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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-90

Filed: 19 July 2016

Guilford County, Nos. 14 CRS 67802, 67804, 703666

STATE OF NORTH CAROLINA

v.

JARID JERMAINE ARCHIE

Appeal by Defendant from judgments entered 2 July 2015 by Judge Susan E. Bray in Guilford County Superior Court. Heard in the Court of Appeals 9 June 2016.

*Attorney General Roy Cooper, by Assistant Attorney General Derek L. Hunter, for the State.*

*Yoder Law PLLC, by Jason Christopher Yoder, for Defendant.*

STEPHENS, Judge.

In this appeal from his convictions on charges of possession of a firearm by a felon, driving while impaired (“DWI”), driving while license revoked for impaired driving, and open container, Defendant raises two arguments related to his sentencing. However, because we allow Defendant’s motion for appropriate relief (“MAR”), vacate his firearm possession conviction for lack of subject matter jurisdiction, and remand for resentencing as discussed herein, Defendant’s arguments on direct appeal are now moot.

*Factual and Procedural Background*

The charges involved in this appeal arise from events which occurred in the early morning hours of 3 February 2014. At about 1:30 a.m., a High Point resident heard a loud sound outside her home on a dead end street in a residential area of the city. When she looked outside, the resident saw an SUV that had driven into a ditch in her yard. The vehicle's tires spun as the driver repeatedly attempted to extricate the SUV from the ditch, until suddenly the SUV lurched out of the ditch and crashed into the front porch of the resident's home. When she went outside to investigate, the resident saw two African American men get out of the SUV and noted that both men appeared to be intoxicated. After she overheard the driver tell the passenger, "Be careful, man. The gun is loaded under the seat[,]” the resident went back inside and called 911. When an officer with the High Point Police Department arrived on the scene, Defendant Jarid Jermaine Archie was sitting in the driver's seat of the SUV and his passenger was standing nearby. The officer noted that Archie appeared intoxicated: smelling of alcohol, walking unsteadily, and slurring his words. Archie had difficulty communicating with the initial officer who responded as well as with the officer who responded as backup. Archie denied having been in a car wreck or having been driving the SUV, and refused a roadside alcohol test and field sobriety tests. As a result, Archie was arrested for DWI. As officers prepared to have the SUV removed from the scene, a handgun was discovered under the driver's seat.

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On 21 April 2014, Archie was indicted on charges of possession of a firearm by a felon, DWI, driving while license revoked for impaired driving, and driving with an open container of alcohol. The indictment in file number 14 CRS 67802 for possession of a firearm by a felon alleged that Archie had previously been convicted in file number 95 CRS 14976 of possession with intent to sell and deliver cocaine, a Class H felony. The charges arising from the car wreck on 3 February 2014 came on for trial at the 29 June 2015 criminal session of Guilford County Superior Court, the Honorable Susan E. Bray, Judge presiding.<sup>1</sup> The jury returned guilty verdicts on all counts. The trial court determined that Archie had 5 prior convictions, making him a Prior Conviction Level III for misdemeanor sentencing, and 10 Prior Record Level points,<sup>2</sup> making him a Prior Record Level IV for felony sentencing. The court consolidated the possession of a firearm by a felon, driving while license revoked, and open container convictions into a single judgment and imposed a sentence of 19-32 months in prison. The court imposed a sentence of 120 days on the DWI conviction and ordered that the sentences run consecutively. On 13 July 2015, Archie gave written notice of appeal. On 2 March 2016, Archie filed his primary brief in this Court, arguing two sentencing errors by the trial court: (1) in giving Archie one Prior

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<sup>1</sup> At the time of trial, Archie also apparently faced pending charges for first-degree sex offense, first-degree rape, kidnapping, and another DWI. However, those charges are not part of this appeal.

<sup>2</sup> Two points were the result of his conviction for possession with intent to sell and deliver cocaine in file number 95 CRS 14976.

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Record Level point for the aggravating factor of being on probation at the time of the DWI offense and (2) in considering Archie's then-pending charges of first-degree sex offense, first-degree rape, kidnapping, and DWI in determining his sentence for the convictions in this matter.

