IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-26-2

Filed: 5 November 2019

Johnston County, No. 14 CRS 55188, 15 CRS 53276

STATE OF NORTH CAROLINA

v.

VAN BUREN KILLETTE, SR.

Appeal by defendant from judgment entered 6 July 2017 by Judge Thomas H. Lock in Johnston County Superior Court. Originally heard in the Court of Appeals 20 September 2018, with opinion issued 2 October 2018. The defendant's petition for discretionary review pursuant to N.C. Gen. Stat. § 7A-31 was allowed by the Supreme Court of North Carolina on 19 August 2019 for the limited purpose of remanding to this Court for reconsideration.

Attorney General Joshua H. Stein, by Assistant Attorney General Nancy Dunn Hardison, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Katy Dickinson-Schultz, for defendant-appellant.

TYSON, Judge.

I. Factual Background

The facts giving rise to this appeal are set forth in detail in this Court's prior opinion. *State v. Killette*, ___ N.C. ___, 818 S.E.2d 646, 2018 WL 4701970 (2018) (unpublished). Defense counsel filed a motion to suppress the items seized during

the September 2014 search. The hearing on this motion was held 3 May 2017. At the conclusion of the hearing, the parties consented to the court ruling out of session. The court signed a written order denying Defendant's motion to suppress on 6 July 2017, which was filed 7 July 2017.

Defense counsel also filed a motion to suppress the items seized from a June 2015 search. The hearing on this motion was held 18 May 2017. At the conclusion of this hearing, the trial court orally denied the motion to suppress and entered a written order memorializing its ruling filed on 7 June 2017.

On 6 July 2017, Defendant entered an *Alford* plea pursuant to a plea arrangement with the State to the two counts of manufacturing methamphetamine, alleged in 14 CRS 55188 and 15 CRS 53276. In exchange for the plea, the State dismissed the remaining charges. The trial court consolidated the offenses into one judgment, sentenced Defendant to a term of 120 to 156 months of imprisonment in accordance with the terms of the plea arrangement. Defendant filed a handwritten notice of appeal on 10 July 2017.

Defendant's *pro se* notice of appeal was filed appealing "the decision made in reference to the file number 14 CRS 055188 and 15 CRS 053276." The notice is addressed "To The Clerk of Superior Court" and does not reflect an appeal to this Court nor show that the notice was served on the State. Nonetheless, appellate entries were completed and appellate counsel was appointed. Defendant's appellate

counsel filed a petition for writ of certiorari to allow Defendant to seek review to this Court.

II. Intent to Appeal Denial of Motion to Suppress Evidence

A. Direct Appeal

Defendant's sole argument on appeal is that the trial court erred by denying his motion to suppress the evidence obtained from the probation officer's search in September 2014. We dismiss Defendant's attempted direct appeal for his failure to preserve this issue and to provide notice to the State and trial court when he entered his guilty plea.

The Supreme Court of North Carolina has held "when a defendant intends to appeal from the denial of a suppression motion pursuant to [N.C. Gen. Stat. § 15A-979(b)], he must give notice of his intention to the prosecutor and to the court *before* plea negotiations are finalized; otherwise, he will waive the appeal of right provisions of the statute." *State v. Tew*, 326 N.C. 732, 735, 392 S.E.2d 603, 605 (1990) (citation omitted) (emphasis supplied).

This Court has repeatedly held that when a defendant pleads guilty without first notifying the State of the intent to appeal a suppression ruling, the defendant "has not failed to take timely action," and thus "this Court is without authority to grant a writ of certiorari." *State v. Pimental,* 153 N.C. App. 69, 77, 568 S.E.2d 867, 872, *disc. review denied*, 356 N.C. 442, 573 S.E.2d 163 (2002). Rather, as in other

cases involving a guilty plea, the right to appeal was lost because the defendant pleaded guilty, thereby waiving the right to appeal, and not because he failed "to take timely action." *Id.* at 75-77, 568 S.E.2d at 871-72. Under Appellate Rule 21, a petition for a writ of certiorari may be allowed in this context only if the defendant's right to prosecute the appeal "has been lost by failure to take timely action." N.C. R. App. P. 21(a).

B. Defendant's Petition for Writ of Certiorari

Defendant has "petitioned this Court for *certiorari*. A petition for the writ must show merit or that error was probably committed below. *In re Snelgrove,* 208 N.C. 670, 672, 182 S.E. 335. *Certiorari* is a discretionary writ, to be issued only for good and sufficient cause shown. *Womble v. Gin Company,* 194 N.C. 577, 579, 140 S.E. 230." *State v. Grundler,* 251 N.C. 177, 189, 111 S.E.2d 1, 9 (1959). *See also State v. Ross*, 369 N.C. 393, 400, 794 S.E.2d 289, 293 (2016) (reversing grant of certiorari by the Court of Appeals on defendant's challenge of sufficiency of factual basis of a guilty plea: "Court of Appeals may choose to grant such a writ to review some issues that are meritorious but not others for which a defendant has failed to show good or sufficient cause").

