COA19-122 TENTH DISTRICT

NORTH CAROLINA COURT OF APPEALS

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 )

 STATE OF NORTH CAROLINA )

 )

 v. ) From Wake

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 RAUMEL HERNANDEZ ZUNIGA )

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DEFENDANT-APPELLANT’S BRIEF

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**INDEX**

TABLE OF AUTHORITIES iii

ISSUE PRESENTED 1

STATEMENT OF THE CASE 2

STATEMENT OF GROUNDS FOR APPELLATE REVIEW 3

STATEMENT OF THE FACTS 4

STANDARD OF REVIEW 4

ARGUMENT 5

I. THE JUDGMENTS MUST BE VACATED BECAUSE THE TRIAL COURT WAS PROVIDED WITH A FACTUAL BASIS FOR ONLY THREE OF THE TEN CHARGES FOR WHICH MR. ZUNIGA WAS CONVICTED 5

*A. Introduction* 5

*B. The trial court was provided with a factual basis which supported only three of the ten charges* 6

*C. Without an adequate factual basis, the trial court erred in accepting Mr. Zuniga’s pleas of guilty to the remaining seven charges* 8

i. There was no evidence to support a factual basis for the crimes of trafficking in cocaine by sale, delivery and possession in 18 CrS 2037727 (51)-(53) 9

ii. There was no evidence to support a factual basis for the crime of delivering methamphetamine in 18 CrS 203725 11

iii. There was no evidence to support a factual basis for the crime of maintaining a dwelling to keep or sell methamphetamine in 18 CrS 203724 12

iv. There was no evidence to support a factual basis for the crime of trafficking in cocaine by sale and trafficking in cocaine by delivery in 18 CrS 203720 (51) and (52) 15

v. Mr. Zuniga’s pleas and judgments must be vacated and his case remanded to the trial court for new proceedings 17

# Conclusion 19

CERTIFICATE OF FILING AND SERVICE 20

**TABLE OF AUTHORITIES**

Cases

*N.C. Dep’t of Envtl. & Natural Res. v. Carroll*,

 358 N.C. 649, 599 S.E.2d 888 (2004) 5

*State v. Agnew*,

 361 N.C. 333, 643 S.E.2d 581 (2007) 4, 9, 17, 18

*State v. Battle*,

 167 N.C. App. 730, 606 S.E.2d 418 (2005) 14

*State v. Dickens*,

 299 N.C. 76, 261 S.E.2d 183 (1979) 8

*State v. Flint*,

 199 N.C. App. 709, 682 S.E.2d 443 (2009) 18

*State v. Ross,*

173 N.C. App. 569, 620 S.E.2d 33 (2005), *aff’d*,

 360 N.C. 355, 625 S.E.2d 779 (2006) 9

*State v. Sinclair*,

 301 N.C 193, 270 S.E.2d 418 (1980) 17

*State v. Stonestreet*,

 243 N.C. 28, 89 S.E.2d 734 (1955) 18

*State v. Thompson*,

 199 N.C. App. 102, 654 S.E.2d 814 (2008) 13

*State v. Weathers*,

 339 N.C. 441, 451 S.E.2d 266 (1994) 4

Statutes

N.C. Gen. Stat. § 15A-1022(c) 9, 17

N.C. Gen. Stat. § 15A-1444(e) 3

N.C. Gen. Stat. § 90-95(a)(1) 11

N.C. Gen. Stat. § 90-95(h)(3)(a) 10, 15

N.C. Gen. Stat. § 90-108(a)(7) 13

Other Authorities

N.C. R. App. P. 21 3

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DEFENDANT-APPELLANT’S BRIEF

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**ISSUE PRESENTED**

I. SHOULD THE JUDGMENTS BE VACATED BECAUSE THE TRIAL COURT WAS PROVIDED WITH A FACTUAL BASIS FOR ONLY THREE OF THE TEN CHARGES FOR WHICH MR. ZUNIGA WAS CONVICTED?

