NO. COA11-1366 **TWENTY-FOURTH DISTRICT**

NORTH CAROLINA COURT OF APPEALS

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STATE OF NORTH CAROLINA	**)**	
	)	
v.	**)**	**WATAUGA COUNTY**
	)	**No. 08 CRS 052295**
CHAD ETHMOND BRASWELL	**)**	

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MOTION FOR STAY AND MOTION FOR RECONSIDERATION

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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 Carrie D. Randa, Assistant Attorney General, moving pursuant to N.C. R. App. P. 2 for this Court to reconsider its opinion filed 19 June 2012. In support of this motion, the State shows the following:

On 10 February 2011 defendant pled guilty to one count of Driving While Impaired in Watauga County District Court pursuant to a plea arrangement wherein one count of Leaving the Scene of an Accident or Collision was dismissed. (R p 20). Defendant appealed for a trial in Superior Court *de novo*. On 13 July 2011 defendant was convicted of one count each of Driving While Impaired and Leaving the Scene of an Accident or Collision in Watauga County Superior Court. (R pp 35-36). On 13 July 2011, defendant gave oral notice of appeal from his convictions and on 22 July 2011

defendant filed a written notice of appeal for the same. (R pp 43-46). The appeal was subsequently perfected. Although no issue was raised by the parties concerning the sufficiency of the charge of Leaving the Scene of an Accident or Collision, this Court in its opinion filed on 19 June 2012 vacated defendant's conviction after concluding the State did not properly re-indict defendant on that specific charge.

Because the parties did not address the validity of this issue as it was not raised on appeal, it would be appropriate for this Court to reconsider its decision with the benefit of argument by the parties. As this is a published opinion, it will have broad effects on criminal practice in both the district and superior courts. Upon reconsidering its opinion, this Court should withdraw its current opinion.

I. NORTH CAROLINA GENERAL STATUTES 7A-271(b) AND 15A-1431(b) GRANT THE SUPERIOR COURT JURISDICTION OVER ALL MISDEMEANORS ON APPEAL FROM DISTRICT COURT AS THEY SUBSISTED IMMEDIATELY PRIOR TO ENTRY OF A PLEA ARRANGEMENT FOR A TRIAL *DE NOVO*.

In its opinion, this Court held that, because the State failed to indict defendant on the charge of leaving the scene of an accident after previously dismissing the same charge pursuant to a plea arrangement in district court, the State was precluded from proceeding with this charge in superior court. This Court further vacated judgment as to that charge following defendant's conviction. The State respectfully contends that this Court erred in vacating the judgment.

The North Carolina General Statutes specifically provide that in criminal cases that are appealed from district to superior court, the superior court has jurisdiction. N.C.G.S. § 7A-271(b) (2012) and N.C.G.S. § 15A-1431(b) (2012). North Carolina General Statute 7A-271(b) expressly states that:

> when that conviction resulted from a *plea arrangement between the defendant and the State pursuant to which misdemeanor charges were dismissed, reduced, or modified*, [the superior court is required] to try those charges in the form and to the extent that they subsisted in the district court immediately prior to entry of the defendant and the State of the plea arrangement.

Id. North Carolina General Statute 15A-1431(b) mimics this language and indicates that:

> upon docketing in the superior court of an appeal from a judgment imposed *pursuant to a plea arrangement between the State and the defendant, the jurisdiction of the superior court over any misdemeanor dismissed, reduced, or modified pursuant to that plea arrangement* shall be the same as was had by the district court prior to the plea arrangement.

N.C.G.S. § 15A-1431(b) (2012) (emphasis added). The general rule is that charges originating in district court may not be enhanced or changed upon appeal, however; these statutes denote express exceptions to the general rule when the appeal is the result of a plea arrangement. *Id. See also, State v. Monroe,* 57 N.C. App. 597, 292 S.E.2d. 21 (1981). Originally dismissed or reduced charges that are appealed from district court return in their original form to be tried *de novo* in superior court. *Id.* at 599, 292 S.E.2d. 21, 22.

In *Monroe*, the defendant argued that the prosecutor was without authority to proceed on the charge of driving while license permanently revoked when the defendant had pled guilty to reduced charge of simply driving while revoked in district court. 57 N.C. App. 597, 292 S.E.2d 21 (1981). The defendant argued that the charge in superior court had been changed or enhanced, however; this Court ruled that pursuant to the statute, the charge was properly tried in superior court as it existed prior to the plea arrangement. *Id.*

In the current case, defendant pled guilty to one count of driving while impaired in district court as part of a plea arrangement wherein the district attorney dismissed the charge of leaving the scene of an accident. (R p 20). Upon entry of notice of appeal to superior court, the prosecutor proceeded on both charges as originally charged in district court prior to the negotiated plea. North Carolina General Statutes 7A-271 (b) and 15A-1431(b) authorizes this practice by conferring jurisdiction to the superior court over charges as they existed prior to entry of the plea. N.C.G.S. §§ 7A-271(b) and 15A-1431(b) (2012). The charges as they existed before the plea included the charge of leaving the scene of the accident, thus the superior court obtained jurisdiction over that charge for trial. Defendant was properly convicted of the charge of leaving the scene of an accident and driving while impaired, as evidence was presented of both, and this

Court erred in vacating judgment on that charge.

