

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA15-615

Filed: 5 April 2016

Johnston County, No. 13CRS051137

STATE OF NORTH CAROLINA

v.

MORRIS LEAVETT STITH, Defendant.

Appeal by Defendant from judgment entered 24 September 2014 by Judge Claire V. Hill in Johnston County Superior Court. Heard in the Court of Appeals 4 November 2015.

Attorney General Roy A. Cooper, III, by Special Deputy Attorney General Charles G. Whitehead, for the State.

Kimberly P. Hoppin for the Defendant.

DILLON, Judge.

Morris Leavett Stith (“Defendant”) appeals from a judgment entered upon jury verdicts finding him guilty of (1) possession with intent to sell or deliver an opium derivative and (2) trafficking in an opium derivative by sale. For the following reasons, we find no error.

I. Background

On 21 November 2012, Defendant sold fifteen (15) pills containing a controlled substance (hydrocodone) combined with a non-controlled substance (acetaminophen) to a confidential police informant for \$75.

Defendant was subsequently indicted by a Johnston County grand jury with (1) possession with intent to sell or deliver a Schedule II controlled substance and (2) trafficking in an opium derivative by sale. The matter came on for a two-day trial in superior court.

The jury found Defendant guilty of (1) possession with intent to sell or deliver a Schedule *III* (as opposed to a Schedule II) controlled substance and (2) trafficking in an opium derivative by sale. Defendant stipulated to his status as an habitual felon. The trial court consolidated the charges for judgment, sentencing Defendant to prison for ninety (90) to 120 months based on certain mitigating factors. Defendant entered notice of appeal in open court.

II. Analysis

Defendant makes a number of arguments that the judgments should be vacated based on his contentions that the drug was misidentified in the indictments and that the trial court erred in allowing the prosecutor to amend the indictments. We address each conviction in turn.

A. Possession of Controlled Substance with Intent to Sell or Deliver

1. The Indictment

The original indictment returned by the grand jury charged Defendant the possession of the controlled substance “hydrocodone” (combined with a non-narcotic,

acetaminophen) and stated that this substance was a Schedule II drug. Specifically, the indictment stated, in relevant part, as follows:

Offense: Possession of a SCH II CS [Schedule II Controlled Substance] with Intent to Sell or Deliver

. . . Defendant . . . did [feloniously] possess **acetaminophen and hydrocodone bitartrate**[.] Acetaminophen and hydrocodone bitartrate [] is a controlled substance **which is included in Schedule II of the North Carolina Controlled Substance Act**[.]

2. The Amendment to the Indictment and the Evidence at Trial

Hydrocodone is a drug listed in Schedule II, the possession of which (with the intent to sell or deliver) is a Class H felony. N.C. Gen. Stat. §§ 90-90(1)(a)(10), 90-95(b)(1) (2012). However, by the start of the trial, it became apparent to the State that its evidence would show that the hydrocodone possessed by Defendant was combined with a non-narcotic such that the hydrocodone is considered under our law to be a Schedule III controlled substance, the possession of which (with the intent to sell or deliver) is only a Class I felony. *Id.* §§ 90-91(d)(3)-(5), 90-95(b)(2). Accordingly, the State made a request that it be allowed to strike through the phrase “Schedule II of” in the indictment, which the trial court granted.

During the trial, the State’s evidence tended to show that Defendant possessed pills containing hydrocodone bitartrate¹ combined with acetaminophen, but that the

¹As stated in Defendant’s brief, the term “bitartrate” in the indictment does not refer to any controlled substance but merely modifies “hydrocodone” as being in a certain salt form.

pills were of such weight and combination to bring the hydrocodone within Schedule III. Defendant was convicted of possessing Schedule III hydrocodone with the intent to sell or deliver, a Class I felony.

3. Holding

We hold that the original indictment, as returned by the grand jury, was sufficient to charge the crime of possessing hydrocodone, a Schedule II controlled substance (and noting that the hydrocodone was combined with the non-narcotic, acetaminophen). We hold that the indictment was sufficient to allow the jury to convict Defendant of possessing hydrocodone under Schedule III, based on its determination that the hydrocodone pills were under a certain weight and combined with acetaminophen within a certain ratio to bring it within Schedule III. That is, the jury did not convict Defendant of possessing an entirely different controlled substance than that which the *grand jury* had found Defendant to have possessed when it returned the original indictment. Finally, we hold that the strikethrough of the words “Schedule II of” from the indictment allowed at the start of trial was not reversible error and was not otherwise prejudicial to Defendant.

