IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-59

Filed: 5 September 2017

Wake County, No. 15CRS701096

STATE OF NORTH CAROLINA,

v.

DARYL JONES, Defendant.

Appeal by defendant from judgment entered 15 June 2016 by Judge G. Bryan Collins, Jr. in Wake County Superior Court. Heard in the Court of Appeals 8 June 2017.

Attorney General Joshua H. Stein, by Assistant Attorney General Carole Biggers, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender James R. Grant, for defendant-appellant.

BERGER, Judge.

Daryl Lamont Jones ("Defendant") appeals from the judgment entered following his conviction for operating a motor vehicle with an open container of alcohol while alcohol remained in his system. Defendant alleges the trial court lacked subject matter jurisdiction, arguing the citation issued to Defendant failed to state facts establishing each of the elements of the statutory offense. We disagree.

Factual & Procedural Background

On January 4, 2015, Officer Donnie Johnson with the Raleigh Police Department stopped a vehicle driven by Defendant on New Bern Avenue. Officer Johnson estimated Defendant's speed to be approximately sixty-five miles per hour in a forty-five mile-per-hour zone. Officer Johnson approached Defendant's vehicle and noticed an open can of beer in the center console of Defendant's vehicle. After determining Defendant was not impaired, Officer Johnson issued Defendant a citation for speeding and operating a vehicle with an open container of alcohol in the car, while alcohol remained in his system. The citation read as follows:

> The officer named below has probable cause to believe that on or about Sunday, the 04 day of January, 2015 at 10:16PM in [Wake] [C]ounty . . . [Defendant] did unlawfully and willfully OPERATE A MOTOR VEHICLE ON A STREET OR HIGHWAY AT A SPEED OF 62 MPH IN A 45 MPH ZONE. (G.S. 20-141(J1))
> *and* on or about Sunday, the 04 day of January, 2015 at 10:16PM in [Wake] [C]ounty . . . [Defendant] did unlawfully and willfully WITH AN OPEN CONTAINER OF ALCOHOLIC BEVERAGE AFTER DRINKING. (G.S. 20-138.7(A))[.]

(Emphasis added). In addition, the officer's comments contained the following: "OPEN COORS LIGHT IN CENTER CONSOLE. HALF CONSUMED, STILL WITH CONDENSATION ON IT. . . . PULLED OUT OF DONALD ROSS DR[.] AND SPED UP TO 62MPH. PURSUED FOR NEARLY 1/2 MILE BEFORE SLOWING DOWN [IN FRONT OF] WAKE MED."

Defendant was convicted of both offenses in District Court, and appealed the conviction to Superior Court. At trial in Superior Court, Defendant made a motion to dismiss the open container charge at the close of the State's evidence, arguing that the citation was "fatally defective" and the trial court lacked jurisdiction. Defendant asserted that the citation failed to include an essential element of an open container offense: operating a motor vehicle while on a public street or highway. The trial court, citing *State v. Allen*, ___ N.C. App. ___, 783 S.E.2d 799 (2016), denied Defendant's motion. The jury found Defendant guilty of the open container charge and not guilty of speeding. Defendant timely filed notice of appeal.

Analysis

The North Carolina Constitution states, "Except in misdemeanor cases initiated in the District Court Division, no person shall be put to answer any criminal charge but by indictment, presentment, or impeachment. But any person, when represented by counsel, may, under such regulations as the General Assembly shall prescribe, waive indictment in noncapital cases." N.C. Const. art. I, § 22. A "valid indictment returned by a legally constituted grand jury" is required for a court to have jurisdiction. *State v. Yoes*, 271 N.C. 616, 630, 157 S.E.2d 386, 398 (1967) (citations and quotation marks omitted).

However, "[t]he General Assembly may . . . provide for other means of trial for misdemeanors, with the right of appeal for trial de novo." N.C. Const. art. I, § 24.

The Superior Court Division "has original general jurisdiction throughout the State *except as otherwise provided by the General Assembly*; and the General Assembly is authorized by general law to prescribe the jurisdiction and powers of the district courts." *State v. Wall*, 271 N.C. 675, 680, 157 S.E.2d 363, 366 (1967) (emphasis in original). The General Assembly has indeed delineated the jurisdiction and procedure for trial of misdemeanors in the district courts, and provided for the right of appeal of those matters for trial *de novo* in the superior courts.

