

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

NO. COA11-936  
NORTH CAROLINA COURT OF APPEALS

Filed: 19 June 2012

STATE OF NORTH CAROLINA

|                   |                   |
|-------------------|-------------------|
|                   | Buncombe County   |
| v.                | Nos. 96 CRS 61003 |
|                   | 98 CRS 2945       |
| JIMMY LEE HARRIS, | 98 CRS 2947       |
| Defendant.        | 98 CRS 2949       |

Appeal by defendant from order entered 25 February 2010 by Judge James U. Downs in Buncombe County Superior Court. Heard in the Court of Appeals 25 January 2012.

*Attorney General Roy Cooper, by Assistant Attorney General Laura E. Parker, for the State.*

*Appellate Defender Staples Hughes, by Assistant Appellate Defender Kathleen M. Joyce, for defendant-appellant.*

GEER, Judge.

Defendant Jimmy Lee Harris appeals from an order dismissing his motion for post-conviction DNA testing pursuant to N.C. Gen. Stat. § 15A-269 (2011). Although the trial court initially granted defendant's motion and ordered that the evidence be tested, defendant subsequently declined to provide a sample of his DNA even after the trial court ordered him to do so.

Because defendant failed to comply with the court's order to provide a sample, we affirm the trial court's order dismissing defendant's motion for post-conviction DNA testing.

#### Facts

Defendant was convicted of second degree rape, second degree sexual offense, second degree kidnapping, attempted crime against nature, and of being a habitual felon. This Court found no error in *State v. Harris*, 140 N.C. App. 208, 535 S.E.2d 614 (2000).

Defendant subsequently filed a motion for DNA testing under N.C. Gen. Stat. § 15A-269. Judge Mark E. Powell held a hearing on the motion on 2 April 2007. During the argument, defendant's counsel pointed out that a rape kit taken from the victim had never been tested because the State had no sample from defendant. At the conclusion of the hearing, Judge Powell orally found that "the rape kit was not tested before" and ordered that the "rape kit be tested and the sample from the defendant, if one has not been taken already, be used in the DNA analysis."

Although defendant's counsel agreed to draft an order, the order apparently was never submitted to the court for signature. On 28 August 2008, a hearing was held before Judge Dennis J. Winner. After Judge Winner was told Judge Powell had granted

the motion, he entered an order directing "that the SBI laboratory conduct a test of the 'rape kit' held in evidence in this matter to determine the presence of any DNA and compare any DNA to that of the Defendant . . . ."

Fourteen items were sent to the SBI on or about 20 February 2009, including vaginal smears, vaginal swabs, panties, pubic hair, clothing, and swabbing from the inside and outside of a condom. On 1 June 2009, the SBI Crime Laboratory issued a laboratory report, indicating that it had received 14 items of evidence and that it had been requested to examine the items for the presence of semen. The report stated that vaginal smears and slides from the swabbing of the inside and outside of a condom failed to reveal the presence of spermatozoa, while vaginal swabs, panties, and toilet paper showed no chemical indications of the presence of semen. A visual examination of the victim's dress also failed to reveal the presence of semen. The report stated that all the evidence was being returned except for the victim's saliva sample and the condom swabbings, which were being retained "pending DNA assignment and analysis." The hair samples were also not analyzed.

On 21 September 2009, however, the SBI Crime Laboratory returned the saliva sample and condom swabbings, explaining that the "Forensic Biology Section of the SBI Crime Laboratory does

not analyze evidence without known DNA Standards from all relevant individuals involved in the case. *Since the required standards were not submitted*, the evidence is being returned . . . ." (Emphasis added.)

On 8 January 2010, defendant's court-appointed counsel moved to withdraw. As grounds for this motion, counsel stated that he had been advised that the SBI was requiring a DNA sample from defendant in order to make the comparison required by Judge Winner's order, that counsel had sent a consent form to defendant in August 2009 to allow the State to obtain the sample, and that defendant had declined to sign the consent form. Counsel stated that he could not "proceed, absent the cooperation of [defendant]." In a motion dated 15 January 2010, the State moved to dismiss defendant's motion for post-conviction DNA testing "due to the Defendant's refusal to cooperate with said testing."

Judge Forrest D. Bridges heard both motions on 9 February 2010. Judge Bridges denied counsel's motion to withdraw. With respect to the motion to dismiss, both Judge Bridges and defendant's counsel attempted to explain to defendant that Judge Winner's order required that the SBI Crime Laboratory conduct a comparison of his DNA with the rape kit and that a sample of his

DNA was needed. Defendant, however, insisted that the testing had, in fact, been completed, and no sample was necessary.

In an order signed 9 February 2009, Judge Bridges directed: "The Defendant has ten (10) days from today's date to execute written consent allowing a sample of his blood to be submitted to the State Bureau of Investigation lab for DNA analysis, in compliance with Judge Winner's prior order dated August 28, 2008." The order further provided: "Refusal by the Defendant to comply within ten (10) days will result in such sanctions as allowed by law and may include dismissal of the Defendant's request should another Court so find this and/or other remedies to be appropriate."

Defendant refused to provide written consent. In a motion dated 22 February 2010, the State moved to dismiss defendant's motion for post-conviction DNA testing due to defendant's noncompliance with the 9 February 2010 order. At the 22 February hearing on the State's motion before Judge James U. Downs, defendant's counsel requested that the trial court proceed as if all of the testing had been completed, including the ordered comparison, and conduct a hearing pursuant to N.C. Gen. Stat. § 15A-270.

