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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-973

Filed: 20 August 2019

Pitt County, Nos. 15 CRS 58365, 712403

STATE OF NORTH CAROLINA,

v.

NAZARIO GARCIA HERNANDEZ, Defendant.

Appeal by the State from order entered 11 December 2017 by Judge Jeffrey B. Foster in Pitt County Superior Court. Heard in the Court of Appeals 6 June 2019.

Attorney General Joshua H. Stein, by Assistant Attorney General Joseph L. Hyde, for the State.

The Robinson Law Firm, P.A., by Leslie S. Robinson, for Defendant-Appellee.

COLLINS, Judge.

The State appeals from an order dismissing its prosecution of Defendant Nazario Garcia Hernandez for lack of subject matter jurisdiction. We affirm in part and reverse and remand in part.

I. Background

Resolution of this appeal is controlled by this Court's decision in *State v. Baker*, 822 S.E.2d 902 (N.C. Ct. App. 2018). In *Baker*, the prosecutor submitted a

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presentment and an indictment for two misdemeanors to a grand jury simultaneously, and the grand jury returned the same simultaneously. *Id.* at 903-04. Upon the State’s appeal from the superior court’s order granting the defendant’s motion to dismiss challenging the procedure by which the presentment and indictment were submitted and returned, the *Baker* Court held that the procedure: (1) contravened N.C. Gen. Stat. § 15A-641(c), which requires prosecutors “to investigate the factual background of every presentment returned in his district and to submit bills of indictment to the grand jury dealing with the subject matter of any presentments when it is appropriate to do so[;]” (2) violated the defendant’s rights under Article I, section 22 of the North Carolina Constitution, which sets forth that “[e]xcept in misdemeanor cases initiated in the District Court Division, no person shall be put to answer any criminal charge but by indictment, presentment, or impeachment[;]” and (3) rendered both the presentment and indictment invalid as a matter of law. *Id.* at 906-07. Accordingly, the Court affirmed the superior court’s ruling that it lacked subject matter jurisdiction over the case.¹ *Id.* at 908. The *Baker* Court also held, however, that the superior court erred by not transferring the case to the Pitt County District Court as required by N.C. Gen. Stat. § 7A-271(c), and

¹ “The district court is vested with exclusive jurisdiction for most misdemeanor cases. . . . The superior court attains original jurisdiction for misdemeanor actions only if, among other independent reasons, ‘the charge is initiated by presentment.’” *Baker*, 822 S.E.2d at 904 (citing to N.C. Gen. Stat. §§ 7A-271(a)(2) and -272(a) (2017)).

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remanded the case to the superior court with instructions to transfer the case to the district court. *Id.* at 907-08.

The State's appeal in this case arises from a misdemeanor prosecution involving the same prosecutor and defense attorney, the same presentment and indictment procedure, and the same procedural posture at issue in *Baker*. But because this appeal involves a different defendant and different facts, we briefly recite the factual and procedural history below.

Defendant was cited and charged with driving while impaired, possession of an open container after consuming alcohol, and careless and reckless driving by uniform citation on 29 December 2015 in Pitt County. Defendant's initial appearance in Pitt County District Court was set for 5 January 2016.² On 27 February 2017, in Pitt County Superior Court, the prosecutor submitted a presentment and indictment on the charges to the Pitt County grand jury, and the grand jury returned the same. The parties stipulated that the presentation, submission, and return of the presentment and indictment against Defendant "proceeded in an identical fashion" as the procedure followed in *Baker*.

On 3 July 2017, Defendant filed a motion to dismiss the charge, mirroring the argument in *Baker* that the presentment and indictment were invalid and did not convey subject matter jurisdiction over the action to the superior court. Defendant's

² The record does not contain any evidence regarding the district court action, including what the status of the district court action was as of the date the State noticed its appeal.

motion came on for hearing on 11 December 2017, and the superior court granted the motion. The superior court entered its written order dismissing the action on 11 December 2017, and the State timely appealed.

II. Discussion

As noted above, the legal issue before us concerning the issuance of the presentment and indictment in this case is identical to that resolved by our decision in *Baker*. Consistent with that opinion, we affirm the superior court's determinations that it lacked subject matter jurisdiction and that the prosecution violated Sections 7A-271 and 15A-641 of our General Statutes and Article I, section 22 of the North Carolina Constitution, without addressing the prejudice of the constitutional violation.³

As in *Baker*, the State contends that the proper remedy in this case is not dismissal, but rather remand to the district court for proceedings commenced by Defendant's initial misdemeanor citations. Because the State at no point has indicated that it has dismissed or discontinued proceedings in the district court and the superior court never obtained subject matter jurisdiction over the prosecution,⁴

³ Because we affirm the trial court's determination that the prosecution violated Article I, section 22 of the North Carolina Constitution, we need not analyze the trial court's conclusions that Defendant's rights under Article I, sections 19 and 23 of the North Carolina Constitution were also violated.

⁴ Defendant argues that the State's actions amount to a *nolle prosequi* insofar as they constitute the functional equivalent of a dismissal. *See State v. Hickey*, 317 N.C. 457, 464 n.3, 346

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we reverse the dismissal of the case and remand for entry of an order transferring the case to the district court. *See Baker*, 822 S.E.2d at 907-08.

AFFIRMED IN PART AND REVERSED AND REMANDED IN PART.

Judges ARROWOOD and INMAN concur.

Report per Rule 30(e).

S.E.2d 646, 651 n.3 (1986) (“A *nolle prosequi* was formerly used by a solicitor [now district attorney] to announce that he did not wish to proceed further with a particular prosecution and would not at that time prosecute the defendant on that charge.” (brackets in original) (citation omitted)). Defendant cites two published cases for this proposition. The first, *State v. Courtney*, 25 N.C. App. 351, 213 S.E.2d 403 (1975), sets forth the definition of *nolle prosequi* in the context of purported violations of the defendant’s right to a speedy trial where the State expressly entered a *nolle prosequi* on the record; it is therefore inapposite here. The second case, *State v. Cole*, 822 S.E.2d 456 (N.C. Ct. App. 2018), was held inapposite in *Baker* for reasons that are no less applicable here. *See Baker*, 822 S.E.2d at 908 (“While *Cole* holds that the State implicitly abandons its prosecution in district court when it proceeds to trial in superior court and acknowledges its intent on the record not to proceed in district court, it does not apply here where the superior court failed to even exercise jurisdiction.”). Defendant’s argument is therefore unavailing.