

NORTH CAROLINA COURT OF APPEALS

STATE OF NORTH CAROLINA)	
)	
v.)	<u>From Sampson</u>
)	
RICHARD MARLO MELVIN)	

STATE'S RESPONSE TO PETITION FOR WRIT OF CERTIORARI

TO: THE HONORABLE CHIEF JUDGE AND ASSOCIATE JUDGES OF THE NORTH CAROLINA COURT OF APPEALS

NOW COMES the State of North Carolina, by and through Roy Cooper, Attorney General, and Joseph L. Hyde, Assistant Attorney General, and responding to Petitioner's petition for writ of certiorari filed 1 August 2012, requests that the petition be denied.

PROCEDURAL HISTORY

1. On 20 August 2004, Petitioner was convicted of second degree murder and discharging a firearm into occupied property. He pled guilty to attaining habitual felon status, and was sentenced to consecutive terms of a minimum 282, maximum 348, and a minimum 107, maximum 138 months in prison. State v. Melvin, No. COA05-531, 2006 WL 695684 (N.C. Ct. App. March 21, 2006) (unpublished), disc. review denied, 360 N.C. 542, 634 S.E.2d 893 (2006).

2. Petitioner appealed. By unpublished opinion, this Court found no error in Petitioner trial, and vacated and remanded the portion of the judgment recommending restitution. Id. at *5.

3. Petitioner filed the instant petition on 1 August 2012, apparently seeking another appeal of the same judgment.

REASONS WHY THE WRIT SHOULD NOT ISSUE

I. The petition should be denied because Petitioner's claims are not properly before this Court.

In the petition, Petitioner argues his prior record level was incorrectly calculated, and that appellate counsel was ineffective for not raising the issue on direct appeal. (See petition pp. 5-6) Petitioner may not obtain a second review of the same judgment.

In State v. Speaks, 95 N.C. 689 (1886), the defendant was convicted of murder and appealed. Id. at 690. Our Supreme Court found no error, and the superior court was directed to proceed to judgment. Id. When the defendant appeared in superior court, he again moved for arrest of judgment. Id. The motion was overruled, and the defendant again appealed. Id. On appeal, our Supreme Court stated: "It is too plain a proposition to require support from argument or precedent, that whatever defences were set up, or could have been set up, upon the hearing of the former appeal, are conclusively determined in that adjudication, and are not reviewable in the present appeal." Id. at 691.

Controversies would never be settled if this practice were allowed, and successive appeals, but successive experiments, none finally disposing of the cause. As the defence now sought to be set up could as well have been made available when the first appeal was taken, it has passed into the domain of *res adjudicata*, and cannot now be pressed into service. If a series of appeals were allowable under such circumstances, they might be the means of an indefinite postponement of the execution of the judgment, and perhaps defeat it altogether.

Id. (citation omitted).

In the present case, Petitioner was convicted of second degree murder and discharging a firearm into occupied property. He was sentenced as an habitual felon to consecutive terms of a minimum 282, maximum 348, and a minimum 107, maximum 138 months in prison. On appeal, Petitioner argued the trial court erred by: (1) failing to instruct the jury as requested, (2) allowing the State to elicit evidence he was driving while his license was revoked, and (3) in calculating the amount of restitution. Melvin, 2006 WL 695684 at *3-*5. Although Petitioner could have challenged the determination of his prior record level, he did not do so on direct appeal.

Petitioner now seeks a second review of the same judgment, contending that the trial court erred in its calculation of his prior record level. As this claim could have been raised in the prior appeal, "it has passed into the domain of res adjudicata, and cannot now be pressed into service." Speaks, 95 N.C. at 691. Accordingly, this Court should deny the petition for certiorari.

