

STATE OF NORTH CAROLINA
COUNTY OF RUTHERFORD

IN THE GENERAL COURT OF JUSTICE
2015 AUG 24 AM 9:32 SUPERIOR COURT DIVISION
FILE No.: 15-CRS-154-155, 164
FLAMINGO COUNTY C.S.C.

STATE OF NORTH CAROLINA,

Plaintiff,

vs.

BROOKE MCFADDEN COVINGTON,
SARAH COVINGTON ANDERSON, *and*
JUSTIN BROCK COVINGTON,

Defendants.

**MOTION TO STRIKE
THE DOCUMENTS CAPTIONED
“NOTICE OF APPEAL”
AND
MOTION TO STAY PROCEEDINGS”**

NOW COMES the State of North Carolina, by and through the undersigned Assistant District Attorney, and moves the Court to issue an Order striking the above-named defendants' purported Notices of Appeal and corresponding Motion to Stay Proceedings from the official record in this cause upon the grounds that there is no basis in law or fact for the documents to be filed and that the documents are of no legal effect. In support thereof, the State shows the following:

Procedural History and Material Facts

1. On August 3, 2015, this Honorable Court heard the State's Motion to Disqualify Counsel in Rutherford County Superior Court. After hearing the arguments of counsel, reviewing the briefs of counsel, and the hearing of evidence in support of said motion, the Court retired to consider the matter and to review the various cases submitted by defense counsel during the hearing.
2. On August 6, 2015, the Court entered an Order disqualifying Mark Morris (State Bar #32846), Josh Farmer (State Bar #32669), Andrea Farmer (State Bar #32668), the law firm of TOMBLIN, FARMER & MORRIS, PLLC (SOSID #0746187), and their associates (hereinafter referred to individually and collectively as "disqualified counsel" or "opposing counsel"), from representing the above-named defendants in these criminal cases.

3. Thereafter on August 20, 2015, despite being removed from these cases by the Court and being ordered to cease representation of the defendants in these matters, disqualified counsel continued representation of the defendants by filing a document captioned "Notice of Appeal" in each of these three cases. This document purported to appeal the Court's Order of August 6 to the North Carolina Court of Appeals. Defendants asserted that, in appealing the Court's Order they proposed to "... ask the North Carolina Court of Appeals to reverse the Order disqualifying counsel entered on August 6, 2015, and to remand the cause for further proceedings."
4. Disqualified counsel also filed a document captioned "Motion to Stay Proceedings" – a pre-trial motion in the substantive cause of each case – on the same date that they filed the aforesaid "Notice of Appeal." In this document, disqualified counsel moves the Court "... to stay proceedings in these cases until all appellate matters are resolved ... with the exception of ruling on the Movants Motion for Reconsideration of the Disqualification Order. . ."
5. Continuing on, disqualified counsel also on August 20 filed a "Motion to Reconsider Order Disqualifying Counsel." In this document, they assert "... there has been a substantial change in circumstances warranting this Court's reconsideration of the prior order and denial of the State's motion." In this motion, disqualified counsel go on *to detail their continued and uninterrupted representation* of the defendants after the entry of the Court's Order on August 6 up to and including the present.
6. A total of 9 separate acts of representation appear in the official record as filings on the part of disqualified counsel after the entry of the Court's Order of August 6 which disqualified them all as legal counsel in these matters. This number does not include the drafting and execution of the Affidavits or other supporting documents which are included in the defendants' Motion for Reconsideration, nor does it include the number of meetings conducted with the defendants to advance the documents filed and other acts surrounding these prohibited filings. This number also does not include their appearance before the Court to advance these causes on behalf of the defendants.
7. A total of 24 separate acts of representation that are reflected and appear in the official record as exhibits which were prepared by disqualified counsel after the entry of the Court's Order of August 6 which disqualified them as legal counsel in these matters.

