NO. 54A19-3 **TENTH DISTRICT**

SUPREME COURT OF NORTH CAROLINA

****

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

****

NEW BRIEF FOR THE STATE
Appellee

****

TABLE OF CONTENTS

TABLE OF CASES AND AUTHORITIES

FEDERAL CASES

STATE CASES

CONSTITUTIONAL PROVISIONS

STATUTES

RULES

OTHER AUTHORITIES

NO. 54A19-3 **TENTH DISTRICT**

SUPREME COURT OF NORTH CAROLINA

****

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

****

NEW BRIEF FOR THE STATE
Appellee

****

ISSUES PRESENTED

I. **WHETHER DEFENDANT IS ENTITLED TO THE REINSTATEMENT OF HIS CRIMINAL CHARGES.**

II. **WHETHER THE DISTRICT COURT ERRED IN DENYING THE MOTION TO REINSTATE CHARGES.**

III. **WHETHER THE SUPERIOR COURT ERRED IN DENYING THE PETITION FOR CERTIORARI.**

IV. **WHETHER THE COURT OF APPEALS ERRED IN DENYING THE PETITION FOR CERTIORARI.**

V. **WHETHER THE COURT OF APPEALS ERRED IN AFFIMING THE SUPERIOR COURT'S ORDER.**

VI. **WHETHER THE COURT OF APPEALS ERRED IN DENYING THE PETITION FOR MANDAMUS.**

VII. WHETHER THE COURT OF APPEALS ERRED BY DECLINING TO TAKE JUDICIAL NOTICE.

VIII. WHETHER THIS COURT SHOULD ISSUE ITS WRITS OF MANDAMUS.

IX. WHETHER THIS COURT SHOULD CONSIDER ANY MOOT ASPECTS OF THIS APPEAL.

X. WHETHER THIS COURT SHOULD EXERCISE ITS SUPERVISORY AUTHORITY.

XI. WHETHER THIS MATTER SHOULD BE REMANDED TO THE SUPERIOR COURT FOR A HEARING.

STATEMENT OF THE CASE

On 4 April 2015, Defendant Rogelio Albino Diaz-Tomas ("Defendant") was charged by citation with driving while impaired and no operator's license. (R pp. 5, 55) He failed to appear in court, and on or about 11 July 2016, the State dismissed the charges with leave. (R pp. 16, 55)

On 28 January 2019, Defendant filed with the district court a motion to reinstate charges. (R pp. 33, 56) By order filed 15 July 2019, the district court denied the motion. (R p. 55) On 22 July 2019, Defendant filed with the superior court a petition for certiorari seeking review. (R p. 60) By order filed 24 July 2019, the superior court denied the petition. (R p. 71)

On 27 July 2019, Defendant filed with the Court of Appeals a petition for certiorari seeking review of the district and superior court's orders. By order dated 15 August 2019, the Court of Appeals allowed the petition to review the superior court's order. (R p. 75) On 4 September 2019, Defendant filed with the Court of Appeals a petition for mandamus seeking an order to compel the District Attorney to reinstate charges. (See Docket in Case No. COA19-777)

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 order denying the petition for certiorari, and it denied the petition for mandamus. State v. Diaz-Tomas, __ N.C. App. __, 841 S.E.2d 355 (2020). Judge Zachary

dissented in part, concluding the superior court erred by denying the petition for certiorari. Id. at __, 841 S.E.2d at 361 (Zachary, J. dissenting).

On 12 May 2020, Defendant filed with this Court a notice of appeal based on the dissent and a petition for discretionary review of additional issues. By order dated 15 December 2020, this Court allowed the petition in part.[1] It also allowed review by certiorari of the district court's order denying the motion to reinstate charges and the Court of Appeals' order denying review of that order. (See Docket in Case No. 54A19-3)

---

[1] This Court allowed the petition as to issues I-V, VIII-IX, XII-XIV: (1) whether the Court of Appeals erred in failing to vacate both the District and Superior Court orders, (2) Whether the Court of Appeals erred in failing to remand the matter to Superior Court for further remand to District Court with instructions to reinstate the Defendant's criminal charges on the active trial docket, (3) Whether the Court of Appeals erred in declining to issue a writ of mandamus to the Wake Country District Court to command it to schedule a trial or hearing within a reasonable time, (4) Whether the Court of Appeals erred in declining to issue a writ of mandamus to the Wake County District Attorney to command her to reinstate or dismiss the Defendant's criminal charges within a reasonable time, (5) Whether the Court of Appeals incorrectly reasoned in denying Defendant's mandamus petitions, (8) Whether this Court should issue its writ of certiorari to directly review the District Court Order denying Defendant's Motion to Reinstate Charges, (9) Whether this Court should issue its writ of certiorari to review the Court of Appeals Order on Defendant's Certiorari Petition, (12) Whether this Court should issue its writ of mandamus to the District Court to compel it to promptly schedule a trial or hearing for the Defendant, (13) Whether this Court should issue its writ of Mandamus to the District Attorney to compel her to either reinstate or dismiss the Defendant's charges within a reasonable time, (14) Whether the prompt issuance of a writ of mandamus by this Court will render this matter no longer reviewable by this Court. (See Def.'s pdr-adiss)

STATEMENT OF THE FACTS

The record in this case contains no transcript of sworn testimony. The district court and the superior court made the following findings of fact.[2]

