An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA17-742

Filed: 7 August 2018

Wake County, Nos. 11-CRS-211149; 11-CRS-100

STATE OF NORTH CAROLINA

v.

SERGIO ANDRES NARANJO

Appeal by Defendant from order entered 10 August 2016 by Judge Donald W. Stephens in Superior Court, Wake County. Heard in the Court of Appeals 4 June 2018.

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

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Emily H. Davis, for Defendant.

McGEE, Chief Judge.

Sergio Andres Naranjo ("Defendant") pleaded guilty on 25 July 2012 to statutory rape of a fourteen-year-old and to two counts of first-degree sexual offense. Defendant was sentenced to a minimum of 192 months and a maximum of 240 months in prison. Defendant filed a *pro se* motion to locate and preserve evidence

and for post-conviction DNA testing pursuant to N.C. Gen. Stat. § 15A-269 (2015) on 14 June 2016. The trial court entered an order denying Defendant's motion on 10 August 2016. Defendant appeals.

I. Factual and Procedural History

Defendant was indicted on 6 June 2011 and 12 September 2011 for five counts of first-degree sexual offense, one count of statutory rape of a person who was thirteen, fourteen, or fifteen years of age, two counts of first-degree rape, three counts of indecent liberties with a minor, and one count of attempted first-degree sexual offense. Defendant pleaded guilty to statutory rape of a fourteen-year-old and to two counts of first-degree sexual offense on 25 July 2012. The State then agreed to dismiss Defendant's remaining charges. The trial court sentenced Defendant to a minimum of 192 months and a maximum of 240 months in prison.

Defendant filed a *pro se* motion on 14 June 2016 to locate and preserve evidence pursuant to N.C.G.S. § 15A-269(f) and for post-conviction DNA testing pursuant to N.C.G.S. § 15A-269(a). Defendant alleged that certain items collected in the investigation should be DNA tested, including: fifty "plucked head hairs," fifty "pubic hairs," "two swabs of saliva," a rape kit from the victim, two sets of bed sheets, various items of clothing, and other assorted items. Defendant alleged that DNA testing of these items would prove that he was not the perpetrator of the alleged crime.

Defendant accompanied his motion with an affidavit of innocence as required by N.C.G.S. § 15A-269(b)(3).

The trial court entered an order on 10 August 2016 denying Defendant's motion without a hearing. The trial court held that Defendant "failed to show how DNA testing would be material to his defense or what his defense is." Defendant filed a *pro se* notice of appeal on 25 August 2016 pursuant to N.C. Gen. Stat. § 15A-270.1 (2015). Defendant's notice of appeal was not timely filed and, therefore, failed to fully comply with the requirements of N.C. R. App. P. 4. Defendant, however, has filed an alternative petition for writ of certiorari acknowledging the deficiencies. In the interest of justice, Defendant's petition for writ of certiorari is allowed.

Counsel appointed to represent Defendant on appeal has filed a brief pursuant to *Anders v. California*, 368 U.S. 738, 18 L. Ed. 2d 493 (1967) and *State v. Kinch*, 314 N.C. 99, 331 S.E.2d 665 (1985), after being unable to identify any issue with sufficient merit so as to make a non-frivolous argument for relief and has asked this Court to review the record for any possible prejudicial error. Defendant's counsel has complied with the requirements of *Anders* and *Kinch*, by advising Defendant of his right to file written arguments with this Court and by providing Defendant with the materials necessary for him to do so. Defendant has failed to file any written arguments with this Court and a sufficient amount of time for him to do so has passed.

II. Analysis

The State raises two arguments as to why Defendant's appeal is meritless. First, the State argues that *Anders* does not apply to the appeal of orders denying post-conviction DNA testing. Second, the State argues that a defendant who has pleaded guilty will be unable to establish materiality under N.C.G.S. § 15A-269(a)(1). For the reasons stated in our opinion in *State v. Thomas*, ___ N.C. App. ___, ___ S.E.2d ___ (2018) (COA17-904), filed concurrently with this opinion, we disagree with both of the State's arguments.

Nevertheless, we have reviewed the record pursuant to *Anders* for possible prejudicial error and agree with Defendant's counsel that Defendant's appeal is wholly frivolous. The order of the trial court is hereby affirmed.

AFFIRMED

Judges BRYANT and STROUD concur.

Report per Rule 30(e).