IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-672

Filed: 4 June 2019

Buncombe County, No. 15 CRS 5521, 15 CRS 93237, 15 CRS 93241

STATE OF NORTH CAROLINA

v.

MATTHEW GARRET MCMAHAN, Defendant.

Appeal by Defendant from judgments entered 25 August 2017 by Judge Alan Z. Thornburg in Buncombe County Superior Court. Heard in the Court of Appeals 30 January 2019.

*Attorney General Joshua H. Stein, by Special Deputy Attorney General Kathryn H. Shields, for the State.*

*Charlotte Gail Blake for defendant-appellant.*

MURPHY, Judge.

Defendant, Matthew Garret McMahan, solely appeals his conviction of failure to maintain lane control under N.C.G.S. §20-146(d)(1). Defendant argues the State failed to present substantial evidence that he was driving on a street that was "divided into two or more clearly marked lanes for traffic," an element of the failure to maintain lane control infraction, and that the trial court subsequently erred in

denying his motion to dismiss. In response to our decision in *State v. Baker*, ___ N.C. App. ___, 822 S.E.2d 902 (2018), and after supplemental briefing, Defendant argues the Superior Court was without jurisdiction to enter judgment on the infraction, as the State improperly obtained a presentment and indictment from the grand jury. We agree and vacate the judgment on the failure to maintain lane control infraction.

## BACKGROUND

On 12 December 2015, Officer Onderdonk with the Asheville Police Department responded to a report of a single vehicle collision near "I-40 westbound and US 25, or Hendersonville Road." He described the geography of the surrounding roads and the site of the collision as follows:

> [I] travelled down I-40 westbound. Exited Hendersonville Road heading northbound toward town. As I was coming off the on-ramp – or off-ramp around the one curve, I could see a vehicle off the roadway to the right side with the front end against a tree on an embankment.
>
> . . .
>
> If you're not familiar – when you exit right there, it's a slight right turn to a left turn and then another right turn onto – it's all flowing. There's no stop signs or anything onto US 25. Once you – right when you get off the interstate and you start that right turn and it starts coming back left, in that turn, the vehicle is up, I'd say probably 15 to 20 yards off of the lane of traffic. There's an embankment, and then there was a tree, and the vehicle was up against the tree with the front end of the vehicle – so front end was facing westbound.

When Officer Onderdonk approached the vehicle, he found Defendant in the driver's seat with a laceration on his right cheek and observed blood on the deployed airbags. Defendant, when asked by Officer Onderdonk what happened, replied, "what the fuck does it look like[?]" Officer Onderdonk smelled an odor of marijuana.[1]

On 3 April 2017, the grand jury issued presentments and indictments for driving while impaired, simple possession of marijuana, simple possession of a Schedule IV controlled substance, and failure to maintain lane control. The presentments and indictments were issued on the same day.[2] The trial court dismissed the simple possession of a Schedule IV controlled substance pursuant to Defendant's motion to dismiss at the close of the State's evidence. The jury found Defendant guilty of driving while impaired and simple possession of marijuana and responsible for failure to maintain lane control. Defendant timely appealed his convictions; however, by his initial brief, he only maintained his appeal of the failure to maintain lane control infraction.

## ANALYSIS

The issue of subject matter jurisdiction is one that "may be raised at any time, even for the first time on appeal or by a court *sua sponte*." *State v. Webber*, 190 N.C.

[1] Defendant does not contest the validity of his driving while impaired conviction, so we need not further discuss the factual circumstances leading to that conviction.

[2] The tactic of obtaining presentments and indictments from the grand jury in cases of impaired driving and related charges and the rationale behind it is fully discussed in *Baker*. *Baker*, ___ N.C. App. at ___, 822 S.E.2d at 903.

App. 649, 650, 660 S.E.2d 621, 622 (2008). "The existence of subject matter jurisdiction is a matter of law and cannot be conferred upon a court by consent." *State v. Williams*, 368 N.C. 620, 628, 781 S.E.2d 268, 274 (2016) (citation and internal quotation marks omitted). We review questions of subject matter jurisdiction de novo. *State v. Gorman*, 221 N.C. App. 330, 333, 727 S.E.2d 731, 733 (2012).

"The district court is vested with exclusive jurisdiction for most misdemeanor cases. The superior court attains original jurisdiction for misdemeanor actions only if, among other independent reasons, the charge is initiated by presentment." *State v. Baker*, ___ N.C. App. ___, ___, 822 S.E.2d 902, 904 (2018) (citations and internal quotation marks omitted). In *Baker*, we thoroughly explained the history of presentments as accusations "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*." *Baker*, ___ N.C. App. at ___, 822 S.E.2d at 906 (quoting *State v. Morris*, 104 N.C. 837, 839, 10 S.E. 454, 455 (1889)) (emphasis in original). Accordingly, we held that "[s]ome duration of time is required for the prosecutor to sufficiently investigate the grand jury's directive because the presentment must not stem from any bill of indictment brought before them." *Id.* (citation, alteration, and internal quotation marks 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." *Id.*

