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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-1065

Filed: 15 August 2017

Surry County, Nos. 12 CRS 1110–11

STATE OF NORTH CAROLINA

v.

WALTER COLUMBUS SIMMONS

On certiorari review of judgment entered 16 May 2016 by Judge A. Moses Massey in Surry County Superior Court. Heard in the Court of Appeals 5 April 2017.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Creecy C. Johnson, for the State.

The Law Office of Sterling Rozear, PLLC, by Sterling Rozear, for defendant-appellant.

ELMORE, Judge.

Walter Columbus Simmons (defendant) appeals from a consolidated judgment entered after he pled guilty to aggravated felony death by vehicle (AFDV) and felony hit and run (FHR). Defendant contends the trial court lacked jurisdiction to accept his guilty pleas and enter a judgment against him, challenging the sufficiency of both indictments, and the factual basis underlying each plea. Because defendant has no

statutory right to appeal, we dismiss his appeal. In our discretion, we allow his certiorari petition for the sole purpose of reviewing his sufficiency-of-the-AFDV-indictment argument.

Because we conclude the AFDV indictment was fatally defective, we vacate defendant's AFDV conviction and remand for entry of judgment and sentence on the lower-grade offense of felony death-by-vehicle (FDV). Because the AFDV and FHR convictions were consolidated for judgment and sentence on the higher-class offense of AFDV, we remand for entry of a consolidated judgment on FDV and FHR, and one sentence on the higher-class offense of FDV. We also instruct the court to correct its clerical error by reflecting in its new consolidated judgment that defendant pled guilty to FHR.

I. Background

On 16 May 2016, defendant pled guilty to AFDV and FHR. Pursuant to his plea arrangement, the trial court dismissed charges of habitual felon, driving left of center, driving while impaired, and two counts of driving while license revoked; consolidated the AFDV and FHR convictions for judgment; and sentenced defendant as a Class D felon for the higher offense of AFDV within the presumptive range of 108 to 142 months' incarceration. Defendant appeals.

II. Jurisdiction

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The State has filed a motion to dismiss defendant’s appeal, and defendant has filed a petition for certiorari review with his appellate brief. Defendant concedes he lacks a statutory right to appeal the issues he raises. *See* N.C. Gen. Stat. §§ 15A-1444(a1), (a2) (2015) (listing inapplicable issues a guilty pleading defendant has a right to appeal). We thus allow the State’s motion and dismiss defendant’s appeal.

Yet a guilty pleading defendant still has a statutory right to petition for certiorari review, *see* N.C. Gen. Stat. § 15A-1444(e) (2015), and this Court has the jurisdiction and authority under N.C. Gen. Stat. § 7A-32(c) (2015) to allow it. *See State v. Thomsen*, ___ N.C. ___, ___, 789 S.E.2d 639, 642 (2016) (recognizing that despite any limiting language in our Appellate Rules, “[s]ection 7A-32(c) . . . creates a default rule that the Court of Appeals has jurisdiction to review a lower court judgment by writ of certiorari” absent “a more specific statute [that] restricts jurisdiction”); *see also State v. Jones*, ___ N.C. App. ___, ___, ___ S.E.2d ___, ___, slip op. at 9–11 (Jun. 6, 2017) (No. 16-1280) (concluding that “a statutory right to seek certiorari may not be limited or restricted by . . . Appellate Rule 21” and issuing a certiorari writ to review the merits of a guilty pleading defendant’s argument arising from a circumstance unlisted in N.C. Gen. Stat. § 15A-1444(a1)–(a2)).

“The decision concerning whether to issue a writ of certiorari is discretionary, and thus, the Court of Appeals may choose to grant such a writ to review some issues that are meritorious but not others for which a defendant has failed to show good or

sufficient cause.” *State v. Ross*, ___ N.C. ___, ___, 794 S.E.2d 289, 293 (reviewing this Court’s decision to allow in part the certiorari petition of a guilty pleading defendant in order to review *sua sponte* an issue related to the voluntariness of his plea, despite issue not being presented in the petition). Because we conclude that defendant has only shown good cause to issue a writ of certiorari to review his sufficiency-of-the-AFDV-indictment argument, in our discretion we allow his certiorari petition for the sole purpose of reviewing this issue.

