

NORTH CAROLINA COURT OF APPEALS

STATE OF NORTH CAROLINA)	
)	
v.)	<u>From Gaston</u>
)	
MARK BRADLEY CARVER)	

**MOTION TO DISMISS STATE'S BRIEF /
MOTION TO STRIKE PORTIONS OF STATE'S BRIEF**

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No. COA19-1055

JUDICIAL DISTRICT 27A

NORTH CAROLINA COURT OF APPEALS

STATE OF NORTH CAROLINA)	
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MARK BRADLEY CARVER)	

**MOTION TO DISMISS STATE'S BRIEF /
MOTION TO STRIKE PORTIONS OF STATE'S BRIEF**

TO THE HONORABLE COURT OF APPEALS OF NORTH CAROLINA:

NOW COMES the Defendant-Appellee, Mr. Mark Bradley Carver, through undersigned counsel, and respectfully moves this Court, pursuant to Rule 37(a) of the N.C. Rules of Appellate Procedure (“Rules”) to dismiss the State’s appeal as moot in light of the State’s inability to rely on N.C. Gen. Stat. § 15A-1445(a)(2) or *State v. Peterson*, 228 N.C. App. 339, 343, 744 S.E.2d 153, 157, *review denied*, 367 N.C. 284, 752 S.E.2d 479 (2013), for review of the trial court’s 12 June 2019 Order Granting Defendant’s Motion for Appropriate Relief on the basis of ineffective assistance of counsel. In support of this Motion, Mr. Carver shows the following:

FACTUAL AND PROCEDURAL BACKGROUND

1. On 15 December 2008, a grand jury in Gaston County Superior Court indicted Mr. Carver and his cousin, Mr. Neal Cassada, with first-degree murder and conspiracy to commit first-degree murder in connection with the 5 May 2008 death of Ms. Irina Yarmolenko. (R p 4; Trial T p 2).¹

2. Mr. Cassada died of a heart attack the day before his October 2010 trial. Mr. Carver's case went to trial in March 2011 before the Honorable Timothy S. Kincaid. (R p 391; Trial T p 1).

3. Attorneys Brent Ratchford and David Phillips represented Mr. Carver at trial. (T pp 1083, 1187).

4. At trial, Karen Winningham of the SBI (now State) Crime Lab testified that the partial DNA profile in a sample taken from the pillar above the driver's side rear door of Ms. Yarmolenko's car (Item 34-2) was a mixture, with the predominant profile matching Mr. Carver's DNA profile. (R pp 469, 478; Trial T pp 271-272). She also testified that Mr. Carver could not be excluded as a contributor to the DNA mixture found on the seatbelt button in the passenger side rear seat (Item 34-15). (R p 470; Trial T pp 280-281).

¹ The Motion to Dismiss State's Appeal / Motion to Strike Portions of State's Brief and Defendant-Appellee's Brief will use these designations: March 2011 trial transcript (Trial T p ___); April 2019 hearing transcript (T p ___); Record on Appeal and Supplement to Record on Appeal (R p ___).

5. Mr. Carver's counsel provided the State with no pretrial discovery and presented no evidence on his behalf. (Trial T pp 3, 337-340).

6. Although the trial court dismissed the conspiracy charge, the jury found Mr. Carver guilty of first-degree murder. (R p 7; Trial T pp 336-337, 851).

7. On 21 March 2011, the trial court entered judgment and sentenced Mr. Carver to a mandatory sentence of life without parole. (R pp 10-11; Trial T pp 854-855).

8. Mr. Carver gave oral notice of appeal in open court upon entry of judgment and filed an MAR on 29 March 2011 in Gaston County Superior Court pursuant to N.C. Gen. Stat. § 15A-1414. (R pp 12-20; Trial T p 855).

9. The trial court summarily denied the MAR in a 14 April 2011 administrative order. (R p 21).

10. On 5 June 2012, a divided panel of this Court upheld Mr. Carver's conviction. *State v. Carver*, 221 N.C. App. 120, 122, 725 S.E.2d 902, 904 (2012), *aff'd per curiam*, 366 N.C. 372, 736 S.E.2d 172 (2013).

