

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-527

Filed: 18 December 2018

Pitt County, No. 16CRS50001

STATE OF NORTH CAROLINA

v.

SAMANTHA LEIGH BAKER, Defendant.

Appeal by State from order entered 27 November 2017 by Judge Marvin K. Blount, III, in Pitt County Superior Court. Heard in the Court of Appeals 15 November 2018.

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

*The Robinson Law Firm, P.A., by Leslie S. Robinson for Defendant-Appellee.*

INMAN, Judge.

The State appeals from the superior court's order dismissing misdemeanor charges against Samantha Leigh Baker ("Defendant") for lack of subject matter jurisdiction. After careful review of the record and applicable law, we affirm the superior court's ruling that the State improperly circumvented district court jurisdiction by simultaneously obtaining a presentment and indictment from a grand jury, but we hold that the charges are not subject to dismissal. We affirm in part, reverse in part, and remand.

I. Factual and Procedural Background

The record reflects the following facts:

On 31 December 2015, Defendant was arrested and issued citations for impaired driving and operating an overcrowded vehicle in Pitt County. After Defendant's initial hearing date in Pitt County District Court and before her case was called for trial, Defendant was indicted by the Pitt County Grand Jury on both misdemeanor counts and her case was transferred to Pitt County Superior Court.

In the wake of a decision by this Court holding that impaired driving citations were insufficient to toll the two-year statute of limitations for prosecution of those cases,<sup>1</sup> the Pitt County District Attorney's Office employed a novel and unusual procedure to obtain grand jury presentments and indictments in pending impaired driving cases. Legal assistants to prosecutors prepared presentments and indictments identical in content, except for their titles ("PRESENTMENT" versus "INDICTMENT") and the description of the grand jury's action in the foreman's signature block ("Bill of Presentment" versus "Bill of Indictment"). After a prosecutor signed both the presentment and indictment for each impaired driving case, both

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<sup>1</sup> Assistant District Attorney Phillip Entzminger—the prosecutor who signed the presentment and indictment at issue—testified that the procedure was in response to a then-recent, but later struck down, decision rendered by this Court. *See State v. Turner*, \_\_ N.C. App \_\_, \_\_, 793 S.E.2d 287, 290 (2016) (holding that Section 15-1 of our General Statutes does not toll the two-year statute of limitations for, *inter alia*, citations received for driving while impaired), *rev'd by* \_\_ N.C. \_\_, 817 S.E.2d 173 (2018).

documents were combined and placed in a folder for simultaneous delivery to the grand jury.

At the start of the next superior court session in which the grand jury was convened, the prosecutor delivered to a law enforcement officer in charge of the grand jury, in open court, the folder containing all documents to be reviewed by the grand jury in that session, including the substantially identical presentments and indictments for impaired driving cases. When the arresting officer in each impaired driving case came before the grand jury, the grand jury officer provided to the testifying officer both the presentment and indictment for that case. As with all grand jury proceedings, all the testimony and verbal exchanges before the grand jury occurred behind closed doors and in secret, so no transcript is available of those proceedings.

During its session on 27 February 2017, the grand jury considered the presentment and indictment prepared and signed by the district attorney's office charging Defendant with impaired driving and operating an overcrowded vehicle, and heard testimony from Officer C. Cordena, the officer who had arrested and initially cited Defendant for those offenses.

At the end of the 27 February 2017 session, the grand jury foreman, escorted by the grand jury officer, returned to the courtroom and presented to the presiding judge the folder containing all the documents reviewed and returned by the grand

jury. After the judge reviewed the documents and confirmed in open court that each had been signed by the grand jury foreman, they were filed with the clerk's office.<sup>2</sup>

Defendant's case was ultimately called for trial in Pitt County Superior Court. Defendant filed a motion to dismiss her case for lack of subject matter jurisdiction due to the constitutional and statutory invalidity of the presentment and indictment procedure. After a hearing, the superior court on 27 November 2017 granted Defendant's motion, concluding that the district attorney's office had violated Sections 7A-271 and 15A-641 of our General Statutes and Defendant's constitutional rights. The State timely appealed.

