STATE OF NORTH CAROLINA
COUNTY OF HERTFORD

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION

File Nos. 05CRS003853,
05CRS003859

STATE OF NORTH CAROLINA	)	DEFENDANTS' MOTION FOR APPROPRIATE RELIEF
vs.	)	
ADRIA JOY HINKLE and ANDREW COOK	)	
Defendants	)	

Now comes DEFENDANTS Adria Joy Hinkle and Andrew Cook, through counsel, and respectfully move the Court pursuant to N.C.G.S. § 15A-1414 for appropriate relief as follows: (1) an order vacating their convictions for littering, or (2) if the convictions are not vacated, an order modifying the sentences so that they comport with applicable law. As grounds therefore, Defendants state as follows:

1. The jury acquitted Ms. Hinkle and Mr. Cook of eight counts of misdemeanor animal cruelty in violation of N.C.G.S. § 14-360 and acquitted Ms. Hinkle of three counts of obtaining property by false pretenses in violation of N.C.G.S. § 14-100. The jury convicted each Defendant of one count of littering in violation of N.C.G.S. § 14-399. The Court dismissed all felony counts of animal cruelty, thirteen counts of misdemeanor animal cruelty, six counts of littering against each Defendant, and three counts of obtaining property by false pretenses against Mr. Cook.

2. The Court imposed the following sentence on each Defendant for his/her littering conviction: (1) a ten day sentence, execution suspended; (2) 12 months supervised probation; (3) 50 hours of community service; (4) a fine of $1,000; (5) restitution of $2,987.50; (6) court costs and fees; and (7) forfeiture of the van from which

Print to PDF without this message by purchasing novaPDF (http://www.novapdf.com/)

the Defendants removed the bag that was "littered." The judgments and restitution worksheets are attached as Exhibit 1.

GROUNDS FOR VACATING THE LITTERING CONVICTIONS

3. The littering convictions must be vacated because the State failed to prove that the Defendants violated the littering statute and because the Court failed to properly instruct the jury on the offense of littering. Under the terms of the littering statute, the placement of discarded material into a litter receptacle is not littering. The evidence established that the Defendants placed bags into a private dumpster, which is a litter receptacle. The Defendants requested a jury instruction stating that the State must prove that the litter was not placed into a litter receptacle. The Defendants also moved to dismiss the littering charges on the ground that the evidence established that the Defendants placed the litter into a litter receptacle.

4. The littering statute, N.C.G.S. § 14-399(a), prohibits a person from "dispos[ing] of any litter upon any public property or private property not owned by the person . . . except . . . (2) Into a litter receptacle in a manner that the litter will be prevented from being carried away or deposited by the elements upon any part of the private or public property or waters." N.C.G.S. § 14-399(a). A copy of the littering statute is attached as Exhibit 1.

5. The trash dumpster in which the Defendants placed the litter is a "litter receptacle" which prevents litter from "being carried away or deposited by the elements upon any part of the private or public property." N.C.G.S. § 14-399(a)(2). The Merriam-Webster's Collegiate Dictionary defines "dumpster" as a noun meaning "used for a large

Print to PDF without this message by purchasing novaPDF (http://www.novapdf.com/)

trash receptacle." Merriam-Webster's Collegiate Dictionary 359 (10th Ed. 1995).[1] By placing the litter into the dumpster, the defendants placed the litter into a "litter receptacle." Therefore, they cannot be convicted of littering.

GROUNDS FOR MODIFYING THE SENTENCE

6. Alternatively, if the Court does not vacate the convictions, the Defendants' sentences must be modified as follows: (1) the suspended jail sentence, supervised probation, restitution, and forfeiture must be vacated and the number of community service hours must be reduced because those penalties are not permitted by the littering statute; (2) if restitution is permitted, the amount of restitution must be reduced; and (3) the order of forfeiture of the van must be vacated because it is not authorized under the laws and Constitution of North Carolina or the Constitution of the United States.

The Maximum Permissible Sentence Is Established by the Littering Statute

7. The general misdemeanor sentencing statute sets forth the permissible punishment for a misdemeanor conviction "[u]nless otherwise provided for a specific offense," N.C.G.S. § 15A-1340.23(b) and (c). The littering statute under which the defendants were convicted – N.C.G.S. § 14-399(a) – has a subsection – subsection (c) - setting forth the permissible maximum punishment -- a fine of $1,000 or less and community service of 24 hours or less.[2] Therefore, the specific specific provision of

[1] It is well-established that Courts "may look to dictionaries to determine the ordinary meaning of words within a statute." *Perkins v. Arkansas Trucking Servs., Inc.*, 351 N.C. 634, 528 S.E.2d 902, 904 (2000) (consulting Merriam Webster's Collegiate dictionary in determining plain meaning of "principal"); *see also State v. Thomas*, 292 N.C. 251, 232 S.E.2d 411 (1977) (consulting dictionary to determine plain meaning of "picking" a safe in safecracking statute, and dismissing defendant's conviction for failure to meet definition).

