



## State v. Cobb

616 S.E.2d 29 (2005) | Cited 1 times | Court of Appeals of North Carolina | August 2, 2005

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

James Jordan Cobb, III ("defendant") appeals the trial court judgments entered upon his plea of guilty to embezzlement and corporate malfeasance. For the reasons discussed herein, we hold that defendant received a trial free of prejudicial error, but we remand the case for resentencing.

The factual basis for defendant's guilty plea, as recited by the State for the trial court, tends to show the following: During the years 1997 through 23 June 2001, defendant was a minority shareholder in Southland Pine Needles, LLC ("Southland"), a business engaged in the preparation and packaging of horticultural and landscaping products for sale. In addition to his minority ownership interest, defendant served as manager of Southland's Aberdeen, North Carolina, facility.

On 10 October 1995, defendant entered into an agreement which governed the operation of Southland's Aberdeen facility. As part of the operating agreement, defendant was prohibited from entering into contracts on behalf of Southland without approval of the majority shareholders, and defendant was further prohibited from engaging in any business competitive with that of Southland. The operating agreement also required that Southland's bank accounts be maintained in a bank approved by the majority shareholders, and the financial records of Southland were kept at the headquarters of its parent company, Southern Importers, Inc. ("Southern"). However, unbeknownst to either Southern or the other shareholders of Southland, on 14 January 1997, defendant opened a checking account entitled "Southland Pine Needles Petty Cash Fund" ("Petty Cash Account") at First Union National Bank in Southern Pines, North Carolina.

Over the course of the next four and one-half years, defendant engaged in multiple unreported sales of Southland's products. Defendant deposited the \$1,111,718.97 in funds obtained through the sales into the Petty Cash Account. In order to transfer funds to his personal bank accounts and to pay off his personal debts, defendant subsequently withdrew cash and drafted checks on the account. In June 2001, Southern discovered the existence of the Petty Cash Account and thereafter retained Kenneth Dickson ("Dickson") to investigate the matter. Dickson's investigation revealed that defendant had withdrawn or transferred over \$850,000.00 from the Petty Cash Account and was unable to provide a legitimate business purpose for any of his actions related to the Petty Cash Account.

On 6 May 2002, defendant was indicted on five counts of embezzlement and one count of corporate



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malfeasance. Defendant subsequently entered into a plea agreement with the State, whereby each of the embezzlement charges would be consolidated into one Class C felony for judgment, with the length of defendant's sentence to be determined by the trial court. The plea agreement further provided that defendant would serve a sentence of six to eight months for corporate malfeasance, which would run at the expiration of defendant's sentence of embezzlement and would be suspended according to the terms and conditions of the trial court.

On 25 August 2003, defendant pled guilty pursuant to the plea agreement. The trial court found that defendant's plea was voluntary and defendant stipulated that a factual basis for the plea existed. The State subsequently provided a summary of the factual basis for the plea, and the State presented detailed testimony from Dickson and other witnesses. Following arguments from the parties regarding the presence of aggravating and mitigating factors, the trial court found as an aggravating factor that defendant's offenses involved the actual taking of property of great monetary value. The trial court further found as mitigating factors that defendant (i) voluntarily acknowledged wrongdoing in connection with the offenses at an early stage of the criminal process and prior to arrest, (ii) had been a person of good character prior to the offenses, (iii) had accepted responsibility for his criminal conduct, and (iv) had a positive employment history. After weighing the aggravating and mitigating factors, the trial court determined that the aggravating factor outweighed the mitigating factors. The trial court thereafter imposed an active sentence of ninety-two to 120 months incarceration for embezzlement and a suspended sentence of six to eight months incarceration for corporate malfeasance. Defendant appeals.

We note initially that defendant's brief contains arguments supporting only four of the seven original assignments of error. Pursuant to N.C.R. App. P. 28(b)(6) (2005), the three omitted assignments of error are deemed abandoned. Therefore, we limit our present review to those assignments of error properly preserved by defendant for appeal.

The issues on appeal are: (I) whether the indictments provided the trial court with proper jurisdiction; and (II) whether the trial court erred by applying an aggravating factor to enhance defendant's sentence.

Defendant first argues that the trial court lacked sufficient jurisdiction to impose a sentence upon him because the indictments failed to properly charge an offense. We disagree.

"An indictment or criminal charge is constitutionally sufficient if it apprises the defendant of the charge against him with enough certainty to enable him to prepare his defense and to protect him from subsequent prosecution for the same offense." *State v. Coker*, 312 N.C. 432, 434, 323 S.E.2d 343, 346 (1984). The indictment must express the charge in a "plain, intelligible and explicit manner." *Id.* at 435, 323 S.E.2d at 346. "A charge in a bill of indictment must be complete in itself, and contain all of the material allegations which constitute the offense charged." *State v. Guffey*, 265 N.C. 331, 333, 144 S.E.2d 14, 17 (1965).