It is true that amending an indictment is statutorily prohibited. *See* N.C. Gen. Stat. § 15A-923(e) (2014). However, our Supreme Court has held that not all change to an indictment is error. Specifically, the Court interpreted the term “amendment” in the statute to mean “any change in the indictment which would substantially alter

the charge set forth in the indictment.” *State v. Price*, 310 N.C. 596, 598, 313 S.E.2d 556, 558 (1984). Therefore, as our Court has held, while “amending an indictment to add an essential element to the allegations contained therein constitutes a substantial alteration[,] . . . an amendment that simply corrects an error unconnected and extraneous to the allegations of the essential elements . . . is not[.]” *State v. Williams*, ___ N.C. App. ___, ___, 774 S.E.2d 880, 883 (2015).

It is true that *the identity of the controlled substance* is an essential element of the crime of possession of a controlled substance with the intent to sell or deliver. *State v. Board*, 296 N.C. 652, 657, 252 S.E.2d 803, 806 (1979). However, as our Supreme Court has observed, the controlled substance need not be identified by the identical language used in the statute, but rather, the controlled substance may be identified “by whatever official name, common or usual name, chemical name, or trade name[.]”² *Id.* at 658, 252 S.E.2d at 807. *See also State v. Sullivan*, ___ N.C. App. ___, ___, 775 S.E.2d 23, 27 (2015) (holding that an indictment was fatal because the name employed to identify the controlled substance was not the name used in the statute nor was there evidence that the name was the trade name); *State v. Newton*, 21 N.C. App. 384, 386, 204 S.E.2d 724, 725 (1974) (holding that indictment was sufficient where the controlled substance was identified by its trade name rather than by the name used in the statutory language).

²This quoted language is the same language used in each of the statutes which identifies the schedules of controlled substances. *Compare* N.C. Gen. Stat. § 90-90 *with id.* § 90-89.

In the present case, the original indictment identified the controlled substance possessed by Defendant as hydrocodone, and the jury ultimately convicted Defendant of possessing hydrocodone. The “change” in the indictment did not change the identity of the controlled substance. It only eliminated one of the two references to Schedule II. (Even with the strikethrough, the face of the indictment still contained a reference to Schedule II in its heading, identifying the offense charged as “Possession of SCH II CS [Schedule II controlled substance] with Intent to Sell or Deliver.”) In any case, even changing “Schedule II” to “Schedule III” would not have changed the identity of the controlled substance (hydrocodone) combined with acetaminophen in this case, but rather it would have merely changed *the maximum weight* of hydrocodone and ratio of hydrocodone with acetaminophen in each pill such that each pill would be considered a Schedule III drug.

4. Schedule II Hydrocodone vs. Schedule III Hydrocodone

The State’s expert described the pills possessed by Defendant as Schedule III hydrocodone. Some clarification is necessary since “hydrocodone” is referred to by its synonym “dihydrocodeinone” in Schedule III of our statutes, which is provided below:

“Hydrocodone” is a controlled substance and is listed on Schedule II. N.C. Gen. Stat. § 90-90(1)(a)(10) (2012). However, hydrocodone can also be a Schedule III substance when it is *at or below a certain dosage weight* **and** *combined within a certain ratio with a “nonnarcotic ingredient,”* such as acetaminophen. *Id.* § 90-

91(d)(4). In other words, hydrocodone, whether by itself or combined with a non-narcotic, is a Schedule II drug *unless* it is *below a certain amount* and combined *within a certain ratio* with the non-narcotic, in which case it is considered a Schedule III drug, the possession of which carries a lighter punishment.

