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IN THE COURT OF APPEALS OF NORTH CAROLINA

2022-NCCOA-937

No. COA22-274

Filed 29 December 2022

Johnston County, Nos. 21 CRS 264, 21 CRS 292, 21 CRS 50312

STATE OF NORTH CAROLINA, Plaintiff,

v.

JACQUELYN EVETTE SANDERS, Defendant.

Appeal by Defendant from judgment entered 20 September 2021 by Judge James F. Ammons, Jr. in Johnston County Superior Court. Heard in the Court of Appeals 7 September 2022.

Attorney General Joshua H. Stein, by Assistant Attorney General Carolyn McLain, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Katherine Jane Allen, for Defendant-Appellant.

CARPENTER, Judge.

¶ 1 Jacquelyn Sanders (“Defendant”) appeals from the trial court’s judgment and sentence on the ground that the indictment for felony habitual larceny was fatally defective thus depriving the trial court of jurisdiction. We hold the trial court erred in determining Defendant had attained felony habitual larceny status; therefore, we vacate Defendant’s convictions for felony habitual larceny and having attained

habitual felon status, and remand to Johnston County Superior Court for further proceedings.

I. Facts and Procedural Background

¶ 2

On 15 January 2021, Jacquelyn Sanders (“Defendant”) walked into a Dollar General Store in Smithfield. When she approached the register, the cashier noticed a bottle of beer under Defendant’s shirt and asked her to put it back. Upon reviewing the surveillance camera footage, Connie Newsham, the manager of the Dollar General Store, determined that Defendant had taken other items from the store. **{T pp 28-29}**. Gwynn Dixon, an employee of the Dollar General Store, provided police with a description of Defendant’s car, including a license plate number. **{T p 29}**. Officer Nathan Memmelaar (“Officer Memmelaar”) ran the license plate number and, due to Defendant’s history in Smithfield, Officer Memmelaar was able to identify Defendant as someone with whom he had prior interactions. **{T pp 29-30}**.

¶ 3

On 1 March 2021, Defendant was indicted in Johnston County Superior Court on two counts of misdemeanor larceny, attaining felony habitual larceny status, and attaining habitual felon status. **{R pp 2-6}**. On 20 September 2021, Defendant appeared in Johnston County Superior Court and plead guilty to attempted felony habitual larceny and attaining habitual felon status, pursuant to a plea agreement made with the State. **{R p 27}**. The plea agreement stipulated that the State would drop one of the two counts of felony habitual larceny in exchange for Defendant’s

guilty plea. **{R pp 26-29}**. According to the structure of the plea, Defendant would attain felony habitual larceny status and serve a sentence of 40-60 months of incarceration. **{R pp 27-29}**. On the same date, Judge Ammons accepted the plea agreement, found Defendant to have 20 prior record points and a prior record level VI, and sentenced her to a mitigated sentence of 40-60 months. **{R pp 33-36}**.

¶ 4 In the indictments and during the sentencing hearing, the State relied on the following four prior convictions to support the charge of felony habitual larceny: (1) attempted habitual larceny on 22 September 2016; (2) habitual larceny on 14 August 2014; (3) misdemeanor larceny on 13 December 2010; and (4) misdemeanor larceny on 29 January 2008. **{T p 30, R pp 4-5}**.

¶ 5 On 23 September 2021, without assistance of counsel, Defendant filed timely, written notice of appeal. **{R pp 39-40}**. On 10 May 2022, counsel for Defendant filed a Petition for Writ of Certiorari on the basis that the written notice of appeal failed comply with N.C. R. App. P. 4 (written notice of appeal must be served upon the district attorney and must identify the court to which the appeal is taken), and also in the event this Court determined Defendant was not entitled to direct review of the allegedly invalid indictment. **{Appellant's PWC p 3; 4-7}**.

