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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-938

Filed: 31 December 2020

Wake County, No. 17 CR 732228

STATE OF NORTH CAROLINA

v.

JWANA CHERISE LAKE

Appeal by defendant from order entered 7 June 2019 by Judge Paul C. Ridgeway in Superior Court, Wake County. Heard in the Court of Appeals 13 May 2020.

*Attorney General Joshua H. Stein, by Assistant Attorney General Robert C. Ennis, for the State.*

*Appellate Defender Glenn Gerding, by Assistant Appellate Defender Nicholas C. Woomer-Deters, for defendant.*

STROUD, Judge.

Defendant appeals from an order denying her second petition for writ of certiorari. Because the State's amendment to Defendant's misdemeanor citation charged a different crime, it violated North Carolina General Statute § 15A-922(f) (2017), and therefore we reverse the superior court's order denying Defendant's

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petition for writ of certiorari and vacate her conviction for second degree trespass under *State v. Bryant*, 267 N.C. App. 575, 833 S.E.2d 641 (2019).

I. Background

On 6 June 2017, a Garner police officer issued Defendant a citation for misdemeanor shoplifting by concealment of merchandise in Target. The citation alleged:

The officer named below has probable cause to believe that on or about Tuesday, the 06 day of June, 2017 at 02:47 PM in the county named above you did unlawfully and willfully WITHOUT AUTHORITY DID CONCEAL VARIOUS CLOTHES AND OTHER ITEMS VALUED AT \$114.96 THE GOODS AND MERCHANDISE OF A STORE TARGET STORES, INC. WHILE STILL UPON THE PREMISES OF THE STORE AND NOT HAVING THERETOFORE PURCHASED THE GOODS AND MERCHANDISE. (G.S. 14-72.1(A))

On 10 August 2017, Defendant appeared before a magistrate and signed a waiver of counsel form. That day, Defendant and an assistant district attorney signed a “CRIMINAL DEFERRAL AGREEMENT” form, wherein Defendant agreed to complete 75 hours of community service by a specified date in return for dismissal of the charge, which was identified as “M-Larceny.” After several continuances, the case was calendared for 25 June 2018 and marked “LAST for compliance.” Defendant appeared on that date, and a prosecutor drew two lines through the allegations quoted above on the citation and wrote “2nd deg. Trespass,” along with the

prosecutor's initials and the date, "6/25/18." Defendant subsequently pled guilty to second degree trespass, and the court entered judgment against her.

On 4 December 2018, Defendant filed a motion for appropriate relief ("MAR") in district court challenging her conviction. The district court judge wrote "respectfully denied" on the last page of the MAR. Defendant then filed a petition for writ of certiorari ("PWC") in superior court, seeking review of the order denying her MAR. The PWC was denied. On 10 March 2019, Defendant filed a PWC with this Court, seeking review of the superior court's order denying her PWC. By order dated 27 March 2019, this Court dismissed Defendant's PWC without prejudice for failure to attach a district court order adjudicating her MAR.

On 27 March 2019, Defendant filed in our Supreme Court a petition for writ of mandamus ("PWM") and a PWC, seeking review of the district court's judgment and order denying her MAR, the superior court's order denying her PWC, and this Court's 27 March 2019 order dismissing her PWC. On the same day, Defendant filed in this Court a PWM seeking to compel the district court to enter an order on her MAR. On 12 April 2019, this Court allowed Defendant's PWM, and ordered the district court to enter an order disposing of her MAR. By order dated 16 April 2019, our Supreme Court dismissed the PWM as moot and denied the PWC seeking review of this Court's March 2019 order dismissing her PWC. By orders dated 18 April 2019, our Supreme

Court denied Defendant's PWC seeking review of the trial courts' orders and her motion to arrest the district court's judgment.

Defendant filed an amended MAR in district court. The district court entered an order denying Defendant's amended MAR. Defendant then filed a second PWC in superior court to review the district court's order. The superior court denied the PWC, and Defendant filed a PWC with this Court. By order dated 28 June 2019, this Court granted Defendant's PWC.

