No. COA21-538 29A DISTRICT

NORTH CAROLINA COURT OF APPEALS

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STATE OF NORTH CAROLINA )

 ) From Rutherford County

 v. ) 18 CRS 53659, 702746

 ) 19 CRS 51671, 51585,

 ) 19 CRS 701436-37

TREVELLE SHADE )

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# DEFENDANT-APPELLANT’S BRIEF

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# DEFENDANT-APPELLANT’S BRIEF

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**ISSUES PRESENTED**

**I. DID THE TRIAL COURT ERR IN ACCEPTING MR. SHADE’S GUILTY PLEA AND ENTERING JUDGMENT AND COMMITMENT THEREON WHERE THE STATE’S FACTUAL BASIS DID NOT SUPPORT THE COMMISSION OF EACH OFFENSE REFLECTED IN THE PLEA TRANSCRIPT?**

**II. DID THE TRIAL COURT LACK JURISDICTION TO ENTER JUDGMENT AND COMMITMENT FOR A VIOLATION OF N.C. GEN. STAT. § 20-309, SET OUT IN FILE NUMBER 19 CRS 51671, WHEN THE PLEADING ALLEGING THE OFFENSE WAS FATALLY DEFECTIVE?**

**STATEMENT OF THE CASE**

Defendant Trevelle Shade originally appeared in the District Court of Rutherford County and entered pleas of guilty to criminal contempt, possession of marijuana, driving while license revoked, two counts of failure to appear on a misdemeanor, three more counts of driving while license revoked, three counts of operating a vehicle with no insurance, driving a vehicle with no registration, and two counts of fictitious or altered tag or registration. (Rpp 14-17, Addendum to Record pp 5-6) Mr. Shade gave notice of appeal from the judgment of the District Court to the Superior Court. (Rpp 14-17, Addendum to Record pp 7-8)

 Mr. Shade was then brought for hearing before the Honorable J. Thomas Davis, Superior Court Judge, presiding, at the February 1, 2021 session of criminal Superior Court of Rutherford County. Mr. Shade entered pleas of guilty to a Class 3 possession of marijuana, two counts of failure to appear on a misdemeanor, four counts of driving while license revoked, two counts of operating a vehicle with no insurance, driving a vehicle with no registration, and two counts of fictitious or altered tag or registration. (Rpp 20-23) Pursuant to the plea agreement, the trial court consolidated the charges and sentenced Mr. Shade to a 30-day active sentence and gave him credit for time served. (Rpp 20-23, 26-29) Mr. Shade filed written notice of appeal on February 12, 2021. (Rpp 30, 31)

**STATEMENT OF THE GROUNDS FOR APPELLATE REVIEW**

 Defendant appeals pursuant to N.C. Gen. Stat. § 7A-27(b), N.C. Gen. Stat. § 15A-1442, N.C. Gen. Stat. § 15A-1444, and N.C. Gen. Stat. § 15A-1446(d) from a final judgment of Rutherford County Superior Court.

 Undersigned counsel has filed a petition for writ of certiorari contemporaneously with this brief asking that the Court reach the merits of Mr. Shade’s arguments, where his notice of appeal may be deemed deficient, or where Mr. Shade may not have an appeal by right. N.C. Gen. Stat. §15A-1444(e) states: “the defendant …when he has entered a plea of guilty … to a criminal charge in the superior court … may petition the appellate division for review by writ of certiorari.” N.C. Gen. Stat. §15A-1444(e). *See* *State v. Carter*, 167 N.C. App. 582, 585, 605 S.E.2d 676, 678 (2004) (“a defendant may petition for writ of certiorari when he is challenging the procedures employed in accepting a guilty plea”).

Additionally, this Court has the discretion to invoke Rule 2 of the North Carolina Rules of Appellate Procedure, if necessary, in order to consider the merits of the claims raised in this brief. Rule 2 states:

To prevent manifest injustice to a party, or to expedite decision in the public interest, either court of the appellate division may, except as otherwise expressly provided by these rules, suspend or vary the requirements or provisions of any of these rules in a case pending before it upon application of a party or upon its own initiative, and may order proceedings in accordance with its directions.

N.C. R. App. P. Rule 2. Our Supreme Court has observed, “it is the task of an appellate court to resolve appeals on the merits if at all possible.” *Dogwood Dev. & Mgmt. Co. v. White Oak Transp. Co.*, 362 N.C. 191, 199, 657 S.E.2d 361, 366 (2008).

**STATEMENT OF THE FACTS**

 The State summarized a factual basis to support the pleas in this matter, and provided to the court the following statement:

In File 18CRS53659, on or about December 14th of 2018, the defendant unlawfully and willfully did possess one half ounce of marijuana or less, a controlled substance included in Schedule VI of the North Carolina Controlled Substances Act.