II. Alternatively, the petition should be denied as Petitioner's claims are without merit.

Chapter 14, Article 2A of our General Statutes deals with habitual felons. Under section 14-7.1, "[a] person who has been convicted of or pled guilty to three felony offenses . . . is declared to be an habitual felon." N.C.G.S. § 14-7.1 (2003). "For the purposes of this Article, felonies committed before a person attains the age of 18 years shall not constitute more than one felony." Id. (emphasis added). "By its own express words, the application of N.C. Gen. Stat. § 14-7.1 is limited to sentencing

for habitual felon purposes only.” State v. Travis, COA04-679, 2005 WL 14645, *1 (N.C. Ct. App. Jan. 4, 2005) (unpublished).¹

Chapter 15A, Article 81B deals with structured sentencing. “Before imposing a sentence, the [trial] court shall determine the prior record level for the offender pursuant to G.S. 15A-1340.14.” N.C.G.S. § 15A-1340.13(b) (2003). Under section 15A-1340.14, one point is assigned for each prior misdemeanor conviction. “For purposes of this subsection, misdemeanor is defined as any Class A1 and Class 1 nontraffic misdemeanor offense, impaired driving, impaired driving in a commercial vehicle, and misdemeanor death by vehicle, but not any other misdemeanor traffic offense under Chapter 20 of the General Statutes.” N.C.G.S. § 15A-1340.14(b) (5) (2003) (citations omitted). Thus, a prior conviction for driving while impaired is assigned one point for purposes of calculating a defendant’s prior record level. See State v. Hyden, 175 N.C. App. 576, 579, 625 S.E.2d 125, 127 (2006). “In determining the prior record level, convictions used to establish a person’s status as an habitual felon shall not be used.” N.C.G.S. § 14-7.6 (2003).

A defendant who claims his prior record level was incorrectly determined must show the trial court erred in assigning points and that the erroneous assignment affected the determination of his prior record level. An erroneous assignment of points that does not change the prior record level is harmless error. See State v. Massey, 195 N.C. App. 423, 428, 672 S.E.2d 696, 699 (2009); State

¹ A copy of this Court’s unpublished opinion in Travis is attached hereto.

v. Allah, 168 N.C. App. 190, 195, 607 S.E.2d 311, 315, disc. review denied, 359 N.C. 636, 618 S.E.2d 232 (2005).

In the present case, Petitioner's habitual felon indictment listed three prior felony convictions, including:

- (1) Felony Offense: Sale and Delivery of Cocaine
 Conviction Date: 11/04/1992 in Superior Court of Sampson County in the State of North Carolina
 Date of occurrence of offense: 04/30/1992.
 State against whom this offense was committed: North Carolina

(See habitual felon indictment attached to petition) Petitioner's prior record level worksheet listed nine prior convictions, including:

Offense	File No.	Date of conviction	County	Class
assault on a child under 12	87CR6250	12-17-87	Sampson	A1
DWI	95CR7689	1-11-96	Sampson	1
sell or del[iver] cocaine	92CR5622	11-4-92	Sampson	H
(m) B+E [breaking and entering]	86CR7185	10-10-86	Sampson	1

(See prior record level worksheet attached to petition)²

Petitioner contends the trial court erred by assigning a point to his prior conviction for DWI. He says that such a conviction cannot be used for points at all. (See petition p. 3) But section

² Petitioner has attached parts of two proposed worksheets to the petition. The record from Petitioner's prior appeal indicates that only the worksheet containing nine prior convictions was used in calculating his prior record level. (R pp. 69-72)

15A-1340.14(b) (5) defines impaired driving as a misdemeanor which shall be assigned one point. There is therefore no merit to the argument that the DWI conviction should not have been counted.

Petitioner also contends the trial court erred in assigning a point to both his prior convictions for assault on a child under twelve, dated 17 December 1987, and misdemeanor breaking and entering, dated 10 October 1986. He asserts that only one prior conviction from before he turned eighteen should have been counted. (See petition p. 3) Although General Statute section 14-7.1 allows only one such conviction to be used in determining habitual felon status, there is no comparable provision prohibiting the use of such convictions when calculating a defendant's prior record level. There is therefore no merit to the argument that the trial court erred in counting both of these convictions.

Finally, Petitioner argues the trial court erred in assigning points to his prior conviction for sale or delivery of cocaine, dated 4 November 1992, because the same conviction was also used in establishing his status as an habitual felon. (See petition p. 4) Even assuming the trial court erred in assigning points to this conviction, the assignment was at most harmless error. Subtracting the two points that were assigned to the conviction would leave Petitioner with 10 prior record level points. Petitioner would still qualify as a Prior Record Level IV offender. See N.C.G.S. § 15A-1340.14(c) (4) (2003) ("Level IV - At least 9, but not more than 14 points."). There is therefore no merit to the argument that the assignment affected the determination of his prior record level.