**STATEMENT OF THE CASE**

 On April 19, 2018, Raumel Hernandez Zuniga was charged by information with the following ten offenses:

|  |  |
| --- | --- |
| **Case No.** | **Offense** |
| 18 CrS 203720 (51) | Trafficking cocaine by sale on February 24, 2018 in the amount of 200-400 grams to E. Sanchez. |
| 18 CrS 203720 (52) | Trafficking cocaine by delivery on February 24, 2018 in the amount of 200-400 grams to E. Sanchez. |
| 18 CrS 203720 (53) | Trafficking cocaine by possession on February 24, 2018 in the amount of 200-400 grams to E. Sanchez. |
| 18 CrS 203722 | Maintaining a dwelling to keep or sell cocaine on February 24, 2018.  |
| 18 CrS 203723 | Sale of methamphetamine on January 25, 2018 to E. Sanchez.  |
| 18 CrS 203724 | Maintaining a dwelling to keep or sell methamphetamine on January 25, 2018.  |
| 18 CrS 203725 | Delivery of methamphetamine on January 24, 2018 to E. Sanchez.  |
| 18 CrS 203727 (51) | Trafficking cocaine by sale on January 11, 2018 in the amount of 28-200 grams to E. Sanchez.  |
| 18 CrS 203727 (52) | Trafficking cocaine by delivery on January 11, 2018 in the amount of 28-200 grams to E. Sanchez. |
| 18 CrS 203727 (53) | Trafficking cocaine by possession on January 11, 2018 in the amount of 28-200 grams to E. Sanchez. |

 (Rpp. 2-7)

 On April 19, 2018, Mr. Zuniga appeared in Wake County Superior Court before the Honorable Vincent Rozier and pleaded guilty to the ten offenses listed above. (Rp. 16) Judge Rozier found there was a factual basis for the entry of the pleas and accepted the pleas. (Rp. 25)

 Judge Rozier consolidated the three convictions in 18 CrS 203727 into one judgment with a sentence of 35-51 months incarceration. The remaining seven convictions were consolidated under case number 18 CrS 203720 into one judgment with a sentence of of 70-93 months incarceration. The two judgments were ordered to run consecutively. (Rpp. 31-35)

 Mr. Zuniga gave written notice of appeal on April 25, 2018. (Rpp. 36-37)

**STATEMENT OF GROUNDS FOR APPELLATE REVIEW**

Mr. Zuniga appeals pursuant to N.C. R. App. P. 21 and N.C. Gen. Stat. § 15A-1444(e). Contemporaneously with this brief, Mr. Zuniga filed a petition for writ of certiorari seeking review on the basis that the state failed to offer a factual basis to support seven of the ten convictions. The issues argued in the petition and fully contained in this brief are reviewable by writ of certiorari.

**STATEMENT OF THE FACTS**

 Sometime prior to January 4, 2018, Mr. Zuniga spoke to an undercover officer about selling methamphetamine to the officer.

 On January 24, 2018, Mr. Zuniga met the undercover officer and gave him two small clear crystal rocks, which weighed approximately half a gram. (Rp. 23)

 On January 25, 2018, Mr. Zuniga met with an undercover officer in a car and sold the officer 26.9 grams of methamphetamine. (Rp. 23)

 On February 24, 2018, Mr. Zuniga and the undercover officer texted about another drug transaction. The officer went to Mr. Zuniga’s apartment complex. That afternoon, a search warrant was executed on the defendant’s apartment where officers found cocaine in three different receptacles and $643.00 in cash. The total amount of cocaine was 249.47 grams. (Rpp. 24-25)

**STANDARD OF REVIEW**

 Whether the State’s factual basis was sufficient to support the defendant’s plea is a question of law reviewed *de novo* on appeal. *See State v. Agnew,* 361 N.C. 333, 643 S.E.2d 581 (2007); *State v. Weathers*, 339 N.C. 441, 451 S.E.2d 266 (1994). Under a *de novo* review, this Court considers the matter anew. *N.C. Dep’t of Envtl. & Natural Res. v. Carroll*, 358 N.C. 649, 660, 599 S.E.2d 888, 895 (2004).

**ARGUMENT**

**I. THE JUDGMENTS MUST BE VACATED BECAUSE THE TRIAL COURT WAS PROVIDED WITH A FACTUAL BASIS FOR ONLY THREE OF THE TEN CHARGES FOR WHICH MR. ZUNIGA WAS CONVICTED.**

***A. Introduction***

Mr. Zuniga was charged with, and pleaded guilty to, ten offenses. However, the trial court was provided with a factual basis for only three of those offenses – (1) 18 CrS 203723, sale of methamphetamine; (2) 18 CrS 203720 (53), trafficking in cocaine by possession; and, (3) 18 CrS 203722, maintaining a dwelling to keep or sell cocaine. There was no factual basis whatsoever to support the remaining seven offenses. Accordingly, the trial court erred in accepting Mr. Zuniga’s pleas and the pleas must be vacated and the matter remanded to Superior Court for further proceedings.

