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NO. COA11-887
NORTH CAROLINA COURT OF APPEALS

Filed: 7 February 2012

STATE OF NORTH CAROLINA

v.

Buncombe County
No. 10 CRS 700243

SEAN MICHAEL KELLY

Appeal by defendant from judgment entered 16 March 2011 by Judge Mark E. Powell in Buncombe County Superior Court. Heard in the Court of Appeals 23 January 2012.

Attorney General Roy Cooper, by Assistant Attorney General Larissa S. Williamson, for the State.

Bryan Gates for defendant-appellant.

ERVIN, Judge.

Defendant Sean Michael Kelly appeals from a judgment entered by the trial court based upon Defendant's convictions for speeding and reckless driving. On appeal, Defendant argues that the citation issued against him fails to sufficiently allege that he committed the offense of reckless driving. After careful consideration of Defendant's challenge to the trial court's judgment in light of the record and the applicable law, we conclude that the trial court's reckless driving judgment

should be vacated and that this case should be remanded to the Buncombe County Superior Court for resentencing.

I. Factual Background

On 9 January 2010, Trooper R.D. Kent of the North Carolina State Highway Patrol issued a citation charging Defendant with (1) speeding, in violation of N.C. Gen. Stat. § 20-141(j1), and (2) reckless driving, in violation of N.C. Gen. Stat. § 20-140(a). The portion of the citation charging Defendant with reckless driving alleged that:

on or about Saturday, the 09 day of January, 2010 at 01:32 PM in the county named above [Defendant] did unlawfully and willfully carelessly and heedlessly in willful and wanton disregard of the rights and safety of others. (G.S. 20-140(A))

After Defendant pled guilty to both charges in the Buncombe County District Court, he was sentenced to thirty days in the custody of the Sheriff of Buncombe County. However, Defendant's sentence was suspended and Defendant was ordered to complete 12 months of supervised probation. Defendant noted an appeal to the Buncombe County Superior Court. After a trial *de novo*, the jury returned a verdict finding Defendant guilty of both charges on 16 March 2011. As a result, the trial court consolidated Defendant's two convictions for judgment, sentenced Defendant to a term of thirty days in the custody of the Sheriff of Buncombe County, suspended Defendant's sentence, and ordered Defendant to

successfully complete 12 months of supervised probation. Defendant noted an appeal to this Court from the trial court's judgment.

II. Legal Analysis

In his sole challenge to the trial court's judgment, Defendant argues that the citation fails to sufficiently charge that he committed the offense of reckless driving because it fails to allege that he drove a vehicle. We agree.

According to N.C. Gen. Stat. § 20-140(a):

Any person who drives any vehicle upon a highway or any public vehicular area carelessly and heedlessly in willful or wanton disregard of the rights or safety of others shall be guilty of reckless driving.

A criminal pleading purporting to charge the commission of any offense must contain:

A plain and concise factual statement in each count which, without allegations of an evidentiary nature, asserts facts supporting every element of a criminal offense and the defendant's commission thereof with sufficient precision clearly to apprise the defendant or defendants of the conduct which is the subject of the accusation.

N.C. Gen. Stat. § 15A-924(a)(5); *see also State v. Billinger*, __ N.C. App. __, __, 714 S.E.2d 201, 206 (2011). "Where the warrant or indictment contains separate counts, each count should be complete in itself." *State v. Fuller*, 24 N.C. App. 38, 39, 209 S.E.2d 805, 806 (1974) (citation omitted). "It is

an essential of jurisdiction that a criminal offense shall be sufficiently charged in a warrant or an indictment. . . . A court cannot properly give judgment in a criminal action, unless it appears in the record that a criminal offense is sufficiently charged." *State v. Wallace*, 251 N.C. 378, 381, 111 S.E.2d 714, 717 (1959) (citations omitted).

The citation purporting to charge Defendant with reckless driving does not allege that Defendant drove a vehicle, an essential element of the offense specified in N.C. Gen. Stat. § 20-140(a). Instead, the portion of the citation purporting to charge Defendant with reckless driving consists of a sentence fragment that omits any reference to the verb "drive" or to a synonym such as "operate." See *State v. Coker*, 312 N.C. 432, 436, 323 S.E.2d 343, 347 (1984). Although the portion of the citation charging Defendant with speeding alleges that Defendant drove a vehicle, the language contained in that count cannot be used to salvage the defective reckless driving charge. Thus, we agree with Defendant's contention that the trial court lacked jurisdiction to enter judgment against him for reckless driving. As a result, given that Defendant's two convictions were consolidated for judgment, we must vacate the trial court's reckless driving judgment and remand this case to the Buncombe County Superior Court for resentencing on Defendant's speeding

conviction. See *State v. Graves*, 203 N.C. App. 123, 129, 690 S.E.2d 545, 549 (2010), *cert. denied*, 365 N.C. 188, 707 S.E.2d 233 (2011).

VACATED IN PART AND REMANDED FOR RESENTENCING.

Judges ROBERT C. HUNTER and STEPHENS concur.

Report per Rule 30(e).