North Carolina General Statute § 7A-270 (2015) provides that "[g]eneral jurisdiction for the trial of criminal actions is vested in the superior court and the district court divisions of the General Court of Justice." The district court division has "exclusive, original jurisdiction" of misdemeanors, N.C. Gen Stat. § 7A-272(a) (2015), while superior courts, with limited exception, have "exclusive, original jurisdiction over all criminal actions not assigned to the district court division[.]" N.C. Gen Stat. § 7A-271(a) (2015).

Defendant was issued a citation for misdemeanor offenses and directed to appear in Wake County District Court. A citation directs a defendant to "appear in court and answer a misdemeanor or infraction charge or charges." N.C. Gen. Stat. § 15A-302(a) (2015). A law enforcement officer may issue a citation when he has probable cause to believe the individual cited committed an infraction or

misdemeanor offense. N.C. Gen. Stat. § 15A-302(b) (2015). For a citation to be valid, it 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 appear in a designated court, at a designated time and date.

N. C. Gen. Stat. § 15A-302(c) (2015).

The official commentary to Article 49, entitled Pleadings and Joinder, contains a primer on various criminal pleadings in North Carolina. N.C. Gen. Stat. ch. 15A, art. 49 official commentary (2015). The commentary notes that misdemeanor cases initiated by warrant or criminal summons require a finding of probable cause and a "statement of the crime." *Id.* It is the "statement of the crime" set forth in warrants and criminal summons that constitutes the "pleading" for misdemeanor criminal cases. *Id.* Citations, however, are treated differently. According to the commentary, a citation simply needs to identify the crime charged.

> It should be noted that the citation (G.S. 15A-302) requires only that the crime be "identified," less than is required in the other processes. This is a reasonable difference, since it will be prepared by an officer on the scene. *It still may be used as the pleading, but rather than get into sufficiency of the pleading in such a case the Commission simply gives the defendant the right to object and require a more formal pleading*. G.S. 15A-922(c).

Id. (emphasis added). *See also* N.C. Gen. Stat. § 15A-302 official commentary (2015) ("*[I]n certain circumstances* the citation can serve as the pleading upon which trial is based. See G.S. 15A-922 . . . ." (emphasis added)).

To the extent there was a deficiency in the citation, Defendant had the right to object to trial on the citation by filing a motion:

> A defendant charged in a citation with a criminal offense may by appropriate motion require that the offense be charged in a new pleading. The prosecutor must then file a statement of charges unless it appears that a criminal summons or a warrant for arrest should be secured in order to insure the attendance of the defendant, and in addition serve as the new pleading.

N.C. Gen. Stat. §15A-922(c) (2015). The statement of charges, summons, or warrant may then be subjected to the scrutiny argued for by Defendant. However, a defendant must file his or her objection to the citation in the district court division.

The defendant in *State v. Allen*, ___ N.C. App. ___, ___, 783 S.E.2d 799, 799 (2016) was charged by citation with, among other offenses, transporting an open container of alcohol. Defendant was convicted by a jury and, on appeal, he argued that the citation failed to allege all essential elements of the offense, depriving the court of jurisdiction. *Id.* at ___, 783 S.E.2d at 800. This Court held that because the citation put the defendant on notice and met the statutory requirements of N.C. Gen. Stat. § 15A-302, his failure to object to the citation pursuant to N.C. Gen. Stat. § 15A-

922(c) precluded his challenge to jurisdiction. *Id.* at ___, 783 S.E.2d at 801. The Court also stated:

> 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[.]").

Id. at ___, 783 S.E.2d at 800-01.

Similarly, in *State v. Monroe*, 57 N.C. App. 597, 598, 292 S.E.2d 21, 21-22 (1982), the defendant argued that a jurisdictional defect existed for his charges of driving under the influence and driving while license revoked. Defendant filed a motion pursuant to Section 15A-922(c) in Superior Court. *Id.* This Court held that

> [h]ad defendant filed his motion prior to his trial at district court, the statute would indeed have precluded his trial on the citation alone. . . . [But] [o]nce jurisdiction had been established and defendant had been tried in district court, therefore, 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. at 598-99, 292 S.E.2d at 22. S*ee also State v. Phillips*, 149 N.C. App. 310, 318, 560 S.E.2d 852, 857 ("[The] defendant's objection to trial by citation must be asserted in the court of original jurisdiction, in this case, the district court." (citation omitted)), *appeal dismissed*, 355 N.C. 499, 564 S.E.2d 230 (2002).

