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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-975

Filed: 2 July 2019

Pitt County, Nos. 15 CRS 3582, 58947

STATE OF NORTH CAROLINA

v.

RAYMOND WARREN FOSTER, JR.

Appeal by 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.

ARROWOOD, Judge.

The State appeals from the superior court's order dismissing its prosecution of Raymond Warren Foster, Jr., ("defendant") for lack of subject matter jurisdiction. After careful review of the record and applicable law, we affirm the superior court's ruling that the State improperly circumvented district court jurisdiction by simultaneously obtaining a presentment and indictment from a grand jury, but we

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hold that the charges are not subject to dismissal. Therefore, we affirm in part, reverse in part, and remand.

I. Background

Resolution of this appeal is controlled by this Court's decision in *State v. Baker*, ___ N.C. App. ___, 822 S.E.2d 902 (2018). The State's appeal arises from an impaired driving prosecution involving the same prosecutor and defense attorney and the same procedural posture as in *Baker*. Because this appeal involves different facts underlying the impaired driving prosecution, we briefly recite the factual and procedural history below.

Defendant was arrested and charged with impaired driving and misdemeanor hit and run by uniform citation on 3 December 2015 in Pitt County. A grand jury returned a presentment and indictment on those charges in superior court on 13 March 2017. The parties stipulate that the submission and return of the presentment and indictment against defendant "proceeded in an identical fashion" as the procedure performed in *Baker*. On 3 July 2017, defendant filed a motion to dismiss, 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. Following a hearing held 11 December 2017, the superior court entered an order granting the motion and dismissing the action. The State timely appealed.

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II. Discussion

As noted *supra*, the legal issue before us 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 that constitutional violation. Also for the reasons set forth in *Baker*, we reverse the court's determination that defendant's constitutional rights under Article I, Sections 19 and 23 of the North Carolina Constitution were violated. Finally, because, like in *Baker*, the State at no point indicated that it had dismissed or discontinued the district court action and the superior court never obtained subject matter jurisdiction over the prosecution,¹ we reverse the dismissal of the case and remand for entry of an order transferring the case back to district court.

AFFIRMED IN PART; REVERSED IN PART; REMANDED FOR FURTHER PROCEEDINGS.

¹ 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 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." (citations omitted) (alteration in original)). Defendant cites two published cases for this proposition. The first, *State v. Courtney*, 25 N.C. App. 351, 213 S.E.2d 403, *cert. denied*, 288 N.C. 245, 217 S.E.2d 668 (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 as to the substantive law. The second case, *State v. Cole*, ___ N.C. App. ___, 822 S.E.2d 456 (2018), was held inapposite in *Baker* for reasons that are no less applicable here.

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Judges INMAN and COLLINS concur.

Report per Rule 30(e).