

NO. 54A19-3

TENTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

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

From Wake

STATE'S RESPONSE TO DEFENDANTS
PETITION FOR DISCRETIONARY REVIEW

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SUPREME COURT OF NORTH CAROLINA

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STATE'S RESPONSE TO DEFENDANTS
PETITION FOR DISCRETIONARY REVIEW

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 discretionary review filed 12 May 2020 respectfully requests that the petition be denied.

In support of this response, the State shows the following:

FACTUAL AND 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)

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. He also filed 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 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. (See Docket in Case No. 54A19-3)

On 23 April 2020, Petitioner filed 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 Judge Zachary's dissent. He also filed the instant petition for discretionary review of additional issues. (See Docket in Case No. 54A19-3)

**REASONS WHY THIS COURT SHOULD DENY DEFENDANT'S
PETITION FOR DISCRETIONARY REVIEW**

In the petition, Petitioner contends the Court of Appeals erred by: (1) denying his petitions for mandamus, (2) not vacating the district court's and superior court's orders, and (3) declining to review the district court's order. He also contends this Court should: (4) issue its writ of certiorari to review the orders of the Court of Appeals and the district court, and (5) issue its writ of mandamus to compel the district court to schedule a trial or hearing and the district attorney to reinstate the charges. Petitioner seeks this Court's discretionary review of fourteen additional issues. (See petition)

I. PETITIONER FAILS TO SHOW THE COURT OF APPEALS' OPINION CONTAINS ANY ERROR OF LAW.

A. The Court of Appeals did not err by denying the PWMs.

“An action for a writ of mandamus lies only where the plaintiff 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).

“It 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). Hence, “mandamus may not be used as a substitute for an appeal.” Snow, 273 N.C. at 570, 160 S.E.2d at 727. “When appeal is the

proper remedy, mandamus does not lie.” In re T.H.T., 362 N.C. 446, 454, 665 S.E.2d 54, 59 (2008).

In his motion to reinstate charges, Petitioner argued the district attorney has an obligation, when a defendant is apprehended, to reinstate charges that had been dismissed with leave upon the defendant’s failure to appear. (R p. 36) The district court disagreed and denied the motion to reinstate charges. (R p. 55) The superior court denied Petitioner’s petition to review the district court’s order, but the Court of Appeals allowed his petition to review the superior court’s order. (R p. 75)

In his 4 September 2019 petition for mandamus, Petitioner sought an order to compel the district attorney to reinstate the charges. He recapitulated the arguments from his motion to reinstate charges, contending that Sections 15A-932 and 20-24.1 supported his position. Petitioner claimed that he lacked any other adequate remedy, as mandamus was a “more timely alternative than an appeal.” (See Docket No. COA19-777, 09/04/2019 PWM)

In his 4 November 2019 petition for mandamus, Petitioner sought an order to compel the district court to schedule a trial on the dismissed charges. He repeated arguments from his appellant brief and from his prior petition for mandamus (both filed 4 September 2019). Positing that “[a]ppeal and mandamus are not mutually exclusive remedies,” Petitioner also argued that

appeal was not a legally adequate alternative, and he urged the Court of Appeals to order the district court to schedule a trial or hearing regardless of its disposition of the appeal. (See Docket No. COA19-777, 11/04/2019 PWM)

The Court of Appeals denied Petitioner's petitions for mandamus. It recognized mandamus may not be used as a substitute for an appeal. Diaz-Tomas, 2020 WL 1918719 at *1. The PWMs, it said, essentially asked the Court of Appeals to compel the district court to reverse itself. Id. Petitioner's remedy, it concluded, lay through appeal or certiorari. Id. Concurring in this result, Judge Zachary added that Petitioner failed to show a clear legal right to the acts he sought to compel. Id. at *5 (Zachary, J., concurring in part).

The Court of Appeals did not err by denying Petitioner's PWMs. As the majority recognized, Petitioner sought through mandamus the same remedy he pursued on appeal: reversal of the order denying his motion to reinstate charges. The possibility of relief on appeal, however, means that mandamus will not lie to obtain the same result. See T.H.T., 362 N.C. at 454, 665 S.E.2d at 59; Snow, 273 N.C. at 570, 160 S.E.2d at 727. Accordingly, the Court of Appeals did not err by denying Petitioner's petitions for mandamus.

