

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-1065-2

Filed: 20 February 2018

Surry County, Nos. 12 CRS 1110–11

STATE OF NORTH CAROLINA

v.

WALTER COLUMBUS SIMMONS

On certiorari review of judgment entered 16 May 2016 by Judge A. Moses Massey in Surry County Superior Court. Originally heard in the Court of Appeals 5 April 2017. By opinion issued 15 August 2017, a unanimous panel of this Court vacated in part the judgment of the trial court and remanded with instructions to enter a modified judgment. By order dated 11 December 2017, the Supreme Court of North Carolina remanded the case to the Court of Appeals for reconsideration in light of its decision in *State v. Brice*, \_\_\_ N.C. \_\_\_, 806 S.E.2d 32 (2017), *rev'g* \_\_\_ N.C. App. \_\_\_, 786 S.E.2d 812 (2016).

*Attorney General Joshua H. Stein, by Special Deputy Attorney General Creecy C. Johnson, for the State.*

*The Law Office of Sterling Rozear, PLLC, by Sterling Rozear, for defendant-appellant.*

ELMORE, Judge.

On 16 May 2016, Walter Columbus Simmons (defendant) pled guilty to aggravated felony death by vehicle (AFDV) and felony hit and run (FHR). The

judgment, however, inaccurately reflected that defendant pled guilty to felony serious injury by vehicle instead of FHR. Defendant later petitioned this Court to issue a writ of *certiorari* to review issues pertaining to his guilty plea. *See State v. Simmons*, No. 16-1065, slip op. at 3 (N.C. App. Aug. 15, 2017) (unpublished). We deemed meritorious only one of those issues, a jurisdictional challenge to the sufficiency of the AFDV indictment, and the State conceded that indictment was fatally defective under the authority of this Court's decision in *State v. Brice*, \_\_\_ N.C. App. \_\_\_, 786 S.E.2d 812 (2016), *rev'd*, \_\_\_ N.C. \_\_\_, 806 S.E.2d 32 (2017). *Id.* slip op. at 4. Accordingly, we allowed in part defendant's petition for the limited purpose of reviewing that sole issue and addressing the clerical error regarding the offenses to which defendant pled guilty. *Id.* slip op. at 4–5.

In *Brice*, this Court held that the State's failure to comply with N.C. Gen. Stat. § 15A-928's special-pleading requirement—that is, when a prior conviction or convictions constitute an element of a greater offense, that prior conviction or those convictions must be listed on a special indictment or information, or in a separate count—constituted a fatal jurisdictional defect. \_\_\_ N.C. App. at \_\_\_, 786 S.E.2d at 815 (citing *State v. Williams*, 153 N.C. App. 192, 568 S.E.2d 890 (2002), *disc. rev. improvidently allowed*, 357 N.C. 45, 577 S.E.2d 618 (2003), *and overruled by Brice*, \_\_\_ N.C. at \_\_\_ n.4, 806 S.E.2d at 40 n.4). The *Brice* panel thus vacated the defendant's habitual misdemeanor larceny conviction and remanded for entry of a

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judgment and resentencing on the lesser offense of misdemeanor larceny. *Id.* Here, the State similarly violated N.C. Gen. Stat. § 15A-928 by including a prior conviction of driving while impaired, an element of AFDV, on defendant's AFDV indictment. *Simmons*, slip op. at 4. Accordingly, under *Brice*, we vacated defendant's AFDV conviction and remanded for entry of a judgment and resentencing on the lesser offense of felony death by vehicle (FDV). *Id.* slip op. at 4. We also instructed the trial court on remand to correct a clerical error in its judgment. *Id.* slip op. at 5 ("Although the plea arrangement and plea hearing transcript reflect that defendant pled guilty to FHR, see N.C. Gen. Stat. § 20-166(a) (2015), the judgment reflects that he pled guilty to felony serious injury by vehicle, see N.C. Gen. Stat. § 20-141.4(a3) (2015).").

