An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA18-502

Filed: 7 May 2019

Mecklenburg County, Nos. 08 CRS 250566–67, 08 CRS 80584

STATE OF NORTH CAROLINA

v.

RODNEY EUGENE JONES

Appeal by defendant from order entered 22 June 2017 by Judge W. Robert Bell in Mecklenburg County Superior Court. Heard in the Court of Appeals 27 November 2018.

Attorney General Joshua H. Stein, by Assistant Attorney General Kimberly N. Callahan, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Aaron Thomas Johnson, for defendant-appellant.

BRYANT, Judge.

Defendant Rodney Eugene Jones appeals from order denying defendant's request for post-trial DNA testing. Where defendant's notice of appeal was untimely, we dismiss the appeal. We also deny defendant's petition for writ of certiorari and alternative petition for writ of mandamus.

The underlying factual background for this case can be found in this Court's unpublished decision in *State v. Jones*, No. COA12-1320, slip op. 1 (N.C. Ct. App. Sept. 17, 2013). The procedural history, relevant to the instant appeal, is as follows.

On 8 December 2008, defendant was indicted for first degree burglary, larceny after breaking and entering, and attaining habitual felon status. Defendant was convicted by jury for first-degree burglary and larceny after breaking and entering. Thereinafter, defendant pled guilty to attaining habitual felon status. Defendant appealed. On 17 September 2013, this Court issued an unpublished decision in *Jones*, holding no error occurred in defendant's trial or the judgment entered upon his convictions.

On 27 January 2017, defendant filed a motion requesting post-conviction DNA testing on a gray "jacket." Defendant argued that the gray jacket had been destroyed prematurely in violation of N.C. Gen. Stat. § 15A-268. The gray jacket in question had been processed almost ten years earlier by the Charlotte-Mecklenburg Police Department ("CMPD") and destroyed on 1 April 2010.

Defendant subsequently filed an amendment to his motion and a request for appointment of counsel. On 6 April 2017, defendant filed another motion for appointment of counsel. On 17 April 2017, the trial court, under the mistaken impression that defendant had not filed an underlying motion for post-conviction

DNA testing, entered an order denying defendant's request for counsel. On 2 May 2017, defendant filed an "objection" to the trial court's order.

On 17 May 2017, the trial court considered defendant's 27 January 2017 motion for post-conviction DNA testing (including his assertion that the destruction of the jacket violated his due process rights), his 16 February 2017 amendment to the motion, and his 2 May 2017 objection to the trial court's previous order. The trial court entered an extensive order denying the motions. The trial court concluded that defendant failed to demonstrate materiality for DNA testing of the gray jacket, and without meeting that burden, he could not show a due process violation. The record supports the trial court's determination that there was additional evidence, including eyewitness testimony of defendant as he kicked open the door and entered the victim's home. Per the trial court's order, defendant's claims were "without merit."

On 1 June 2017, defendant filed a second motion for post-conviction DNA testing of the gray jacket claiming that CMPD violated his due process rights. In response, the trial court attached a copy of the 17 May 2017 order. Two weeks later, defendant filed a third motion for post-conviction DNA testing requesting an evidentiary hearing and again asserted a due process violation. On 22 June 2017, the trial court entered an order denying defendant's request for DNA testing because no new issues were raised that had not been previously addressed.

Defendant's *pro se* notice of appeal from the 22 June 2017 order was not filed until 7 August 2017. Defendant contemporaneously filed a petition for writ of certiorari and a petition for writ of mandamus with his appellant brief. In his brief, defendant contends the trial court erred by failing to address his claim for DNA testing of the gray jacket and that destruction of the gray jacket violated his due process rights. In response, the State filed an appellee brief and motion to dismiss. After careful consideration, we grant the motion to dismiss defendant's appeal for failure to comply with N.C.R. App. R. 4.

Rule 4 of the North Carolina Rules of Appellate Procedure governs appeals in criminal cases. Section 15A-270.1 of our General Statutes grants a direct right to appeal from an order denying the defendant's motion for DNA testing, provided that the defendant complies with the requirements of Rule 4. N.C. Gen. Stat. § 15A-270.1 (2017).