Here, both the presentment and indictment were issued by the grand jury in Buncombe County on the same day, 3 April 2017. While the prosecutor may be aware of the underlying facts and may furnish that information to the grand jury prior to the presentment, and there is no bright line rule on how much time must pass between the issuance of the presentment and indictment, there must be *some* duration of time for the prosecutor to sufficiently investigate the underlying facts of the presentment. There is no evidence of such a delay or duration of time between the presentment and indictment during which the prosecutor sufficiently investigated the grand jury's directive nor evidence that such an investigation in fact occurred. This renders both the presentment and indictment invalid as a matter of law and deprives the Superior Court of original jurisdiction.

The State makes two arguments in support of its contention that the Superior Court exercised proper jurisdiction in this case. First, it argues this case is similar to *State v. Cole*, 294 N.C. 304, 240 S.E.2d 355 (1978), where our Supreme Court held that an indictment, which was issued on the same day as the presentment, was valid. However, as we noted in *Baker*, "*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." *Baker*, ___

N.C. App. at ___, 822 S.E.2d at 906, n. 5 (quoting *Cole*, 294 N.C. at 309, 240 S.E.2d at 358). Here, the question is of the temporal context of the presentment and indictment, not the factual matter therein; thus, *Cole* is inapplicable.

Second, the State argues that *Baker* is inapplicable here because the record is silent as to whether the presentment and indictment "were submitted and returned simultaneously." This argument ignores *Baker's* holding requiring "some duration of time . . . for the prosecutor to sufficiently investigate the grand jury's directive . . . ." *Id.* While there has been no stipulation between the parties that the presentment and indictment were simultaneously submitted and returned, the presentment and indictment were returned by the grand jury on the same day with no evidence of a duration of time between the issuance of the presentment and indictment during which the prosecutor sufficiently investigated the underlying facts of the presentment, much less evidence of any such investigation.

The State also contends that "[i]nsofar as the record does not show the presentments and indictments were returned simultaneously, this Court cannot determine under *Baker* whether the superior court had jurisdiction, and the appeal should be dismissed." In support of this contention, the State points us to a line of cases that, it argues, hold that "[w]hen the record is silent and an appellate court is unable to determine whether the court below had jurisdiction, the appeal should be dismissed." Yet, those cases are procedurally distinguishable from the case at hand,

as they dealt with scenarios where we are unable to determine jurisdiction due to silence in the record. *See State v. Felmet*, 302 N.C. 173, 273 S.E.2d 708 (1981) (holding the Court of Appeals properly dismissed the defendant's appeal where the record was silent to jurisdiction because it did not indicate whether the defendant was tried in district court); *State v. Hunter*, 245 N.C. 607, 96 S.E.2d 840 (1957) (defendant's appeal dismissed where no copy of the bill of indictment was included in the record on appeal). This is contrary to the scenario in this case where the record itself shows a *lack of* jurisdiction. *See State v. Petersilie*, 334 N.C. 169, 175, 432 S.E.2d 832, 836 (1993). The issuance of the presentment and indictment on the same charges absent evidence of a delay subsequent to the presentment and preceding the indictment for sufficient investigation is precisely what renders both documents invalid and deprives the Superior Court of jurisdiction.

Having determined that the Superior Court was without jurisdiction due to the invalid presentment and indictment, we must determine the appropriate remedy. N.C.G.S. § 7A-271(c) states:

> (c) When a district court is established in a district, any superior court judge presiding over a criminal session of court shall order transferred to the district court any pending misdemeanor which does not fall within the provisions of subsection (a), and which is not pending in the superior court on appeal from a lower court.

N.C.G.S. § 7A-271(c) (2017). In *Baker*, we held that this section "instructs the trial court to transfer the misdemeanor charge to the district court when Section 7A-271(a)

cannot be met." *Baker*, ___ N.C. App. at ___, 822 S.E.2d at 908. In *Baker*, "the prosecutor made clear that the district court case was 'never dismissed[,]'" so we remanded to the district court "for proceedings commenced by [the d]efendant's initial misdemeanor citations." *Id.* at ___, 822 S.E.2d at 907-08.

In the case before us, the record does not reflect that there is a pending misdemeanor charge to be transferred. While testimony indicates Defendant was initially charged by citation, that citation is not included in the record before us, only the Superior Court presentment and indictment. Accordingly, the record before us shows no pending charging document in District Court over which the District Court may exercise jurisdiction. The conviction for failure to maintain lane control that Defendant challenges on appeal is vacated.

## CONCLUSION

For the reasons stated above, both the presentment and indictment were rendered invalid as a matter of law, and the Superior Court was without jurisdiction to enter judgment on the failure to maintain lane control conviction that Defendant contests. We vacate the judgment on this conviction.

VACATED.

Judges DILLON and ARROWOOD concur.

Report per Rule 30(e).