Defendant contends the trial court lacked jurisdiction to try him for a violation of N.C. Gen. Stat. § 20-138.7(a), and asserts that the citation charging him failed to allege an essential element of that statutory offense. However, the citation issued to Defendant by Officer Johnson complied with the provisions of N.C. Gen. Stat. § 15A-302(c). The citation properly identified the crime of having an open container of alcohol in the car while alcohol remained in his system, charged by citing N.C. Gen. Stat. § 20-138.7(a) and stating Defendant had an open container of alcohol after drinking. Identifying a crime charged does not require a hyper-technical assertion of

each element of an offense, nor does it require the specificity of a "statement of the crime" necessary to issue a warrant or criminal summons.

However, a citation charging the offense of driving with an open container after consuming must include additional information to be considered sufficient.

> (g) Pleading. — In any prosecution for a violation of subsection (a) of this section, *the pleading is sufficient* if it states the time and place of the alleged offense in the usual form and charges that the defendant drove a motor vehicle on a highway or the right-of-way of a highway with an open container of alcoholic beverage after drinking.

N.C. Gen. Stat. § 20-138.7(g) (2015) (emphasis added). Pursuant to the Official Commentary to Article 49, issues concerning the sufficiency of pleadings in citations are to be addressed through a Section 15A-922(c) motion.

The citation at issue here satisfied the requirements of Section 15A-302, establishing jurisdiction in the District Court division. Defendant's concern regarding sufficiency of the offense charged in the citation required an objection to trial on the citation at the district court level. Because Defendant failed to file a motion pursuant to Section 15A-922(c), he was no longer in a position to assert his statutory right to object to trial on citation, or to the sufficiency of the allegations set forth in Section 20-138.7(g).

Even if, assuming *arguendo*, Defendant was not required to object, the failure to comply with N.C. Gen. Stat. § 15A-924(a)(5) by neglecting to allege facts supporting every element of an offense in a citation is not a *jurisdictional* defect.

Our state constitution requires an indictment to allege each element as a prerequisite of the superior court's jurisdiction. "Except in misdemeanor cases initiated in the District Court Division, no person shall be put to answer any criminal charge but by indictment, presentment, or impeachment." N.C. Const. art. I, § 22. Therefore, the constitution does not so require for a citation charging a misdemeanor to allege each element as a prerequisite of the district court's jurisdiction.

Our Supreme Court has held that "[every defendant] charged with a criminal offense has a right to the decision of twenty-four of his fellow-citizens upon the question of his guilt: first, by a grand jury [of twelve], and secondly, by a petit jury [of twelve][.]" *State v. Barker*, 107 N.C. 913, 918, 12 S.E. 115, 117 (1890) (citation and quotation marks omitted). That is, where the prosecutor elects to use an indictment, the superior court does not obtain jurisdiction to try a defendant unless a grand jury of twelve has first determined that probable cause exists that the defendant committed the crime. *See State v. Abraham*, 338 N.C. 315, 339, 451 S.E.2d 131, 143 (1994) ("It is well settled that a valid bill of indictment is essential to the jurisdiction of the trial court to try an accused for a felony." (citation and quotation marks omitted)). *See also State v. Thomas*, 236 N.C. 454, 458-61, 73 S.E.2d 283, 286-88 (1952). Further, our Supreme Court has instructed that "[t]o be sufficient under our Constitution, an indictment must allege lucidly and accurately all the essential elements of the offense endeavored to be charged." *State v. Hunt*, 357 N.C. 257, 267,

582 S.E.2d 593, 600, *cert. denied*, 539 U.S. 985, 156 L. Ed. 2d 702 (2003) (citations and quotation marks omitted).

In sum, if an indictment is returned by a grand jury without referencing each element, it cannot be said that the grand jury found probable cause that the defendant committed the crime charged – which, under our constitution where an indictment is used, is required to empower the superior court to try the defendant.

As mentioned above, citations differ from indictments. Our constitution does not require a grand jury to make a probable cause determination for misdemeanors tried in district court as a jurisdictional prerequisite. Therefore, any failure of a law enforcement officer to include each element of the crime in a citation is not fatal to the district court's jurisdiction. Moreover, the record establishes that Defendant was apprised of the charge against him and would not be subject to double jeopardy.

