IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-945

Filed: 16 July 2019

Gaston County, No. 16 CRS 54022

STATE OF NORTH CAROLINA

v.

RICKY FRANKLIN CHARLES, Defendant.

Appeal by Defendant from judgment entered 26 April 2018 by Judge Todd Pomeroy in Gaston County Superior Court. Heard in the Court of Appeals 14 March 2019.

Attorney General Joshua H. Stein, by Assistant Attorney General William H. Harkins, Jr., for the State.

The Epstein Law Firm, PLLC, by Drew Nelson, for defendant-appellant.

MURPHY, Judge.

The record before us is silent as to whether Defendant gave proper notice of appeal from District Court to Superior Court. This silence in the record renders us unable to determine whether the Superior Court acquired jurisdiction. We dismiss Defendant's appeal.

BACKGROUND

On 9 April 2016, Officer Jasmine Moore ("Officer Moore")[1] was on patrol in Gaston County when she responded to a call and found Defendant, Ricky Franklin Charles, in his car. Defendant's car was parked with the engine running on Wayne Lane near its intersection with Pinhook Loop Road. When Officer Moore approached Defendant, he was nonresponsive and "slumped over in the driver's seat" with his head down and eyes closed. Officer Moore tapped on the driver's window for several minutes and attempted to speak with Defendant through the window, but Defendant remained nonresponsive. Defendant eventually came to and "was very disoriented[,]" and Detective Moore observed Defendant "reaching out toward his steering wheel toward his gear shifter" as if "he was attempting to get away or was going to drive away[.]" Officer Moore then "struck the window [with her baton] until it broke[,]" and Defendant was subsequently placed in handcuffs.

Defendant consented to blood testing, and the toxicology report analyzing Defendant's blood showed positive findings for "Alprazolam, Oxycodone Free, and Oxymorphone Free." Officer Moore stated that, prior to the blood draw, Defendant admitted to taking Oxycodone, Hydrocodone, Flexeril, and Xanax "regularly." Officer Moore also opined that Defendant was extremely impaired and that his impairment stemmed from his prescription medication. Defendant was subsequently charged

[1] At the time of the offense, Officer Moore was a patrol officer with Gaston County and has since become a Detective.

with driving while impaired, and the Gaston County District Court found him guilty of that offense.

A trial was subsequently held in Gaston County Superior Court, and the jury convicted Defendant of driving while impaired. Defendant now appeals to this Court.

ANALYSIS

The issue of subject matter jurisdiction is one that "may be raised at any time, even for the first time on appeal or by a court *sua sponte*." *State v. Webber*, 190 N.C. App. 649, 650, 660 S.E.2d 621, 622 (2008). "The existence of subject matter jurisdiction is a matter of law and cannot be conferred upon a court by consent." *State v. Williams*, 368 N.C. 620, 628, 781 S.E.2d 268, 274 (2016) (citation and internal quotation marks omitted). We review questions of subject matter jurisdiction de novo. *State v. Gorman*, 221 N.C. App. 330, 333, 727 S.E.2d 731, 733 (2012).

Our Supreme Court has provided the framework to determine the existence of our jurisdiction:

> 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. When the record is silent and the appellate court is unable to determine whether the court below had jurisdiction, the appeal should be dismissed.

State v. Felmet, 302 N.C. 173, 176, 273 S.E.2d 708, 711 (1981) (citations omitted). "The [S]uperior [C]ourt has no jurisdiction to try a defendant on a warrant for a misdemeanor charge unless he is first tried, convicted and sentenced in district court

and then appeals that judgment for a trial *de novo* in superior court." *Id.* at 175, 273 S.E.2d at 710 (emphasis added). A defendant appealing a District Court sentence to Superior Court is required to give oral notice of appeal or written notice of appeal within 10 days of entry of the judgment:

> Any defendant convicted in district court before the judge may appeal to the superior court for trial de novo. *Notice of appeal may be given orally in open court, or to the clerk in writing within 10 days of entry of judgment.* Upon expiration of the 10-day period in which an appeal may be entered, if an appeal has been entered and not withdrawn, the clerk shall transfer the case to the district or superior court docket.