On 4 April 2015, Defendant was charged by citation with driving while impaired and no operator's license. (R pp. 5, 55) On 24 February 2016, he failed to appear in court, and an order for his arrest was issued. (R pp. 14, 55) On 11 July 2016, the State dismissed the charges with leave. (R pp. 16, 55, 71)

On 24 July 2018, Defendant was arrested on the order for arrest issued for failure to appear on 24 February 2016. (R pp. 17, 56) On 9 November 2018, Defendant again failed to appear in court, and an order for arrest was issued. (R pp. 22, 56) On 12 December 2018, Defendant was arrested on the order for arrest issued for failure to appear on 9 November 2018. (R pp. 25, 56) On 14 December 2018, the State declined to reinstate the charges. (R pp. 56, 71)

On 28 January 2019, Defendant filed with the district court a motion to reinstate charges. (R p. 33) By order filed 15 July 2019, the district court denied the motion. (R p. 55) On 22 July 2019, Defendant filed with the superior court a petition for certiorari seeking review. (R p. 60) By order filed 24 July 2019, the superior court denied the petition. (R p. 71)

---

[2] Defendant's statement of the facts includes a number of unsubstantiated allegations copied from his motion to reinstate charges.

ARGUMENT

I. THE DISTRICT COURT DID NOT ERR BY DENYING DEFENDANT'S MOTION TO REINSTATE CHARGES.[3]

Defendant first argues the district court erred by denying his motion to reinstate charges. (Def.'s Br. p. 32) This argument is without merit.

A. The District Attorney is responsible for the prosecution.

The legislative, executive, and supreme judicial powers of the State government shall be forever separate and distinct. N.C. Const. art. I, § 6. "Along with popular sovereignty, separation of powers is one of the fundamental principles on which state government is constructed." John V. Orth & Paul Martin Newby, *The North Carolina State Constitution*, 50 (2nd ed. 2013). Each branch of government has a distinctive purpose: the executive branch effectuates the laws, whereas the judicial branch interprets the laws. State ex rel. McCrory v. Berger, 368 N.C. 633, 635, 781 S.E.2d 248, 250 (2016). A violation occurs when one branch attempts to exercise the powers of another or when the actions of one branch prevent another from performing its duties. Cooper v. Berger, 376 N.C. 22, 44, 852 S.E.2d 46, 63 (2020).

---

[3] Defendant's notice of appeal listed five issues. His petition for discretionary review listed fourteen. This Court allowed discretionary review of ten issues. Defendant's new brief includes eleven issues – only a few of which correspond to those listed in his notice of appeal and petition for discretionary review – but only nine arguments. The State's brief tracks Defendant's arguments.

Our constitution assigns to the District Attorney the responsibility for prosecuting all criminal actions on behalf of the State. N.C. Const. art. IV, § 18; State v. Bates, 348 N.C. 29, 38, 497 S.E.2d 276, 281 (1998); cf. N.C.G.S. § 7A-61 (2019). "The clear mandate of that provision is that the responsibility and authority to prosecute all criminal actions in the superior courts is vested solely in the several District Attorneys of the State." State v. Camacho, 329 N.C. 589, 593, 406 S.E.2d 868, 871 (1991); cf. In re Spivey, 345 N.C. 404, 409, 480 S.E.2d 693, 696 (1997) ("sole and exclusive responsibility"). "The ability to be selective in determining what cases to prosecute . . . against a particular defendant is ancillary to the district attorney's prosecutorial authority." State v. Ward, 354 N.C. 231, 243, 555 S.E.2d 251, 260 (2001).

The trial court "invade[s] the province" of the district attorney when it directs the exercise of prosecutorial discretion. Camacho, 329 N.C. at 594, 406 S.E.2d at 871. In Camacho, the defendant was indicted for murder and burglary; upon the defendant's motion, the trial court ordered the district attorney's office to withdraw (to avoid the impression of any conflict of interest) and for the Attorney General's Office to assume the prosecution of the case. Id. at 593, 406 S.E.2d at 870. Upon review, this Court held the trial court exceeded its authority. Id. at 602, 406 S.E.2d at 876. "The courts of this State," it said, "must, at the very least, make every possible effort to avoid unnecessarily

interfering with the District Attorneys in their performance of [their] duties." Id. at 595, 406 S.E.2d at 872. "Such orders unnecessarily disrupt the system established by our Constitution." Id. at 599, 406 S.E.2d at 874.

At the same time, a defendant has a constitutional right to a speedy trial. U.S. Const. Amend. VI; State v. McCollum, 334 N.C. 208, 231, 433 S.E.2d 144, 156 (1993), cert. denied, 512 U.S. 1254, 129 L. Ed. 2d 895 (1994). Under Barker v. Wingo, 407 U.S. 514, 33 L. Ed. 2d 101 (1972), the factors to be considered in determining whether a speedy trial violation occurred include: (1) the length of delay, (2) the reason for delay, (3) the defendant's assertion of his right, and (4) prejudice to the defendant from the delay. State v. Farmer, 376 N.C. 407, 411, 852 S.E.2d 334, 338-39 (2020). The only possible remedy for a violation of the right to a speedy trial is dismissal of the charges. N.C.G.S. § 15A-954(a)(3) (2019); State v. Spivey, 357 N.C. 114, 118, 579 S.E.2d 251, 254 (2003).