In File 18CRS702746, on or about September 27th, 2018, the defendant did operate a motor vehicle on a street or highway while his license was revoked, and he did operate a motor vehicle on a street or highway without having financial responsibility required by law.

In File 19CRS51585, on or about June 5th, 2019, the defendant unlawfully and willfully did operate a vehicle on a street or highway while his driver’s license was revoked, and he did operate a motor vehicle on a street or highway with a fictitious tag, knowing it to be fictitious.

In 19CRS51671, on or about June 14th, 2019, the defendant did operate a motor vehicle on a street or highway while his license was revoked, no liability insurance, and did display a registration number knowing it was fictitious.

In 19CRS701437, on or about May 2nd of 2019, the defendant operated a motor vehicle on a street or highway without that vehicle being registered and did drive while his license was revoked. I think that was it.

(Tpp 11-12) No further information was presented concerning a factual basis for the pleas.

**ARGUMENT**

1. **THE TRIAL COURT ERRED IN ACCEPTING MR. SHADE’S GUILTY PLEA AND ENTERING JUDGMENT AND COMMITMENT THEREON WHERE THE STATE’S FACTUAL BASIS DID NOT SUPPORT THE COMMISSION OF EACH OFFENSE REFLECTED IN THE PLEA TRANSCRIPT.**

STANDARD OF REVIEW: Whether there was a sufficient factual basis to support the defendant’s plea is a question of law. This Court reviews questions of law *de novo*. *See* *State v. Weathers*, 339 N.C. 441, 451 S.E.2d 266 (1994); *State v. Crawford*, 2021-NCCOA-272. Under de novo review, this Court “considers the matter anew and freely substitutes its own judgment for that of the lower tribunal.” State v. Williams, 362 N.C. 628, 632–33, 669 S.E.2d 290, 294 (2008) (quotation marks and citation omitted).

This Court further reviews whether there was an error in the entry of the plea under N.C. Gen. Stat. § 15A-1446(d)(16) or whether the sentence was otherwise invalid as a matter of law under N.C. Gen. Stat. § 15A-1446(d)(18) even where there was no objection in the trial court. *See* *State v. Artis*, 174 N.C. App. 668, 622 S.E. 204 (2005); *State v. Meadows*, 371 N.C. 742, 821 S.E.2d 402 (2018); *State v. Mumford*, 364 N.C. 394, 403, 699 S.E.2d 911, 917 (2010).

**A. Applicable Law**

 N.C. Gen. Stat. § 15A-1022(c) requires that prior to accepting a plea of guilty, the trial court must determine there is a factual basis for the plea. N.C. Gen. Stat. § 15A-1022(c). This determination may be based upon information including but not limited to (1) a statement of the 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), or (5) a statement of facts by the defense counsel. *Id*. The statute “requires an independent judicial determination that a factual basis exists before a trial court accepts a guilty plea.” *State v. Agnew*, 361 N.C. 333, 335, 643 S.E.2d 581, 582 (2007).

 “The five sources listed in [N.C.G.S. § 15A-1022(c)] are not exclusive, and therefore the trial judge may consider any information properly brought to his attention.” *State v. Collins*, 221 N.C. App. 604, 606, 727 S.E.2d 922, 924 (2012). In enumerating these five sources, the statute “contemplate[s] that some substantive material independent of the plea itself appear of record which tends to show that defendant is, in fact, guilty.” *State v. Sinclair*, 301 N.C. 193, 199, 270 S.E.2d 418, 421-22 (1980). *See also* *State v. Flint*, 199 N.C. App. 709, 726, 682 S.E.2d 443, 453 (2009) (explaining that when it is unclear if information was before the trial court during the defendant’s plea hearing, then that information cannot be considered in a factual basis determination, even when contained in the record on appeal).

 As set out recently in *Crawford*,

[o]ur Supreme Court has previously held a *Transcript of Plea*, in and of itself, cannot provide the factual basis for [a plea.] *Sinclair*, 301 N.C. at 199, 270 S.E.2d at 421 (“[T]he Transcript of Plea itself [does not] provide a factual basis for the plea. A defendant’s bare admission of guilt, or plea of no contest, always contained in such transcripts, does not provide the ‘factual basis’ contemplated by [N.C.G.S. §] 15A-1022(c).”) Further, in *State v. Agnew*, our Supreme Court held an “indictment [that] simply stated the charge and did not provide any further factual description of [the] defendant’s particular alleged conduct[,]” taken together with the *Transcript of Plea*, was insufficient to serve as a factual basis for accepting the plea. *Agnew*, 361 N.C. at 337, 643 S.E.2d at 584.