11. On 8 December 2016, Mr. Carver filed an MAR in Gaston County Superior Court pursuant to N.C. Gen. Stat. § 15A-1415. (R pp 22-51). He amended the MAR on 26 July 2018 and 8 April 2019. (R pp 100-122, 156-162). Mr. Carver asserted several claims, including ineffective assistance of counsel and newly discovered evidence. (R pp 39-46, 109-110).

12. On 10 January 2017, the Honorable Jesse B. Caldwell III ordered an evidentiary hearing for Mr. Carver's MAR. (R pp 52-53). In April 2019, the hearing took place over nine days in Gaston County Superior Court, with the Honorable Christopher W. Bragg presiding. (R p 165).

13. On 12 June 2019, the trial court filed a written Order Granting Defendant's Motion for Appropriate Relief on grounds of ineffective assistance of counsel and newly discovered evidence. (R p 165-179). The trial court denied Mr. Carver's remaining claims. (R p 174).

14. In granting Mr. Carver's ineffective assistance of counsel claim, the court concluded that it was "not reasonable" that Mr. Carver's trial counsel failed to investigate his medical condition "particularly in light of the manner of death (strangulation) of a young, healthy and seemingly fit Ms. Yarmolenko," and that it was not "not reasonable" that counsel failed to investigate his intellectual disabilities, which were "relevant regarding statements he made during his questioning by SBI Special Agent David Crow." (R pp 167-168, 172-173).

15. The court further concluded that it was "not reasonable" that Mr. Carver's counsel – specifically Ratchford – failed to "independently and adequately research, investigate, and educate himself on the science related to the one key piece of evidence in this case, "Touch DNA." (R pp 168-169, 173-174).

16. In its findings of fact, the court found that Ratchford relied on a DNA expert, Dr. Ron Ostrowski, even though he had "little information" in his case file about the expert, including no CV or report, and that Ratchford failed to meet with or discuss the testimony of the SBI Crime Lab analysts, Winningham and Hughes. (R p 168).

17. The court noted in its findings of fact that Ratchford was not aware of revised guidelines for DNA mixture interpretation that the Scientific Working Group on DNA Analysis Methods (SWGDM) published in April 2010. (R p 168; T pp 811-812).

18. The court further found that, "lacking any independent research, education, knowledge or investigation of Touch DNA," Ratchford "could not challenge the opinions of" his DNA expert, Ostrowski, who had told him that the State's touch DNA evidence was "good," and that calling him as a witness would only hurt the defense. (R pp 168-169).

19. Based on its findings of fact, the court concluded that Mr. Carver met his burden of proof and established his ineffective assistance of counsel claim by a preponderance of the evidence. (R p 174).

20. In granting Mr. Carver's newly discovered evidence claim, the court recognized that Mr. Carver had asked the court to find that "newly discovered evidence exists in the form of scientific advances in DNA testing

specifically as it relates to the testing, analysis and interpretation of DNA mixtures.” (R p 169).

21. The court accepted, adopted, and incorporated Dr. Maher Nouredine’s 20 November 2016 report, opinions, and conclusions “as facts for the purposes of supporting this Order.” (R p 171).

22. Dr. Nouredine testified as a DNA expert for the defense at the evidentiary hearing. (T p 800).

23. In his report and testimony, Dr. Nouredine stated that the SBI Crime Lab had failed to adopt the revised SWGDAM guidelines for DNA mixture interpretation (published in April 2010) when the lab analyzed Items 34-2 and 34-15 in Mr. Carver’s case, and the lab did not adopt those guidelines until 2013. (R p 177; T pp 879-880, 894).

24. When Dr. Nouredine applied the SWGDAM guidelines to his interpretation of the DNA mixtures in Items 34-2 and 34-15, he concluded that the samples had too much missing data and should have been deemed “inconclusive.” (R pp 177-178; T pp 832, 853-857). He described Winningham’s interpretation of Item 34-2 to be “highly erroneous and scientifically baseless,” and he said that Item 34-15 was of such low quality that one could not do “anything” with it. (R p 177; T pp 832, 853-857).