III. Analysis

Defendant contends the trial court lacked jurisdiction to enter judgment against him for AFDV because the indictment listed both his alleged prior driving-while-impaired conviction, an element of AFDV, and the substantive offense of AFDV. *See* N.C. Gen. Stat. § 15A-928 (2015) (prohibiting previous convictions that comprise an element of a higher-grade offense from being listed on the same indictment). The State concedes the AFDV indictment is fatally defective under this Court’s decision in *State v. Brice*, ___ N.C. App. ___, ___, 786 S.E.2d 812, 815 (holding similar indictment error failed to confer jurisdiction to the trial court and required vacatur of higher-grade offense conviction, and remand for entry of judgment and sentence on lower-grade offense), *disc. rev. allowed*, ___ N.C. ___, 793 S.E.2d 686 (2016).

Accordingly, under *Brice*, we vacate defendant’s AFDV conviction and remand for entry of judgment and sentence on the lower-grade offense of FDV. Additionally,

because the convictions for AFDV, a Class D felony, and FHR, a Class F felony, were consolidated for judgment and one sentence was imposed on the higher-class offense, we remand for entry of a consolidated judgment on the FHR and FDV offenses, and one sentence on the higher Class E felony offense of FDV.¹

Both parties also note a clerical error in the judgment. Although the plea arrangement and plea hearing transcript reflect that defendant pled guilty to FHR, *see* N.C. Gen. Stat. § 20-166(a) (2015), the judgment reflects that he pled guilty to felony serious injury by vehicle, *see* N.C. Gen. Stat. § 20-141.4(a3) (2015). We instruct the court on remand to correct this clerical error in its new consolidated judgment.

III. Conclusion

Because defendant has no statutory right to appeal the issues raised, we allowed the State's motion and dismissed his appeal. In our discretion, we allowed defendant's certiorari petition for the sole purpose of reviewing his sufficiency-of-the-AFDV-indictment argument. Because that indictment was fatally defective, we vacate his AFDV conviction. Since the AFDV and FHR convictions were consolidated for judgment and one sentence imposing Class D punishment on the higher-class offense of AFDV, we remand for entry of a consolidated judgment on FDV and FHR,

¹ FDV is currently punished as a Class D felony. *See* N.C. Gen. Stat. § 20-141.4 (2015). Punishment for FDV was raised from Class E to Class D for offenses committed on or after 1 December 2012. Act of July 12, 2012, ch. 165, secs. 2, 4, 2012 N.C. Sess. Laws 781, 781–83 (raising punishment for vehicular homicide). Because defendant's offense occurred on 6 October 2012, he is subject only to Class E punishment.

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and one sentence imposing Class E punishment on the higher-class offense of FDV. We also instruct the trial court on remand to correct its clerical error by ensuring the new consolidated judgment accurately reflects that defendant pled guilty to FHR.

VACATED IN PART AND REMANDED.

Judge INMAN concurs.

Judge BERGER concurs in result only by separate opinion.

Report per Rule 30(e).

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BERGER, Judge, concurring in result only in separate opinion.

I concur in result only, and write separately to state that we are currently bound by *State v. Brice*, ___ N.C. App. ___, 786 S.E.2d 812, *disc. review allowed*, ___ N.C. ___, 793 S.E.2d 686 (2016). However, *Brice* is currently pending in the North Carolina Supreme Court, and that Court’s decision could significantly impact the outcome here. But for the decision this Court rendered in *Brice*, I would have affirmed the trial court because I do not believe failure to comply with N.C. Gen. Stat. § 15A-928 is a jurisdictional defect.

The North Carolina Supreme Court has held that an indictment will be considered sufficient

if it charges all essential elements of the offense with sufficient particularity to apprise the defendant of the specific accusations against him and (1) will enable him to prepare his defense and (2) will protect him against another prosecution for that same offense.

State v. Bowden, 272 N.C. 481, 483, 158 S.E.2d 493, 495 (1968). *See also State v. Hunt*, 357 N.C. 257, 267, 582 S.E.2d 593, 600 (2003) (“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. Justice*, 219 N.C. App. 642, 643, 723 S.E.2d 798, 800 (2012) (“An

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indictment is fatally defective when it fails to charge an essential element of the offense.” (citation omitted)).