On 28 August 2017, the State filed a petition for a writ of *supersedeas* and a motion for a temporary stay with the Supreme Court of North Carolina. On 15 September 2017, the State filed a petition for discretionary review. On 28 September 2017, defendant filed a response to the State's petition for discretionary review and a conditional request for discretionary review of an additional issue. On 7 December 2017, our Supreme Court dissolved the temporary stay, denied the State's petition for a writ of *supersedeas*, denied defendant's conditional petition for discretionary review, and allowed the State's petition for discretionary review for the limited purpose of remanding the case to this Court for reconsideration of our decision in

*Simmons* in light of its decision in *State v. Brice*, \_\_\_ N.C. \_\_\_, 806 S.E.2d 32 (2017), *rev'g* \_\_\_ N.C. App. \_\_\_, 786 S.E.2d 812 (2016).

On remand, after reviewing *Brice*, we conclude that defendant's alleged AFDV indictment error under N.C. Gen. Stat. § 15A-928 no longer implicates jurisdiction and, therefore, defendant has waived his right to appellate review of this issue by failing to object below. Accordingly, we modify our prior decision in *Simmons* and sustain the trial court's judgment and sentence with respect to the AFDV conviction. We remand for the limited purpose of instructing the trial court to correct the clerical error in its judgment by reflecting that defendant pled guilty to FHR.

### ***I. Analysis***

In *Brice*, this Court held that the State's failure to comply with N.C. Gen. Stat. § 15A-928's special-pleading requirement constituted a fatal jurisdictional defect. \_\_\_ N.C. App. at \_\_\_, 786 S.E.2d at 815 (citation omitted). We thus vacated the defendant's conviction for habitual misdemeanor larceny and remanded for entry of a judgment and sentence on misdemeanor larceny. *Id.*

On discretionary review, by written opinion filed 3 November 2017, our Supreme Court held that the State's failure to comply with N.C. Gen. Stat. § 15A-928's special-pleading requirement did not implicate the trial court's jurisdiction. *Brice*, \_\_\_ N.C. at \_\_\_, 806 S.E.2d at 38. Thus, as the defendant failed to object below to the State's N.C. Gen. Stat. § 15A-928 noncompliance, she was not entitled to raise

that non-jurisdictional issue for the first time on appeal. *Id.* at \_\_\_, 806 S.E.2d at 39–40. Accordingly, our Supreme Court reversed our decision in *Brice*, deemed the defendant’s N.C. Gen. Stat. § 15A-928 issue waived, and remanded with instructions to reinstate the trial court’s prior judgment. *Id.*

In reconsideration of our decision, we are bound by our Supreme Court’s holdings in *Brice*. As the preservation issue in this case is indistinguishable from *Brice*, we hold that because defendant failed to object below to the State’s noncompliance with N.C. Gen. Stat. § 15A-928’s special-pleading requirement, he “is not entitled to seek relief based upon that indictment-related deficiency for the first time on appeal.” *Id.* at \_\_\_, 806 S.E.2d at 40 (footnote omitted). Accordingly, under *Brice*, we deem this issue unpreserved for appellate review and thus hold the trial court’s prior judgment should be reinstated. We remand this case for the limited purpose of instructing the trial court to correct the clerical error in its judgment to reflect accurately that defendant pled guilty to FHR.

## ***II. Conclusion***

After reconsideration of our prior decision in light of *Brice*, we conclude that defendant’s failure to object below to the State’s noncompliance with N.C. Gen. Stat. § 15A-928 waived his right to appellate review of this issue. Therefore, we hold that the trial court’s prior judgment be reinstated. We remand for the limited purpose of

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instructing the trial court to correct the clerical error in its judgment by accurately reflecting that defendant pled guilty to FHR.

REMANDED FOR CORRECTION OF CLERICAL ERROR.

Judges INMAN and BERGER concur.