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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-448

Filed: 7 January 2020

Buncombe County, Nos. 16 CRS 81849-51

STATE OF NORTH CAROLINA

v.

ROBERTO HERNANDEZ-GONZALEZ

Appeal by defendant from judgments entered 5 July 2018 by Judge Marvin P. Pope, Jr., in Buncombe County Superior Court. Heard in the Court of Appeals 4 December 2019.

*Attorney General Joshua H. Stein, by Special Deputy Attorney General Melissa H. Taylor, for the State.*

*Appellate Defender Glenn Gerding, by Assistant Appellate Defender Andrew DeSimone, for defendant.*

ARROWOOD, Judge.

Roberto Hernandez-Gonzalez (“defendant”) appeals from judgments entered against him for driving while impaired and resisting a public officer. Defendant has also filed a petition for *writ of certiorari* requesting review of the judgment entered

upon his plea for driving while license revoked, which we deny. For the following reasons, we reverse and remand for further remand to the district court.

I. Background

On 26 February 2016, defendant was cited and arrested for driving while impaired and reckless driving. Later that day, defendant was charged by citation and magistrate's order in Buncombe County District Court for driving while impaired, driving while license revoked, misdemeanor possession of marijuana, and resisting a public officer. On 28 March 2017, the district attorney transferred defendant's charges to superior court to be tried after grand jury issuance of a presentment and indictment. The district attorney presented the grand jury with forms requesting that it issue presentments and indictments for the misdemeanor offenses. The grand jury returned all the presentments and indictments on 3 April 2017.

Defendant subsequently filed a pretrial motion to dismiss the charges against him on the ground that the Buncombe County Superior Court lacked subject matter jurisdiction to try the misdemeanor offenses of which he was accused. Defendant contended that the district attorney did not comply with the procedures necessary for misdemeanor offenses to be tried in superior court: namely, that the district attorney did not conduct an investigation after the grand jury returned the presentments and before it returned the indictments. A hearing was held on defendant's motion on

2 July 2018. The State argued that any necessary investigation had occurred while defendant's case was pending in district court, and thus the prosecutor was not required to perform any additional investigation between the grand jury's return of the presentments and indictments. The trial court subsequently entered a written order denying defendant's motion to dismiss.

Defendant's case proceeded to trial in Buncombe County Superior Court. The jury found him guilty of driving while impaired and resisting a public officer, but acquitted him of misdemeanor possession of marijuana and reckless driving. Defendant pleaded guilty to driving while license revoked. The trial court thereafter entered judgments sentencing defendant on his convictions, and defendant filed a written notice of appeal.

## II. Discussion

On appeal, defendant argues that: (a) the Buncombe County Superior Court erred in denying his motion to dismiss the charges against him because it lacked jurisdiction to hear the misdemeanor charges; and (b) the proper remedy for this error is to vacate the judgments against him, without remand for trial *de novo* before the district court; or, if denial of his motion to dismiss was proper, (c) that the trial court erred in sentencing him upon his convictions.

Addressing each in turn, we agree that the trial court erred in denying defendant's motion to dismiss, but find vacating his judgments with remand to the

district court for a trial *de novo* to be the appropriate remedy. Because we are vacating the judgments on the cases for which he was convicted, we do not reach defendant's alleged error in his sentencing.

A. Superior Court's Original Jurisdiction

Defendant argues that the trial court lacked subject matter jurisdiction to hear his misdemeanor charges because the district attorney failed to conduct any investigation in the interim period between the grand jury's issuance of presentments against defendant and the district attorney's subsequent submission of indictments to the grand jury for its consideration. We review questions of subject matter jurisdiction *de novo*. *State v. Baker*, \_\_ N.C. App. \_\_, \_\_, 822 S.E.2d 902, 904 (2018) (citation omitted).

The question presented in this case involves the original jurisdiction of a superior court to try misdemeanor offenses under N.C. Gen. Stat. § 7A-271(a)(2) (2017). The instant case is the latest in a series addressing this issue in the wake of a tactic briefly employed by several district attorneys to try misdemeanor offenses in superior court. *See, e.g., Baker*, \_\_ N.C. App. \_\_, 822 S.E.2d 902; *State v. Cole*, \_\_ N.C. App. \_\_, 822 S.E.2d 456 (2018), *disc. rev. denied*, \_\_ N.C. \_\_, 824 S.E.2d 420 (2019); *State v. McMahan*, No. COA 18-672, 2019 WL 2355201 (N.C. Ct. App. June 4, 2019), *disc. rev. denied*, \_\_ N.C. \_\_, 832 S.E.2d 716 (2019).

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Generally, the district court has exclusive original jurisdiction to hear 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.’” *Baker*, \_\_ N.C. App. at \_\_, 822 S.E.2d at 904 (citing N.C. Gen. Stat. § 7A-271(a)(2)).

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). “A presentment is an accusation of an offense made by a grand jury upon their own knowledge or observation, or upon information from others, without any bill of indictment having been submitted to them by the public prosecuting attorney.” *State v. Gunter*, 111 N.C. App. 621, 625, 433 S.E.2d 191, 193 (1993) (citing *State v. Thomas*, 236 N.C. 454, 457, 73 S.E.2d 283, 285 (1952)).

Defendant concedes that the trial court could have properly exercised jurisdiction over his misdemeanor charges under a procedure compliant with N.C. Gen. Stat. § 7A-271(a)(2). However, he correctly argues that the procedure used in this case did not comply with N.C. Gen. Stat. § 7A-271(a)(2).

