IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA23-172

Filed 05 September 2023

Davidson County, No. 22CRS50813

STATE OF NORTH CAROLINA,

v.

JEFFREY RAY BACOT, Defendant.

Appeal by defendant from judgment entered 11 August 2022 by Judge Lori I. Hamilton in Davidson County Superior Court. Heard in the Court of Appeals 9 August 2023.

Attorney General Joshua H. Stein, by Assistant Attorney General Ann Stone for the State.

Richard Croutharmel for defendant-appellant.

FLOOD, Judge.

Jeffrey Ray Bacot ("Defendant") asks us to conduct an independent review of the Record to determine whether prejudicial error occurred in the trial proceedings. Defendant requests we consider whether: (1) the trial court erred when it failed to find mitigating factors and sentenced Defendant within the presumptive range, and (2) whether the trial court miscalculated Defendant's prior record level. As we

explain in further detail below, the trial court did not err.

I. Facts and Procedural Background

On 17 February 2022, Lexington Police Officer Hernandez stopped Defendant's car for a fictitious tag and for failure to stop at a stop sign. Defendant had no driver's license nor proof of insurance. Officer Hernandez searched Defendant's person and found a pill bottle containing methamphetamine. A search of the vehicle yielded another pill bottle containing methamphetamine. Defendant was charged with possession of methamphetamine, possession of drug paraphernalia, and driving with a revoked license. On 2 May 2022, Defendant was indicted by a grand jury for possession of methamphetamine and possession of drug paraphernalia. The same day, the State dismissed the driving with a revoked license charge.

On 11 August 2022, Defendant pleaded "no contest" in a plea agreement where the State agreed to a probationary sentence and dismissal of the drug paraphernalia charge. In court, Defendant stipulated that the substances found on his person and in his car were methamphetamine. Defendant's attorney argued for a mitigated sentence based on early acceptance of responsibility and a positive employment history. In support of the mitigated sentence, Defendant's counsel also asserted that Defendant's last conviction was in 2014, for driving with revocation not based on impairment. The plea was accepted.

Defendant was sentenced as a Class I felon having a prior record level II, in the presumptive range of six to seventeen months' imprisonment. The trial court

suspended that sentence and placed Defendant on twenty-four months of supervised probation. On 23 August 2022, Defendant filed a *pro se* written notice of appeal.

II. Jurisdiction

Defendant's notice of appeal fails to show the judgment from which he appeals, the court to which he appeals, or that he served the State with a copy of his appeal as required by N.C.R. App. P. 4(a)–(d). *See* N.C.R. App. P. 4. These defects under the North Carolina Rules of Appellate Procedure, however, do not necessarily require dismissal of the appeal.

> Even when objected to, a defendant's failure to indicate service on the State in violation of N.C.R. App. P. 4(a)(2) does not require dismissal of the appeal as it does not deprive the court of jurisdiction. Despite Defendant's failure to indicate service on the State with notice of appeal, we have jurisdiction and may reach the merits.

State v. Jenkins, 273 N.C. App. 145, 145, 848 S.E.2d 245, 246–247 (2020).

Defendant has, nonetheless, filed a petition for writ of certiorari pursuant to N.C.R. App. P. 21(a)(1) due to these errors. Defendant's petition is granted, as his appeal is of right for sentencing issues. N.C. Gen. Stat. § 15A-1444(a1)–(a2) (2021).

III. Standards of Review

"This Court reviews a trial court's decision to sentence outside of the presumptive range for an abuse of discretion." *State v. Davis*, 206 N.C. App. 545, 548, 696 S.E.2d 917, 920 (2010) (citing *State v. Chavis*, 141 N.C. App. 553, 568, 540 S.E.2d 404, 415 (2000)). "Abuse of discretion results where the court's ruling is manifestly

unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *Watauga Cnty. v. Beal*, 255 N.C. App. 849, 852, 806 S.E.2d 338, 340 (2017) (citation omitted).

"When this Court is confronted with statutory errors regarding sentencing issues, such errors are questions of law, and as such, are reviewed *de novo*." *State v. Allen*, 249 N.C. App. 376, 379, 790 S.E.2d 588, 591 (2016) (citation and internal quotation marks omitted). "Under a *de novo* review, [this Court] considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *State v. Clapp*, 235 N.C. App. 351, 359–60, 761 S.E.2d 710, 717 (2014) (citation and internal quotation marks omitted).

IV. Analysis

Defendant's counsel is unable to identify any issues with sufficient merit to support relief on appeal. Defendant's counsel requests this Court to conduct an independent review of the Record, pursuant to *Anders v. California*, 386 U.S. 738, 87 S. Ct. 1396, 18 L. Ed. 2d 493, *reh'g denied*, 388 U.S. 924, 87 S. Ct. 2094, 18 L. Ed. 2d 1377 (1967), and *State v. Kinch*, 314 N.C. 99, 331 S.E.2d 665 (1985), to ascertain whether any prejudicial error occurred in the trial proceedings. Per *Anders*, if a defendant's counsel finds his client's appeal to be frivolous or unmeritorious, he should advise the court and request permission to withdraw. 386 U.S. at 744, 87 S. Ct. at 1400, 18.L. Ed. 2d at 498. "This request must, however, be accompanied by a

brief referring to anything in the record that might arguably support appeal." *Id.* at 744, 87 S. Ct. at 1400, L. Ed. 2d at 498.