[2] The applicable sentencing provision is in subsection (c) of 14-399, not in subsection (d) Subsection (c) provides the penalty for littering under 15 pounds and subsection (d) provides the penalty for littering over 15 pounds but less than 500 pounds. The Defendants must be sentenced under subsection (c) because the jury was not asked to decide the weight of the littered bag and the State's evidence did not establish the weight of the littered bag. Without a jury finding and supporting evidence establishing that the weight of

Print to PDF without this message by purchasing novaPDF (http://www.novapdf.com/)

section 14-399(c) establishes the maximum punishment, not the general misdemeanor sentencing statute – section 15A-1340.23. *See State v. Desperados, Inc.*, 2006 N.C. App. LEXIS 2383 *25-26, 638 S.E.2d 4 (N.C. App. 2006) (Tyson, concurring in part and dissenting in part). In fact, in sentencing Ms. Hinkle and Mr. Cook, this Court relied on the maximum fine provision of section 14-399(c) (authorizing a $1,000 fine for littering) rather than the maximum fine provision of section 15A-1340.23(b) (authorizing a $200 fine for a Class 3 misdemeanor). Therefore, including in the Defendants' sentences a period of supervised probation, a suspended 10 day jail sentence, 50 hours of community service, restitution, and forfeiture is not permissible and the sentences should be modified accordingly.

Restitution

8. The amount of restitution is excessive. The restitution is to be paid to the Ahoskie Police Department (APD) for what the Defendants understand to be some cost associated with emptying the dumpster and burying the animals and the cost of storing the van for the eighteen months between its seizure on June 15, 2005, through trial, which concluded on February 2, 2007. The Defendants understand, based on statements of the District Attorney at sentencing, that all but a small portion of the restitution amount is the cost to the APD of the storage of the van. The restitution order must be vacated or reduced for several reasons.

9. The APD is not entitled to restitution because it is not a "victim" as defined by the restitution statutes, N.C.G.S. § 15A-1340.34 *et seq*. A victim is defined as

---

the littered bag exceeded 15 pounds, sentencing the Defendants based on a weight in excess of 15 pounds would violate the Defendants' rights under the Sixth and Fourteenth Amendments of the United States Constitution and Article I, sections 19, 24, and 27 of the North Carolina Constitution. *See Blakely v. Washington*, 542 U.S. 296; *State v. Allen*, 359 N.C. 425, 615 S.E.2d 256 (2005).

Print to PDF without this message by purchasing novaPDF (http://www.novapdf.com/)

"a person directly and proximately harmed as a result of the defendant's commission of the criminal offense." N.C.G.S. § 15A-1340.34(a). The APD was not directly and proximately harmed by the littering offense. Nor is the APD an "aggrieved party," as that term is used in N.C.G.S. § 15A-1343(d), if that statute is found to apply.[3]

10. APD also is not entitled to restitution because N.C.G.S. § 15A-1340.37(c) provides in pertinent part that "[n]o government agency shall benefit by way of restitution except for particular damages or loss to it over and above its normal operating costs." The State has not shown that the costs to APD were above APD's normal operating costs.

11. The State also has not provided any competent evidence supporting the amount of restitution. It offered only the statement of the prosecutor, which is insufficient. The North Carolina Court of Appeals repeatedly and recently has vacated orders of restitution that were supported only by the statement of the prosecutor:

> "[T]he amount of restitution recommended by the trial court must be supported by evidence adduced at trial or at sentencing." *State v. Shelton*, 167 N.C. App. 225, 233, 605 S.E.2d 228, 233 (2004). Furthermore, this Court has held that the "unsworn statements of the prosecutor . . .[do] not constitute evidence and cannot support the amount of restitution recommended." *State v. Buchanan*, 108 N.C. App. 338, 341, 423 S.E.2d 819, 821 (1992).

State v. Replogle, No. COA06-152 (N.C. App. Feb. 6, 2007) (copy attached as Exhibit 3).

12. Even if APD can collect some restitution, it is not entitled to recover the storage fees for the van, for the following reasons:

---

[3] It is the Defendants' position that the more specific provisions of Article 81C ("Restitution") of the Criminal Procedure Act govern restitution and not the more general language regarding restitution in Article 82 ("Probation"). *See State v. Wilson*, 158 N.C. App. 235, 241, 580 S.E.2d 386, 390 (2003) (In enacting the Restitution Article, the "legislative intent [was] to narrow the scope of permissible bases upon which a trial court may award restitution.")

Print to PDF without this message by purchasing novaPDF (http://www.novapdf.com/)

(a) Storage fees for a van in order to have the van available as evidence in a trial are not "injuries or damages" contemplated by the restitution statute. *See State v. Wilson*, 158 N.C. App. 235, 580 S.E.2d 386 (2003) (restitution may only be awarded for losses contemplated by restitution statute).