In Klopfer v. North Carolina, 386 U.S. 213, 18 L. Ed. 2d 1 (1967), the United States Supreme Court invalidated a state rule of procedure whereby a prosecutor could take a nolle prosequi with leave absent some justification. Id. at 216, 18 L. Ed. 2d at 4. It held the Sixth Amendment right to a speedy trial affords affirmative protection against an unjustified postponement. Id. at 220, 18 L. Ed. 2d at 6. The Supreme Court specifically noted that Section 15-175 – pertaining to a defendant who had not been apprehended – did "not apply to

the facts of this case." Id. at 215, 18 L. Ed. 2d at 4. Needless to say, a defendant who fails to appear may not legitimately complain about postponement of trial. E.g., State v. Kivett, 321 N.C. 404, 411, 364 S.E.2d 404, 408 (1988).

Responding to Klopfer, our legislature enacted provisions permitting the voluntary dismissal of charges. N.C.G.S. § 15A-931 (commentary) (2019). "No approval by the court is required, on the basis that it is the responsibility of the solicitor, as an elected official, to determine how to proceed with regard to pending charges." Id. The allocation of this duty to the district attorney does not violate a defendant's constitutional rights. Simeon v. Hardin, 339 N.C. 358, 377, 451 S.E.2d 858, 871 (1994). When, however, the State enters a voluntary dismissal after jeopardy has attached, double jeopardy bars later prosecution on the same change. State v. Courtney, 372 N.C. 458, 471, 831 S.E.2d 260, 270 (2019), cert. denied, 140 S. Ct. 2820, 207 L. Ed. 2d 151 (2020).

Accordingly, "[t]he prosecutor may enter a dismissal with leave for nonappearance" when a defendant fails to appear at a proceeding at which his attendance is required. N.C.G.S. § 15A-932(a)(2) (2019). Upon apprehension of the defendant, "the prosecutor may reinstitute the proceedings by filing written notice with the clerk." Id. at (d). Failure to provide such written notice is not, however, a jurisdictional defect. State v. Patterson, 332 N.C. 409, 422, 420 S.E.2d 98, 105 (1992). "The statute does not contain any time limitation,

and contemplates that a case remains 'active' after a failure to appear and dismissal with leave." State v. Mark, 154 N.C. App. 341, 347, 571 S.E.2d 867, 871 (2002), aff'd per curiam, 357 N.C. 242, 580 S.E.2d 693 (2003).

> If the proceeding was dismissed pursuant to subdivision (2) of subsection (a) of this section [i.e., failure to appear] and charged only offenses for which written appearance, waiver of trial or hearing, and plea of guilty or admission of responsibility are permitted pursuant to G.S. 7A-148(a) [including certain "traffic offenses"], and the defendant later tenders to the court that waiver and payment in full of all applicable fines, costs, and fees, the clerk shall accept said waiver and payment without need for a written reinstatement from the prosecutor.

N.C.G.S. § 15A-932(d1) (2019); see also N.C.G.S. §§ 7A-148; 7A-273(2) (2019).

The same motor vehicle operation may give rise to two separate and distinct proceedings: one, a civil licensing procedure instituted by DMV, the other, a criminal action prosecuted by the State to determine if a crime was committed. Joyner v. Garrett, 279 N.C. 226, 238, 182 S.E.2d 553, 562 (1971). Hence, DMW must revoke the license of a person who was charged with a motor vehicle offense and failed to appear. N.C.G.S. § 20-24.1(a)(1) (2019). The license remains revoked until the defendant disposes of the charge, shows he is not the person charged, pays the penalty, or shows his failure to pay is not willful. Id. at (b). "A defendant must be afforded an opportunity for a trial or a hearing within a reasonable time of the defendant's appearance." Id. at (b1).

B. The district court did not err by denying Defendant's motion.

In his motion to reinstate charges, Defendant acknowledged that Section 15A-932 does not explicitly grant a district court authority to reinstate charges; he insisted, however, that the district court had such authority. He recognized Section 15A-932 says the State *may* reinstate charges upon the defendant's apprehension; he posited that if a defendant becomes available his charges "must be dismissed or reinstated." Defendant maintained that under Section 20-24.1(b1), he had "an absolute statutory right to have the matter reinstated for a prompt trial or hearing," and that failure to afford relief would result in a violation of his rights to a speedy trial and to due process. (R pp. 33-42)

The district court denied Defendant's motion. It found Section 15A-932 "clearly indicates" that the discretion to reinstate charges "lies solely with the prosecutor," and that the State "exercised its discretion and acted within its statutory authority" when it declined to reinstate Defendant's charges. It found that for the court to reinstate the charges as requested "would constitute an unauthorized and impermissible interference with the District Attorney's performance of constitutional and statutory duties." It also found the court complied with Section 20-24.1(b1) by scheduling court dates for the matter to be heard on 9 November 2018 and 14 December 2018 after Defendant's arrests on 24 July 2018 and 12 December 2018 for failure to appear. (R pp. 55-58)

The district court did not err by denying the motion. As the district court found, the decision to reinstate charges lies in the discretion of the prosecutor. See Little v. Penn Ventilator Co., 317 N.C. 206, 218, 345 S.E.2d 204, 212 (1986) ("may" indicates discretion). Indeed, the legislature has specifically provided an avenue to circumvent this discretion only for certain offenses and only when the defendant pleads guilty. See N.C.G.S. § 15A-932(d1). Otherwise, it is the responsibility of the prosecutor to determine how to proceed with regard to pending charges. See N.C.G.S. § 15A-931 (commentary).

