No. COA21-224 TWENTY-SIXTH DISTRICT

NORTH CAROLINA COURT OF APPEALS

\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*

STATE OF NORTH CAROLINA )

 )

 v. ) From Mecklenburg County

 )

MYLEICK SHAWN PATTERSON )

\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*

DEFENDANT-APPELLANT’S BRIEF

\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*

No. COA21-224 TWENTY-SIXTH DISTRICT

NORTH CAROLINA COURT OF APPEALS

\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*

STATE OF NORTH CAROLINA )

 )

 v. ) From Mecklenburg County

 )

MYLEICK SHAWN PATTERSON )

\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*

DEFENDANT-APPELLANT’S BRIEF

\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*

**ISSUE PRESENTED**

Whether the trial court erred in determining Mr. Patterson’s prior record level?

**STATEMENT OF THE CASE**

On 30 October 2017, the Mecklenburg County Jury indicted Mr. Patterson for financial card theft. (R p. 2) On 10 May 2018 a jury found Mr. Patterson guilty of financial card theft. (R p. 5) The trial court sentenced Mr. Patterson to eight to nineteen months imprisonment suspended for twenty-four months of supervised probation. (R pp. 12-13) Mr. Patterson appealed and on 4 February 2020, this Court issued its decision holding the trial court erred in finding an aggravating factor. (R pp. 14-26) On 13 March 2020, this Court issued its judgment vacating and remanding the matter for a sentencing hearing. (R p. 27)

 The matter came on for resentencing at the 9 November 2020 Criminal Session of Mecklenburg County Superior Court, the Honorable W. Robert Bell presiding. (T p. 1) The trial court sentenced Mr. Patterson to eight to nineteen months imprisonment suspended for twenty-four months of supervised probation. (R pp. 38-39) Mr. Patterson gave oral notice of appeal. (R p. 40)

**STATEMENT OF THE GROUNDS FOR APPELLATE REVIEW**

 Mr. Patterson appeals from the final judgment of Mecklenburg County Superior Court pursuant to N.C.G.S. §§ 7A-27 and 15A-1444.

**STATEMENT OF THE FACTS**

 At the sentencing hearing, the State presented a prior record level worksheet and copies of Mr. Patterson’s prior convictions. (T p. 11; R pp. 29-37) The worksheet stated Mr. Patterson had ten points which consisted of one Class G offense, two Class H/I offenses, and two Class 1 misdemeanor offenses. (R p. 29) The trial court found that Mr. Patterson was a prior record level IV with 10 prior record level points. (T p. 11) Mr. Patterson did not stipulate to his prior record level. (T p. 9) The trial court sentenced Mr. Patterson for a Class I felony and imposed an active sentence of eight to nineteen months imprisonment suspended for twenty-four months of supervised probation. (T p. 11; R p. 38)

**STANDARD OF REVIEW**

 The issue of whether the trial court erred in determining Mr. Patterson’s prior record level is a question of law subject to *de novo* review. *State v. Cannon*, 216 N.C. App. 507, 514, 721 S.E.2d 691, 696 (2011). Under *de novo* review, this Court considers the matter anew and freely substitutes its own judgment for that of the trial court. *State v. Williams*, 362 N.C. 628, 632-33. 669 S.E.2d 290. 294 (2008).

**ARGRUMENT**

**The trial court erred in determining Mr. Patterson’s prior record level.**

Mr. Patterson’s prior record level worksheet lists ten convictions and assigns a total of ten prior record level points. However, several convictions cannot be included when determining Mr. Patterson’s prior record level. The convictions listed on Mr. Patterson’s prior record level worksheet show he should have been sentenced as a level III offender with eight points instead of a level IV offender with ten points. This Court must remand for resentencing. This argument is preserved for appellate review despite trial counsel’s failure to object. N.C.G.S. § 15A-1446(d)(18); *State v. Cannon*, 216 N.C. App. 507, 514, 721 S.E.2d 691, 696 (2011).

