IN THE COURT OF APPEALS OF NORTH CAROLINA

2022-NCCOA-671

No. COA22-64

Filed 4 October 2022

Columbus County, Nos. 18 CRS 52078, 20 CRS 89

STATE OF NORTH CAROLINA

v.

EDWARD DERON RIGGINS, Defendant.

Appeal by Defendant from judgment entered 28 May 2021 by Judge Douglas B. Sasser in Columbus County Superior Court. Heard in the Court of Appeals 24 August 2022.

Attorney General Joshua H. Stein, by Assistant Attorney General Lewis W. Lamar Jr., for the State.

Sandra Payne Hagood for Defendant-Appellant.

JACKSON, Judge.

¶ 1 Edward Deron Riggins ("Defendant") appeals from judgment entered after a jury found him guilty of discharging a weapon into an occupied dwelling and possession of a firearm by a felon. Defendant contends that the trial court erred by improperly calculating his prior record level for purposes of sentencing. We agree and remand for resentencing.

I. Background

¶ 2 Defendant and the Bellamys were neighbors for approximately two and a half years in Tabor City. According to Mr. Bellamy, sometime in late 2017, a dispute arose between Defendant and the Bellamys over Defendant repeatedly putting dirty diapers in the Bellamys' trashcan. Mr. Bellamy testified that Defendant threatened to shoot him after Mr. Bellamy dumped the dirty diapers on the end of Defendant's driveway. Mr. Bellamy also testified that Defendant shot over Mr. Bellamy's car with a black handgun in September 2017 and on 6 August 2018, Defendant shot towards Mr. Bellamy while he was working in his garden. Mr. Bellamy called 911 after both incidents.

¶ 3 On the night of 16 August 2018, Mr. Bellamy was returning home after having a few beers with a friend. Mr. Bellamy saw Defendant and his girlfriend standing at the back of his house. Mr. Bellamy testified that after he went inside his house without speaking to Defendant, someone began shooting into the house, hitting the air conditioner and the windows. Mr. Bellamy explained that Defendant then tried to get inside the house through the backdoor, but the door was locked. Mr. Bellamy also testified that he saw Defendant's girlfriend hand him a gun right before he went inside the house and the shooting began. Law enforcement found two bullet holes in the air conditioning unit and a shattered window after they arrived on scene.

¶ 4 On 7 November 2018, Defendant was indicted by a Columbus County grand

jury for discharging a weapon into an occupied dwelling and possession of a firearm by a felon. The matter came on for trial on 26 May 2021 and the jury found Defendant guilty of both charges.

¶ 5 In calculating Defendant's prior record level for felony sentencing purposes, the trial court found that Defendant had a total of 12 points for both offenses and sentenced Defendant as a prior record level IV. The trial court sentenced Defendant at the high end of the presumptive range for each offense: 97 to 129 months for discharging a weapon into an occupied dwelling and 19 to 35 months for possession of a firearm by a felon. The trial court ordered the sentences to run consecutively.

¶ 6 Defendant gave notice of appeal in open court on 28 May 2021.

II. Analysis

¶ 7 Defendant argues that the trial court erred by sentencing him as a prior record level IV in several respects: (1) by finding that the State met its burden of showing that Defendant's out-of-state offense was substantially similar to a North Carolina offense; (2) by assigning a point for a misdemeanor conviction for which he was convicted on the same date of a higher point conviction; and (3) by using the same prior record level worksheet for each judgment and thus improperly adding an additional point for discharging a weapon into an occupied dwelling.

¶ 8 Although Defendant did not object to the trial court sentencing him as a prior record level IV for both offenses, nonconstitutional sentencing arguments that the

sentence imposed is invalid as a matter of law are preserved for appellate review even if a defendant failed to object. N.C. Gen. Stat. § 15A-1446(d)(18) (2021); *see also State v. Meadows*, 371 N.C. 742, 747-48, 821 S.E.2d 402, 406 (2018) (holding that N.C. Gen. Stat. § 15A-1446(d)(18) is constitutional because there is no conflict with Rule 10(a)(1) of the North Carolina Rules of Appellate Procedure).

A. Out-of-State Conviction

¶ 9 A trial court's determination of whether an out-of-state offense is substantially similar to a North Carolina offense is a question of law which we review *de novo* on appeal. *State v. Fortney*, 201 N.C. App. 662, 669, 687 S.E.2d 518, 524 (2010).

¶ 10 "The prior record level of a felony offender is determined 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) (2021). Regarding out-of-state convictions,

> a conviction occurring in a jurisdiction other than North Carolina 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). In other words, the default classification for an out-of-state felony conviction is Class I and only if the State can prove by a preponderance of the

evidence that the out-of-state conviction is substantially similar to a North Carolina felony offense can the out-of-state conviction be counted as a higher classification than Class I. The substantially similar determination involves "comparison of the elements of the out-of-state offense to those of the North Carolina offense." *State v. Sanders*, 367 N.C. 716, 720, 766 S.E.2d 331, 334 (2014) (quoting *Fortney*, 201 N.C. App. at 671, 687 S.E.2d at 525).

¶ 11 Defendant's out-of-state conviction from South Carolina was only identified by the State with the description, "voluntary manslaughter." The State never identified the South Carolina statute number, and the only proof of the conviction the State offered was the entry on the prior record level worksheet. After stating that Defendant was convicted of voluntary manslaughter in South Carolina, the State told the trial court the following:

> And, Judge, I have printed off the statute, the South Carolina statute, if the Court would like to see it.
>
> A person convicted of manslaughter or the unlawful killing of another without malice, expressed or implied, must be imprisoned not more than 30 years or less than 2 years.
>
> That's the South Carolina state law.
>
> And, additionally, the charging language that North Carolina follows is: unlawfully, willfully, and feloniously did kill and slay the victim.
>
> And so I would ask that the Court does find that there is a substantial similarity between the two and allow for the prior sentencing record to count as a D for sentencing

purposes today.