## II. Standard of Review

A writ of certiorari is granted or denied at the discretion of the superior court judge, *see State v. Hamrick*, 110 N.C. App. 60, 65, 428 S.E.2d 830, 832-33 (1993), and ordinarily is reviewed for abuse of discretion, *see N.C. Cent. Univ. v. Taylor*, 122 N.C. App. 609, 612, 471 S.E.2d 115, 117 (1996), *aff'd per curiam*, 345 N.C. 630, 481 S.E.2d 83 (1997). However, Defendant's certiorari petition alleged that the district court lacked subject matter jurisdiction to enter judgment against her. "Whether a trial court has subject-matter jurisdiction is a question of law, reviewed de novo on appeal." *State v. Armstrong*, 248 N.C. App. 65, 67, 786 S.E.2d 830, 832 (2016) (quoting *McKoy v. McKoy*, 202 N.C. App. 509, 511, 689 S.E.2d 590, 592 (2010)). Under *de novo* review, this Court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal. *See State v. Williams*, 362 N.C. 628, 632-33, 669 S.E.2d 290, 294 (2008) (internal marks and citations omitted).

*State v. Bryant*, 267 N.C. App. at 576-77, 833 S.E.2d at 642-43.

## III. Citations and Subject Matter Jurisdiction

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Defendant argues, “the lower court lacked jurisdiction to enter judgment against [Defendant] because the amended citation was insufficient to charge her with second-degree trespass.” (Original in all caps.) “A properly drafted criminal pleading provides the court with jurisdiction to enter judgment on the offense charged, while certain pleading defects deprive the court of jurisdiction.” *Id.* at \_\_\_, 833 S.E.2d at 643 (citing *State v. Wallace*, 351 N.C. 481, 503-04, 528 S.E.2d 326, 340-41 (2000)). A citation is one of seven types of pleading that may initiate a criminal prosecution in North Carolina. N.C. Gen. Stat. § 15A-921(1) (2017). “The citation, criminal summons, warrant for arrest, or magistrate’s order serves as the pleading of the State for a misdemeanor prosecuted in the district court, unless the prosecutor files a statement of charges, or there is objection to trial on a citation.” N.C. Gen. Stat. § 15A- 922(a) (2017). “A statement of charges, criminal summons, warrant for arrest, citation, or magistrate’s order may be amended at any time prior to or after final judgment when the amendment does not change the nature of the offense charged.” N.C. Gen. Stat. § 15A-922(f) (2017). “It is well established that misdemeanor charging documents may not be amended so as to charge the defendant with committing a different crime.” *Bryant*, 267 N.C. App. at 577-78, 833 S.E.2d at 643 (quoting *State v. Carlton*, 232 N.C. App. 62, 66, 753 S.E.2d 203, 206 (2014)).

Defendant’s unamended citation charged her with concealing various items of clothing and cited to North Carolina General Statute § 14-72.1(a) which states:

Whoever, without authority, willfully conceals the goods or merchandise of any store, not theretofore purchased by such person, while still upon the premises of such store, shall be guilty of a misdemeanor and, upon conviction, shall be punished as provided in subsection (e). Such goods or merchandise found concealed upon or about the person and which have not theretofore been purchased by such person shall be prima facie evidence of a willful concealment.

N.C. Gen. Stat. § 14-72.1(a) (2017).

A prosecutor amended Defendant's citation by crossing out the text under "WHAT YOU ARE CHARGED WITH," replacing it with "2nd degree trespass," and initialing and dating the alteration. Second degree trespass is defined as:

(a) Offense.--A person commits the offense of second degree trespass if, without authorization, he enters or remains on premises of another:

- (1) After he has been notified not to enter or remain there by the owner, by a person in charge of the premises, by a lawful occupant, or by another authorized person; or
- (2) That are posted, in a manner reasonably likely to come to the attention of intruders, with notice not to enter the premises.

N.C. Gen. Stat. § 14-159.13 (2017).