Defendant's contention of error is overruled.

NO ERROR.

Judge DILLON concurs.

Judge ZACHARY dissents with separate opinion.

ZACHARY, Judge, dissenting:

Defendant appeals from the judgment entered upon his conviction of operating a motor vehicle with an open container of alcohol in the passenger area of his car while alcohol remained in his system. On appeal, defendant argues that the trial court lacked subject matter jurisdiction over the charge because the citation that the State used as the criminal pleading did not state facts supporting the elements of this criminal offense, as required by long-standing appellate jurisprudence and the express language of N.C. Gen. Stat. § 15A-924 (2015). The majority opinion holds that a citation is not required to comply with the statutory requirements for all criminal pleadings, but need only meet the requirements of N.C. Gen. Stat. § 15A-302 (2015) for use of a citation as a form of process to secure defendant's attendance in court. Because I disagree with this conclusion, I must respectfully dissent.

Background

On 4 January 2015, a Raleigh police officer stopped a car driven by defendant, based upon the officer's estimation that defendant was exceeding the legal speed limit. When the officer approached defendant's car, he observed an open can of beer in the center console next to defendant. After determining that defendant was not impaired, the officer issued a citation that purported to charge defendant with speeding and with operating a motor vehicle with an open container of alcohol while alcohol remained in his system. Defendant was convicted of both offenses in district

court and appealed to superior court for a trial *de novo,* where the jury returned a verdict finding defendant guilty of operating a motor vehicle with an open container of alcohol in the passenger area of the car with alcohol remaining in his system. Defendant noted an appeal to this Court.

Standard of Review

Defendant argues that the trial court lacked subject matter jurisdiction to try him for a violation of N.C. Gen. Stat. § 20-138.7(a) (2015), on the grounds that the citation that purported to charge him with this offense did not meet the requirements for a valid criminal pleading. "A facially invalid indictment deprives the trial court of jurisdiction to enter judgment in a criminal case." *State v. Haddock*, 191 N.C. App. 474, 476, 664 S.E.2d 339, 342 (2008) (citations omitted). "The subject matter jurisdiction of the trial court is a question of law, which this Court reviews *de novo* on appeal." *State v. Barnett*, 223 N.C. App. 65, 68, 733 S.E.2d 95, 98 (2012) (citation omitted). "Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the [trial court]." *In re Appeal of The Greens of Pine Glen Ltd. P'ship*, 356 N.C. 642, 647, 576 S.E.2d 316, 319 (2003) (citation omitted).

Preservation of Issue for Appellate Review

The majority opinion emphasizes the district court's general jurisdiction over the trial of misdemeanors, and the jurisdiction of our superior courts to conduct a trial *de novo* upon a criminal defendant's appeal from district court. Defendant has

not challenged the trial court's general jurisdiction. However, "a trial court's general jurisdiction over the type of proceeding or over the parties does not confer jurisdiction over the specific action." *In re McKinney*, 158 N.C. App. 441, 447, 581 S.E.2d 793, 797 (2003) (citation omitted).

The majority opinion also discusses N.C. Gen. Stat. § 15A-952(c) (2015), which provides that a "defendant charged in a citation with a criminal offense may by appropriate motion require that the offense be charged in a new pleading." The majority opinion appears to hold that by failing to file such a motion in district court, defendant has lost the right to challenge the trial court's subject matter jurisdiction. The majority opinion notes that defendant "contends [that] the trial court lacked jurisdiction to try him . . . when the citation charging him failed to allege an essential element" of the charged offense. The opinion then holds that "Defendant was required to raise any objection to trial on the citation at the district court level. Defendant's failure to object to proceeding by citation established jurisdiction in district court." This indicates that the majority opinion is holding that defendant has waived review of the issue of the trial court's subject matter jurisdiction to try him. However, it is axiomatic that:

> A court must have subject matter jurisdiction in order to decide a case. . . . As a result, subject matter jurisdiction may be raised at any time, whether at trial or on appeal, *ex mero motu*. "A party may not waive jurisdiction, and a court has inherent power to inquire into, and determine, whether it has jurisdiction and to dismiss an action *ex mero motu* when subject matter jurisdiction is lacking."