In his petition for writ of certiorari, Defendant asserts the applicability of *State v. Davis,* 237 N.C. App. 22, 763 S.E.2d 585, (2014). The opinion in *Davis*, with no analysis and without citing or addressing prior binding authority in *Tew* or *Pimental,*

cited a case with no precedential value and allowed a discretionary writ of certiorari in a similar circumstance. *Id.* at 27, 763 S.E.2d at 589 (citing *State v. Franklin,* 224 N.C. App. 337, 736 S.E.2d 218, *aff'd per curiam by equally divided court*, 367 N.C. 183, 752 S.E.2d 143 (2013)).

Our Supreme Court has addressed this Court's responsibility when faced with two arguably inconsistent opinions from separate panels: we must follow the earlier opinion. *State v. Jones,* 358 N.C. 473, 487, 598 S.E.2d 125, 133-34 (2004) (citing *In re Civil Penalty*, 324 N.C. 373, 385, 379 S.E.2d 30, 37 (1989)). In *Jones,* our Supreme Court held that, when faced with two or more inconsistent panel opinions on an issue, this Court must follow the earliest opinion, because one panel of this Court cannot overrule another. *Id.* The Supreme Court explained that although "a panel of the Court of Appeals may disagree with, or even find error in, an opinion by a prior panel and may duly note its disagreement or point out that error in its opinion, the panel is bound by that prior decision until it is overturned by a higher court." *Id.* Under well-settled precedents, we disregard *Davis* and follow *Tew*, *Pimental*, and *State v. Harris* as the earlier, binding precedents. *See Jones,* 358 N.C. at 487, 598 S.E.2d at 133-34.

In our view, *Tew, Pimental,* and *Harris* correctly apply the law. *State v. Harris*, 243 N.C. App. 137, 141, 776 S.E.2d 554, 556 (2015). In previous cases, our Supreme Court and this Court have stressed the importance of a defendant's prior notice of

intent to appeal as a way to alert the State, during the plea bargaining process, that the defendant may seek to appeal the denial of the motion to suppress. *Tew*, 326 N.C. at 735, 392 S.E.2d at 605.

> Once a defendant strikes the most advantageous bargain possible with the prosecution, that bargain is incontestable by the [S]tate once judgment is final. If the defendant may first strike the plea bargain, "lock in" the State upon final judgment, and then appeal a previously denied suppression motion, [the defendant] gets a second bite at the apple, a bite usually meant to be foreclosed by the plea bargain itself.

State v. McBride, 120 N.C. App. 623, 626, 463 S.E.2d 403, 405 (1995).

Here, the wisdom of this reasoning is plainly evident. Defendant entered an *Alford* plea pursuant to a plea arrangement with the State on the two counts of manufacturing methamphetamine, 14 CRS 55188 and 15 CRS 53276, on 6 July 2017. In exchange, *the State dismissed the remaining charges*. The trial court consolidated the offenses into one judgment, again in accordance with the terms of the plea arrangement.

Defendant knew his motions to suppress were denied. He received the full benefit of his bargain and failed to place the State or the trial court on any notice he intended to reserve the right to appeal. Defendant's failure to provide the required notice to the State and the trial court damages the integrity of the plea bargaining process. If defendants can so easily circumvent the fairness requirement that the

State be informed of a defendant's intent to appeal prior to concluding the plea agreement, the State may offer fewer plea bargains.

Even if *Tew*, *Pimental* and *Harris* were not binding on the issues here—and they are—within any jurisdictional discretion to allow the petition, we would follow and apply their reasoning. After reviewing the parties arguments, we apply binding precedents, and deny Defendant's petition for a writ of certiorari on this ground.

Unless *Tew*, *Pimental*, and *Harris* holdings are overturned by our Supreme Court, this Court is bound to follow them in all future cases, even if one panel of our Court failed to follow and to apply prior binding precedents, and purportedly relied upon a fractured case with no precedential value. *See Davis*, 237 N.C. App. at 27, 763 S.E.2d at 589; *see also In re Civil Penalty*, 324 N.C. at 385, 379 S.E.2d at 37.

Other than recognizing this Court's appellate *jurisdiction to exercise our discretion* on a petition for writ of certiorari, nothing else in the holdings of either *State v. Stubbs*, 368 N.C. 40, 770 S.E.2d 74 (2015) or *State v. Ledbetter*, __ N.C. __, 814 S.E.2d 39 (2018) bears on the issues before us in this appeal. The fact this Court possesses the jurisdictional power to allow in our discretion, does not compel us to do so under Defendant's burden to show prejudicial reversible error and the clearly unmeritorious facts before us.

