Prior Convictions for Possession of Drug Paraphernalia

Author : Jamie Markham

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A recent case from the court of appeals answers a question we've been wondering about for four years: How should a person's prior conviction for possession of drug paraphernalia (PDP) count toward his or her prior record level after the General Assembly created a new offenses of possession of marijuana paraphernalia?

I wrote about this general issue back in 2014 (here), when G.S. 90-113.22A first came into effect. Under that law, effective December 1, 2014, possession of drug paraphernalia related to marijuana was created as a Class 3 misdemeanor. The existing PDP offense, G.S. 90-113.22(a), remained a Class 1 misdemeanor, but was amended to say that it applied to possession of paraphernalia related to controlled substances other than marijuana.

In State v. McNeil, the defendant was convicted in 2017 for a felony committed in 2016. He had a prior PDP conviction from 2012—back when the only version of the offense was the Class 1 misdemeanor. It was treated as a Class 1 misdemeanor, counting for 1 point. That point gave him 14 total points, making him Prior Record Level V.

4	LARCENY	10CR202416	03/04/2010	WAKE	1
4	LARCENY	10CR202417	03/04/2010	WAKE	1
4	ASSAULT ON A FEMALE	10CR218894	12/23/2010	WAKE	A1
4	POSSESS DRUG PARAPHERNALIA	12CR204006	03/13/2012	WAKE	1
4	OBTAIN PROPERTY BY FALSE PRETENSE	12CRS209938	10/15/2012	WAKE	H
4	RESIST PUBLIC OFFICER	14CR223270	11/06/2014	WAKE	m
4	LARCENY	16CR212731	12/19/2016	WAKE	1

On appeal, the defendant argued that his 2012 PDP conviction ought to have been treated as a Class 3 misdemeanor. Under G.S. 15A-1340.14(c), the classification of a prior offense is the classification assigned to it as of the offense date of the crime now being sentenced. Because McNeil's present offense was committed in February 2016, he maintained that his prior PDP should be updated to a Class 3 misdemeanor in the absence of any proof by the State that it did not involve marijuana.

The court of appeals agreed. There was no proof in the record indicating whether the PDP conviction involved marijuana or some other drug, and the defendant didn't stipulate one way or the other. With that in mind, the unanimous panel concluded that "the State failed to prove whether that charge was related to marijuana or another drug," slip op. at 5, and therefore the trial court erred by treating it as a Class 1 misdemeanor. The court remanded the case to the trial court for the defendant to be resentenced at Prior Record Level IV.

McNeil will likely lead to resentencing for many felony defendants sentenced for offenses committed on or after December 1, 2014, who had PDP convictions from before that date on their record. The case doesn't have any impact on defendants presently sentenced for misdemeanors, since all convictions count the same for misdemeanor prior conviction level purposes.

Going forward, if the State wants a pre–12/1/2014 PDP conviction to count for a felony sentencing point, it will

apparently need to present information to the court sufficient for the judge to find that the crime was not related to marijuana. It seems to me that will sometimes be a difficult negative to prove given the records readily available for a low-level crime of that vintage. Even if records were available, the paraphernalia in question might not always be tied to a specific drug, or at least any single drug.

It also appears to be permissible to resolve the issue by stipulation of the defendant. That's essentially what happened in *State v. Arrington*, a case recently decided by the Supreme Court of North Carolina on how prior second-degree murders should count for points in light of the 2012 bifurcation of that offense into Class B1 and Class B2 varieties. I'll write more about *Arrington* in a future post.