State v. Sellers, __ N.C. App. __, __, 789 S.E.2d 459, 465 (2016) (quoting *Reece v. Forga*, 138 N.C. App. 703, 705, 531 S.E.2d 881, 882 (2000) (other citations omitted) (emphasis added). Moreover, N.C. Gen. Stat. § 15A-1446(d) (2015) specifically provides that:

> Errors based upon any of the following grounds, which are asserted to have occurred, may be the subject of appellate review even though no objection, exception or motion has been made in the trial division. . . . (4) The pleading fails to state essential elements of an alleged violation, as required by G.S. 15A-924(a)(5).

To the extent that the majority opinion holds that defendant has waived his right to seek review of the issue of the trial court's subject matter jurisdiction, I believe this holding to be inconsistent with long-standing legal principles of our jurisprudence.

Requirements for a Valid Criminal Pleading in North Carolina

Defendant was charged in a two-count citation with two separate offenses. Defendant has not challenged the validity of the charge of speeding, for which the jury found him not guilty. The pivotal issue in this case is whether the second count of the citation met the requirements for a valid criminal pleading, thus giving the trial court subject matter jurisdiction over the charge of driving a motor vehicle on a public highway with an open container of alcohol in the passenger area of the car while alcohol remained in defendant's system. I would hold that, upon application of the plain language of the statutes governing criminal pleadings in North Carolina, the citation is invalid.

A criminal pleading is "[a]n indictment, information, or complaint by which the government begins a criminal prosecution." BLACK'S LAW DICTIONARY 8th Edn. 1190. The State charges a criminal offense in a pleading. N.C. Gen. Stat. § 15A-921 (2015) sets out the documents that may be used as the State's pleading in a criminal case in North Carolina, and states that "the following may serve as pleadings of the State in criminal cases:

> (1) Citation.
> (2) Criminal summons.
> (3) Warrant for arrest.
> (4) Magistrate's order . . . after arrest without warrant.
> (5) Statement of charges.
> (6) Information.
> (7) Indictment.

The general requirements for all criminal pleadings are set out in N.C. Gen. Stat. § 15A-924(a) (2015), which states in relevant part that:

> (a) A criminal pleading must contain:
> (1) The name or other identification of the defendant[.]
> (2) A separate count addressed to each offense charged, but allegations in one count may be incorporated by reference in another count.
> (3) A statement or cross reference in each count indicating that the offense charged therein was committed in a designated county.
> (4) A statement or cross reference in each count indicating that the offense charged was committed on, or on or about, a designated date[.]
> (5) 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. . . .

> (6) For each count a citation of any applicable statute, rule, regulation, ordinance, or other provision of law alleged therein to have been violated. . . .

It is well established that "[N.C. Gen. Stat. §] 15A-924 codifies the requirements of a criminal pleading. A criminal pleading must contain, *inter alia* . . . '[a] plain and concise factual statement in each count which . . . asserts facts supporting every element of a criminal offense and the defendant's commission thereof[.]' " *State v. Saults*, 294 N.C. 722, 724, 242 S.E.2d 801, 803-04 (1978). The purpose of this requirement is:

> (1) [to provide] such certainty in the statement of the accusation as will identify the offense with which the accused is sought to be charged; (2) to protect the accused from being twice put in jeopardy for the same offense; (3) to enable the accused to prepare for trial; and (4) to enable the court, on conviction or plea of *nolo contendere* or guilty to pronounce sentence according to the rights of the case.

State v. Greer, 238 N.C. 325, 327, 77 S.E.2d 917, 919 (1953). Thus, "an indictment is sufficient if it, first, contains the elements of the offense charged and fairly informs a defendant of the charge against which he must defend, and, second, enables him to plead an acquittal or conviction in bar of future prosecutions for the same offense." *Hamling v. United States*, 418 U.S. 87, 117, 41 L. Ed. 2d 590, 620 (1974).

"This constitutional mandate, however, merely affords a defendant the right to be charged by a lucid prosecutive statement which factually particularizes the essential elements of the specified offense. *See* G.S. 15A-924(a)(5)[.]" *State v. Sturdivant*, 304 N.C. 293, 309, 283 S.E.2d 719, 730 (1981). "N.C.G.S. § 15A-924 does

not require that an indictment contain any information beyond the specific facts that support the elements of the crime." *State v. Rambert*, 341 N.C. 173, 176, 459 S.E.2d 510, 512 (1995).

