No. COA15-708 17B JUDICIAL DISTRICT

NORTH CAROLINA COURT OF APPEALS

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STATE OF NORTH CAROLINA	)	
	)	
v.	)	From Surry
	)	
JUAN FITZGERALD ALLEN	)	

****

DEFENDANT-APPELLANT'S
MOTION TO STAY ISSUANCE OF THE MANDATE AND
WITHDRAW PUBLISHED SLIP OPINION

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MOTION TO STAY ISSUANCE OF THE MANDATE AND
WITHDRAW PUBLISHED SLIP OPINION

****

TO THE HONORABLE NORTH CAROLINA COURT OF APPEALS:

NOW COMES defendant-appellant, Juan Fitzgerald Allen, through undersigned counsel, and respectfully moves this Court, pursuant to Rule 2 of the Rules of Appellate Procedure, to stay issuance of its mandate and withdraw the published slip opinion filed on 19 April 2016, because the opinion evidences a factual misapprehension and conflicts with precedent established by this Court. As grounds for this motion, Mr. Allen shows the following:

1. On 27 July 2013, Mr. Allen was arrested and purportedly charged via citation with, *inter alia*, one count of transporting an open container of spirituous liquor in the passenger area of a motor vehicle in violation of N.C.G.S. § 18B-401(a). (R p 4) Following a bench trial in District Court, the

case was tried *de novo* on the same citation during the 21 January 2015 Criminal Session of Surry County Superior Court, the Honorable R. Stuart Albright presiding. (T p 1)

2. The jury convicted Mr. Allen of transporting spirituous liquor, in addition to other charges, and Judge Albright sentenced Mr. Allen to 20 days jail time for that offense. (R p 36) Mr. Allen entered timely written notice of appeal. (R p 38)

3. On appeal, Mr. Allen raised one issue, namely, that the trial court lacked jurisdiction to try him for the offense of transporting spirituous liquor when the citation upon which he was tried failed to allege an essential element of that offense. (Def. Br. pp 3-5)

4. In overruling Mr. Allen's argument, this Court did not address whether the citation at issue omitted an essential element of the offense it purported to charge. Rather, the Court held that a citation, unlike an indictment or other criminal pleading, is not subject to the jurisdictional requirement that it allege every element of the offense sought to be charged. Specifically, the Court stated that "defendant fails to direct our attention to any opinion from this Court or other authority equating the requirements for a valid citation with those of a valid indictment, and we find none." *Allen*, slip op. at 5.

5. However, Mr. Allen did direct the Court's attention to such authority, specifically *State v. Wells*, 59 N.C. App. 682, 684–85, 298 S.E.2d 73, 75 (1982), cited on pages 4 and 5 of Mr. Allen's brief. In *Wells*, this Court arrested judgment on the defendant's conviction in Superior Court for resisting arrest when the citation upon which he was tried failed to allege an essential element of that offense. Even though the "defendant made no motion in the trial court to arrest judgment on this charge, this Court *ex mero motu* [took] notice of the *fatally defective citation* and [ordered the] judgment on this charge be arrested." *Id.* (emphasis added). Mr. Allen cited *Wells* for the proposition that "the citation [in his case] failed to allege all of the essential elements of the offense charged and was fatally defective." (Def. Br. p 5)

6. This Court has long held that a citation, when it is the criminal pleading upon which a defendant is tried, must, like an indictment, properly allege a criminal offense. *See State v. Wallace*, 49 N.C. App. 475, 485, 271 S.E.2d 760, 766 (1980) (holding citation fatally defective and citing indictment cases for the proposition that citations, like warrants, must "make clear and definite the offense charged[.]"); *State v. Johnson*, 42 N.C. App. 234, 236–37, 256 S.E.2d 297, 298–99 (1979) ("Because the citation fails to charge a crime, the judgment of the Superior Court must be and is hereby arrested."). Indeed, this Court regularly vacates judgments entered upon citations that fail to allege

every element of the offense sought to be charged, occasionally with the State's consent. *E.g.*, *State v. Barr*, 234 N.C. App. 478, 762 S.E.2d 532 (2014) (unpublished); *State v. Gorham*, 227 N.C. App. 650, 745 S.E.2d 374 (2013) (unpublished); *State v. Kelly*, 218 N.C. App. 457, 721 S.E.2d 762 (2012) (unpublished); *State v. Coleman*, 188 N.C. App. 633, 656 S.E.2d 16 (2008) (unpublished). *See also State v. Lewis*, 230 N.C. App. 145, 752 S.E.2d 258 (2013) (unpublished) (acknowledging that "the initial citation charging [defendant] with misdemeanor larceny was fatally defective" but concluding that the State's amendment to the citation cured the defect and thus "the trial court had jurisdiction to hear [the] case."). (App pp 9-25)

7. *Wells*, *Wallace*, and *Johnson* are binding on this Court. *In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1979). Moreover, all of the above-cited authority is consonant with our General Statutes' directive that a citation may serve as a criminal pleading, N.C.G.S. § 15A-921, and therefore must "assert[] facts supporting every element of a criminal offense[.]" N.C.G.S. § 15A-924(a)(5). Mr. Allen cited this statutory authority in support of his argument. (Def. Br. p 4)

8. To the extent the Court's opinion was also premised on *State v. Phillips*, 149 N.C. App. 310, 318, 560 S.E.2d 852, 857 (2002), and *State v. Monroe*, 57 N.C. App. 597, 599, 292 S.E.2d 21, 22 (1982), those cases are

inapposite. *Allen*, slip op. at 4. *Monroe* and *Phillips* merely identify the statutory right of a defendant to object to trial on citation, and note that a defendant waives that right in the absence of an objection. *Monroe* and *Phillips* do not address the jurisdictional issues raised by the above authority and this case, and in fact presuppose the existence of a jurisdictionally-valid citation. *See Phillips*, 149 N.C. App. at 318, 560 S.E.2d at 857 ("Thus, in *Monroe*, we held that '*once jurisdiction had been established* and defendant had been tried in district court [. . .] he was no longer in a position to assert his statutory right to object to trial on citation when he appealed to superior court.'") (emphasis added).

9. The published slip opinion in this case conflicts with binding precedent and statutory provisions, thereby creating a split of authority, and additionally conflicts with the weight of persuasive authority. Therefore, Mr. Allen respectfully asks the Court to stay its mandate and withdraw the slip opinion.

WHEREFORE, for the above reasons, Mr. Allen respectfully requests that this Court stay issuance of its mandate and withdraw the published slip opinion filed by the Court on 19 April 2016.

Respectfully submitted this the 20th day of April, 2016.

(Electronically Submitted)
James R. Grant
Assistant Appellate Defender
North Carolina State Bar #44410

Glenn Gerding
Appellate Defender
North Carolina State Bar #23124

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ATTORNEYS FOR
DEFENDANT-APPELLANT

CERTIFICATE OF FILING AND SERVICE

I hereby certify that the original Motion has been duly filed, pursuant to Rule 26, by electronic means with the Clerk of the North Carolina Court of Appeals.

