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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-1294

Filed: 19 June 2018

Johnston County, Nos. 16 CRS 52616, 1735

STATE OF NORTH CAROLINA

v.

JESSE JUNIOR PRATT

Appeal by defendant from judgment entered 19 April 2017 by Judge Thomas H. Lock in Johnston County Superior Court. Heard in the Court of Appeals 5 June 2018.

Attorney General Joshua H. Stein, by Assistant Attorney General J. Aldean (“Dean”) Webster III, for the State.

Patterson Harkavy LLP, by Paul E. Smith, for defendant-appellant.

CALABRIA, Judge.

Where an erroneous date did not render an indictment facially invalid, and the amendment thereof did not constitute a substantial alteration, the trial court did not err in granting the State’s motion to amend. We find no error.

I. Factual and Procedural Background

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In the early morning of 29 April 2016, Officer Brandon Smith (“Officer Smith”) of the Smithfield Police Department (“SPD”) observed a moped driving along South Brightleaf Boulevard in Smithfield, without its lights on. There were two people on the moped, and one of them was not wearing a helmet. Officer Smith pulled the moped over. Jesse Pratt (“defendant”) was in the first seat, and Amanda Covington (“Covington”) was in the second. Officer Smith called for backup, and when other officers arrived, he conducted an investigation for impaired driving. Officer Smith observed “swerving of the moped, the strong odor of alcoholic beverage, the not following commands, being belligerent, slurred speech.” Officer Smith performed two field sobriety tests, which defendant failed. He also asked defendant to perform a portable breath test, which defendant refused. Officer Smith then arrested defendant for driving while impaired.

On 6 June 2016, defendant was indicted for habitual impaired driving. This indictment listed three prior incidents of impaired driving from 2005, 2009, and 2012. Defendant was also indicted for attaining the status of an habitual felon. This indictment also listed three prior felony convictions from 1996, 2010, and 2012. On 7 April 2017, the trial court granted the State’s motion to amend the habitual felon indictment, correcting the date of one of the offenses.

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On 18 April 2017, defendant stipulated to having three prior convictions for driving while impaired for the purpose of satisfying that element of the habitual impaired driving charge.

On 19 April 2017, the jury returned a verdict finding defendant guilty of driving while impaired. Defendant pleaded guilty to attaining habitual felon status, while reserving the right to appeal the underlying conviction for habitual impaired driving. The trial court sentenced defendant to a minimum of 90 and a maximum of 120 months in the custody of the North Carolina Department of Adult Correction.

Defendant appeals.

II. Habitual Felon Indictment

In his sole argument on appeal, defendant contends that his habitual felon indictment was invalid on its face. We disagree.

A. Standard of Review

“An attack on an indictment is waived when its validity is not challenged in the trial court.” *State v. Wallace*, 351 N.C. 481, 503, 528 S.E.2d 326, 341, *cert. denied*, 531 U.S. 1018, 148 L. Ed. 2d 498 (2000). “However, where an indictment is alleged to be invalid on its face, thereby depriving the trial court of its jurisdiction, a challenge to that indictment may be made at any time, even if it was not contested in the trial court.” *Id.*

B. Analysis

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The original indictment for the offense of attaining the status of an habitual felon alleged three prior felony convictions:

I. On July 29, 1996, in 95CRS 11029, in the Superior Court of Johnston County, North Carolina, the Defendant was convicted of Breaking and Entering, a Class H felony, in violation of N.C.G.S. 14-54(A); the aforesaid offense occurred on August 17, 1995, and was committed against the State of North Carolina.

II. On April 20, 2010, in 10CR 051389, in the District Court of Harnett County, North Carolina, the Defendant was convicted of Break[ing] or Enter[ing] a Motor Vehicle, a Class I felony, in violation of N.C.G.S. 14-56; the aforesaid offense occurred on March 29, 2010, and was committed against the State of North Carolina.