A defendant commits the offense of aggravated felony death by vehicle if, after having one prior impaired driving conviction within seven years of the offense at issue, that individual “unintentionally causes the death of another person” while driving impaired as set forth in G.S. § 20-138.1 or G.S. § 138.2, and the impaired driving is the proximate cause of the victim’s death. N.C. Gen. Stat. § 20-141.4(a5) (2015). The indictment at issue herein alleged each essential element of N.C. Gen. Stat. § 20-141.4(a5) in stating that

Defendant “unintentionally cause[d] the death of Odell France while engaged in the offense of impaired driving under G.S. 20-138.1, in that the defendant unlawfully and willfully did drive a vehicle on Reely Cook Road, a highway, in Surry County, North Carolina, while subject to an impairing substance. The impaired driving offense was the proximate cause of the death. The defendant has a previous conviction involving impaired driving within seven years of the offense charged above, having been convicted of Driving While Impaired on November 18th, 2010, in the District Court of Surry County, North Carolina.

Defendant does not argue that the indictment is fatally defective because it failed to allege the essential elements of N.C. Gen. Stat. § 20-141.4(a5), nor that he was unable to prepare for his defense, nor that he was not protected against another prosecution for the same offense. Defendant asserts that the indictment failed to

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comply with the pleading requirements set forth in N.C. Gen. Stat. § 15A-928, which provides,

(a) When the fact that the defendant has been previously convicted of an offense raises an offense of lower grade to one of higher grade and thereby becomes an element of the latter, an indictment or information for the higher offense may not allege the previous conviction. If a reference to a previous conviction is contained in the statutory name or title of the offense, the name or title may not be used in the indictment or information, but an improvised name or title must be used which labels and distinguishes the offense without reference to a previous conviction.

(b) An indictment or information for the offense must be accompanied by a special indictment or information, filed with the principal pleading, charging that the defendant was previously convicted of a specified offense. At the prosecutor's option, the special indictment or information may be incorporated in the principal indictment as a separate count. Except as provided in subsection (c) . . . , the State may not refer to the special indictment or information during the trial nor adduce any evidence concerning the previous conviction alleged therein.

N.C. Gen. Stat. § 15A-928(a)-(b) (2015).

In addition to making certain that defendants are fully informed about the prior convictions the State will use to enhance the level of offense, this section is designed to prevent potentially prejudicial information about prior convictions from reaching the jury at an early stage of a trial. *See State v. Ford*, 71 N.C. App 452, 322 S.E.2d 431 (1984); *State v. Jernigan*, 118 N.C. App. 240, 455 S.E.2d 163 (1995). A

proper reading of the statute indicates that N.C. Gen. Stat. § 15A-928 is not designed to confer jurisdiction, but rather to protect a defendant's right to a fair trial.

The North Carolina General Assembly has provided that indictments should not be subjected to the type of hyper-technical scrutiny argued for by Defendant.

Every criminal proceeding by warrant, indictment, information, or impeachment is sufficient in form for all intents and purposes if it express[es] the charge against the defendant in a plain, intelligible, and explicit manner; and the same shall not be quashed, nor the judgment thereon stayed, by reason of any informality or refinement, if in the bill or proceeding, sufficient matter appears to enable the court to proceed to judgment.

N.C. Gen. Stat. § 15-153 (2015).

Further, the North Carolina Supreme Court has stated that

it is not the function of an indictment to bind the hands of the State with technical rules of pleading, and that we are no longer bound by the ancient strict pleading requirements of the common law[.] Instead, contemporary criminal pleading requirements have been designed to remove from our law unnecessary technicalities which tend to obstruct justice.

State v. Williams, 368 N.C. 620, 623, 781 S.E.2d 268, 270-71 (2016) (internal citations and quotation marks omitted).

Defendant's assertion that N.C. Gen. Stat. § 15A-928 implicates jurisdictional concerns would impose "unnecessary technicalities" the General Assembly and our Supreme Court have cautioned against. However, "[w]here a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of

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the same court is bound by that precedent, unless it has been overturned by a higher court.” *In the Matter of Appeal from Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989) (citations omitted). As such, I am bound by *Brice*, and concur in result only.