I further certify that a copy of the foregoing Motion has been served upon Ms. Tamika L. Henderson, North Carolina Department of Justice, PO Box 629, Raleigh, North Carolina 27602, by deposit in the United States mail, first class and postage prepaid.

This the 20th day of April, 2016.

(Electronically Submitted)
James R. Grant
Assistant Appellate Defender

No. COA15-708 17B JUDICIAL DISTRICT

NORTH CAROLINA COURT OF APPEALS

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STATE OF NORTH CAROLINA	)	
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JUAN FITZGERALD ALLEN	)	

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APPENDIX

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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA15-708

Filed: 19 April 2016

Surry County, Nos. 13 CRS 651–52, 13 CRS 52914

STATE OF NORTH CAROLINA

v.

JUAN FITZGERALD ALLEN

Appeal by defendant from judgments entered 23 January 2015 by Judge R. Stuart Albright in Surry County Superior Court. Heard in the Court of Appeals 17 November 2015.

Attorney General Roy Cooper, by Assistant Attorney General Tamika L. Henderson, for the State.

Appellate Defender Staples Hughes, by James R. Grant, for defendant-appellant.

BRYANT, Judge.

Where defendant was tried without objection and convicted on a misdemeanor citation in district court, appealed the conviction for a trial *de novo* in superior court and was convicted by jury on the same misdemeanor citation, again without objection to the citation, defendant's challenge to the jurisdiction of the trial court is without merit.

On 27 July 2013, defendant Juan Fitzgerald Allen was issued North Carolina Uniform Citations charging him with willfully operating a motor vehicle on a street or highway/public vehicular area (1) while subject to an impairing substance, (2)

while his drivers' license was revoked, (3) while displaying an expired registration plate knowing the same to be expired, (4) without having a current electronic inspection, such vehicle requiring such an inspection, and (5) for transporting an open container of fortified wine or spirituous liquor. Defendant submitted to a chemical analysis of his breath approximately one hour after his arrest and registered a 0.23 blood alcohol level. The record indicates that a bench trial was held in Surry County District Court followed by a trial *de novo* commenced on 21 January 2015, during the criminal session in Surry County Superior Court, the Honorable Stuart Albright, Judge presiding.

During a pre-trial conference in superior court, the State made an unchallenged oral motion before the trial court to join for trial the charges of transporting fortified wine or spirituous liquor without being in an unopened original container, driving while impaired, and driving while license revoked. The State took a voluntary dismissal on charges of driving with an expired registration and no vehicle inspection. The matter proceeded to trial before a jury.

Following the presentation of all evidence and the trial court's instruction to the jury, the jury returned guilty verdicts against defendant for impaired driving, driving a motor vehicle on a highway while his driver's license was revoked, and transporting within the passenger area of a motor vehicle spirituous liquor in other than the manufacturer's unopened original container. The jury further found as an

aggravating factor that "[a]t the time of the offense, . . . defendant's license was revoked because of impaired driving." Based on the jury's finding of the aggravating factor, the trial court arrested judgment on the offense of driving a motor vehicle on a highway while his driver's license was revoked. In accordance with the remaining jury verdicts, the trial court entered judgment against defendant for the offense of impaired driving and sentenced him to an active term of two years. Judgment was entered against defendant for transporting an open container of spirituous liquor, for which he was sentenced to an active term of twenty days, to be served concurrent with his DWI sentence. Defendant entered written notice of appeal.

On appeal, defendant argues the trial court lacked jurisdiction to try him for transporting an open container of spirituous liquor, a misdemeanor, when the charging citation failed to allege an essential element of that offense. Specifically, defendant contends that the charging citation was fatally defective as it failed to allege that the open container was transported in the passenger area of defendant's vehicle. We disagree.

"There can be no trial, conviction, or punishment for a crime without a formal and sufficient accusation. In the absence of an accusation the court acquires no jurisdiction whatever, and if it assumes jurisdiction a trial and conviction are a nullity." *McClure v. State*, 267 N.C. 212, 215, 148 S.E.2d 15, 17–18 (1966) (citations

and quotation marks omitted). "[A] citation . . . serves as the pleading of the State for a misdemeanor prosecuted in the district court, unless the prosecutor files a statement of charges, or there is objection to trial on a citation." N.C. Gen. Stat. § 15A-922(a) (2015). "A citation is a directive, issued by a law enforcement officer or other person authorized by statute, that a person appear in court and answer a misdemeanor or infraction charge or charges." *Id.* § 15A-302(a) (2015). "The citation must: (1) [i]dentify the crime charged, including the date, and where material, identify the property and other persons involved[.]" *Id.* § 15A-302(c).

Initially, we note that a defendant may object to a trial on a citation; "[a] defendant charged in a citation with a criminal offense may by appropriate motion require that the offense be charged in a new pleading." *Id.* § 15A-922(c). However, this Court has held that a defendant may not challenge the derivative jurisdiction of the superior court to try a misdemeanor offense on a citation, where that challenge was not raised before the district court. *See State v. Phillips*, 149 N.C. App. 310, 318, 560 S.E.2d 852, 857 (2002) ("[A] defendant's objection to trial by citation must be asserted in the court of original jurisdiction, in this case, the district court. *See State v. Monroe*, 57 N.C. App. 597, 599, 292 S.E.2d 21, 22 (1982) . . . . Thus, . . . '[o]nce jurisdiction had been established and [the] defendant had been tried in district court, . . . he was no longer in a position to assert his statutory right to object to trial on citation when he appealed to superior court.' *Id.*").

Defendant appeals from the conviction by jury of a misdemeanor allowed by his *de novo* appeal to superior court. "[T]he superior court has jurisdiction to try a misdemeanor . . . [w]hen a misdemeanor conviction is appealed to the superior court for trial de novo . . . ." N.C. Gen. Stat. § 7A-271(a)(5) (2015). The record does not indicate that defendant—tried and convicted in district court before his appeal to superior court for a trial *de novo*—challenged the charges in the citation during proceedings in the district court, or the superior court. Now before this Court, defendant raises this challenge to the jurisdiction of the trial courts for the first time. We acknowledge defendant is allowed to challenge jurisdiction for the first time on appeal. *See* N.C. R. App. P. 10(a)(1) (2015) ("[W]hether the court had jurisdiction over the subject matter, and whether a criminal charge is sufficient in law, may be made the basis of an issue presented on appeal."). However, the ability to raise a jurisdictional challenge at any time does not ensure that the jurisdictional challenge has merit.