In Schedule III, “hydrocodone” is actually referred to by its synonym “dihydrocodeinone.” *See id.* Our Court has observed that, as discussed above, Schedule III hydrocodone (or dihydrocodeinone) is differentiated from Schedule II hydrocodone “by the quantitative ratio of dihydrocodeinone to nonnarcotic ingredients [such as acetaminophen] *per dosage unit.*” *State v. Johnson*, 214 N.C. App. 436, 441, 714 S.E.2d 502, 506 (2011) (emphasis in original). Our Supreme Court has referred to “dihydrocodeinone” as “dihydrocodeinone (hydrocodone).” *State v. Ward*, 364 N.C. 133, 138 n. 2, 694 S.E.2d 738, 741 n. 2 (2010). Other jurisdictions also recognize that hydrocodone and “dihydrocodeinone” are the same controlled substance. *See State v. Benedict*, 887 So.2d 649, 651 (2004) (observing that the substances are equivalent under Louisiana law); N.Y. CLS Pub. Health § 3306 (2015) (referring to hydrocodone as “hydrocodone (also known as dihydrocodeinone)” under Schedule II of New York’s controlled substances law); *State v. Pewitte*, 2014 Tenn. Crim. App. LEXIS 261, *14, n. 3 (2014) (unpublished opinion) (noting the use of “hydrocodone” and “dihydrocodeinone” interchangeably); *State v. Pagan*, 2011 Wash. App. LEXIS 88, *6 n. 3 (2011) (unpublished opinion) (explaining that “hydrocodone”

and “dihydrocodeinone” are synonyms, citing a number of medical sources); *United States v. McKinney*, 2009 U.S. Dist. LEXIS 35825, *13 (2009) (unpublished opinion) (citing 21 C.F.R. § 1308.13(e)(1)(iii)-(iv)).

Likewise, the term “dihydrocodeinone” does not appear in Schedule II, but is referred to by its synonym “hydrocodone,” *but “dihydrocodeinone” is not to be confused with an entirely different Schedule II controlled substance, “dihydrocodeine”* referenced in N.C. Gen. Stat. § 90-90(2)(f).

5. This Case is Distinguishable from Recent Cases Cited by Defendant

Defendant argues that we are compelled to find that the indictment was insufficient to convict him of possessing Schedule III hydrocodone, citing a number of cases. *See, e.g., State v. Ahmadi-Turshizi*, 175 N.C. App. 783, 784-85, 625 S.E.2d 604, 605 (2006) (“When a defendant has been charged with possession of a controlled substance, the identity of the controlled substance that defendant allegedly possessed is considered to be an essential element which must be alleged properly in the indictment.”). Indeed, our Court has required that controlled substances be identified with precision, noting that “the legal definition of these [controlled] substance[s] is itself technical and requires precision.” *State v. Ledwell*, 171 N.C. App. 328, 332, 614 S.E.2d 412, 415 (2005). However, we hold that the present case is distinguishable.

In *Ledwell*, a 2005 case, our Court held that an indictment identifying the drug as “Methylenedioxyamphetamine (MDA)” was fatal because this term did not refer to

the same substance as the controlled substance listed in our statutes as “3,4 – Methylenedioxyamphetamine (MDA).” *Id.* at 331-33, 614 S.E.2d at 414-15. The next year, our Court relied on *Ledwell* to reach an identical holding. *Ahmadi-Turshizi*, 175 N.C. App. at 786, 625 S.E.2d at 605-06. These cases were based on the fact that MDA is not identical to 3,4-methylenedioxyamphetamine. *See Board*, 296 N.C. at 657-58, 252 S.E.2d at 806-07.

In 2010, our Court held that an indictment identifying the controlled substance as “Benzodiazepines, which is included in Schedule IV” was defective because “benzodiazepines” is not found in Schedule IV but refers to a category of drugs, some of which are named in Schedule IV. *State v. LePage*, 204 N.C. App. 37, 54, 693 S.E.2d 157, 168 (2010). The actual drug at issue was clonazepam, which is a Schedule IV drug. N.C. Gen. Stat. § 90-92(a)(1)(i) (2012). The *LePage* Court based its holding on the fact that “benzodiazepines,” (the term used in the indictment) is not the same controlled substance as “clonazepam” (the drug actually possessed), but rather clonazepam is a particular controlled substance *within* the benzodiazepines category of controlled substances. 204 N.C. App. at 54, 693 S.E.2d at 168. Accordingly, based on *LePage*, our Court is compelled to conclude that a drafter of an indictment has failed to use sufficient technical precision by identifying clonazepam as “benzodiazepines, a Schedule IV drug.” *See id.*

