this opinion.

JUDGMENT VACATED; REMANDED FOR RESENTENCING.

Judges TYSON and MURPHY concur.

Report per Rule 30(e).