Because this is a published opinion, and contrary to statutory authority, there is further concern that this case will have broad effect on practice in district and superior courts. The Constitution of North Carolina establishes jurisdiction with the Superior Court and also gives the General Assembly the power to place limitations on it pursuant to statute. N.C. Const. Art. IV, § 12(3). Specifically the Constitution states "Except as otherwise provided by the General Assembly the Superior Court shall have original jurisdiction throughout the State." *Id.* The Constitution makes it clear that the General Assembly has the power to prescribe jurisdiction through statute as it has in the statutes above.

If this Court's holding stands, it will cause trial judges and lawyers to think that the State is required to indict misdemeanors in Superior Court after appeal from plea arrangements by defendants. This new requirement is not correct, will give defendants unnecessary and unfair benefit from plea arrangements and does not appear to be the legislative intent of the statutes.

II. THIS HOLDING IN *FOX* INVOLVED FELONIES ORIGINATING IN DISTRICT COURT AND ARE THUS GOVERNED UNDER SEPARATE STATUTORY RULES AND ARE DISTINGUISHABLE FROM THE CURRENT CASE.

This Court utilized in its holding, *State v. Fox*, 34 N.C. App. 576, 239 S.E.2d 471 (1977), a case involving an appeal from district court to superior court from a plea arrangement involving

felonies. In *Fox*, the defendant pled guilty in district court, pursuant to a plea arrangement, to misdemeanors in exchange for dismissals of pending felonies. The defendant then gave notice of appeal for a trial *de novo* in superior court. The superior court judge found that by accepting a plea arrangement in district court, the defendant waived his right to appeal for a trial *de novo*, dismiss the appeal and remanded the case back to district court for entry of judgment on the misdemeanors. *Id.*

This Court noted that when an appeal of right is taken to superior court, it is as if the case had no previous trial and any previous judgments are annulled. *Id.* At 578-579. This court also noted that where a defendant elects not to stand by his plea arrangement, the State is not bound by the previous agreement, and can proceed on the original felonies in superior court. *Id.* This process is imperative, as anything other would allow defendants to avoid prosecution of serious charges by pleading to reduced charges and then appealing only to be tried *de novo* on those same reduced charges.

This case is clearly distinguishable from the current case, as the current case involved misdemeanors, not a plea arrangement wherein felonies were reduced to misdemeanors. This Court indicated that the original felonies would have been available for prosecution in the *Fox* case following the appeal. 34 N.C. App. 576, 239 S.E.2d 471 (1977). For the superior court to retain

jurisdiction over felonies, those charges must be indicted or proceeded on in bills of information. N.C.G.S. §§ 15A-641 and 15A-642 (2012). The North Carolina General Statutes do not require the same for misdemeanors originating in district court and proceeding to superior court on appeal. N.C.G.S. § 7A-271(b) (2012) and N.C.G.S. § 15A-1431(b) (2012). The current case involved misdemeanors alone, and thus jurisdiction in superior court would follow from N.C.G.S. § 7A-271(b) (2012) and N.C.G.S. § 15A-1431(b) (2012).

This Court also cited *Field v. Sheriff of Wake County,* 831 F. 2d 530 (4th Cir. 1987), as authority under which appeals from district court must be indicted, however; a reading of the case indicates the issue on appeal was whether sentencing under North Carolina General Statute 20-179 for driving while impaired offenses was constitutional. This case is also clearly distinguishable from the current case as this issue does not involve sentencing.

III. THE RIGHTS OFFERED TO A DEFENDANT REGARDING CHEMICAL ANALYSIS ARE STATUTORY.

Additionally, on page three of the Court's opinion, the facts indicate that defendant was informed of his Constitutional rights to a blood test. The rights offered to the defendant in terms of chemical analysis are conferred by statute. N.C.G.S. § 20-16.2 (2012). This appears to be a clerical error, however; this error may appear misleading. The State would respectfully request that it be changed to reflect its statutory nature.

In this case, the State properly tried defendant in superior court on both the charge of driving while impaired and the charge of leaving the scene of an accident pursuant to statute. Defendant was convicted of both charges based on adequate and appropriate evidence and both convictions should stand. This Court should reconsider that portion of its opinion and withdraw its opinion on the procedural issue.

WHEREFORE, the State respectfully requests that this Court reconsider part of its opinion filed in this case on 19 June 2012.

Electronically submitted this the 25th day of June, 2012.

ROY COOPER
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CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the foregoing **MOTION FOR RECONSIDERATION** upon defendant by placing same in the United States Mail, first class postage prepaid, addressed as follows:

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This the 25th day of June, 2012.

Electronic Submission
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Assistant Attorney General