Defendant argues that "[a] citation, like a warrant or an indictment, may serve as a pleading in a criminal case and must therefore allege lucidly and accurately all the essential elements of the [crime] . . . charged." However, defendant fails to direct our attention to any opinion from this Court or other authority equating the requirements for a valid citation with those of a valid indictment, and we find none. *Compare id.* § 15A-302(c) ("The citation must: (1) Identify the crime charged,

including the date, and where material, identify the property and other persons involved[.]"), *with id.* § 15A-644(a)(3) ("An indictment must contain: . . . (3) Criminal charges pleaded as provided in Article 49 of [Chapter 15A], Pleadings and Joinder[.]"); *see also State v. Hunt*, 357 N.C. 257, 267, 582 S.E.2d 593, 600 (2003) ("An indictment, as referred to in [N.C. Const. art. I, § 22] . . . , is a written accusation of a crime drawn up by the public prosecuting attorney and submitted to the grand jury, and by them found and presented on oath or affirmation as a true bill. To be sufficient under our Constitution, an indictment must allege lucidly and accurately all the essential elements of the offense endeavored to be charged." (citation and quotation marks omitted)); *State v. Jones*, 157 N.C. App. 472, 477, 579 S.E.2d 408, 411 (2003) ("[A] citation is not an indictment[.]").

On 27 July 2013, defendant was issued a Uniform Citation by a law enforcement officer with the Mt. Airy Police Department: "Defendant did unlawfully and willfully operate a (motor) vehicle on a (street or highway) (public vehicular area) transport open container of fortified wine/spirituous liquor unopened original container G.S. 18B-401(a)." Section 401 of General Statutes Chapter 18B ("Regulation of Alcoholic Beverages") states that "[i]t shall be unlawful for a person to transport fortified wine or spirituous liquor in the passenger area of a motor vehicle in other than the manufacturer's unopened original container. . . . Violation of this

subsection shall constitute a Class 3 misdemeanor." N.C. Gen. Stat. § 18B-401(a) (2015).

Defendant argues that the citation failed to state that he transported the fortified wine or spirituous liquor "in the passenger area" of his motor vehicle and as such, is fatally defective to confer jurisdiction. Defendant contends that the citation failed to include an essential element of the crime charged and that a citation, which may be issued by a law enforcement officer, *see* N.C.G.S. § 15A-302(b) ("An officer may issue a citation to any person who he has probable cause to believe has committed a misdemeanor or infraction."), is to be held to the same standard as an indictment issued by a grand jury, *see* N.C. Gen. Stat. § 15A-641(a) (2015) ("Any indictment is a written accusation by a grand jury, filed with a superior court, charging a person with the commission of one or more criminal offenses."). Defendant's contention does not comport with the statutory law of North Carolina, where the standard for issuance of an indictment is not precisely the same as a citation.

Nevertheless, in pertinent part, General Statutes, section 15A-302 states that a citation must "[i]dentify the crime charged." N.C.G.S. § 15A-302(c). As noted above, the citation issued to defendant on 27 July 2013 sufficiently identified the crime charged—transporting an open container of fortified wine or spirituous liquor while operating a motor vehicle—and put defendant on notice of the charge. Defendant was

tried on the citation at issue without objection in the district court, and by a jury in the superior court on a trial *de novo*. Thus, once jurisdiction was established and defendant was tried in the district court, "he was no longer in a position to assert his statutory right to object to trial on citation . . . ." *Monroe*, 57 N.C. App. at 599, 292 S.E.2d at 22. Therefore, defendant's challenge to the trial court's jurisdiction is without merit.

NO ERROR.

Judges GEER and McCULLOUGH concur.

234 N.C. App. 478; 762 S.E.2d 532;
*2014 N.C. App. LEXIS 637, **

STATE OF NORTH CAROLINA v. BARBARA ANN BARR

NO. COA13-1461

COURT OF APPEALS OF NORTH CAROLINA

234 N.C. App. 478; 762 S.E.2d 532; 2014 N.C. App. LEXIS 637

April 23, 2014, Heard in the Court of Appeals
June 17, 2014, Filed

NOTICE: THIS IS AN UNPUBLISHED OPINION. PLEASE REFER TO THE NORTH CAROLINA RULES OF APPELLATE PROCEDURE FOR CITATION OF UNPUBLISHED OPINIONS.

PUBLISHED IN TABLE FORMAT IN THE SOUTH EASTERN REPORTER.

PUBLISHED IN TABLE FORMAT IN THE NORTH CAROLINA COURT OF APPEALS REPORTS.

PRIOR HISTORY: [*1]
McDowell County. No. 12 CRS 1514.

DISPOSITION: VACATED.

CORE TERMS: larceny, misdemeanor, stolen, criminal pleading, toenails, pocketbook, artificial, indictment, highlighters, camera, trial counsel's, diaper, male, bag, accusation, utilized, imprisonment, sentencing, probation, restroom, vacated, noticed, picked, phone, criminal offense, fatally defective, jurisdiction to enter, intent to deprive, identification, permanently

COUNSEL: Attorney General Roy Cooper, by Assistant Attorney General Benjamin J. Kull, for the State.

Gilda C. Rodriguez for Defendant.

JUDGES: ERVIN, Judge. Judges GEER and STEPHENS concur.

OPINION BY: ERVIN

OPINION

App. 10

Appeal by defendant from judgment entered 28 June 2013 by Judge Gary Gavenus in McDowell County Superior Court. Heard in the Court of Appeals 23 April 2014.

ERVIN , Judge.

Defendant Barbara Ann Barr appeals from a judgment sentencing her to a term of 45 days imprisonment and ordering her to pay a fine and the costs based upon her conviction for misdemeanor larceny. On appeal, Defendant contends that the trial court erred by rejecting the plea agreement that she had reached with the State without providing any explanation for its decision to act in that manner and that Defendant was provided ineffective assistance of counsel as the result of her trial counsel's failure to assert her right to obtain an explanation of the trial court's decision to reject the negotiated plea and to have her case continued following the rejection of her guilty plea. After careful consideration of Defendant's challenges to the trial court's judgment in light of the record and the applicable law, **[*2]** we conclude that the trial court's judgment should be vacated given that the criminal pleading upon which the trial court's judgment rests was fatally defective.

I. Factual Background

A. Substantive Facts

1. State's Evidence

On the afternoon of 24 October 2012, Defendant entered a Walmart store in Marion, North Carolina, along with a male adult and a young child. Brandy Bartlett, who worked as a loss protection assistant at the store, initially noticed Defendant because she was carrying a large pocketbook and an empty diaper bag and was engaging in behavior that suggested that she might be involved in unlawful conduct. After making this initial observation, Ms. Bartlett continued to watch Defendant closely and even came within a few feet of her.

While she watched Defendant, Ms. Bartlett noticed that Defendant had put a pack of highlighters and an iPhone case in her shopping cart. In addition, Ms. Bartlett noticed that the adult male who was accompanying Defendant had picked up a camera and placed it in the diaper bag. Subsequently, Defendant took the child, along with the diaper bag, into a restroom, where the two of them remained for approximately five minutes.

After Defendant exited the **[*3]** restroom, she handed the child to her male companion, went to a different aisle, and picked up a set of artificial toenails. Eventually, Ms. Bartlett observed Defendant place the artificial toenails, iPhone case, and highlighters into her pocketbook and walk to the cash register. At that point, Defendant's male companion left the store with the diaper bag and child while Defendant paid for other items that she had taken into her possession during her time in the store.

