NO. COA05-1625

NORTH CAROLINA COURT OF APPEALS

Filed: 3 October 2006

STATE OF NORTH CAROLINA

v. Davie County
No. 02 CRS 774

RENEE SMITH HOWELL,

Defendant.

Appeal by Defendant from judgment entered 14 July 2004 by Judge Howard R. Greeson, Jr. in Davie County Superior Court and from order entered 12 April 2005 by Judge W. David Lee in Davie County Superior Court denying Defendant's Motion for Appropriate Relief. Heard in the Court of Appeals 24 August 2006.

Attorney General Roy Cooper, by Assistant Attorney General David D. Lennon, for the State.

Parker and Parker, Attorneys at Law, by Michael J. Parker, for Defendant-Appellant.

STEPHENS, Judge.

On 14 July 2004, a jury convicted Defendant of embezzlement. That same day, the Honorable Howard R. Greeson, Jr. entered judgment suspending a sentence of six to eight months imprisonment and sentencing Defendant to thirty-six months of supervised probation. On 20 July 2004, Defendant filed written notice of appeal. Thereafter, the court reporter prepared the transcript of the trial proceedings and, in her certificate of service, noted

that the transcript was "delivered or mailed" to the attorneys of record on 14 September 2004.

On 20 October 2004, Defendant filed, in Davie County Superior Court, a Motion for Appropriate Relief ("MAR 1"), which was denied on 12 April 2005 following a hearing conducted by the Honorable W. David Lee. Defendant then, on 12 August 2005, filed a second Motion for Appropriate Relief ("MAR 2"), also in Davie County Superior Court. In an order filed 16 November 2005, the Honorable Mark E. Klass continued the motion until it could be heard by Judge Lee. Judge Klass' order also provided as follows:

> The Defendant shall be and is hereby granted an additional ninety (90) days to begin the Appeal process and shall have until Wednesday, November 23, 2005 to serve the Defendant's proposed Record on Appeal on the State of North Carolina to the Office of the District Attorney for the Twenty-Second Judicial District.

The Record on Appeal contains a certificate of service signed by Defendant's counsel indicating that the proposed record on appeal was served on the State on 18 August 2005.[1] After consenting to the State's amendments and objections, the record was settled on 6 December 2005 and filed in this Court on 14 December 2005. For the reasons which follow, we dismiss the appeal and

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[1] While Defendant purportedly served the proposed record on 18 August 2005, this date is outside the time frame allowed by the Rules of Appellate Procedure and came before the trial court purported to grant Defendant additional time in which to serve the proposed record. We are unable to discern from the record before us whether Defendant served the proposed record before the order of Judge Klass was entered, or if Defendant's certificate of service contains an inaccurate date.

vacate the trial court's orders on Defendant's motions for appropriate relief.

First, we address Defendant's argument concerning the trial court's orders regarding MAR 1 and MAR 2. By these motions, Defendant sought to have the trial court review alleged newly discovered evidence and, based on this evidence, grant her a new trial. North Carolina law provides that

> [n]otwithstanding the time limitations herein, a defendant at any time after verdict may by a motion for appropriate relief, raise the ground that evidence is available which was unknown or unavailable to the defendant at the time of trial, which could not with due diligence have been discovered or made available at that time, . . . and which has a direct and material bearing upon . . . the defendant's guilt or innocence.

N.C. Gen. Stat. § 15A-1415(c) (2005). However, the proper tribunal in which to make a motion for appropriate relief is a question of jurisdiction.

> When a case is in the appellate division for review, a motion for appropriate relief based upon grounds set out in G.S. 15A-1415 must be made in the appellate division. For the purpose of this section a case is in the appellate division when the jurisdiction of the trial court has been divested as provided in G.S. 15A-1448 . . . .

N.C. Gen. Stat. § 15A-1418(a) (2005). A trial court is divested of jurisdiction "when notice of appeal has been given" and the time period for giving notice of appeal has expired. N.C. Gen. Stat. § 15A-1448(a)(3) (2005). Rule 4 of the North Carolina Rules of Appellate Procedure provides that a criminal defendant who does not

give oral notice of appeal at trial may file a written notice of appeal "within 14 days after entry of the judgment or order[.]" N.C. R. App. P. 4(a)(2).

In this case, the trial court entered judgment against Defendant on 14 July 2004. Six days later, Defendant gave timely notice of appeal under Rule 4 of the Rules of Appellate Procedure. Pursuant to Chapter 15A of the North Carolina General Statutes, the trial court was divested of jurisdiction when Defendant gave her notice of appeal and the time to give such notice had expired (that is, as of 28 July 2004). Once the trial court was divested of jurisdiction, this Court was the proper forum in which to file a motion for appropriate relief. N.C. Gen. Stat. § 15A-1418(a); *State v. Brock*, 46 N.C. App. 120, 264 S.E.2d 390 (1980).

"A universal principle as old as the law is that the proceedings of a court without jurisdiction of the subject matter are a nullity." *Burgess v. Gibbs*, 262 N.C. 462, 465, 137 S.E.2d 806, 808 (1964) (citing *High v. Pearce*, 220 N.C. 266, 17 S.E.2d 108 (1941)). "'When the record shows a lack of jurisdiction in the lower court, the appropriate action on the part of the appellate court is to arrest judgment or vacate any order entered without authority.'" *State v. Crawford*, 167 N.C. App. 777, 779, 606 S.E.2d 375, 377, *disc. review denied*, 359 N.C. 412, 612 S.E.2d 324 (2005) (quoting *State v. Felmet*, 302 N.C. 173, 176, 273 S.E.2d 708, 711 (1981)). We conclude that because Defendant filed MAR 1 and MAR 2 in the trial court after the trial court had been divested of

jurisdiction, we must vacate the trial court's orders regarding these motions.

