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-Petitioner	)	

REPLY TO STATE'S RESPONSE TO DEFENDANT'S PETITION FOR DISCRETIONARY REVIEW

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NOW COMES, the Defendant-Petitioner, Rogelio Albino Diaz-Tomas, by and through undersigned counsel, Anton M. Lebedev, and respectfully replies to the State's response to his petition for discretionary review. In reply, the Defendant makes the following:

ARGUMENT

I. Defendant demonstrated a clear legal right to the action demanded.

"An action for a writ of *mandamus* lies only where the [petitioner] shows a clear legal right to the action demanded and has no other adequate remedy." Snow v. N.C. Bd. of Architecture, 273 N.C. 559, 570, 160 S.E.2d 719, 727 (1968). Without even considering other relevant authority, it well-established that the Defendant cannot be denied an opportunity to exonerate himself in the discretion of the prosecutor "and

held subject to trial, over his objection, throughout the unlimited period in which the" prosecutor "may restore the case to the calendar." Klopfer v. North Carolina, 386 U.S. 213, 216 (1967). Klopfer imposes the same constitutional obligation to both the District Criminal Court and the District Attorney.

While section § 15A-932 states that the State *may* reinstate criminal charges, that statutory provision is not necessarily inconsistent with Klopfer. The State does for instance has discretion to simply dismiss the charges in lieu of reinstatement or to agree with the Defendant to enter into a deferred prosecution agreement and keep the case dismissed with leave.

Because the State cannot point this Court to any precedential case which held that a criminal defendant's criminal prosecution can be suspended over his explicit objection, there is no reasonable debate that the Defendant has a clear legal right to the action demanded. Snow, 273 N.C. at 570, 160 S.E.2d at 727.

II. The State's reliance on T.H.T. is misplaced.

Citing In re T.H.T., 362 N.C. 446, 454, 665, S.E.2d 54, 59 (2008), the State argues that the "possibility of relief on appeal, however,

means that *mandamus* will not lie to obtain the same result." T.H.T. does not support that conclusion.

Rather, T.H.T. merely stands for the principle that "[w]hen appeal is the *proper* remedy, *mandamus* does not lie." Id. Indeed, *mandamus* "cannot be employed if other *adequate* means are available to correct the wrong for which redress is sought." King v. Baldwin, 276 N.C. 316, 321, 172 S.E.2d 12, 15 (1970).

In this case, *mandamus* is not a mere "substitute for an appeal." Snow, 273 N.C. at 570, 160 S.E.2d at 727. Here, *mandamus* rather than appeal is the *proper* remedy. In re T.H.T., 362 N.C. 4at 454, 665, S.E.2d at 59. Contrary to the State's contentions, defendants who have demonstrated their clear eligibility for *mandamus* relief should not be required to wait for the outcome of a lengthy and expensive appeal.

III. The State's reliance on Wilson is misplaced.

Citing State v. Wilson, 151 N.C. App. 219, 223, 565 S.E.2d 223, 226, cert. denied, 356 N.C. 313, 571 S.E.2d 215 (2002), in its response, the State argues that "the Court of Appeals does not *typically* review the orders or judgments of the district court when there is an intervening disposition by the superior court."

The State's reliance on Wilson is misplaced. First, the reasoning that the Court of Appeals in Wilson employed in denying *certiorari* was overruled by this Court's holding in Ledbetter. See State v. Ledbetter, ___ N.C. ___, 814 S.E.2 39 (2018) (the Court of Appeals was required to exercise its discretion whether to grant *certiorari* independent of Appellate Rule 21). Second, Wilson is distinguishable because the defendant in Wilson had an appeal of right to Superior Court.

In this important case, it makes sense for the appellate courts to simply declare that the District Court was incorrect rather than to hypothesize when the Superior Court abuses its discretion in denying *certiorari*. It is also contrary to the interests of judicial economy to not review *both* the District Court and Superior Court orders, as the Court of Appeals has done before.