## II. Analysis

### *A. Standard of Review*

The State argues that the superior court erred in concluding as a matter of law that it was without jurisdiction to hear Defendant's case. "Questions of subject matter jurisdiction are reviewed *de novo*." *State v. Rogers*, \_\_ N.C. App. \_\_, \_\_, 808 S.E.2d 156, 162 (2017).

The State does not challenge any of the trial court's findings of fact, so each of those findings is binding on appeal. *State v. Biber*, 365 N.C. 162, 167-68, 712 S.E.2d 874, 878 (2011). Conclusions of law drawn from the findings of facts are reviewed *de novo*. *State v. Williams*, 362 N.C. 628, 632, 669 S.E.2d 290, 294 (2008). "Under a *de*

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<sup>2</sup> The grand jury proceedings took place from 10:01 am until 3:52 pm. In that time span, the grand jury returned 286 true bills of indictments, 34 presentments, and one no true bill.

*novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal.” *Id.* at 628, 669 S.E.2d at 294 (quotations and citations omitted).

*B. Presentment and Indictment*

The district court is vested with exclusive jurisdiction for most misdemeanor cases. N.C. Gen. Stat. § 7A-272(a) (2017). The superior court attains original jurisdiction for misdemeanor actions only if, among other independent reasons, “the charge is initiated by presentment.” N.C. Gen. Stat. § 7A-271(a)(2) (2017).

A presentment is a written accusation by a grand jury, *made on its own motion* and filed with a superior court, charging a person, or two or more persons jointly, with the commission of one or more criminal offenses. A presentment does not institute criminal proceedings against any person, but the *district attorney is obligated to investigate* the factual background of every presentment returned in his district and to submit bills of indictment to the grand jury dealing with the subject matter of any presentments when it is appropriate to do so.

N.C. Gen. Stat. § 15A-641(c) (2017) (emphasis added). An indictment, by contrast, “is a written accusation by a grand jury, filed with a superior court, charging a person with the commission of one or more criminal offenses.” N.C. Gen. Stat. § 15A-641(a) (2017). The plain language of Section 15A-641 precludes a grand jury from issuing a presentment and indictment on the same charges absent an investigation by the prosecutor following the presentment and prior to the indictment.

The State argues that Section 15A-641 conflicts with Section 15A-644, requiring a contrary conclusion. Section 15A-644 provides that a valid presentment “must contain everything required of an indictment” except that the statutory requirement for the prosecutor’s signature “do[es] not apply.”<sup>3</sup> N.C. Gen. Stat. § 15A-644(c) (2017). An indictment must contain (1) the superior court’s name; (2) the title of the action; (3) the criminal offense charged; (4) the prosecutor’s signature, though its absence is not fatal; and (5) the grand jury foreman’s signature attesting the grand jury’s unanimous concurrence. *Id.* § 15A-644(a). The State asserts that Section 15A-644(c) governs the procedure for presentments, and that because the presentment here meets all the requirements of Section 15A-644(c), it is valid.

The State further asserts that Section 15A-641(c) is merely a definitional provision, intending to only parallel the common law definition of a presentment.

The State confuses the issue in this case. It is not the sufficiency of the presentment form and contents that is at issue, but the presentment’s simultaneous occurrence with the State’s indictment that makes both invalid. Also, contrary to the State’s argument, the second sentence of Section 15A-641(c) does in fact dictate what procedure must occur before an indictment can be provided. A valid presentment instructs the prosecutor to perform an investigation, without an accompanying

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<sup>3</sup> Because we base our decision today on the *timing* of the presentment and the indictment, not the *substance* of the presentment, we need not address the issue of whether a prosecutor’s signature on a presentment form given to the grand jury violates Section 15A-644.

indictment, into suspected illegal activity. N.C. Gen. Stat. § 15A-641(c); *State v. Morris*, 104 N.C. 837, 839, 10 S.E. 454, 455 (1889).<sup>4</sup> This procedural requirement, while also defining what a presentment is, was not followed in this case. Contrary to the State’s argument, Sections 15A-644(c) and 15A-641(c) do not conflict with each other. One merely defines what a presentment is and what it instructs, while the other provides what an *otherwise valid presentment* must contain.

