

NO.

THIRTY-EIGHTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

STATE OF NORTH CAROLINA)
)
 v.)
)
 MARK BRADLEY CARVER)

From Gaston
COA19-1055

STATE'S PETITION FOR DISCRETIONARY REVIEW

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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 respectfully petitions this Court, pursuant to Appellate Rule 15 and Section 7A-31, to certify for discretionary review the published opinion of the North Carolina Court of Appeals issued 20 April 2021 in State v. Carver, No. COA19-1055, 2021 WL 1537712 (N.C. Ct. App. Apr. 20, 2021) (copy of opinion attached). In support of this petition, the State shows the following:

FACTUAL AND PROCEDURAL HISTORY

On 5 May 2008, Defendant murdered Irina Yarmolenko, a student at UNC Charlotte, and left her body on the bank of the Catawba River near the Whitewater Center, where it was found by jet skiers. (03/11 T pp. 38-41, 72)

On 15 December 2008, Defendant was indicted for first-degree murder. (R p. 4) The matter came on for trial by jury in March 2011. (03/11 T p. 1) Defendant was convicted and sentenced to life without parole. (R p. 10) Defendant appealed. By opinion issued 5 June 2012, the Court of Appeals found no error at trial. 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).

On 8 December 2016, Defendant filed with the trial court a motion for appropriate relief (MAR). (R p. 22) The matter came on for an evidentiary hearing in April 2019. (T p. 1) By order filed 12 June 2019, the trial court granted the MAR and awarded Defendant a new trial based in part on newly discovered evidence. (R p. 165) The State filed notice of appeal. (R p. 180)

On 27 July 2020, Defendant filed with the Court of Appeals a motion to dismiss the appeal and a petition for writ of certiorari, seeking review of the order granting his MAR. On 7 August 2020, the State filed responses to the motion and petition. (See Docket in Case No. COA19-1055) In the State's response to Defendant's petition for writ of certiorari, it stated the following:

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.

(See 08/07/2021 Response in Case No. COA19-1055)

By opinion issued 20 April 2021, the Court of Appeals dismissed the appeal. State v. Carver, No. COA19-1055, 2021 WL 1537712 (Apr. 20, 2021). The Court of Appeals acknowledged that Section 15A-1445(a)(2) provides the State a right to appeal upon the granting of a new trial on the ground of newly discovered evidence. Id. at *3. It acknowledged that it had previously held the State had a right to appeal when the trial court granted a new trial based in part on newly discovered evidence. Id. at *4 (citing 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)). Still, the Court of Appeals dismissed the appeal from that part of the order not based on newly discovered evidence, and then dismissed as moot "the remaining portion of the appeal."¹ Id. at *5.

By order dated 20 April 2021, the Court of Appeals denied Defendant's petition for writ of certiorari. (See Docket in Case No. COA19-1055)

¹ By order dated 20 April 2021, the Court of Appeals also allowed Defendant's motion to dismiss/motion to strike "per opinion." (See Docket in Case No. COA19-1055) To the extent it is necessary, the State requests that this Court issue its writ of certiorari to review the Court of Appeals' order dismissing the State's appeal for the reasons explained herein. See N.C. R. App. P. 21(a)(2).

REASONS WHY CERTIFICATION SHOULD ISSUE

Section 15A-1445 “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.” State v. Monroe, 330 N.C. 433, 436, 410 S.E.2d 913, 915 (1991). Here, the Court of Appeals held the State lacked a right to appeal from a superior court order granting a defendant a new trial on the ground of newly discovered evidence. This Court should allow discretionary review because the opinion conflicts with this Court’s precedent and because the cause involves legal principles of major significance to the state’s jurisprudence.

I. THE STATE HAS AN ABSOLUTE RIGHT TO APPEAL.

“Ordinarily, the State has no right to appeal from a judgment in favor of a defendant in a criminal case, unless such right has been granted by statute.” Monroe, 330 N.C. at 435, 410 S.E.2d at 915. Whether competent evidence supports the trial court’s findings of fact is a question of law. State v. Connley, 295 N.C. 327, 337, 245 S.E.2d 663, 669 (1978), vacated on other grounds, 441 U.S. 929, 60 L. Ed. 2d 657 (1979); cf. Wallace v. Benner, 200 N.C. 124, 130, 156 S.E. 795, 798 (1931). By statute, the State may appeal from the superior court to the appellate division upon “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).