25. Based on its findings of fact, the court concluded that Mr. Carver met his burden of proof and established his newly discovered evidence claim by a preponderance of the evidence. (R p 174).

26. The court vacated Mr. Carver's 21 March 2011 first-degree murder conviction and awarded him a new trial. (R p 175).

27. On 13 June 2019, the State filed written notice of appeal. (R pp 180-181). The notice provided no statutory grounds for the appeal. (R p 180).

28. On 25 November 2019, the State-Appellant filed the settled Record on Appeal in this Court, which docketed the appeal on 3 December 2019.

29. On 24 January 2020, after receiving one extension of time, the State-Appellant filed the Brief for the State. The Brief presented two issues (framed as a single issue): Did the trial court err by granting Mr. Carver's MAR on the grounds of ineffective assistance of counsel and newly discovered evidence? (Brief for the State pp 12-30).

30. In the Brief, the State relies on N.C. Gen. Stat. § 15A-1445(a)(2) and *Peterson*, 228 N.C. App. at 343, 744 S.E.2d at 157, as grounds for appellate review. (Brief for the State pp 2-3).

31. The State challenges the trial court's findings of fact and conclusions of law on both ineffective assistance of counsel and newly discovered evidence and seeks reversal of the trial court's Order as to both claims. (R pp 12-30).

32. To date, the State has not filed a Petition for Writ of Certiorari which seeks this Court's review of the trial court's granting of Mr. Carver's ineffective assistance of counsel claim.

33. On this date, 27 July 2020, Mr. Carver has filed the Defendant-Appellee's Brief and Petition for Writ of Certiorari simultaneously with this Motion to Dismiss / Motion to Strike Portions of State's Brief. This Motion incorporates the Brief and Petition by reference as if fully set forth herein.

**REASONS WHY THIS COURT SHOULD DISMISS
THE STATE'S APPEAL OR, IN THE ALTERNATIVE,
STRIKE PORTIONS OF THE STATE'S BRIEF**

The State cannot rely on N.C. Gen. Stat. § 15A-1445(a)(2) or *Peterson*, 228 N.C. App. at 343, 744 S.E.2d at 157, to seek appellate review of the trial court's ruling on Mr. Carver's claim of ineffective assistance of counsel. The State also can assert no grounds for certiorari review of this issue. Even if the State prevails on the lone issue properly before this Court – newly discovered evidence – the trial court's findings of fact and conclusions of law on ineffective assistance of counsel are sufficient to uphold the court's order granting Mr. Carver's Motion for Appropriate Relief (MAR) and awarding him a new trial. Thus, the State's appeal should be dismissed as moot.

"[T]he State's right to appeal in a criminal case is statutory, and statutes authorizing an appeal by the State in criminal cases are strictly construed." *State v. Howard*, 247 N.C. App. 193, 202, 783 S.E.2d 786, 793

(2016) (citations omitted). Statutes authorizing appeal by the state in a criminal proceeding, such as N.C. Gen. Stat. § 15A-1445, “may not be enlarged” by this Court. *State v. Vestal*, 131 N.C. App. 756, 757, 509 S.E.2d 249, 250 (1998). “Because section 15A-1445 is to be strictly construed, any deviations from or additions to the orders or rulings appealable by the State must be authorized by the legislature, not the courts.” *State v. J.C.*, 372 N.C. 203, 207-208, 827 S.E.2d 280, 283 (2019).

N.C. Gen. Stat. § 15A-1445(a)(2) entitles the State to appeal a trial court’s “granting of a motion for a new trial on the ground of newly discovered or newly available evidence "but only on questions of law." None of the other six grounds for appellate review listed in N.C. Gen. Stat. § 15A-1445 permit the State to appeal from an ordering granting a defendant’s claim of ineffective assistance of counsel in an MAR. In the Brief for the State, the State seeks review pursuant to N.C. Gen. Stat. § 15A-1445(a)(2) and *Peterson*, 228 N.C. App. at 342, 744 S.E.2d at 157. (Brief for the State pp 2-3). The State’s citation to *Peterson* is the State’s only acknowledgement that a jurisdictional issue exists in this case.