As the district court also found, it would be inappropriate for the trial court to invade the province of the prosecutor in the exercise of this discretion. To be sure, the district court could schedule a hearing to determine the status of the pending charges. See Simeon, 339 N.C. at 376, 451 S.E.2d at 870. It could dismiss the charges upon a showing of a constitutional violation. See Spivey, 357 N.C. at 118, 579 S.E.2d at 254. It could not however compel the State to reinstitute the proceedings. See Camacho, 329 N.C. at 594, 406 S.E.2d at 871. The decision whether to prosecute lies solely with the District Attorney.

Further, Section 20-24.1(b1) does not eliminate the prosecutorial discretion recognized by Section 15A-932. Like the right to a speedy trial, Section 20-24.1(b1) guarantees the defendant an opportunity for a trial or a hearing within a reasonable time; it does not entitle him to the reinstatement

of charges upon demand. In any event, the record reflects that Defendant was afforded the opportunity for a trial or a hearing within a reasonable time. The district court therefore did not err in denying the motion to reinstate charges.

C. Defendant fails to show the district court erred.

"[I]n the absence of an adequate state remedy, one whose state constitutional rights have been abridged has a direct claim against the State under our Constitution." Corum v. Univ. of N.C., 330 N.C. 761, 782, 413 S.E.2d 276, 289, cert. denied, 506 U.S. 985, 121 L. Ed. 2d 431 (1992). In fashioning a remedy, the trial court must "minimize the encroachment upon other branches of government." Id. at 784, 413 S.E.2d at 291. To assert a direct constitutional claim, "a plaintiff must allege that no adequate state remedy exists." Copper ex rel. Copper v. Denlinger, 363 N.C. 784, 788, 688 S.E.2d 426, 428 (2010).

Defendant says reinstatement is a remedy, not a right. Citing Corum, he proposes the district court has the power to fashion an appropriate remedy. Defendant contends the appropriate remedy is reinstatement, and the district court erred by denying his motion to reinstate charges. (Def.'s Br. pp. 32-33)

Defendant fails to show the district court erred by denying his motion. His motion to reinstate charges raised no Corum claim; rather, he maintained that he was entitled to relief under Sections 15A-932 and 20-24.1(b1). (R p. 36) Defendant fails to show the district court erred under Corum.

1. Compliance with Section 20-24.1(b).

Defendant argues the district court erred in finding compliance with Section 20-24.1(b1). He recognizes his case was heard on an administrative calendar. Defendant complains that his case was never added to a trial calendar after the charges were dismissed with leave. (Def.'s Br. pp. 33-35)

Defendant fails to show the district court erred in finding compliance with Section 20-24.1(b1). That provision promises a defendant an opportunity for a trial or a hearing; Defendant acknowledges that a hearing was conducted. He cites no authority for the proposition that Section 20-14.1 requires more. He consequently fails to show the district court erred in finding compliance.

2. Misapprehension of law.

Defendant argues the district court misapprehended the law. He posits that the district court has "the inherent authority to schedule . . . a prompt trial or hearing." Insisting that Simeon is the governing case, Defendant contends the district court erred by relying on Camacho "[i]n determining that it lacks the requisite calendaring authority." (Def.'s Br.pp. 35-38)

Defendant fails to show the district court erred by relying on Camacho. Contrary to Defendant's suggestion, the district court's conclusions of law say nothing about calendaring authority. The district court was concerned with the prosecutor's discretion to reinstate charges under Section 15A-932, which

is not even cited in Simeon. Defendant does not explain how the district court could have compelled the State to call the matter for trial, arraign him, and present its evidence without invading the exclusive province of the District Attorney to prosecute the case. See N.C. Const. art. IV, § 18; N.C.G.S. § 7A-61. He consequently fails to show the district court erred by declining to interfere.

3. Implicit admission, waiver of trial.

Defendant asks this Court to construe the State's lack of response to his motion as an implicit concession of factual and legal issues. (Def.'s Br. p. 39) At the same time, he insists that his failure to appear should not be construed as a waiver of his right to contest factual and legal issues. (Def.'s Br. p. 41)

Defendant fails to show the district court erred. Indeed, the district court found neither an implicit concession nor a waiver of Defendant's right to trial. This argument identifies no error in the district court's findings or conclusions.

4. Constitutionality of Section 15A-932.

Defendant argues Section 15A-932 is unconstitutional to the extent it permits the prosecution to calendar criminal matters ex parte. (Def.'s Br. p. 42) Absent any reviewable ruling on the constitutional issue, Defendant failed to preserve this issue. See State v. Lloyd, 354 N.C. 76, 86-87, 552 S.E.2d 596, 607 (2001). In any event, statutes granting calendaring authority to the District Attorney are not unconstitutional. Simeon, 339 N.C. at 377, 451 S.E.2d at 871.

5. Contravention of Calendaring Rules.

Defendant contends the district court denied his motion despite its own policies stating that such pending matters need to be promptly scheduled. (Def.'s Br. pp. 43-44) Defendant cites no binding authority for the proposition that failure to comply with such policy constitutes reversible error.