***B. The trial court was provided with a factual basis which supported only three of the ten charges.***

 The entirety of the evidence offered in support of Mr. Zuniga’s guilt came in the form of the state’s factual basis. This factual basis was sufficient to support a conviction for three offenses. Specifically, it supported a conviction for selling methamphetamine to an undercover officer on January 25, 2018 in case number 18 CrS 203723. (Rp. 23) It supported a conviction for the offense of trafficking in cocaine by possession in the amount of 200-400 grams on February 24, 2018 in case number 18 CrS 203720. (Rpp. 24-25) And, it supported a conviction for the offense of maintaining a dwelling to keep or sell cocaine on February 24, 2018 in case number 18 CrS 203722. (Rpp. 24-25) For the remaining seven offenses the state failed to proffer facts sufficient to constitute a factual basis.

 The prosecutor’s factual basis for all offenses was as follows:

[Prosecutor]: Yes, Your Honor. As you can probably tell based on the number of -- or the file numbers that are in front of you, this occurred over about a month-and-a-half period. On January 4, 2018, is the first date of offense. Prior to that date of offense, this defendant spoke to an undercover officer about selling methamphetamine to that undercover officer. The two of them agreed to meet, and the defendant would provide the officer a sample of that methamphetamine.

 So they did, in fact, meet on January 24 of 2018, at 4232 Middle Oaks Drive in Raleigh, which is the defendant's address. The defendant got in the undercover officer's car, gave him two small, clear crystal rocks, which weighed about half a gram, and then discussed further or future transactions as well.

 Then on that same day, when the defendant -- I'm sorry. On the 25th of 2018, at the same location, the undercover officer arrived. The defendant then goes down to meet him. They have a conversation about meeting the defendant's supplier. The undercover officer leaves, comes back again about two hours later, so at about 7:15 p.m. The defendant meets the undercover officer in his car and sells him methamphetamine. The labs in that case came back as being 26.9 grams of methamphetamine that he sold to the undercover officer.

 Then on February 24 is [sic] about a month later, of 2018. The defendant texted that undercover officer about meeting up for another drug transaction. The officer told the defendant he was at work, but a little bit later that day, the undercover officer went to the defendant's apartment complex, as they had agreed to previously.

 After that, a search warrant was executed at the defendant's apartment. Wake County Sheriff's officers entered about 5:15 p.m. in apartment 301, which is the defendant's apartment. A K-9 officer gave a positive alert on cash and a gray bag that was vacuum sealed and contained cocaine.

 In the master bedroom of the defendant's apartment, there was a gray bag with vacuum sealed bags inside that contained cocaine that ended up weighing about 261.5 grams. There was $643 of cash on the shelf of a TV stand. Deputies also found a red box with a plastic bag that had 45 smaller bags of cocaine on a shelf that weighed about 20 grams. There were knotted-up bags under the TV with cocaine in them.

There were documents throughout the bedroom that had the defendant's name and address and an almost empty container of creatine powder in that bedroom. In the laundry room of that apartment, there was an orange Hermes of Paris container with two bags of cocaine inside the dryer.

 In the kitchen, there was more mail on the bar. The defendant's passport was also on the bar. And in a coat closet, there was a laptop bag, a laptop, and a charger.

 The total weight of the cocaine from that search warrant execution was 249.47 grams.

 Those are some of the facts as they would be presented had this gone to trial.

THE COURT: Yes, sir [sic]. Facts on behalf of the defendant?

[DEFENSE COUNSEL]: No, Your Honor. Thank you.

(Rpp. 23-25)

***C. Without an adequate factual basis, the trial court erred in accepting Mr. Zuniga’s pleas of guilty to the remaining seven charges.***

“A plea of guilty or no contest is improperly accepted unless the trial judge has first determined that there is a factual basis for the plea.” *State v. Dickens*, 299 N.C. 76, 79, 261 S.E.2d 183, 185 (1979). This determination may be made in one of several ways, including:

1. A statement of facts by the prosecutor.

2. A written statement of the defendant.

3. An examination of the presentence report.

4. Sworn testimony, which may include reliable hearsay.

5. A statement of facts by the defense counsel.

N.C. Gen. Stat. § 15A-1022(c).