In 2015, our Court held that the trial court erred by allowing the State to amend an indictment by adding the prefix “4-” to the word “methylethcathinone.” *Williams*, ___ N.C. App. at ___, 774 S.E.2d at 885-87. The Court essentially held that adding the numeric prefix *changed* the identity of the controlled substance and therefore “added an essential element [to the indictment] that was previously absent, [] constitut[ing] a substantial alteration[.]” *Id.* at ___, 774 S.E.2d at 885-86.

However, unlike the above cases, in the present case the indictment was not changed such that the identity of the controlled substance was changed. Rather, it was changed to reflect that the controlled substance was below a certain weight and mixed with a non-narcotic (the identify of which was also contained in the indictment) to lower the punishment from a Class H felony to a Class I felony. The grand jury returning the indictment and the jury convicting Defendant both concluded that the controlled substance possessed by Defendant was hydrocodone.

Moreover, we believe that the indictment adequately apprised Defendant of the controlled substance that he possessed, hydrocodone. The indictment also alleged that the hydrocodone was combined with acetaminophen. The fact that the evidence at trial showed that *the ratio* of hydrocodone to acetaminophen and *the weight* of hydrocodone contained in each pill was sufficient to bring it within Schedule III did

not render the indictment invalid, nor does it create a fatal variance.³ Further, the amendment allowed by the trial court was not material because the strikethrough of certain language did not alter *the identity* of the controlled substance which Defendant was alleged to have possessed; and, in any case, even with the strikethrough, the face of the indictment still charged Defendant with possessing Schedule II hydrocodone.

Though not controlling, we find the case *Graham v. State of Mississippi*, 935 So.2d 1119 (2006), persuasive. In that case, the Mississippi intermediate appellate court held that an amendment to an indictment for the sale of hydrocodone which changed the Schedule from “II” to “III” did not prejudice the defendant. *Id.* at 1121-22. The Court specifically distinguished the case from another Mississippi opinion finding the omission of the numeric prefix from a drug name (similar to the omission which rendered the indictments fatal in *Ledwell* and *Ahmadi-Turshizi*) to be fatal. *Id.* at 1121. *See also State v. Toddy*, 2000 Ohio App. LEXIS 5736, *10-11 (2000) (unpublished opinion) (allowing amendment of indictment for trafficking in hydrocodone by changing Schedule III to Schedule II).

B. Trafficking in an Opium Derivative

³The present situation is similar to a situation where a defendant is indicted with *felonious* larceny of certain tools valued at over \$1,000 (a felony because the value of the tools is over \$1,000). *See* N.C. Gen. Stat. § 14-72(a) (2012). There is no fatal variance merely because the jury determines that the value of the tools was under \$1,000 and convicts the defendant of a misdemeanor. *See State v. Jones*, 275 N.C. 432, 437-38, 168 S.E.2d 380, 384 (1969).

Defendant was also indicted for trafficking an opium derivative, for selling the hydrocodone pills. The indictment identifies the controlled substance using the same language as the language used in the indictment charging Defendant with possession with the intent to sell.

On appeal, Defendant makes the same arguments concerning the change to the indictment allowed by the trial court (namely, striking the words “Schedule II of” as was allowed with the other indictment). For the same reasons, we hold that the actions of the trial court did not constitute reversible error. Further, we hold that there was no fatal variance between the indictment and the evidence at trial. The indictment alleged that Defendant was trafficking in hydrocodone, and the evidence tended to show that Defendant was trafficking in hydrocodone. Accordingly, this argument is overruled.

NO ERROR.

Judge GEER concurs.

Judge HUNTER, JR., dissents by separate opinion.

HUNTER, JR., Robert N., Judge, Dissenting.

