An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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.

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-923

Filed: 17 April 2018

Davidson County, No. 97 CRS 21108

STATE OF NORTH CAROLINA

v.

FREDDY VAN

Appeal by defendant from judgment entered 2 August 1999 by Judge Melzer A. Morgan Jr. in Davidson County Superior Court. Heard in the Court of Appeals 24 January 2018.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Amy Kunstling Irene, for the State.

Massengale & Ozer, by Marilyn G. Ozer, for defendant.

DIETZ, Judge.

Defendant Freddy Van appeals from a sentence imposed in 1999 after he pleaded guilty to murder and related offenses. Van did not file a notice of appeal from that judgment but this Court granted Van's petition for a writ of certiorari six years later, in 2005. Then, because of miscommunication and oversight by the trial court,

the clerk of superior court, and Van's court-appointed counsel, Van did not file the record on appeal for another *twelve years*, until 2017.

As explained below, Van's arguments on appeal involve unresolved fact issues concerning what happened at a nearly twenty-year-old sentencing hearing; whether Van was indigent twelve years ago; and what steps the trial court, the clerk, and Van's counsel took to preserve his right to appeal. These fact issues cannot be resolved on direct appeal. We construe his arguments as a motion for appropriate relief and remand the motion for consideration in the trial court. We instruct the trial court to appoint counsel to represent Van on remand.

Facts and Procedural History

In 1998, the State charged Defendant Freddy Van with first degree murder and attempted robbery with a dangerous weapon. The following year, Van pleaded guilty to second degree murder and attempted armed robbery with a dangerous weapon.

At sentencing, the trial court found four aggravating factors and two mitigating factors, found that the aggravating factors outweighed the mitigating factors, and sentenced Van to consecutive sentences of 237-294 months for second degree murder and 95-123 months for attempted armed robbery. Van did not appeal the judgment.

In 2005, Van filed a *pro se* petition for a writ of certiorari, arguing that he intended to appeal his sentence but his court-appointed counsel failed to do so. On 11 March 2005, this Court entered an order allowing Van's petition to permit review of the second degree murder judgment, "limited to the issues within defendant's appeal of right under N.C. Gen. Stat. § 15A-1444(a1), (a2)." The order directed that "[t]he Superior Court, Davidson County, shall determine whether defendant is entitled to proceed as an indigent, and if so, shall appoint counsel and enter other appropriate orders." The order indicates that it was sent to the Davidson County Clerk of Superior Court with a copy to Van.

On 19 September 2005, Van filed a *pro se* "motion to dismiss" in the trial court. In that filing, Van mentioned this Court's order granting a writ of certiorari, but did not request that the trial court conduct the indigency hearing described in that order. Instead, Van's motion raised other arguments concerning his conviction and sentence. The trial court denied the motion on 27 September 2005.

Eight years later, on 10 October 2013, Van filed a motion for appropriate relief. In that motion, Van asked the trial court to "carry out the 2005 order from the Court of Appeals." Later that month, the trial court entered an order finding Van indigent and appointing the Office of the Appellate Defender to represent him.

Several months later, in early 2014, the Appellate Defender informed the court that it would not recognize the court's order, apparently because the Appellate

Defender mistakenly believed the order concerned Van's motion for appropriate relief, not this Court's order granting a writ of certiorari. The trial court then appointed a private attorney to represent Van. Van's newly appointed counsel did not pursue an appeal in this Court.

Two more years passed and then, in October 2016, Van sent a letter to the trial court "to inquire into the status of the appointment of counsel to perfect [his] belated appeal." In November 2016, the trial court entered an order finding that "the defendant is entitled to appellate counsel pursuant to the order of the NC Court of Appeals date[d] March 11, 2005." The order released Van's previously appointed counsel and appointed the Appellate Defender to handle the appeal to this Court.

Another four months passed with no action on the appeal. Then, in March 2017, Van sent a letter to the Appellate Defender asking about the status of his appeal. The Appellate Defender sent a lengthy letter to the Clerk of Superior Court for Davidson County, explaining that the clerk's office had failed to promptly notify the Appellate Defender of the trial court's appointment order and had failed to forward various case-related material. The clerk's office also had not requested a transcript from the nearly two-decade-old sentencing hearing.