8. Altogether, a total of **33 separate acts** of representation appear in the official record by disqualified counsel after this Court ordered them removed as counsel. These include the following in chronological order:
- a. *Informed Consent of Adam Bartley for Tomblin, Farmer & Morris to Continue Representation of Co-Defendants on behalf of Sarah Covington Anderson* – executed August 13, 2015;
 - b. *Informed Consent of Adam Bartley for Tomblin, Farmer & Morris to Continue Representation of Co-Defendants on behalf of Brooke McFadden Covington* – executed August 13, 2015;
 - c. *Informed Consent of Adam Bartley for Tomblin, Farmer & Morris to Continue Representation of Co-Defendants on behalf of Justin Brock Covington* – executed August 13, 2015;
 - d. *Informed Consent of Adam Bartley for Tomblin, Farmer & Morris to Continue Representation of Co-Defendants on behalf of Robert Louis Walker* – executed August 13, 2015;
 - e. *Informed Consent of Adam Bartley for Tomblin, Farmer & Morris to Continue Representation of Co-Defendants on behalf of Adam Bartley* – executed August 13, 2015;
 - f. *Rejection of Plea Offer to Adam Christopher Bartley on behalf of Sarah Covington Anderson* – obtained on or about August 13, 2015;
 - g. *Rejection of Plea Offer to Adam Christopher Bartley on behalf of Brooke McFadden Covington* – obtained on or about August 13, 2015;
 - h. *Rejection of Plea Offer to Adam Christopher Bartley on behalf of Justin Brock Covington* – obtained on or about August 13, 2015;
 - i. *Rejection of Plea Offer to Adam Christopher Bartley on behalf of Adam Christopher Bartley* – obtained on or about August 13, 2015;
 - j. *Informed Consent of Robert Louis Walker, Jr., for Tomblin, Farmer & Morris to Continue Representation of Co-Defendants on behalf of Sarah Covington Anderson* – executed August 18, 2015;

- k. *Informed Consent of Robert Louis Walker, Jr., for Tomblin, Farmer & Morris to Continue Representation of Co-Defendants on behalf of Brooke McFadden Covington* – executed August 18, 2015;
- l. *Informed Consent of Robert Louis Walker, Jr., for Tomblin, Farmer & Morris to Continue Representation of Co-Defendants on behalf of Justin Brock Covington* – executed August 18, 2015;
- m. *Affidavit of Robert Louis Walker, Jr., obtained on behalf of Sarah Covington Anderson* – executed August 18, 2015;
- n. *Affidavit of Robert Louis Walker, Jr., obtained on behalf of Brooke McFadden Covington* – executed August 18, 2015;
- o. *Affidavit of Robert Louis Walker, Jr., obtained on behalf of Justin Brock Covington* – executed August 18, 2015;
- p. *Affidavit of Sarah Covington Anderson on behalf of Sarah Covington Anderson* – executed August 18, 2015;
- q. *Affidavit of Sarah Covington Anderson on behalf of Brooke McFadden Covington* – executed August 18, 2015;
- r. *Affidavit of Sarah Covington Anderson on behalf of Justin Brock Covington* – executed August 18, 2015;
- s. *Affidavit of Brooke McFadden Covington on behalf of Sarah Covington Anderson* – executed August 19, 2015;
- t. *Affidavit of Brooke McFadden Covington on behalf of Brooke McFadden Covington* – executed August 19, 2015;
- u. *Affidavit of Brooke McFadden Covington on behalf of Justin Brock Covington* – executed August 19, 2015;
- v. *Affidavit of Justin Brock Covington on behalf of Sarah Covington Anderson* – executed August 19, 2015;
- w. *Affidavit of Justin Brock Covington on behalf of Brooke McFadden Covington* – executed August 19, 2015;

- x. *Affidavit of Justin Brock Covington on behalf of Justin Brock Covington* – executed August 19, 2015;
 - y. *Notice of Appeal on behalf of Sarah Covington Anderson* – filed August 20, 2015;
 - z. *Notice of Appeal on behalf of Brooke McFadden Covington* – filed August 20, 2015;
 - aa. *Notice of Appeal on behalf of Justin Brock Covington* – filed August 20, 2015;
 - bb. *Motion to Stay Proceedings on behalf of Sarah Covington Anderson* – filed August 20, 2015;
 - cc. *Motion to Stay Proceedings on behalf of Brooke McFadden Covington* – filed August 20, 2015;
 - dd. *Motion to Stay Proceedings on behalf of Justin Brock Covington* – filed August 20, 2015;
 - ee. *Motion to Reconsider Order Disqualifying Counsel on behalf of Sarah Covington Anderson* – filed August 20, 2015;
 - ff. *Motion to Reconsider Order Disqualifying Counsel on behalf of Brooke McFadden Covington* – filed August 20, 2015; and
 - gg. *Motion to Reconsider Order Disqualifying Counsel on behalf of Justin Brock Covington* – filed August 20, 2015.
9. As the official record of these cases indicates, disqualified counsel's representation of the defendants has continued without interruption and in clear violation of the Order of this Court which remains in effect. The fact that disqualified counsel have another hearing before this Court, ***to advance a cause on behalf of forbidden clients***, illustrates the gravity of the situation.
10. Angela S. Beeker (State Bar #18420), Attorney at Law, of the Henderson County Bar, signed the aforesaid documents along with disqualified counsel as attorney for the defendants. Attorney Beeker has, in doing so, entered a general and unlimited appearance as counsel for the captioned defendants in

these ongoing criminal matters as provided for by N.C. Gen. Stat. § 15A-141(2). The State takes due notice thereof and will proceed accordingly.