2021- NCCOA-272, ¶35. In *Crawford*, the Court found that the indictments provided “significant factual details beyond the charge alleged and provided the trial court with a ‘factual description of [D]efendant’s particular alleged conduct.’” *Id*., at ¶36 (quoting *Agnew*, 361 N.C. at 337, 643 S.E.2d at 584).

In the present matter, the transcript of the plea hearing does not indicate that the trial court reviewed the charging documents in making its independent judicial determination that a factual basis existed to support the pleas. Moreover, as explained below, the pleadings here did not provide factual descriptions of particularized conduct beyond the recitation of the charges to support Mr. Shade’s guilty pleas.

 **B. Discussion**

 “Because a guilty plea waives certain fundamental constitutional rights such as the right to a trial by jury, our legislature has enacted laws to ensure guilty pleas are informed and voluntary.” *Agnew,* 361 N.C. at 335, 643 S.E.2d at 583. In support of its holding in *Agnew* finding an insufficient factual basis for the guilty plea, the Court explained that

[t]he [t]ranscript of [p]lea standing alone was inadequate. Similarly, the defense counsel’s stipulation to the existence of a factual basis was insufficient because the stipulation gave the trial court no additional substantive information about the case as required by statute. Likewise, the indictment simply stated the charge and did not provide any further factual description of defendant’s particular alleged conduct.

*Agnew*, 361 N.C. at 337, 643 S.E.2d at 584. Nothing in the present case provides any more substantive information, beyond the plea transcript and stipulation to a factual basis, to support Mr. Shade’s pleas. Further, the charging documents here did not provide factual descriptions beyond the charges alleged. The State, in providing its factual basis, did no more than read to the trial court the charges as set out in the pleadings.

 **1. Two Counts of Failure to Appear**

As written above, the State’s factual basis consisted of a recitation of ten of the twelve charges included in the judgment, as set out in the pleadings. The State, in its recitation, made no mention of the offenses of failing to appear in file numbers 19 CRS 701436 and 19 CRS 701437, though these charges were included in the plea transcript and judgment. The charging documents for these offenses said no more than that “the defendant has failed to appear on the date shown to appear as required by a duly executed Criminal Summons or by a Citation that charged defendant with a misdemeanor.” (Addendum to Record, pp 1-4) No further information was provided describing any particularized alleged conduct. Thus, there was an insufficient factual basis to support the guilty pleas to these two offenses.

**2. Four Counts of Driving While License Revoked**

“To convict a person of the crime of driving with a revoked license, the State must prove beyond a reasonable doubt that defendant was on notice that his driver's license was revoked.” *State v. Funchess*, 141 N.C. App. 302, 311, 540 S.E.2d 435, 440 (2000); *see also* *State v. Woody*, 102 N.C. App. 576, 578, 402 S.E.2d 848, 850 (1991) (“To sustain the charge against [defendant for driving while license revoked,] the State had to prove that (1) [defendant] operated a motor vehicle, (2) on a public highway, (3) while his operator's license was suspended or revoked, and (4) had knowledge of the suspension or revocation.”).

Here again, the factual basis provided by the State consisted of a recitation of the charges as alleged in the pleadings for file numbers 18 CRS 702746, 19 CRS 51585, 19 CRS 51671, and 19 CRS 701436, without providing any additional information describing defendant’s particularized alleged conduct for each incident of the alleged offenses. More specifically, neither the charging documents nor the State’s recitation provided additional particularized information or factual basis to support the trial court’s independent judicial determination that Mr. Shade had the requisite notice or knowledge that his driver’s license was revoked.

There was an insufficient factual basis to support Mr. Shade’s pleas to four counts of driving while license revoked, and it was error to accept the pleas and enter judgment thereon.

**3. Possession of Marijuana and Remaining Offenses**

Regarding the possession of marijuana charge, neither the pleading for this offense, in file number 18 CRS 53659 (Rpp 3-4), nor the State’s reading of the charge as the factual basis for the offense (Tp 11), provided any more substantive information to support Mr. Shade’s actual guilt of this offense, other than to allege that Mr. Shade possessed one half of marijuana or less on or about December 14, 2018. There was no description of any particularized conduct beyond a statement of the charge itself, and thus, there was not enough information for an independent judicial determination of Mr. Shade’s actual guilt.

Likewise with the other offenses charged, the State did no more than read the charges as alleged in the pleadings, and the pleadings themselves did not provide a factual description of the particularized alleged conduct beyond the charge. Again, there was not a sufficient factual basis to support the pleas to these offenses.

