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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-1005-2

Filed: 20 March 2018

Washington County, No. 13CRS50004

STATE OF NORTH CAROLINA

v.

AILKEEM ANTHONY NORMAN

Appeal by defendant from judgment entered 13 April 2016 by Judge J. Carlton Cole in Washington County Superior Court. Heard in the Court of Appeals 6 April 2017. By opinion issued 2 May 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 8 February 2018, 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).

Attorney General Joshua H. Stein, by Special Deputy Attorney General Douglas W. Corkhill, for the State.

Irons & Irons, P.A., by Ben G. Irons II, for defendant-appellant.

PER CURIAM.

On 13 April 2016, Ailkeem Anthony Norman ("Defendant") was convicted by a jury of carrying a concealed weapon, resisting a public officer, felony carrying a concealed gun, and assault with a firearm on a law enforcement officer. On appeal, Defendant argued, in part, that the indictment for felony carrying a concealed gun was fatally defective and deprived the trial court of jurisdiction, because it did not include a separate count alleging that Defendant was previously convicted of carrying a concealed gun pursuant to N.C. Gen. Stat. § 15A-928(a) and (b). *State v. Norman*, No. COA16-1005**,** 2017 WL 1632644 at *4 (N.C. App. May 2, 2017) (unpublished). The State conceded the 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). *Id.*.

In *Brice*, this Court had held 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 (citing *State v. Williams*, 153 N.C. App. 192, 568 S.E.2d 890 (2002), *disc. review improvidently allowed*, 357 N.C. 45, 577 S.E.2d 618 (2003), *and overruled by State v. Brice*, ___ N.C. ___ , ___ n.4, 806 S.E.2d 32, 40 n.4 (2017)).

N.C. Gen. Stat. § 15A-928 requires that 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. N.C. Gen. Stat. § 15A-928(a)-(b) (2017). The panel in *Brice* vacated the defendant's

habitual misdemeanor larceny conviction and remanded for entry of a judgment and resentencing on the lesser offense of misdemeanor larceny. *Brice*, ___ N.C. App. at ___, 786 S.E.2d at 815.

Here, the State similarly violated N.C. Gen. Stat. § 15A-928 by including Defendant's prior conviction of carrying a concealed weapon to elevate Defendant's charge to felony carrying a concealed gun. *Norman*, 2017 WL 1632644, at *2. Relying upon *Brice*, we vacated Defendant's conviction for felony carrying a concealed gun and remanded for resentencing and entry of judgment on the misdemeanor offense of carrying a concealed weapon. *Id*. at *5.

On 17 May 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 6 June 2017, the State filed a petition for discretionary review. On 19 June 2017, Defendant filed a response to the State's petition for discretionary review. On 7 December 2017, our Supreme Court dissolved the temporary stay, denied the State's petition for a writ of *supersedeas*, but allowed the State's petition for discretionary review for the limited purpose to remand the case to this Court for reconsideration of our prior decision in *Norman* in light of its decision in *State v. Brice*, ___ N.C. ___, 806 S.E.2d 32.

On remand, after reviewing our Supreme Court's opinion in *Brice*, we conclude that the stipulated error of N.C. Gen. Stat. § 15A-928's requirements in Defendant's

carrying a concealed gun indictment no longer implicates jurisdiction. As in *Brice* and because Defendant waived his right to appellate review of this issue by failing to object before the trial court, we modify our prior decision in *Norman* and sustain the trial court's judgment and sentence imposed upon Defendant with respect to the jury's felony carrying a concealed gun conviction.

I. Analysis

In *Brice*, this Court had 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). This Court 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, 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. As the defendant failed to object below to the State's noncompliance with N.C. Gen. Stat. § 15A-928, 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. Our Supreme Court reversed this Court's 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.*

Our Supreme Court's holding in *Brice* determines the outcome here. Upon reconsideration of our prior decision, the preservation issue in this case is indistinguishable from that reviewed by our Supreme Court in *Brice*.

Defendant failed to object at trial to the State's admitted 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). Under *Brice*, this issue is unpreserved for appellate review and the trial court's prior judgment is reinstated. *Id.*

II. Conclusion

After reconsideration of our prior decision in light of *Brice*, Defendant's failure to object to the State's noncompliance with N.C. Gen. Stat. § 15A-928 waived his right to appellate review of this issue. *Id.* at ___, 806 S.E.2d at 39-40. We hold the trial court's prior judgment on Defendant's conviction for felony carrying a concealed gun be reinstated. The remainder of this Court's prior opinion remains undisturbed. *It is so ordered.*

REVERSED IN PART; NO ERROR IN PART.

Panel consisting of: Dillon, Tyson, and Arrowood, JJ.

Report per Rule 30(e).