In the petition, Petitioner argues the Court of Appeals erred by denying his PWMs. He contends this Court should review the matter because: (1) the majority and concurrence differed in their reasoning, (2) the decision conflicts

with this Court's precedent, (3) the majority disregarded his arguments as to Rule 2 and Section 7A-32, and (4) the decision "is patently erroneous and creates catastrophic precedent." Petitioner insists appeal is not an adequate remedy because he lacks a right to appeal from the district court's order, and the Court of Appeals by affirming the superior court's denial of certiorari rendered review by certiorari "practically infeasible."¹ (See petition pp. 7-15)

Petitioner fails to show the Court of Appeals erred by denying his petitions for mandamus. Indeed, he fails to establish any material conflict with this Court's precedent. It is true Petitioner lacked a statutory right to appeal from the district court's order. But review of that order by certiorari provides an adequate means for correcting the wrong for which redress was sought. Petitioner does not explain how the remedy he sought via mandamus – compelling the district attorney and the district court to reinstate charges – would not essentially reverse the same order for which he sought review. Petitioner consequently fails to show error in the denial of his PWMs.

B. The Court of Appeals did not err by limiting its review.

"Certiorari is a discretionary writ, to be issued only for good and sufficient cause shown." State v. Grundler, 251 N.C. 177, 189, 111 S.E.2d 1, 9

¹ Petitioner also argues the dissent erred by concluding he does not have a clear legal right to the remedy sought. (See petition pp. 15-32) Any error in the dissent not addressed by the majority is not before this Court for review.

(1959), cert. denied, 362 U.S. 917, 4 L. Ed. 2d 738 (1960). It 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). Hence, “the Court of Appeals may choose to grant such a writ to review some issues that are meritorious but not others for which a defendant has failed to show good or sufficient cause.” State v. Ross, 369 N.C. 393, 400, 794 S.E.2d 289, 293 (2016).

In his 27 July 2019 petition for certiorari, Petitioner sought the Court of Appeals’ review of the district court’s order denying his motion to reinstate charges and the superior court’s order denying his petition for certiorari. By order dated 15 August 2019, the Court of Appeals allowed the petition solely in order to review the superior court’s order. (R p. 75)

Notwithstanding the prescribed scope of review, in his brief Petitioner argued the district court erred by denying his motion to reinstate charges. The Court of Appeals recognized the limits of its order granting certiorari and declined to address the argument. Diaz-Thomas, 2020 WL 1918719 at *3. Judge Zachary agreed that the district court’s order was not properly before the panel for review. Id. (Zachary, J., concurring in part).

The Court of Appeals did not err in declining to review the district court’s order. In the first place, lacking a statutory right to appeal, Petitioner

was not entitled to review of that order as a matter of right. In the second place, the Court of Appeals did not abuse its discretion in limiting its review to the order of the superior court. Indeed, 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. See State v. Wilson, 151 N.C. App. 219, 223, 565 S.E.2d 223, 226 (noting “general principle of appellate review”), cert. denied, 356 N.C. 313, 571 S.E.2d 215 (2002). Further, given the petition panel declined to allow review of the district court’s order, a later panel was bound by that decision. See N.C. Nat. Bank v. Virginia Carolina Builders, 307 N.C. 563, 567, 299 S.E.2d 629, 632 (1983). The Court of Appeals therefore did not err by declining to review the district court’s order.