*Archie's MAR*

On 6 May 2016, citing N.C. Gen. Stat. §§15A-1415(b)(2), (b)(3), (b)(8), (c), Art. 1, §§19 and 22 of the North Carolina Constitution, and the Sixth and Fourteenth Amendments to the United States Constitution, Archie filed in this Court an MAR in which he moves this Court to vacate the conviction for possession of a firearm by a felon in file number 14 CRS 67802 on grounds that the trial court lacked jurisdiction over that charge because the indictment was fatally defective in that it failed to identify a valid predicate felony.<sup>3</sup> In its response filed 2 June 2016, the State concedes that we must vacate the firearm possession conviction and remand for resentencing. We agree and allow Archie's MAR.

*I. The predicate felony alleged (file number 95 CRS 14976) was void ab initio and has now been vacated.*

The State's proof at trial of Archie's prior felony consisted of a certified copy of the judgment in file number 95 CRS 14976 which indicated that on 3 June 1996, Archie pled guilty in Guilford County Superior Court in file number 95 CRS 14976 to

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<sup>3</sup> "When a case is in the appellate division for review, [an MAR] based upon grounds set out in [section] 15A-1415 must be made in the appellate division." N.C. Gen. Stat. §15A-1418(a) (2015).

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possession with intent to sell and deliver *cocaine* for an offense that was alleged to have occurred on 13 September 1995. The original file in 95 CRS 14976 was not available from the Guilford County Clerk of Court at the time of Archie's trial in this matter, but his appellate counsel obtained a recreation of it in December 2015 via microfilm from the North Carolina Administrative Office of the Courts. That recreation revealed that the indictment in 95 CRS 14976 was for possession with intent to sell and deliver *marijuana*, not cocaine.

As a result of this discovery, on 29 February 2016, Archie filed an MAR in Guilford County Superior Court in file number 95 CRS 14976 arguing that the trial court lacked jurisdiction to enter judgment for possession with intent to sell and deliver cocaine because Archie had never been indicted for that offense. On 26 March 2016, the State filed a response conceding that the judgment in 95 CRS 14976 must be vacated for lack of subject matter jurisdiction. On 25 April 2016, in Guilford County Superior Court, the Honorable John O. Craig, III, Judge presiding, issued an order vacating Archie's conviction for possession with intent to sell and deliver cocaine in 95 CRS 14976, the predicate felony alleged in Archie's indictment for possession of a firearm by a felon in this case in file number 14 CRS 67802.

*II. Impact on subject matter jurisdiction in file number 14 CRS 67802*

"The question of subject matter jurisdiction may be raised at any time . . . ."  
*Lemmerman v. A.T. Williams Oil Co.*, 318 N.C. 577, 580, 350 S.E.2d 83, 85 (1986),

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*reh'g denied*, 318 N.C. 704, 351 S.E.2d 736 (1986). In criminal cases, “[i]t is hornbook law that a valid indictment is a condition precedent to the jurisdiction of the Superior Court to determine the guilt or innocence of the defendant, and to give authority to the court to render a valid judgment.” *State v. Ray*, 274 N.C. 556, 562, 164 S.E.2d 457, 461 (1968) (citations omitted). “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 internal quotation marks omitted). “An order is void *ab initio* . . . when it is issued by a court that does not have jurisdiction. . . . and may be attacked either directly or collaterally, or may simply be ignored.” *State v. Sams*, 317 N.C. 230, 235, 345 S.E.2d 179, 182 (1986) (citations omitted). “When the record shows a lack of jurisdiction in the lower court, the appropriate action on the part of the appellate court is to arrest judgment or vacate any order entered without authority.” *State v. Felmet*, 302 N.C. 173, 176, 273 S.E.2d 708, 711 (1981) (citations omitted).

“The essential elements of the offense of possession of a firearm by a convicted felon are that (1) the defendant was previously convicted of a felony and (2) subsequently possessed a firearm.” *State v. Floyd*, \_\_ N.C. App. \_\_, \_\_, 766 S.E.2d 361, 366 (2014) (citations omitted), *disc. review allowed*, 368 N.C. 258, 771 S.E.2d 295

(2015).<sup>4</sup> In such cases, where the predicate felony alleged “is a nullity[, it] cannot serve to support [a d]efendant’s conviction for possession of a firearm by a felon, [and] the trial court’s judgment stemming from [a d]efendant’s conviction for possession of a firearm by a felon must be vacated.” *Id.* at \_\_\_, 766 S.E.2d at 368.

