IN THE COURT OF APPEALS OF NORTH CAROLINA

2021-NCCOA-555

No. COA20-684

Filed 5 October 2021

Pitt County, No. 03CRS064482

STATE OF NORTH CAROLINA

v.

TAVARES ONTRELL REDD, Defendant.

Appeal by Defendant from judgment entered 26 July 2019 by Judge Jeffery B. Foster in Pitt County Superior Court. Heard in the Court of Appeals 11 August 2021.

Attorney General Joshua H. Stein, by Special Deputy Attorney General James B. Trachtman, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Katy Dickinson-Schultz, for the Defendant.

DILLON, Judge.

¶ 1 Defendant Tavares Redd appeals from a judgment entered 26 July 2019 resentencing him for the crime of second-degree murder.

I. Background

¶ 2 In 2004, Defendant entered an *Alford* plea to second-degree murder and was sentenced to 220 to 273 months of imprisonment. In 2018, Defendant filed a *pro se* motion for appropriate relief ("MAR"). Defendant was appointed counsel, and an

amended MAR was filed in 2019 by said counsel. On 26 July 2019, the trial court granted Defendant's MAR, vacated his 2004 sentence, and held a resentencing hearing.

¶ 3 At the resentencing hearing, the State relied on three prior convictions to determine that Defendant had five prior record points, corresponding to a Level III prior record level ("PRL"). Defense counsel agreed that Defendant had five prior record points but submitted three statutory mitigating factors[1] and several non-statutory mitigating factors[2] to argue that Defendant should be sentenced in the mitigated range. The three prior out-of-state convictions relied on by the State were:

- Class H/I Felony: Conviction for grand larceny (two points)
- Class I Felony: Conviction for attempted possession of a controlled substance in the 5th degree (two points)
- Misdemeanor: Assault (one point)

¶ 4 Neither Defendant nor defense counsel agreed to sign the sentencing worksheet handed up by the State. When the trial court asked if defense counsel had

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[1] Defense counsel submitted the following statutory mitigating factors: (1) Defendant's limited mental capacity at the time of the crime, (2) Defendant had accepted responsibility for the crime, and (3) Defendant has a support system in the community. *See* N.C. Gen. Stat. § 15A-1340.16(e) (2019).

[2] Defense counsel submitted the following non-statutory mitigating factors: (1) Defendant had been in prison for over fifteen (15) years, (2) Defendant's infractions were minor, (3) Defendant had achieved a minimum custody level in prison, and (4) Defendant had worked and taken classes as much as possible while in prison.

signed the worksheet, defense counsel responded, "I have gotten to the point where I am hesitant to stipulate to anything." The trial court noted for the record that defense counsel "was not comfortable signing the worksheet and stipulating to the information."

¶ 5 Although the trial court found the statutory and non-statutory mitigating factors requested by defense counsel, the trial court resentenced Defendant in the presumptive range. Defendant was sentenced to 220 to 273 months of imprisonment, the same sentence he received in 2004. Defendant appealed to our Court.

II. Analysis

¶ 6 Defendant argues that the trial court erred by treating his New York conviction for attempted possession of a controlled substance in the 5th degree as a presumptive Class I felony. We agree and remand Defendant's case for resentencing.

¶ 7 "The trial court's determination of a defendant's prior record level is a conclusion of law, which this Court reviews *de novo* on appeal." *State v. Threadgill*, 227 N.C. App. 175, 178, 741 S.E.2d 677, 679-80 (2013). "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, 632-33, 669 S.E.2d 290, 294 (2008) (internal quotation marks and citation omitted).

¶ 8 Our General Statutes provide a framework for determining a defendant's prior record level. *See* N.C. Gen. Stat. § 15A-1340.14 (2019). When a prior conviction

occurred outside North Carolina,

> [It] is classified as a Class I felony if the jurisdiction in which the offense occurred classifies the offense as a felony[.]
>
> If the State proves by the preponderance of the evidence that an offense classified as either a misdemeanor or a felony in the other jurisdiction is substantially similar to an offense in North Carolina that is classified as a Class I felony or higher, the conviction is treated as that class of felony for assigning prior record level points.

Id. § 15A-1340.14(e). A prior conviction shall be proved by: (1) stipulation of the parties, (2) court record of the prior conviction, (3) a copy of records from the Department of Public Safety, the Division of Motor Vehicles, or the Administrative Office of the Courts, or (4) any other method found by the court to be reliable. *Id.* § 15A-1340.14(f). The State bears the burden of proving the prior conviction by a preponderance of the evidence. *Id.* § 15A-1340.14(f).

¶ 9 Defense counsel may not stipulate that "a particular out-of-state conviction is substantially similar to a particular North Carolina felony or misdemeanor," but may stipulate that an out-of-state conviction is considered a felony in that jurisdiction. *State v. Bohler*, 198 N.C. App. 631, 637-38, 681 S.E.2d 801, 806 (2009) (internal quotation marks and citation omitted). Our Court has held that defense counsel's failure to object to a PRL worksheet or the State's argument that an out-of-state conviction is a felony amounts to a stipulation. *Threadgill*, 227 N.C. App at 180, 741

S.E.2d at 681; *State v. Wade*, 181 N.C. App. 295, 299, 639 S.E.2d 82, 86 (2007).

¶ 10 We considered a similar issue in *State v. Huu The Cao*, 175 N.C. App. 434, 626 S.E.2d 301 (2006). In that case, the State only presented a PRL worksheet and computer printouts of the defendant's prior criminal convictions from the United States and Texas. *Id.* at 442, 626 S.E.2d at 306. The State failed to establish that the Texas conviction was a felony but attempted to provide the Texas statute on appeal to indicate that its violation constituted a felony. *Id.* at 442-43, 626 S.E.2d at 306-07. We remanded for a resentencing hearing, concluding that the State had failed to satisfy its burden at the trial level. *Id.* at 443, 626 S.E.2d at 307.

¶ 11 Here, the State only presented New York Penal Laws § 10.00 ("Definitions of terms of general use in this chapter") and § 120.00 ("Assault in the third degree") at trial. N.Y. Penal Law §§ 10.00, 120.00 (Consol. 2019). On appeal, the State argues that we may take judicial notice of additional New York Penal Laws § 110.00 ("Attempt to commit a crime"); § 111.05 ("Attempt to commit a crime, punishment"); and § 222.06 ("Criminal possession of a controlled substance in the fifth degree"), attached to the brief by exhibit. N.Y. Penal Law §§ 110.00, 111.05, 222.06 (Consol. 2019).

¶ 12 However, this evidence was not presented by the State to the trial court. Defendant also expressly refused to stipulate to the PRL worksheet. Therefore, we agree with Defendant that the State failed to carry its burden of proving, by a

preponderance of the evidence, that Defendant had three prior out-of-state convictions. Specifically, the State failed to show that Defendant's New York conviction for attempted possession of a controlled substance in the 5th degree should be considered a Class I felony under North Carolina law.

¶ 13 Thus, we remand for a resentencing hearing at which the State must prove by a preponderance of the evidence that Defendant's out-of-state convictions are felonies, and that the felonious convictions are substantially similar to North Carolina offenses that are classified as Class I felonies or higher. *See Huu The Cao*, 175 N.C. App. at 443, 626 S.E.2d at 307.

III. Conclusion

¶ 14 We vacate the sentence and remand Defendant's case for a resentencing hearing at which the parties may offer additional evidence.

VACATED AND REMANDED FOR RESENTENCING.

Judges INMAN and CARPENTER concur.

Report per Rule 30(e).