N.C.G.S. § 7A-290 (2017) (emphasis added). Without proper notice of appeal, the Superior Court does not acquire jurisdiction.

The District Court judgment on the AOC-CR-500 Form was complete with regard to the judgment rendered, but did not have a check in the box containing the statement, "The defendant in open court, gives notice of appeal to the Superior Court." Nor does the record contain a separate written notice of appeal. Without proper notice of appeal as described in N.C.G.S. § 7A-290, the Superior Court did not acquire jurisdiction over this matter. The silence as to the notice of appeal therefore makes us unable to determine whether the Superior Court had jurisdiction. *See Felmet*, 302 N.C. at 176, 273 S.E.2d at 711. We dismiss Defendant's appeal.

CONCLUSION

Based on the record before us, we are unable to determine whether the Superior Court had jurisdiction over this matter. In accordance with *Felmet*, we dismiss Defendant's appeal.

DISMISSED.

Judge BERGER concurs.

Chief Judge McGEE dissents with separate opinion.

Report per Rule 30(e).

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McGEE, Chief Judge, *dissenting*.

I respectfully dissent from the majority opinion. The record is silent as to whether Defendant properly gave notice of appeal and thus jurisdiction of the superior court is not established in the record. However, I would exercise our discretionary authority under N.C. Gen. Stat. § 7A-32(c) (2017) to treat Defendant's appeal as a petition for writ of certiorari and reach the merits. On the merits, I would hold the trial court did not err in denying Defendant's motion to dismiss because there was sufficient evidence he committed the crime charged. Exercising discretionary jurisdiction "avoids undue emphasis on procedural niceties." *State v. Felmet*, 302 N.C. 173, 176, 273 S.E.2d 708, 711 (1981).

I. Analysis

The record before us does not include a notice of appeal from the district court to the superior court. The record shows only an order from the district court, which does not include a notice of appeal, and that Defendant was tried and convicted in the Superior Court of Gaston County, but not that the matter was properly before the superior court. The majority cites our Supreme Court's opinion in *Felmet* for the following proposition:

> 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. When the record is silent and the

> appellate court is unable to determine whether the court below had jurisdiction, the appeal should be dismissed.

Felmet, 302 N.C. at 176, 273 S.E.2d at 711 (internal citations omitted). In *Felmet*, our Supreme Court first noted this Court had denied the defendant's motion to amend the record to add the judgment from the district court and the notice of appeal; however, our Supreme Court then allowed the amendment in order to decide the substantive issue, holding that amending the record "is the better reasoned approach and avoids undue emphasis on procedural niceties." *Id.* Therefore, this Court may order the record to be amended under North Carolina Rule of Appellate Procedure 9(b)(5) on its own motion. N.C.R. App. P. 9(b)(5). *See State v. Phillips*, 152 N.C. App. 679, 682, 568 S.E.2d 300, 302 (2002) (noting this Court ordered the record amended to include the district court judgment and notice of appeal).

Alternatively, this Court may "exercise our discretion to treat defendant's appeal as a petition for [writ of]certiorari" under N.C. Gen. Stat. § 7A-32(c). *State v. Phillips*, 149 N.C. App. 310, 314, 560 S.E.2d 852, 855, *appeal dismissed*, 355 N.C. 499, 564 S.E.2d 230 (2002) (citations omitted); *see State v. McNeil*, ___ N.C. App. ___, ___, 822 S.E.2d 317, 321 (2018); *State v. Hamrick*, 110 N.C. App. 60, 63, 428 S.E.2d 830, 832 (1993). N.C.G.S. § 7A-32(c) provides that this Court "has jurisdiction . . . to issue the prerogative writs, including . . . certiorari . . . in aid of its own jurisdiction[.]"

In *Phillips*, the defendant "failed to include in the record on appeal a copy of the district court judgment establishing the derivative jurisdiction of the superior

court." *Phillips*, 149 N.C. App. at 313, 560 S.E.2d at 855. This Court nevertheless exercised its discretion under N.C.G.S. § 7A-32(c) to treat the appeal as a petition for writ of certiorari. *Phillips*, 149 N.C. App. at 314, 560 S.E.2d at 855. Similarly, in *McNeil*, this Court treated the defendant's appeal as a petition for writ of certiorari and granted it where the judgment of the district court was not included in the record, but the existence of a district court proceeding was alluded to in the record and the State had not disputed that the superior court had jurisdiction. *McNeil*, ___ N.C. App. at ___, 822 S.E.2d at 321. Finally, in *Hamrick*, the defendant failed to follow the statutory procedure for providing notice of appeal to this Court, but we allowed the petition because of the importance of the issues raised by the appeal. *Hamrick*, 110 N.C. App. at 63, 428 S.E.2d at 832.