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To prove embezzlement in violation of N.C. Gen. Stat. § 14-90 (2003), the State is required to establish the following factors:

- (1) that the defendant was the agent of the prosecutor;
- (2) that by the terms of his employment he was to receive the property in principal;
- (3) that he received the property in the course of his employment; and
- (4) knowing it was not his own, converted it to his own use or fraudulently misapplied it.

Where the value of the property taken by the defendant is \$100,000.00 or more, the defendant is guilty of a Class C felony. *Id.* Where the value of the property taken by the defendant is less than \$100,000.00, the defendant is guilty of a Class H felony. *Id.*

In the instant case, defendant was indicted on five counts of embezzlement and one count of corporate malfeasance. Three of the indictments charged him with a Class C felony. In indictment number 02 CRS 23422, defendant was charged with taking \$404,436.00 from Southland via multiple checks drawn on the Petty Cash Account between 11 May 1998 and 20 May 2001. In indictment number 02 CRS 23424, defendant was charged with taking \$109,763.00 from Southland via multiple checks drawn on the Petty Cash Account between 25 May 1998 and 23 April 2001. In indictment number 02 CRS 23426, defendant was charged with taking \$296,901.00 from Southland via multiple cash withdrawals from the Petty Cash Account between 18 January 1997 and 21 June 2001.

Defendant contends that because none of the cash withdrawals or drawn checks referred to in the indictments exceed \$100,000.00, it was improper to charge him with a Class C felony. In support of this contention, defendant cites this Court's opinion in *State v. Mullaney*, 129 N.C. App. 506, 509, 500 S.E.2d 112, 114 (1998), in which this Court "found no authority which supports the conclusion that multiple acts of embezzlement occurring over a period of time would constitute one continuing offense." However, we note that in *Mullaney*, the issue was whether the defendant should have been sentenced under the Fair Sentencing Act or the Structured Sentencing Act, and "the defendant d[id] not challenge the validity of the indictment." *Id.* While we recognize that "our courts have previously allowed defendants to be charged with multiple counts of embezzlement for multiple acts within a continuous series of actions[.]" *Id.* (citing *State v. Rupe*, 109 N.C. App. 601, 428 S.E.2d 480 (1993) (defendant indicted on forty counts of embezzlement which occurred within a continuous series of actions over a period of years)), we are not convinced that our previous decisions preclude the State from indicting a defendant for one count of embezzlement where the offense involves multiple misapplications and conversions of property extended over a period of time. Instead, we conclude that "[t]he choice of how to proceed is with the district attorney." *Mullaney*, 129 N.C. App. at 512, 500 S.E.2d at 116 (Judge Greene, concurring).



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Moreover, we note that in the instant case, because the State could have obtained a separate Class H felony indictment for each drawn check and cash withdrawal made by defendant, the issuance of an indictment for each time period of embezzlement rather than each offense of embezzlement actually benefitted defendant. Had the State chosen to issue a separate Class H felony embezzlement indictment for each of the 705 alleged acts of embezzlement, the trial court could have sentenced defendant far more severely. See N.C. Gen. Stat. § 15A-1340.17 (2003). By choosing instead to issue two Class H and three Class C felony embezzlement indictments, the State significantly decreased the maximum potential sentence. See *id.* In light of the foregoing, we conclude that defendant has failed to demonstrate that he was prejudiced by a defect in the indictments. See *State v. Thompson*, 50 N.C. App. 484, 489, 274 S.E.2d 381, 385, disc. review denied, 302 N.C. 633, 280 S.E.2d 448 (1981) (noting that "because the State could have obtained a separate indictment for each check drawn by [the] defendant in excess of the authorized amount, the issuance of one indictment for each year rather than for each offense benefited [the] defendant and could not have prejudiced her."). Therefore, we overrule defendant's first argument. Defendant next argues that the trial court erred by sentencing him in the aggravated range. We note initially that the State argues that defendant has failed to preserve this argument for appellate review because at sentencing, defendant's counsel stated that he did not "wish to be heard on the issue of the great monetary loss factor" and offered no objection to the trial court's finding of it. However, N.C. Gen. Stat. § 15A-1446(d) (2003) provides as follows:

Errors based upon any of the following grounds, which are asserted to have occurred, may be the subject of appellate review even though no objection, exception or motion has been made in the trial division.