In *Peterson*, this Court found that two grounds, *Brady* violations and newly discovered evidence, served as the basis for the trial court's decision to grant the defendant's MAR and award him a new trial. *Peterson*, 228 N.C. App. at 342, 744 S.E.2d at 156-157. This Court held:

"[B]ecause the trial court granted defendant's MAR based, in part, on newly discovered evidence, the State had the right to appeal the MAR order. We note that the State, in case we found that the MAR order was based solely on *Brady* violations, filed a petition for writ of certiorari. Since certiorari is not necessary to confer jurisdiction on this Court, we dismiss the State's petition." *Id.*

Because this Court upheld the order for a new trial on newly discovered evidence grounds, it did not reach the other ground for relief which the trial court found. *Id.*, 228 N.C. App. at 348, 744 S.E.2d at 156. Accordingly, this Court's statement regarding the scope of the State's appeal was non-binding dicta. This Court later followed *Peterson*, with limitation, stating:

"[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) as its ground for appellate review." *Howard*, 247 N.C. App. at 205, 783 S.E.2d at 794 (2016).

Thus, in *Howard*, this Court did not hold that non-binding dicta from *Peterson* established a blanket rule that all grounds for relief are appealable by the State when one of those grounds is the granting of a newly discovered evidence claim. Instead, "all of the relief" which the trial court grants to the defendant must be "inextricably linked to, and based on, what the court found to be newly discovered evidence." *Id.*

In Mr. Carver's case, the trial court found the newly discovered evidence to be "scientific advances in DNA testing specifically as it relates to

the testing, analysis and interpretation of DNA mixtures,” which the SBI Crime Lab had failed to adopt at the time of Mr. Carver’s March 2011 trial. (R pp 169-172, 174). The court also held that the failure of Mr. Carver’s counsel to “independently and adequately research, investigate and educate himself on the science related to the one, key piece of evidence in this case, ‘Touch DNA,’” amounted to ineffective assistance of counsel. (R pp 168-169, 173-174). However, the court found ineffective assistance of counsel on two additional grounds – the failure of Mr. Carver's counsel to investigate his medical condition and intellectual limitations. (R pp 167-168, 172-173).

Thus, in contrast to *Howard*, “all of the relief” which the trial court granted to Mr. Carver in his MAR was not “inextricably linked to, and based on, what the court found to be newly discovered evidence.” Accordingly, the State cannot rely on either N.C. Gen. Stat. § 15A-1445(a)(2) or *Peterson* as grounds for review of the trial court’s granting of Mr. Carver’s ineffective assistance of counsel claim.

Moreover, the State did not rely on *Howard* in asserting a right to review of the trial court's granting of Mr. Carver's ineffective assistance of counsel claim. (Brief for the State pp 2-3). Thus, under N.C. R. App. P. 28(b)(6), the State has abandoned that argument for appellate review. *See State v. Hester*, 254 N.C. App. 506, 529, 803 S.E.2d 8, 24 (2017) (litigants “waive the arguments they fail to make”).

The State's situation is similar to the situation which criminal defendants face when they appeal from guilty pleas. Under N.C. Gen. Stat. § 15A-1444, a defendant's right to appeal after a guilty plea is statutory and limited. *State v. Rouse*, 234 N.C. App. 92, 95, 757 S.E.2d 690, 692 (2014) (recognizing the constitutional issue raised by the defendant did not fall within his limited right of appeal after a guilty plea under N.C. Gen. Stat. § 15A-1444). When a defendant appeals on one statutorily authorized ground, this Court has still dismissed issues which exceeded the defendant's statutory right to appeal. *See, e.g., State v. Pimental*, 153 N.C. App. 69, 74, 568 S.E.2d 867, 870 (2002) (concluding there was no right to appeal six issues raised in defendant's guilty plea appeal even though two issues were properly before the Court). However, even though they are not statutorily appealable, a defendant may still seek certiorari review of those issues. *See, e.g., State v. Collins*, 221 N.C. App. 604, 606, 727 S.E.2d 922, 924 (2012) (granting the State's motion to dismiss the defendant's direct appeal from the judgement entered on his guilty plea, but still granting certiorari review).