"An indictment 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 (1998)). "Lack of jurisdiction in the trial court due to a fatally defective indictment requires 'the appellate court . . . to arrest judgment or vacate any order entered without authority.' " *State v. Galloway*, 226 N.C. App. 100, 103, 738 S.E.2d 412, 414 (2013) (quoting *State v. Petersilie*, 334 N.C. 169, 175, 432 S.E.2d 832, 836 (1993)).

The vast majority of our appellate cases addressing the sufficiency of a criminal pleading arise in the context of indictments. However, N.C. Gen. Stat. § 15A-924 states the general requirement that a "criminal pleading" must contain certain information, and does *not* limit its application to a subset of the types of criminal pleadings listed in N.C. Gen. Stat. § 15A-921. In addition, the requirement that a criminal pleading must state facts supporting the elements of the charged offense has been addressed in cases in which a defendant's conviction was based on a criminal pleading other than an indictment. *See, e.g., State v. Coker*, 312 N.C. 432, 434, 323 S.E.2d 343, 346 (1984) (addressing the sufficiency of the factual allegations in a

citation charging the defendant with impaired driving), *State v. Balance*, 218 N.C. App. 202, 720 S.E.2d 856 (2012) (applying the requirements of N.C. Gen. Stat. § 15A-924(a) to a misdemeanor statement of charges), and *State v. Camp*, 59 N.C. App. 38, 41-42, 295 S.E.2d 766, 768 (1982) (applying requirement that a criminal pleading must state facts supporting the elements of the charged offense to a warrant).

In sum, N.C. Gen. Stat. § 15A-921 expressly states that a citation may serve as the State's pleading in a criminal case, and N.C. Gen. Stat. § 15A-924(a)(5) requires that every criminal pleading must contain facts supporting each of the elements of the criminal offense with which the defendant is charged. There do not appear to be *any* appellate cases holding that N.C. Gen. Stat. § 15A-924 does not apply to a citation used as the pleading in a criminal case. Under the plain language of these statutes, when a citation is used by the State as the pleading in a criminal case, it must -- like any other criminal pleading -- allege facts that support the elements of the offense with which the defendant is charged.

Discussion

Defendant was convicted of operating a motor vehicle with an open container of alcohol in the passenger area of the car while alcohol remained in his system, in violation of N.C. Gen. Stat. § 20-138.7(a) (2015). This statute provides that "[n]o person shall drive a motor vehicle on a highway or the right-of-way of a highway: (1) While there is an alcoholic beverage in the passenger area in other than the unopened manufacturer's original container; and (2) While the driver is consuming alcohol or

while alcohol remains in the driver's body." The elements of this offense are that the defendant (1) drove a motor vehicle on a highway or right-of-way of a highway, (2) with an open container of an alcoholic beverage in the passenger area of the car, (3) while alcohol remained in the defendant's body.

The charging language of the citation issued in order to compel defendant's attendance in court states the following:

> The officer named below has probable cause to believe that on or about Sunday, the 04 day of January 2015 at 10:16 p.m. in the county named above you did unlawfully and willfully
> OPERATE A MOTOR VEHICLE ON A STREET OR HIGHWAY AT A SPEED OF 62 MPH IN A 45 MPH ZONE. (G.S. 20-141(J1))
>
> and on or about Sunday, the 04 day of January 2015 at 10:16 p.m. in the county named above you did unlawfully and willfully
> WITH AN OPEN CONTAINER OF ALCOHOLIC BEVERAGE AFTER DRINKING. (G.S. 20-138.7(a))
>
> (Underlined script indicates information added by the law enforcement officer on a Uniform Citation Form).

The citation thus charges that on Sunday, 4 January 2015, defendant "did unlawfully and willfully WITH AN OPEN CONTAINER OF ALCOHOLIC BEVERAGE AFTER DRINKING. (G.S. 20-138.7(a))." This sentence fragment fails to include a verb stating *what* defendant did "with an open container of alcohol." Specifically, it fails to allege that defendant operated a motor vehicle on a public road or highway, or even that he "drove." Nor does the citation allege that the open container of alcohol was in the passenger area of defendant's car. The citation fails

to allege facts that would support two of the three elements of the offense: that defendant drove on a public highway, or that he had an open container of alcohol in the passenger area of the car. As a result, the citation did not comply with the requirements of N.C. Gen. Stat. § 15A-924 and did not confer subject matter jurisdiction upon the trial court. The majority opinion reaches the contrary conclusion and holds that the citation was valid. After careful consideration of the reasoning supporting this holding, I am unable to agree.