6. Right to a Speedy trial.

Defendant argues that Klopfer mandates reinstatement of his charges. He notes that a criminal defendant is constitutionally entitled to a speedy trial. Defendant says Klopfer makes it clear that an available defendant is entitled to be added back to the active criminal docket upon demand. (Def.'s Br. p. 46)

Admittedly, Defendant's motion alleged that failure to afford relief would result in a speedy trial violation. (R p. 37) But the district court made no findings or conclusions on this claim. (R p. 55) Absent any reviewable ruling on the constitutional issue, Defendant failed to preserve this issue for appeal. See Lloyd, 354 N.C. at 86-87, 552 S.E.2d at 607.

Assuming the district court had passed upon a constitutional claim, still Defendant fails to show error. Unlike in Klopfer, the prosecutor did not take an unjustified nolle prosequi with leave; Defendant failed to appear in court. Klopfer declined to address the scenario of a defendant who failed to appear. It certainly does not mandate reinstatement of charges upon demand.

7. Right to due process.

Defendant argues that due process mandates the reinstatement of his charges or an opportunity to be heard. He claims his rights were violated by permitting the removal of his charges from the calendar and by the indefinite suspension of his case. Defendant insists that due process requires either reinstatement of the charges or that the district court determine whether to interfere with purported calendaring abuses. (Def.'s Br. pp. 46-48)

Admittedly, Defendant's motion alleged that failure to afford relief would result in a violation of due process. (R p. 37) But the district court made no findings or conclusions on this claim. (R p. 55) Absent any reviewable ruling on the constitutional issue, Defendant failed to preserve this issue for appeal. See Lloyd, 354 N.C. at 86-87, 552 S.E.2d at 607 (2001).

To the extent Defendant claims he was entitled to a hearing on his motion to reinstate charges, he fails to show error. Indeed, Defendant was given ample opportunity to be heard. That the district court considered his motion and entering a detailed order containing findings and conclusions demonstrates as much. Defendant fails to show a violation of due process.

8. Rules of Professional Conduct.

Defendant argues the Rules of Professional Conduct support his position. He posits that the prosecution violates its ethical obligations when it declines

to reinstate charges and pressures a defendant to plead guilty. Defendant concludes our Rules of Professional Conduct require the State to act reasonably and reinstate the charges of an available defendant. (Def.'s Br. p. 48-50)

Defendant fails to show the district court erred. In the first place, the district court made no findings or conclusions on any alleged violation of the Rules of Professional Conduct. In any event, there does not appear to be any such rule prohibiting a prosecutor from exercising his discretion to reinstitute proceedings vel non under Section 15A-932. Defendant consequently fails to show any remediable violation of the Rules of Professional Conduct.

9. Automatic reinstatement, continuance, sanctions.

Defendant asserts the case was reinstated by operation of law, that the failure to reinstate charges contravenes Section 15A-952(g) (factors to consider in whether to allow a continuance), and that there are alternative mechanisms for sanctioning defendant who fail to appear in court. (Def.'s Br. pp. 50-53)

Defendant fails to show the district court erred. In the first place, it does not appear that the district court ruled on any of these claims. Defendant certainly does not identify any findings or conclusions to which they pertain. Further, Defendant does not explain how acceptance of any of these arguments would warrant reversing the district court's order. He consequently fails to show the district court erred by denying his motion to reinstate charges.

II. THE PETITION FOR MANDAMUS SHOULD BE DENIED FOR THE SAME REASONS IT WAS DENIED BEFORE.

Defendant argues this Court should issue a writ of mandamus to the district court and the District Attorney to compel them to reinstate the charges. (Def.'s Br. pp. 53-75) The petition should be denied.

On 11 February 2019, Petitioner filed with this Court a petition for writ of mandamus seeking an order to compel the district court and the District Attorney to reinstate the charges. By order dated 26 February 2019, this Court denied the petition. State v. Diaz-Tomas, 372 N.C. 98, 823 S.E.2d 393 (2019).

In his brief, Petitioner again asks this Court to issue a writ of mandamus to the district court and the District Attorney to compel them to reinstate the charges. He says this request is distinguishable from his 11 February 2019 petition because that petition was made: (1) shortly after he filed his motion to reinstate charges, (2) before the district court ruled on his motion, and (3) before he sought review of the district court's order. (Def.'s Br. p. 73-74)

The renewed petition for mandamus should be denied. In the first place, no briefing is allowed on such a petition unless ordered by the Court upon its own initiative. N.C. R. App. P. 22(c). Further, the petition should be denied for the reasons stated in the State's prior response (incorporated by reference).

The circumstances Defendant cites to distinguish the instant petition – that he has since been granted appellate review of the denial of the relief which he seeks by mandamus – illustrate the inappropriateness of mandamus here. See Snow v. N.C. Bd. of Architecture, 273 N.C. 559, 570, 160 S.E.2d 719, 727 (1968) (not as a substitute for appeal); Moody v. Transylvania Cty., 271 N.C. 384, 390, 156 S.E.2d 716, 720 (1967) (not to enforce a questionable right).

III. THE SUPERIOR COURT DID NOT ERR BY DENYING DEFENDANT'S PETITION FOR WRIT OF CERTIORARI.

Defendant argues the superior court erred by denying his petition for certiorari. (Def.'s Br. p. 78) This argument is meritless.

