An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA17-904

Filed: 7 August 2018

Davidson County, Nos. 11 CRS 53949 and 11 CRS 5349

STATE OF NORTH CAROLINA

v.

PATRICK EUGENE THOMAS

Appeal by Defendant from order entered 11 May 2017 by Judge Mark E. Klass in Superior Court, Davidson 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 James R. Grant, for Defendant.

McGEE, Chief Judge.

Patrick Eugene Thomas ("Defendant") pleaded guilty on 11 September 2013 to possession of a controlled substance and to having attained the status of an habitual felon. Defendant was sentenced to a minimum of 87 months and a maximum of 114 months' incarceration. 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 23 September 2016, and again on 22 February 2017. The trial court entered an order denying Defendant's motion on 30 September 2016 and entered a second order on 11 May 2017. Defendant appeals the trial court's 11 May 2017 order.

I. Factual and Procedural History

Defendant was indicted for possession of a controlled substance and having attained the status of an habitual felon. Defendant entered a plea of guilty as to both offenses pursuant to *North Carolina v. Alford*, 400 U.S. 25, 27 L. Ed. 2d 162 (1970) on 11 September 2013. The State stipulated to the existence of one mitigating factor and the trial court accepted Defendant's plea and entered judgment on 11 September 2013. The trial court sentenced Defendant to a minimum of 87 months and a maximum of 114 months' incarceration.

Defendant filed a *pro se* motion on 23 September 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 during the investigation of Defendant's crimes should be tested for DNA. These items included a bag of white substance, latent fingerprints, tape, a plastic bag, and a "bag with various items." Defendant alleged that DNA testing of these items would prove that he was not the perpetrator of the 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 30 September 2016 denying Defendant's motion. The trial court's order stated that Defendant had "failed to allege new grounds sufficient for the relief requested." Defendant filed a *pro se* notice of appeal on 17 October 2016 pursuant to N.C. Gen. Stat. § 15A-270.1 (2015). Defendant filed a *pro se* petition for writ of mandamus with this Court on 25 January 2017. In his petition, Defendant requested this Court to compel the trial court to "order the preparation of the Appellate Entries and to appoint [appellate] counsel[.]" This Court denied Defendant's petition on 8 February 2017.

Defendant again filed a *pro se* motion to locate and preserve evidence and for post-conviction DNA testing on 22 February 2017. The trial court acknowledged receipt of Defendant's motion in a letter dated 28 February 2017, but stated that Defendant's "failure to assert any other grounds in [his] motion shall be subject to being treated in the future as a procedural bar to other claims, assertions, petitions, or motions" and that the 29 September 2016 order remained in effect. The trial court entered no order regarding Defendant's 22 February 2017 motion. Defendant filed a second notice of appeal of the trial court's order denying his motion for post-conviction DNA testing on 8 March 2017, but failed to specify the date of the trial court order to which he was referring. In a letter dated 14 March 2017, the trial court acknowledged receipt of Defendant's notice of appeal, but again warned Defendant that his failure to assert additional grounds could act as a procedural bar in the future.

Defendant again filed a petition for writ of mandamus, dated 29 March 2017, with this Court and the trial court. The trial court denied Defendant's petition on 7 April 2017. Before this Court could rule on Defendant's petition for writ of mandamus, Defendant filed a notice of appeal of the trial court's 7 April 2017 order, incorrectly identifying that order as denying his motion for post-conviction DNA testing. This Court granted Defendant's petition for writ of mandamus on 13 April 2017 and directed the trial court to rule on Defendant's 22 February 2017 motion within sixty days. The trial court entered an order on 11 May 2017 denying both Defendant's 22 February 2017 motion to locate and preserve evidence and for post-conviction DNA testing, and his 8 March 2017 notice of appeal. On the same day, the trial court entered an order for the appointment of appellate counsel.

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 and a sufficient amount of time for him to do so has passed.

Defendant's notice of appeal was not timely filed and the notice of appeal 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.