Section 15A-641 was “intended to set out the North Carolina common law relating to the definitions of indictment . . . and presentment.” N.C. Gen. Stat. § 15A-641 official commentary (2017). So, in addition to deriving our holding based on the plain language of the statute, we consider the long history of case law regarding presentments and indictments to interpret the statute.

The distinction between an indictment and a presentment dates as far back as the 1776 Halifax Convention, the genesis of North Carolina’s Constitution. *State v. Thomas*, 236 N.C. 454, 457, 73 S.E.2d 283, 285 (1952). Enshrined within Section 8 of the Declaration of Rights, the 1776 Constitution provided that “no freeman shall be put to answer any criminal charge, but by indictment, presentment, or impeachment.” *Id.* at 457, 73 S.E.2d at 285 (quotations omitted). While North Carolina’s Constitution was, in relevant part, adjusted in 1797, 1868, and again in

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<sup>4</sup> This decision was reprinted in 1920 as 104 N.C. 576.

1950, that delineation between presentment and indictment never wavered. *Id.* at 457, 73 S.E.2d at 285. Article I, Section 22 of our Constitution provides:

Except in misdemeanor cases initiated in the District Court Division, no person shall be put to answer any criminal charge but by indictment, presentment, *or* impeachment. . . .

N.C. Const. art. I, § 22 (emphasis added). Historically, similar to the way the terms are codified now in Section 15A-641, an indictment was referenced in the “constitutional provision to signify a written accusation of a crime drawn up by the public prosecuting attorney and submitted to the grand jury . . . as a true bill.” *Thomas*, 236 N.C. at 457, 73 S.E.2d at 285. By contrast, a presentment was “an accusation, made *ex mero motu* by a grand jury, of an offense, upon their own observation and knowledge, or upon evidence before them, and *without any bill of indictment laid before them.*” *Morris*, 104 N.C. at 839, 10 S.E. at 455 (emphasis added). Some duration of time is required for the prosecutor to sufficiently investigate the grand jury’s directive because the presentment must not stem from

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“any bill of indictment [brought] before them.”<sup>5</sup> *Lewis v. Bd. of Comm’rs of Wake Cnty.*, 74 N.C. 194, 197 (1876).<sup>6</sup>

While the grand jury acts of its own volition for presentments, it can still rely “upon information from others,” including the prosecutor.<sup>7</sup> *Thomas*, 236 N.C. at 457, 73 S.E.2d at 285; *see* N.C. Gen. Stat. § 15A-628(a)(4) (2017) (“An investigation may be initiated upon the concurrence of 12 members of the grand jury itself or upon the request of the presiding or convening judge or the prosecutor.”); *see also State v. Gunter*, 111 N.C. App. 621, 625, 433 S.E.2d 191, 193 (1993) (“[T]he district attorney presented information to the grand jury regarding the offense, and the grand jury issued the presentment[.]”).

Since 1797, presentments have not initiated criminal charges; rather, a presentment is “nothing more than an instruction by the grand jury to the public prosecuting attorney to frame a bill of indictment” to submit back to them. *State v.*

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<sup>5</sup> For the first time on appeal, during oral argument, the State asserted that in *State v. Cole*, 294 N.C. 304, 240 S.E.2d 355 (1978), the North Carolina Supreme Court held that an indictment issued on the same day as a presentment was valid. *Cole* is readily distinguishable in fact and law. The defendant in *Cole* was tried originally in the district court in 18 December 1974 and only went to the superior court on appeal. So *Cole* was not a case in which the superior court had original jurisdiction. While Defendant’s appeal was pending in superior court, the grand jury returned a presentment and the district attorney’s office issued an indictment on the same day, though the decision does not state whether the presentment and indictment occurred simultaneously. Contrary to the State’s rendition, *Cole* held that an indictment language must only contain the “same factual subject matter” initiated by the presentment; that decision did not address the temporal context of the presentment and indictment. *Id.* at 309, 240 S.E.2d at 358.