In *State v. Bryant*, the defendant was cited for larceny of \$14.94 worth of goods from a Wal-Mart. 267 N.C. App. at 575, 833 S.E.2d at 642. The defendant entered into a plea agreement with the State, and the prosecutor "reduced the charge by drawing a line through the capitalized text, handwrote 'Shoplifting,' and beside the word initialed her name with the date." *Id.* at 576, 833 S.E.2d at 642. The defendant

then filed a MAR in district court challenging her conviction, which was denied. *Id.* The defendant then filed a PWC seeking reversal of the order denying her MAR. *Id.* This was also denied before Defendant appealed to this Court. *Id.* This Court concluded, “the amendment was not legally permissible and deprived the district court of jurisdiction to enter judgment against Defendant.” *Id.* at 578, 833 S.E.2d at 644.

Defendant argues “*Bryant* is materially indistinguishable” from this case, but the State argues there are five reasons that *Bryant* does support Defendant’s argument:

First, unlike in Bryant, our Supreme Court has already decided in this case that the citation amendment was not a jurisdictional defect by its decision to deny Defendant’s motion to arrest the district court’s 2018 judgment. Second, Bryant neither decided nor addressed the jurisdictional question of whether the citation as amended was valid in that it satisfied Section 15A-302’s requirements. Third, Bryant declined to address the controlling Supreme Court precedent in Jones. Fourth, unlike the amendment in Bryant, the amendment here was not so substantial as to change the nature of punishment. Fifth, unlike the defendant in Bryant, Defendant here also previously admitted her guilt to criminal conduct arising from the incident via the deferred prosecution agreement.

(Citations omitted.)

We do not find the State’s arguments to be persuasive. The Supreme Court’s 18 April 2019 order states in relevant part, “The following order has been entered on the motion filed on the 27th of March 2019 by Defendant to Arrest the District Court

Criminal Judgment: ‘Motion Denied by order of the Court in conference, this the 18th of April 2019.’” We are unable to conclude that the Supreme Court’s order “has already decided in this case that the citation amendment was not a jurisdictional defect by its decision to deny Defendant’s motion to arrest the district court’s 2018 judgment.”

The State’s argument overlooks that we must first consider whether the amendment of a citation was proper. *Bryant*, 267 N.C. App. at 576 n.2, 833 S.E.2d at 643 n.2 (“Because we decide the amendment itself was unlawful under N.C. Gen. Stat. § 15A-922(f), we do not reach the issue of whether the citation as amended meets the requirements of N.C. Gen. Stat. § 15A-302(c) as articulated in *State v. Jones*, 371 N.C. 548, 819 S.E.2d 340 (2018).”). Therefore, we do not find *State v. Bryant*, 267 N.C. App. 575, 833 S.E.2d 641, and *State v. Jones*, 371 N.C. 548, 819 S.E.2d 340 (2018) (addressing the requirements of a citation under North Carolina General Statute § 15A-302(c)) to be in conflict. In addition, the State argues, “the amendment here was not so substantial as to change the nature of *punishment*.” (Emphasis added.) However, [i]t is well established that misdemeanor charging documents may not be amended so as to charge the defendant with *committing a different crime*.” *Bryant*, 267 N.C. App. at 577-78, 833 S.E.2d at 643 (emphasis added) (quoting *State v. Carlton*, 232 N.C. App. at 66, 753 S.E.2d at 206).



Our Supreme Court recently addressed the types of amendments which are proper under North Carolina General Statute § 15A-922(f):

Subsection 15A-922(f) of the North Carolina General Statutes provides that a criminal pleading, including an arrest warrant, “may be amended at any time prior to or after final *judgment when the amendment does not change the nature of the offense charged.*” N.C.G.S. § 15A-922(f) (2019). Section 15-24.1 supplements this principle in the specific context of an amendment that corrects an allegation of property ownership. It provides that a criminal warrant may be amended in superior court “before or during the trial, when there shall appear to be any variance between the allegations in the warrant and the evidence in setting forth the ownership of property if, in the opinion of the court, such amendment will not prejudice the defendant.” N.C.G.S. § 15-24.1 (2019). *Together, these provisions make clear that a charging instrument may generally be amended at any time when doing so does not materially affect the nature of the charges or is otherwise authorized by law.*

*State v. Capps*, 374 N.C. 621, 625, 843 S.E.2d 167, 169-70 (2020) (emphases added) (footnote omitted).