Firstly, in its assessment of the validity of the citation, the majority includes notes made by the charging officer in a box below the charging language with the heading "Officer's Comments." No legal basis for including this language is set out in the opinion. Moreover, the "Officer's Comments" do not state that defendant was driving a motor vehicle upon a public road.

Secondly, the majority opinion appears to adopt the State's argument that we should read the language of the first count, which alleges that defendant operated a motor vehicle at a speed in excess of the legal speed limit, and then add only the word "and" from the second count (which alleges that "and on or about Sunday, the 04 day of January 2015 at 10:16 PM in the county named above you did unlawfully and willfully"), and by this means arrive at a reading of the citation stating that defendant "operated a motor vehicle" at an excessive speed "and" (omitting the words "on or about Sunday, the 04 day of January 2015 at 10:16 PM in the county named above you did unlawfully and willfully") "with an open container of alcoholic beverage after

drinking." However, no authority is cited in support of this procedure, and "[i]t is settled law that each count of an indictment containing several counts should be complete in itself." *State v. Moses*, 154 N.C. App. 332, 336, 572 S.E.2d 223, 226 (2002) (internal quotation omitted). By the same measure, each count of a criminal pleading, such as a citation, containing several counts should be complete in itself.

The holding of the majority opinion that the citation issued in this case was valid is based primarily upon the language of N.C. Gen. Stat. § 15A-302 (2015). The opinion states that "[f]or a citation to be valid, it must contain" the information specified in N.C. Gen. Stat. § 15A-302(b). The flaw in this argument is that N.C. Gen. Stat. § 15A-302 is a statute contained in N.C. Gen. Stat. § 15A, Article 17, entitled "Criminal Process," which addresses the use of a citation as criminal *process*, and not as a *pleading*. The majority fails to acknowledge this issue or to articulate a basis for applying the requirements for use of a citation as a form of process, rather than the specific statutory criteria for use of a citation as a criminal pleading.

The Official Commentary to Article 17 states that "[c]riminal process includes the citation, criminal summons, warrant for arrest, and order for arrest. They all serve the function of requiring a person to come to court." This language is consistent with the definition of "criminal process" as "[a] process (such as an arrest warrant) that issues to compel a person to answer for a crime." BLACK'S LAW DICTIONARY, 8th Edn. 1242. The statutes in Article 17 govern the requirements for issuance of process

requiring a defendant to appear in court and answer a criminal charge. For example, N.C. Gen. Stat. § 15A-301 (2015) states that:

> (a)(2) "Criminal process, other than a citation, must be signed and dated by the justice, judge, magistrate, or clerk who issues it. The citation must be signed and dated by the law-enforcement officer who issues it."
>
> (b) Warrants for arrest and orders for arrest must be directed to a particular officer, a class of officers, or a combination thereof, having authority and territorial jurisdiction to execute the process. A criminal summons must be directed to the person summoned to appear[.] . . . The citation must be directed to the person cited to appear.

Similarly, N.C. Gen. Stat. § 15A-302 sets out the requirements for the use of a citation as criminal *process*:

> (a) 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. (emphasis added).
>
> . . .
>
> (c) Contents. -- The 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.

> (d) A copy of the citation shall be delivered to the person cited who may sign a receipt on the original which shall thereafter be filed with the clerk by the officer. . . .

The functions of a criminal pleading, which are discussed above, are fundamentally different from the purpose of criminal process, which is simply to secure the defendant's attendance in court. Notably, an indictment, which is the primary form of criminal pleading, is not included as a permissible type of criminal process. The majority opinion holds that "[f]or a citation to be valid" it need only comply with N.C. Gen. Stat. § 15A-302(c). However, the majority offers no basis upon which to ignore the express language of N.C. Gen. Stat. § 15A-924, which governs the requirements for all criminal pleadings, in favor of N.C. Gen. Stat. § 15A-302, which sets out the requirements for the use of a citation as criminal process.