According to Rule 4, any party can appeal from a judgment or order in a criminal action by "filing notice of appeal with the clerk of superior court and serving copies thereof upon all adverse parties within fourteen days after entry of the judgment or order. . . ." N.C.R. App. P. 4(a)(2) (2019) (emphasis added). "[C]ompliance with the requirements of Rule 4(a)(2) is jurisdictional and cannot simply be ignored by this Court." *State v. McCoy*, 171 N.C. App. 636, 638, 615 S.E.2d

319, 320 (2005). Therefore, "when a defendant has not properly given notice of appeal, this Court is without jurisdiction to hear the appeal." *Id*.

In the instant case, defendant did not properly preserve his right to appeal from the trial court's order. The record reveals that defendant's notice of appeal was filed well after the applicable deadline and failed to comply with Rule 4. In *State v. Hughes*, 210 N.C. App. 482, 485, 707 S.E.2d 777, 779 (2011), this Court dismissed the defendant's appeal for failure to give timely notice of appeal from a trial court's judgment. *Id*. at 485, 707 S.E.2d at 779. Consistent with our ruling in *Hughes*, where defendant failed to give timely and proper notice of appeal, pursuant to Rule 4, we are required to dismiss the appeal as this Court is without jurisdiction.

Defendant filed a petition for writ of certiorari in recognition of the fact that his notice of appeal was untimely. Rule 21(a)(1) of the Appellate Rules allows this Court, in its discretion, to grant a petition for writ of certiorari and review defendant's arguments where "the right to prosecute an appeal has been lost by failure to take timely action[.]" N.C.R. App. P. 21(a)(1) (2019). The record before this Court reveals defendant has filed numerous motions and had many hearings on those motions. As for defendant's instant motion, we note the trial court's ruling that the courts below have held evidentiary hearings and comprehensively considered defendant's argument regarding the destruction of evidence within his motions for DNA testing. Therefore, we agree with the trial court's conclusion that "[d]efendant's [m]otions are

without merit and do not raise any question of fact which must be resolved by an evidentiary hearing[.]" Therefore, in our discretion, we decline to grant the petition for writ of certiorari.[1]

Alternatively, defendant's petition for writ of mandamus asks this Court to direct the trial court to resolve the allegations that CMPD violated N.C. Gen. Stat. § 15A-268 ("Preservation of biological evidence") by prematurely destroying the gray jacket and that destroying the jacket violated defendant's due process rights. As noted above, we agree with the trial court that there are no remaining questions of fact to be resolved, and no need for further evidentiary hearings.

"A writ of mandamus is an extraordinary court order to a[n]. . . inferior court . . . commanding the performance of a specified official duty imposed by law." *In re T.H.T.*, 362 N.C. 446, 453, 665 S.E.2d 54, 59 (2008) (citation and quotation marks omitted). "An action for mandamus may not be used as a substitute for an appeal." *Snow v. N.C. Bd. of Architecture*, 273 N.C. 559, 570, 160 S.E.2d 719, 727 (1968) (emphasis omitted). "Such writ will not be issued to enforce an alleged right which is in question. Mandamus lies only to enforce a clear legal right and will be issued

[1] In addition to the trial court's findings of fact and conclusions of law, we note that, on federal habeas review, defendant raised similar arguments in his motions for an evidentiary hearing and discovery before the United States District Court for the Western District of North Carolina. The federal district court acknowledged that "[t]he North Carolina Court of Appeals and/or the Mecklenburg County Superior Court adjudicated the majority of the claims raised herein on the merits" and denied defendant's motions. *Jones v. Joyner*, No. 3:14CV420–FDW, 2015 WL 5567569, at *4 (W.D.N.C. Sept. 22, 2015).

only where there is no other legal remedy." *Bd. of Managers of James Walker Mem'l Hosp. v. City of Wilmington*, 235 N.C. 597, 601, 70 S.E.2d 833, 836 (1952) (internal citation and quotation marks omitted).

Where the trial court has already addressed defendant's statutory and due process claims, defendant cannot establish that the trial court is under any further duty to act. *See T.H.T.*, 362 N.C. at 453, 665 S.E.2d at 59 ("Appellate courts may only issue mandamus to enforce established rights, not to create new rights."). Defendant's alternative petition for writ of mandamus is denied.

APPEAL DISMISSED; PETITIONS DENIED.

Judges DILLON and ZACHARY concur.

Report per Rule 30(e).