**A. The prior record level worksheet shows only eight prior record level points could be assigned and Mr. Patterson should have been sentenced as a prior record level III.**

In the present case, the following convictions were listed on Mr. Patterson’s prior record level worksheet:

|  |  |  |  |
| --- | --- | --- | --- |
| **File Number** | **Conviction Date** | **Offense** | **Class** |
| 17 CR 9129 | 03/14/2018 | Possess Marijuana up to ½ oz | 3[[1]](#footnote-1) |
| 17 CR 211619 | 01/18/2018 | Possess Marijuana up to ½ oz | 3[[2]](#footnote-2) |
| 15 CRS 208239 | 05/22/2017 | Possess Handgun By Minor | 1[[3]](#footnote-3) |
| 13 CRS 250021 | 09/03/2015 | Sell Marijuana | H[[4]](#footnote-4) |
| 13 CRS 250024 | 09/03/2015 | PWISD Marijuana | I[[5]](#footnote-5) |
| 13 CRS 250033 | 09/03/2015 | Sell Marijuana | H |
| 13 CRS 250035 | 09/03/2015 | PWISD Marijuana | I |
| 14 CRS 238845 | 05/04/2015 | Misdemeanor Larceny | 1[[6]](#footnote-6) |
| 14 CR 216160 | 06/11/2014 | Shoplifting Concealment Goods | 3[[7]](#footnote-7) |
| Federal Offense | 01/16/2020 | Possession of Firearm by Felon | G[[8]](#footnote-8) |

(R pp. 29-30)

The State bears the burden of establishing “by a preponderance of the evidence, that a prior conviction exists and that the offender before the court is the same person as the offender named in the prior conviction.” N.C.G.S. § 15A-1340.14(f). The trial court determines the prior record level for a felony offender by calculating the sum of the points assigned to each of the defendant’s prior convictions. N.C.G.S. § 15A-1340.14(a). The number of points assigned to each Class of felony and misdemeanor offense is specified in N.C.G.S. § 15A-1340.14(b).

**1. Only two of the five prior misdemeanor convictions can be used to determine Mr. Patterson’s prior record level.**

For purposes of felony sentencing, only felonies and Class A1 or Class 1 nontraffic misdemeanor offenses may be counted when determining a defendant’s prior record level. N.C.G.S. § 15A-1340.14(b)(5).

In the present case, Mr. Patterson has five prior misdemeanor convictions. (R p. 30) Of those five, only two can be included in Mr. Patterson’s prior record level determination. The convictions for possession of marijuana up to ½ ounce and concealment of goods cannot be included in Mr. Patterson’s prior record level because they are Class 3 misdemeanors. N.C.G.S. § 15A-1340.14(b)(5); N.C.G.S. § 90-95(d)(4); N.C.G.S. § 14-72.1(e). However, the misdemeanor larceny conviction and possession of a handgun by a minor conviction are both Class 1 misdemeanors. N.C.G.S. § 14-269.7(a); N.C.G.S. § 14-72(a). Accordingly, they account for a total of two prior record level points. N.C.G.S. § 15A-1340.14(b)(5).

**2. Only two of the five prior felony convictions can be used to determine Mr. Patterson’s prior record level.**

“[I]f 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.” N.C.G.S. §15A-1340.14(d).

 The prior record level worksheet lists two Class H convictions for “Sell Marijuana” and two Class I convictions for PWISD Marijuana. (R p. 30) All four of these convictions occurred on the same day, 3 September 2015. (R pp. 30-34) Because these convictions occurred on the same day only one of them may be used in determining Mr. Patterson’s prior record level. N.C.G.S. § 15A-1340.14(d); *see State v. Fair*, 205 N.C. App. 315, 318-319, 695 S.E.2d 514, 516 (2010) (holding the trial court erred in determining defendant’s prior record level by including a Class H and Class I offense with the same conviction date). Accordingly, Mr. Patterson can only be assigned a total of two points for these marijuana convictions. N.C.G.S. § 15A-1340.14(b)(4).

