

NO. 11A22

FIFTH DISTRICT

NORTH CAROLINA SUPREME COURT

STATE OF NORTH CAROLINA)

)

v.)

From New Hanover

)

JAQUALYN ROBINSON)

MOTION TO DISMISS APPEAL

TO: THE HONORABLE CHIEF JUSTICE AND ASSOCIATE
JUSTICES OF THE NORTH CAROLINA SUPREME COURT

NOW COMES the State of North Carolina, by and through Nicholas R. Sanders, Assistant Attorney General, respectfully requests that this Court enter an order dismissing the appeal in this case. In support of this motion the State shows as follows:

PROCEDURAL HISTORY¹

1. On 29 October 2020, Defendant pled guilty to felony possession of cocaine and carrying a concealed gun pursuant to a plea agreement with the State. In accordance with that plea agreement, the trial court sentenced

¹ For a more complete factual and procedural history, the State respectfully refers this Court to its response to Defendant's conditional petition for writ of certiorari.

Defendant to 4 to 14 months' imprisonment, suspended the sentence, and placed Defendant on supervised probation for 12 months. (App. p. 29)²

2. Defendant noticed appeal and also filed a petition for writ of certiorari in the Court of Appeals. On 28 December 2021, the Court of Appeals entered an order dismissing the appeal and denying the petition for writ of certiorari. Judge Jackson dissented from the order with explanation as to why he would have allowed the petition for writ of certiorari. (See Order attached to Notice of Appeal)

3. On 10 January 2021, Defendant filed the instant notice of appeal based on this “dissent” and a conditional petition for writ of certiorari.

REASONS WHY THE APPEAL SHOULD BE DISMISSED

A party has a right to appeal to this Court when there is a dissenting opinion in the Court of Appeals. N.C.G.S. § 7A-30 provides in relevant part that “an appeal lies of right to [this Court] from any decision of the Court of Appeals rendered in a case” “[i]n which there is a dissent when the Court of Appeals is sitting in a panel of three judges.” Id. at (2). Rule 14 of the Rules of Appellate Procedure, which provides the rules for noticing appeal in this situation, specifically refers to this right to appeal as one “based upon the

² The documents in the appendix to the petition for writ of certiorari will be cited to as “(App. p. __).”

existence of a dissenting opinion in the Court of Appeals.” N.C. R. App. P. 14(b)(1) (emphasis added).

In contrast, Rule 21 of the Rules of Appellate Procedure specifically governs review in this Court from orders in the Court of Appeals. As that rule explains, only discretionary review through a petition for writ of certiorari is available to obtain review of an order issued by the Court of Appeals:

(2) Review of the Judgments and Orders of the Court of Appeals. The writ of certiorari may be issued by the Supreme Court in appropriate circumstances to permit review of the decisions and orders of the Court of Appeals when the right to prosecute an appeal of right or to petition for discretionary review has been lost by failure to take timely action, or for review of orders of the Court of Appeals when no right of appeal exists.

N.C. R. App. 21(a)(2) (bolding in original; underline added).

In this case, the Court of Appeals issued an order dismissing Defendant’s appeal and denied his petition for writ of certiorari; therefore, Defendant may only seek discretionary review of this order through a petition for writ of certiorari.³ See N.C. R. App. P. 21; see, e.g., Sanford v. Paris, 364 N.C. 306,

³ See Scherer & Leerberg, North Carolina Appellate Practice and Procedure § 21.09 (“When a Court of Appeals’ decision regarding whether to issue a writ of certiorari is memorialized in an opinion, the Supreme Court normally reviews the decision by notice of appeal or a petition for discretionary review. However, a party seeking further review in the Supreme Court should petition the Supreme Court for writ of certiorari when . . . [c]hallenging a Court of Appeals order granting or denying certiorari[.]” (emphasis in original)); § 16.04 (“[I]t is

310–11 (2010) (“[P]laintiffs filed a petition for writ of certiorari in this Court seeking review of the orders of the Court of Appeals . . .”). Judge Jackson’s dissent from the order does not grant Defendant a right to appeal the order under N.C.G.S. § 7A-30 because it is not a “dissenting opinion.” The Court of Appeals in this case ruled on the State’s motion to dismiss and Defendant’s petition for writ of certiorari through an order—no “opinions” were issued.⁴ Without an opinion, there is not a dissenting opinion. Therefore, Defendant has no right to appeal the order by the Court of Appeals, and his appeal in this Court should be dismissed.

CONCLUSION

WHEREFORE, the State of North Carolina respectfully requests this Court enter an order dismissing defendant’s appeal.

generally understood that an order of the Court of Appeals, is subject to further review in the Supreme Court by way of a petition for writ of certiorari.” (emphasis in original)).

⁴ Indeed, in addition to specifically referring to the right to appeal as one based on a dissenting “opinion[.]” N.C. R. App. P. 14 also provides that notice of appeal be given within a certain timeframe of the mandate issuing to the trial courts; however, there is no mandate when the Court of Appeals issues an order denying a petition for writ of certiorari.

Electronically submitted this the 24th day of January, 2022.

JOSHUA H. STEIN
ATTORNEY GENERAL

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this day served the foregoing MOTION TO DISMISS APPEAL upon the DEFENDANT by emailing a PDF version of same, addressed to his ATTORNEY OF RECORD as follows

Sarah Holladay
Email: sarah@holladaylawoffice.com

Electronically submitted this the 24th day of January, 2022.

Electronically Submitted
Nicholas R. Sanders
Assistant Attorney General