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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-285

Filed: 3 September 2019

Davie County, Nos. 13 CRS 50224; 14 CRS 358

STATE OF NORTH CAROLINA

v.

DOUGLAS EUGENE CURLEE

Appeal by Defendant from Judgments entered 26 November 2018 by Judge Mark Klass in Davie County Superior Court. Heard in the Court of Appeals 8 August 2019.

Attorney General Joshua H. Stein, by Assistant Attorney General Lewis W. Lamar, Jr., for the State.

Jillian C. Katz for defendant-appellant.

HAMPSON, Judge.

Factual and Procedural Background

This is the third time this matter has come before this Court following two prior reversals. Douglas Eugene Curlee (Defendant) now appeals from a Judgment reinstating his original sentence based upon convictions of Larceny from a Merchant

and attaining Habitual-Felon status. The Record before us tends to show the following:

On 7 October 2013, Defendant was indicted on the charge of Larceny from a Merchant. Defendant was subsequently indicted on the charge of attaining Habitual-Felon status on 19 May 2014. Defendant was found guilty on both charges and filed his first appeal. In his first appeal, this Court overturned Defendant's convictions because the trial court erroneously ruled Defendant had waived his right to counsel and denied Defendant's request for counsel. *State v. Curlee* (*Curlee I*), 251 N.C. App. 249, 795 S.E.2d 266 (2016). On retrial, Defendant was found guilty of the Larceny-from-a-Merchant charge and pleaded guilty to attaining Habitual-Felon status. Defendant was sentenced to an active sentence of 115 to 150 months in the custody of the North Carolina Department of Correction. Defendant again appealed, and this Court overturned the Judgment because the trial court sentenced Defendant to a more severe sentence upon retrial, thereby violating N.C. Gen. Stat. § 15A-1335, which forbids imposing a more severe sentence after appellate review. *State v. Curlee* (*Curlee II*), ___ N.C. App. ___, 813 S.E.2d 482 (15 May 2018) (unpublished).

With the case on remand for the second time, on 14 August 2018, Defendant filed a *pro se* Motion to Dismiss arguing the Larceny-from-a-Merchant Indictment failed to allege all of the essential elements of the offense. On 26 November 2018, a new sentencing hearing was held, the trial court declined to rule on Defendant's

Motion, and Defendant was resentenced to an active prison term of 103 to 136 months. Defendant appealed.

Issue

In his sole argument on appeal, Defendant asserts that the trial court lacked subject-matter jurisdiction over his case because the Indictment for the Larceny-from-a-Merchant charge lacked two essential elements of the offense.

Analysis

I. Standard of Review

"We review the issue of insufficiency of an indictment under a *de novo* standard of review." *State v. Marshall*, 188 N.C. App. 744, 748, 656 S.E.2d 709, 712 (2008) (citation omitted). "Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *State v. Williams*, 362 N.C. 628, 632-33, 669 S.E.2d 290, 294 (2008) (citation and quotation marks omitted).

II. Subject-Matter Jurisdiction

Defendant contends that the trial court lacked subject-matter jurisdiction over his case because the indictment for the Larceny-from-a-Merchant charge lacked two essential elements: (1) the property taken; and (2) taking and carrying away. The State concedes the indictment failed to sufficiently allege these two essential elements of the offense charged.

"[A]n indictment must allege every element of an offense in order to confer subject matter jurisdiction on the court." *State v. Kelso*, 187 N.C. App. 718, 722, 654 S.E.2d 28, 31 (2007). "[W]here an indictment is alleged to be invalid on its face, thereby depriving the trial court of its jurisdiction, a challenge to that indictment may be made at any time, even if it was not contested in the trial court." *State v. Wallace*, 351 N.C. 481, 503, 528 S.E.2d 326, 341 (2000) (citations omitted).

N.C. Gen. Stat. § 14-72.11, defining the offense of larceny from a merchant, provides:

> A person is guilty of a Class H felony if the person commits larceny against a merchant under any of the following circumstances:
>
> . . . .
>
> (2) By removing, destroying, or deactivating a component of an antishoplifting or inventory control device to prevent the activation of any antishoplifting or inventory control device.

N.C. Gen. Stat. § 14-72.11(2) (2017). "[A]n indictment under section 14-72.11(2) must allege the four elements of larceny and also removal of an antishoplifting or inventory control device." *State v. Justice*, 219 N.C. App. 642, 644, 723 S.E.2d 798, 801 (2012). The four elements of larceny the State must allege are: "(a) took the property of another; (b) carried it away; (c) without the owner's consent; and (d) with the intent to deprive the owner of his property permanently." *State v. Jones*, 369 N.C. 631, 633, 800 S.E.2d 54, 56 (2017) (citation and quotation marks omitted).