II. Analysis

The State first argues that *Anders* does not apply to the appeal of orders denying post-conviction DNA testing. For the reasons stated in *State v. Velasquez-Cardenas*, ___ N.C. App. ___, ___ S.E.2d ___ (2018) (COA17-422), the State's argument is without merit. "[W]e hold that *Anders* procedures apply to appeals pursuant to N.C.G.S. § 15A–270.1." *Id.* at ___, ___ S.E.2d at ___. Based on our review, we agree with Defendant's counsel that the appeal is wholly frivolous.

"Under our review pursuant to *Anders* and *Kinch*, 'we must determine from a full examination of all the proceedings whether the appeal is wholly frivolous.'" *State v. Frink*, 177 N.C. App. 144, 145, 627 S.E.2d 472, 473 (2006) (citation omitted). "[W]e will review the legal points appearing in the record, transcript, and briefs, not for the purpose of determining their merits (if any) but to determine whether they are wholly frivolous." *Id.* (citation omitted).

"[A] condition precedent to a trial court's statutory authority to grant a motion under N.C.G.S. § 15A–269 is that the conditions of subsection (a) be met." *State v.*

Foster, 222 N.C. App. 199, 204, 729 S.E.2d 116, 120 (2012) (citations and quotations omitted). N.C. Gen. Stat. § 15A-269(a) provides:

> A defendant may make a motion before the trial court that entered the judgment of conviction against the defendant for performance of DNA testing and, if testing complies with FBI requirements and the data meets NDIS criteria, profiles obtained from the testing shall be searched and/or uploaded to CODIS if the biological evidence meets all of the following conditions:
>
> (1) Is material to the defendant's defense.
>
> (2) Is related to the investigation or prosecution that resulted in the judgment.
>
> (3) Meets either of the following conditions:
>
> a. It was not DNA tested previously.
>
> b. It was tested previously, but the requested DNA test would provide results that are significantly more accurate and probative of the identity of the perpetrator or accomplice or have a reasonable probability of contradicting prior test results.

N.C.G.S. § 15A-269(a).

The State argues that, where a defendant has pleaded guilty, it is impossible to establish materiality under N.C.G.S. § 15A-269(a)(1). This Court has previously acknowledged that, where a defendant enters a guilty plea, it is inherently more difficult to establish materiality. *State v. Randall*, ___ N.C. App. ___, ___ S.E.2d. ___, (5 June 2018) (COA17-924). However,

> we do not believe that the statute was intended to completely forestall the filing of [ ] such a motion where a defendant did, in fact, enter a plea of guilty. The trial court is obligated to consider the facts surrounding a defendant's decision to plead guilty in addition to other evidence, in the context of the entire record of the case, in order to determine whether the evidence is "material."

Id. at ___, ___ S.E.2d at ___ (citing *State v. Lane*, 370 N.C. 508, 809 S.E.2d 568 (2018)).

Nevertheless, Defendant's conclusory statements in his motion for post-conviction DNA testing that the DNA evidence would "prove that fact that Defendant was <u>not</u> the perpetrator of the crime," that he was "set up by the Davidson County Sheriff's Office," and that "this is exactly the kind of case where DNA evidence is MATERIAL and can result in EXONERATION" were insufficient to establish materiality under N.C.G.S. § 15A-269(a)(1). *See State v. Cox*, 245 N.C. App. 307, 312, 781 S.E.2d 865, 868 (2016). In *Cox*, this Court held that,

> Defendant's burden to show materiality requires more than the conclusory statement that [t]he ability to conduct the requested DNA testing is material to the [d]efendant's defense[,] . . . . [T]he defendant must provide *specific reasons* that the requested DNA test would be significantly more accurate and probative of the identity of the perpetrator or accomplice or that there is a reasonable probability of contradicting the previous test results.

Id. at 312, 781 S.E.2d at 868-69 (emphasis in original) (internal citations and quotations omitted).

Defendant failed to provide specific arguments as to how DNA testing would show that he was "set up" or would otherwise prove that he was not the perpetrator

of the alleged crime; therefore, he failed to sufficiently establish materiality under *Randall* and *Cox*. Because Defendant failed to establish a condition precedent to the trial court's statutory authority to grant a motion under N.C.G.S. § 15A–269, the trial court did not err in denying Defendant's motion to locate and preserve evidence and for post-conviction DNA testing.

AFFIRMED.

Judges BRYANT and STROUD concur.

Report per Rule 30(e).