 **C. Conclusion**

As in *Agnew*, the record here “did not contain enough information for an independent judicial determination of [the] defendant’s actual guilt” to support the guilty pleas. *Agnew*, 361 N.C. at 337, 643 S.E.2d at 584. The trial court here erred in accepting Mr. Shade’s pleas as there was insufficient information in the Record to support an independent judicial determination of a factual basis for the pleas in accordance with N.C. Gen. Stat. § 15A-1022(c). Mr. Shade’s guilty pleas, and the judgment thereon, should be vacated, and the case remanded for further proceedings as necessary.

 In *Flint*, this Court wrote,

Because defendant has requested that he be relieved of his plea agreement, we also set aside defendant’s plea agreement due to failure of the State to provide a factual foundation. This case is remanded to the trial court where defendant may “withdraw his guilty plea and proceed to trial on the criminal charges … [or] attempt to negotiate another plea agreement[.]” *State v. Wall*, 348 N.C. 671, 676, 502 S.E.2d 585, 588 (1998).

*Flint*, 199 N.C. App. at 727, 682 S.E.2d at 453.

 Should this Court determine that there was an insufficient factual basis for some but not all of the charges included in the transcript of plea or judgment, the pleas and judgment should still be vacated. Our Supreme Court has held that a “[d]efendant cannot repudiate [a plea agreement] in part without repudiating the whole.” *State v. Rico*, 218 N.C. App. 109, 122, 720 S.E.2d 801, 809 (Steelman, J., dissenting), *rev’d for reasons stated in dissent*, 366 N.C. 327, 734 S.E.2d 571 (2012); *see also* *State v. Pless*, 249 N.C. App. 668, 791 S.E.2d 869 (2016).

1. **THE TRIAL COURT LACKED JURISDICTION TO ENTER JUDGMENT AND COMMITMENT FOR A VIOLATION OF N.C. GEN. STAT. § 20-309, SET OUT IN FILE NUMBER 19 CRS 51671, WHERE THE CITATION PURPORTING TO CHARGE THE OFFENSE WAS FATALLY DEFECTIVE.**

STANDARD OF REVIEW: This Court reviews the sufficiency of an indictment *de novo*. *State v. Marshall*, 188 N.C. App. 744, 748, 656 S.E.2d 709, 712 (2008). Under de novo review, this Court “considers the matter anew and freely substitutes its own judgment for that of the lower tribunal.” Williams, 362 N.C. at 632–33, 669 S.E.2d at 294 (quotation marks and citation omitted).

 “[A] challenge to the facial validity of an indictment may be brought at any time, and need not be raised at trial for preservation on appeal.” State v. LePage, 204 N.C.App. 37, 49, 693 S.E.2d 157, 165 (2010).

 **A. Applicable Law**

“[N.C. Gen. Stat. §] 15A-924 codifies the requirements of a criminal pleading. A criminal pleading must contain, inter alia … ‘[a] plain and concise factual statement in each count which … asserts facts supporting every element of a criminal offense and the defendant’s commission thereof[.]’” *State v. Saults*, 294 N.C. 722, 724, 242 S.E.2d 801, 803-04 (1978). An indictment is invalid and prevents the trial court from acquiring jurisdiction over the charged offense if [it] ‘fails to state some essential and necessary element of the offense of which defendant is found guilty.’” *State v. McNeil*, 209 N.C. App. 654, 658, 707 S.E.2d 674, 679 (2011) (quoting *State v. Wilson*, 128 N.C. App. 688, 691, 497 S.E.2d 416, 419 (1998)). “Lack of jurisdiction in the trial court due to a fatally defective indictment requires ‘the appellate court … to arrest judgment or vacate any order entered without authority.’” *State v. Galloway*, 226 N.C. App 100, 103, 738 S.E.2d 412, 414 (2013) (quoting *State v. Petersilie*, 334 N.C. 169, 175, 432 S.E.2d 832, 836 (1993)).

N.C. Gen. Stat. § 15A-924 states the general requirement that a “criminal pleading” must contain certain information, and does not limit its application to a subset of the types of criminal pleadings listed in N.C. Gen. Stat. § 15A-921. *See* N.C. Gen. Stat. § 15A-921 and N.C. Gen. Stat. § 15A-924. The requirement that a criminal pleading must state facts supporting the elements of the charged offense has been addressed in cases in which a defendant’s conviction was based on a criminal pleading other than an indictment. *See, e.g.,* *State v. Camp*, 59 N.C. App. 38, 41-42, 295 S.E.2d 766, 768 (1982) (applying requirement that a criminal pleading must state facts supporting the elements of the charged offense to a warrant).