In *Justice*, the defendant was indicted and convicted of larceny from a merchant by removal of an anti-theft device and subsequently pleaded guilty to a habitual-felon charge. 219 N.C. App. at 643, 723 S.E.2d at 800. On appeal, the defendant argued that the trial court lacked subject-matter jurisdiction because the larceny-from-a-merchant charge in the indictment was fatally flawed. *Id.* This Court agreed and held that the indictment was fatally flawed where it failed to allege the defendant had taken or carried away property and failed to sufficiently describe the property. *Id.* at 645, 723 S.E.2d at 801. The *Justice* Court also overturned the judgment entered upon the defendant's guilty plea to the habitual-felon charge because "[b]eing [a] habitual felon is not a crime and cannot support, standing alone, a criminal sentence. Rather, being [a] habitual felon is a status justifying an increased punishment for the principal felony." *Id.* (citation and quotation marks omitted).

Here, the factual scenario is indistinguishable from *Justice*. Defendant was indicted for Larceny from a Merchant and attaining the status of a Habitual Felon. Defendant was found guilty on the Larceny-from-a-Merchant charge and pleaded guilty to attaining Habitual-Felon status. The Indictment in the case *sub judice* states:

> [T]hat on or about the 6th day of February, 2013, and in [Davie County], the defendant . . . unlawfully, willfully and feloniously did commit a larceny against a merchant, Lowe's Home Improvement, LLC, by removing or destroying or deactivating a

> component of an antishoplifting or inventory control device to prevent the activation of an antishoplifting or inventory control device, contrary to the form of the statute in such case made and provided and against the peace and dignity of the State.

The State concedes the Indictment fails to allege two essential elements of Larceny from a Merchant. Specifically, the State failed to allege Defendant took property from Lowe's and failed to allege the property was carried away. *See Jones*, 369 N.C. at 633, 800 S.E.2d at 56 (listing these two elements as essential elements of larceny); *see also Justice*, 219 N.C. App. at 644, 723 S.E.2d at 801 (holding "an indictment under section 14-72.11(2) must allege the four elements of larceny and also removal of an antishoplifting or inventory control device"). Because the Indictment fails to allege these two essential elements, the trial court lacked subject-matter jurisdiction to enter Judgment. *See Kelso*, 187 N.C. App. at 722, 654 S.E.2d at 31-32 ("[W]hen an indictment has failed to allege the essential elements of the crime charged, it has failed to give the trial court subject matter jurisdiction over the matter[.]" (citation and quotation marks omitted)). Therefore, we arrest Judgment on Defendant's conviction for Larceny from a Merchant, which serves to vacate the verdict entered against Defendant in file number 13 CRS 50224. *See State v. Pakulski*, 326 N.C. 434, 439, 390 S.E.2d 129, 132 (1990) ("When judgment is arrested because of a fatal flaw which appears on the face of the record, such as a substantive error on the indictment, the verdict itself is vacated and the State must seek a new

indictment if it elects to proceed again against the defendant." (citation omitted)); *see also Justice*, 219 N.C. App. at 645-46, 732 S.E.2d at 801-02 (citations omitted).

Further, because the Judgment in file number 13 CRS 50224 is arrested and the verdict vacated, as in *Justice*, we also reverse the Judgment entered upon Defendant's guilty plea to the Habitual-Felon charge in file number 14 CRS 358. *See Justice*, 219 N.C. App. at 645-46, 732 S.E.2d at 801-02 ("[B]eing [a] habitual felon is not a crime and cannot support, standing alone, a criminal sentence. Rather, being [a] habitual felon is a status justifying an increased punishment for the principal felony." (alteration in original) (citation and quotation marks omitted)). Without an underlying felony prosecution for the Habitual-Felon proceeding to "attach as an ancillary proceeding," Defendant's Judgment entered upon his guilty plea to the Habitual-Felon charge must be reversed and remanded to the trial court for dismissal. *State v. Allen*, 292 N.C. 431, 436, 233 S.E.2d 585, 589 (1977) (citation omitted).

Conclusion

For the foregoing reasons, we arrest Judgment against Defendant in file number 13 CRS 50224 on the conviction for Larceny from a Merchant. We reverse the Judgment in file number 14 CRS 358 upon Defendant's guilty plea of attaining Habitual-Felon status and remand the matter to the trial court to enter an order dismissing the Habitual-Felon Indictment. Because we arrest Judgment on the

Larceny-from-a-Merchant charge, the State may elect to seek a new indictment on that charge as well as the ancillary Habitual-Felon charge. *See State v. Fowler*, 266 N.C. 528, 531, 146 S.E.2d 418, 420 (1966) ("The legal effect of arresting the judgment is to vacate the verdict and sentence of imprisonment below, and the State, if it is so advised, may proceed against the defendant upon a sufficient bill of indictment.").

JUDGMENT ARRESTED IN PART; REVERSED AND REMANDED IN PART.

Judges TYSON and INMAN concur.

Report per Rule 30(e).