I dissent. An indictment is the *sine qua non* of criminal jurisdiction as required by Article I, Section 22 of the Constitution of North Carolina. To indict, twelve to eighteen persons sitting as a grand jury have to concur in the indictment. N.C. Gen. Stat. § 15A-621. The language of an indictment is presented to the grand jury by a District Attorney pursuant to N.C. Gen. Stat. § 15A-627. The purpose of Constitutional provisions for indictments is: “(1) to provide certainty so as to identify the offense, (2) to protect the accused from twice being put in jeopardy for the same offense, (3) to enable the accused to prepare for trial, and (4) to enable the court, on conviction or plea of guilty or *Nolo contendere*, to pronounce sentence according to the rights of the case.” *State v. Foster*, 10 N.C. App. 141, 142–43, 177 S.E.2d 756, 757 (1970) (citation omitted); *see also State v. Stokes*, 274 N.C. 409, 411, 163 S.E.2d 770, 772 (1968). In my view, the language of the indictment fails under our precedents to meet these standards.

On 1 April 2013, the grand jury indicted Morris Leavett Stith on two counts, as follows:

Count I

Offense: Possession of SCH II CS with Intent to Sell or Deliver

Date of Offense: November 21, 2012

In violation of: N.C.G.S. 90-95(a)(1)

I. The jurors for the State upon their oath present that on or about November 21, 2012, in the county of Johnston, the

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HUNTER, JR., Robert N., J., dissenting

Defendant named above, unlawfully, willfully, and feloniously did possess acetaminophen and hydrocodone bitartrate (Percocet), with the intent to sell or deliver said acetaminophen and hydrocodone bitartrate (Percocet). Acetaminophen and hydrocodone bitartrate (Percocet) is a controlled substance which is included in Schedule II of the North Carolina Controlled Substances Act. The act is in violation of N.C.G.S. § 90-95(a)(1).

Count II

Offense: Trafficking in Opiates, Synthetic Opiates and Opiate Derivatives by Sale

Date of Offense: November 21, 2012

In violation of: N.C.G.S. 90-95(h)(4)(a)

II. The jurors for the State upon their oath further present that on or about November 21, 2012, in the county of Johnston, the Defendant named above intentionally, unlawfully, willfully, and feloniously did traffick in opium or opiates or a derivative or preparation of opium or opiate or any mixture containing such substances, by selling four (4) grams or more but less than fourteen (14) grams of Acetaminophen and Hydrocodone Bitartrate (Percocet), a controlled substance which is included in Schedule II of the North Carolina Controlled Substances Act, to Selma Jerome. This act was in violation of North Carolina General Statutes Section 90-95(h)(4)(a).

Count One of this indictment is jurisdictionally deficient under settled law of this court consistently applied in *State v. Ledwell*, 171 N.C. App. 328, 331, 614 S.E.2d 412, 414 (2005), *State v. Turshizi*, 175 N.C. App. 783, 625 S.E.2d 604 (2006), and *State v. Sullivan*, ___ N.C. App. ___, 775 S.E.2d 23 (2015). *See also State v. Barnes*, 213 N.C. App. 424, 714 S.E.2d 274 (2011) (unpublished). Count Two of the indictment is

also jurisdictionally deficient because its language fails to meet all four of the standards set forth in *Foster* and *Stokes*.

Realizing under our holdings in *Ledwell*, *Turshizi*, and *Sullivan* that this indictment did not confer jurisdiction to the trial court, the State moved to “amend” the indictment, which the court granted, and the Assistant District Attorney struck through “Schedule II” in Counts I and II. It is apparent the State did this in an attempt to cure fatal defects in the indictment.

Because only a grand jury can indict a defendant, a court is prohibited by statute from amending an indictment in a material way. N.C. Gen. Stat. § 15A-923(e); *State v. White*, 202 N.C. App. 524, 527, 689 S.E.2d 595, 596–97 (2010) (“[O]ur appellate courts have interpreted [section 15A-923(e)] to mean that a bill of indictment may not be amended in a manner that substantially alters the charged offense.”) (citations and quotation marks omitted). Because the original indictment was defective, one cannot tell whether the amended version would have been concurred by twelve grand jurors or not. The defects could have been cured in advance of the trial had the Assistant District Attorney sought a superseding indictment, but she did not. The court lacked jurisdiction to both hear the matter or to amend the indictment.

