

SUPREME COURT OF NORTH CAROLINA

STATE OF NORTH CAROLINA)
)
 v.)
)
 ROGELIO ALBINO DIAZ-TOMAS)

From Wake

STATE'S RESPONSE TO PETITION FOR WRIT OF PROCEDENDO

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ROGELIO ALBINO DIAZ-TOMAS)

STATE’S RESPONSE TO PETITION FOR WRIT OF PROCEDENDO

TO: THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF NORTH CAROLINA

NOW COMES the State of North Carolina, by and through undersigned counsel, and responding to Petitioner’s petition for writ of procedendo filed 17 August 2020, requests that the petition be denied.

PROCEDURAL HISTORY

On or about 4 April 2015, Petitioner was charged by citation with driving while impaired (DWI) and no operator’s license (NOL). (R pp. 5, 55) On 24 February 2016, he failed to appear in Wake County District Court, and the trial court issued an order for his arrest. (R pp. 14, 55) On or about 11 July 2016, the State dismissed the charges with leave. (R pp. 16, 55)

On or about 24 July 2018, Petitioner was arrested in Davidson County on the order for arrest issued 24 February 2016. (R pp. 17, 56) On 9 November 2018, he failed to appear in Wake County District Court, and the trial court issued another order for arrest. (R pp. 22, 56) On or about 12 December 2018, Petitioner was arrested in Wake County on the order for arrest issued 9 November 2018. (R pp. 25, 56)

On 28 January 2019, Petitioner filed with the district court a “motion to reinstate charges.” (R pp. 33, 56) On 11 February 2019, Petitioner filed with this Court a petition for writ of mandamus (PWM), seeking an order to compel the district court and the district attorney’s office to reinstate the charges. By order dated 26 February 2019, this Court denied the petition. (See Docket in Case No. 54P19-1)

By order filed 15 July 2019, the district court denied Petitioner’s motion to reinstate charges. (R p. 55) On 22 July 2019, Petitioner filed with the superior court a petition for writ of certiorari (PWC), seeking review of the district court’s 15 July 2019 order. (R p. 60) By order filed 24 July 2019, the superior court denied the PWC. (R p. 71)

On 27 July 2019, Petitioner filed with the Court of Appeals a PWC, seeking review of the district court’s and superior court’s orders. By order dated 15 August 2019, the Court of Appeals allowed the petition in order to review

the superior court's order. (R p. 75) On 3 September 2019, Petitioner filed a record on appeal. On 4 September 2019, he filed an appellant brief. (See Docket in Case No. COA19-777)

On 4 September 2019, Petitioner filed with the Court of Appeals a PWM seeking an order to compel the prosecutor to reinstate or dismiss the charges and a motion to expedite the appeal. By order dated 6 September 2019, the Court of Appeals denied the motion to expedite the appeal. On 1 October 2019, Petitioner filed with the Court of Appeals a "motion to take judicial notice of current local rules." On 4 November 2019, he filed with the Court of Appeals a PWM seeking an order to compel the district court to schedule a trial or hearing. (See Docket in Case No. COA19-777)

On 4 November 2019, Petitioner filed with this Court a petition for mandamus and certiorari, seeking an order to compel the Court of Appeals to rule on his petition for review of the district court's order. He also sought review of the district court's order denying his motion to reinstate charges and the Court of Appeals' order denying review. By order dated 8 November 2019, this Court denied the petition. (See Docket in Case No. 54P19-2)

The matter came on for a hearing in the Court of Appeals on 22 January 2020. By opinion issued 21 April 2020, the Court of Appeals affirmed the superior court's order denying Petitioner's petition for certiorari, denied his

petitions for mandamus, and denied his motion to take judicial notice. State v. Diaz-Tomas, No. COA19-777, 2020 WL 1918719, at *1 (N.C. Ct. App. April 21, 2020). Judge Zachary dissented in part, stating she would allow the motion to take judicial notice and reverse the superior court's order denying the petition for certiorari. Id. at *3 (Zachary, J., dissenting in part).

