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IN THE COURT OF APPEALS OF NORTH CAROLINA

2022-NCCOA-668

No. COA22-133

Filed 4 October 2022

Rowan County, No. 20CRS54033

STATE OF NORTH CAROLINA

v.

CARL KEITH BRINDLE, JR.

Appeal by Defendant from Judgment entered 16 August 2021 by Judge Richard S. Gottlieb in Rowan County Superior Court. Heard in the Court of Appeals 7 September 2022.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Lisa M. Taylor, for the State.

Gilda C. Rodriguez for defendant-appellant.

HAMPSON, Judge.

Factual and Procedural Background

¶ 1

Carl Keith Brindle, Jr. (Defendant) appeals from Judgment entered 16 August 2021 upon his convictions for Possession of a Firearm by a Person Subject to a Domestic Violence Protective Order, Misdemeanor Carrying a Concealed Gun, and

Fictitious Registration of a Motor Vehicle. The Record before us tends to reflect the following:

¶ 2 On 3 November 2020, Master Deputy William Basinger (Deputy Basinger) observed Defendant driving a Chevrolet Blazer with a registration plate not completely attached—the left side of the plate was hanging off the vehicle, tilted downward. Deputy Basinger ran the registration plate in the Report Management System and discovered the plate was registered to Defendant—but to a Ford Mustang. The Report Management System also revealed a domestic violence protective order was in effect against Defendant. Deputy Basinger observed Defendant driving erratically, swerving, speeding up, slowing down, and failing to maintain his lane of travel. Upon these observations, Deputy Basinger initiated a traffic stop. Deputy Basinger notified Master Deputy Ted Miller (Deputy Miller) that he was initiating a traffic stop, and Deputy Miller arrived at the traffic stop shortly thereafter.

¶ 3 When the deputies approached Defendant’s vehicle, Defendant provided his driver’s license and immediately told Deputy Basinger a domestic violence protective order had been filed against him. Deputy Basinger questioned Defendant about the registration plate, to which Defendant responded he had recently purchased the vehicle and was planning to change the registration from the Ford Mustang to the Chevrolet Blazer. After returning Defendant’s license, Deputy Basinger retrieved his

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K-9 from his patrol vehicle, who alerted on Defendant's vehicle.¹ Upon the K-9 alert, Deputy Basinger asked Defendant to step out of his vehicle and proceeded to conduct a search of the vehicle. Deputy Basinger testified that during the search, he observed a cut straw with a white powder residue in it on the front passenger floorboard, cash in the center console, and digital scales on the driver's side floorboard. The search also revealed a .22 caliber handgun, loaded with nine rounds, and a tray of .22 long-rifle bullets located in the center console. Deputy Basinger informed Defendant that a firearm was located in the center console and placed him under arrest.

¶ 4

On 1 March 2021, a Rowan County Grand Jury returned true Bills of Indictment charging Defendant with Possession of a Firearm by a Person Subject to a Domestic Violence Protective Order in violation of N.C. Gen. Stat. § 14-269.8, Carrying a Concealed Gun, and Fictitious Registration. Defendant's case came on for trial on 2 August 2021, and on 4 August 2021, the jury returned a verdict finding Defendant guilty of all three charges. Defendant stipulated to a Prior Record Level Worksheet (Worksheet) presented by the State that listed Defendant's prior convictions in North Carolina. The Worksheet disclosed a total of six points—five points for prior convictions and one point for being on probation at the time of the

¹ Defense counsel initially objected to the State eliciting testimony about the K-9's positive alert, but counsel failed to renew his objection when the State presented further evidence of the positive alert.

offense—making Defendant a prior record level III offender for sentencing purposes. Before proceeding to sentencing, the following colloquy regarding the Worksheet occurred between counsel:

[Prosecutor]: [Defense Counsel], you've signed a worksheet stipulating your client's a Prior Record Level III for felony sentencing purposes?

[Defense Counsel]: [Defendant] signed it.

[Prosecutor]: As well as a Prior Record Level III for misdemeanor sentencing purposes?

[Defense Counsel]: Yes.

[Prosecutor]: That includes for the felony purposes one point for being on probation at the time -- excuse me, parole or post-release supervision for 20-CR-50479, which was a misdemeanor violation of a Domestic Violence Protective Order; is that correct?

[Defense Counsel]: Yes.

¶ 5 On 4 August 2021, the trial court entered a consolidated Judgment and Commitment Order and sentenced Defendant to an active sentence of nine to twenty months. On 11 August 2021, Defendant timely filed a notice of appeal.

Issues

¶ 6 The issues on appeal are whether: (I) the trial court committed plain error in admitting evidence of drug paraphernalia found in Defendant's vehicle; and (II) the trial court erred in assigning a prior record level point based on an offense committed while Defendant was on probation.

