No. 54A19-3 DISTRICT 10

NORTH CAROLINA SUPREME COURT

****

STATE OF NORTH CAROLINA	)	From Court of Appeals
	)	19-777
v.	)	
	)	From Wake County
ROGELIO ALBINO DIAZ-TOMAS	)	15-CR-1985
Defendant-Appellant	)	

DEFENDANT-APPELLANT'S REPLY BRIEF

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NOW COMES, the Defendant-Appellant, Rogelio Albino Diaz-Tomas, by and through undersigned counsel, Anton M. Lebedev, and respectfully replies to the State's responsive brief. In reply, the Defendant-Appellant makes the following:

ARGUMENT

In its response brief, the State, among other things, argues that the District Court did not err in denying his motion to reinstate charges, that this Court should deny the Defendant's *mandamus* request, and that the Superior Court did not abuse its discretion in denying the Defendant

certiorari relief. In reply, the Defendant briefly addresses these main invalid contentions of the State.[1]

I. The District Court erred in denying the Defendant's motion to reinstate charges.

In its response, the State argues that the District Court did not err in denying the Defendant's motion to reinstate charges. In doing so, the State argues that the separation of powers doctrine prevents the District Attorney from reinstating the Defendant's criminal charges on the trial calendar. (State's Br. at 6) This argument "must fail since the district attorney is a judicial or quasi-judicial officer." State v. Friend, 724 S.E.2d 85, 88 (N.C. Ct. App. 2012). Moreover, the doctrine of separation of powers does not demand that the branches of government "must be kept wholly and entirely separate and distinct[.]" State v. Furmage, 250 N.C. 616, 626, 109 S.E.2d 563, 570 (1959) (quoting 2 Joseph Story, Commentaries on the Constitution of the United States § 524 (1833)).

Second, the State argues that the Defendant does not articulate how the District Court can compel the State "to call the [Defendant's] matter for trial, arraign [the Defendant], and present its evidence without invading the exclusive province of the District Attorney to prosecute the case." (State's Br. at 15) The Defendant however never demanded the courts to

[1] The Defendant also noticed that he inadvertently omitted the citation to State v. Lamb, 321 N.C. 633, 365 S.E.2d 600 (1988) in his opening brief.

compel the State to do any of these specific things. The Defendant merely requested that his matter be re-calendered for trial and then if necessary, continued in accordance with § 15A-952(g).[2] The State retains its discretion to dismiss the Defendant's criminal charges pursuant to section 15A-931 in lieu of trying the case.

Third, the State argues that the fact that section 15A-932 states that the District Attorney "may" reinstate criminal charges implies that only the District Attorney has the authority to do so. (State's Br. at 12) That is incorrect. By enacting section 15A-932(d), the General Assembly did not intend to limit the circumstances in which the Court may reinstate criminal charges. It instead simply clarified specific circumstances in which the filing of a notice of reinstatement by the District Attorney remains permissible. Indeed, "because the ultimate authority over managing the trial calendar is retained in the court, it cannot be said that [section 15-

[2] The State argues that the argument concerning 15A-952(g) was unpreserved. The State is mistaken. It is well established that "when a trial court acts contrary to a statutory mandate and a defendant is prejudiced thereby, the right to appeal the court's action is preserved, notwithstanding defendant's failure to object at trial." State v. Davis, 364 N.C. 297, 301, 698 S.E.2d 65, 67 (2010) (first quoting State v. Ashe, 314 N.C. 28, 39, 331 S.E.2d 652, 659 (1985) (citation omitted); then citing State v. Tirado, 358 N.C. 551, 571, 599 S.E.2d 515, 529 (2004), cert. denied , 544 U.S. 909, 125 S. Ct. 1600, 161 L.Ed. 2d. 285 (2005)); see State v. Hucks, 323 N.C. 574, 579, 374 S.E.2d 240, 244 (1988) ("When a trial court acts contrary to a statutory mandate, the error ordinarily is not waived by the defendant's failure to object at trial." (citing Ashe, 314 N.C. at 39, 331 S.E.2d at 659)); see also State v. Bryant, 189 N.C. 112, 115, 126 S.E. 107, 109 (1925) ("The fact that exception was not entered at the time the remark was uttered is immaterial. The statute is mandatory, and ... may be excepted to after the verdict." (citation omitted)).

932(d)] infringe[s] upon the [District] [C]ourt's inherent authority[.]" Simeon v. Hardin, 339 N.C. 358, 376 (1994).

Fourth, citing State v. Spivey, 357 N.C. 114, 118, 579 S.E.2d 251 (2003), the State argues that "dismissal of the charges is the only possible remedy for denial of a right to a speedy trial." (State's Br. at 8) Spivey is distinguishable from this case. In Spivey, the defendant did not challenge the propriety of calendaring procedures and did not ask for a remedy short of dismissal.

