

STATE OF NORTH CAROLINA
COUNTY

GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
FILE NO.

STATE OF NORTH CAROLINA)
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 v.)
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 Defendant.)

MOTION FOR APPROPRIATE RELIEF

Pursuant to N.C. Gen. Stat. §15A-1415 (b)(8), Defendant, by and through counsel, respectfully moves for appropriate relief in the above captioned case. Specifically, Defendant moves the Court to set aside his enhanced sentence pursuant to N.C. Gen. Stat. §14-7.1 (habitual felon) in that two of the three prior felonies contained in the indictment were committed prior to Defendant turning 18 years old. In support of this motion, the Defendant shows the following:

PROCEDURAL HISTORY

On April 5, 2001, Defendant pled guilty to two counts of breaking and/or entering, two counts of larceny after breaking and/or entering, and two counts of larceny of a motor vehicle. Defendant also pled guilty to being a habitual felon. (See Exhibit 1 - Judgment and Commitment). Under the plea agreement, Defendant agreed to be sentenced to a minimum of 80 months and a maximum of 105 months. (See Exhibit 2 - Transcript of Plea).

The prior felonies listed in the habitual felon indictment were: (1) the felony of Breaking and Entering in violation of N.C. Gen. Stat. §14-54, which was committed on or about January 29, 1996; (2) the felony of Breaking and Entering a Motor Vehicle in violation of N.C. Gen. Stat. §14-56, which was committed on or about July 21, 1996; (3) the felony of Escape Department of Correction, in violation of N.C. Gen. Stat. §148-45(b), which was committed on or about February 24, 1998 (See Exhibit 3 - Habitual Felon Indictment). Defendant's was born on November 20, 1979, and did not reach 18 until November 20, 1997. (See Exhibit 4 - Defendant's Affidavit). The first two convictions contained in the habitual felon indictment occurred before the Defendant was 18 years old.

GROUND FOR RELIEF

Defendant moves this Court to vacate conviction as an habitual felon on the grounds that the habitual felon indictment was invalid and the Defendant was wrongfully sentenced as an habitual felon under N.C. Gen. Stat. §14-7.1.

ARGUMENT

I. The Sentence Imposed was not Authorized by the Habitual Felon Statute and it Must be Vacated Because the Court was without Jurisdiction.

N. C. Gen.Stat. § 14-7.1 defines habitual felons. It provides as follows:

Any person who has been convicted of or pled guilty to three felony offenses in any federal court or state court in the United States or combination thereof is declared to be an habitual felon. ... For the purposes of this Article, felonies **committed** before a person attains the age of 18 years shall not constitute more than one felony. ...(emphasis added)

Two of the felonies used in Defendant's habitual felon indictment were committed before the defendant attained the age of 18 years and they are not a proper basis for his indictment as a habitual felon in this case.

It is well established that a valid indictment is required for a court to have jurisdiction. *See State v. Morgan*, 226 N.C. 414, 38 S.E.2d 166, 167 (1946); *State v. Guffey*, 265 N.C. 331, 144 S.E.2d 14, 17 (1965); *State v. Jarvis*, 50 N.C.App. 679, 274 S.E.2d 852, 853 (1981). *See also State v. Neville* 108 N.C.App. 330, 423 S.E.2d 496, 497 (1992). An indictment must charge all of the essential elements of the alleged criminal offense. *State v. McBane*, 276 NC 60, 170 S.E.2d 913, 916 (1969). Errors in an indictment cannot be waived unless the waiver is express and intelligent and the purpose of the indictment--in protecting the accused--has been accomplished. *See Burgess v. Griffin*, 585 F.Supp 1564, 1570 (W.D.N.C. 1984), *aff'd* 743 F.2d 1064 (4th Cir. 1984). Further, "a plea of guilty standing alone does not waive a jurisdictional defect." *State v. Stokes*, 274 N.C. 409, 163 S.E.2d 770, 772 (1968). *Accord State v. Neville*, 108 N.C. App. 330, 423 S.E.2d at 497.

In the instant case, there was no waiver of the critical defect in the indictment. *See generally, State v. Stokes*, 274 N.C. 409, 163 S.E.2d at 772-75. The error in the indictment deprived the Trial Court of jurisdiction and the judgment is not valid. *See State v. Fisher*, 270 N.C. 315, 154 S.E.2d 333, 336 (1967); *State v. Benton*, 275 N.C. 378, 167 S.E.2d 775, 777-78 (1969); *State v. Neville*, 108 N.C. App. 330, 423 S.E.2d at 497.

Thus, the Trial Court was acting without jurisdiction when it sentenced Defendant as a habitual felon. The Defendant is therefore entitled to have his Judgment in

vacated.

CONCLUSION

Defendant is entitled to have the habitual indictment vacated because in violation N. C. Gen.Stat. § 14-7.1 the habitual felon indictment contained two prior convictions that were committed before the Defendant reached 18. Defendant should receive a new sentencing hearing.

WHEREFORE, Defendant requests this Court:

1. Grant the Petitioner's Motion for Appropriate Relief and rule as a matter of law that Defendant's Judgment and Commitment be vacated for the reasons above;
2. Vacate the sentence of 80 - 105 months imposed in Case No. _____ ;
3. Resentence Defendant
4. Grant such other relief as is just and proper.

Respectfully submitted this day of , 2005.

ATTACHMENTS

- EXHIBIT 1 – Judgment and Comment
- EXHIBIT 2 – Transcript of Plea
- EXHIBIT 3 – Habitual Felon Indictment
- EXHIBIT 4 – Defendant's Affidavit

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing MOTION FOR APPROPRIATE RELIEF, together with attached exhibits, and the attached NOTICE OF LIMITED APPEARANCE have this day been served by first class mail upon the following counsel:

Assistant District Attorney

This the day of , 2005.