I conclude that equating the requirements for process with those applicable to pleadings is a classic "apples to oranges" comparison. This position finds support in the language of the relevant statutes and in this Court's opinion in *State v. Garcia*, 146 N.C. App. 745, 553 S.E.2d 914 (2001). In *Garcia*, the defendant was served with an arrest warrant charging him with assault. On appeal, the defendant argued that the arrest warrant, although adequate to compel him to appear in court, failed to satisfy the requirements for a criminal pleading. We agreed, and held that:

> A warrant for an arrest "must contain a statement of the crime of which the person to be arrested is accused. No warrant for arrest . . . is invalid because of any technicality of pleading if the statement is sufficient to identify the crime." N.C.G.S. § 15A-304(c) (1999). <u>If the arrest warrant, however, is used as a</u>

> criminal pleading pursuant to N.C. Gen. Stat. § 15A-921(3), it must contain "[a] plain and concise factual statement . . . which . . . asserts facts supporting every element of [the] criminal offense and the defendant's commission thereof with sufficient precision clearly to apprise the defendant . . . of the conduct which is the subject of the accusation." N.C.G.S. § 15A-924(a)(5) (1999).

Garcia, 146 N.C. App. at 746, 553 S.E.2d at 915 (emphasis added).

Given that (1) when used as criminal *process*, both warrants and citations must "identify the crime" charged; (2) N.C. Gen. Stat. § 15A-921 includes both warrants and citations as valid criminal pleadings; and (3) N.C. Gen. Stat. § 15A-924 requires that all criminal pleadings state facts supporting the elements of the offense with which the defendant is charged, I would conclude that the holding of *Garcia* is equally applicable to the instant case. I cannot agree that the criminal process requirements of N.C. Gen. Stat. § 15A-302, rather than the pleading requirements of N.C. Gen. Stat. § 15A-924, should determine the resolution of this case. *See also State v. Cook*, 272 N.C. 728, 731, 158 S.E.2d 820, 822 (1968) ("[T]he warrant fails to allege an essential element of the offense[.] . . . This defect is not cured by reference in the warrant to the statute.").

The majority opinion also notes this Court's opinion in *State v. Allen*, __ N.C. App. __, 783 S.E.2d 799 (2016). In *Allen*, the defendant was charged in a citation with a violation of N.C. Gen. Stat. § 18B-401(a) (2015), which makes it 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." On

appeal, the defendant argued that the trial court lacked jurisdiction to try him, on the grounds that the charging citation failed to allege an essential element of the offense. This Court held that the citation complied with the requirement of N.C. Gen. Stat. § 15A-302 that the citation "[i]dentify the crime charged." Apparently the charging citation was also used as the State's criminal pleading in *Allen*. However, *Allen* did not cite N.C. Gen. Stat. § 15A-924(b)(5) or address the requirements of that statute for all criminal pleadings. As a result, *Allen* is distinguishable from the present case.

Conclusion

The majority opinion holds that when a citation is used by the State as a criminal pleading, the law "does not require a hyper-technical assertion of each element of an offense[.]" However, our legislature enacted N.C. Gen. Stat. § 15A-921 and N.C. Gen. Stat. § 15A-924, and thereby determined the types of documents that may serve as a criminal pleading as well as the level of specificity required. These statutes plainly state that a citation may serve as the State's criminal pleading and that criminal pleadings must state facts supporting the elements of the charged offense. "This policy decision is within the legislature's purview," *Hest Techs., Inc. v. State of N.C. ex rel. Perdue*, 366 N.C. 289, 303, 749 S.E.2d 429, 439 (2012), and "[w]hen the language of a statute is clear and unambiguous, it must be given effect and its clear meaning may not be evaded . . . under the guise of construction." *State*

v. Bates, 348 N.C. 29, 34-35, 497 S.E.2d 276, 279 (1998) (citation and internal quotation marks omitted).

For the reasons discussed above, I conclude that the citation charging that defendant "unlawfully and willfully with an open container of alcoholic beverage after drinking" failed to state facts that would support the elements of the offense of operating a motor vehicle with an open container of alcohol in the passenger area of the car while alcohol remained in the defendant's system. Pursuant to N.C. Gen. Stat. § 15A-924(a)(5), all criminal pleadings, including citations, must allege facts that establish every element of the offense with which the defendant is charged. For this reason, I cannot agree with the holding of the majority opinion and must respectfully dissent.