The prosecutor may properly present the grand jury with a form inviting it to issue a certain presentment and put forth evidence in support of such an invitation. *Baker*, \_\_ N.C. App. at \_\_, 822 S.E.2d at 906 n.7 (citations omitted). Once the grand jury returns the invited presentment, the prosecutor must conduct an investigation pursuant to the presentment before the grand jury returns an indictment. *Id.*, \_\_ N.C. App. at \_\_, 822 S.E.2d at 906 (“Some 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.”) (alterations, internal quotation marks, and citation omitted). This interim investigation is mandatory, because “[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.” *Id.* at \_\_, 822 S.E.2d at 906 (citation omitted).

In *Baker*, “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 . . . [and] submitted these documents to the grand jury simultaneously and they were returned by the grand jury simultaneously[.]” *Id.* at \_\_, 822 S.E.2d at 906 (internal quotation marks omitted). Affirming the trial court’s

pretrial dismissal of the charges, we held that this procedure contradicted the meaning of “presentment” as defined in N.C. Gen. Stat. § 15A-641(c), and thus the superior court did not have original jurisdiction over the misdemeanor charges pursuant to N.C. Gen. Stat. § 7A-271(a)(2). *Id.* at \_\_\_, 822 S.E.2d at 906. In *McMahan*, which occurred in the same county on the same day as the instant case, we vacated the defendant’s misdemeanor convictions because the indictments and presentments were submitted to and returned by the grand jury on the same day and the record did not reflect the occurrence of any interim investigation. 2019 WL 2355201, at \*3 (“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.”).

In the instant case, the evidence in the record concerning the procedure employed to prosecute defendant’s misdemeanor charges in superior court is substantially similar to that of *Baker* and *McMahan*. As in *McMahan*, here the Buncombe County District Attorney submitted both presentment and indictment forms to the grand jury on 3 April 2017. On the very same day, the grand jury returned their presentments and indictments for the misdemeanor charges. While

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the indictment and presentment forms filled out by the grand jury do reflect that each document was returned based upon the sworn testimony of the arresting officer, the record is silent regarding when the officer testified within the chronology of the grand jury proceedings. Thus, as in *McMahan*, the record in the instant case does not contain any competent evidence from which it can be inferred that the prosecutor conducted an interim investigation. In fact, in argument before the trial court, the assistant district attorney conceded that the entire investigation had occurred before the initial presentment, and argued that no additional investigation need occur. There is no competent evidence in the record that the State offered any evidence to refute the defendant's verified motion to dismiss.

Because the indictment procedure in the instant case was nearly indistinguishable from those of *Baker* and *McMahan*, we are compelled to reach the same result. *In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989). The trial court lacked original jurisdiction to hear the misdemeanor charges against defendant under N.C. Gen. Stat. § 7A-271(a)(2), and its denial of defendant's motion to dismiss on this ground was error. The only issue remaining is what remedy will properly correct this error.

B. Proper Remedy



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Defendant argues that we must vacate his convictions without remand to the district court. We hold that vacating defendant's convictions with remand to the district court is the proper remedy.

Our interpretation of N.C. Gen. Stat. § 7A-271(c) in *Baker* compels us to reach this conclusion. “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 [over which it does not have jurisdiction and] . . . is not pending in the superior court on appeal from a lower court.” N.C. Gen. Stat. § 7A-271(c) (2017). In *Baker*, we interpreted this directive to “instruct[ ] 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. Accordingly, we remanded to the trial court, with instructions to enter an order transferring the charges to the district court for a trial *de novo*. *Id.* at \_\_, 822 S.E.2d at 908. Transfer was appropriate because “the prosecutor made clear that the district court case was ‘never dismissed[,]’ ” and jeopardy had not attached to the charges because the trial court granted the defendant's pretrial motion to dismiss. *Id.* at \_\_, 822 S.E.2d at 908.

In contrast, vacating a defendant's misdemeanor convictions after trial for lack of jurisdiction under N.C. Gen. Stat. § 7A-271(a), without transferring the charges to district court for a trial *de novo*, is appropriate in two circumstances. The first is where the defendant was independently charged with the misdemeanor offenses in

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both superior court and district court, but the record makes clear that the district court functionally dismissed the charges by abandoning prosecution after the superior court exercised concurrent jurisdiction. *Cole*, \_\_ N.C. App. at \_\_, 822 S.E.2d at 461-63; *Baker*, \_\_ N.C. App. at \_\_, 822 S.E.2d at 907 (“[In *Cole*, w]e 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.”) (citing *Cole*, \_\_ N.C. App. at \_\_, 822 S.E.2d at 462-63).

The second scenario is where the district and superior courts do not independently exercise concurrent jurisdiction over the misdemeanor offense, and the record fails to reflect if or how the charges were first initiated in district court and subsequently transferred to superior court. *See McMahan*, 2019 WL 2355201, at \*3 (“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 . . . is vacated.”).

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In the instant case, the district court and superior court never independently exercised concurrent jurisdiction over defendant's misdemeanor offenses. The record reflects that defendant was first charged with driving while impaired and resisting a public officer in district court by citation and magistrate's order. Defendant's case was subsequently transferred to the superior court to be tried after initiating charges by presentment. Defendant was tried and convicted of the misdemeanor charges. Because "the record before us shows . . . pending charging document[s] in district court over which the district court may exercise jurisdiction[.]" *id.* at \*3, we hold that the appropriate remedy is to vacate defendant's convictions with remand to the superior court, with instructions to transfer the case to district court for a trial *de novo*.

III. Conclusion

For the foregoing reasons, we hold that the trial court erred in denying defendant's motion to dismiss his misdemeanor charges, and remand to the superior court with instructions to enter an order transferring defendant's charges to district court for a trial *de novo*.

REVERSED AND REMANDED.

Judges STROUD and BROOK concur.

Report per Rule 30(e).