

STATE OF NORTH CAROLINA v. BARRY SCOTT VIA

NO. COA08-1147

Filed: 2 June 2009

**1. Appeal and Error—motion to dismiss in superior court—review of district court preliminary determination**

Defendant did not have a statutory right to appeal from superior court, but certiorari was granted, where the superior court denied defendant's motion to dismiss the State's appeal from a district court preliminary determination that it would dismiss impaired driving charges. While N.C.G.S. § 15A-1432(d) provides a method by which a defendant may appeal the ruling of a superior court finding that a judgment, ruling or order dismissing criminal charges in district court was in error, the district court here did not dismiss the charges.

**2. Criminal Law—appeal by State to Superior Court—motion to dismiss—review of preliminary determination**

The Court of Appeals affirmed a superior court order denying defendant's motion to dismiss a prosecution after the State's appeal from a preliminary district court determination that it would grant a dismissal for defendant. The matter was remanded to superior court for review of the district court's preliminary determination.

Appeal by defendant from order entered 21 May 2008 by Judge Quentin T. Sumner in Nash County Superior Court. Heard in the Court of Appeals 9 March 2009.

*Roy Cooper, Attorney General, by Sebastian Kielmanovich, Assistant Attorney General, for the State.*

*Wyrick Robbins Yates & Ponton, LLP, by K. Edward Greene and Tobias S. Hampson, and Fanney & Jackson, P.C., by John K. Fanney, for defendant-appellant.*

*Center for Death Penalty Litigation, by Thomas K. Maher, and The Ward Law Firm, P.A., by David J. Ward, for North Carolina Advocates for Justice, amicus curiae.*

MARTIN, Chief Judge.

Barry Scott Via ("defendant") appeals from the order of the superior court denying his motion to dismiss the State's appeal,

made pursuant to N.C.G.S. § 20-38.7(a), and to declare N.C.G.S. §§ 20-38.6(f) and 20-38.7 unconstitutional. We affirm.

Defendant was charged with operating a motor vehicle without decreasing speed as necessary to avoid a collision, possessing an open container of alcohol in the passenger area of a vehicle while operating the vehicle, and driving while impaired. When the matter came on for hearing in Nash County District Court, defendant filed a pretrial motion to dismiss. Pursuant to N.C.G.S. § 20-38.6, the district court preliminarily ruled the motion to dismiss should be allowed. The State appealed the district court's preliminary determination to superior court, where defendant then filed a motion to dismiss the State's appeal and to declare N.C.G.S. §§ 20-38.6(f) and 20-38.7 unconstitutional. The superior court entered an order denying defendant's motion. Defendant gave notice of appeal, after which the superior court certified this matter as appropriately justiciable in the appellate division pursuant to N.C.G.S. § 15A-1432. Additionally, defendant filed a petition for writ of certiorari in this Court.

[1] N.C.G.S. § 15A-1432(d) provides a method by which a defendant may appeal the ruling of a superior court which "finds that a *judgment, ruling, or order* dismissing criminal charges in the district court was in error." N.C. Gen. Stat. § 15A-1432(d) (2007) (emphasis added). In the case at bar, the district court did not dismiss criminal charges, but rather made a preliminary determination, pursuant to N.C.G.S. § 20-38.6(f), that it would grant defendant's pretrial motion to dismiss. The superior court

did not rule on the merits of the district court's preliminary determination, but instead merely denied defendant's motion to dismiss the State's appeal and declare N.C.G.S. §§ 20-38.6(f) and 20-38.7 unconstitutional. As such, N.C.G.S. § 15A-1432 does not provide defendant a statutory right of appeal from the superior court's ruling in this case and we must dismiss defendant's appeal.

However, this Court may issue a writ of certiorari "when no right of appeal from an interlocutory order exists." N.C.R. App. P. 21(a)(1). Having determined that defendant has no statutory right of appeal from the superior court's order, we exercise our discretion to grant the State's petition for writ of certiorari.

[2] Defendant's assignments of error and arguments in this appeal are essentially identical to those raised by the defendant in *State v. Fowler*, 197 N.C. App. \_\_, \_\_ S.E.2d \_\_ (2009). For the reasons stated in that opinion, we reject defendant's arguments in this case. The order denying defendant's motion is affirmed and this case is remanded to the superior court for review of the district court's preliminary determination that it would grant defendant's pretrial motion to dismiss made in accordance with N.C.G.S. § 20-38.6(a).

Affirmed.

Judges WYNN and ERVIN concur.