III. On July 24, 2012, in 12CR 051935, in the District Court of Harnett County, North Carolina, the Defendant was convicted of Larceny of Motor Vehicle, a Class H felony, in violation of N.C.G.S. 14-72(A); the aforesaid offense occurred on February 5, 2015, and was committed against the State of North Carolina.

Subsequently, the State made a motion, which was granted by the trial court, to amend the third count in the indictment to reflect that the offense occurred on 19 March 2012, not 5 February 2015. Nonetheless, defendant contends that the indictment, prior to its amendment, was facially invalid, as it was “facially impossible” to be convicted of a crime that had not yet occurred. Defendant further argues that the trial court’s order could not amend this facial invalidity.

Our General Statutes provide that “[a]ny person who has been convicted of or pled guilty to three felony offenses . . . is declared to be an habitual felon[.]” N.C.

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Gen. Stat. § 14-7.1(a) (2017). An habitual felon indictment must allege: (1) the dates that the prior felony offenses were committed, (2) the names of the states or sovereignties against whom the offenses were committed, (3) the dates of pleas or convictions, and (4) the courts where the pleas or convictions were entered. N.C. Gen. Stat. § 14-7.3 (2017). This Court has held that “[t]he dates of offense and the corresponding dates of conviction are essential elements of the habitual felon indictment[.]” *State v. Langley*, ___ N.C. App. ___, ___, 803 S.E.2d 166, 172, *review allowed*, ___ N.C. ___, 805 S.E.2d 483 (2017).

Our General Statutes provide that “[a] bill of indictment may not be amended.” N.C. Gen. Stat. § 15A-923(e) (2017). Our Supreme Court “has interpreted that provision to mean a bill of indictment may not be amended in a manner that substantially alters the charged offense.” *State v. Silas*, 360 N.C. 377, 380, 627 S.E.2d 604, 606 (2006). This Court has, in turn, held that “amending an indictment by adding an essential element is substantially alter[ing] the indictment.” *State v. De la Sancha Cobos*, 211 N.C. App. 536, 541, 711 S.E.2d 464, 468 (2011) (quotation marks omitted). Defendant thus argues that the original indictment inaccurately stated an essential element of the offense, and any attempt to amend it was precluded by statutory mandate.

This Court has, however, found exceptions to this rule. For example, in *State v. Locklear*, 117 N.C. App. 255, 450 S.E.2d 516 (1994), the defendant was indicted for,

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inter alia, attaining habitual felon status. Prior to the presentation of evidence to the jury, the State made a motion to amend the habitual felon indictment, to change the date of one of the predicate offenses from 19 December 1992 to 2 December 1992. The defendant objected, but the trial court overruled the objection and allowed the amendment. *Id.* at 256-57, 450 S.E.2d at 517. On appeal, this Court held:

The term “amendment” in North Carolina General Statutes § 15A-923(e) has been defined as “any change in the indictment which would substantially alter the charge set forth in the indictment.” *State v. Price*, 310 N.C. 596, 598, 313 S.E.2d 556, 558 (1984). “Ordinarily, the date alleged in the indictment is neither an essential nor a substantial fact, and therefore the State may prove that the offense was actually committed on some date other than that alleged in the indictment without the necessity of a motion to change the bill.” *State v. Cameron*, 83 N.C. App. 69, 72, 349 S.E.2d 327, 329 (1986). “The failure to state accurately the date or time an offense is alleged to have occurred does not invalidate a bill of indictment nor does it justify reversal of a conviction obtained thereon.” *Id.* See also North Carolina General Statutes § 15-155 (1983). We agree with the trial court that in the case *sub judice*, it was the fact that another felony was committed, not its specific date, which was the essential question in the habitual felon indictment. Therefore, because the date alleged in the indictment is neither an essential nor a substantial fact as to the charge of habitual felon, we find the trial court properly allowed the State to change the habitual felon indictment.

Id. at 260, 450 S.E.2d at 519.

