

NO. COA19-1055

TWENTY-SEVEN-A DISTRICT

NORTH CAROLINA COURT OF APPEALS

STATE OF NORTH CAROLINA)

)

v.)

From Gaston

)

MARK BRADLEY CARVER)

STATE’S RESPONSE TO DEFENDANT’S
MOTION TO DISMISS THE APPEAL

TO: THE HONORABLE CHIEF JUDGE AND ASSOCIATE JUDGES
OF THE NORTH CAROLINA COURT OF APPEALS

NOW COMES the State of North Carolina, by and through
undersigned counsel, and responding to Defendant’s motion to dismiss filed
27 July 2020, requests that the motion be denied.

PROCEDURAL HISTORY

1. On 21 March 2011, Defendant was convicted by a jury of first degree
murder. He was sentenced to life without parole. (R p. 10)

2. Defendant appealed. By opinion issued 5 June 2012, this Court
found no error. State v. Carver, 221 N.C. App. 120, 126, 725 S.E.2d 902, 906
(2012), aff’d per curiam, 366 N.C. 372, 736 S.E.2d 172 (2013).

3. On 8 December 2016, Defendant filed with the trial court a motion for appropriate relief (MAR) seeking among other things a new trial. (R p. 48) Pursuant to an evidentiary hearing and by order filed 12 June 2019, the trial court granted the MAR and awarded Defendant a new trial on the basis of newly discovered evidence and ineffective assistance of counsel. (R p. 165) The State filed written notice of appeal. (R p. 180)

4. On 25 November 2019, the State filed with this Court a record on appeal. On 24 January 2020, the State filed an appellant brief identifying one issue: whether the trial court erred by awarding Defendant a new trial. (See Docket in Case No. COA19-1055)

5. On 27 July 2020, Defendant filed with this Court an appellee brief. He also filed a petition for writ of certiorari seeking review of the trial court's 12 June 2019 order granting his MAR, and the instant motion to dismiss the State's appeal or strike portions of the State's brief.

REASONS WHY THE MOTION SHOULD BE DENIED

Appeal lies to this Court from any order or judgment from which appeal is authorized by statute. N.C.G.S. § 7A-27(b) (2019). A party entitled to appeal from a judgment or order in a criminal case may take appeal by giving oral notice at trial or filing written notice of appeal. N.C. R. App. P. 4(a). A written notice of appeal shall designate, inter alia, "the judgment or order

from which appeal is taken;” it need not identify statutory grounds. Id. at (b). This Court’s jurisdiction to review the judgment or order depends on the appellant’s compliance with Rule 4. State v. McCoy, 171 N.C. App. 636, 638, 615 S.E.2d 319, 320, appeal dismissed, 360 N.C. 73, 622 S.E.2d 626 (2005).

Generally, when no appeal is pending, the trial court’s ruling on an MAR is subject to review only by writ of certiorari. N.C.G.S. § 15A-1422(c) (2019). The State may however appeal from the superior court to the appellate division “[u]pon the granting of a motion for a new trial on the ground of newly discovered or newly available evidence but only on questions of law.” N.C.G.S. § 15A-1445(a)(2) (2019). Thus, Section 15A-1445(a)(2) “grants the State an absolute right to appellate review of a superior court order granting defendant a new trial on the ground of newly discovered evidence without regard to whether such superior court order is interlocutory in nature.” State v. Monroe, 330 N.C. 433, 436, 410 S.E.2d 913, 915 (1991).

In State v. Peterson, 228 N.C. App. 339, 744 S.E.2d 153, disc. review denied, 367 N.C. 284, 752 S.E.2d 479 (2013), the defendant was convicted of murder and appealed; this Court found no reversible error. Id. at 341, 744 S.E.2d at 156. He later filed an MAR and the trial court granted a new trial “based on constitutional violations as well as newly discovered evidence.” Id. at 342, 744 S.E.2d at 157. The State appealed. Id. at 342, 744 S.E.2d at 156.

Upon review, this Court held the trial court had entered an appealable order: “because the trial court granted defendant’s MAR based, in part, on newly discovered evidence, the State had the right to appeal the MAR order.” Id. at 343, 744 S.E.2d at 157. The State’s petition for certiorari was dismissed. Id.

Similarly in State v. Howard, 247 N.C. App. 193, 783 S.E.2d 786 (2016), the defendant was convicted of murder and appealed; this Court found no error. Id. at 194, 783 S.E.2d at 787-88. He later filed an MAR and the trial court granted a new trial on the basis of: “(1) newly discovered evidence, (2) constitutional violations, and (3) ‘favorable’ post-conviction DNA test results.” Id. at 201, 783 S.E.2d at 792. The State appealed. Id. Before this Court, the defendant argued the State had no right to appeal “from certain portions of the trial court’s order.” Id. This Court disagreed. “[S]ince all of the relief granted to defendant was inextricably linked to, and based on, what the court found to be newly discovered evidence, the State properly relied on subdivision 15A-1445(a)(2).” Id. at 205, 783 S.E.2d at 794. Again, the State’s petition for certiorari was dismissed. Id. at 205, 783 S.E.2d at 795.

