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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-1387

Filed: 3 July 2018

Wilkes County, Nos. 14 CRS 50680, 52851; 15 CRS 43, 163, 188-189, 249

STATE OF NORTH CAROLINA

v.

CARL RAY POORE, JR.

Appeal by defendant from order entered 12 May 2017 by Judge Richard Doughton in Wilkes County Superior Court. Heard in the Court of Appeals 5 June 2018.

Attorney General Joshua H. Stein, by Assistant Attorney General Joseph L. Hyde, for the State

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Daniel K. Shatz, for defendant.

ARROWOOD, Judge.

Carl Ray Poore, Jr., (“defendant”) appeals the denial of his motion for appropriate relief (“MAR”) from judgment entered upon his plea of no contest to various larceny and possession of stolen property charges. For the following reasons, we vacate and remand.

I. Background

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Between August 2014 and March 2015, defendant was indicted on charges in three different counties. On 4 August 2014, an Alleghany County Grand Jury indicted defendant on one count of felony larceny in file number 15 CRS 189¹ and for being an habitual felon in file number 15 CRS 188. On 12 January 2015, a Wilkes County Grand Jury indicted defendant on one count of felony larceny in file number 14 CRS 50680 and one count of felony larceny and one count of felony larceny of a motor vehicle in file number 14 CRS 52851. The State also contends a Wilkes County Grand Jury indicted defendant for being an habitual felon in file number 15 CRS 43. On 23 March 2015, a Yadkin County Grand Jury indicted defendant on two counts of felony possession of stolen property in file number 15 CRS 163 and one count of misdemeanor possession of stolen property in file number 15 CRS 249.

Upon motions by defendant and with the consent of the State, orders changing the venue of all cases to Wilkes County Superior Court were entered by Judge Richard Doughton in Alleghany County Superior Court on 16 March 2015 and by Judge David L. Hall in Yadkin County Superior Court on 23 March 2015.

Once the cases were together in Wilkes County Superior Court, on 1 July 2015, defendant entered into a plea arrangement whereby he pleaded no contest to all charges and agreed to be sentenced in the judge's discretion. Judge Michael D. Duncan accepted defendant's plea and entered judgment on 1 July 2015. All the

¹ All file numbers referenced are Wilkes County file numbers, some of which were assigned after all of defendant's cases were moved to Wilkes County Superior Court.

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offenses were consolidated into felony larceny in file number 14 CRS 50680 and, pursuant to the habitual felon status in file number 15 CRS 43, defendant received an enhanced sentence of 110 to 144 months imprisonment.

On 12 November 2015, defendant filed a *pro se* MAR. In the MAR, defendant asserted that the habitual felon indictment in file number 15 CRS 43 was defective and he received ineffective assistance of counsel. By order signed 4 December 2015, Judge Duncan recused himself from defendant's MAR and assigned the matter to Judge Doughton, who subsequently appointed counsel and ordered a transcript for defendant by order signed 15 December 2015. On 15 August 2016, defendant's appointed counsel filed notice that she would not be filing an amended MAR on defendant's behalf. Defendant's counsel also requested that clerical errors in the judgment be corrected. Although represented by appointed counsel, on 6 September 2016, defendant filed a *pro se* motion to amend his MAR and a *pro se* amended MAR.

Defendant's MAR came on for hearing on 12 May 2017 in Wilkes County Superior Court before the Honorable Richard Doughton. Upon the conclusion of the hearing, the trial court entered an order denying defendant's MAR and ordering the correction of clerical errors in the judgment. An amended judgment correcting clerical errors was filed the same day.

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On 20 June 2017, defendant filed a *pro se* petition for writ of certiorari (“PWC”) with this Court seeking a review of the 12 May 2017 order denying his MAR. This Court allowed defendant’s PWC by order on 29 June 2017. Defendant was determined to be indigent and appellate counsel was appointed.