As a defendant's right to appeal from a guilty plea is statutory, an appeal of right is limited to those grounds specifically set out by statute, and all other grounds must be addressed to this Court in a petition for writ of certiorari. Likewise, under N.C. Gen. Stat. § 15A-1445(a)(2), 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. Review of any other ground which is not “inextricably linked to, and based on, what the court found to be newly discovered evidence,” *Howard*, 247 N.C. App. at 205, 783 S.E.2d at 794, must be brought before this Court in a petition for writ of certiorari.

However, in this case, the State should not even be entitled to certiorari review pursuant to N.C. R. App. P. 21. In a petition for writ of certiorari, a party must demonstrate “merit, or that probable error was committed” below. *State v. Moore*, 210 N.C. 686, 691, 188 S.E. 421, 424 (1936). Here, as set out fully in the Defendant-Appellee’s Brief, the State’s argument that the trial court erred in granting Mr. Carver’s ineffective assistance of counsel claim is entirely without merit. (Defendant-Appellee's Brief pp 21-48).

Thus, the State cannot rely on N.C. Gen. Stat. § 15A-1445(a)(2) or *Peterson*, 228 N.C. App. at 343, 744 S.E.2d at 157, to seek appellate review of the trial court’s granting of Mr. Carver’s ineffective assistance of counsel claim. Under N.C. R. App. P. 28(b)(6), the State also should be precluded from relying on *Howard*, 247 N.C. App. at 205, 783 S.E.2d at 794, due to its failure to make that argument in its principal brief and because “all of the relief” which the trial court granted to Mr. Carver in his MAR was not “inextricably linked to, and based on, what the court found to be newly discovered evidence.” Finally, because the State's challenge of the trial court's

granting of Mr. Carver's ineffective assistance of counsel claim is without merit, the State should not be eligible for certiorari review of that issue.

Even if the State successfully appeals the granting of Mr. Carver's MAR on the ground of newly discovered evidence, the Order awarding him a new trial would still be fully supported by the trial court's holding that his trial counsel was ineffective for failing to investigate his medical condition and intellectual limitations in addition to their failure to investigate the State's touch DNA evidence. Thus, the State's appeal of the newly discovered evidence grounds could have no meaningful effect and this Court should, therefore, dismiss the State's appeal as moot.

However, should this Court review the State's appeal, the State's challenge to the trial court's findings of fact on newly discovered evidence should be stricken from the Brief for the State. (Brief for the State p 28). Challenging the trial court's findings of fact does not involve "questions of law" and exceeds the scope of appellate review which N.C. Gen. Stat. § 15A-1445(a)(2) permits.

PRAYER FOR RELIEF

WHEREFORE, the Defendant-Appellee, Mr. Mark Bradley Carver, respectfully requests this Court to dismiss the State's appeal, or in the alternative, to strike any portions of the Brief for the State which challenge

the trial court's findings of fact on newly discovered evidence, and to grant any other relief which this Court deems proper.

Respectfully submitted, this 27th day of July 2020.

s/Electronically filed

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that the Motion to Dismiss State's Appeal / Motion to Strike Portions of the State's Brief has, on this date, been filed in the N.C. Court of Appeals by electronic delivery.

I further hereby certify that a copy of the above and foregoing Motion has, on this date, been duly served upon the State-Appellant by electronic mail as permitted by N.C. R. App. P. Rule 26(c) addressed to:

Mr. Joseph L. Hyde
Assistant Attorney General
N.C. Department of Justice
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On this 27th day of July 2020.

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