



North Carolina Court of Appeals

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From Onslow County
(19CRS55485)

No. 22-84

STATE OF NORTH CAROLINA

v.

GERALD DEWAYNE JACKSON, JR.

ORDER

The following order was entered:

Defendant filed a defective notice of appeal from his 27 July 2021 judgment. After Defendant filed his record on appeal, he filed a petition for writ of *certiorari* pursuant to N.C.R. App. P. 21 seeking review of the 27 July 2021 judgment, particularly with regard to the issue of whether "North Carolina's extortion statute requires a threat of unlawful physical violence[.]" For the reasons explained herein, Defendant's petition for writ of *certiorari* is denied, and his appeal is dismissed.

Rule 4 of the North Carolina Rules of Appellate Procedure provides, in relevant part, that the notice of appeal in criminal cases shall be "fil[ed] with the clerk of superior court and serv[ed] . . . upon all adverse parties within fourteen days after entry of the judgment or order[.]" N.C.R. App. P. 4(a)(2). "A failure on the part of the appealing party to comply with Rule 4 deprives this Court of jurisdiction to consider his or her appeal . . ." *State v. Hughes*, 210 N.C. App. 482, 484, 707 S.E.2d 777, 778 (2011).

In the present case, Defendant's notice of appeal was defective because it was filed one day late, and it was not formally served on counsel for the State. As such, it does not comply with the requirements of Rule 4 and leaves this Court without jurisdiction to consider Defendant's appeal. See N.C.R. App. P. 4(a)(2); *accord Hughes*, 210 N.C. App. at 484, 707 S.E.2d at 778.

This Court may nonetheless review Defendant's unperfected appeal by allowing his petition for writ of *certiorari*. N.C.R. App. P. 21(a)(1). However, the "petition for the writ must show merit or that error was probably committed below[.]" as "[c]ertiorari is a discretionary writ, to be issued only for good and sufficient cause shown." *State v. Grundler*, 251 N.C. 177, 189, 111 S.E.2d 1, 9 (1959), *cert. denied*, 362 U.S. 917, 4 L. Ed. 2d 738 (1960).

As explained below, Defendant is unable to demonstrate the merit of his claim; therefore, his petition is denied. *See id.*

Defendant contends that “[t]he trial court erred by denying [his] motion to dismiss where (1) North Carolina’s extortion statute requires a threat of unlawful physical violence, and (2) [Defendant] did not make any such threat.” He asserts that this Court’s opinion in *State v. Taylor*, 270 N.C. App. 514, 841 S.E.2d 776 (2020), *rev’d and remanded*, 379 N.C. 589, 2021-NCSC-164, supports his contention. However, *Taylor* is inapposite. This Court’s recent decisions in *State v. Bowen*, 2022-NCCOA-213, *temporary stay allowed*, 381 N.C. 276, 871 S.E.2d 102 (2022), and *In re J.A.D.*, 2022-NCCOA-259, instead control, and do not support Defendant’s argument.

In *Taylor*, this Court addressed whether, when prosecuting a defendant pursuant to N.C. Gen. Stat. Section 14-16.7(a) (2021) for making threats against a public official, the State must prove that the threat was a “true threat” rather than just “political hyperbole.” 270 N.C. App. at 540, 841 S.E.2d at 803. Because “[t]he right of citizens to criticize public officials is at the heart of First Amendment protections[,]” *id.* at 532, 841 S.E.2d at 798, the Court concluded that a “‘true threat’ must be included as an essential element” of N.C. Gen. Stat. Section 14-16.7(a), *id.* at 541, 841 S.E.2d at 803.

This Court again confronted this issue in *Bowen*, but as it applied in the context of our extortion statute, N.C. Gen. Stat. Section 14-118.4. 2022-NCCOA-213, paragraph 15. The defendant in *Bowen* argued that *Taylor*’s holding “require[d] a ‘true threat’ reading to be applied to every anti-threat statute.” *Id.* paragraph 16. The *Bowen* Court determined that “[a]lthough the ‘true threat’ requirement under the First Amendment has been applied to speech surrounding political hyperbole,” *id.* paragraph 24, such a requirement does not extend to extortion, *id.* Paragraph 23. “Extortion is speech that is integral to criminal conduct, notwithstanding the content of the speech. It therefore falls within the category of unprotected speech, and necessarily may be restricted.” *Id.* paragraph 25.

Similarly, in *J.A.D.*, the respondent-juvenile argued that his extortion conviction should be vacated because “North Carolina’s extortion statute requires a threat of unlawful physical violence[.]” 2022-NCCOA-259, paragraph 26. This Court disagreed, reasoning that “[r]estricting the crime of extortion to threats of physical violence would defeat the purpose of the crime.” *Id.* paragraph 30. Because “[t]here is no federal or North Carolina state constitutional rule that threats are protected speech unless they threaten unlawful physical violence[,]” *id.* paragraph 34, the Court concluded that the “First Amendment ‘true threat’ analysis does not require a threat to include ‘unlawful physical violence[,]’ ” *id.* paragraph 33.

In the present case, the trial court did not err by denying Defendant’s motion to dismiss. Defendant’s sole argument on appeal is that “because the extortion statute—properly construed—can only apply to threats of unlawful physical violence, and because [Defendant] did not make any threat that might plausibly fit that description, the trial court erred by denying his motion to dismiss.” However, as *Bowen* and *J.A.D.* make abundantly clear, the “First Amendment ‘true threat’ analysis does *not* require a threat to include ‘unlawful physical violence.’ ” *Id.* (emphasis added). Therefore, the State only had to prove that Defendant (1) “threaten[ed] or communicate[d] a threat or threats” (2) “to another” (3) with the intent to “wrongfully . . . obtain anything of value[.]” N.C. Gen. Stat. Section 14-118.4.

A review of the record indicates that the State presented substantial evidence as to each of these elements—specifically, through the recorded conversation and transcript admitted into evidence. The recorded conversation established that Defendant (1) threatened to publicly release personally and professionally damaging information about Mr. Stuart Popkin; (2) communicated

this threat to Mr. Popkin; and (3) sought to use this threat of releasing information to obtain \$4,500.00 from Mr. Popkin, money to which he was otherwise not entitled. *Id.*

In that “[t]he State was under no burden to prove that [Defendant] threatened unlawful physical violence[,]” *J.A.D.*, 2022-NCCOA-259, paragraph 35, the evidence presented at trial was sufficient to prosecute Defendant for extortion. Defendant’s argument to the contrary lacks merit.

Accordingly, we deny Defendant’s petition for writ of *certiorari* and dismiss Defendant’s appeal. Appellant to pay costs.

And it is considered and adjudged further, that Appellant Gerald Dewayne Jackson, do pay the costs of the appeal in this Court incurred, to wit, the sum of Fifty Nine and 75/100 (\$59.75), and execution issue therefor.

By order of the Court this the 12th of September, 2022.

Panel Consisting of: Chief Judge Stroud, Judge Dietz, and Judge Zachary.

WITNESS my hand and the official seal of the North Carolina Court of Appeals, this the 12th day of September 2022.



Eugene H. Soar
Clerk, North Carolina Court of Appeals

Copy to:

Mr. Aaron Thomas Johnson, Assistant Appellate Defender, For Jackson, Gerald Dewayne (Jr.) - (By Email)
Mr. Glenn Gerding, Appellate Defender - (By Email)
Mr. Phillip K. Woods, Special Deputy Attorney General, For State of North Carolina - (By Email)
Hon. Bettie B. Gurganus, Clerk of Superior Court