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NO. COA06-42

NORTH CAROLINA COURT OF APPEALS

Filed: 19 December 2006

STATE OF NORTH CAROLINA

v.

SANDRA T. CANTY

Guilford County
Nos. 04CRS024100-04
024300, 024303,
068556

Appeal by defendant from judgments entered 18 January 2005 by Judge Catherine C. Eagles in Guilford County Superior Court. Heard in the Court of Appeals 11 October 2006.

Attorney General Roy A. Cooper, III, by Special Deputy Attorney General Robert C. Montgomery, for the State.

Michael J. Reece for defendant-appellant.

HUNTER, Judge.

Sandra T. Canty ("defendant") appeals from a guilty plea to six counts of embezzlement and one count of obtaining property by false pretenses entered 18 January 2005. For the reasons stated herein, we reverse the judgments as to the six counts of embezzlement.

Defendant was an accounts payable clerk employed by County Electric, an electrical equipment wholesaler. Defendant was in charge of an account with one of County Electric's largest suppliers, Cutler and Hammer ("Cutler"). Cutler provided rebates

for purchases, which County Electric then applied to its bills with Cutler.

In 2003, an investigation revealed that certain of Cutler's rebates were being applied twice by defendant. Defendant kept two sets of books. One set of books showed that a check had been used to pay a creditor, and the other showed that the same checks had been applied as credit to Cutler's account. County Electric's policies required two signatures for the rebate checks to be cashed. Defendant obtained her direct supervisor's signature and then forged the second signature in order to deposit seven checks totaling \$593,000.00 into a bank account at Lexington State Bank in the name of "Sandra Canty, d/b/a Cutler and Hammer, C and H Associates."

Defendant was charged with six counts of embezzlement, one count of obtaining property by false pretenses, and habitual felon status. Defendant pled guilty to all of the charges. Pursuant to her plea agreement, defendant was sentenced to one active sentence of 93 to 121 months for five counts of embezzlement as an habitual felon, a consecutive active sentence of seventy to ninety-three months for obtaining property by false pretenses as an habitual felon, and one suspended sentence for embezzlement. Defendant appeals from the judgments for the six counts of embezzlement, but does not appeal from the judgment and conviction for obtaining property by false pretenses.

The State moved to dismiss defendant's appeal on the grounds that neither N.C. Gen. Stat. § 15A-1444 (2005), nor N.C. Gen. Stat. § 15A-979 (2005), provide a statutory basis for defendant's appeal. We agree, but have granted defendant's petition for writ of certiorari.

Defendant contends that the trial court erred in accepting her guilty plea as there was no proper factual basis, but does not allege the trial court erred in sentencing or in denying a motion to suppress. Defendant's appeal is therefore not permitted by statute. See *State v. Bolinger*, 320 N.C. 596, 601, 359 S.E.2d 459, 462 (1987) (a "defendant is not entitled as a matter of right to appellate review of his contention that the trial court improperly accepted his guilty plea").

Defendant petitioned this Court in the alternative for a writ of certiorari for review of the procedural flaws under N.C. Gen. Stat. § 15A-1444(e) in acceptance of her guilty plea to the crime of embezzlement. We have granted defendant's petition to review this assignment of error. See *State v. Poore*, 172 N.C. App. 839, 841, 616 S.E.2d 639, 640 (2005) (treating the defendant's appeal as to an insufficient factual basis for a guilty plea as a petition for a writ of certiorari); *State v. Rhodes*, 163 N.C. App. 191, 193-94, 592 S.E.2d 731, 732-33 (2004).

II.

Defendant contends the trial court erred in finding a factual basis for her guilty plea to six counts of embezzlement, as defendant never had lawful possession of the funds. We agree.