In Monroe, the defendant was convicted of armed robbery in June 1989. Monroe, 330 N.C. at 434, 410 S.E.2d at 914. Six months later, he filed an MAR and the superior court awarded a new trial on the basis of newly discovered evidence. Id. at 434-35, 410 S.E.2d at 914. The State appealed, but the Court of Appeals dismissed the appeal as interlocutory. Id. at 435, 410 S.E.2d at 914. Upon review, this Court concluded the Court of Appeals erred by dismissing the appeal. Id. at 436, 410 S.E.2d at 915. “By statute,” it said, “the State clearly has been granted the right to appeal a superior court order awarding a defendant a new trial on the ground of newly discovered evidence.” Id. This Court remanded to the Court of Appeals for consideration of the appeal. Id.

In Peterson, the defendant was convicted of murder and appealed; the Court of Appeals found no reversible error. Peterson, 228 N.C. App. at 341, 744 S.E.2d at 156. Eight years later, the defendant 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, the Court of Appeals held the trial court had entered an appealable order: “because the trial court granted [the] 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 Court of Appeals dismissed as unnecessary the State’s petition for certiorari. Id.

In State v. Howard, 247 N.C. App. 193, 783 S.E.2d 786 (2016), the defendant was convicted of murder and appealed; the Court of Appeals found no error. Id. at 194, 783 S.E.2d at 787-88. The defendant 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’ . . . DNA test results.” Id. at 201, 783 S.E.2d at 792. The State appealed. Id. Before the Court of Appeals, the defendant argued the State had no right to appeal “from certain portions of the trial court’s order.” Id. The Court of Appeals 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. It dismissed as unnecessary the State’s petition for certiorari. Id. at 205, 783 S.E.2d at 795.

Here, the trial court granted Defendant 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 relief based in part on other grounds as well as newly discovered evidence. This does not make the order any less appealable. See Peterson, 228 N.C. App. 343, 744 S.E.2d at 157. Indeed, the State did not appeal from certain portions of the trial court’s order, but from the order as a whole. See Howard, 247 N.C. App. At 205, 783 S.E.2d at 794.

II. THE COURT OF APPEALS ERRED BY DISMISSING.

The Court of Appeals dismissed the State's appeal. It posited that it could "review issues beyond the newly discovered evidence only if those issues are intertwined with the newly discovered evidence issue." Carver, 2021 WL 1537712, at *1; see also id. at *3 (citing Howard and Carl v. State, 192 N.C. App. 544, 550, 665 S.E.2d 787, 793 (2008), disc. review denied, 363 N.C. 123, 672 S.E.2d 684 (2009)). It rejected the State's reliance on Peterson, noting that Howard had cited Peterson (thus they were "harmonized"), and it was bound by the more recent decision. Id. at *4. The Court of Appeals found the two issues here "are not inextricably linked." Id. It concluded that "the right to appeal one ruling does not confer a right to appeal the other." Id.

In support of its conclusion that the State lacked a right to appeal from "every issue," the Court of Appeals noted that Section 15A-1445(a)(2) limits appellate review to "questions of law." Id. at *4. The State's argument, it said, would ignore the limitation. Id. In particular, it noted that the State challenged the trial court's findings of fact as unsupported by the evidence. Id.

The Court of Appeals chided the State for not petitioning for certiorari. Id. at *5. Declaring fealty to Howard, it dismissed the State's appeal "from the portion of the challenged order" not based on newly discovered evidence, and then dismissed "the remaining portion of the appeal as moot." Id.

The Court of Appeals erred by dismissing the State's appeal. Peterson held unequivocally that the State has a right to appeal "because the trial court granted defendant's MAR based, in part, on newly discovered evidence." Peterson, 228 N.C. App. at 343, 744 S.E.2d at 157. Howard actually denied a motion to dismiss based on the same grounds as Defendant asserted here: that the State could not appeal from "the portion" of the order not pertaining to newly discovered evidence. Howard, 247 N.C. App. at 203, 783 S.E.2d at 793.

What the Court of Appeals called the "inextricably intertwined doctrine" finds no support in law. Carver, 2021 WL 1537712, at *4. In Carl, the Court of Appeals allowed an interlocutory appeal in order to address the issue of sovereign immunity, and then allowed review by certiorari of another issue as "inextricably intertwined" with the issue of sovereign immunity. Carl, 192 N.C. App. at 550, 665 S.E.2d at 793. Presumably, absent the intertwining, the Court of Appeals would have been bound to dismiss the appeal as interlocutory.

Citing Carl, the Court of Appeals here found no intertwining of issues and dismissed the appeal. It thus reverted to Carl's general rule that there is no appeal of right from an interlocutory order. It is true the order awarding a new trial based on newly discovered evidence is interlocutory, but it is one from which the State has an absolute right to appeal. Monroe, 330 N.C. at 436, 410 S.E.2d at 915. The Court of Appeals' opinion is indistinguishable from Monroe.