After paying for these additional items, Defendant walked through the first set of doors leading to the exterior of the store building, where she encountered Ms. Bartlett, who told Defendant what she had observed. After Defendant denied having engaged in any misconduct, Ms. Bartlett stated that she was aware that Defendant had items in her purse for which she had not paid, that she had no desire to embarrass Defendant, and that Defendant should accompany her to the store office. At that point, Defendant did as Ms. Bartlett had requested.

After Defendant and Ms. Bartlett reached the office, Ms. Bartlett, in the presence of her assistant manager, told Defendant that she needed to remove the items that she had taken from **[*4]** the store without making payment from her pocketbook. At that point, Defendant produced the highlighters, the iPhone case, and the artificial toenails while claiming that she had gotten the toenails from a Family Dollar store at an earlier time. After Defendant stated that she did not have identification, Ms. Bartlett told Defendant that she was required to call the police.

Sergeant Mike Hensley of the Marion Police Department arrived at the Walmart store at approximately 4:30 p.m. Although Sergeant Hensley saw the items that Defendant had removed from her pocketbook, he did not search or interview Defendant. After Ms. Bartlett created a receipt indicating the total value of the items in question and confirmed that the items were included in the Walmart store's inventory, Sergeant Hensley took a copy of the receipt and cited Defendant for misdemeanor larceny.

2. Defendant's Evidence

Defendant went to the Marion Walmart store on 24 October 2012 with her boyfriend, Shannon Mosteller, and her youngest child. The highlighters, phone case, and artificial toenails were in her possession at the time of her arrival given that she had purchased them on the preceding evening and planned to return **[*5]** the phone case and the artificial toenails. However, after arriving at the store, Defendant decided to keep these items and, instead, purchased groceries and a toy truck.

As she was leaving the store, Defendant was stopped by Ms. Bartlett, who identified herself as a Walmart employee and told Defendant, without providing any further explanation, that she needed to accompany Ms. Bartlett to the office. As the two women re-entered the store, Sergeant Hensley joined them. Subsequently, Corporal D.J. Barrier of the Marion Police Department arrived at the Walmart store as well.

After reaching the office, Ms. Bartlett asked Defendant to hand her the camera that she claimed to have seen Defendant take into the restroom. After Corporal Barrier brought Mr. Mosteller inside the office and asked him about the camera, Mr. Mosteller stated that, while he and Defendant had picked up a camera, they had returned it to the display shelf, showed the officers where he had placed the camera, and consented to a visual inspection of his vehicle, which did not result in the discovery of any stolen property.

Although she initially declined to allow the officers to search her pocketbook, Defendant eventually **[*6]** consented to such an examination after Sergeant Hensley stated that she could be charged criminally if she maintained her initial position with respect to that issue. As the search proceeded, Ms. Bartlett pointed out the highlighters, phone case, and artificial toenails, which she had not mentioned until that point. After Ms. Bartlett indicated that the items had been stolen, Sergeant Hensley cited Defendant for misdemeanor larceny.

B. Procedural History

On 24 October 2012, Defendant was issued a citation purporting to charge her with misdemeanor larceny. On 20 May 2013, Defendant entered a plea of guilty in the McDowell County District Court. In light of Defendant's guilty plea, the District Court entered a judgment sentencing Defendant to a term of 45 days imprisonment and then suspended that sentence and placed Defendant on unsupervised probation for a period of twelve months on the condition that Defendant comply with the usual terms of probation, pay the costs, and complete 24 hours of community service. Defendant noted an appeal to the McDowell County Superior Court from the District Court's judgment.

On 24 June 2013, Defendant filed a motion seeking to have evidence concerning **[*7]** the items allegedly seized from her pocketbook suppressed. The charge against Defendant came on for trial before the trial court and a jury at the 27 June 2013 criminal session of the McDowell County Superior Court. After hearing testimony and argument concerning the issues raised by Defendant's suppression motion, the trial court denied Defendant's motion. In addition, the trial court denied Defendant's motion that the case be remanded to the McDowell District Court for compliance with the District Court judgment.

After discussions with the prosecutor, Defendant's trial counsel informed the trial court that Defendant and the State had reached an agreement under which Defendant would plead guilty to misdemeanor larceny, receive a suspended sentence, and be placed on supervised probation. The

trial court, however, rejected the proposed plea agreement without comment. After hearing the testimony of the parties' witnesses, the arguments of counsel, and the trial court's instructions, the jury returned a verdict convicting Defendant of misdemeanor larceny. On 28 June 2013, the trial court entered a judgment sentencing Defendant to 45 days imprisonment and requiring Defendant to pay a $250.00 **[*8]** fine and the costs. Defendant noted an appeal to this Court from the trial court's judgment.[1]

FOOTNOTES

1 After the conclusion of the proceedings in the trial court, Defendant's trial counsel informed the trial court that Defendant desired to appeal the trial court's judgment and stated that he did not know how to do so considering that he had "never handled an appeal." In response, the trial court indicated that Defendant had given notice of appeal based upon the statement made by her trial counsel. As a result of the fact that Defendant clearly indicated a desire to appeal from the trial court's judgment orally and in open court, we concur in the trial court's determination that Defendant had adequately noted an appeal to this Court from the trial court's judgment and, for that reason, deny the alternative petition for the issuance of a writ of *certiorari* that Defendant has filed with this Court.

II. Legal Analysis

As an initial matter, we are required to determine whether the trial court had jurisdiction to enter the judgment from which Defendant has appealed. Although neither party has advanced any contention with respect to this issue, well-established North Carolina law provides that, "where **[*9]** an indictment [or other criminal pleading] is alleged to be invalid on its face, depriving the trial court of its jurisdiction, a challenge may be made at any time." *State v. Ackerman*, 144 N.C. App. 452, 464, 551 S.E.2d 139, 147, *cert. denied*, 354 N.C. 221, 554 S.E.2d 344 (2001). Simply put, "'[t]here can be no trial, conviction, or punishment for a crime without a formal and sufficient accusation. In the absence of an accusation the court acquires no jurisdiction whatever, and if it assumes jurisdiction a trial and conviction are a nullity.'" *McClure v. State*, 267 N.C. 212, 215, 148 S.E.2d 15, 17-18 (1966) (quoting 42 C.J.S., Indictments and Informations § 1 (1944)). "This Court may raise the question of subject matter jurisdiction on its own motion, even if it was not argued by the parties in their briefs." *Ramsey v. Interstate Insurors, Inc.*, 89 N.C. App. 98, 102, 365 S.E.2d 172, 175, *disc. review denied*, 322 N.C. 607, 370 S.E.2d 248 (1988). As a result, we must determine whether the trial court had jurisdiction over this case before we have the authority to address the validity of Defendant's challenges to the trial court's judgment.