Similarly, in *State v. Taylor*, 203 N.C. App. 448, 691 S.E.2d 755 (2010), the defendant was indicted for, *inter alia*, attaining habitual felon status. One of the

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predicate felonies for this indictment was a conviction for possession of marijuana with intent to sell or distribute. The indictment alleged that the offense occurred on 8 December 1992. However, the actual judgment for the conviction revealed that the date of the offense was 18 December 1992. Citing our decision in *Locklear*, this Court once more noted that:

With respect to defendant's habitual felon indictment, this Court has held that “the date alleged in the indictment is neither an essential nor a substantial fact as to the charge of habitual felon” *State v. Locklear*, 117 N.C. App. 255, 260, 450 S.E.2d 516, 519 (1994). It is “the fact that another felony was committed, not its specific date, which [i]s the essential question in the habitual felon indictment.” *Id.*

Id. at 454, 691 S.E.2d at 761. We further held that, “[d]espite the discrepancy regarding the date defendant committed the prior PWISD marijuana offense, the habitual felon indictment in this case provided defendant with adequate notice of the prior felonies supporting the indictment in order for defendant to prepare a defense.” *Id.* at 455, 691 S.E.2d at 761. We therefore concluded that the habitual felon indictment was sufficient on its face to support the offense of which the defendant was convicted.

In the instant case, defendant nonetheless contends that the amendment was an impermissible substantial alteration. Defendant cites *State v. Winslow*, 169 N.C. App. 137, 609 S.E.2d 463, (Hunter, J. dissenting), *rev'd per curiam for reasons in dissent*, 360 N.C. 161, 623 S.E.2d 11 (2005). In *Winslow*, the defendant was arrested

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on 9 April 2000, and later indicted, for driving while impaired. He was also indicted for habitual driving while impaired, resulting from three convictions, on 1 April 1993, 22 November 1998, and 2 October 1999. After the State rested its case, the defendant moved to dismiss the charge, as the first of the three dates fell outside of the seven-year period prescribed in the habitual driving while impaired statute. In response, the State moved to amend the indictment, noting that it had mistakenly alleged the date of the offense, 1 April 1993, instead of the date of conviction, 11 August 1993, which was within the seven-year period. The trial court permitted the State to amend the indictment. *Id.* at 138-39, 609 S.E.2d at 464-65. In his dissent, which was ultimately adopted by the Supreme Court, Judge Hunter noted:

In this case, the State did not allege three prior convictions within seven years in the original habitual impaired driving indictment. Thus, under the original indictment, defendant could not be convicted of habitual impaired driving and would only be sentenced for the misdemeanor impaired driving charge. By amending the indictment at trial to include a conviction date within the seven year time period, defendant's charge was enhanced to a felony. An indictment amendment which elevates a misdemeanor charge to a felony is a substantial alteration and is not permitted under N.C. Gen. Stat. § 15A-923(e).

Id. at 143-44, 609 S.E.2d 467-68 (Hunter, J. dissenting).

We hold, however, that the instant case is distinguishable from *Winslow*. The crux of Judge Hunter's dissent in *Winslow* was that the erroneous date in the original indictment precluded the offense from falling within the statutory seven-year

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window, rendering it facially insufficient to support a conviction for habitual impaired driving. In the instant case, however, the date of defendant's offense did not preclude the offense from falling within a statutory window. The problem is not that it was facially insufficient to support a conviction for attaining habitual felon status, but rather that it bizarrely fell three years *after* the date of conviction.

On its face, the indictment alleged all of the requisite elements of the offense of attaining habitual felon status; the mere fact that one of those dates was out of place does not render conviction impossible. We hold that this case aligns with *Locklear* and *Taylor* rather than with *Winslow*. Accordingly, we hold that this minor error did not render the indictment facially invalid, that the amendment was not a substantial alteration, and that the trial court did not err in granting the State's motion to amend.

NO ERROR.

Judges MURPHY and ARROWOOD concur.

Report per Rule 30(e).