Can the State Obtain Appellate Review of a Judge's Order Granting a Defendant's MAR?

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I've been asked a couple of times recently whether the state can obtain appellate review of a judge's order granting a defendant's motion for appropriate relief, or MAR. The questions have come up in the context of superior court proceedings, so that's what this post will address. The answer might be different for district court cases, as Jessie Smith notes in this paper.

The crucial, and confusing, case in this area of law is *State v. Starkey*, 177 N.C. App. 264 (2006). In *Starkey*, the defendant was charged with possession of a miniscule amount of cocaine and with being a habitual felon. He was convicted, and the trial judge sentenced him to 70 to 93 months. The judge then sua sponte granted his own MAR, finding the sentence unconstitutionally harsh, and resentenced the defendant to 8 to 10 months. The state sought to review the judge's order by (1) appeal and (2) petition for a writ of certiorari.

The court of appeals first analyzed the state's right to appeal. The court treated the MAR as if it had been made under G.S. 15A-1414, which allows virtually any error to be the subject of a defendant's MAR so long as the motion is filed within 10 days of the entry of judgment. Technically, this wasn't correct, since the MAR at issue in *Starkey* was the court's motion, not the defendant's, but since this post is concerned with MARs filed by defendants, that doesn't matter. The court noted that G.S. 15A-1422(b) governs appeals in proceedings concerning MARs filed under G.S. 15A-1414. That subsection provides that "[t]he grant or denial of relief sought pursuant to G.S. 15A-1414 is subject to appellate review only in an appeal regularly taken."

The court stated that an appeal "regularly taken," as applied to appeals by the state, means an appeal under G.S. 15A-1445. Fair enough, since that's the section captioned "Appeal by the State." Further, the court stated that "it is the underlying judgment and not the order granting [the MAR] from which the State must have the right to take an appeal." I'm not so sure that's right. As authority for that statement, the court cited *State v. Howard*, 70 N.C. App. 487 (1984). In *Howard*, a defendant filed an MAR and won a new trial, but was denied outright dismissal. He tried to appeal the trial court's refusal to dismiss, but the court of appeals ruled that he couldn't because (a) the order denying dismissal was interlocutory until after the new trial took place, and (b) G.S. 15A-1444, which governs a defendant's right to appeal, expressly states that a defendant may appeal when "final judgment has been entered." Note that there's no similar "final judgment" language in G.S. 15A-1445. In fact, G.S. 15A-1445 explicitly allows at least some appeals that are interlocutory in nature: G.S. 15A-1445(a)(2) provides for appeals "[u]pon the granting of a motion for a new trial on the ground of newly discovered . . . evidence." And the law generally allows interlocutory appeals by the state more freely than by the defense because double jeopardy often prevents appeals by the state after an acquittal. Because appeals by the state under G.S. 15A-1445 are so different from appeals by the defendant under G.S. 15A-1444, I'm not sure that *Howard* really support's the court's conclusion in *Starkey* that G.S. 15A-1445 doesn't encompass appeals of orders granting MARs.

Whether it does or doesn't, of course, *Starkey* is the law on this point. And interpreting an appeal "regularly taken" to mean an appeal of the underlying judgment, not of the order granting the MAR, the *Starkey* court found that the state had no right to an appeal regularly taken because the underlying judgment – the original one that imposed a sentence of 70 to 93 months – did not dismiss charges, grant a new trial, or impose an unlawful sentence, which are the only

grounds for appeal by the state as provided in G.S. 15A-1445.

The court next analyzed the state's right to seek review through a petition for a writ of certiorari. Such writs are governed by N.C. R. App. P. 21, which states that a writ may issue:

to permit review of the judgments and orders of trial tribunals when [1] the right to prosecute an appeal has been lost by failure to take timely action, or [2] when no right of appeal from an interlocutory order exists, or [3] for review pursuant to G.S. 15A-1422(c)(3) of an order of the trial court denying a motion for appropriate relief.

The state conceded, and the court of appeals found, that none of those three conditions obtained. The court also declined to exercise its authority to suspend its own rules. Concluding that the state had neither a right to appeal nor a right to certiorari review, the court dismissed the state's appeal. Judge Hunter's concurrence emphasized that the trial judge's order contradicted settled Eighth Amendment law, and suggested that the state supreme court could review the order under that court's general supervisory authority. *See generally* State v. Norris, 360 N.C. 507 (2006). However, the supreme court declined to review the case. *Starkey* has since been applied in the factually identical case of *State v. Griffin*, 2011 WL 3890856 (N.C. Ct. App., Sept. 6, 2011) (unpublished) (following *Starkey* and dismissing the state's appeal; rejecting the state's argument that in *Griffin* it sought to appeal the second judgment rather than the order granting the MAR).

Although the state conceded in *Starkey* that none of the conditions of Rule 21 were present, it may be otherwise in cases where a judge grants an MAR and orders a new trial or a new sentencing hearing, as opposed to entering a final order such as a new judgment, as was apparently done in *Starkey*, or a dismissal. The argument would be that the order granting a new trial or a new sentencing hearing is an interlocutory order from which there is no right of appeal, and so meets the second condition for certiorari review.

So where does that leave us? Here's my short summary.

For MARs filed pursuant to G.S. 15A-1414 (almost any grounds, within 10 days after entry of judgment):

- The state may *appeal* an order granting a new trial on the ground of newly discovered evidence, under G.S. 15A-1445(a)(2)
- The state may *seek certiorari review* of an order granting a new trial or a new sentencing hearing on any other ground, under N.C. R. App. P 21
- The state *cannot obtain review* of an order dismissing charges or imposing a new sentence, under *Starkey*, except perhaps somehow under the supreme court's general supervisory power

For MARs filed pursuant to G.S. 15A-1415 (limited grounds, any time after entry of judgment except in capital cases):

Remember that *Starkey* analyzed G.S. 15A-1422(b), while appeals in MAR proceedings under G.S. 15A-1415 are governed by G.S. 15A-1422(c). That subsection provides that rulings on MARs may be reviewed:

(1) If the time for appeal from the conviction has not expired, by appeal.

(2) If an appeal is pending when the ruling is entered, in that appeal.

(3) If the time for appeal has expired and no appeal is pending, by writ of certiorari.

The absence of the "regularly taken" language in G.S. 15A-1422(c) might at first seem to open the door to a broader right of appeal. But in fact, MARs filed under G.S. 15A-1415 are usually filed after an unsuccessful appeal, or instead of one, so neither (1) nor (2) will typically apply. In the end, I think the rules are generally the same as they are for MARs filed under G.S. 15A-1414:

- The state may *appeal* an order granting a new trial on the ground of newly discovered evidence, under G.S. 15A-1445(a)(2)
- The state may *seek certiorari review* of an order granting a new trial or a new sentencing hearing on any other ground, under N.C. R. App. P 21
- The state *cannot obtain review* of an order dismissing charges or imposing a new sentence, under *Starkey*, except perhaps somehow under the supreme court's general supervisory power

I'm sorry for the long post. As I noted at the beginning, this is a confusing area of the law. I hope that I've untangled it correctly.