"A citation is a directive, issued by a law enforcement **[*10]** officer or other person authorized by statute, that a person appear in court and answer a misdemeanor or infraction charge or charges." N.C. Gen. Stat. § 15A-302(a). Citations "may serve as pleadings of the State in criminal cases." N.C. Gen. Stat. § 15A-921(1). "The purpose of a[] [charging instrument] is to give defendant sufficient notice of the charge against him, to enable him to prepare his defense, and to raise the bar of double jeopardy in the event he is again brought to trial for the same offenses." *State v. Ingram*, 20 N.C. App. 464, 466, 201 S.E.2d 532, 533 (1974). As a result, a valid citation must:

> (1) Identify the crime charged, including the date, and where material, identify the property and other persons involved,
>
> (2) Contain the name and address of the person cited, or other identification if that cannot be ascertained,
>
> (3) Identify the officer issuing the citation, and
>
> (4) Cite the person to whom issued to appear in a designated court, at a designated time and date.

N.C. Gen. Stat. § 15A-302(c). In addition, every criminal pleading, including a citation used for that purpose, must contain "[a] plain and concise factual statement in each count which, without allegations **[*11]** of an evidentiary nature, asserts facts supporting every element of a criminal offense and the defendant's commission thereof with sufficient precision clearly to apprise the defendant or defendants of the conduct which is the subject of the accusation." N.C. Gen. Stat. § 15A-924(a)(5). As a result, given that "[a]n indictment [or other criminal pleading] is invalid and prevents the trial court from acquiring jurisdiction over the charged offense if [it] 'fails to state some essential and necessary element of the offense of which the defendant is found guilty,'" *State v. McNeil*, 209 N.C. App. 654, 658, 707 S.E.2d 674, 679 (2011) (quoting *State v. Wilson*, 128 N.C. App. 688, 691, 497 S.E.2d 416, 419, *disc. review improvidently granted*, 349 N.C. 289, 507 S.E.2d 38 (1998)), the citation issued against Defendant in this case would not have sufficed to authorize the trial court to exercise jurisdiction over this case in the event that it failed to charge the Defendant with the commission of a misdemeanor larceny in the manner required by N.C. Gen. Stat. § 15A-924 (a) (5).

"The essential elements of larceny are that the defendant:

(1) took the property of another;

(2) carried it away;

(3) without **[*12]** the owner's consent; and

(4) with the intent to deprive the owner of his property permanently."

State v. Perry, 305 N.C. 225, 233, 287 S.E.2d 810, 815 (1982) (citing *State v. Booker*, 250 N.C. 272, 273, 108 S.E.2d 426, 427 (1959) and N.C. Gen. Stat. § 14-72(a)), *overruled on other grounds in State v. Mumford*, 364 N.C. 394, 402, 699 S.E.2d 911, 916 (2010). Consistently with the language of N.C. Gen. Stat. § 15A-302(c)(1), which requires citations to identify "the property" involved in the commission of a particular crime, "our case law on larceny indictments makes clear that the property alleged to have been taken must be identified 'with certainty sufficient to enable the jury to say that the article proved to be stolen is the same.'" State v. Justice, 219 N.C. App. 642, 644, 723 S.E.2d 798, 801 (2012) (quoting *State v. Ingram*, 271 N.C. 538, 541-42, 157 S.E.2d 119, 122 (1967)); *see also State v. Godet*, 29 N.C. 210, 210 (1847) (holding that "[a]n indictment for larceny must describe the article stolen with a certainty sufficient to identify it" so as to "enable[e] the judge to see upon its face that the article is of value" and to protect "the accused" by "enabl[ing] him to show, if subsequently **[*13]** called into court to answer for the offense, that he has already been convicted or acquitted of its commission"). As a result, a criminal pleading, including a citation, that purports to charge the defendant with committing larceny must specify the property that the defendant is alleged to have stolen.

The citation issued to Defendant in this case alleged that she "did steal take and carry away with the intent to deprive the owner of its use permanently items belonging to Wal Mart Inc. having a value of $25.43." As should be obvious from even a cursory examination of the citation that was issued to Defendant, the criminal pleading utilized in this case does not identify the property that Defendant is alleged to have stolen. For that reason, the charging instrument utilized in this case did not describe the items stolen "'with certainty sufficient to enable the jury to say that the article proved to be stolen is the same.'" *Ingram*, 271 N.C. at 541, 157 S.E.2d at 122 (quoting *State v. Caylor*, 178 N.C. 807, 808, 101 S.E. 627, 628 (1919)). As a result, given that the citation that served as the basis for the entry of the trial court's judgment was fatally defective and did not suffice to **[*14]** provide the trial court with jurisdiction over this case, we are required to vacate the trial court's judgment. *Eg., State v. Johnson*, 42 N.C. App. 234, 236-37, 256 S.E.2d 297, 299 (1979) (citing 4 Strong's N.C. Index 3rd, Criminal Law § 127.2, p. 665) (holding that "[t]he court should have allowed the motion to dismiss on the grounds that the citation failed to charge the commission of a crime" and stating that, " [b]ecause the citation failed to charge a crime, the judgment of the Superior Court must be . . . arrested").[2]

FOOTNOTES

2 Had the defect in the citation issued in this case been identified prior to trial, the prosecutor could have addressed the problem discussed in the text of this opinion by filing a misdemeanor statement of charges as authorized by N.C. Gen. Stat. § 15A-922.

III. Conclusion

Thus, for the reasons set forth above, we conclude that, since the citation utilized as the criminal pleading in this case failed to adequately charge the commission of a criminal offense, the trial court lacked jurisdiction to enter judgment against Defendant in this case. As a result, the trial court's judgment should be, and hereby is, vacated.

VACATED.

Judges GEER and STEPHENS concur.

Report per **[*15]** Rule 30(e).

Service: **Get by LEXSEE®**
Citation: **234 N.C. App. 478**
View: Full
Date/Time: Wednesday, April 20, 2016 - 9:22 AM EDT

227 N.C. App. 650; 745 S.E.2d 374;
*2013 N.C. App. LEXIS 578, **

STATE OF NORTH CAROLINA v. PHILLIPPI DEMOND GORHAM

NO. COA12-1370

COURT OF APPEALS OF NORTH CAROLINA

227 N.C. App. 650; 745 S.E.2d 374; 2013 N.C. App. LEXIS 578

May 14, 2013, Heard in the Court of Appeals
June 4, 2013, Filed

NOTICE: THIS IS AN UNPUBLISHED OPINION. PLEASE REFER TO THE NORTH CAROLINA RULES OF APPELLATE PROCEDURE FOR CITATION OF UNPUBLISHED OPINIONS.

PUBLISHED IN TABLE FORMAT IN THE SOUTH EASTERN REPORTER.

PUBLISHED IN TABLE FORMAT IN THE NORTH CAROLINA COURT OF APPEALS REPORTS.

PRIOR HISTORY: [*1]
Beaufort County. Nos. 09 CRS 50895, 09 CRS 50896, 09 CRS 50897.

DISPOSITION: Vacated in part and remanded for resentencing in part.