Finally, the State listed Mr. Patterson’s previous federal conviction for possession of firearm by a felon. (R p. 30) The State presented the federal judgment to the court. (T p. 11; R p. 37) Accordingly, this offense may be included in the prior record level determination as a Class G felony. N.C.G.S. § 14-415.1; *see* *State v. Riley*, 253 N.C. App. 819, 824-27 802 S.E.2d 494, 498-500 (2017) (holding copy of federal judgment was sufficient to prove the federal offense possession of firearm by a felon was substantially similar to the state offense.). This offense accounts for four prior record level points. N.C.G.S. § 15A-1340.14(b)(3).

The convictions that can be properly included in Mr. Patterson’s prior record level are:

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| **File Number** | **Conviction Date** | **Offense** | **Class** | **Points Assigned** |
| 14 CRS 238845 | 05/04/2015 | Misdemeanor Larceny | 1 | 1 |
| 15 CRS 208239 | 05/22/2017 | Possess Handgun By Minor | 1 | 1 |
| 13 CRS 250021 | 09/03/2015 | Sell Marijuana | H | 2 |
| Federal Offense | 01/16/2020 | Possession of Firearm by Felon | G | 4 |

(R pp. 29-30).

These convictions account for a total of eight prior record level points. *See* N.C.G.S. § 15A-1340.14(b). Accordingly, Mr. Patterson’s prior record level is a III. N.C.G.S. § 15A-1340.14(c).

**B. Mr. Patterson was prejudiced by the trial court’s erroneous prior record level determination.**

Mr. Patterson was prejudiced by the trial court’s erroneous calculation of his prior record level. If the trial court had correctly calculated Mr. Patterson’s eight prior record level points, he would have been sentenced as a level III, rather than a level IV offender. *See State v. Snelling*, 231 N.C. App. 676, 680, 752 S.E.2d 739, 743 (2014) (“A sentencing error that improperly increases a defendant’s PRL is prejudicial.”) (citation omitted). As a level III offender, Mr. Patterson could have only received a presumptive sentence of six to seventeen months imprisonment for a Class I felony. *See* N.C.G.S. § 15A-1340.17(c). This Court should remand for resentencing as a prior record level III. *See Fair*, 205 N.C. App. at 319, 695 S.E.2d at 516.

**CONCLUSION**

 For the foregoing reasons, Mr. Patterson respectfully requests this Court remand for resentencing as a prior record level III.

 Respectfully submitted, this the 12th day of May, 2021.

By Electronic Submission:

 Candace Washington

 Assistant Appellate Defender

 NC Bar #52447

Candace.M.Washington@nccourts.org

Glenn Gerding

Appellate Defender

NC Bar #23124

Office of the Appellate Defender

 123 W. Main Street, Suite 500

 Durham, North Carolina 27701

 (919) 354-7210

*Attorneys for Defendant-Appellant*

**CERTIFICATE OF COMPLIANCE WITH RULE 28(J)**

Undersigned counsel hereby certifies that this brief complies with North Carolina Rule of Appellate Procedure 28(j), in that it is printed in 13-point Century Schoolbook font and contains no more than 8,750 words in the body of the brief, footnotes and citations included, as indicated by the word-processing program used to prepare this brief.

 This the 12th day of May 2021.

 By Electronic Submission:

 Candace Washington

 Assistant Appellate Defender

**CERTIFICATE OF SERVICE**

 I hereby certify that a copy of Defendant-Appellant’s Brief has been duly served by sending it electronically to Ms. Kerry Boehm, Assistant Attorney General at kboehm@ncdoj.gov.

 This the 12th day of May 2021.

 By Electronic Submission:

Candace Washington

Assistant Appellate Defender

1. N.C.G.S. § 90-95(d)(4). [↑](#footnote-ref-1)
2. *Id.* [↑](#footnote-ref-2)
3. N.C.G.S. § 14-269.7(a). [↑](#footnote-ref-3)
4. N.C.G.S. § 90-95(b)(1). [↑](#footnote-ref-4)
5. *Id.* [↑](#footnote-ref-5)
6. N.C.G.S. § 14-72(a). [↑](#footnote-ref-6)
7. N.C.G.S. § 14-72.1(e). [↑](#footnote-ref-7)
8. N.C.G.S. § 14-415.1. [↑](#footnote-ref-8)