In the present case, the jurisdiction of the superior court cannot be affirmatively established from the record because the district court judgment included in the record does not indicate Defendant gave oral notice of appeal to the superior court at the time judgment was entered, nor was there a separate written notice of appeal included. However, as in *McNeil*, the State does not dispute the jurisdiction of the superior court. Also, as in *Hamrick*, the substantive issue raised in Defendant's appeal merits consideration by this Court. Therefore, I would exercise our discretion to treat Defendant's appeal as a petition for writ of certiorari under N.C.G.S. § 7A-32(c) and would grant certiorari. This "is the better reasoned approach

and avoids undue emphasis on procedural niceties." *Felmet*, 302 N.C. at 176, 273 S.E.2d at 711. Therefore, I dissent from the majority opinion, which dismisses the appeal, and instead would reach the merits.

On appeal, Defendant contends the trial court erred by denying his motion to dismiss the driving while impaired charge because "the State failed to offer substantial evidence that his car was located in a public vehicular area." After considering the substantive issue, I would hold the trial court did not err in denying Defendant's motion.

Upon a defendant's motion to dismiss for insufficient evidence, the question for the court is "whether there is substantial evidence of each essential element of the crime and that the defendant is the perpetrator." *State v. Chekanow*, 370 N.C. 488, 492, 809 S.E.2d 546, 549 (2018) (citation omitted). "Substantial evidence is that amount of relevant evidence necessary to persuade a rational juror to accept a conclusion." *Id.*

> The trial court should consider the evidence in the light most favorable to the State, and "the State is entitled to all reasonable inferences which may be drawn from the evidence. Any contradictions or discrepancies arising from the evidence are properly left for the jury to resolve and do not warrant dismissal."

State v. McDaniel, ___ N.C. App. ___, ___, 817 S.E.2d 6, 11 (2018) (internal citation omitted). "This Court reviews the trial court's denial of a motion to dismiss *de novo*." *Id.* at ___, 817 S.E.2d at 11 (internal citation and quotation marks omitted).

N.C. Gen. Stat. § 20-138.1(a) prohibits driving while impaired "upon any highway, any street, or any public vehicular area within this State[.]" N.C.G.S. § 20-138.1(a) (2017). The General Assembly defines a public vehicular area as, *inter alia*, the following:

> Any area within the State of North Carolina that meets one or more of the following requirements:
>
> a. *The area is used by the public for vehicular traffic at any time*, including by way of illustration and not limitation any drive, driveway, road, roadway, street, alley, or parking lot upon the grounds and premises of any of the following:
>
> 1. Any public or private hospital, college, university, school, orphanage, church, or any of the institutions, parks or other facilities maintained and supported by the State of North Carolina or any of its subdivisions.
> 2. Any service station, drive-in theater, supermarket, store, restaurant, or office building, or any other business, residential, or municipal establishment providing parking space whether the business or establishment is open or closed.
> 3. Any property owned by the United States and subject to the jurisdiction of the State of North Carolina. . . .
>
> b. . . . .
>
> c. *The area is a road used by vehicular traffic within or leading to a gated or non-gated subdivision or community, whether or not the subdivision or community roads have been offered for dedication to the public.*

N.C. Gen. Stat. § 20-4.01(32) (2017) (emphasis added).

In the present case, Defendant contends only that the State failed to provide substantial evidence to support a finding that Wayne Lane, where Defendant was found parked, was a public vehicular area (PVA) under N.C.G.S. § 20-4.01(32). The State argues Wayne Lane satisfies the requirements of subsections (a) and (c) of the statute defining PVA. I consider each subsection in turn.