Defendant's counsel refers us to two issues that "might arguably support the appeal": (A) whether the trial court abused its discretion by failing to find mitigating factors and sentence Defendant in the mitigated range; and (B) whether the trial court erred in calculating Defendant's prior record level. *See Anders*, 386 U.S. at 744, 87 S. Ct. at 1400, 18 L. Ed. 2d at 498.

A. Mitigating Factors and Sentencing in the Presumptive Range

"The court shall make findings of . . . mitigating factors present in the offense only if, in its discretion, it departs from the presumptive range of sentences[.]" N.C. Gen. Stat. § 15A-1340.16(c) (2021). "The court shall consider evidence of . . . mitigating factors present in the offense that make . . . [a] mitigated sentence appropriate, but the decision to depart from the presumptive range is in the discretion of the court." N.C. Gen. Stat. § 15A-1340.16(a) (2021). "The following are mitigating factors: . . . (11) [p]rior to arrest or at an early stage of the criminal process, the defendant voluntarily acknowledged wrongdoing in connection with the offense to a law enforcement officer . . . [and] (19) [t]he defendant has a positive employment history or is gainfully employed." N.C. Gen Stat. § 15A-1340.16(e)(11), (19) (2021). The trial court weighs the credibility of the evidence in support of mitigating factors

and determines whether such factors are present. *State v. Canty*, 321 N.C. 520, 523, 364 S.E.2d 410, 413 (1988).

During the plea agreement and sentencing hearing, defense counsel asked the trial court to consider Defendant's positive employment history and his early acceptance of responsibility. The trial court asked about Defendant's employment, and his counsel explained Defendant is employed and is a "hard worker." This employment information was also reflected in the affidavit of indigency at the start of the case. Defense counsel also argued this hearing is the "first time" Defendant's arrest has "been on in superior court[,]" (sic) so Defendant was "taking care of this at an early stage of the investigation" in accordance with mitigating factor eleven under N.C. Gen. Stat. § 15A-1340.16(e). Additionally, defense counsel asked the court to consider that Defendant had not engaged in criminal activity in the several years prior to the arrest. These assertions, however, are not mitigating factors. *See* N.C. Gen. Stat. § 1340.16(e). Defense counsel did not otherwise provide any other evidence in support of mitigating factors.

The trial court was not required to consider the mitigating factors, here, as Defendant was sentenced in the presumptive range. *See* N.C. Gen. Stat. § 15A-1340.16(c) Despite not being required to, the trial court still considered these statutory factors and the arguments of counsel, and the court found there were no mitigating factors. The trial court did not abuse its discretion when it failed to find

mitigating factors because Defendant's sentence was within the presumptive range. *See Davis*, 206 N.C. App. at 548, 696 S.E.2d at 920.

B. Calculation of Prior Record Level

"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[.]" N.C. Gen. Stat. § 1340.14(b) (2021). For felony sentencing purposes, prior convictions of a Class 1 misdemeanor results in the assessment of one point, and a prior conviction of a Class I felony results in the assessment of two points. *See* N.C. Gen. Stat. § 1340.1(b)(4), (5) (2021). A prior record level II for felony sentencing occurs when a defendant has between two and five points. *See* N.C. Gen. Stat. § 15A-1340.14(c)(2) (2021). When the incorrect "calculation of [a] defendant's prior record points does not affect the determination of his prior record level, the error is harmless." *State v. Blount*, 209 N.C. App. 340, 347, 703 S.E.2d 921, 926 (2011) (citing *State v. Smith*, 139 N.C. App. 209, 220, 533 S.E.2d 518, 524 (2000) (holding that error in calculating defendant's prior record points is harmless if the error does not affect the determination of defendant's prior record level)).

The prior record level worksheet indicates Defendant had three scoreable misdemeanors. The trial court asked Defendant if he had three prior record level points, and Defendant answered in the affirmative. Defendant, however, actually had two scoreable misdemeanors and one scoreable Class I felony. This means Defendant had four prior record level points, instead of three. Either way, whether

Defendant had three or four prior record level points, Defendant was still a prior record level II pursuant to statute. *See* N.C. Gen. Stat. § 15A-1340.14(c)(2). This was a harmless error, and it is not grounds for reversal. *See Blount*, 209 N.C. App. at 347, 703 S.E.2d. at 926.

V. Conclusion

For the reasons stated above, the trial court did not err in failing to find mitigating factors and in sentencing Defendant within the presumptive range, nor did the trial court err in sentencing Defendant as a prior record level II. Upon review of the Record, there are no grounds for reversible error, and we affirm the trial court's decision.

AFFIRMED

Judges TYSON and CARPENTER concur.

Report per Rule 30(e).