The trafficking statute charged in Count II, N.C. Gen. Stat. § 90-95(h)(4)(a), punishes “[a]ny person who sells, manufactures, delivers, transports, or possesses

four grams or more [but less than fourteen grams] of opium or opiate, or any salt, compound, derivative or preparation of opium or opiate (except apomorphine, nalbuphine, analoxone and naltrexone and their respective salts), including heroin, or any mixture containing such substance” N.C. Gen. Stat. § 90-95(h)(4)(a). Count II alleges Defendant trafficked “a controlled substance which is included in Schedule II of the North Carolina Controlled Substances Act.” Our statutes define a “controlled substance” as a “drug, substance, or immediate precursor included in Schedules I through VI” of the North Carolina Controlled Substances Act. N.C. Gen. Stat. § 90-87(5).

Reviewing the indictment, it is unclear whether the grand jury concurred in finding Defendant trafficked “opiates, synthetic opiates, or opiate derivatives,” “Acetaminophen and Hydrocodone Bitartrate,” “Percocet,” or “a controlled substance which is included in Schedule II of the North Carolina Controlled Substances Act.” Schedule II includes “opium and opiate, and any salt, compound, derivative, or preparation of opium and opiate,” N.C. Gen. Stat. § 90-90(1)(a), and “Hydrocodone,” N.C. Gen. Stat. § 90-90(1)(a)(10), but it does not enumerate Acetaminophen, Hydrocondone Bitartrate, Percocet, or the substance proven at trial, “Hydrocodeinone,” which appears as “dihydrocodeinone” in Schedule III. N.C. Gen. Stat. § 90-91(d)(3)–(4). This flaw poses jurisdictional problems for the trial court.

Under the long standing jurisprudence of this Court, and our Supreme Court, it is apparent the trial court did not have jurisdiction to act under the indictment. “It is elementary that a valid bill of indictment is essential to the jurisdiction of the trial court to try an accused for a felony.” *Ledwell*, 171 N.C. App. at 331, 614 S.E.2d at 414 (citing *State v. Sturdivant*, 304 N.C. 293, 308, 283 S.E.2d 719 (1981)). “An indictment must allege all of the essential elements of the crime sought to be charged.” *Ledwell*, 171 N.C. App. at 331, 614 S.E.2d at 414 (citing *State v. Westbrook*, 345 N.C. 43, 57, 478 S.E.2d 483, 492 (1996)). “Identity of a controlled substance allegedly possessed is such an essential element.” *Ledwell*, 171 N.C. App. at 331, 614 S.E.2d at 414 (citation omitted). “An indictment is invalid where it fails to state some essential and necessary element of the offense of which the defendant is found guilty.” *Id.* (citations and quotation marks omitted).

Punishment for trafficking opiates depends upon drug weight, not drug scheduling. N.C. Gen. Stat. §§ 90-95(h)(4)(a)–(c). The State was not required to cite Schedule II, or any specific controlled substance schedule, when it indicted Defendant for violating N.C. Gen. Stat. § 90-95(h)(4)(a). Nonetheless, the State incorrectly identified the controlled substance, hydrocodeninone, with the “Schedule II” language. This identification is essential to the indictment, and it marks a fatal flaw that deprives the court of jurisdiction. *Ledwell*, 171 N.C. App. at 331, 614 S.E.2d at 414 (citation omitted).

Further, the State changed the identity of the controlled substance alleged in Count II by striking the “Schedule II” language, which is an inherently statutory matter. Our statutes prevent trial courts from making these kinds of amendments precisely so only a grand jury can indict a defendant as provided in our Constitution. N.C. Gen. Stat. § 15A-923(e); N.C. Const. art. I, § 22. With a fatally flawed indictment and no jurisdiction to impose a felony judgment, the trial court should have dismissed the case. I am not persuaded by the majority’s attempts to distinguish the controlling decisions. We are bound to follow these decisions. *In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989). Nor am I persuaded by the law of Louisiana in this matter. Believing that a certain result should obtain in this case does not follow the law. Therefore, I must respectfully dissent and I would vacate the judgment imposed on Counts I and II. *See Ledwell*, 171 N.C. App. 328, 614 S.E.2d 412; *Turshizi*, 175 N.C. App. 783, 625 S.E.2d 604; *Sullivan*, ___ N.C. App. ___, 775 S.E.2d 23.