Because concealing merchandise and second degree trespassing are entirely different crimes, we conclude the procedure by which Defendant’s citation was amended violated North Carolina General Statute § 15A-922(f). Therefore, “the amendment was not legally permissible and deprived the district court of jurisdiction to enter judgment against Defendant.” *Bryant*, 267 N.C. App. at 578, 833 S.E.2d at 644.

#### IV. Conclusion

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We reverse the superior court's order denying Defendant's PWC and vacate the judgment entered against her.

REVERSED AND VACATED.

Judge YOUNG concurs.

Judge DILLON dissents with separate opinion.

Report per Rule 30(e).

DILLON, Judge, dissenting.

Defendant was cited for misdemeanor larceny for stealing merchandise from a store. The prosecutor, though, agreed to allow Defendant to plead guilty to second-degree trespassing instead of pursuing the larceny charge, knowing that the change would likely benefit Defendant in the future. In open court, the prosecutor marked through the larceny language on the citation, wrote in the trespassing charge, and initialed the change. Defendant then stood before the district court judge presiding and pleaded guilty to the trespassing charge. Judgment was entered accordingly.

Sixteen months later, Defendant filed a motion for appropriate relief (“MAR”), challenging the jurisdiction of the district court to enter judgment against her on the trespassing charge, the charge she agreed to plead guilty to. Defendant contended that the prosecutor lacked authority to change the charge from a larceny charge to a trespassing charge on the charging document, i.e., the citation.

The majority agrees with Defendant, concluding that her conviction must be vacated. The majority reasons that we are bound by *State v. Bryant*, 267 N.C. App. 575, 833 S.E.2d 641 (2019). I respectfully dissent. If *Bryant* is controlling, I recognize that *our panel* must follow its holding.<sup>1</sup>

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<sup>1</sup> I note that the record is not clear as to whether Defendant had been arraigned prior to the change being made to the citation. If an arraignment had not occurred, then the prosecutor is

I conclude that a prosecutor has the authority to enter an *agreement* with a defendant to charge a different misdemeanor as part of a plea agreement which then can be accepted by a district court judge, even if the agreement is reached after the defendant has been arraigned. This is certainly true for felony charges in superior court, where pleading is even more formal. In superior court, the prosecutor can file an “information” at any time, provided that the defendant agrees. N.C. Gen. Stat. § 15A-644(b) (2017). Further, Section 7A-272(c)(1) provides that a *district court* judge has jurisdiction to accept a plea of guilty of a Class H or I felony where the defendant and prosecutor have agreed based on the “information” filed by the prosecutor. N.C. Gen. Stat. § 7A-272(c)(1) (2017).

Section 15A-922 allows a prosecutor to charge a misdemeanor in district court by a pleading called a “statement of charges,” which is similar to the “information” filed to charge felonies in superior court. N.C. Gen. Stat. § 15A-922. I do not interpret Section 15A-922 as being more rigid regarding a prosecutor’s authority to file a statement charging a different crime (by writing the new charge on the original citation and then initialing it) *as part of a plea agreement with the defendant*. Section 15A-922(d) does contain language which limits a prosecutor’s ability to file a statement of charges after the arraignment, but this limitation only applies to pleadings that are filed “on [the prosecutor’s] own determination,” which I interpret

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authorized to add/change charges “on his own determination.” N.C. Gen. Stat. § 15A-922(d) (2017). *Bryant* was not decided based on Section 15A-922(d).

to mean without the consent of the defendant. I do not believe the General Assembly intended to limit a prosecutor's ability to negotiate with defendants in district/traffic court by offering to dismiss the charged offense with an offense more favorable to the defendant, even if the defendant has already been arraigned.<sup>2</sup>

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<sup>2</sup> It may be argued that the record does not show any formal *agreement* to the change from larceny to trespass. But I think the result is the same by Defendant's plea of guilty, which *waives* any procedural defect.