IV. The State's reliance on N.C.N.B. is misplaced.

In its response, the State cites this Court's opinion in N.C.N.B. which stands for the general principle that where a panel of the Court of Appeals had *denied* a petition for a writ of certiorari to review an order of the trial court, a second panel of that Court had no authority to

exercise its discretion in favor of reviewing the trial court's order. N.C.N.B. v. Virginia Carolina Builders, 307 N.C. 563 (1983).

The State's reliance on N.C.N.B. is misplaced. The Court of Appeals never explicitly denied the Defendant's *certiorari* petition to review the District Court. N.C.N.B. does not apply where the Court of Appeals merely dismissed or failed to consider the claim.

In general, one panel may not modify, overrule, or change the judgment of another previously made in the same case. Calloway v. Ford Motor Co., 281 N.C. 496, 501, 189 S.E.2d 484, 488 (1972). However, a panel "has the power to modify an interlocutory order made by another whenever there is a showing of changed conditions which warrant such action." Id. at 502, 189 S.E.2d at 488. Modification or change of an interlocutory order is proper where (1) the order was discretionary, and (2) there has been a change of circumstances. Id.; see also Greene v. Charlotte Chemical Laboratories, Inc., 254 N.C. 680, 693, 120 S.E.2d 82, 91 (1961).

Because *certiorari* is a discretionary writ and the recent holding in Doss constituted a change in circumstances, the merits panel had the

authority to re-determine whether *certiorari* should also be issued for the purpose of reviewing the District Court order. Id.

V. Circumstances have changed since the Defendant filed his 11 February 2019 and 4 November 2019 petitions at this Court.

In its response, the State argues that this Court should deny the Defendant's instant petition because it previously denied similar claims for relief . However, circumstances have changed since Defendant's 11 February 2019 and 4 November 2019 petitions have been filed.

In the 11 February 2019 petition, Defendant argued that a writ of *mandamus* should issue because the State declined to reinstate charges and because the District Court is failing to rule on the motion to reinstate charges. In response, the State argued that a writ of *mandamus* is premature because not enough time elapsed since the alleged refusal. This Court denied that *mandamus* petition. The circumstances have since changed. Not only has the District Court since entered an order, although a manifestly improper one, but substantial time has elapsed making the refusal now clearer.

In the 11 February 2019 petition, Defendant argued that a writ of *mandamus* should issue to compel the Court of Appeals to enter an order specifically on its decision whether to directly review the District

Court order. The Defendant also asked this Court to review the order of the Court of Appeals only allowing his *certiorari* petition in part. Lastly, the Defendant asked this Court to review the District and Superior Court orders before the Court of Appeals issued its opinion. In its discretion, this Court denied the Defendant's petitions. Since that denial, the circumstances have changed in that a divided panel of the Court of Appeals has since issued a published opinion and this matter is now before this Court as a matter of right.

VI. The State's reasoning that there was no prosecutorial misconduct is flawed.

In its response, the State argues that the "Petitioner fails to demonstrate any prosecutorial misconduct. As the district court found, the discretion to reinstate charges lies solely with the prosecutor, and the prosecutor acted within his statutory authority by declining to reinstate the charges here. (R p. 55)"

Aside from the fact that the District Court misconstrued its true authority to control its own criminal calendar, it is improper to conclude that the State did not engage in misconduct by only looking at the plain language of section § 15A-932. Our Rules of Professional Conduct, extensive relevant caselaw, and other statutory authority cited in the

Defendant's petition for discretionary review all lead to the conclusion that the prosecution did in fact engage in misconduct.

CONCLUSION

WHEREFORE, Defendant respectfully requests that notwithstanding the State's response, this Court grants all of the relief demanded in his 12 May 2020 petition.

Respectfully submitted, this the 21st day of May, 2020.

(Electronically Submitted)
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CERTIFICATE OF SERVICE

I hereby certify that the original Defendant's Reply to the State's Response to Defendant's Petition for Discretionary Review 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 has been duly served upon the same individuals that his Petition for Discretionary Review was served on by e-mail.

Respectfully submitted, this the 21st day of May, 2020.

(Electronically Submitted)
Anton M. Lebedev
Attorney for the Defendant