First, subsection (a) includes an "area []used by the public for vehicular traffic at any time" in the definition of PVA, listing several examples to illustrate. N.C.G.S. § 20-4.01(32)(a). In *State v. Ricks*, this Court construed the provision as follows:

> It is evident from the examples listed that the definition [of] a [PVA] set out in N.C. Gen. Stat. § 20-4.01(32)(a) contemplates areas generally open to and used by the public for vehicular traffic as a matter of right or areas used for vehicular traffic that are associated with places generally open to and used by the public, such as driveways and parking lots to institutions and businesses open to the public. Furthermore, N.C. Gen. Stat. § 20-4.01(32)(d) provides that "private property used by vehicular traffic and designated by the private property owner as a [PVA]" is a [PVA]. If the State's assertion that any area used by the public for vehicular traffic at any time is a [PVA] is correct, the remainder of the definition of [PVA] in N.C. Gen. Stat. § 20-4.01(32), including subsection (d), is superfluous.

Ricks, 237 N.C. App. 359, 365-66, 764 S.E.2d 692, 696 (2014). In *Ricks*, this Court held that the trial court erred in denying the defendant's motion to dismiss where the area was a dirt path on a vacant lot used as a shortcut for cyclists and pedestrians because "there must be some evidence demonstrating the property is similar in

nature to those examples provided by the General Assembly in the statute[,]" and the lot at issue was dissimilar to those examples. *Id.* at 366, 764 S.E.2d at 696-97.

In the present case, in response to Defendant's argument that where his car was found parked was not a PVA, the State contends: "Wayne Lane qualifies as 'a road used by the public for vehicular traffic' pursuant to N.C.G.S. § 20-[4.01](32)(a)" because it "provides public vehicular access" to several mobile homes, including Defendant's. However, providing vehicular access to private homes for residents and their guests is insufficient to demonstrate the property is similar to the examples provided in the statute by the General Assembly, all of which contemplate "areas used for vehicular traffic that are associated with places generally open to and used by the public, such as driveways and parking lots to institutions and businesses open to the public." *Ricks*, 237 N.C. App. at 365-66, 764 S.E.2d at 696. Therefore, I would hold Wayne Lane does not qualify as a PVA under subsection (a).

Next, the State contends Wayne Lane is a PVA under subsection (c) of N.C.G.S. § 20-4.01(32), while Defendant argues it is not. Subsection (c) provides that an area is a PVA within the meaning of the statute where "[it] is a road used by vehicular traffic within or leading to a gated or non-gated subdivision or community, whether or not the subdivision or community roads have been offered for dedication to the public." N.C.G.S. § 20-4.01(32)(c). There is no dispute that Wayne Lane is available for use by residents, guests, and members of the public. Rather, Defendant contends

Wayne Lane is not within or leading to a subdivision, citing this Court's decisions in *State v. Turner* and *State v. Cornett* to support his position. I now consider these cases.

In *Turner*, the defendant argued the trial court erred in denying his motion to dismiss because the mobile home park in which the street on which he operated a vehicle was private property and the street had never been dedicated to public use. *Turner*, 117 N.C. App. 457, 458, 451 S.E.2d 19, 20 (1994). In *Turner*, this Court relied on Black's Law Dictionary to define "subdivision" as "Division into smaller parts of the same thing or subject-matter. The division of a lot, tract or parcel of land into two or more lots, tracts, parcels or other divisions of land for sale or development." *Id.* at 459, 451 S.E.2d at 20 (quoting *Subdivision*, Black's Law Dictionary 1277 (5th ed. 1979)). This Court then held the mobile home park was a subdivision under that definition because it was "owned by one individual, who ha[d] divided the property into lots for lease." *Turner*, 117 N.C. App. at 459, 451 S.E.2d at 20. The Court also noted the streets were "not marked by signs indicating the roads [we]re private or by signs prohibiting trespassing," and the streets were "available for use by residents and their guests or other visitors." *Id.*

In *Cornett*, this Court applied the definition of subdivision adopted in *Turner* to hold that the road at issue was within or leading to a subdivision where there were six mobile homes along the road "with five or six different owners, each with a

driveway leading off of [the road]." *Cornett*, 177 N.C. App. 452, 455, 629 S.E.2d 857, 858 (2006). While noting that "a PVA must only be opened to vehicular traffic, but not necessarily 'offered for dedication to the public[,]'" the Court also held the road at issue "was opened to vehicular traffic within the meaning of the statute[.]" *Id.* at 455, 629 S.E.2d at 858 (quoting N.C.G.S. § 20-4.01(32)(c)).