A. Certiorari is a discretionary writ.

A criminal defendant's right to appeal is provided entirely by statute. State v. Berryman, 360 N.C. 209, 214, 624 S.E.2d 350, 354 (2006). Our statutes generally limit appeals in criminal cases to those taken from a final judgment. N.C.G.S. §§ 15A-1431(b) (district court); 15A-1444(a) (superior court) (2019). "There is no provision for appeal to the Court of Appeals as a matter of right from an interlocutory order entered in a criminal case." State v. Henry, 318 N.C. 408, 409, 348 S.E.2d 593, 593 (1986) (per curiam).

Generally, appellate courts will not review interlocutory orders in a criminal case. State v. Monroe, 330 N.C. 433, 436, 410 S.E.2d 913, 915 (1991).

Affect upon a substantial right may warrant review of interlocutory orders in civil cases. N.C.G.S. § 7A-27(b)(3)(a) (2019). In criminal cases, however, "reliance upon a substantial rights analysis as the basis for appellate review appears contrary to the plain and unambiguous language of the statutes governing criminal appeals." State v. Shoff, 118 N.C. App. 724, 727, 456 S.E.2d 875, 878 (1995), aff'd per curiam, 342 N.C. 638, 466 S.E.2d 277 (1996).

The writ of certiorari may be issued to permit review of the trial court's orders and judgments when the right to prosecute an appeal has been lost by failure to take timely action or when no right of appeal from an interlocutory order exists. N.C. R. App. P. 21(a)(1). The Court of Appeals may issue the prerogative writs, including certiorari, in aid of its own jurisdiction, or to supervise and control the proceedings of the trial courts. N.C.G.S. § 7A-32(c) (2019). The superior court's authority to grant the writ of certiorari is analogous to the Court of Appeals' power to issue a writ of certiorari under Section 7A-32. State v. Hamrick, 110 N.C. App. 60, 65, 428 S.E.2d 830, 832-33, appeal dismissed, disc. review denied, 334 N.C. 436, 433 S.E.2d 181 (1993).

Certiorari is a discretionary writ. State v. Ross, 369 N.C. 393, 400, 794 S.E.2d 289, 293 (2016); State v. Grundler, 251 N.C. 177, 189, 111 S.E.2d 1, 9 (1959), cert. denied, 362 U.S. 917, 4 L. Ed. 2d 738 (1960). A writ of certiorari "may be allowed by the Court in its discretion, on sufficient showing made, but

such writ is not one to which the moving party is entitled as a matter of right." State v. Walker, 245 N.C. 658, 659, 97 S.E.2d 219, 220 (1957), cert. denied, 356 U.S. 946, 2 L. Ed. 2d 821 (1958). Accordingly, "certiorari is not an appeal of right, and no review is guaranteed once the petition is filed." Clark v. Velsicol Chem. Corp., 110 N.C. App. 803, 808, 431 S.E.2d 227, 229 (1993), aff'd per curiam, 336 N.C. 599, 444 S.E.2d 223 (1994).

B. The superior court did not err by denying review.

In the present case, Defendant filed a motion with the district court contending he was entitled to the reinstatement of charges. (R p. 33) The district court found the discretion to reinstate charges lies with the prosecutor, and it denied the motion. (R p. 55) Defendant then filed a petition for certiorari with the superior court seeking review of the district court's order. (R p. 60) He acknowledged the order was interlocutory; he insisted the order affected a substantial right. (R p. 62) The superior court denied the petition. (R p. 71)

The superior court did not err in denying the petition for certiorari. Defendant has a right to appeal from a final judgment, but he lacked a right to appeal from the district court's interlocutory order. N.C.G.S. § 15A-1431(b). His reliance on a substantial rights analysis to obtain review in a criminal case was misplaced. See Shoff, 118 N.C. App. at 727, 456 S.E.2d at 878.

While the superior court had the discretion to allow review by certiorari, it was not obligated to do so. Even assuming the district court erred in denying Defendant's motion to reinstate charges (but see above), Defendant was not entitled to review prior to entry of a final judgment. See Walker, 245 N.C. at 659, 97 S.E.2d at 220. Review of interlocutory orders is disfavored, and the superior court therefore did not err in denying the petition. See Monroe, 330 N.C. at 436, 410 S.E.2d at 915.

C. Defendant fails to show error in the superior court's order.

1. Failure to perfect an appeal of right.

Certiorari is generally discretionary. Ross, 369 N.C. at 400, 794 S.E.2d at 293. A party is entitled to a writ of certiorari when, and only when, the failure to perfect an appeal is due to some error of the court or its officers, and not to any fault or neglect of the party. State v. Moore, 210 N.C. 686, 691, 188 S.E. 421, 424 (1936); accord Womble v. Moncure Mill & Gin Co., 194 N.C. 577, 140 S.E. 230, 231 (1927). This exception applies when a party's attempt to exercise an appeal of right is frustrated by someone else. See Wachovia Bank & Trust Co. v. Miller, 190 N.C. 775, 776, 130 S.E. 616, 617 (1925) (judge failed to settle case); Johnson v. Andrews, 132 N.C. 376, 381, 43 S.E. 926, 928 (1903) (clerk failed to docket appeal); cf. Winborn v. Byrd, 92 N.C. 7, 9 (1885).