On the other hand, the United States Supreme Court "held that the indefinite postponement of the prosecution, over the defendant's objection, 'clearly' denied the defendant the right to a speedy trial." United States v. MacDonald, 456 U.S. 1, 15 (1982). Indeed, in a criminal case, "the trial court exceeds his discretion in postponing the case indefinitely." Hicks v. Recorder's Court of Detroit, 236 Mich. 689, 690 (1926) (cited for persuasiveness). Therefore, the Defendant's criminal charges must be promptly reinstated on the trial calendar. Id.

II. Defendant's *mandamus* request should not be denied.

The State basically argues that the Defendant's *mandamus* request should be denied for three reasons. First, the State argues that "no briefing is allowed on such a petition unless ordered by the Court upon its own initiative. N.C. R. App. P. 22(c)." (State's Br. at 19) That argument is

flawed. This Court specifically granted briefing on the issue of "[w]hether [it] should issue its writ of *mandamus* to the District Court to compel it to promptly schedule a trial or hearing for the Defendant." (Def.'s PDR at 51) An interpretation of Rule 22(c) of the Rules of Appellate Procedure requiring this Court to only permit such briefing *sua sponte* would result in absurd results and would contravene the very purpose of the appellate rule. In any event, the Defendant's new brief can be treated be as a new petition for writ of *mandamus*.[3]

Second, the State argues that the Defendant's "petition should be denied for the reasons stated in the State's prior response (incorporated by reference)." (State's Br. at 19) This argument also necessarily fails.

> The doctrine of incorporation by reference requires that the paper to be incorporated into a written instrument by reference must be so referred to and described in the instrument that the paper may be identified beyond all reasonable doubt. . .

Chiacchia v. National Westminster Bank, 124 A.D.2d 626, 628, 507 N.Y.S.2d 888, 889-90 (N.Y. App. Div. 1986) (citation omitted). In this situation, it is unclear which "reasons" from which of the numerous responses justify the denial of the Defendant's present *mandamus* request. (State's Br. at 19)

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[3] The Defendant's new brief complies with all other requirements of a *mandamus* petition. Among other things, it was served upon the Chief District Court Judge and the District Attorney and is verified.

Lastly, the State argues that *mandamus* is inappropriate because its being used as a substitute for appeal and because it is being used to enforce a questionable right. (State's Br. at 20) Ironically, on the same page, the State argues that "[t]here is no provision for appeal [] as a matter of right from an interlocutory order entered in a criminal case." Id. As there is no "provision for appeal", *mandamus* surely cannot be a substitute for an appeal. Id. To the extent that the State argues that the right to reinstatement of the case on the criminal calendar is questionable, as previously discussed, the United States Supreme Court "held that the indefinite postponement of the prosecution, over the defendant's objection, *'clearly'* denied the defendant the right to a speedy trial." MacDonald 456 U.S. at 15. In sum, the Defendant "is entitled to a [trial] within a reasonable time. If [this Court is] to protect him in his constitutional rights [it] must order [appropriate] action in his matter within [a reasonable time] from the date of filing [the] opinion. A writ of *mandamus* [must] issue, if necessary." Hicks, 236 Mich. at 691.

III. The Superior Court abused its discretion in denying the Defendant's *certiorari* petition.

The State argues that the "Defendant fails to show the superior court erred by denying his petition for *certiorari*." (State's Br. at 24) In doing so, the State contends that the Defendant "was not entitled to a writ of

certiorari [and that the] Defendant's failure to perfect an appeal from the district court's order is not attributable to some error of the court or its officers, but to the lack of any statutory right to appeal." Id.

The State's argument is flawed in that the Defendant was arguing that the District Court is thwarting his ability to appeal the ultimate criminal judgment, rather than the "order" denying his motion to reinstate charges. Id. [4] Contrary to the State's argument, the Defendant "bec[ame] entitled to [the writ of *certiorari*], because, by no act or neglect of his own, but by the declarations, [] the act, [and] the failure to act," of the District Court, he was prevented from appealing a possible ultimate criminal judgment to the Superior Court for a trial de novo. Winborn v. Byrd, 92 N.C. 7 (1885). For this reason and the many other reasons discussed in the Defendant's opening brief, the Superior Court abused its discretion in denying the Defendant's *certiorari* petition. Id.

CONCLUSION

WHEREFORE, notwithstanding the State's response, this Court should grant the Defendant any and all requested relief, and grant the Defendant any and all other relief that it deems just and proper given the circumstances at hand.

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[4] If the Defendant eventually manages to get a final criminal judgment entered, the order on the motion to reinstate charges would become moot and unappeasable. It is also unclear when, if ever, an order on the motion to reinstate charges will be entered.