In the present case, Defendant argues Wayne Lane is not within or leading to a "subdivision" because only two mobile homes are located there, whereas there were more mobile homes in *Turner* and *Cornett*; the mobile homes in *Turner* and *Cornett* were "organized in a manner that demonstrated a thoughtful division of the property." In *Cornett*, each mobile home was connected to the main road. The State argues Wayne Lane is within or leading to a subdivision because it provides vehicular access to the two mobile homes directly off of it and to approximately six additional plots with mobile homes off of Hyatt Drive.

Taking the facts in the light most favorable to the State, as this Court is required to do, *McDaniel*, ___ N.C. App. at ___, 817 S.E.2d at 11, there is substantial evidence that Wayne Lane is within or leading to a subdivision within the meaning of N.C.G.S. § 20-4.01(32)(c) as interpreted in *Turner* and *Cornett*. The image introduced into evidence shows there are two mobile homes on Wayne Lane and approximately six mobile homes on Hyatt Drive, which forks off of Wayne Lane. At trial, Kimberly Smith, the local resident who discovered Defendant in the car,

testified that Defendant's vehicle was stopped on a "gravel drive road" leading into a "trailer park." Furthermore, the record shows Defendant lived in one of the mobile homes on Wayne Lane, but not the other. Thus, the factfinder could infer these two properties had been divided, and that either the two mobile homes on Wayne Lane or the group of mobile homes on Hyatt Drive were a subdivision.

Defendant's attempts to impose additional requirements for a group of properties to be considered a subdivision are unavailing. Defendant's argument that a subdivision should be composed of more than two properties is not supported by case law, because the definition of subdivision adopted by this Court in *Turner* specifically includes "[t]he division of a lot . . . into *two* [] lots[.]" *Turner*, 117 N.C. App. at 459, 451 S.E.2d at 20 (citation omitted) (emphasis added). There is sufficient evidence to permit an inference that, based on their proximity and the different residents, the two properties with mobile homes on Wayne Lane were divided, and were therefore a subdivision under the definition applied in *Turner* and *Cornett*. Moreover, neither *Turner* nor *Cornett* requires an area to have a "thoughtful" division of the property, such as a name or paved roads, to be considered a subdivision. For example, although the mobile home park in *Turner* had a name, there is no mention of a name for the group of mobile homes in *Cornett*. Nor are any such requirements present in the definition of subdivision applied in both cases by this Court.

Even assuming, *arguendo*, that the two mobile homes on Wayne Lane do not comprise a subdivision by themselves, the record shows that Wayne Lane provides vehicular access to another group of mobile homes on Hyatt Drive, which forks off of Wayne Lane. The record shows there are approximately six separate plots with mobile homes along this road, which is directly analogous to the six mobile homes on Timber Lane in *Cornett*. *See Cornett*, 177 N.C. App. at 455, 629 S.E.2d at 858. While Wayne Lane is arguably "within" this subdivision, N.C.G.S. § 20-4.01(32)(c) also provides that a road "leading to" a subdivision is a PVA, and Wayne Lane clearly leads to the mobile homes along Hyatt Drive. I would hold there is substantial evidence that Wayne Lane is a road within or leading to a subdivision under the statute as interpreted by this Court's case law, and thus is a PVA. Therefore, I would hold there is substantial evidence of every element of the charged offense and Defendant's motion to dismiss was properly denied.

II. Conclusion

Rather than dismissing the case, I would exercise our discretion to treat Defendant's appeal as a petition for writ of certiorari. On the merits of Defendant's appeal of the superior court's denial of his motion to dismiss, I would hold there is substantial evidence in the record of every element of the charge of driving while impaired. Since the record shows there are two mobile homes on Wayne Lane and a group of approximately six on Hyatt Drive, there is substantial evidence the area

surrounding Wayne Lane was a subdivision and, therefore, Wayne Lane was a PVA under our case law. For the reasons stated above, I respectfully dissent.