II. Jurisdiction

¶ 6 Typically, upon entering a guilty plea, the defendant's right of appeal is limited to issues of whether the sentence imposed results from an incorrect finding of the

defendant's prior record level, or contains an unauthorized type of sentence disposition or a term of imprisonment that is for a duration not authorized for the defendant's class of offense and prior record level. N.C. Gen. Stat. § 15A-1444(a2) (2021). Nevertheless, this Court has held that a plea of guilty does not waive a challenge to the sufficiency of the indictment. *State v. McGee*, 175 N.C. App. 586, 587, 623 S.E.2d 782, 784 (1999). Furthermore, "where 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. Irvins*, 277 N.C. App. 101, 103, 2021-NCCOA-143, ¶ 3 (citing *State v. Wallace*, 351 N.C. 481, 503, 528 S.E.2d 326, 341 (2000)).

¶ 7 Here, because Defendant challenges the sufficiency of the indictment, a direct appeal is available. Additionally, this Court is the only court with jurisdiction to hear Defendant's appeal, and the State was not misled by the errors in notice. *State v. Sitosky*, 238 N.C. App. 558, 560, 767 S.E.2d 623, 624 (2014). Accordingly, we dismiss Defendant's petition for writ of certiorari as moot. *See Irvins*, 2021-NCCOA-143, ¶ 3.

III. Standard of Review

¶ 8 This Court reviews the sufficiency of an indictment *de novo*. *State v. White*, 372 N.C. 248, 250, 827 S.E.2d 80, 82 (2019); *State v. Irvins*, 2021-NCCOA-143, ¶ 3. Under *de novo* review, this Court considers the matter anew and freely substitutes

its own judgment for that of the lower court. *State v. Biber*, 365 N.C. 162, 168, 712 S.E.2d 874, 878 (2011).

IV. Analysis

¶ 9

The sole issue before this Court is whether the trial court lacked jurisdiction to enter judgment and commitment because the felony habitual larceny indictment relied on an attempted habitual larceny charge. “To be sufficient under our Constitution, an indictment ‘must allege lucidly and accurately all the essential elements of the offense endeavored to be charged.’” *Irvins*, 2021-NCCOA-143, ¶ 5 (quoting *State v. Hunt*, 357 N.C. 257, 267, 582 S.E.2d 593, 600 (2003)). “It is hornbook law that a valid indictment is a condition precedent to the jurisdiction of the Superior Court to determine the guilt or innocence of the defendant, and to give authority to the court to render a valid judgment.” *State v. Brice*, 370 N.C. 244, 249, 806 S.E.2d 32, 36 (2017) (quoting *State v. Ray*, 274 N.C. 556, 562, 164 S.E.2d 457, 461 (1968)). “A criminal pleading . . . is fatally defective if it ‘fails to state some essential and necessary element of the offense of which the defendant is found guilty.’” *Brice*, 370 N.C. at 249, 806 S.E.2d at 36 (quoting *State v. Ellis*, 368 N.C. 342, 344, 776 S.E.2d 675, 677 (2015)).

¶ 10

In *Irvins*, this Court defined what constitutes the essential and necessary elements of an indictment for felony habitual larceny. *Irvins*, 2021-NCCOA-143, ¶ 4. This Court held that, in order to be valid, an indictment for habitual felony larceny

must allege four prior convictions for a completed offense, as defined by section 14-72(b)(6) (2021). *Id.* ¶ 6. The indictment cannot allege, as one of the four prior convictions, that the defendant was convicted of an *attempted* offense. *Id.* ¶ 1 (emphasis added). In *Irvins*, this Court reasoned that because attempted larceny does not fit within any of the three statutory categories set forth in section 14-72(b)(6), attempted larceny is not an eligible count of larceny to support an indictment for felony habitual larceny. *Id.* ¶ 11.