Applying *Ross*, *Tew, Pimental* and *Harris, supra,* Defendant's petition shows no basis to grant his requested discretionary writ. We deny the petition for a writ of

certiorari to review the unpreserved and waived suppression rulings. Defendant's petition does not assert his "failure to take timely action."

We dismiss Defendant's purported appeal and deny Defendant's petition for writ of certiorari. *It is so ordered*.

DISMISSED.

Judge BERGER concurs.

Judge INMAN concurs with separate opinion.

Inman, Judge, concurring.

I concur in the majority's decision to deny Defendant's petition for certiorari review upon reconsideration in light of the North Carolina Supreme Court's decisions in *State v. Ledbetter*, ___ N.C. ___, 814 S.E.2d 39 (2018), and *State v. Stubbs*, 368 N.C. 40, 770 S.E.2d 74 (2015). I write separately, however, because I respectfully disagree with the majority's holding that prior decisions of the Supreme Court and this Court, relied upon by our earlier opinion in this case and in today's opinion, are binding on our exercise of discretion in this case.

The majority, relying on *State v. Tew*, 326 N.C. 732, 392 S.E.2d 603 (1990), and *State v. Pimental*, 153 N.C. App. 69, 568 S.E.2d 867 (2002), writes that "[u]nder Appellate Rule 21, a petition for a writ of certiorari may be allowed in this context only if the defendant's right to prosecute the appeal 'has been lost by failure to take timely action.' " Following *Ledbetter*, our exercise of discretion is not so limited, and we are required to exercise our discretion independent of Appellate Rule 21. *Ledbetter* held: "Rule 21 does not prevent the Court of Appeals from issuing writs of certiorari *or have any bearing upon the decision as to whether a writ of certiorari should be issued*." ___ N.C. at ___, 814 S.E.2d at 43 (emphasis added). Nor do I agree with the majority's conclusion that *Pimental* and *State v. Harris*, 243 N.C. App. 137, 77 S.E.2d 554 (2015), are "binding . . . within any jurisdictional discretion to allow the petition" after *Ledbetter* and *Stubbs*.

Tew held that if a defendant fails to give notice of his intention to appeal a denial of a motion to suppress before plea negotiations are finalized, he waives his statutory right of appeal pursuant to N.C. Gen. Stat. § 15A-979(b) (2017). 326 N.C. at 735, 392 S.E.2d at 605. Neither this holding, nor the statute it interpreted, addresses a defendant's right to petition for a writ of certiorari, or limit our exercise of discretion provided by N.C. Gen. Stat. § 15A-1444(e) (2017). *See Ledbetter*, ___ N.C. at ___, 814 S.E.2d at 43 ("Absent specific statutory language limiting the Court of Appeals' jurisdiction, the court maintains its jurisdiction and discretionary authority to issue the prerogative writs, including certiorari.").

In *Pimental*, this Court held that a defendant who failed to give notice of his intention to appeal from a motion to suppress prior to accepting a plea bargain was not entitled to a writ of certiorari because that circumstance did not fall within the three enumerated situations outlined in Rule 21(a)(1); as a result, we held "this Court does not have the authority to issue a writ of certiorari." 153 N.C. App. at 77, 568 S.E.2d at 872. Our decision in *Harris* expressly relied on this language in denying a defendant's petition for certiorari as outside our "authority" in similar circumstances. 243 N.C. App. at 138, 776 S.E.2d at 555 (quoting *Pimental*, 153 N.C. App. at 77, 568 S.E.2d at 872). However, as stated above, our Supreme Court has since held that Rule 21 does not limit, determine, or otherwise modify this Court's "jurisdiction and discretionary authority" to issue writs of certiorari. *Ledbetter*, ___ N.C. at ___, 814

S.E.2d at 43; *cf. State v. Thomsen*, 369 N.C. 22, 27, 789 S.E.2d 639, 643 (2016) ("[D]efendant argues that the Court of Appeals was not authorized by Rule 21 . . . to issue the writ of certiorari . . . . But, as we explained in *Stubbs*, if a valid statute gives the Court of Appeals jurisdiction to issue a writ of certiorari, Rule 21 cannot take it away." (citing *Stubbs*, 368 N.C. at 43-44, 770 S.E.2d at 76)).

In sum, while I agree that the analysis in the prior decisions cited by the majority may be instructive to the exercise of our discretion when reviewing a petition for certiorari review of an appeal following a guilty plea—and that Defendant's petition for writ of certiorari should be denied in our discretion—I disagree with the conclusion that these prior decisions foreclose a full exercise of our authority and discretion in reviewing Defendant's petition in this case.