Contrary to the Court of Appeals' suggestion, Howard did not – indeed, could not – overrule Peterson's holding that the State has a right to appeal from an order granting a new trial based in part on newly discovered evidence. Further, even assuming the precedents were inconsistent (which they are not), the Court of Appeals was bound to follow the earlier, not the later opinion. See In re R.T.W., 359 N.C. 539, 542 n.3, 614 S.E.2d 489, 491 n.3 (2005), superseded by statute on other grounds as stated in Matter of A.S.M.R., 375 N.C. 539, 542, 850 S.E.2d 319, 321 (2020). The Court of Appeals erred moreover in thinking Section 15A-1445(a)(2) permits no challenge to unsupported findings of fact. See Connley, 295 N.C. at 337, 245 S.E.2d at 669. Even if that were so, it would not make the order ultimately granting a new trial unappealable.

The Court of Appeals erred fundamentally in partitioning the appeal by issue. Appeal is taken from orders and judgments, not issues and arguments. See N.C.G.S. § 7A-27(b) (2019); N.C. R. App. P. 4 (a)(1). It is true that the legislature may restrict the scope of issues addressed on appeal. E.g., N.C.G.S. § 15A-1444(e) (2019). But 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.” Monroe, 330 N.C. at 436, 410 S.E.2d at 915 (emphasis added). The trial court entered such an order here. Just as in Monroe, the Court of Appeals erred by dismissing the appeal.

III. THIS COURT SHOULD DIRECT THE COURT OF APPEALS TO CONSIDER THE MERITS OF THE STATE'S APPEAL.

By statute, decisions of the Court of Appeals upon review of motions for appropriate relief are final and not subject to further review in this Court by appeal, certification, writ, or otherwise. N.C.G.S. § 7A-28(a) (2019); see also N.C.G.S. § 15A-1422(f) (2019). Ordinarily these statutory provisions preclude this Court's review of Court of Appeals' decision on MARs in noncapital cases. State v. Ellis, 361 N.C. 200, 205, 639 S.E.2d 425, 428 (2007). These statutes cannot however restrict this Court's state constitutional authority to review on appeal any decision of the courts below. Id. (citing N.C. Const. art. IV, § 12); cf. State v. Banks, 367 N.C. 652, 654, 766 S.E.2d 334, 337 (2014) (PDR allowed).

In Monroe, the defendant argued Section 7A-28 barred this Court from reviewing the case. Monroe, 330 N.C. at 435, 410 S.E.2d at 915. This Court observed "that the Court of Appeals erroneously declined to review the merits of the superior court's grant of a new trial." Id. Thus, the Court of Appeals' action was not a "decision . . . upon review" within the meaning of Section 7A-28, and that statute was not an impediment to this Court's review. Id.; see also State v. Roberts, 351 N.C. 325, 328, 523 S.E.2d 417, 419 (2000) (Section 15A-1422(f) did not bar this Court's review where Court of Appeals did not review the trial court's decision to grant the defendant's MAR).

So too here. As in Monroe, the Court of Appeals erred by dismissing the appeal. As in Monroe, no statute bars this Court from reviewing the decision. To the extent necessary, this Court should invoke its constitutional authority. Whatever the vehicle, this Court should allow review because the Court of Appeals' decision conflicts with Monroe, to say nothing of the plain language of Section 15A-1445(a). Further, insofar as the Court of Appeals "harmonized" Peterson so as not to allow an appeal from a superior court's order granting a new trial based in part on newly discovered evidence, it also overruled itself, contrary to In re Civil Penalty, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989).

Moreover, the cause involves legal principles of major significance to the State's jurisprudence. Appellants should be entitled to rely upon precedents defining the scope of their right to appeal. The Court of Appeals had dismissed as unnecessary a petition for writ of certiorari in apparently every other case appealed under Section 15A-1445(a)(2) since Monroe recognized the State's absolute right to appellate review. It was not until the State, relying on these precedents, declined to file a petition for certiorari that the Court of Appeals discovered such a petition was necessary. Whether Section 15A-1445(a)(2) allows an appeal of right from an order granting a new trial based in part on newly discovered evidence, as Peterson said, or not, as the Court of Appeals held here, is a legal issue worthy of this Court's consideration.

CONCLUSION

WHEREFORE, the State respectfully requests this Court summarily reverse and remand to the Court of Appeals with directions to consider the merits of the State's appeal. Alternatively, the State respectfully requests that this Court allow discretionary review of the Court of Appeals' opinion and order which dismissed the State's appeal.

ISSUES TO BE BRIEFED

I. WHETHER THE COURT OF APPEALS ERRED BY DISMISSING THE STATE'S APPEAL.

Electronically submitted this the 10th day of May, 2021.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this day served the foregoing STATE'S PETITION FOR DISCRETIONARY REVIEW upon the DEFENDANT by electronic mail, addressed to his ATTORNEY OF RECORD as follows:

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Electronically submitted this the 10th day of May, 2021.

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