¶ 11 Applying the same reasoning as in *Irvins*, attempted felony habitual larceny is not an eligible count of larceny to support an indictment for felony habitual larceny. See *id.* ¶ 11. The two essential elements of felony habitual larceny are as follows. First, the defendant took the property of another and carried it away without the owner's consent and with the intent to deprive the owner of the property permanently. See *Brice*, 370 N.C. at 248, 806 S.E.2d at 35. Second, the defendant has been convicted of an eligible count of larceny on four prior occasions. See *id.* at 248, 806 S.E.2d at 36. For the purposes of alleging habitual felony larceny,

[a]n eligible count of larceny is a conviction in this State, or in any other jurisdiction, for: (1) any offense of larceny under N.C. Gen. Stat. § 14-72; (2) any offense deemed or punishable as larceny under N.C. Gen. Stat. § 14-72; or (3) any substantially similar offense in any other jurisdiction, regardless of whether the prior convictions were misdemeanors, felonies or a combination thereof.

Irvins, 2021-NCCOA-143, ¶ 6 (internal quotations omitted).

¶ 12 When a statute is clear on its face, it must be applied as written. *Bowers v. City of High Point*, 339 N.C. 413, 419–20, 451 S.E.2d. 284, 289 (1994). This Court must apply the statute as written, and neither attempted larceny nor attempted habitual felony larceny meet those statutory requirements.

¶ 13 First, attempted felony habitual larceny is not “an offense of larceny under § 14-72.” An attempt is an “intentional ‘overt act’ done for the purposes of committing a crime but failing short of the completed crime.” *Irvins* ¶ 8 (quoting *State v. Broome*, 136 N.C. App. 82, 87, 523 S.E.2d 448, 453 (1999)). Because attempted felony habitual larceny is a lesser-included offense of felony habitual larceny, it is not a completed larceny under section 14-72.

¶ 14 Second, attempted felony habitual larceny is not deemed or punishable as larceny under section 14-72. Section 14-72 neither states nor provides the classification or punishment for attempted felony habitual larceny. Pursuant to N.C. Gen. Stat. section 14-2.5, unless a different classification is expressly stated, an attempt to commit a felony is punishable under the next lower classification as the offense which the offender attempts to commit. Accordingly, attempted felony habitual larceny is punished as a Class I. *See id.* ¶ 9.

¶ 15 Third, it is uncontested that Defendant’s conviction for attempted felony habitual larceny was from Johnston County, North Carolina. {R p 4}. Therefore, it

is not a “substantially similar offense from another jurisdiction” pursuant to section 14-72(b)(6). *See id.* ¶ 10.

¶ 16 Applying the statute as clearly written, attempted felony larceny does not fit within any of the three statutory categories set forth in section 14-72(b)(6); therefore, it is not an eligible count of larceny to support an indictment for felony habitual larceny. *See id.* ¶ 11. For that reason, the indictment obtained against Defendant is fatally defective as it did not contain the four necessary prior convictions for larceny.

¶ 17 Finally, we consider the disposition of Defendant’s plea agreement. “Where part of a plea agreement is repudiated, the entirety of the plea must be vacated.” *See State v. Acklin*, 2022-NCCOA-16, ¶ 21, 281 N.C. App. 303 (2022) (unpublished); *see also State v. Fox*, 34 N.C. App. 576, 579, 239 S.E.2d 471, 473 (1977) (“Where a defendant elects not to stand by his portion of a plea agreement, the State is not bound by its agreement to forego the greater charge.”). By appealing, Defendant has elected to repudiate a portion of the plea agreement. *See Acklin*, 2022-NCCOA-16, ¶ 20, 281 N.C. App. 303. We are therefore required to vacate the underlying plea agreement.

V. Conclusion

¶ 18 We conclude the indictment used to sentence and commit Defendant for felony habitual larceny was fatally defective, depriving the trial court of jurisdiction. For

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that reason, we vacate Defendant's plea agreement in its entirety and remand to Johnston County Superior Court for a new disposition.

VACATE AND REMAND.

Judges DIETZ and COLLINS concur.

Report per Rule 30(e).