CORE TERMS: public officer, resisting, reckless driving, driving, vacated, resentencing, probation, impaired, revoked, periods of probation, sentenced, charging, discharge a duty, discharging, sentencing, indictment, supervised, obstruct, resist, driver's license, imprisonment, displaying, license, concedes, vacate

COUNSEL: Attorney General Roy Cooper, by Assistant Attorney General Christopher W. Brooks, for the State.

Richard J. Costanza for Defendant-Appellant.

JUDGES: McGEE, Judge. Judges ELMORE and STEPHENS concur.

OPINION BY: McGEE

OPINION

Appeal by Defendant from judgments entered 15 May 2012 by Judge W. Russell Duke, Jr., in

Superior Court, Beaufort County. Heard in the Court of Appeals 14 May 2013.

McGEE, Judge.

Phillippi Demond Gorham (Defendant) appeals from convictions of resisting a public officer and reckless driving. Defendant does not assert error in his conviction of impaired driving. We vacate in part and remand for resentencing in part.

Trooper Kevin Respass (Trooper Respass) of the North Carolina State Highway Patrol initiated a stop of Defendant on 4 April 2009, after observing Defendant driving his vehicle at a high rate of speed. Trooper Respass noticed a strong order of alcohol about Defendant's person and ordered Defendant out of his vehicle. Defendant became irate and had to be forcefully removed from his vehicle. Defendant was subsequently arrested for impaired driving, resisting a public officer, reckless driving, driving **[*2]** while license revoked, and displaying a revoked driver's license.

Defendant was convicted of all of the charges in district court and appealed to superior court for a trial *de novo.* The State dismissed with leave the charges of driving while license revoked and displaying a revoked driver's license, and proceeded to trial on the remaining three charges. A jury found Defendant guilty of impaired driving, resisting a public officer, and reckless driving. The trial court sentenced Defendant to two years' imprisonment for the driving while impaired conviction. For the resisting a public officer and reckless driving convictions, the trial court entered separate judgments, sentencing Defendant in each to a suspended sixty-day term of imprisonment, and placed Defendant on probation for thirty months, to begin on Defendant's release from incarceration. Defendant appeals.

Defendant contends the trial court lacked jurisdiction over the charge of resisting a public officer because the citation failed sufficiently to allege the offense. The State concedes the charging instrument was fatally flawed and the judgment should be vacated. We agree.

N.C. Gen. Stat. § 14-223 provides: "If any person shall **[*3]** willfully and unlawfully resist, delay or obstruct a public officer in discharging or attempting to discharge a duty of his office, he shall be guilty of a Class 2 misdemeanor." N.C. Gen. Stat. § 14-223 (2011). "An indictment charging a violation of N.C.G.S. § 14-223 must, *inter alia,* 'state in a general way the manner in which [the] accused resisted or delayed or obstructed such officer.'" *State v. Hemphill*, 219 N.C. App. 50, 60, 723 S.E.2d 142, 148, *disc. review denied,* 366 N.C. 235, 731 S.E.2d 166 (2012) (citation omitted).

In the case before us, the citation charging Defendant with violating N.C. Gen. Stat. § 14-223 stated Defendant did "resist, delay and obstruct [Trooper] Respass, a public officer holding the office of State Trooper, while the officer was discharging and attempting to discharge a duty of his office by attempting to arrest [D]efendant[.]" The citation fails to describe the actions by Defendant that comprised the resisting, obstructing, or delaying of Trooper Respass by Defendant. The trial court never had jurisdiction over Defendant on this charge and the judgment is vacated. *See State v. Wagner,* 356 N.C. 599, 601, 572 S.E.2d 777, 779 (2002) (stating if an indictment **[*4]** does not include all the facts necessary to meet the elements of the offense, the trial court lacks jurisdiction over the defendant and subsequent judgments are void and must be vacated).

Defendant also contends the trial court incorrectly placed him on supervised probation for thirty months without making a finding that the term of probation was necessary. The State also concedes this issue. We agree.

N.C. Gen. Stat. § 15A-1343.2(d) provides: "Unless the court makes specific findings that longer or shorter periods of probation are necessary, the length of the original period of probation for offenders sentenced under Article 81B shall be . . . [f]or misdemeanants sentenced to community punishment, not less than six nor more than 18 months[.]" N.C. Gen. Stat. § 15A-1343.2(d)(1) (2011). In the present case, the trial court entered separate judgments placing Defendant on supervised probation for a period of thirty months for convictions of reckless driving and resisting a public officer. However, the trial court did not make specific findings on the judgments that a longer period of probation was necessary. Accordingly, Defendant is entitled to a new sentencing hearing.

Because we vacated **[*5]** the resisting a public officer judgment, we remand for resentencing only on the reckless driving conviction.

In review, we vacate the judgment for resisting a public officer and remand for resentencing in the judgment for reckless driving.

Vacated in part and remanded for resentencing in part.

Judges ELMORE and STEPHENS ▾ concur.

Report per Rule 30(e).

Service: **Get by LEXSEE®**
Citation: **2013 N.C. App. LEXIS 578**
View: Full
Date/Time: Wednesday, April 20, 2016 - 9:24 AM EDT

218 N.C. App. 457; 721 S.E.2d 762;
*2012 N.C. App. LEXIS 182, **

STATE OF NORTH CAROLINA v. SEAN MICHAEL KELLY

NO. COA11-887

COURT OF APPEALS OF NORTH CAROLINA

218 N.C. App. 457; 721 S.E.2d 762; 2012 N.C. App. LEXIS 182

January 23, 2012, Heard in the Court of Appeals
February 7, 2012, Filed

NOTICE: THIS IS AN UNPUBLISHED OPINION. PLEASE REFER TO THE NORTH CAROLINA RULES OF APPELLATE PROCEDURE FOR CITATION OF UNPUBLISHED OPINIONS.

PUBLISHED IN TABLE FORMAT IN THE SOUTH EASTERN REPORTER.

PUBLISHED IN TABLE FORMAT IN THE NORTH CAROLINA COURT OF APPEALS REPORTS.

PRIOR HISTORY: [*1]
Buncombe County. No. 10 CRS 700243.

DISPOSITION: VACATED IN PART AND REMANDED FOR RESENTENCING.

CORE TERMS: reckless driving, speeding, criminal offense, resentencing, purporting, charging, sentence, drove, citation omitted, wanton disregard, consolidated, carelessly, heedlessly, supervised, indictment, sentenced, suspended, probation, highway, custody, willful, drive, vacated

COUNSEL: Attorney General Roy Cooper, by Assistant Attorney General Larissa S. Williamson, for the State.

Bryan Gates for defendant-appellant.

JUDGES: ERVIN, Judge. Judges ROBERT C. HUNTER and STEPHENS concur.

OPINION BY: ERVIN

OPINION

App. 19

Appeal by defendant from judgment entered 16 March 2011 by Judge Mark E. Powell in Buncombe County Superior Court. Heard in the Court of Appeals 23 January 2012.