 The requirements of this statute are mandatory. “A defendant’s bare admission of guilt contained in the transcript of a plea does not provide the factual basis for the plea.” *State v. Ross,* 173 N.C. App. 569, 573, 620 S.E.2d 33, 36 (2005), *aff’d*, 360 N.C. 355, 625 S.E.2d 779 (2006). A fully executed plea transcript does not satisfy the statute, even when accompanied by the indictment and a factual basis stipulation from defense counsel. *Agnew,* 361 N.C. at 337, 643 S.E.2d at 584. The trial court must be provided with substantive facts allowing for an independent judicial determination of defendant’s actual guilt.

*Id.*

 **i. There was no evidence to support a factual basis for the crimes of trafficking in cocaine by sale, delivery and possession in 18 CrS 2037727 (51)-(53).**

 The information obtained against Mr. Zuniga for the crimes of trafficking in cocaine by sale, trafficking in cocaine by delivery, and trafficking in cocaine by possession in 18 CrS 2037727 alleged that on January 11, 2018, Mr. Zuniga sold 28-200 grams of cocaine to E. Sanchez, delivered 28-200 grams of cocaine to E. Sanchez, and possessed 28-200 grams of cocaine. (Rp. 7) Therefore, the state was obligated to offer a factual basis establishing that Mr. Zuniga: knowingly; sold, delivered, and possessed; cocaine; to E. Sanchez (for the sale and delivery); in the amount of 28-200 grams. N.C. Gen. Stat. §90-95(h)(3)(a).

 However, the state’s factual basis was utterly devoid of facts regarding this offense. The state’s factual basis never mentions any meeting or transaction occurring on January 11, 2018 between Mr. Zuniga and any person. The state’s factual basis never mentions that Mr. Zuniga had cocaine in the amount of 28-200 grams. The state’s factual basis never mentions an individual named E. Sanchez. The state offered no evidence, statements, witnesses, testimony, arguments, allegations, assertions, or factual basis to prove that Mr. Zuniga was in possession of any cocaine on January 11, 2018, that Mr. Zuniga sold any cocaine to E. Sanchez on January 11, 2018, or that Mr. Zuniga delivered any cocaine to E. Sanchez on January 11, 2018.

 Accordingly, the state failed to provide sufficient evidence to support a factual basis for the crimes of trafficking in cocaine by sale, trafficking in cocaine by delivery, and trafficking in cocaine by possession in 18 Crs 2037727 (51)-(53).

 **ii. There was no evidence to support a factual basis for the crime of delivering methamphetamine in 18 CrS 203725.**

 The information obtained against Mr. Zuniga for the crime of delivering methamphetamine in 18 CrS 203725 alleged that on January 24, 2018, Mr. Zuniga delivered methamphetamine to E. Sanchez. (Rp. 6) Therefore, the state was obligated to offer a factual basis establishing that Mr. Zuniga: knowingly; delivered; a controlled substance identified as methamphetamine; to another person identified as E. Sanchez. N.C. Gen. Stat. §90-95(a)(1).

 However, the state’s factual basis failed to establish that the item Mr. Zuniga delivered was, in fact, methamphetamine. The state’s factual basis asserted that on January 4, 2018, Mr. Zuniga and an unidentified undercover officer (whose name was never provided) discussed the sale of methamphetamine. (Rp. 23) The state then asserted that on January 24, 2018, “[t]he defendant got in the undercover officer's car, gave him two small, clear crystal rocks, which weighed about half a gram, and then discussed further or future transactions as well.” (Rp. 23) That constituted the entirety of the state’s factual basis for the offense of delivering methamphetamine in 18 CrS 203725.

 The state offered no laboratory reports, evidence, statements, witnesses, testimony, arguments, assertions, or factual basis to establish that the “two small, clear crystal rocks” were methamphetamine. The state did not assert that the two items were field tested, tested in the police laboratory, tested by an independent laboratory, or sent to the SBI. The state simply failed to prove in any legally sufficient manner that the two items were methamphetamine.

 Accordingly, the state failed to provide sufficient evidence to support a factual basis for the crime of delivering methamphetamine in 18 CrS 203725.

 **iii. There was no evidence to support a factual basis for the crime of maintaining a dwelling to keep or sell methamphetamine in 18 CrS 203724.**

 The information obtained against Mr. Zuniga for the crime of maintaining a dwelling to keep or sell methamphetamine in 18 CrS 203724 alleged that on January 25, 2018, Mr. Zuniga kept and maintained a dwelling that was used for the keeping or selling of a methamphetamine. (Rp. 5) To sustain a felony conviction for this offense, the state was obligated to offer a factual basis establishing that Mr. Zuniga: knowingly and intentionally; kept and maintained; a dwelling house; for the unlawful keeping or selling of methamphetamine. N.C. Gen. Stat. §90-108(a)(7).