N.C. Gen. Stat. § 15A-1022(c) (2005) states that:

(c) The judge may not accept a plea of guilty or no contest without first determining that there is a factual basis for the plea. This determination may be based upon information including but not limited to:

- (1) A statement of the facts by the prosecutor.
- (2) A written statement of the defendant.
- (3) An examination of the presentence report.
- (4) Sworn testimony, which may include reliable hearsay.
- (5) A statement of facts by the defense counsel.

Id. "It is a rule of universal observance in the administration of criminal law that a defendant must be convicted, if convicted at all, of the particular offense charged in the bill of indictment. The allegation and proof must correspond.'" *State v. Watson*, 272 N.C. 526, 527, 158 S.E.2d 334, 335 (1968) (citation omitted). Therefore, the factual basis for a guilty plea must correspond with the particular offense to which a defendant pleads guilty.

To convict a defendant of embezzlement "four distinct propositions of fact must be established: (1) that the defendant was the agent of the prosecutor, and (2) by the terms of his employment had received property of his principal; (3) that he received it in the course of his employment; and (4) knowing it was not his own, converted it to his own use."

State v. Palmer, ___ N.C. App. ___, ___, 622 S.E.2d 676, 679 (2005) (citations omitted). Our Supreme Court recently reaffirmed the distinction between larceny and embezzlement.

"While there is similarity in some respects between larceny and embezzlement, they are distinct offenses. Larceny is a common law offense not defined by statute; while embezzlement is a criminal offense created by statute to cover fraudulent acts which did not contain all the elements of larceny.

Generally speaking, to constitute larceny there must be a wrongful taking and carrying away of the personal property of another without his consent, and this must be done with felonious intent The embezzlement statute makes criminal the fraudulent conversion of personal property *by one occupying some position of trust or some fiduciary relationship as specified in the statute.* The person accused must have been entrusted with and *received into his possession lawfully* the personal property of another, and thereafter with felonious intent must have fraudulently converted the property to his own use."

State v. Weaver, 359 N.C. 246, 255, 607 S.E.2d 599, 604 (2005) (emphasis added and emphasis in original) (citation omitted). In *Weaver*, the Supreme Court concluded that when the defendant's wife, whom he was charged with aiding and abetting, had no independent authority to write or sign checks, her possession of the property was neither lawful nor under her care and control as required by N.C. Gen. Stat. § 14-90 for the crime of embezzlement. *Id.* at 256, 607 S.E.2d at 605; see also *Palmer*, ___ N.C. App. at ___, 622 S.E.2d at 680 (holding that access to incoming checks, when the defendant did not have lawful possession nor was entrusted as a fiduciary, was insufficient to sustain a conviction for embezzlement).

Here, the State concedes that the factual basis for defendant's conviction shows that she had no independent authority

over the checks, as she forged a supervisor's signature in order to obtain control of them, and therefore was not in lawful possession of the property. As clarified in *Weaver*, a conviction for embezzlement cannot be sustained when a defendant does not have lawful possession. *Id.* at 256, 607 S.E.2d at 605. As defendant did not lawfully possess the checks, the proof cannot correspond to the crime with which defendant was charged, embezzlement. See *Watson*, 272 N.C. at 527, 158 S.E.2d at 335. The trial court erred in accepting defendant's plea of guilty, and the judgment must be vacated.¹ *State v. Weathers*, 339 N.C. 441, 453, 451 S.E.2d 266, 272 (1994) (holding that "[a] judge may not accept a defendant's guilty plea without first determining that there is a factual basis for the plea").

As an insufficient factual basis was given in support of defendant's guilty plea to embezzlement, defendant's judgments in 04CRS024303 and 04CRS068556 are reversed.

Reversed.

Judges HUDSON and CALABRIA concur.

Report per Rule 30(e).

¹ We note that the decision in *State v. Weaver* had not yet been issued at the time the trial court accepted the factual basis for defendant's guilty plea. See *State v. Gaines*, 345 N.C. 647, 670, 483 S.E.2d 396, 410 (1997) (reviewing on appeal the application of a holding by a higher court issued after the trial, but while the case was pending direct review).