<sup>6</sup> This decision was reprinted in 1957 as 74 N.C. 156.

<sup>7</sup> We agree with the State that the prosecutor did not violate Section 15A-628(a)(4) or the common law practice of furnishing information to the grand jury—in the guise of the presentment form and Officer Cordena’s private grand jury testimony—in order to facilitate its investigation.

*Wall*, 271 N.C. 675, 682, 157 S.E.2d 363, 368 (1967) (quotations and citation omitted). If the delivery of an indictment were not preceded by a factual investigation by the prosecutor after the return of a presentment, then the presentment, in and of itself, would institute criminal proceedings. *See State v. Guilford*, 49 N.C. (4 Jones) 83, 86 (1856) (noting that, prior to 1797, grand jury presentments “were frequently so informal” that they oppressed citizens who “had committed no violation of the public law”). A presentment returned simultaneously with an indictment would not be from the grand jury’s “own knowledge or observation,” or “upon information from others,” but by the direct endorsement of the prosecutor. *Thomas*, 236 N.C. at 457, 73 S.E.2d at 285.

For all of these reasons, we are unpersuaded by the State’s argument that the simultaneous submission to, and return of, both a presentment and an indictment in a misdemeanor case could confer jurisdiction on the superior court.

Here, the trial court found that the prosecutor “did not investigate the factual background of the Presentment after it was returned and before the Grand Jury considered the Indictment” of Defendant on the misdemeanor charges. Instead, “the prosecutor’s office reviewed the case file prior to the preparation of the Presentment and Indictment.” Because the prosecutor submitted these documents to the grand jury simultaneously and they were returned by the grand jury simultaneously, in contravention of Section 15A-641(c), we hold that each was rendered invalid as a

matter of law. Because the presentment and indictment were invalid, we affirm the superior court's ruling that it did not have subject matter jurisdiction.

*C. Constitutional Issues*

The trial court also concluded that Defendant's North Carolina constitutional rights were violated pursuant to Article I, Sections 19, 22, and 23 of our Constitution. The State and Defendant agree on appeal that only Article I, Section 22 is implicated in this case.

Article I, Section 22 provides:

Except in misdemeanor cases initiated in the District Court Division, no person shall be put to answer any criminal charge but by indictment, presentment, or impeachment. But any person, when represented by counsel, may, under such regulations as the General Assembly shall prescribe, waive indictment in noncapital cases.

N.C. Const. art. I, § 22. Defendant contends she was "put to answer" for her criminal charges by the invalid presentment and indictment. As discussed *supra*, the presentment and indictment were invalid because they were issued and returned in violation of Sections 7A-271 and 15A-641. As a result of the State's improper prosecution in superior court, Defendant had to appear in that court to seek dismissal of the prosecution and had to appear before this Court following the State's appeal. Although we affirm the trial court's conclusion of law that the superior court prosecution violated Defendant's right pursuant to Article I, Section 22, we need not

determine whether Defendant was prejudiced by the State's violation of her North Carolina constitutional right and do not address that issue.

*D. Dismissal Versus Remand to District Court*

The State, pursuant to authorities submitted supplemental to its briefs and in oral argument, contends that if this Court holds the superior court was without jurisdiction, the proper remedy is not dismissal but remand to the district court for proceedings commenced by Defendant's initial misdemeanor citations. We agree.

Section 7A-271(c) provides that the superior court, if it does not have jurisdiction pursuant to Section 7A-721(a), must "transfer[] to the district court any pending misdemeanor." N.C. Gen. Stat. § 7A-271(c) (2017). Accordingly, rather than affirming the trial court's order of dismissal, we remand to the superior court to enter an order transferring Defendant's case to the district court in Pitt County.