Analysis

I. **Plain Error**

¶ 7

First, Defendant contends the trial court committed plain error during his trial for Possession of a Firearm by a Person Subject to a Domestic Violence Protective Order, Misdemeanor Carrying a Concealed Gun, and Fictitious Registration of a Motor Vehicle by admitting several pieces of testimony and evidence regarding Defendant’s possession of drug paraphernalia at the time of his arrest. We disagree.

A. Standard of Review

¶ 8

Our Supreme Court “has elected to review unpreserved issues for plain error when they involve . . . rulings on the admissibility of evidence.” *State v. Gregory*, 342 N.C. 580, 584, 467 S.E.2d 28, 31 (1996) (citations omitted); N.C.R. App. P. 10(a)(4) (2022). “Under the plain error rule, defendant must convince this Court not only that there was error, but that absent the error, the jury probably would have reached a different result.” *State v. Jordan*, 333 N.C. 431, 440, 426 S.E.2d 692, 697 (1993) (citation omitted).

B. Drug-Related Evidence

¶ 9

Defendant contends the trial court erred in admitting evidence of alleged drug involvement for the purpose of proving Defendant “had a ‘propensity’ to engage in unlawful behavior.” Even if we were to assume, without deciding, the trial court’s admission of drug-related evidence was erroneous, Defendant failed to establish the

jury would have probably reached a different result had the evidence not been admitted. Thus, any such error would not amount to plain error given the other admissible evidence not challenged by Defendant.

¶ 10 Here, the Record reflects the State offered substantial evidence including: (1) a domestic violence protective order was in effect at the time of Defendant's arrest; (2) Defendant was in possession of a firearm in violation of that Order and N.C. Gen. Stat § 14-269; and (3) at the time of the traffic stop, the registration tag on the Chevrolet Blazer Defendant was driving was registered to a Ford Mustang. Therefore, as a result of the substantial amount of evidence of Defendant's guilt and, specifically, Defendant's possession of the firearm at the time of the traffic stop, we cannot conclude the jury would have probably reached any different result. As such, Defendant has failed to meet his burden under the plain error standard. Consequently, the trial court did not commit plain error by failing to exclude the challenged evidence in the absence of an objection by Defendant.

II. Sentencing Classification

A. *Standard of Review*

¶ 11 "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, 632-33, 669 S.E.2d 290, 294 (2008) (citation and quotation marks 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).

B. Prior Record Level Point

¶ 12 “[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) (2021)). However, under N.C. Gen. Stat. § 15A-1340.16(a6), “[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) (2021); 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).” (citation omitted)).

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¶ 13 In the case *sub judice*, Defendant contends the State failed to provide Defendant with the required written notice of its intent to prove the existence of a prior record level point based on the current offense. The State argues this issue is moot because Defendant has been released from serving his active sentence. While Defendant has been released from custody, he remains on post-release supervision; thus, his sentence has not yet been completed, and the issue is not moot. *See In re K.N.H.*, 278 N.C. App. 27, 37, 2021-NCCOA-267, ¶ 37 (stating “a [defendant]’s appeal from a disposition and commitment order would not become moot where the [defendant] served his sentence but faced a possibility of ‘adverse consequence flowing from a judgment,’ such as post-release supervision.”).

¶ 14 Here, the trial court never determined whether the statutory requirements of N.C. Gen. Stat § 15A-1340.16(a6) were met. Additionally, there is no evidence in the Record the State provided Defendant with written notice of its intent to include a prior record level point based on its allegation Defendant committed the charged offense while on probation. Moreover, the Record does not reflect Defendant waived his right to receive such notice. *See State v. High*, 271 N.C. App. 771, 774, 845 S.E.2d 150, 153 (2020) (“[A] defendant’s stipulation does not end the inquiry into his or her prior record level.”). As such, the trial court erred in including the probation point in Defendant’s sentencing as a prior record level III. This error was prejudicial because the probation point increased Defendant’s prior record level from a level II to a level

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III. *See Snelling*, 231 N.C. App. at 680, 752 S.E.2d at 743 (“A sentencing error that improperly increases a defendant’s [prior record level] is prejudicial.” (citing *State v. Hanton*, 175 N.C. App. 250, 260, 623 S.E.2d 600, 607 (2006))). Consequently, we remand this matter to the trial court for Defendant to be resentenced as a prior record level II offender.

Conclusion

¶ 15 Accordingly, for the foregoing reasons: (I) there was no plain error in Defendant’s trial, and we affirm the Judgment entered upon the jury verdict; and (II) this matter is remanded for resentencing in accordance with this opinion.

NO PLAIN ERROR; REMANDED FOR RESENTENCING.

Judges WOOD and GRIFFIN concur.

Report per Rule 30(e).