The Appellate Defender informed the Clerk of Superior Court that if the clerk did not take immediate action, the Appellate Defender would pursue a writ of mandamus from this Court. Unfortunately, the court reporter records necessary to

prepare a transcript of the 1999 sentencing hearing were destroyed in 2010 as part of a routine document destruction program. Van filed the record on appeal with this Court in August 2017, twelve years after this Court's order permitting that appeal, and nearly twenty years after entry of the judgment Van seeks to challenge.

Analysis

Van argues that the twelve-year delay between this Court's order granting appellate review and the filing of the record on appeal violated Van's due process rights. He also argues that he is entitled to a new sentencing hearing because the destruction of the court reporter's records in 2010 prevent this Court from determining whether he stipulated to certain aggravating factors at the 1999 sentencing hearing.

Notably, none of these issues are grounds on which this Court originally granted review by writ of certiorari in 2005. Instead, these issues arose because the trial court did not conduct an indigency hearing as this Court instructed in its 2005 order, leaving this appeal in limbo for close to a decade, until 2014. During that time, as part of a routine document destruction process, the State destroyed the court reporter's records necessary to create a transcript of the 1999 sentencing hearing.

As a result, Van's arguments in this appeal require determination of a number of facts that the parties did not have an opportunity to develop and include in the appellate record. For example, with respect to Van's due process argument, this Court

must apply a four-factor test that includes both "defendant's assertion of his right" to a speedy appellate process and the "prejudice to defendant resulting from the delay." *State v. Berryman*, 360 N.C. 209, 218–19, 624 S.E.2d 350, 357 (2006). Evaluating these factors requires determination of a key fact: was Van "entitled to proceed as an indigent" in 2005? If he was, the failure to appoint an attorney to represent him would weigh heavily in his favor in this analysis. By contrast, if he was not indigent in 2005, he may share responsibility for allowing the appeal to remain in limbo for so long.

This Court is not a fact-finding court and we are unable to resolve this fact question on the record before us. *Johnston v. State*, 224 N.C. App. 282, 302, 735 S.E.2d 859, 873 (2012), *aff'd*, 367 N.C. 164, 749 S.E.2d 278 (2013). Because neither party had an opportunity to develop a record answering this and other, related fact questions, the appropriate remedy is to construe these arguments as a motion for appropriate relief and remand to the trial court, where the court can resolve these arguments after conducting an evidentiary hearing. *State v. Stroud*, 147 N.C. App. 549, 554–55, 557 S.E.2d 544, 547 (2001).

Similarly, although a transcript of the 1999 sentencing hearing is not available, there are other ways to determine whether Van stipulated to the aggravating factors at sentencing—the central issue in his challenge to his sentence. "[O]ur Supreme Court has held that the lack of a transcript does not prejudice the defendant when alternatives—such as a narrative of testimonial evidence compiled

pursuant to Rule 9(c)(1) of the North Carolina Rules of Appellate Procedure—are available that would fulfill the same functions as a transcript and provide the defendant with a meaningful appeal." *State v. Hobbs*, 190 N.C. App. 183, 186, 660 S.E.2d 168, 170 (2008). The record does not indicate whether the parties attempted to create a narrative of the sentencing proceeding, or whether Van, his court-appointed counsel in 1999, or others involved in the case might recall enough of the proceeding to create a narrative. Moreover, even if creating a narrative of the proceeding is impractical, witnesses involved in that proceeding may recall whether Van stipulated to the aggravating factors on which the trial court relied at sentencing. Again, this Court is ill-suited to resolve these fact questions. They are best pursued in a motion for appropriate relief, where a trial court can hear potentially competing testimony and find facts where necessary.

Accordingly, because the issues asserted in this appeal cannot be resolved without determinations of facts not resolved by the appellate record, we construe these arguments as a motion for appropriate relief and remand the matter to the trial court to address the motion. We instruct the trial court to appoint counsel to represent Van on remand.

Conclusion

For the reasons discussed above, we remand this matter to the trial court.

REMANDED.

Judges ELMORE and HUNTER, JR. concur.

Report per Rule 30(e).