(b) Storage fees for the van do not qualify as "injuries or damages arising directly and proximately out of *the offense committed by the defendant.*" N.C.G.S. § 15A-1340.34(c) (emphasis added). Nor are the storage fees "damage or loss caused by the defendant arising out of the *offense or offenses committed by the defendant*," N.C.G.S. 15A-1343(d) (emphasis added), if that statute applies. The "offense committed by the defendants" was littering. The storage of the van, to the extent it can be justified at all, relates to the State's proof of the cruelty to animals charges for which the Defendants were acquitted, not the littering charges. The State has not established, as it must, that APD incurred expenses of more than $5,000 in order to prove a littering charge.

(c) Storage of the van and the resulting fees also were not directly and proximately caused by the Defendants. APD and the State made a decision to store the van for their own purposes, which constitute an independent, intervening event that broke the chain of causation. The storage of the van was wholly unnecessary for proof of any of the charges, because the State had taken numerous photographs of the van, and the jury did not view the van at trial. PETA, the owner of the van, repeatedly requested the return of the van, which would have eliminated or reduced the storage fees. Affidavit of Blair G. Brown ¶ 2 (attached as Exhibit 4). The State and APD also used the van for their own public relations purposes, allowing a CNN reporter inside the van in December 2005, long after the Defendants' arrest. *Id.* ¶ 3.

Print to PDF without this message by purchasing novaPDF (http://www.novapdf.com/)

Forfeiture of the Van

13. It is unclear what the statutory basis is for ordering forfeiture of the van, but under either possible basis, forfeiture should not have been ordered. Moreover, both the amount of the forfeiture and the procedures used to obtain it violate the United States Constitution and the North Carolina Constitution.

14. The forfeiture cannot be based on N.C.G.S. § 14-399(g). That subsection of the littering statute provides in pertinent part that "[a] motor vehicle . . .involved in the disposal of more than 500 pounds of litter in violation of subsection (a) of this section is declared contraband and is subject to seizure and summary forfeiture to the State." The van cannot be forfeited pursuant to this statute because:

(a) There was no jury determination of the weight of the litter. Imposing a penalty or forfeiture without submission of an essential element to the jury violates the Defendants' Sixth and Fourteenth Amendment rights under the United States Constitution and their rights under Article I, sections 19, 24, and 27 of the North Carolina Constitution. *See Blakely v. Washington*, 542 U.S. 296 (2004); *State v. Allen*, 359 N.C. 425, 615 S.E.2d 256 (2005).

(b) The State did not establish, and could not have established, that the amount of litter exceeded 500 pounds. In fact, there was no evidence presented as to the weight of any of the particular bags placed in the dumpster.

15. If the forfeiture was ordered as a special condition of probation, the forfeiture was unlawful. N.C.G.S. § 15A-1343 (b1) sets forth the permissible special conditions of probation. Forfeiture of a vehicle is not one of them. Subsection (10) of section 15A-1343 provides that the Court may require the defendant to "[s]atisfy any

Print to PDF without this message by purchasing novaPDF (http://www.novapdf.com/)

other condition determined by the court to be reasonably related to his rehabilitation." Forfeiture of the van is not reasonably related to the Defendants' rehabilitation.

16. The forfeiture is excessive in relation to the offense and therefore violates the Eighth and Fourteenth Amendments of the United States Constitution and Article I, sections 19 and 27 of the North Carolina Constitution.

17. The forfeiture also violated the procedural due process protections of the Fourteenth Amendment of the United States Constitution and Article I, section 19 of the North Carolina Constitution because the Defendants and other interested parties were not given adequate notice and an adequate opportunity to be heard and contest the forfeiture.

CONCLUSION

For the reasons stated above, the Defendants respectfully move the Court to vacate their convictions or, if their convictions are not vacated, modify their sentences as set forth above.

Respectfully submitted,

A. Jackson Warmack, Jr.
A. Jackson Warmack, Jr.
Post Office Drawer 648
Rich Square, NC 27869
(252) 539-2662

Blair G. Brown
Lisa J. Stevenson
Zuckerman Spaeder LLP
1800 M Street NW, Suite 1000
Washington, D.C. 20036
(202) 778-1800

Attorneys for Defendant Adria Joy Hinkle

Print to PDF without this message by purchasing novaPDF (http://www.novapdf.com/)

Mark E. Edwards
Edwards & Trenkle PLLC
331 W. Main Street
P.O. Box 77
Durham, NC 27701
(919) 688-9555

Attorney for Defendant Andrew Cook

Print to PDF without this message by purchasing novaPDF (http://www.novapdf.com/)

CERTIFICATE OF SERVICE

This is to certify that the undersigned has this date served the foregoing Defendants' Motion for Appropriate Relief by first class mail in a properly addressed envelope with postage prepaid on:

Valerie Asbell
District Attorney
6B Prosecutorial District
418 South Everett Street, Suite A
Ahoskie, NC 27910

Dated this 9th day of February, 2007

Blair G. Brown

Print to PDF without this message by purchasing novaPDF (http://www.novapdf.com/)