ERVIN , Judge.

Defendant Sean Michael Kelly appeals from a judgment entered by the trial court based upon Defendant's convictions for speeding and reckless driving. On appeal, Defendant argues that the citation issued against him fails to sufficiently allege that he committed the offense of reckless driving. After careful consideration of Defendant's challenge to the trial court's judgment in light of the record and the applicable law, we conclude that the trial court's reckless driving judgment should be vacated and that this case should be remanded to the Buncombe County Superior Court for resentencing.

I. Factual Background

On 9 January 2010, Trooper R.D. Kent of the North Carolina State Highway Patrol issued a citation charging Defendant with (1) speeding, **[*2]** in violation of N.C. Gen. Stat. § 20-141(j1), and (2) reckless driving, in violation of N.C. Gen. Stat. § 20-140(a). The portion of the citation charging Defendant with reckless driving alleged that:

> on or about Saturday, the 09 day of January, 2010 at 01:32 PM in the county named above [Defendant] did unlawfully and willfully carelessly and heedlessly in willful and wanton disregard of the rights and safety of others. (G.S. 20-140(a))

After Defendant pled guilty to both charges in the Buncombe County District Court, he was sentenced to thirty days in the custody of the Sheriff of Buncombe County. However, Defendant's sentence was suspended and Defendant was ordered to complete 12 months of supervised probation. Defendant noted an appeal to the Buncombe County Superior Court. After a trial *de novo*, the jury returned a verdict finding Defendant guilty of both charges on 16 March 2011. As a result, the trial court consolidated Defendant's two convictions for judgment, sentenced Defendant to a term of thirty days in the custody of the Sheriff of Buncombe County, suspended Defendant's sentence, and ordered Defendant to successfully complete 12 months of supervised probation. Defendant noted **[*3]** an appeal to this Court from the trial court's judgment.

II. Legal Analysis

In his sole challenge to the trial court's judgment, Defendant argues that the citation fails to sufficiently charge that he committed the offense of reckless driving because it fails to allege that he drove a vehicle. We agree.

According to N.C. Gen. Stat. § 20-140(a):

> Any person who drives any vehicle upon a highway or any public vehicular area carelessly and heedlessly in willful or wanton disregard of the rights or safety of others shall be guilty of reckless driving.

A criminal pleading purporting to charge the commission of any offense must contain:

> A plain and concise factual statement in each count which, without allegations of an evidentiary nature, asserts facts supporting every element of a criminal offense and the defendant's commission thereof with sufficient precision clearly to apprise the defendant or defendants of the conduct which is the subject of the accusation.

N.C. Gen. Stat. § 15A-924(a)(5); *see also State v. Billinger*, N.C. App. , , 714 S.E.2d 201, 206 (2011). "Where the warrant or indictment contains separate counts, each count should be complete in itself." *State v. Fuller*, 24 N.C. App. 38, 39, 209 S.E.2d 805, 806 (1974) **[*4]** (citation omitted). "It is an essential of jurisdiction that a criminal offense shall be sufficiently charged in a

warrant or an indictment. . . . A court cannot properly give judgment in a criminal action, unless it appears in the record that a criminal offense is sufficiently charged." *State v. Wallace*, 251 N.C. 378, 381, 111 S.E.2d 714, 717 (1959) (citations omitted).

The citation purporting to charge Defendant with reckless driving does not allege that Defendant drove a vehicle, an essential element of the offense specified in N.C. Gen. Stat. § 20-140(a). Instead, the portion of the citation purporting to charge Defendant with reckless driving consists of a sentence fragment that omits any reference to the verb "drive" or to a synonym such as "operate." *See State v. Coker*, 312 N.C. 432, 436, 323 S.E.2d 343, 347 (1984). Although the portion of the citation charging Defendant with speeding alleges that Defendant drove a vehicle, the language contained in that count cannot be used to salvage the defective reckless driving charge. Thus, we agree with Defendant's contention that the trial court lacked jurisdiction to enter judgment against him for reckless driving. As a result, given **[*5]** that Defendant's two convictions were consolidated for judgment, we must vacate the trial court's reckless driving judgment and remand this case to the Buncombe County Superior Court for resentencing on Defendant's speeding conviction. *See State v. Graves*, 203 N.C. App. 123, 129, 690 S.E.2d 545, 549 (2010), *cert. denied*, 365 N.C. 188, 707 S.E.2d 233 (2011).

VACATED IN PART AND REMANDED FOR RESENTENCING.

Judges ROBERT C. HUNTER ▾ and STEPHENS ▾ concur.

Report per Rule 30(e).

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Date/Time: Wednesday, April 20, 2016 - 9:25 AM EDT

*2008 N.C. App. LEXIS 205, **

STATE OF NORTH CAROLINA, Plaintiff, v. TRACY WRIGHT COLEMAN, Defendant.

NO. COA07-886

COURT OF APPEALS OF NORTH CAROLINA

2008 N.C. App. LEXIS 205

January 14, 2008, Heard in the Court of Appeals
February 5, 2008, Filed

NOTICE:

PURSUANT TO RULE 32(b), NORTH CAROLINA RULES OF APPELLATE PROCEDURE, THIS DECISION IS NOT FINAL UNTIL EXPIRATION OF THE TWENTY-ONE DAY REHEARING PERIOD. THIS IS AN UNPUBLISHED OPINION. PLEASE REFER TO THE NORTH CAROLINA RULES OF APPELLATE PROCEDURE FOR CITATION OF UNPUBLISHED OPINIONS.

SUBSEQUENT HISTORY: Reported at State v. Coleman, 655 S.E.2d 16, 2008 N.C. App. LEXIS 305 (N.C. Ct. App., Feb. 5, 2008)

PRIOR HISTORY: [*1]
Rowan County. No. 05CRS010810.

DISPOSITION: VACATED.

CORE TERMS: legal entity, fatally defective, indictment, larceny, owning, vacated, natural person, deprive

COUNSEL: Attorney General Roy A. Cooper III, by Assistant Attorney General Jacqueline A. Tope, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Kristen L. Todd, for defendant-appellant.

JUDGES: STROUD, Judge. Judges McGEE and ARROWOOD concur.

OPINION BY: STROUD

OPINION

Appeal by defendant from judgment entered on or about 28 February 2007 by Judge Kimberly S. Taylor in Superior Court, Rowan County. Heard in the Court of Appeals 14 January 2008.

STROUD, Judge.

Defendant was charged by citation with misdemeanor larceny. She was found guilty of the charge in district court. She appealed to the superior court, where she was also found guilty. She was sentenced at her request to an active term of imprisonment for thirty days.

Defendant contends that the court lacked jurisdiction to try her and to enter judgment against her because the citation failed to charge that the alleged victim was a corporation or other legal entity capable of owning property. The citation alleged that defendant "[d]id steal, take, carry away items from Wal-Mart vi[z]; 2 Logitech Playstation controllers - valued at $ 79.48: At which time the suspect had intention to permanently deprive **[*2]** Wal-Mart of the property, knowing that she was not entitled to the property w/o consent of Wal-Mart."