When reviewing a ruling on an MAR, the appellate court must determine whether the findings of fact are supported by the evidence, whether the findings support the conclusions of law, and whether the conclusions of law support the order entered. State v. Mbacke, 365 N.C. 403,

406, 721 S.E.2d 218, 220, cert. denied, 568 U.S. 864, 184 L. Ed. 2d 116 (2012). Though findings supported by competent evidence are binding, “whether such evidence supports the findings and whether the findings themselves support the [trial] court’s conclusions are questions of law reviewable on appeal.” State v. Connley, 295 N.C. 327, 337, 245 S.E.2d 663, 669 (1978), judgment vacated on other grounds, 441 U.S. 929, 60 L. Ed. 2d 657 (1979); cf. Clark v. American & Efird Mills, 82 N.C. App. 192, 196, 346 S.E.2d 155, 157 (stating whether evidence supported Commission’s findings of fact is question of law), disc. review denied, 318 N.C. 413, 349 S.E.2d 591 (1986).

Here, the trial court’s 12 June 2019 order allowing Defendant’s MAR granted a new trial based in part on newly discovered evidence. (R p. 165) The order is appealable as a matter of right under Section 15A-1445(a)(2). See Monroe, 330 N.C. at 436, 410 S.E.2d at 915. It is true the trial court awarded a new trial on the basis of IAC as well as newly discovered evidence. But this does not make the order any less subject to appeal under Section 15A-1445(a)(2). See Peterson, 228 N.C. App. at 343, 744 S.E.2d at 157. And since the order contains alternative bases for relief, this Court is empowered to examine the entire order on appeal; indeed, the State has not taken appeal from any particular issue but from the trial court’s order granting a new trial. See Howard, 247 N.C. App. at 205, 783 S.E.2d at 794.

Defendant argues the State's appeal should be dismissed as moot. He relies on Howard for the proposition that an order granting a new trial is appealable only when "all of the relief" granted is based on newly discovered evidence. Hence, he concludes "the State's right to appeal is limited to whether the trial court made an error of law in finding that newly discovered evidence entitled the defendant to a new trial." Noting that the trial court here also found IAC, Defendant argues that not all of the relief which the trial court granted him was based on newly discovered evidence, and review "of any other ground" is available only by certiorari.¹ (Def's MTD pp. 8-13)

Defendant's motion to dismiss the appeal should be denied. Contrary to his suggestion, Howard did not (indeed, could not) overrule Peterson's holding that an order granting a new trial based in part on newly discovered evidence is appealable as a matter of right. Far from supporting Defendant's position, Howard actually rejected an identical attempt to conflate appealable *orders* with appealable *bases*. See Howard, 247 N.C. App. at 202, 783 S.E.2d at 792 ("appeal the other bases"). It is the order, not the particular basis for relief, that is subject to appeal under Section 15A-1445(a)(2). Monroe, 330 N.C. at 436, 410 S.E.2d at 915 ("review of a superior court order").

¹ Curiously, Defendant also claims the State should be precluded from relying on Howard in asserting grounds for appellate review, as though the right to appeal derived from that case and not Section 15A-1445. (Def.'s MTD p. 11)

To be sure, the right to appeal conferred by Section 15A-1445(a)(2), like the right to appeal from a judgment entered on a guilt plea, is not unlimited. Upon review of an order granting a new trial for newly discovered evidence, this Court may consider only “questions of law.” N.C.G.S. § 15A-1445(a)(2); cf. N.C.G.S. § 15A-1444(e) (2019) (motion to suppress & sentencing issues). That includes whether the trial court’s findings of fact are supported by competent evidence and whether its conclusions are supported by its findings. Connley, 295 N.C. at 337, 245 S.E.2d at 669. Defendant fails to show the State lacks a statutory right to appeal, or that the appeal has been rendered moot, and the motion to dismiss the appeal should therefore be denied.

Alternatively, Defendant asks this Court to strike from the State’s brief its challenges to the findings on newly discovered evidence. He contends that challenging the findings does not involve questions of law and exceeds the scope of review provided by Section 15A-1445(a)(2). (Def.’s MTD p. 14)

Defendant’s request to strike part of the State’s brief should be denied. Defendant cites no caselaw in support of his request; it appears there is none. In his brief at least, he recognizes that the standard of review includes review of the findings for evidentiary support. Indeed, the issue of whether the findings are supported by evidence is a question of law reviewable on appeal. Connley, 295 N.C. at 337, 245 S.E.2d at 669. The motion should be denied.

WHEREFORE, the State respectfully requests that this Court deny Defendant's motion.

Electronically submitted this the 7th day of August, 2020.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this day served the foregoing RESPONSE TO MOTION TO DISMISS STATE'S BRIEF / MOTION TO STRIKE PORTIONS OF STATE'S BRIEF by emailing a PDF version of same, addressed to his ATTORNEYS OF RECORD as follows

Christine C. Mumma
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Electronically submitted this the 7th day of August, 2020.

Electronically Submitted
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