

NO. COA19-1055

TWENTY-SEVEN-A DISTRICT

NORTH CAROLINA COURT OF APPEALS

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STATE OF NORTH CAROLINA )

)

v. )

From Gaston

)

MARK BRADLEY CARVER )

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STATE’S RESPONSE TO DEFENDANT’S  
PETITION FOR WRIT OF CERTIORARI

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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 petition for writ of certiorari filed 27 July 2020, requests that the petition be dismissed.

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 motion to dismiss the State's appeal, and the instant petition for certiorari seeking review of the 12 June 2019 order granting his MAR.

### **REASONS WHY THE WRIT SHOULD NOT ISSUE**

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, among other things, "the judgment or order from which appeal is taken." Id. at (b).

Appeal from a trial court's order or judgment may be taken only by an aggrieved party. Bailey v. State, 353 N.C. 142, 156, 540 S.E.2d 313, 322 (2000). "An aggrieved party is one whose rights have been directly and injuriously affected by the action of the court." Culton v. Culton, 327 N.C. 624, 625, 398 S.E.2d 323, 324 (1990). A party who received the relief he sought is not aggrieved by the trial court's order. See Templeton v. Apex Homes, Inc., 164 N.C. App. 373, 378, 595 S.E.2d 769, 772 (2004); Alexander v. DaimlerChrysler Corp., 158 N.C. App. 637, 641-42, 582 S.E.2d 57, 60 (2003).

The writ of certiorari may be issued to permit review of the trial court's "judgments and orders." N.C. R. App. P. 21(a)(1). Unlike an appeal of right, however, certiorari is a discretionary writ issued only for good and sufficient cause. 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). "Where a statute provides an orderly procedure for appeal, certiorari will not lie as a substitute for an appeal, but is proper only when the aggrieved party cannot perfect his appeal within the time limited and such inability is not due to any fault on his part." In re Halifax Paper Co., 259 N.C. 589, 597, 131 S.E.2d 441, 447 (1963).

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 State gave written notice of appeal. (R p. 180) As explained in the

State's response to Defendant's motion to dismiss the appeal, the trial court's order is subject to appeal as a matter of right under Section 15A-1445(a)(2). Defendant has not identified any defect in the State's notice of appeal.

In the petition, Defendant seeks review of the trial court's 12 June 2019 order granting him a new trial. He acknowledges that the trial court granted his MAR, and that the State appealed. Defendant contends that Rule 28(c) permits him as an appellee to argue alternative grounds to support the order. To the extent Rule 28(c) does not permit him to raise those issues on appeal, Defendant asks this Court to review them by certiorari. (See petition)

The petition should be dismissed. The trial court's 12 June 2019 order is properly before this Court for review by virtue of the State's appeal. A petition for certiorari is unnecessary. E.g., State v. Howard, 247 N.C. App. 193, 205, 783 S.E.2d 786, 795 (2016). Further, Defendant was not aggrieved by the order which awarded him the new trial he sought. He lacks standing to seek review. See Halifax Paper Co., 259 N.C. at 597, 131 S.E.2d at 447.

To the extent this Court agrees with Defendant that the State's appeal should be dismissed, the State would join in Defendant's request for review of the trial court's 12 June 2019 order by certiorari.

WHEREFORE, the State of North Carolina respectfully requests that this Court dismiss Defendant's petition for writ of certiorari.

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 PETITION FOR WRIT OF CERTIORARI upon the  
DEFENDANT by emailing a PDF version of same, addressed to his  
ATTORNEYS OF RECORD as follows

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

Electronically Submitted  
Joseph A. Hyde  
Assistant Attorney General