 However, the state’s factual basis failed to establish that Mr. Zuniga kept a home for the storage or selling of methamphetamine. The state’s factual basis alleged that on January 25, 2018, an undercover officer arrived at the apartment complex where Mr. Zuniga lived. (Rp. 23) Mr. Zuniga went down to meet the officer and they had a conversation about meeting Mr. Zuniga’s supplier. (Rp. 23) The undercover officer left and returned two hours later. (Rp.) Mr. Zuniga then met “the undercover officer in his car and [sold] him methamphetamine.” (Rp. 23) Those statements constituted the entirety of the state’s factual basis for the offense of maintaining a dwelling to keep or sell methamphetamine in 18 CrS 203724.

 Simply being in possession of a controlled substance is insufficient to prove that a defendant uses his home as a place to “keep” that controlled substance over a duration of time. *State v. Thompson*, 199 N.C. App. 102, 105, 654 S.E.2d 814, 817 (2008). Nor does the fact that Mr. Zuniga sold methamphetamine to an officer in a car in the parking lot of his apartment complex constitute a sufficient factual basis to support a charge of intentionally keeping and maintaining a dwelling for the purpose of selling methamphetamine. *See, e.g., State v. Battle*, 167 N.C. App. 730, 734-35, 606 S.E.2d 418, 421 (2005)(State’s “meager evidence” that defendant was arrested in a hotel room with cocaine, marijuana and $71.00 cannot be substantial evidence to support a charge of keeping and maintaining a room for the purpose of selling a controlled substance).

 The state offered no evidence, statements, witnesses, testimony, arguments, assertions, or factual basis to establish: (1) that Mr. Zuniga kept methamphetamine inside his home for any period of time; (2) that methamphetamine was ever found inside Mr. Zuniga’s home; or, (3) that the methamphetamine which he sold to the undercover officer, in fact, came from inside his home. The state simply failed to prove in any legally sufficient manner that Mr. Zuniga kept a home for the storage or selling of methamphetamine.

 Accordingly, the state failed to provide sufficient evidence to support a factual basis for the crime of maintaining a dwelling to keep or sell methamphetamine in 18 CrS 203724.

**iv. There was no evidence to support a factual basis for the crime of trafficking in cocaine by sale and trafficking in cocaine by delivery in 18 CrS 203720 (51) and (52).**

 The information obtained against Mr. Zuniga for the crimes of trafficking in cocaine by sale and trafficking in cocaine by delivery in 18 CrS 203720 alleged that on February 24, 2018, Mr. Zuniga sold 200-400 grams of cocaine to E. Sanchez and delivered 200-400 grams of cocaine to E. Sanchez. (Rp. 2) Therefore, the state was obligated to offer a factual basis establishing that Mr. Zuniga: knowingly; sold and delivered; cocaine; to E. Sanchez; in the amount of 200-400 grams. N.C. Gen. Stat. §90-95(h)(3)(a).

 However, the state’s factual basis was utterly devoid of facts regarding this offense. The entirety of the state’s factual basis regarding the events of February 24, 2018 is as follows:

 Then on February 24 is [sic] about a month later, of 2018. The defendant texted that undercover officer about meeting up for another drug transaction. The officer told the defendant he was at work, but a little bit later that day, the undercover officer went to the defendant's apartment complex, as they had agreed to previously.

 After that, a search warrant was executed at the defendant's apartment. Wake County Sheriff's officers entered about 5:15 p.m. in apartment 301, which is the defendant's apartment. A K-9 officer gave a positive alert on cash and a gray bag that was vacuum sealed and contained cocaine.

 In the master bedroom of the defendant's apartment, there was a gray bag with vacuum sealed bags inside that contained cocaine that ended up weighing about 261.5 grams. There was $643 of cash on the shelf of a TV stand. Deputies also found a red box with a plastic bag that had 45 smaller bags of cocaine on a shelf that weighed about 20 grams. There were knotted-up bags under the TV with cocaine in them.

There were documents throughout the bedroom that had the defendant's name and address and an almost empty container of creatine powder in that bedroom. In the laundry room of that apartment, there was an orange Hermes of Paris container with two bags of cocaine inside the dryer.