Next, we address Defendant's appeal from the trial court's judgment entered upon the jury's verdict. Because Defendant failed to timely serve the proposed record on appeal on the State and failed to timely file the record in this Court, her appeal is subject to dismissal.

Under North Carolina law, an appellant must serve the proposed record on appeal on the appellee "[w]ithin 35 days after the reporter's or transcriptionist's certification of delivery of the transcript[.]" N.C. R. App. P. 11(a). When notice is delivered by mail, "three days shall be added" to the time period in which a party must serve or file a document. N.C. R. App. P. 27(b).

> The time schedules set out in the rules are designed to keep the process of perfecting an appeal to the appellate division flowing in an orderly manner. *Counsel is not permitted to decide upon his own enterprise how long he will wait to take his next step in the appellate process.*

State v. Gillespie, 31 N.C. App. 520, 521, 230 S.E.2d 154, 155 (1976), *disc. review denied*, 291 N.C. 713, 232 S.E.2d 205 (1977)(emphasis added).

In this case, the court reporter certified that the transcript was "delivered or mailed" to the attorneys on 14 September 2004. Therefore, assuming service by mail, Defendant initially had until 22 October 2004 to serve the proposed record on the State. However, "[t]he trial tribunal for good cause shown by the

appellant may extend once for no more than 30 days the time permitted by Rule 11 . . . for the service of the proposed record on appeal." N.C. R. App. P. 27(c)(1). Accordingly, if Defendant had properly sought and been granted an extension, she would have had until 22 November 2004 to serve the proposed record.[2] The proposed record was not served on the State, however, before 18 August 2005, well outside the time frame required by the appellate rules and any extension of time that could have been properly granted.[3]

In *Higgins v. Town of China Grove*, 102 N.C. App. 570, 402 S.E.2d 885 (1991), this Court dismissed an appeal when the proposed record was not timely served on the appellee and the appellant had failed to timely file the record. "The North Carolina Rules of Appellate Procedure are mandatory and 'failure to follow these rules will subject an appeal to dismissal.'" *Viar v. N.C. DOT*, 359 N.C. 400, 401, 610 S.E.2d 360, 360, *reh'g denied*, 359 N.C. 643, 617 S.E.2d 662 (2005) (quoting *Steingress v. Steingress*, 350 N.C. 64,

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[2]A thirty-day extension would have allowed Defendant until 21 November 2004 to serve the proposed record. Since that day was a Sunday, the time to serve the proposed record was automatically extended one additional day. N.C. R. App. P. 27(a) ("The last day of the period so computed is to be included, unless it is a Saturday, Sunday, or a legal holiday, in which event the period runs until the end of the next day which is not a Saturday, Sunday, or a legal holiday.")

[3]Although the trial court's order filed 16 November 2005 purports to give Defendant additional time to serve the proposed record on appeal, this order is invalid because it grants Defendant until 23 November 2005 to serve the proposed record on the State. This date is exactly one year and one day past the deadline to serve the proposed record that the trial court could have properly permitted, in violation of Rule 27 of the appellate rules.

65, 511 S.E.2d 298, 299 (1999)). Therefore, the appeal is dismissed.

During oral argument, Defendant asserted that if she did violate the Rules of Appellate Procedure, thereby subjecting her appeal to dismissal, we should nevertheless rule on the merits of the appeal by granting her a writ of *certiorari*.

Rule 21 of the North Carolina Rules of Appellate Procedure provides in pertinent part that "[t]he writ of certiorari *may* be issued in appropriate circumstances by either appellate court to permit review of the judgments and orders of trial tribunals when the right to prosecute an appeal has been lost by failure to take timely action[.]" N.C. R. App. P. 21(a)(1) (emphasis added). However, *certiorari* should only be issued "for good or sufficient cause shown, and the party seeking it is required, not only to negative laches on his part in prosecuting the appeal, but also to show merit or that he has reasonable grounds for asking that the case be brought up and reviewed on appeal." *State v. Angel*, 194 N.C. 715, 716, 140 S.E. 727, 728 (1927); *see also In re Snelgrove*, 208 N.C. 670, 182 S.E. 335 (1935). "A party is entitled to a writ of *certiorari* when—and only when—the failure to perfect the appeal is due to some error or act of the court or its officers, and not to any fault or neglect of the party or his agent." *Womble v. Moncure Mill and Gin Co.*, 194 N.C. 577, 579, 140 S.E. 230, 231 (1927)(citations omitted); *see also Snelgrove*, 208 N.C. at 672, 182 S.E. at 336.

In this case, there is no evidence that Defendant's untimely service of the proposed record on the State and failure to timely file the record at this Court occurred for any reason but unexplained delay. Therefore, we decline to grant her oral request to issue our writ of *certiorari*.

For all the reasons stated, the trial court's orders on Defendant's motions for appropriate relief are vacated, Defendant's appeal is dismissed, and her oral request for a writ of *certiorari* is denied.

VACATED, DISMISSED, AND WRIT OF CERTIORARI DENIED.

Judges STEELMAN and LEVINSON concur.

Report per Rule 30(e).