*North Carolina Law does not Authorize an
Appeal as a Matter of Right from an Interlocutory Order
in a Criminal Case*

11. Subsection (a) of North Carolina General Statute § 15A-1444, *which became law in 1977*, provides in pertinent part: “A defendant who has entered a plea of not guilty to a criminal charge, and who has been found guilty of a crime, is entitled to appeal as a matter of right when final judgment has been entered.” (Emphasis added).
12. The Official Commentary to this Statute states: “Subsection (a) states the *familiar rule* of appellate practice that **appeal**, as a matter of right, is **available when final judgment has been entered**.” (Emphasis added).
13. The defendants have not, as of yet, been found guilty of a crime in these cases and no final judgment has been entered against them. There is, therefore, no factual basis which would support the filing of the purported Notice of Appeal by the defendants in these cases.
14. Subsection (e) of § 15A-1444 provides in pertinent part that “[E]xcept as provided in subsection (a) . . . the defendant is not entitled to appellate review as a matter of right . . . in the superior court.” There is, therefore, no legal basis which would permit the filing of the purported Notice of Appeal by the defendants and their counsel in these cases.
15. “The right to appeal in a criminal proceeding is purely statutory. Generally, there is no right to appeal in a criminal case except from a conviction or upon a plea of guilty.” *State v. Shoff*, 118 N.C. App. 724, 725, 456 S.E.2d 875, 876 (1995) (citation omitted), *aff’d per curiam*, 342 N.C. 638, 466 S.E.2d 277 (1996).
16. An interlocutory order is one made during the pendency of a case, which does not dispose of the matter but leaves it for further action by the trial court. *Id.* (quoting *Veazey v. City of Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381 (1950)).
17. In *State v. Williams*, the North Carolina Court of Appeals dismissed the defendant’s appeal because the defendant was not entitled to appellate

review as a matter of right under subsection (a1) of G.S. § 15A-1444. *State v. Williams*, 116 N.C. App. 354, 447 S.E.2d 437; *cert. denied*, 338 N.C. 523, 452 S.E.2d 823 (1994).

18. In *State v. Waters*, because the defendant had no appeal as of right, and he had not petitioned for a writ of certiorari, his notice of appeal was a nullity, and the appellate court had no jurisdiction. *State v. Waters*, 122 N.C. 504, 470 S.E.2d 545 (1996).

19. This Honorable Court's Order of August 6 is interlocutory. The Defendants have no right to appeal from that interlocutory order. Accordingly, the documents captioned "Notice of Appeal" filed by the defendants in each of the cases captioned above should be stricken from the record as being a nullity. Further, the defendants' Motion to Stay Proceedings also has no basis in law or fact and should likewise be stricken.

*The Sole Method to Obtain Appellate Review of
an Interlocutory Order in a NC Criminal Case is
a Petition for a Writ of Certiorari*

20. North Carolina General Statute § 15A-1444 (e) provides in pertinent part that: "Except as provided . . . [a] defendant is not entitled to appellate review as a matter of right . . . but he may petition the appellate division for review by writ of certiorari."

21. "Review by writ of certiorari is available when provided for by this Chapter, by other rules of law, or by rule of the appellate division." N.C. Gen. Stat. § 15A-1444 (g).

22. Rule 21(a)(1) of the North Carolina Rules of Appellate Procedure, as amended effective April 10, 2015, provides as follows:

(a) Scope of the Writ.

*(1) Review of the Judgments and Orders of Trial
Tribunals.* The 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, or when no right of appeal from an

interlocutory order exists, or for review pursuant to N.C.G.S. § 15A-1422(c)(3) of an order of the trial court ruling on a motion for appropriate relief.

(emphasis added)

23. Certiorari is one of the “extraordinary” writs issued by the appellate courts. It is a “. . . discretionary writ, to be issued only for good and sufficient cause shown.” *State v. Grundle*, 251 N.C. 177, 189, 111 S.E.2d 1, 9 (1959). See also, *State v. Rousen*, ___ N.C. App. ___, 741 S.E.2d 470 (2013) (denying petition for writ of certiorari and dismissing appeal for failure “to present a meritorious claim or reveal error in the proceeding below.”).
24. A writ of certiorari is issued only by the North Carolina Court of Appeals or the North Carolina Supreme Court by virtue of Rule 21(a)(1) of the North Carolina Rules of Appellate Procedure cited hereinabove.
25. Disqualified counsel and defense counsel did not follow the proper procedure in attempting to obtain appellate review. The defendants’ aforesaid filed documents should, therefore, be stricken.