 In the kitchen, there was more mail on the bar. The defendant's passport was also on the bar. And in a coat closet, there was a laptop bag, a laptop, and a charger.

 The total weight of the cocaine from that search warrant execution was 249.47 grams.

(Rpp. 24-25)

 This factual basis is devoid of any facts which could establish that Mr. Zuniga sold any cocaine to E. Sanchez on February 24, 2018, or that Mr. Zuniga delivered any cocaine to E. Sanchez on February 24, 2018. As conceded in subsections A and B, *supra* pages 5-8, the state’s factual basis is sufficient to prove that on February 24, 2018, Mr. Zuniga trafficked in cocaine by possession and maintained a dwelling to keep cocaine. But it is not sufficient to prove that he sold or delivered cocaine to E. Sanchez on February 24, 2018. The state simply failed to prove, in any legally sufficient manner, that Mr. Zuniga sold or delivered cocaine to E. Sanchez on February 24, 2018.

 Accordingly, the state failed to provide sufficient evidence to support a factual basis for the crimes of trafficking in cocaine by sale and by delivery in 18 CrS 203720 (51) and (52).

 **v. Mr. Zuniga’s pleas and judgments must be vacated and his case remanded to the trial court for new proceedings.**

Before accepting Mr. Zuniga’s pleas, the trial court was required to ensure a sufficient factual basis existed to support the pleas pursuant to § 15A-1022(c). As permitted by the statute, the trial court determined there was a sufficient factual basis. (Rp. 25) However, “guilty pleas must be substantiated in fact.” *Agnew*, 361 N.C. at 335-36, 643 S.E.2d at 583 (*quoting* *State v. Sinclair*, 301 N.C 193, 199, 270 S.E.2d 418, 421 (1980)). And in this case, the state’s factual basis contained no “substantive material” showing Mr. Zuniga committed seven of the ten offenses for which he was charged. *Id*. As Mr. Zuniga’s written transcript of plea, stipulation to the State’s factual recitation, and stipulation to the existence of a factual basis did not constitute “substantive material” establishing guilt, there was insufficient support for Mr. Zuniga’s pleas in case numbers 18 CrS 2037727 (51)-(53); 18 CrS 203720 (51) and (52); 18 CrS 203724; and, 18 CrS 203725. *Id*. at 337, 643 S.E.2d at 584.

As seven of Mr. Zuniga’s pleas were unsupported by any factual basis, the trial court erred by finding there was a sufficient factual basis, accepting those pleas, and entering judgment against him. *See Agnew*, 361 N.C. at 335-36, 643 S.E.2d at 583. Accordingly, the judgments must be vacated and the case remanded for new proceedings. *State v. Flint*, 199 N.C. App. 709, 727, 682 S.E.2d 443, 453 (2009)(vacating plea and judgment and remanding for new proceedings in which defendant could “withdraw his guilty plea and proceed to trial on the criminal charges . . . [or] attempt to negotiate another plea agreement”). This is required although the convictions were consolidated into two judgments and commitments for sentencing purposes. *State v. Stonestreet*, 243 N.C. 28, 31, 89 S.E.2d 734, 737 (1955) (where two or more charges are consolidated for the purpose of judgment, and a single judgment is pronounced therein even though the plea of guilty on one is sufficient to support the judgment, vacatur of other charges requires that the cause be remanded for proper judgment on the valid charge).

# Conclusion

For the foregoing reasons and authorities, Mr. Zuniga respectfully requests that this Court issue its writ of certiorari to review issues argued in this brief and fully contained in the petition filed contemporaneously with this brief, on the merits, and that his pleas and judgments be vacated and new proceedings ordered.

 Respectfully submitted, this the 5th day of March, 2019.

(Electronically Submitted)

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# CERTIFICATE OF FILING AND SERVICE

I hereby certify that the original Defendant-Appellant’s Brief has been filed, pursuant to Rule 26 of the North Carolina Rules of Appellate Procedure, by electronic means with the Clerk of the North Carolina Court of Appeals.

I further certify that a copy of the above and foregoing Defendant-Appellant’s Brief has been duly served upon Mr. Robert C. Ennis, Assistant Attorney General, North Carolina Department of Justice, by electronic means by emailing it to rennis@ncdoj.gov*.*

 This the 5th day of March, 2019.

(Electronically Submitted)

Katherine Jane Allen

Assistant Appellate Defender