Defendant argues the superior court erred by denying his petition for certiorari. He contends he was entitled to a writ of certiorari because he is being prevented from perfecting an appeal from a final judgment "due to the acts of the District Criminal Court [sic] and its officers, and not any fault or neglect of his own." Defendant claims the superior court misunderstood the rule pertaining to when certiorari is not discretionary. (Def.'s Br. pp. 82-83)

Defendant fails to show the superior court erred by denying his petition for certiorari. He was not entitled to a writ of certiorari. 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. The superior court in its discretion could have allowed review by certiorari, but it was not bound to do so. Defendant fails to show he was entitled to certiorari.

2. Limbo of judgment, only remaining remedy, etc.

Defendant asserts that the law disfavors cases being "in limbo of final judgment," that the superior court erred by denying him his "only remaining" remedy, and that summary denial of his nonfrivolous certiorari petition was unwarranted (though no evidentiary hearing should be held in superior court). He insists interlocutory orders are appealable when they affect a substantial right, and that a violation of his right to a speedy trial qualifies. Defendant

adds that the superior court's order denying his petition is inconsistent with local policies as well as out-of-state authority. (Def.'s Br. pp. 83-91)

Defendant fails to show the superior court erred by denying his petition for certiorari. Defendant is, of course, entitled to a speedy trial. But, as noted above, he has never demonstrated a violation of that right under Barker. Affect upon a substantial right simply does not guarantee immediate review of an interlocutory order in a criminal case. See Shoff, 118 N.C. App. at 727, 456 S.E.2d at 878. Defendant consequently fails to show the superior court erred.

IV. THE COURT OF APPEALS DID NOT ERR BY AFFIRMING THE DENIAL OF THE PETITION FOR CERTIORARI.

Defendant argues the Court of Appeals erred by affirming the superior court's order and not reviewing the district court's order. (Def.'s Br. pp. 92, 94) This argument is meritless.

A. The Court of Appeals did not err by affirming.

The Court of Appeals allowed Defendant's petition for certiorari in order to review the superior court's order denying review of the district court's order denying his motion to reinstate charges. Diaz-Tomas, __ N.C. App. at __, 841 S.E.2d at 357. It denied his petitions for mandamus. Id. As mandamus may not be used as a substitute for appeal, Defendant's avenue of relief lay through review of the district court's order by appeal or certiorari. Id. at __, 841 S.E.2d

at 358. Noting that Defendant's argument did not depend on the local rules, the Court of Appeals declined to take judicial notice of the local rules. Id.

The Court of Appeals recognized that certiorari is discretionary. Id. at __, 841 S.E.2d at 359. Even assuming the district court erred, the superior court was not obligated to grant certiorari; hence the superior court did not err by denying Defendant's petition seeking review of the district court's order. Id. And as the Court of Appeals had granted Defendant's petition for certiorari solely to review the superior court's order, it declined to address Defendant's arguments that the district court erred by denying his motion. Id.

Judge Zachary dissented in part. Agreeing that the district court's order was not before the court, Judge Zachary would have allowed the motion to take judicial notice of the local rules because Defendant argued the district court's ruling was inconsistent with the local rules. Id. at __, 841 S.E.2d at 359 (Zachary, J., dissenting). Judge Zachary agreed that Defendant "failed to demonstrate a clear legal right" to reinstatement. Id. at __, 841 S.E.2d at 361. She found however that Defendant's petition satisfied the criteria for review by certiorari, and she faulted the superior court for not providing "any explanation for the basis" of its decision in its order. Id. at __, 841 at 363-64. Judge Zachary would reverse the superior court's order "and remand for a hearing and decision on the merits." Id. at __, 841 S.E.2d at 361.

The Court of Appeals did not err by affirming the superior court's order denying Defendant's petition for certiorari. As the majority said, certiorari is discretionary, and the superior court was not obligated to allow the petition. See Walker, 245 N.C. at 659, 97 S.E.2d at 220. That the district court's order was interlocutory – a fact noted only by the majority – was sufficient to justify denial of premature review. See Monroe, 330 N.C. at 436, 410 S.E.2d at 915. Absent a showing of abuse of discretion, the Court of Appeals did not err therefore by affirming the order of the superior court.

It is true that a petition for certiorari must show probable error was committed below. In re Snelgrove, 208 N.C. 670, 182 S.E. 335, 336 (1935). But the dissent finds error in the superior court's order merely because Defendant filed a formally sufficient petition. Of course, that is not the test. The petition may have "contain[ed] all of the required information." Diaz-Tomas, __ N.C. App. at __, 841 S.E.2d at 363 (Zachary, J., dissenting). Still, Defendant failed to show he was entitled to review of the order prior to entry of a final judgment. Unsurprisingly, the dissent cited no law in support of its suggestion that the superior court's failure to explain its ruling constituted an abuse of discretion.