(18) The sentence imposed was unauthorized at the time imposed, exceeded the maximum authorized by law, was illegally imposed, or is otherwise invalid as a matter of law.

(19) A significant change in law, either substantive or procedural, applies to the proceedings leading to the defendant's conviction or sentence, and retroactive application of the changed legal standard is required.

We conclude that defendant has not waived appellate review of this issue, and therefore, we will address its merits *infra*.

Defendant asserts that the trial court was prohibited from sentencing him in the aggravated range because (i) the "great monetary value" factor was not submitted to a jury, and (ii) the factor is an inherent element of embezzlement. Because we agree that the trial court's failure to submit the aggravating factor to a jury was a reversible error, we need not address defendant's contention that the aggravating factor is an inherent element of embezzlement.

In *State v. Allen*, \_\_\_ N.C. \_\_\_, \_\_\_ S.E.2d \_\_\_ (Filed 1 July 2005) (No. 485PA04), our Supreme Court



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recently examined the constitutionality of this state's structured sentencing scheme in light of the United States Supreme Court's decisions in *Apprendi v. New Jersey*, 530 U.S. 466, 147 L.Ed. 2d 435 (2000) and *Blakely v. Washington*, 542 U.S. 296, 159 L.Ed. 2d 403 (2004). The Court concluded that, when "[a]ppplied to North Carolina's structured sentencing scheme, the rule of *Apprendi* and *Blakely* is: Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed presumptive range must be submitted to a jury and proved beyond a reasonable doubt." Allen, \_\_\_ N.C. at \_\_\_, \_\_\_ S.E.2d at \_\_\_ (citing *Blakely*, 542 U.S. at \_\_\_, 159 L.Ed. 2d at 413-14; *Apprendi*, 530 U.S. at 490, 147 L.Ed. 2d at 455; N.C. Gen. Stat. §§ 15A-1340.13, 15A-1340.14, 15A-1340.16, 15A-1340.17). The Court noted that its holding would "apply to cases 'in which the defendants have not been indicted as of the certification date of this opinion and to cases that are now pending on direct review or are not yet final.'" \_\_\_ N.C. at \_\_\_, \_\_\_ S.E.2d at \_\_\_ (quoting *State v. Lucas*, 353 N.C. 568, 598, 548 S.E.2d 712, 732 (2001)).

In the instant case, the trial court unilaterally found that defendant's actions involved the taking of property of great monetary value, thereby aggravating defendant's sentence without first submitting the issue to a jury. Although we note that defendant pled guilty to various offenses involving approximately \$1,000,000.00, we are not convinced that defendant's plea and its implications cure the trial court's failure to submit the aggravating factor to a jury for proof beyond a reasonable doubt. See Allen, \_\_\_ N.C. at \_\_\_, \_\_\_ S.E.2d at \_\_\_ ("Because 'speculat[ion] on what juries would have done if they had been asked to find different facts' is impermissible, the Washington Supreme Court concluded, as do we, that '[h]armless error analysis cannot be conducted on *Blakely* Sixth Amendment violations.'" (quoting *State v. Hughes*, 154 Wash. 2d 118, 148, 110 P.3d 192, 208) (alterations in original)). Thus, in light of the foregoing, we conclude that the trial court committed reversible error by sentencing defendant in the aggravated range.<sup>2</sup> Therefore, we remand the case for resentencing.

No error in part; remanded for resentencing.

Judges HUDSON and STEELMAN concur.

Report per Rule 30(e).

1. By order of this Court, the filing of this opinion was delayed pending our Supreme Court's decision in *State v. Allen*, \_\_\_ N.C. \_\_\_, \_\_\_ S.E.2d \_\_\_ (Filed 1 July 2005) (No. 485PA04).
2. Defendant also asserts that the trial court was prohibited from sentencing him in the aggravated range because the State failed to allege the pertinent aggravating factor in the indictment. However, our Supreme Court expressly rejected the same assertion by the defendant in *Allen*. \_\_\_ N.C. at \_\_\_, \_\_\_ S.E.2d at \_\_\_ (overruling language in *Lucas* "requiring sentencing factors which might lead to a sentencing enhancement to be alleged in an indictment[,] finding no error in the State's failure to include aggravating factors in the defendant's indictment, and noting that in *State v. Hunt*, "[T]his Court concluded that 'the Fifth Amendment would not require aggravators, even if they were fundamental equivalents of



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elements of an offense, to be pled in a state-court indictment.'" (quoting *State v. Hunt*, 357 N.C. 257, 272, 582 S.E.2d 593, 603, cert. denied, 539 U.S. 985, 156 L.Ed. 2d 702 (2003)). Accordingly, defendant's assertion in the instant case is overruled as well.

