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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-73

Filed: 18 July 2017

Wake County, No. 16JB490

IN THE MATTER OF: T.Z.J.

Appeal by juvenile from orders entered 1 March 2016 by Judge John Covolo in Nash County District Court File No. 15JB104, and 19 July 2016 by Judge Vince Rozier in Wake County District Court in File No. 16JB490. Heard in the Court of Appeals 10 July 2017.

*Attorney General Joshua H. Stein, by Special Deputy Attorney General Stephanie A. Brennan, for the State.*

*Morgan & Carter PLLC, by Michelle F. Lynch, for juvenile-appellant.*

BERGER, Judge.

Juvenile T.Z.J. appeals from orders adjudicating him delinquent for indecent liberties between children in violation of N.C. Gen. Stat. § 14-202.2 (2015) and imposing a Level 1 disposition. We vacate the trial courts' orders for lack of subject matter jurisdiction.

On December 8, 2015, a juvenile court counselor filed a delinquency petition in Nash County District Court alleging that T.Z.J. "unlawfully, willfully . . . and

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feloniously . . . did engage in a sexual act with [redacted], a child who was under the age of 13 years, namely 6 years old. At the time, [T.Z.J.] was at least 13 years of age, namely 13 years old.” Although the allegations charged the essential elements of first-degree statutory sexual offense under N.C. Gen. Stat. § 14-27.4(a)(1) (2013),<sup>1</sup> the caption of the petition mistakenly cited to N.C. Gen. Stat. § 14-27.7A(a).

On March 1, 2016, at the beginning of the delinquency hearing held in Nash County, the prosecutor sought leave to amend the petition to charge T.Z.J. with indecent liberties between children, as follows:

[PROSECUTOR]: [T]he charge right now is statutory sex offense. It needs to be amended to indecent liberties between children.

. . . .

THE COURT: [You are] amending the charge to indecent liberties?

[PROSECUTOR]: Uh-huh.

THE COURT: Okay. And there’s no objection from you?

[JUVENILE’S COUNSEL]: No objection, Your Honor.

THE COURT: Gotcha. All right. And he’s pleading not responsible.

[JUVENILE’S COUNSEL]: Yes, Your Honor.

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<sup>1</sup> For offenses committed on or after December 1, 2015, the offense of first-degree statutory sexual offense was recodified as N.C. Gen. Stat. § 14-27.29 (2015). Because the petition alleged an offense date of September 27, 2015, we refer to former N.C. Gen. Stat. § 14-27.4 (2013).

After hearing the parties' evidence, the trial court adjudicated T.Z.J. delinquent for indecent liberties between children, a minor offense under N.C. Gen. Stat. § 14-202.2(b) (2015) and N.C. Gen. Stat. § 7B-2508(a)(3) (2015).

The cause was transferred to Wake County, the juvenile's county of residence, for disposition. While awaiting the results of his psychosexual risk assessment, the court filed a partial disposition at Level 2 on June 8, 2016.

On July 19, 2016, the morning of the disposition hearing in Wake County District Court, T.Z.J. filed a motion to vacate the adjudication of delinquency and the partial disposition. T.Z.J. argued the amendment to the delinquency petition in Nash County had changed the nature of the offense charged, in violation of N.C. Gen. Stat. § 7B-2400 (2015). Therefore, T.Z.J. claimed, the court was without subject matter jurisdiction to adjudicate him delinquent for the amended charge of taking indecent liberties between children.

On July 27, 2016, the trial court filed a Juvenile Level 1 Disposition Order which denied the juvenile's motion to vacate because "[t]he court did not have the authority to vacate the ruling of another district court" despite acknowledging that "a new petition was necessary to proceed on the charge of indecent liberties between children," because it "was not a lesser included [offense] of the original charge." It is from these orders that T.Z.J. appeals.

On appeal, T.Z.J. claims the trial court erred by allowing the State to amend the delinquency petition in a manner that changed the nature of the offense charged. As a result of the invalid amendment, the court did not have jurisdiction to enter an adjudication and disposition in this cause, rendering each of the courts' orders void *ab initio*. The State concedes "that the trial court lacked jurisdiction in this matter." We agree.

By statute, "[t]he court may permit a [delinquency] petition to be amended when the amendment does not change the nature of the offense alleged." N.C. Gen. Stat. § 7B-2400. The amended petition may not "charge the juvenile with a different offense" than was alleged in the filed petition. *In re Davis*, 114 N.C. App. 253, 255, 441 S.E.2d 696, 698 (1994).

The delinquency petition filed on December 8, 2015 charged T.Z.J. with the essential elements of first-degree statutory sexual offense. *See* N.C. Gen. Stat. § 14-27.4(a)(1); *see also* N.C. Gen. Stat. § 7B-1802 (2015). After allowing the prosecutor to amend the petition, the Nash County District Court adjudicated T.Z.J. delinquent for indecent liberties between children. Indecent liberties between children is not a lesser-included offense of first-degree statutory sexual offense, because the former contains an essential element not included in the latter – *i.e.*, acting "for the purpose of arousing or gratifying sexual desire." *See State v. Williams*, 303 N.C. 507, 514, 279 S.E.2d 592, 596 (1981) (citation omitted); *see also* N.C. Gen. Stat. § 14-202.2(a).

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Therefore, the court did not have jurisdiction to adjudicate T.Z.J. delinquent on the amended charge. *See Davis*, 114 N.C. App. at 255-56, 441 S.E.2d at 698. The fact that T.Z.J. did not object to the amendment is immaterial, “because jurisdiction over the subject matter of a proceeding cannot be conferred by consent, waiver, or estoppel.” *Id.* at 256, 441 S.E.2d at 698 (citation omitted).

The trial courts’ orders are hereby vacated.

VACATED.

Judges ELMORE and DIETZ concur.

Report per Rule 30(e).