II. Discussion

On appeal, defendant contends the trial court erred in denying his MAR. “When considering rulings on motions for appropriate relief, we review the trial court’s order to determine ‘whether the findings of fact are supported by evidence, whether the findings of fact support the conclusions of law, and whether the conclusions of law support the order entered by the trial court.’ ” *State v. Frogge*, 359 N.C. 228, 240, 607 S.E.2d 627, 634 (2005) (quoting *State v. Stevens*, 305 N.C. 712, 720, 291 S.E.2d 585, 591 (1982)). “ ‘When a trial court’s findings on a motion for appropriate relief are reviewed, these findings are binding if they are supported by competent evidence and may be disturbed only upon a showing of manifest abuse of discretion. However, the trial court’s conclusions are fully reviewable on appeal.’ ” *State v. Lutz*, 177 N.C. App. 140, 142, 628 S.E.2d 34, 35 (2006) (quoting *State v. Wilkins*, 131 N.C. App. 220, 223, 506 S.E.2d 274, 276 (1998)).

1. Indictment

Defendant first contends the trial court erred in denying his MAR because the habitual felon indictment in file number 15 CRS 43 is fatally defective on its face.

Therefore, defendant contends the trial court did not have jurisdiction. Defendant's contention is based on the failure of the State to identify defendant anywhere in the body of the indictment.

Pertaining to the sufficiency of the habitual felon indictment in file number 15 CRS 43, the trial court issued the following finding of fact in its order denying defendant's MAR:

3. The Court finds the case of *State v. Sisk*, 123 N.C. App. 361 (1996)[,] to be directly on point and further finds that the indictment of the defendant for habitual felon status as found at 15 CRS 43 of the records of the Wilkes County Clerk of Superior Court to be a valid indictment. This Court makes this finding based upon the fact that the defendant's name of "CARL RAY POORE, JR." appears in the caption of 15 CRS 43 and further that the defendant's three underlying felony convictions as set forth in 15 CRS 43 gave the defendant proper and correct notice of this [sic] three underlying felony convictions and that he was being tried as an habitual felon status offender. The Court finds that the name of "Todd Alan Walker" as it appears in the body of 15 CRS 43 is merely an inadvertence and likely the result of the prosecutor in the instant case using another previously used habitual felon indictment from another case to indict the defendant. As such, because the defendant has failed to demonstrate that he was prejudiced by this mere inadvertence of "Todd Alan Walker" appearing in the body of his habitual felon indictment as found at 15 CRS 43, the Court finds that the defendant had total and legally sufficient notice that he was being tried as an habitual felon due to 15 CRS 43 being a valid indictment thereby properly conferring jurisdiction to the Trial Court to sentence the defendant.

Based on this finding, the trial court concluded as follows:

1. The Court concludes as a matter of law that defendant's indictment for habitual felon status as found at 15 CRS 43 is a valid indictment that properly gave the Trial Court jurisdiction to sentence the defendant . . . for the habitual felon status enhanced offense of felony larceny as found at 14 CRS 50680 with the defendant being a record level VI.
2. The Court concludes as a matter of law that the defendant's [MAR] that was filed November 12, 2015 is without merit as the defendant has failed to demonstrate that he was prejudiced. As such, his claim that the habitual felon indictment as found in 15 CRS 43 was defective is hereby denied and dismissed as the defendant has not shown how he was prejudiced by the name of "Todd Alan Walker" appearing in the body of the habitual felony indictment. . . .

Upon review, we agree with defendant that the trial court erred in finding the habitual felon indictment in file number 15 CRS 43 to be a valid indictment.

"An indictment must clearly and positively identify the person charged with the commission of the offense." *State v. Simpson*, 302 N.C. 613, 616, 276 S.E.2d 361, 363 (1981) (citations omitted). Our Supreme Court has held that "[t]he caption of an indictment . . . is not a part of [the indictment,]" *State v. Bennett*, 271 N.C. 423, 425, 156 S.E.2d 725, 726 (1967), and explained that "[t]he name of the defendant, or a sufficient description if his name is unknown, must be alleged in the body of the indictment; and the omission of his name, or a sufficient description if his name is unknown, is a fatal and incurable defect[,]" *Simpson*, 302 N.C. at 616, 276 S.E.2d at 363 (citations omitted).

In the present case, although defendant's name is included in the caption of the habitual felon indictment in file number 15 CRS 43, the body of the indictment does not identify defendant. Instead, the body of the indictment charges "Todd Alan Walker, whose date of birth is April 24, 1979, is an Habitual Felon[.]" In full, the body of the indictment provides as follows:

The jurors for the State upon their oath present that Todd Alan Walker, whose date of birth is April 24, 1979, is an Habitual Felon in that on or about the dates and in the courts shown below, the defendant was convicted of the indicated felonies which were committed on the dates shown below. At least by [sic] two of these felonies were committed by this defendant after attaining the age of eighteen years.