We acknowledge and distinguish this Court's recent decision in *State v. Cole*, \_\_ N.C. App. \_\_, \_\_ S.E.2d \_\_ (2018) (No. COA18-286). In *Cole*, Defendant was initially prosecuted, tried, and ultimately found guilty of driving while impaired in superior court. The superior court held concurrent jurisdiction with the district court when the grand jury issued a presentment and then, five days later, an indictment charging the defendant with impaired driving, and then exercised its jurisdiction when the case went to trial. *Id.* at \_\_, \_\_ S.E.2d at \_\_; see *Gunter*, 111 N.C. App. at 624, 433 S.E.2d at 193 (holding that Section 7A-271(a)(2) grants the superior court

the ability to acquire jurisdiction of a case already pending in district court). On appeal, the defendant argued that his pretrial motion to dismiss should have been granted because “the State never dismissed the citation in district court,” which was still active and pending. *Cole*, \_\_ N.C. App. at \_\_, \_\_ S.E.2d at \_\_. During the motion to dismiss hearing, the State admitted that there was no longer a pending district court case against the defendant. *Id.* at \_\_, \_\_ S.E.2d at \_\_. We held that (1) “[d]espite the State’s failure to dismiss the citation in district court, it made clear it had abandoned its prosecution in district court” in favor of the superior court, serving as a “functional equivalent of a dismissal;” and (2) once jeopardy attached in the superior court, the State was precluded from bringing the case a second time in the district court. *Id.* at \_\_, \_\_ S.E.2d at \_\_.

The superior court and district court can under certain circumstances retain concurrent jurisdiction in a criminal matter. However, when this happens, “the court first exercising jurisdiction in a particular prosecution obtains jurisdiction to the exclusion of the other. But when it enters a *nolle prosequi* it loses jurisdiction and the other court may proceed.” *State v. Karbas*, 28 N.C. App. 372, 374, 221 S.E.2d 98, 100 (1976).

In *Cole*, there was “no record evidence suggesting the district court exercised its jurisdiction over the offense after the existence of concurrent jurisdiction with the superior court.” *Cole*, \_\_ N.C. App. at \_\_, \_\_ S.E.2d at \_\_. Additionally, the prosecutor

in *Cole* made an express statement on the record that there was no longer a pending district court case because it was “super[s]eded” by the superior court indictment. *Id.* at \_\_, \_\_ S.E.2d at \_\_. Unlike in *Cole*, the superior court in this case failed to attain jurisdiction over Defendant and the prosecutor made clear that the district court case was “never dismissed.” Because the superior court was unable to exercise any jurisdiction, let alone to the exclusion of the district court, *Cole*’s holding that the State functionally dismissed the prosecution in district court once the superior court exercised exclusive jurisdiction is inapposite. Furthermore, jeopardy never attached against Defendant because the superior court determined it lacked jurisdiction.

In sum, Section 7A-271(c) instructs the trial court to transfer the misdemeanor charge to the district court when Section 7A-271(a) cannot be met. While *Cole* holds that the State implicitly abandons its prosecution in district court when it proceeds to trial in superior court and acknowledges its intent on the record not to proceed in district court, it does not apply here where the superior court failed to even exercise jurisdiction. Thus, the district court still has authority to exercise jurisdiction over Defendant’s case and, upon remand, should be transferred thereto.

### III. Conclusion

We hold that the trial court did not err in concluding that it was without jurisdiction to hear Defendant’s case because the presentment and indictment were improperly obtained and were thus invalid. We affirm the trial court’s ruling that

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the prosecution violated Sections 7A-271 and 15A-641 of our General Statutes and Article I, Section 22 of the North Carolina Constitution. We do not address whether Defendant was prejudiced by the State's violation of her North Carolina constitutional right.

We hold that the trial court erred in holding that the State violated Defendant's rights provided by Article I, Sections 19 and 23 of the North Carolina Constitution. We also hold that the trial court erred in dismissing the case, rather than transferring it to the district court upon the finding of a lack of jurisdiction.

AFFIRMED IN PART; REVERSED IN PART; REMANDED FOR FURTHER PROCEEDINGS.

Judges TYSON and ARROWOOD concur.