Because the predicate felony alleged in Archie’s indictment on the charge of possession of a firearm by a felon—the drug possession conviction in file number 95 CRS 14976—was a nullity and has been vacated, it cannot support Archie’s conviction in file number 14 CRS 67802. *See id.* Accordingly, we must vacate his conviction for possession of a firearm by a felon and remand for resentencing. *See State v. Moore*, 327 N.C. 378, 383, 395 S.E.2d 124, 127-28 (1990).

### *III. Impact on Archie’s appeal regarding sentencing*

As noted *supra*, Archie brings forward two sentencing issues in his direct appeal. At sentencing in this matter, Archie was determined to have a total of 10 Prior Record Level points. Two of those points were awarded for Archie’s purported conviction for the void *ab initio* and now-vacated drug possession conviction in file number 95 CRS 14976. Thus, on remand for resentencing for this reason, Archie would have eight Prior Record Level points.

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<sup>4</sup> We note that the case was argued in our Supreme Court on 31 August 2015 on the State’s petition for discretionary review, but no opinion has been filed as of the filing date of this opinion. Accordingly, this Court’s opinion in *Floyd* remains dispositive on our resolution of this appeal. *See In re Appeal from Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989) (“Where a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court.”) (citations omitted).

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In his first argument in his direct appeal, Archie contends that the trial court erred in giving him one Prior Record Level point for the aggravating factor of being on probation at the time of the offenses, and thus elevating his Prior Record Level from III to IV for felony sentencing purposes in file number 14 CRS 67802. However, as discussed *supra*, because Archie's conviction for possession of a firearm by a felon is a nullity and has been vacated, the most serious remaining charge in the consolidated judgment is for driving while license revoked for impaired driving, a Class 1 misdemeanor. See N.C. Gen. Stat. § 20-28(a1) (2015). Unlike a Prior Record Level for felony sentencing, which is determined by calculating prior record *points*, see N.C. Gen. Stat. § 15A-1340.14 (2015), a defendant's Prior Conviction Level for misdemeanor sentencing purposes depends on his *number of prior convictions*. See N.C. Gen. Stat. § 15A-1340.21(b) (2015). In other words, the point that Archie contends was erroneously added by the trial court would only have an impact on his sentencing for a felony and can have no effect at all upon his sentence for his remaining misdemeanor convictions. Without the now-vacated drug possession conviction, the Prior Record/Conviction Level worksheet in the record on appeal indicates that Archie has four prior convictions,<sup>5</sup> and defendants with one to four

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<sup>5</sup> We note that one of Archie's four remaining convictions is listed as "(F) POSS. FIREARM FELON" in file number 02 CRS 103365. Given that the only other felony listed on the worksheet is the now-vacated drug possession conviction, the firearm possession conviction in file number 02 CRS 103365 may also be void. However, that issue is not before us in this appeal.



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prior convictions have a Prior Conviction Level II for misdemeanor sentencing. Thus, Archie's first sentencing argument is now moot, and we dismiss it.

Archie's second argument on appeal is that the trial court erred in considering Archie's then-pending charges of first-degree sex offense, first-degree rape, kidnapping, and DWI in deciding to impose an active, rather than probationary, sentence at the maximum of the presumptive range in file number 14 CRS 67802. Although this argument is likewise moot in light of our resolution of Archie's MAR, we agree that "[i]t is well established that a trial judge may not consider, when imposing a sentence, other charges pending against a defendant for which he has not been convicted." *State v. Westall*, 116 N.C. App. 534, 550, 449 S.E.2d 24, 34 (1994), *disc. review denied*, 338 N.C. 671, 453 S.E.2d 185 (1994). On remand for resentencing on Archie's remaining misdemeanor convictions, we caution the trial court to consider only those matters properly before it. This matter is

DISMISSED AS MOOT IN PART; VACATED IN PART AND REMANDED.

Judges McCULLOUGH and ZACHARY concur.

Report per Rule 30(e).