IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA23-512

Filed 6 February 2024

Forsyth County, Nos. 21 CRS 51796, 21 CRS 51962-68, 21 CRS 54948, 21 CRS 54968, 21 CRS 55237, 21 CRS 55368, 21 CRS 55888, 21 CRS 805

STATE OF NORTH CAROLINA

v.

TIMOTHY WILLIAM MERTES

Appeal by Defendant from judgments entered 29 October 2021 by Judge Daniel A. Kuehnert in Forsyth County Superior Court. Heard in the Court of Appeals 14 November 2023.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Kimberley A. D'Arruda, for the State.

Linda B. Weisel, for the Defendant.

WOOD, Judge.

Defendant filed documents seeking appellate review of judgments entered following his guilty plea on 29 October 2021. Defendant failed to comply with N.C. R. App. P. 4. We decline to grant his petition for *writ of certiorari*. Accordingly, we grant the State's motion to dismiss Defendant's appeal.

I. Factual and Procedural History

In July 2021, a grand jury indicted Defendant on a total of twenty charges and, additionally, for obtaining habitual felon status. The felony indictments were: two counts of stolen goods; possession of drugs with intent to sell; maintaining a dwelling house; four counts of possession of stolen goods; four counts of larceny; possession of heroin; and breaking or entering with intent to commit a larceny. The misdemeanor indictments were: three counts of trespass; simple possession of a Schedule IV controlled substance (clonazepam); possession of drug paraphernalia; and larceny. The dates of offense ranged from 23 December 2020 to 30 May 2021.

On 29 October 2021, the trial court held a plea hearing. That same day, Defendant entered a written transcript of plea in which he pleaded guilty to each of the charged offenses. In the transcript of plea, Defendant affirmed that there were "facts to support [his] plea" and that "[t]here is a factual basis for the entry of the plea." Defendant also affirmed his acknowledgment that the charges would "be consolidated into three Class D felonies for sentencing" and that he was "a prior record level IV for sentencing." The transcript of plea confirmed Defendant understood that the mandatory minimum term of imprisonment was 58 months, and the maximum term of imprisonment was 220 years, 2 months. Defendant further affirmed that "following a plea of guilty there are limitations on [his] right to appeal." The trial court held a plea colloquy with Defendant during which it had before it the plea "transcript[,] . . . [sentencing] worksheet[, and] . . . three restitution worksheets."

Defendant orally stipulated that he "would plead to . . . three Class D felonies for sentencing and that [he was] a Record Level IV, and all sentencing is in the court's discretion." Defendant also orally stipulated to a factual basis for the charges against him, after which the State then orally stated to the trial court the factual basis for the charges. The trial court found there was a factual basis for the entry of Defendant's guilty plea.

Defendant's counsel expressed his concern to the trial court that running all sentences consecutively might be disproportionate to the crimes committed due to the mandatory minimum sentence for each:

> Your Honor, it's a wide range the Court has. By my count, it could be anywhere from 8 to 24 years.
>
> . . .
>
> I would sort of characterize this months-long behavior as sort of a spree. There were certainly a lot of crimes committed, but they were all property crimes, relatively low-level drug offenses. Because of the habitual felon law, no matter -- even the minimum sentence is a matter of years. I would suggest that one sentence from the presumptive range, running those concurrent would be appropriate. If you're getting up into the 24 years, that would be a sentence on par for what someone gets for multiple armed robberies or . . . [f]irst degree sex offense, manslaughter, second degree murder. That hardly seems appropriate. It seems disproportionate when we're really talking about property as opposed to human life.
>
> So I'd ask you to -- I want to say consolidate, but it's not consolidate. I ask that you run them concurrently.

The trial court indicated its intention to sentence Defendant to "probably something in the neighborhood of two active sentences and then the maximum probation I can give you." The trial court thought Defendant would be "facing roughly 15, 16 years. And then you're on probation for about five." The trial court's "concern" was getting Defendant on a "trajectory where [he is] not doing this anymore." However, the State informed the trial court that Defendant was "in an active only block" for sentencing. The trial court responded, "Oh, he's in an active only block. . . . Okay. Well, that's a problem, in my opinion, because I think that a lengthy probation is helpful for everybody at the tail end of the sentence, so." The trial court, realizing it was required to impose active sentences for all three Class D felony convictions, stated to Defendant: "I can't really do under the circumstances what I want to do, but I hope this works out in a way that when you're out of prison, things go better for you and you won't be here anymore and your life will be better and you'll be in a different place."

