No. COA19-85 EIGHTEENTH DISTRICT

NORTH CAROLINA COURT OF APPEALS

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STATE OF NORTH CAROLINA )

)

v. ) From Guilford )

JEROME CANNON MCCOY )

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DEFENDANT-APPELLANT’S BRIEF

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**ISSUE PRESENTED**

SHOULD THE HABITUAL LARCENY JUDGMENT IN 16 CRS 87504 BE VACATED BECAUSE IT WAS UNSUPPORTED BY A FACTUAL BASIS?

# Statement of the Case

On January 23, 2017, in case number 16 CrS 87504, a Guilford County Grand Jury indicted Jerome Cannon McCoy for larceny of food products and beer from a Sheetz store in Greensboro and for attaining the status of habitual larcenist. (Rp. 2)

On March 19, 2018, in case number 16 CrS 78857, a Guilford County Grand Jury indicted Mr. McCoy for larceny of hygiene products and/or food products from a Harris Teeter store and for attaining the status of habitual larcenist. (Rp. 3)

On May 31, 2018, Mr. McCoy appeared before the Honorable Stanley L. Allen in Guilford County Superior Court and entered a plea of guilty to the charges. The terms of the plea agreement stated that: (1) Mr. McCoy stipulated to having 16 prior record points and a level IV prior record level; (2) the larceny counts in both 16 CrS 78857 and 87504 were merged/arrested; (3) the two habitual larceny convictions were merged into one class H felony; and, (4) Mr. McCoy would receive an active sentence of 12-24 months. (Rp. 24)

Mr. McCoy was sentenced according to the terms of the plea agreement. (Rpp. 44-46)

On June 6, 2018, Mr. McCoy gave written notice of appeal. (Rpp. 47-54)

# Statement of the Facts

The factual basis presented by the state alleged that Mr. McCoy and a female entered the Harris Teeter Grocery Store at 701 Francis King Street in Greensboro on May 13, 2016. The female selected men’s shower gel and razor refills and concealed the items in her purse and a bag. As the two headed for the exit, Mr. McCoy was videotaped taking an apple pie. The two left the store without paying, got into a car, and drove away. (Rp. 37)

On September 11, 2016, Mr. McCoy and another person entered a Sheetz Gasoline Store on Battleground Avenue in Greensboro. They selected chips, Pepsi-Colas, beer, and Mike’s Hard Lemonade, left the store without paying, got into a car, and drove away. (Rpp. 37-38)

**STATEMENT OF GROUNDS FOR APPELLATE REVIEW**

Mr. McCoy appeals pursuant to N.C. R. App. P. 21 and N.C. Gen. Stat. § 15A-1444(e). Contemporaneously with this brief, Mr. McCoy filed a petition seeking review of the following by writ of certiorari: (i) the factual basis was insufficient to support his plea to habitual larceny in 16 CrS 87504 and (ii) his right to a direct appeal, as it was most likely waived for failure to file and serve timely notice of appeal in compliance with N.C. R. App. P. 4. The issues argued in the petition and fully contained in this brief are reviewable by writ of certiorari.

**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 JUDGMENT IN 16 CRS 87504 MUST BE VACATED BECAUSE MR. MCCOY’S PLEA TO ATTAINING HABITUAL LARCENIST STATUS WAS UNSUPPORTED BY A SUFFICIENT FACTUAL BASIS.**

Mr. McCoy pleaded guilty. Therefore, the state was obligated to provide a factual basis to support each charge as alleged in the indictments. However, when addressing the habitual larceny charges, the state failed to offer a factual basis for the habitual larceny charge in 16 CrS 87504. Instead, the state offered a factual basis for only the habitual larceny in 16 CrS 78857. The state did so by simply reading the indictment in 16 CrS 78857, as follows:

The prior four larceny convictions that qualify him for the violation of 14-72(b)(6), one on or about June 13th, 2014, the defendant was convicted of misdemeanor larceny in Guilford County, the offense being committed on or about May 24, 2013. This is 13-CR-82986.

Second, on or about March 15th, 2011, the defendant was convicted of misdemeanor larceny in Guilford County, this offense being committed on or about September 16th, 2010, 10-CR-50073.

Third, on or about December 20th, 1996, the defendant was convicted of misdemeanor larceny here in Guilford County, that offense being on or about May 6, 1996, 96-CR-45620.

Then lastly, on or about October 20, 1997, convicted of misdemeanor larceny here in Guilford County. That offense being committed on or about June 18th, 1997, 97-CR-55081. And that would be the factual basis.

(Rpp. 3, 38)

This recitation of the habitual larceny indictment in 16 CrS 78857 failed to establish a factual basis for the habitual larceny in 16 CrS 87504 because the state did not utilize the same prior convictions when charging Mr. McCoy as a habitual larcenist in both cases. (Rpp. 2-3) In 16 CrS 87504 the state chose to indict Mr. McCoy as a habitual larcenist in reliance upon the following four convictions:

(1) 14 Cr 702967, misdemeanor larceny, committed on January 26, 2014, and convicted of the same on June 13, 2014;

(2) 12 Cr 701050, misdemeanor larceny, committed on January 12, 2012, and convicted of the same on July 11, 2012;

(3) 10 Cr 50073, misdemeanor larceny, committed on September 16, 2010, and convicted of the same on March 15, 2011; and,

(4) 97 Cr 55081, misdemeanor larceny, committed on June 18, 1997, and convicted of the same on October 20, 1997. (Rp. 2)

“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.*

When a defendant pleads guilty, the state must provide a factual basis to support the charges as alleged in the indictment. In this case, the state failed to do so because two of the four prior convictions utilized by the state in 16 CrS 87504 are different from the prior convictions relied upon by the state in 16 CrS 78857. Accordingly, when the state recited the priors contained within the habitual larceny indictment for 16 CrS 78857, the state failed to provide a factual basis for the habitual larceny charge in 16 CrS 87504. (Rpp. 2, 3)

Before accepting Mr. McCoy’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. 41) However, the State’s factual basis failed to contain any “substantive material” showing Mr. McCoy attained habitual larceny status of 16 CrS 87504. *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)). As Mr. McCoy’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, none was sufficient to support his plea in case number 16 CrS 87504. *Id*. at 337, 643 S.E.2d at 584.

As Mr. McCoy’s plea to habitual larceny in 16 CrS 87504 was unsupported by any factual basis, the trial court erred by finding there was a sufficient factual basis, accepting the plea, and entering judgment against him. *See Agnew*, 361 N.C. at 335-36, 643 S.E.2d at 583. The judgment 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”).

Although the two habitual larceny convictions were consolidated for sentencing, the case must be vacated and remanded to the trial court. The law is well-settled that “where two or more indictments or counts are consolidated for the purpose of judgment, and a single judgment is pronounced therein even though the plea of guilty or conviction on one is sufficient to support the judgment and the trial thereon is free from error, the award of a new trial on the other indictment[s] or count[s] requires that the cause be remanded for proper judgment on the valid count.” *State v. Stonestreet*, 243 N.C. 28, 31, 89 S.E.2d 734, 737 (1955).

# Conclusion

For the foregoing reasons and authorities, Mr. McCoy 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 plea and judgment be vacated and new proceedings ordered.

Respectfully submitted this the 11th day of February, 2019.

(Electronically Filed)

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# CERTIFICATE OF SERVICE

Undersigned counsel hereby certifies that a copy of the above and foregoing Brief has been duly served upon Daniel O’Brien, Assistant Attorney General, North Carolina Department of Justice, via email to dobrien@ncdoj.gov.

This the 11th day of February, 2019.

(Electronically Filed)

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