Respectfully submitted, this the 8th day of April, 2021.

(Electronically Submitted)
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CERTIFICATE OF SERVICE

I hereby certify that the original Defendant-Appellant's Reply Brief and has been filed, pursuant to Rule 26 of the North Carolina Rules of Appellate Procedure, by electronic means with the Clerk of the North Carolina Supreme Court.

I further certify a copy of the above and foregoing Reply Brief been duly served upon Joseph L. Hyde, Assistant Attorney General by e-mailing it to jhyde@ncdoj.gov

I further certify a copy of the above and foregoing Reply Brief been duly served upon Daniel P. O'Brien, Special Deputy Attorney General by e-mailing it to dobrien@ncdoj.gov

I further certify a copy of the above and foregoing Reply Brief has been duly served upon N. Lorrin Freeman, Wake County District Attorney by e-mailing it to n.lorrin.freeman@nccourts.org

I further certify a copy of the above and foregoing Reply Brief has been duly served upon Daniel C. Watts, Wake County Assistant District Attorney by e-mailing it to daniel.c.watts@nccourts.org

I further certify a copy of the above and foregoing Reply Brief has been duly served upon the Honorable Debra S. Sasser, Wake County Chief District Court Judge by e-mailing it to debra.s.sasser@nccourts.org

Respectfully submitted, this the 8th day of April, 2021.

(Electronically Submitted)_____
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APPENDIX

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Supreme Court of Michigan

Hicks v. Recorder's Court of Detroit

236 Mich. 689 (Mich. 1926) · 211 N.W. 35
Decided Dec 8, 1926

Submitted October 26, 1926. (Calendar No. 32,846.)

Writ granted December 8, 1926.

Mandamus by John W.L. Hicks to compel John A. Boyne, judge of the recorder's court of Detroit, and others to proceed with the trial of a criminal case. Submitted October 26, 1926. (Calendar No. 32,846.) Writ granted December 8, 1926.

John W.L. Hicks (*Charles C. Stewart*, of counsel), *in pro. per. Robert M. Toms*, Prosecuting Attorney, and *Van H. Ring*, Assistant Prosecuting Attorney,
690 for defendants. *690

BIRD, C.J.

On the 28th day of May, 1925, plaintiff was complained of and arrested in Wayne county for the crime of perjury in connection with his testimony before the probate court in the matter of probating a will. He was arraigned before the examining recorder on June 15th. He was given an examination on June 19th. On August 25, 1925, he was held to the recorder's court for trial. His trial was set for July 15, 1926. Plaintiff was present with his witnesses, but the matter was adjourned on application of the prosecutor. His trial was again set for September 16, 1926. Plaintiff was again present with his witnesses. On that date the matter was adjourned indefinitely upon the application of the prosecutor, and the reason assigned therefor was that the will case had not yet been tried in the circuit court where it was pending. Despairing of getting a hearing in the recorder's court, he has appealed to this court for a writ of mandamus to direct the recorder's court to give him an immediate trial.

The Michigan Constitution provides:

In every criminal proceeding the accused shall have the right to a speedy and public trial by an impartial jury." * * * Article 2, § 19.

In view of this constitutional provision it becomes necessary to inquire what a speedy trial means. We apprehend it means such reasonable time under all the attendant circumstances as will give the people an opportunity to present its case in court. 16 C. J. p. 439. A speedy trial does not mean that the defendant is entitled to have his trial commence immediately after being bound over to the trial court. What would be a reasonable time in one case would be perhaps unreasonable in another. The question might be affected by the gravity of the offense, the number of witnesses involved, the terms of court, and many other
691 circumstances. Owing to this, much *691 must necessarily be left to the discretion of the trial court. The trial court must exercise its best judgment upon such applications, keeping in mind, however, the defendant's constitutional rights.

Applying this rule to the present case we think the trial court exceeds his discretion in postponing the case indefinitely. This is a criminal case. The will case is a civil case. A determination of either would not be conclusive of the other. This was not an adequate reason for postponing the trial after it had already been postponed nearly 18 months. *People* v. *Hayes*, 140 N.Y. 489 (35 N.E. 951, 23

L.R.A. 830, 37 Am. St. Rep. 572). The offense charged against plaintiff is a serious one. The pendency of such a charge against him, undoubtedly, affects his business as a lawyer. He is entitled to a hearing thereon within a reasonable time. If we are to protect him in his constitutional rights we must order action in his matter within 30 days from the date of filing this opinion. A writ of mandamus will issue, if necessary. No costs.

SHARPE, SNOW, STEERE, FELLOWS, WIEST,
692 CLARK, and McDONALD, JJ., concurred. *692