Prior to sentencing, Defendant once more stipulated to his sentencing status as Record Level IV with 11 points. The trial court entered three judgments sentencing Defendant to three consecutive terms of imprisonment, all within the presumptive ranges: (1) a sentence of 78-106 months; (2) a consecutive sentence of 78-106 months; and (3) a consecutive sentence of 58-82 months. The trial court further ordered Defendant to pay restitution in the total amount of $48,885.00 for stolen property, for a total of $51,165.50 after costs and fees.

On 5 March 2022, Defendant wrote a *pro se* letter to the Forsyth County Superior Court Clerk's Office, stating he sent his "original appeal request" from prison on 2 November 2021 and that he had "not heard anything and have sent two other notices since then." On 17 October 2022, Defendant sent another letter to the Forsyth County Superior Court Clerk's Office stating he had not received a reply and "here is a copy of my request for MAR" (motion for appropriate relief). To this letter he attached a motion for preparation of stenographic transcript, which was filed on 27 October 2022. On 31 October 2022, superior court Judge L. Todd Burke entered appellate entries noticing Defendant's appeal, finding Defendant indigent, and appointing the Appellate Defender to represent him.

II. Analysis

Defendant argues: (1) the indictments for possession of stolen goods are facially invalid; (2) the restitution order was not supported by sufficient evidence; (3) there was an insufficient factual basis for Defendant's guilty plea; and (4) the trial court failed to inform or misinformed Defendant of the consequences of his guilty plea.

N.C. Gen. Stat. § 15A-1444 provides that a "defendant is not entitled to appellate review as a matter of right when he has entered a plea of guilty . . . to a criminal charge in the superior court, but he may petition the appellate division for review by writ of certiorari." N.C. Gen. Stat. § 15A-1444(e). Rule 21 of the Rules of Appellate Procedure states in pertinent part, "[t]he writ of certiorari may be issued in appropriate circumstances by either appellate court to permit review of the

judgments and orders of trial tribunals when the right to prosecute an appeal has been lost by failure to take timely action." N.C. R. App. P. 21(a)(1).

N.C. R. App. P. 4(a)(1) and (2) require a defendant to give oral notice of appeal at trial or to file an appeal with the clerk of superior court and serve copies of it upon all adverse parties within fourteen days after entry of the judgment. N.C. R. App. 4(b) requires a defendant to "designate the judgment or order from which appeal is taken and the court to which appeal is taken." "Our Supreme Court has said that a jurisdictional default, such as a failure to comply with Rule 4, precludes the appellate court from acting in any manner other than to dismiss the appeal." *State v. Hammonds*, 218 N.C. App. 158, 162, 720 S.E.2d 820, 823 (2012) (quotation marks omitted). "A writ of certiorari is not intended as a substitute for a notice of appeal." *State v. Bishop*, 255 N.C. App. 767, 769, 805 S.E.2d 367, 369 (2017).

Here, the Record reflects that Defendant did not comply with N.C. R. App. P. 4. The trial court entered judgments on 29 October 2021. Defendant wrote two *pro se* letters apparently attempting to give notice of appeal; however, the first letter was dated 5 March 2022 and filed 11 March 2022, more than four months after the judgments were entered. The second letter was dated 17 October 2022, and the motion for preparation of stenographic transcript which was attached to it was filed 27 October 2022. Defendant did not give oral notice of appeal nor file written notice of appeal within fourteen days after entry of the trial court's judgments. Therefore, Defendant failed to comply with N.C. R. App. P. 4(a)(1) and (2). It is possible

Defendant failed to designate a court to which appeal is taken in violation of N.C. R. App. 4(b) because Defendant intended to file an MAR. The record is unclear. We note that although both of Defendant's letters are titled "Letters Requesting Appeal" and the trial court treated the letters as constituting requests for appeal, Defendant specifically states in his second letter, "Here is a copy of my request for MAR." We agree that an MAR would be the appropriate manner by which to seek relief in this case.

Defendant's appeal is untimely and fails to comply with the Rules of Appellate Procedure. Accordingly, Defendant's petition for *writ of certiorari* is denied. The State's motion to dismiss Defendant's appeal is granted. Appeal dismissed.

DISMISSED.

Judge ARROWOOD concurs.

Judge Thompson dissents by separate opinion.

THOMPSON, Judge, dissenting in part.