Petitioner also argues he received ineffective assistance of counsel ("IAC") when appellate counsel failed to raise the issue of prior record level on appeal. (See petition pp. 5-6) As explained above, however, the trial court did not err in determining Petitioner was a prior record level IV. As the trial court did not err in determining his prior record level, Petitioner cannot show counsel was ineffective for not raising the issue. See State v. Manley, 345 N.C. 484, 487, 480 S.E.2d 659, 661 (1997) (where trial court did not err, counsel was not ineffective for not objecting). There is therefore no merit to Petitioner's IAC claims.

WHEREFORE, the State respectfully requests that this Court deny Petitioner's petition for writ of certiorari.

Electronically submitted this 7th day of August, 2012.

ROY COOPER
Attorney General

Electronically Submitted,
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Assistant Attorney General

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the foregoing **STATE'S RESPONSE TO PETITION FOR WRIT OF CERTIORARI** upon Petitioner by placing same in the United States Mail, first class postage prepaid, addressed as follows:

Richard Marlo Melvin (#0279002)
Wayne Correctional Center
Caller Box 8011
Goldsboro, North Carolina 27533-8011

This the 7th day of August, 2012.

Electronically Submitted
Joseph L. Hyde
Assistant Attorney General

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.

NO. COA04-679

NORTH CAROLINA COURT OF APPEALS

Filed: 4 January 2005

STATE OF NORTH CAROLINA

v.

DONALD LEE TRAVIS

Surry County
No. 03-CRS-51607-09
03-CRS-51611
03-CRS-4392

Appeal by defendant from judgment entered 5 February 2004 by Judge A. Moses Massey in Surry County Superior Court. Heard in the Court of Appeals 28 December 2004.

Attorney General Roy Cooper, by Assistant Attorney General Brian C. Wilks, for the State.

Don Willey, for defendant-appellant.

MARTIN, Chief Judge.

Defendant was found guilty of possession with intent to sell cocaine, sale or delivery of cocaine, and two counts of conspiracy to sell or deliver cocaine. After entry of the jury verdicts, he pled guilty to habitual felon status. On the prior record level worksheet the court determined that defendant had six prior record level points, thereby placing him within prior record level III. The court consolidated all of the offenses into one judgment and sentenced defendant to an active term within the presumptive range of a minimum of 116 months and a maximum of 149 months.

Defendant assigns as error the trial court's finding that he had a prior record level of III. He argues the court erred by allowing one of two convictions entered during the same week of court to be used to establish habitual felon status and by allowing the other conviction to be used in the calculation of prior record level points.

Defendant acknowledges that in *State v. Truesdale*, 123 N.C. App. 639, 642, 473 S.E.2d 670, 672 (1996), this Court held that when two convictions are entered during the same week of court, one of the convictions may be used to establish habitual felon status while the other conviction may be used to establish the defendant's prior record level points. Defendant argues *Truesdale* is inapplicable to the case at bar because the offenses in this case were committed prior to defendant's eighteenth birthday. He submits that N.C. Gen. Stat. § 14-7.1 prohibits the use of offenses committed prior to the time a defendant reaches the age of eighteen as constituting more than one felony. This statute provides, in pertinent part, that "[f]or the purposes of this Article, felonies committed before a person attains the age of 18 years shall not constitute more than one felony." N.C. Gen. Stat. § 14-7.1 (2003). By its own express words, the application of N.C. Gen. Stat. § 14-7.1 is limited to sentencing for habitual felon purposes only. We can find nothing in the Structured Sentencing Act which prohibits consideration of a conviction of an offense committed prior to the offender's eighteenth birthday. We conclude defendant's attempted distinction is not significant, and hold *Truesdale* is controlling.

Thus, we affirm the court's allocation of prior record level points to one of the two convictions.

We note that the judgment contains an evident clerical error. Judge Massey signed the prior record level worksheet finding that defendant had six prior record level points and that his prior record level is III. In open court Judge Massey found the same number of prior record level points and the same prior record level. However, the judgment in the record on appeal states that the number of prior record points is seventeen and that the prior record level is V. This finding in the judgment is not consistent with the sentence imposed by the court as the presumptive range of minimum sentences for a Class V is 121-151 months, a range clearly above the term imposed by the court. See N.C. Gen. Stat. § 15A-1340.17(c). We therefore remand for correction of this clerical error.

Remanded.

Judges McCULLOUGH and CALABRIA concur.

Report per Rule 30(e).