On 21 April 2020, Petitioner filed with this Court a petition for writ of supersedeas and a motion for temporary stay. By order dated 21 April 2020, this Court allowed the motion for stay. By order dated 3 June 2020, this Court allowed the petition for supersedeas. (See Docket in Case No. 54A19-3)

On 22 April 2020, Petitioner filed with the Court of Appeals a “motion to correct clerical error.” By order dated 23 April 2020, the Court of Appeals allowed the motion and issued an amended opinion. (See Docket in Case No. COA19-777)

On 12 May 2020, Petitioner filed with this Court a notice of appeal based on the dissent and a petition for discretionary review of additional issues. He also filed a motion to expedite consideration of his matters, a motion to proceed in forma pauperis, a motion to take judicial notice, and a motion for leave to amend notice of appeal. (See Docket in Case No. 54A19-3)

On 1 June 2020, Petitioner filed with this Court a motion for summary reversal. (See Docket in Case No. 54A19-3)

On 8 June 2020, Petitioner filed with this Court a motion to supplement the record on appeal. (See Docket in Case No. 54A19-3)

On 29 June 2020, Petitioner filed with this Court a motion to consolidate his petition for discretionary review with the petition for discretionary review in State v. Nunez, a motion to clarify the extent of the supersedeas order, and a motion in the alternative to hold certiorari and mandamus petitions in abeyance. By order dated 30 June 2020, this Court allowed the motion to consolidate. (See Docket in Case No. 54A19-3)

On 6 July 2020, Petitioner filed with this Court a motion to file memorandum of additional authority. (See Docket in Case No. 54A19-3)

On 17 August 2020, Petitioner filed with this Court a motion for the production of discovery under seal, a motion for printing and mailing of PDR on additional issues, and the instant petition for writ of procedendo.

REASONS WHY THE WRIT SHOULD NOT ISSUE

This Court exercises a power comparable to that of the court of King's Bench in England, which always had a superintendency of the inferior courts, and as a means by which to exert supervision and control used various remedial writs, such as certiorari to remove the proceedings from an inferior court of record to that court. State v. Swepson, 83 N.C. 584, 587 (1880). "A procedendo, as the term imports, can only issue when a proceeding has been

instituted in the inferior court, and is interrupted by an appeal; in such cases the superior court puts the matter right, and directs the inferior court to proceed.” Evans v. Governor's Creek Transp. & Min. Co., 50 N.C. 331, 333 (1858). Absent correction by the court to which appeal is taken, “the order of procedendo accomplishes the same purpose as the dismissal of the appeal[.]” State v. Pollard, 83 N.C. 597, 601 (1880); cf. Caldwell v. Parks, 61 N.C. 54, 56 (1866) (“the effect was . . . to discontinue the suit in the Superior Court”).

In the petition, Petitioner seeks a writ of procedendo to compel the district court to proceed to judgment. He contends that the district court has a duty to dispose of pending cases and has unreasonably delayed proceeding to judgment here even after his demand for a speedy trial. He reiterates his argument from other filings that he is entitled to a reinstatement of charges. Petitioner concludes this Court should issue its writ to command the district court to proceed to judgment on his charges. (See petition)

Petitioner essentially seeks an order to compel the district court to reinstate the charges. The instant petition is thus indistinguishable from the petition for mandamus that he filed 11 February 2019, and which this Court denied by order dated 26 February 2019. (See Docket in Case No. 54P19) To the extent Petitioner again asks this Court for an order to compel the district court to reinstate charges, the instant petition should likewise be denied.

Petitioner also claims that, while he was “ultimately granted an appeal” to the Court of Appeals and this Court, he “was never legally entitled to those interlocutory appeals.” (See petition pp. 14-15) To the extent Petitioner now seeks dismissal of his appeal, the State joins in the petition. See Pollard, 83 N.C. at 601; Caldwell, 61 N.C. at 56.

WHEREFORE, the State of North Carolina respectfully requests that this Court deny Petitioner’s petition for writ of procedendo.

Electronically submitted this the 28th day of August, 2020.

JOSHUA H. STEIN
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this day served the foregoing STATE'S RESPONSE TO PETITION FOR WRIT OF PROCEDENDO upon PETITIONER by electronic mail, addressed to his ATTORNEY OF RECORD as follows:

Anton M. Lebedev
Attorney for Petitioner
Email: a.lebedev@lebedevesq.com

Electronically submitted this the 28th day of August, 2020.

Electronically Submitted
Joseph L. Hyde
Assistant Attorney General