As discussed by the majority, defendant filed a petition for writ of certiorari, acknowledging deficiencies in his appeal and seeking review of the issues raised in his appellate brief by that means. I find merit in defendant's primary indictment argument and, accordingly, I would allow his petition for writ of certiorari as to that issue, vacate the convictions entered upon defendant's pleas of guilty to six counts of the offense of possession of stolen property, and therefore, vacate all judgments entered upon his plea agreement and remand this case for a new disposition on defendant's remaining convictions. Accordingly, while I agree with my colleagues that the State's motion to dismiss defendant's appeal should be allowed, I respectfully dissent from their decision to deny defendant's petition for writ of certiorari.

It is within this Court's discretion to issue a writ of certiorari to review a judgment or order where the defendant had a right to appeal but lost that right through failure to take timely action. N.C. R. App. P. 21(a)(1). Writs of certiorari are "extraordinary remedial writ[s]," to be issued in the Court's discretion only upon a defendant showing sufficient cause to support the petition. *State v. Diaz-Tomas*, 382 N.C. 640, 651, 888 S.E.2d 368, 377 (2022). As this Court has held:

> If this Court routinely allowed a writ of certiorari in every case in which the appellant failed to properly appeal, it would render meaningless the rules governing the time and manner of noticing appeals. Instead, as our Supreme

> Court has explained, "[a] petition for the writ *must show merit* or that error was probably committed below."

State v. Bishop, 255 N.C. App. 767, 769, 805 S.E.2d 367, 369 (2017) (emphasis added) (quoting *State v. Grundler*, 251 N.C. 177, 189, 111 S.E.2d 1, 9 (1959), *cert. denied*, 362 U.S. 917 (1960)).

Defendant notes, however, that the first two of his proposed issues for our review concern the alleged facial invalidity of indictments returned against him on charges of felony possession of stolen goods.

> By knowingly and voluntarily pleading guilty, an accused waives all defenses other than the sufficiency of the indictment. Nevertheless, *when an indictment is alleged to be facially invalid, thereby depriving the trial court of jurisdiction, the indictment may be challenged at any time*. Our Supreme Court has stated that an indictment is fatally defective when the indictment fails on the face of the record to charge an essential element of the offense.

State v. McGee, 175 N.C. App. 586, 587–88, 623 S.E.2d 782, 784 (emphasis added) (citations and quotation marks omitted), *appeal dismissed and disc. review denied*, 360 N.C. 542, 634 S.E.2d 891 (2006). " '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.' " *State v. Sellers*, 248 N.C. App. 293, 299–300, 789 S.E.2d 459, 465 (2016) (quoting *State v. Felmet*, 302 N.C. 173, 176, 273 S.E.2d 708, 711 (1981)). As discussed below, I find merit in one of defendant's indictment arguments regarding the facial validity of the possession of stolen property indictments, and thus I would allow defendant's petition for writ of certiorari

as to that issue, vacate all six of the convictions for that offense, and—because those convictions are part of the plea agreement into which defendant entered—vacate all judgments resulting from the agreement and remand to the trial court for entry of a new disposition.

"North Carolina law has long provided that there can be no trial, conviction, or punishment for a crime without a formal and sufficient accusation." *State v. Marshall*, 188 N.C. App. 744, 748, 656 S.E.2d 709, 712 (2008) (citation and internal quotation marks omitted). An "indictment must . . . charge all the essential elements of the alleged criminal offense." *State v. Floyd*, 148 N.C. App. 290, 295, 558 S.E.2d 237, 241 (2002) (citation omitted). Because an indictment establishes the trial court's jurisdiction to hear a criminal case, the requirement that all essential elements must be alleged applies even where a defendant has entered a plea of guilty. *State v. Stonestreet*, 243 N.C. 28, 31, 89 S.E.2d 734, 737 (1955); *see also Sellers*, 248 N.C. App. at 299, 789 S.E.2d at 464. "Where an indictment is allegedly facially invalid, the indictment may be challenged at any time, even if it was uncontested in the trial court." *Id.* at 299, 789 S.E.2d at 464 (citing *State v. Wallace*, 351 N.C. 481, 503, 528 S.E.2d 326, 341, *cert. denied*, 531 U.S. 1018 (2000)). Challenges to the sufficiency of an indictment are considered de novo. *Id.*

Defendant argues that the indictments in file numbers 21-CRS-51796, 21-CRS-51963-64, 21-CRS-51967, and 21-CRS-55888—which purport to charge defendant with felony possession of stolen property—must be vacated because they

fail to allege that the subject property was stolen, an essential element of the offense. I agree and find this issue dispositive of defendant's appeal.