When the pleading is a criminal summons, warrant for arrest, or magistrate’s order, or statement of charges based thereon, both the statement of the crime and any information showing probable cause which was considered by the judicial official which has been furnished to the defendant must be used in determining whether the pleading is sufficient to meet the foregoing requirement. [N.C. Gen. Stat.] § 15A-924(a)(5) (2017).

*State v. Jones*, 371 N.C. 548, 553, 819 S.E.2d 340, 343-44 (2018).

  **B. Insufficient Pleading**

In file number 19 CRS 51671, Mr. Shade was charged under N.C. Gen. Stat. § 20-309 with “NO LIABILITY INSURANCE.” The pleading – in this case a Magistrate’s Order – read:

I, the undersigned, find that the defendant named above has been arrested without a warrant and the defendant’s detention is justified because there is probable cause to believe that on or about the date of offense shown and in the county named above the defendant named above unlawfully and willfully did FAIL TO MAINTAIN FINANCIAL RESPONSIBILITY; LIABILITY INSURANCE[.]

(Rpp 6-7) N.C. Gen. Stat. § 20-309(a) sets out in relevant part that

[n]o motor vehicle shall be registered in this State unless the owner at the time of registration provides proof of financial responsibility for the operation of such motor vehicle, as provided in this Article. The owner of each motor vehicle registered in this State shall maintain financial responsibility continuously throughout the period of registration.

N.C. Gen. Stat. § 20-309(a). To prove a violation of this offense, the State was required to prove that the defendant was the owner of the motor vehicle, that defendant registered the motor vehicle with the North Carolina Division of Motor Vehicles, and that defendant operated the motor vehicle at a time when the defendant did not have in place the financial responsibility as required by North Carolina law. N.C.P.I. – Criminal 271.92.

 In this case, the pleading failed to allege essential elements of this offense that Mr. Shade owned a motor vehicle to which this requirement applied, and that he registered the motor vehicle with the North Carolina Division of Motor Vehicles.

An indictment that “fails to state some essential and necessary element of the offense” is fatally defective. *Wilson*, 128 N.C. App. at 691, 497 S.E.2d at 419 (citation and quotation marks omitted), *disc. review improvidently allowed*, 349 N.C. 289, 507 S.E.2d 38 (1998). If the indictment at issue is fatally defective, the superior court lacks subject matter jurisdiction over the case. *State v. Justice*, 219 N.C. App. 642, 643, 723 S.E.2d 798, 800 (2012).

Here, the pleading upon which Mr. Shade’s conviction for failing to maintain liability insurance under N.C. Gen. Stat. § 20-309, in file number 19 CRS 51671, was fatally defective and failed to confer jurisdiction on the trial court. “Where an indictment … is fatally defective …, we must vacate the judgment based upon that indictment.” *State v. Oldroyd*, 271 N.C. App. 544, 545, 843 S.E.2d 478, 479, *writ allowed*, 843 S.E.2d 449 (2020). Mr. Shade’s conviction for failing to maintain liability insurance based on this fatally defective pleading in 19 CRS 51671 must be vacated. “Further, where part of a plea agreement is repudiated, the entirety of the plea must be vacated.” *Id*.

**CONCLUSION**

 For the above and foregoing reasons, Trevelle Shade respectfully contends that his pleas of guilty to a Class 3 possession of marijuana, two counts of failure to appear on a misdemeanor, four counts of driving while license revoked, two count of operating a vehicle with no insurance, driving a vehicle with no registration, and two counts of fictitious or altered tag or registration should be set aside, the convictions thereon vacated, and the case remanded for further proceedings as necessary.

Respectfully submitted this the 14th day of January, 2022.

 (Electronically submitted)

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 28(j) of the Rules of Appellate Procedure, counsel for the Defendant-Appellant certifies that the foregoing brief, which is prepared using a proportional font, is less than 8,750 words (excluding cover, indexes, tables of authorities, certificates of service, this certificate of compliance and appendixes) as reported by the word-processing software.

 (Electronically submitted)

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 Kimberly P. Hoppin

 Counsel for Defendant-Appellant

**CERTIFICATE OF FILING AND SERVICE**

 I hereby certify that the original Defendant-Appellant’s Brief has been filed electronically, pursuant to Rule 26(a)(2) of the North Carolina Rules of Appellate Procedure, with the Court of Appeals of North Carolina.

 I further certify that a copy of the above and foregoing Defendant-Appellant’s Brief has been duly served upon the State by email, addressed as follows:

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 This the 14th day of January, 2022.

 (Electronically submitted)

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