¶ 12 After Defendant's counsel responded and asked the trial court to count the South Carolina offense as a lower felony classification because it carries a minimum of two years, which is less than the minimum for a North Carolina Class D felony, the trial court directed the State: "I'll let you just pass that document up to me, please." It is unclear what document the trial court was referring to—whether the printout of the South Carolina statute, the prior record level worksheet, or something else. As the State concedes here, the specific South Carolina statute which the State referred to during sentencing does not appear in the Record. The trial court then found "by a preponderance of the evidence that the South Carolina voluntary manslaughter conviction is substantially similar to manslaughter under North Carolina law under G.S. 14-18, which is a Class D felony."

¶ 13 Based on these facts, we hold that the trial court erred by failing to undertake the necessary substantial similarity analysis. *See e.g.*, *State v. Hanton*, 175 N.C. App. 250, 258-59, 623 S.E.2d 600, 606-07 (2006) (concluding the trial court erred in finding New York's second-degree assault to be substantially similar to North Carolina's assault inflicting serious injury as the New York offense does not require serious physical injury). The State and the trial court also should have specified on the record the exact South Carolina statute under which Defendant was convicted for voluntary manslaughter. *See State v. Henderson*, 201 N.C. App. 381, 388, 689 S.E.2d 462, 467

(2009) (highlighting that "brief and non-specific descriptions" could arguably refer to more than crime and therefore out-of-state convictions should be identified by statute). Accordingly, we remand for the trial court to compare the elements of the specific South Carolina statute for voluntary manslaughter and the similar North Carolina offense and determine whether the State has met its burden of proving by a preponderance of the evidence that the out-of-state conviction is substantially similar to a higher classification North Carolina felony than the default Class I.

B. Misdemeanor Conviction

¶ 14 The determination of a defendant's prior record level is a conclusion of law which we review *de novo* on appeal. *State v. Fraley*, 182 N.C. App. 683, 691, 643 S.E.2d 39, 44 (2007).

¶ 15 When calculating a defendant's prior record level, one point is assigned for any Class A1 or Class 1 nontraffic misdemeanors and certain designated misdemeanor traffic offenses. N.C. Gen. Stat. § 15A-1340.14(b)(5) (2021). However,

> if 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. If an offender is convicted of more than one offense in a single session of district court, only one of the convictions is used.

Id. § 15A-1340.14(d).

¶ 16 Per the prior record level worksheet prepared by the State, Defendant was

previously convicted of a Class 3 misdemeanor in 2020 and a Class A1 misdemeanor in the same 4 May 2016 session of court in which he was convicted of a Class G felony. Under § 15A-1340.14(b)(5), the Class 3 misdemeanor conviction does not add any points. Under § 15A-1340.14(d), because Defendant was convicted of more than one offense in a single session of court, the trial court should not have added any points for the Class A1 misdemeanor conviction and only added points for the Class G felony conviction. Therefore, the trial court should not have added any points for Defendant's misdemeanor convictions.

¶ 17 The trial court, however, did add one point for a Class A1 or 1 misdemeanor conviction when calculating Defendant's prior record level. This assignment was done in error. Therefore, one point should be deducted from Defendant's prior record level points as counted by the trial court.

C. Same Prior Record Level Worksheet

¶ 18 The determination of a defendant's prior record level is a conclusion of law which we review *de novo* on appeal. *Fraley*, 182 N.C. App. at 691, 643 S.E.2d at 44.

¶ 19 Where a defendant is convicted of more than one offense and the trial court uses the same prior record level worksheet for all sentences, the worksheet must "accurately reflect[] the defendant's prior record level for each sentence." *State v. Mack*, 188 N.C. App. 365, 380, 656 S.E.2d 1, 12 (2008). In addition to adding points for prior convictions, "[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," then one point is added. N.C. Gen. Stat. § 15A-1340.14(b)(6) (2021). In other words, when a trial court is sentencing a defendant for more than one offense, an additional point can only be added per § 15A-1340.14(b)(6) for the present offenses that include all the elements of a prior convicted offense. *See e.g.*, *State v. Posner*, 277 N.C. App. 117, 122, 2021-NCCOA-147, ¶ 20 (holding the trial court erred by adding an additional point for all five of the defendant's present offenses when only three of the present offenses included all the elements of prior offenses).

¶ 20 Here, the trial court only used one prior record level worksheet in determining the sentences for both possession of a firearm by a felon and discharging a weapon into an occupied dwelling. Because Defendant had been previously convicted of possession of a firearm by a felon, the trial court added one point per the directive of § 15A-1340.14(b)(6). This was proper for determining the sentence for possession of a firearm by a felon. However, the elements of discharging a weapon into an occupied dwelling are not included in possession of a firearm by a felon, or any of his other previous convictions, and therefore the trial court erred by adding an additional point per § 15A-1340.14(b)(6) when determining the sentence for discharging a weapon into an occupied dwelling. The trial court therefore should have used a different prior record level worksheet for determining the sentence for discharging a weapon into an

occupied dwelling. Ultimately, the point total for discharging a weapon into an occupied dwelling should be one less than the point total for possession of a firearm by a felon.

III. Conclusion

¶ 21 For the foregoing reasons, the trial court erred by failing to conduct a proper substantial similarity analysis for Defendant's out-of-state conviction, by adding a point for Defendant's Class A1 misdemeanor conviction, and by using the same prior record level worksheet for both offenses. We remand for resentencing in accordance with our holdings above.

REMANDED FOR RESENTENCING.

Judges COLLINS and HAMPSON concur.

Report per Rule 30(e).