Defendant specifically contends that the indictments under review in this case, while alleging possession of personal property which defendant knew or had reasonable grounds to believe was stolen, do not allege that the property in question was in fact stolen. Our review of the indictments reveals that each identifies the property allegedly possessed by defendant as being "the personal property of" a person or entity other than defendant and alleges that defendant knew or had reason to know the property was "feloniously stolen." Defendant represents that the elements of "knowing or believing" property to be stolen and the property actually being stolen are distinct, with the former concerning defendant's state of mind and the latter being a factual state of the property possessed.

"If any person shall possess any . . . property, . . . the stealing or taking whereof amounts to larceny or a felony, either at common law or by virtue of any statute . . . , such person knowing or having reasonable grounds to believe the same to have been feloniously stolen or taken, he shall be guilty of a Class H felony." N.C. Gen. Stat. § 14-71.1 (2021). Thus, "[t]he essential elements of feloniously possessing stolen property are (1) possession of personal property, (2) valued at more than [the statutory amount], (3) *which has been stolen*, (4) the possessor knowing or having reasonable grounds to believe the property to have been stolen, and (5) the possessor acting with a dishonest purpose." *State v. Davis*, 302 N.C. 370, 373, 275 S.E.2d 491,

493 (1981) (emphasis added) (citing N.C. Gen. Stat. §§ 14-71.1, 14-72, and N.C.P.I.-Crim. § 216.47). *See also State v. Tanner*, 364 N.C. 229, 232, 695 S.E.2d 97, 100 (2010) (stating that the essential elements of possession of stolen goods are "(1) possession of personal property; (2) *which has been stolen*; (3) the possessor knowing or having reasonable grounds to believe the property to have been stolen; and (4) the possessor acting with a dishonest purpose") (emphasis added).

The Pattern Jury Instructions for various forms of the offense of possession of stolen property, as cited in *Davis*, all treat the fact of property being stolen as an element separate from the defendant knowing or having reason to believe that the property was stolen. The instructions for "Misdemeanor Possession of Stolen Goods," "Felonious Possession of Stolen Goods–Goods Worth More Than $1,000," "Possession of Property Stolen Pursuant to a Breaking or Entering," and "Felonious Possession of Stolen Goods–Stolen Pursuant to a Breaking or Entering or Worth More Than $1,000 (Including Non-Felonious Possession)" all begin by instructing the jury that the State must prove beyond a reasonable doubt, *inter alia*: "[f]irst, that [the property] was stolen. Property is stolen when it is taken and carried away without the owner's consent by someone who intends at the time to deprive the owner of its use permanently and knows that he is not entitled to take it." *See* N.C.P.I.-Crim. §§ 216.46, 216.47, 216.48, and 216.48A. This element is separate and distinct from any additional elements in the instructions that concern the defendant's mental state or intent; for example, the requirements that the State must prove beyond a reasonable

doubt "that the defendant knew or had reasonable grounds to believe that the property had been stolen[; and] that the defendant possessed this property with a dishonest purpose." N.C.P.I.-Crim. §§ 216.46, 216.47.

Defendant relies on *Sellers*, in which case this Court, *sua sponte*, vacated the defendant's conviction after determining that "the indictment reveals the indictment did not contain all of the elements of possession of stolen property." 248 N.C. App. at 294, 789 S.E.2d at 461–62. In *Sellers*, the defendant was charged with possession of stolen goods and the indictment alleged only that the defendant " 'unlawfully, willfully and feloniously did possess one handbag containing personal items, one wallet, one Wachovia debit/credit card, one social security card, one check book, and $30.00 in United States currency.' " *Id.* at 301, 789 S.E.2d at 465–66. Because "[t]he indictment d[id] not allege the essential *elements* that the listed personal *property was stolen* or that [the *d*]*efendant knew or had reason to know the property was stolen*," the indictment was facially deficient. *Id.* at 301, 789 S.E.2d at 466 (emphases added). I believe that the holding of *Sellers*, which distinguishes two elements—property being stolen and the defendant knowing or having reason to believe the property to be stolen—and describes them as "essential elements" of the offense of possession of stolen property which must appear in a facially valid indictment for possession of stolen property, requires the Court to vacate defendant's convictions for that offense based upon the failure of those indictments to allege that the subject property in each matter was stolen. *See In re Appeal from Civil Penalty*, 324 N.C. 373,

384, 379 S.E.2d 30, 37 (1989) ("Where a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court.").