Judge Downs, however, entered an order on 25 February 2010 finding that defendant had failed to provide a DNA sample for

testing in connection with his own request for post-conviction DNA testing, that Judge Bridges had ordered him to comply within 10 days or face potential dismissal, and that defendant had failed to comply with Judge Bridges' order. Judge Downs, therefore, ordered that defendant's request for DNA testing was dismissed and that all prior orders directing testing were vacated. Defendant appealed to this Court.

#### Discussion

We first address the State's motion to dismiss on the grounds that defendant has no right to appeal under N.C. Gen. Stat. § 15A-270.1 (2011).<sup>1</sup> Section 15A-270.1 states: "The defendant may appeal an order *denying* the defendant's motion for DNA testing under this Article . . . ." (Emphasis added.) The State contends that because, in this case, defendant's motion for DNA testing was dismissed and not denied, he has no right to appeal.

In support of this argument, the State points to *State v. Norman*, 202 N.C. App. 329, 688 S.E.2d 512, *disc. review denied*,

---

<sup>1</sup>It appears that defendant sent a notice of appeal to the Buncombe County Clerk of Court that would have been timely. For unexplained reasons, the Clerk did not file the notice of appeal until 10 June 2010. Although defendant argues that his appeal was timely, he has also filed a petition for writ of certiorari. The State has not moved to dismiss the appeal as being untimely. We have granted defendant's petition for writ of certiorari since it is not contested that any delay in the filing of his notice of appeal was through no fault of defendant.

364 N.C. 439, 702 S.E.2d 792 (2010). In *Norman*, however, the defendant's motion for testing was granted. Once the testing was completed, the trial court conducted a hearing pursuant to N.C. Gen. Stat. § 15A-270 (2011). The trial court determined that the results of the testing were unfavorable to the defendant and, therefore, dismissed the motion pursuant to N.C. Gen. Stat. § 15A-270(b). 202 N.C. App. at 331, 688 S.E.2d at 514. N.C. Gen. Stat. § 15A-270(b) provides: "If the results of DNA testing conducted under this section are unfavorable to the defendant, the court shall dismiss the motion . . . ."

On appeal, this Court held that N.C. Gen. Stat. § 15A-270.1 provided a right to appeal from the denial of a motion for testing, but no right to appeal "from an order denying relief following a hearing to evaluate the test results." 202 N.C. App. at 332, 688 S.E.2d at 515. The Court observed: "If the legislature intended to provide a right to appeal from the trial court's ruling on the results of DNA testing, we presume that it would have stated as such." *Id.*

In contrast to *Norman*, this case does not involve an appeal from an order entered pursuant to N.C. Gen. Stat. § 15A-270(b). Instead, defendant is appealing from an order denying him the opportunity for post-conviction DNA testing under N.C. Gen. Stat. § 15A-269.

While the State contends that the trial court's use of the word "dismissed" is dispositive, we do not believe that defendant's right to appeal hinges on whether the trial court chooses to use the word "dismiss" as opposed to "deny." "Denial" is defined as a "refusal or rejection." *Black's Law Dictionary* 499 (9th ed. 2009). "Dismissal" is defined as "[t]ermination of an action or claim without further hearing." *Id.* at 537. In the context of N.C. Gen. Stat. § 15A-270.1, we fail to see any meaningful distinction between a dismissal and a denial. The result is the same: the DNA testing does not occur.

It is, of course, well established that when a criminal statute is ambiguous, the rule of lenity requires us to resolve "[a]ll conflicts and inconsistencies" in "favor of the defendant." *State v. Scoggin*, 236 N.C. 1, 10, 72 S.E.2d 97, 103 (1952). We, therefore, hold that because defendant was denied relief under N.C. Gen. Stat. § 15A-269, he is entitled to appeal under N.C. Gen. Stat. § 15A-270.1. The State's motion to dismiss is denied.

Turning to the merits of defendant's appeal, Judge Downs dismissed defendant's motion and vacated the prior orders because defendant failed to comply with Judge Bridges' order that defendant, within 10 days, provide a written consent for the State to obtain a DNA sample. Judge Bridges had determined



that a sample from defendant was necessary for "compliance with Judge Winner's prior order dated August 28, 2008." In short, defendant sought testing under N.C. Gen. Stat. § 15A-269; Judges Powell and Winner ordered testing, including a comparison of defendant's DNA to the rape kit; Judge Bridges determined that defendant needed to provide a sample to comply with the prior written order; and defendant declined to provide one. Given defendant's refusal, the trial court was entitled to deny or dismiss his request.

Defendant argues that the SBI already had his DNA, citing N.C. Gen. Stat. § 15A-266.4 (2011) and notes that since 1994, all convicted felons have been required to give a DNA sample. Nevertheless, the SBI Criminal Laboratory's 21 September 2009 report indicates that the SBI had not received a "known DNA Standard from all relevant individuals involved in the case." Since the SBI Criminal Laboratory would not perform the required analysis without a sample from defendant, the trial court could properly order defendant to provide a sample as a condition of granting his request for DNA testing. As defendant refused to consent to providing a sample despite being given multiple opportunities, any denial of testing under N.C. Gen. Stat. § 15A-269 was due to defendant's own conduct. The trial court, therefore, did not err in dismissing defendant's motion.

Affirmed.

Judges STEELMAN and ROBERT N. HUNTER, JR. concur.

Report per Rule 30(e).