B. Defendant fails to show the Court of Appeals erred.

In N.C. Cent. Univ. v. Taylor, 122 N.C. App. 609, 471 S.E.2d 115 (1996), aff'd per curiam, 345 N.C. 630, 481 S.E.2d 83 (1997), the superior court granted

certiorari to review a case pending before the Office of Administrative Hearings (OAH). Id. at 612, 471 S.E.2d at 117. The Court of Appeals allowed certiorari to review the superior court's order. Id. at 610, 471 S.E.2d at 116. As certiorari is discretionary, it reviewed whether the superior court abused its discretion. Id. at 612, 471 S.E.2d at 117. "We do not address the merits of the petition to the superior court," it said. Id. The Court of Appeals found judicial review was available for any final agency decision, so the superior court erred by allowing certiorari to review an interlocutory ruling. Id. at 614, 471 S.E.2d at 118.

The defendant in State v. Bryant, 267 N.C. App. 575, 833 S.E.2d 641 (2019), pled guilty to shoplifting in March 2015. Id. at 576, 833 S.E.2d at 642. In August 2018, she filed a motion for appropriate relief (MAR); the district court denied the MAR, and the superior court denied a petition for certiorari. Id. The Court of Appeals granted certiorari to review the superior court's order. Id. It found that the defendant's citation had been improperly amended and it vacated the district court's judgment. Id. at 578, 833 S.E.2d at 644. It also reversed the superior court's order denying her petition for certiorari. Id.

In the present case, the Court of Appeals recognized that the superior court has the authority to grant certiorari in appropriate cases. Diaz-Tomas, __ N.C. App. at __, 841 S.E.2d at 358. It recognized certiorari is a discretionary writ, and not one to which the moving party is entitled as a matter of right. Id.

In reviewing the superior court's ruling on certiorari, the Court of Appeals said, it would determine only whether the superior court abused its discretion, and "'[w]e do not address the merits of the petition to the superior court.'" Id. (quoting Taylor, 122 N.C. App. at 612, 471 S.E.2d at 117).

Defendant now argues the Court of Appeals misconstrued Taylor, which he says was a unique case where appeal was available as a matter of right. He claims Taylor "actually compelled the Court of Appeals to consider the substantive merits of [his] claim." Defendant contends that the Court of Appeals in Bryant held that, in reviewing the denial of a petition for certiorari, the court "must review the merits of the substantive claim." He complains that the Court of Appeals here "essentially overruled Bryant." (Def.'s Br. pp. 94-96)

Defendant fails to show the Court of Appeals erred by affirming the superior court's order. As in Taylor, appeal is available to the superior court from a final judgment of the lower court. To the extent Defendant attempts to distinguish Taylor on that basis, he fails to identify any meaningful distinction. Nothing in Taylor compels a reviewing court to look beyond whether the superior court abused its discretion in ruling on a petition for certiorari.

It is true Bryant addressed directly the claims raised in the district court. The Court of Appeals justified itself there by adverting to the jurisdictional nature of the claims. Bryant, 267 N.C. App. at 576-77, 833 S.E.2d at 642-43.

By contrast, Defendant's motion to reinstate charges did not challenge the district court's jurisdiction to enter a judgment. Further, to the extent Bryant suggests that the standard of review for the superior court's denial of certiorari is de novo, rather than abuse of discretion, the case was wrongly decided.

Defendant fails to show he was entitled to judicial review of the district court's interlocutory order, either by the superior court or the Court of Appeals. He consequently fails to show the Court of Appeals erred by affirming the superior court's order and not reviewing the district court's order.

Defendant also argues the Court of Appeals erred in declining to take judicial notice of the local rules. He acknowledges that he "did not provide a detailed explanation on how the policies were relevant." Defendant now claims the policies were relevant to his mandamus petition, and the Court of Appeals should have considered the policies in its analysis. (Def.'s Br. pp. 76-77)

Defendant fails to show the Court of Appeals erred by declining to take judicial notice. In his appellant brief, Defendant did not rely on or cite the local rules, and the local rules had no bearing on the disposition of his appeal. Diaz-Tomas, __ N.C. App. at __, 841 S.E.2d at 358. The Court of Appeals did not err by failing to take judicial notice of material that was irrelevant to its analysis.

Further, had the Court of Appeals taken judicial notice of the local rules, the outcome would have been the same. As Judge Zachary noted, Defendant

asserted in his motion that the local rules were inconsistent with the district court's action. Diaz-Tomas, __ N.C. App. at __, 841 S.E.2d at 359 (Zachary, J., dissenting). Judge Zachary agreed with the majority however that Defendant's challenge to the district court's order was not before the court. Id. Accordingly, even if the Court of Appeals erred in this respect, such error was not prejudicial so as to require a reversal of the decision. See State ex rel. Utilities Comm'n v. Nello L. Teer Co., 266 N.C. 366, 378, 146 S.E.2d 511, 519 (1966).

CONCLUSION

WHEREFORE, the State respectfully requests that this Court affirm the decision of the Court of Appeals.

Electronically submitted this the 5th day of April, 2021.

JOSHUA H. STEIN
ATTORNEY GENERAL

Electronically Submitted
Joseph L. Hyde
Assistant Attorney General

North Carolina Department of Justice
Post Office Box 629
Raleigh, North Carolina 27602
919-716-6500
State Bar No. 39775
jhyde@ncdoj.gov

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this day served the foregoing NEW BRIEF FOR THE STATE upon DEFENDANT by electronic mail, addressed to his ATTORNEY OF RECORD as follows:

Anton M. Lebedev
Email: a.lebedev@lebedevesq.com

Electronically submitted this the 5th day of April, 2021.

Electronically Submitted
Joseph L. Hyde
Assistant Attorney General