In the petition, Petitioner argues the Court of Appeals erred in not vacating both orders. Contrary to the dissent, he claims the proper remedy is not remand to the superior court but reversal of the district court’s order. Petitioner also argues the Court of Appeals erred by declining to review the district court’s order. Contending the Court of Appeals was not barred by its prior order, by Rule 21, or by Article 91, he says the majority erred by failing to treat his brief as a PWC or invoke Rule 2 to review the district court’s order. Petitioner implores this Court to disregard onerous rules of procedure and expedite a decision in the public interest. (See petition pp. 32-44)

Petitioner fails to show the Court of Appeals erred by declining to review the district court's order. In the first place, any error in the dissent not addressed by the majority is not before this Court for review. See N.C. R. App. P. 16(a); State v. Miller, 282 N.C. 633, 643, 194 S.E.2d 353, 359 (1973). Further, Petitioner fails to show the Court of Appeals erred by declining to review the district court's order. Had it treated Petitioner's brief as another petition for certiorari or invoked Rule 2, the Court of Appeals was still bound by its prior order limiting the scope of review. In any event, Petitioner was not entitled to review by certiorari of the district court's order, and he fails to show the Court of Appeals erred by reviewing only the superior court's order.

C. Petitioner fails to show discretionary review of additional issues is warranted.

In the petition, Petitioner asserts that the subject matter of the appeal has significant public interest, that the cause involves legal principles of major significance to the jurisprudence of the state, and that the Court of Appeals' decision conflicts with this Court's precedent. (See petition p. 7)

The petition should be denied. As stated above, the Court of Appeals did not err by limiting its review and by denying the petitions for mandamus. Petitioner has not otherwise identified a single discrete issue with sufficient particularity to warrant this Court's discretionary review.

II. THE PETITIONS FOR CERTIORARI AND MANDAMUS SHOULD BE DENIED.

The writ of certiorari may be issued in appropriate circumstances to permit review of the orders and judgments of the lower courts when, among other things, no right to appeal exists. N.C. R. App. P. 21(a). Application for the writ shall be made by filing a petition therefor with the clerk of the appellate division to which appeal of right might lie from a final judgment in the cause. *Id.* at (b). The writ of mandamus under Rule 22 may be issued to compel *judicial* action erroneously refused. N.C. R. App. P. 22 (commentary).

In his 11 February 2019 petition for mandamus, Petitioner sought an order to compel the district attorney and the district court to reinstate the charges. This Court denied the petition by order dated 26 February 2019. In his 4 November 2019 petition for certiorari, Petitioner asked this Court to review the district court's order denying his motion to reinstate charges and the Court of Appeals' order denying review. This Court denied the petition by order dated 8 November 2019. (See Docket Nos. 54P19 & 54P19-2)

In the instant petition, Petitioner asks this Court to issue a writ of certiorari to review: (1) the district court's 15 June 2019 [sic] order denying his motion to reinstate charges, and (2) the Court of Appeals' 15 August 2019 order denying review. He also asks this Court to issue a writ of mandamus to compel the district attorney to reinstate the charges and the district court to schedule

a trial or hearing. Petitioner contends such extraordinary relief is warranted because the case involves “prosecutorial misconduct” and “calendarizing misconduct.” (See petition pp. 45-49)

The instant petitions for certiorari and mandamus should be denied. Petitioner’s request that this Court review the orders of the district court and the Court of Appeals is identical to that in his 4 November 2019 petition for certiorari. His request that this Court compel the district attorney and the district court to reinstate charges is identical to that in his 11 February 2019 petition for mandamus. This Court already denied both requests once before. Insofar as Petitioner seeks to bypass the Court of Appeals’ opinion (for which he is ostensibly seeking review), there has been no change in circumstances. The petitions are still meritless and should be denied for the same reasons.

Further, 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) As explained in the State’s response to his 11 February 2019 petition (hereby incorporated), Petitioner fails to show a clear legal right to have the charges reinstated upon demand. The petitions for certiorari and mandamus should therefore be denied.

CONCLUSION

WHEREFORE, the State respectfully requests that this Court deny the petition for discretionary review.

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

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this day served the foregoing STATE'S RESPONSE TO DEFENDANT'S PETITION FOR DISCRETIONARY REVIEW upon DEFENDANT by emailing a PDF version of same, addressed to his ATTORNEY OF RECORD as follows

Anton M. Lebedev
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Electronically submitted this the 21th day of May, 2020.

Electronically Submitted
Joseph L. Hyde
Assistant Attorney General