A fatally defective indictment deprives the trial court of jurisdiction. *State v. Wallace*, 351 N.C. 481, 503, 528 S.E.2d 326, 341, *cert. denied*, 531 U.S. 1018, 121 S. Ct. 581, 148 L. Ed. 2d 498 (2000). "[W]hether a trial court has subject matter jurisdiction is a question of law, which is reviewable on appeal *de novo*." *Ales v. T.A. Loving Co.*, 163 N.C. App. 350, 352, 593 S.E.2d 453, 455 (2004).

A larceny indictment must allege that the stolen property is owned by a natural person or a legal entity capable of owning property. *State v. Roberts*, 14 N.C. App. 648, 649, 188 S.E.2d 610, 611 (1972). "[A] larceny indictment which does not indicate the legal entity is a corporation or the name of the legal entity does not import a corporation is fatally defective." *State v. Cathey*, 162 N.C. App. 350, 353-54, 590 S.E.2d 408, 411 (2004). Similarly, a warrant charging a person with larceny is fatally defective if it fails to allege the ownership of the property either in a natural person or a legal entity capable of owning property. *State v. Wooten*, 18 N.C. App. 652, 654, 197 S.E.2d 614, 615, *cert. denied*, 283 N.C. 758, 198 S.E.2d 728 (1973). **[*3]** A citation, like a warrant or indictment, is a pleading in a criminal case and is thus controlled by the above case law. *See* N.C. Gen. Stat. § 15A-921 (2005).

The citation in this case does not allege that Wal-Mart is a corporation or other legal entity capable of owning property. The State concedes that the citation is fatally defective and that the judgment should be vacated.

For the foregoing reasons, the judgment is vacated.

VACATED.

Judges McGEE and ARROWOOD concur.

Report per Rule 30(e).

230 N.C. App. 145; 752 S.E.2d 258;
*2013 N.C. App. LEXIS 1048, **

STATE OF NORTH CAROLINA v. JASMINE ANTOINETTE LEWIS

NO. COA13-309

COURT OF APPEALS OF NORTH CAROLINA

230 N.C. App. 145; 752 S.E.2d 258; 2013 N.C. App. LEXIS 1048

October 7, 2013, Heard in the Court of Appeals
October 15, 2013, Filed

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PUBLISHED IN TABLE FORMAT IN THE SOUTH EASTERN REPORTER.

PUBLISHED IN TABLE FORMAT IN THE NORTH CAROLINA COURT OF APPEALS REPORTS.

SUBSEQUENT HISTORY: Stay granted by State v. Lewis, 749 S.E.2d 837, 2013 N.C. LEXIS 1138 (N.C., Nov. 4, 2013)
Stay dissolved by State v. Lewis, 367 N.C. 281, 752 S.E.2d 471, 2013 N.C. LEXIS 1401 (N.C., Dec. 18, 2013)
Stay denied by State v. Lewis, 367 N.C. 281, 752 S.E.2d 471, 2013 N.C. LEXIS 1402 (N.C., Dec. 18, 2013)

PRIOR HISTORY: [*1]
Forsyth County. No. 11 CRS 26774.

DISPOSITION: No error.

CORE TERMS: amend, misdemeanor, larceny, charging, arrest warrant, proposed amendments, fatally defective, offense charged, self-executing, wording, possessor

COUNSEL: Attorney General Roy Cooper, by Assistant Attorney General James C. Holloway, for the State.

Yoder Law PLLC, by Jason Christopher Yoder, for defendant-appellant.

JUDGES: BRYANT, Judge. Judges Robert C. HUNTER, and McCULLOUGH concur.

OPINION BY: BRYANT

OPINION

Appeal by defendant from judgment entered 2 November 2012 by Judge Ronald E. Spivey in Forsyth County Superior Court. Heard in the Court of Appeals 7 October 2013.

BRYANT, Judge.

Defendant Jasmine Antoinette Lewis appeals from a judgment entered upon a jury verdict in Forsyth County Superior Court finding her guilty of misdemeanor larceny. Defendant argues on appeal that the trial court erred in allowing the State to amend the citation charging her with misdemeanor larceny, and lacked jurisdiction over her case because the citation was fatally defective. Because the State properly amended the citation prior to trial, we hold the trial court had jurisdiction to hear this case.

Defendant is correct that the initial citation [1] charging her with misdemeanor larceny was fatally defective. The citation listed the owner of the property as "Sally Beauty," which is not a natural person, and does not give any indication that Sally **[*2]** Beauty is a corporation or other entity capable of owning property. *See State v. Thompson*, 6 N.C. App. 64, 66, 169 S.E.2d 241, 242 (1969). Recognizing this defect, the State filed a written motion to amend the citation, asking the trial court "for an order amending the citation to amend 'Sally Beauty' to 'Sally Beauty Holdings, Inc.'" The trial court allowed the amendment prior to the start of the trial.

FOOTNOTES

1 The citation alleged that defendant "[stole], [took], and carr[ied] away without the consent of the possessor and with the intent to deprive the possessor of its use permanently, knowing that [she] was not entitled to it (body lotion) such property having a value of (est. $30.00) such property belonging to (Sally Beauty)."

Defendant contends the trial court erred in allowing the amendment because it changed the nature of the crime charged. *See* N.C. Gen. Stat. § 15A-922(f) (2011) ("A statement of charges, criminal summons, warrant for arrest, citation, or magistrate's order may be amended at any time prior to or after final judgment when the amendment does not change the nature of the offense charged."). However, in *State v. Reeves*, this Court held that amending at trial an arrest warrant **[*3]** charging misdemeanor larceny "to change the owner of the property taken does not change the nature of the offense charged." *State v. Reeves*, 62 N.C. App. 219, 224, 302 S.E.2d 658, 661 (1983). While defendant was charged with misdemeanor larceny by citation in this case, rather than by an arrest warrant as in *Reeves*, General Statutes, section 15A-922(f) makes no distinction between an arrest warrant and a citation. Accordingly, we hold the trial court did not err in allowing the State to amend the citation to change the owner of the stolen property.

Defendant also argues that even if the trial court did not err in allowing the State's motion to amend the citation, no actual amendment was ever made to the citation, and thus the court still lacked jurisdiction over her case. It is well established that where "neither the motion nor the order set out the contemplated wording of the proposed amendments, the order allowing the motion to amend [is] not self-executing." *State v. Thorne*, 238 N.C. 392, 396, 78 S.E.2d 140, 142 (1953). Here, however, the State's motion set out the contemplated wording of the proposed amendment and the trial court's order allowing the motion to amend was self-executing. **[*4]** Accordingly, we hold the defendant was tried upon a citation properly charging her with misdemeanor larceny from Sally Beauty Holdings, Inc., and the trial court had jurisdiction over her case.

No error.

Judges HUNTER, Robert C., and McCULLOUGH concur.

Report per Rule 30(e).

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