An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA17-471

Filed: 17 April 2018

Forsyth County, Nos. 10 CRS 55393-94, 55398

STATE OF NORTH CAROLINA

v.

JOSE ALBERTO BEIZA TAPIA

Appeal by Defendant from order entered 19 December 2016 by Judge Richard Gottlieb in Superior Court, Forsyth County. Heard in the Court of Appeals 16 October 2017.

Attorney General Joshua H. Stein, by Assistant Attorney General Joseph L. Hyde, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Katherine Jane Allen, for Defendant-Appellant; and Jose Alberto Beiza Tapia, pro se.

McGEE, Chief Judge.

Jose Alberto Beiza Tapia ("Defendant") appeals from order denying his post-conviction motion to locate and preserve evidence and for DNA testing under N.C. Gen. Stat. § 15A-269 (2017). We affirm.

Defendant was convicted on 15 December 2010 of trafficking in cocaine by possession, trafficking in cocaine by transportation, possession with intent to sell or deliver cocaine, maintaining a vehicle for the use or keeping of controlled substances, and fleeing to elude arrest. The State's evidence showed that, on 21 May 2010, Winston-Salem police officers were surveilling an apartment complex when they observed Defendant's brother, Victor, load a toolbox into a Ford Expedition ("the Expedition"). Victor then rode in the Expedition, along with others, to a Lowe's parking lot where he met Defendant, who was driving a black BMW ("the BMW"). *State v. Tapia*, 219 N.C. App. 226, 722 S.E.2d 13, 2012 N.C. App. LEXIS 258, *2 (unpublished), *disc. review denied*, 366 N.C. 238, 731 S.E.2d 155 (2012). After placing the toolbox in the backseat of the BMW, Victor got into the front passenger seat of the BMW, and Defendant drove away. The Expedition left the parking lot in a different direction. When police attempted to stop the BMW, Defendant led them on a high speed chase. During the chase, a passerby observed an object being thrown from the front passenger's side of the BMW. After apprehending Defendant and Victor, officers found an open, empty toolbox in the backseat of the BMW. Officers also found a wrapped kilogram of cocaine on the shoulder of the road along Defendant's path of flight.

The trial court consolidated the offenses into a single judgment and sentenced Defendant to an active prison term of 175 to 219 months. This Court found no error. *Tapia*, 2012 N.C. App. LEXIS 258 at *6.

Defendant filed a motion on 29 August 2016 to locate and preserve evidence and for post-conviction DNA testing, accompanied by a "Memorandum of Innocence." In his motion, Defendant requested fingerprinting and DNA testing of the BMW, the toolbox, the packaging in which the cocaine was wrapped, and other items collected by police on 21 May 2010. Defendant alleged the State Crime Lab had failed to subject this evidence to fingerprinting or DNA testing and claimed that such testing "could easily show that [he] never had any knowledge nor possession factual or constructive of any illegal substance being in the [BMW]."

The trial court denied Defendant's motion by order entered 19 December 2016. The court found, *inter alia*, that Defendant made "no showing as to whether biological evidence was collected in the investigation or prosecution of his case" or any showing that DNA testing was material to his defense. *See* N.C. Gen. Stat. § 15A-269(a)-(b).

Pursuant to his statutory right of appeal, N.C. Gen. Stat. § 15A-270.1 (2017), Defendant filed a *pro se* notice of appeal on 19 January 2017. Recognizing the notice of appeal is untimely, *see* N.C.R. App. P. 4(a)(2),[1] counsel appointed to represent

[1] We note Defendant's certificate of service is dated 29 December 2016, within the fourteen-day appeal period under Rule 4(a)(2). However, our Rules of Appellate Procedure make no special allowance for notices of appeal filed by prison mail. *Compare* N.C. R. App. P. 3(c)(3), 4(a)(2), 26(a)(1), *with* Fed. R. App. P. 4(c).

Defendant on appeal has filed a petition for writ of certiorari asking this Court to review the trial court's order pursuant to N.C. R. App. P. 21(a)(1). In our discretion, we allow the petition in order to consider Defendant's appeal. *See State v. Turner*, 239 N.C. App. 450, 452, 768 S.E.2d 356, 358 (2015).

Counsel appointed to represent Defendant on appeal has been unable to identify any issue with sufficient merit to support a meaningful argument for relief on appeal and asks that this Court conduct its own review of the record for possible prejudicial error. Counsel has shown to the satisfaction of this Court that counsel has complied with the requirements of *Anders v. California*, 386 U.S. 738, 18 L. Ed. 2d 493 (1967), and *State v. Kinch*, 314 N.C. 99, 331 S.E.2d 665 (1985), by advising Defendant of his right to file written arguments with this Court and by providing Defendant with the documents necessary for him to do so. Defendant filed his *pro se* brief on 6 July 2017.

The State contends the protections provided in *Anders* and *Kinch* do not apply to appeals pursuant to N.C. Gen. Stat. § 15A-270.1. For the reasons stated in our opinion in *State v. Velasquez-Cardenas*, __ N.C. App. __, __ S.E.2d __ (2017) (COA17-422), filed concurrently with this opinion, we disagree.

We have considered Defendant's *pro se* arguments and find they are not properly before this Court. Defendant claims that the State's evidence was obtained by an unlawful vehicle stop, search, and seizure in violation of the Fourth

Amendment, and that he was denied his Sixth Amendment right to an impartial jury and to effective assistance of counsel at trial. As none of these claims address the trial court's denial of Defendant's motion for post-conviction DNA testing, they are dismissed.

We have reviewed the record for possible prejudicial error and agree with counsel that the appeal is wholly frivolous. The order of the trial court is hereby affirmed.

AFFIRMED.

Judge CALABRIA concurs.

Judge DILLON concurs with separate opinion.

Report per Rule 30(e).

No. COA17-471 – STATE v. TAPIA

DILLON, Judge, concurring.

I concur in the result reached by the majority. I write separately for the same reasons I wrote separately in *State v. Velasquez-Cardenas* (COA17-422).