*Disqualified Counsel & Defense Counsel Cited the
Proper Procedure in the Defendants’ Motion to Reconsider
but Didn’t Follow It*

26. Paragraph 18 of the defendants’ Motion to Reconsider Order Disqualifying Counsel reads in pertinent part as follows:

Movants also rely on the opinion of the North Carolina Court of Appeals in *State v. Yelton*, 87 N.C. App. 554, 361 S.E.2d 753 (1987), in which the Court of Appeals **granted certiorari** of a **pre-trial order for disqualification of counsel** jointly representing a father and son accused of the same or similar offenses. **After granting certiorari**, the Court overturned the ruling of the trial court after finding that the defendants knowingly waived the right to bring a post-conviction challenge based on ineffective assistance of counsel stemming from a conflict of interest, such waivers having been executed by Movants herein.

... (Emphasis added).

27. Disqualified counsel, as well as attorney Beeker, each individually assert: (1) they have read the foregoing case; (2) they understand the foregoing case; (3) that the foregoing case represents controlling authority in these matters; and (4) they wish for this Court to follow the law as set forth in that case.

28. Curiously, opposing counsel excerpt the very clear and unambiguous language from the *Yelton* case noted above without appearing to recognize its importance.

29. The following is excerpted from the *Yelton* case to illustrate that counsel should have been alerted that a Notice of Appeal was not proper in this situation procedurally:

“On writ of certiorari . . .” (*not on appeal of right*)

“Defendants sought review of the pre-trial order of the Superior Court. . .” (*just like this one*)

“Defendants brought their petition for writ of certiorari to review the order of the trial court . . .” (*not a direct appeal*)

“The petitioners in this action. . .” (*not appellants*)

“ . . . filed writs of supersedeas and certiorari with the Court of Appeals. . .” (*the most obvious*)

“Petitioners contend. . .” (*not appellants*)

“Petitioners first assign as error . . .” (*not appellants*)

30. In effect, disqualified counsel, as well as attorney Beeker, each individually request this Court to follow the law set forth in a case **they themselves cite** when doing so **requires** the dismissal of the defendants’ purported appeal. The defendants have essentially stepped on a land mine which their own attorneys have laid.

31. Opposing counsel misapply the law as set forth in the *Yelton* case as to the facts of the Court’s Order of August 6. However, as far as the stated procedure goes, the State of North Carolina agrees that the writ of certiorari

is the proper mechanism to obtain appellate review of an interlocutory order in a criminal case and therefore moves this Court to strike the defendants' filings as captioned hereinabove.

Conclusion


Wherefore, the State of North Carolina:

1. Moves the Court to strike the document captioned "Notice of Appeal" which was filed by the defendants on August 20, 2015; and
2. Moves the Court to strike the document captioned "Motion to Stay Proceedings" which was filed by the defendants on August 20, 2015; and

This the 24th day of August, 2015.

Respectfully submitted,

FOR THE STATE:


GARLAND F. BYERS, JR.
Assistant District Attorney
N.C. State District Attorney's Office
Rutherford County
P.O. Box 70
Rutherfordton, North Carolina 28139
Telephone: (828) 288-6110
Facsimile: (828) 288-6111
Email: Garland.F.Byers@nccourts.org

CERTIFICATE OF SERVICE

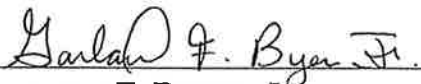
This is to certify that I have this day served Angela S. Beeker, Post Office Box 1666, Hendersonville, NC 28793, counsel for Brooke McFadden Covington, Sarah Covington Anderson & Justin Brock Covington, in the foregoing matter with a copy of the attached document by depositing in the United States Mail a copy of same in a properly addressed envelope with adequate postage thereon in the manner prescribed by Chapter 15A of the North Carolina General Statutes.

This is to certify that I have this day served Joshua Farmer, Mark Morris, and the law firm of TOMBLIN, FARMER & MORRIS, PLLC, in the foregoing matter with a copy of the attached document by hand-delivery.

This the 24th day of August, 2015.

Respectfully submitted,

FOR THE STATE:


GARLAND F. BYERS, JR.
Assistant District Attorney
N.C. State District Attorney's Office
Rutherford County
P.O. Box 70
Rutherfordton, North Carolina 28139
Telephone: (828) 288-6110
Facsimile: (828) 288-6111
Email: Garland.F.Byers@nccourts.org