The indictment then lists three prior felonies. We emphasize that there is no mention of defendant anywhere in the body of the indictment.

Below, the State argued and the trial court found that the indictment was not defective based on this Court's decision in *State v. Sisk*, 123 N.C. App. 361, 473 S.E.2d 348 (1996). However, it is clear to this Court that *Sisk* is distinguishable and the trial court erred in relying on *Sisk* in this case.

In *Sisk*, the defendant argued the trial court erred in denying her motion to dismiss a forgery charge because there was a fatal variance between the indictment and the State's proof. *Id.* at 365, 473 S.E.2d at 351. The defendant's argument was based on the inclusion of the name "Janette Marsh Cook" in the body of the indictment where it should have been the defendant's name. *Id.* Although this Court

“recognize[d] that the indictment was carelessly drafted,” this Court held there was not a fatal variance because

[t]he caption of the indictment correctly stated defendant’s name as the person charged, and the indictment incorporated that identification by reference in the body of the indictment. Moreover, the body of the indictment specifically identified defendant as the named payee of the forged document before mistakenly referring to defendant as Janette Marsh Cook.

Id.

In contrast to *Sisk*, the caption of the habitual felon indictment in file number 15 CRS 43 that includes defendant’s name is not incorporated by reference into the body of the indictment. Moreover, as emphasized above, there is no identification of defendant anywhere in the body of the indictment. The only person identified in the body of the indictment is “Todd Alan Walker.” Because of these significant dissimilarities, *Sisk* is not controlling in the present case.

In fact, the State does not even cite *Sisk* on appeal. Although the State acknowledges that a valid bill of indictment clearly and positively identifying the person charged with an offense is essential to the jurisdiction of a trial court to try an accused for a felony, the State contends an habitual felon indictment is sufficient without identifying the defendant if it otherwise provides adequate notice of the prior felony convictions because “[b]eing an habitual felon is not a crime but rather a status which subjects the individual who is subsequently convicted of a crime to increased punishment for that crime.” *State v. Patton*, 342 N.C. 633, 635, 466 S.E.2d 708, 710

(1996). The State string cites cases showing that this Court has upheld the validity of habitual felon indictments despite various errors or omissions in the indictments. Notably, however, none of the cases cited by the State involved the failure to identify the defendant in the body of an habitual felon indictment.

Although we acknowledge that habitual felon status is not a standalone felony, there is no reason why the requirement that a felony indictment clearly and positively identify the defendant in the body of the indictment is not equally important in an habitual felon indictment that will enhance the punishment for underlying felonies.

Because defendant is not identified in the body of the habitual felon indictment in file number 15 CRS 43, the indictment is fatally defective. Consequently, the trial court did not have jurisdiction to accept defendant's plea that included file number 15 CRS 43, *see State v. Frink*, 177 N.C. App. 144, 146-47, 627 S.E.2d 472, 473-74 (2006) (the trial court lacked subject matter jurisdiction to enter judgment on the defendant's guilty plea because the indictment was fatally defective), and defendant's plea and the judgment entered thereupon must be vacated, *see State v. Barnett*, 223 N.C. App. 65, 68, 733 S.E.2d 95, 97-98 (2012) ("Lack of jurisdiction in the trial court due to a fatally defective indictment requires the appellate court . . . to arrest judgment or vacate any order entered without authority.") (internal quotation marks and citations omitted). The trial court's findings and conclusions to the contrary in the order denying defendant's MAR are in error.

2. Additional Issues

Defendant also argues that the trial court erred in denying his MAR because his plea was not knowing and voluntary, the entry of judgment on all counts of larceny and possession of stolen property violated his right to be free from double jeopardy, and he did not receive effective assistance of counsel. However, because the judgment entered below must be vacated and the matter remanded based on the trial court's lack of jurisdiction to accept defendant's guilty plea, we do not address these remaining issues further.

III. Conclusion

For the reasons discussed above, the trial court erred in denying defendant's MAR. Defendant's guilty plea and the judgment entered thereupon are vacated and the matter is remanded to the trial court.

VACATED AND REMANDED.

Judges CALABRIA and MURPHY concur.

Report per Rule 30(e).