I am not persuaded by the State's attempt to distinguish *Sellers* by drawing our attention to the presence in the indictments here of allegations that the property possessed "was owned by someone other than defendant" and that defendant knew or had reason to believe the property was stolen. As noted above, in *Sellers* the Court discerned the absence of *two essential elements*: that the property was stolen and that the defendant knew or had reason to believe it was stolen. 248 N.C. App. at 301, 789 S.E.2d at 466. Possessing the personal property of another does not establish that the property is stolen.[1]

Likewise, I find the State's citation of *State v. Foster*, 10 N.C. App. 141, 177 S.E.2d 756 (1970) in support of its assertion that "[w]hen an indictment identifies the owner of the property in question, as the indictments did in this case, our Courts have found that language sufficient to allege that the property was stolen" misplaced. The issue in *Foster* was not the presence of the allegation that property was stolen, but

[1] While only dicta, one can hypothesize that such personal property could be that where the ownership was disputed as between spouses or business partners, or where other parties have relinquished legal ownership interest in property unbeknownst to the defendant, or there could simply be a misunderstanding by a defendant; for example, where a defendant might "hold" property for a friend, believing the property to have been stolen by the friend, even though the property was actually borrowed, found, rented, or purchased by the friend.

rather was whether the language "sufficiently identif[ied] the property alleged to have been stolen." *Id.* at 142, 177 S.E.2d at 757.

The State also urges that this Court consider certain case law regarding the offense of *receiving* stolen goods on the basis that "the standard of proof established in cases of receiving stolen goods is equally applicable in cases involving possessing stolen goods." *State v. Medlin*, 86 N.C. App. 114, 124, 357 S.E.2d 174, 180 (1987) (citation omitted). As an initial point, the issue here is not the standard of proof but rather the facial validity of the indictments, and the two offenses—receipt and possession of stolen goods—are not aligned as regards their elements. *See Davis*, 302 N.C. at 373, 275 S.E.2d at 493.

Moreover, the cases cited by the State are inapposite: In *State v. Golden*, there was no challenge to the facial sufficiency of the indictment; rather, the issue before the Court was "a fatal variance between the indictment and the proof," and more critically, the Court considered an argument that the evidence at trial was insufficient to establish the identity of the owner of personal property allegedly received and not whether the property was stolen. 20 N.C. App. 451, 452–53, 201 S.E.2d 546, 547–48, *cert. denied*, 285 N.C. 88, 203 S.E.2d 60 (1974). In *State v. Truesdale*, the Court considered an argument of error by the trial court's denial of "their motion to quash the warrants which charged them with receiving *stolen* property worth $142.70 'in violation of law G.S. 14-71,' " holding that "[t]he warrant sufficiently charged all the essential elements of the offense of receiving and

adequately apprised the appellants of the offense with which they were charged." 13 N.C. App. 622, 625–26, 186 S.E.2d 604, 605 (1972) (emphasis added). That case, as it involved review of an indictment that contained an explicit allegation that the subject property was stolen, sheds no light on the case here and does not support the State's assertion "that ownership in someone other than defendant in receipt of stolen property cases shows the property was stolen."

In my view, the plain language of the statutes defining this offense and controlling case law, which specifically lists the property being stolen as an essential element, require that the challenged indictments were insufficient to allege possession of stolen property, and thus, the convictions entered upon defendant's guilty pleas as to those offenses purported to be charged in the indictments for file numbers 21-CRS-51796, 21-CRS-51963-64, 21-CRS-51967, and 21-CRS-55888 must be vacated. Moreover, while the analysis above addresses only one of defendant's contentions, the result I would reach further requires that the matter must be remanded to the trial court for the entire underlying plea agreement in defendant's case to be set aside and for a new disposition to be entered. "Although a plea agreement occurs in the context of a criminal proceeding, it remains contractual in nature. A plea agreement will be valid if both sides voluntarily and knowingly fulfill every aspect of the bargain." *State v. Rodriguez*, 111 N.C. App. 141, 144, 431 S.E.2d 788, 790 (1993). Thus, where a "[d]efendant has elected to repudiate a portion of his agreement" by virtue of his appeal, "[t]he entire plea agreement must be set aside."

State v. Rico, 218 N.C. App. 109, 122, 720 S.E.2d 801, 809 (Steelman, J., dissenting), *rev'd per curiam for reasons stated in dissent*, 366 N.C. 327, 734 S.E.2d 571 (2012). A "[d]efendant cannot repudiate in part without repudiating the whole." *Id.* (citation omitted).

For these reasons discussed above, I would vacate the judgments arising from the underlying plea agreement and remand this case for a new disposition.