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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-788

Filed: 21 April 2020

Mecklenburg County, No. 07 CRS 249456

STATE OF NORTH CAROLINA

v.

MARKESE RICE

Appeal by Defendant from Order entered 1 April 2019 by Judge Donnie Hoover in Mecklenburg County Superior Court. Heard in the Court of Appeals 22 January 2020.

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

*Appellate Defender Glenn Gerding, by Assistant Appellate Defender Katy Dickinson-Schultz, for defendant-appellant.*

HAMPSON, Judge.

**Factual and Procedural Background**

Markese Rice (Defendant) appeals from an Order Regarding Motion for Appropriate Relief (Order) denying Defendant's *pro se* Motion for Post Conviction DNA Testing (Motion). The Record tends to show the following:

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In November 2007, a grand jury indicted Defendant for first-degree murder. Defendant pleaded not guilty, and the case proceeded to trial. On 10 March 2009, the jury found Defendant guilty of first-degree murder, and the trial court sentenced Defendant to life imprisonment without parole. This Court upheld Defendant's conviction in April 2010. *See State v. Rice*, 203 N.C. App. 573, 692 S.E.2d 890 (20 April 2010) (unpublished).

On 2 October 2018, Defendant filed his *pro se* Motion in the present case. Citing N.C. Gen. Stat. § 15A-269, Defendant's Motion requested post-conviction DNA testing on, *inter alia*, several cartridge cases found at the scene of the alleged murder that Defendant contended would show multiple weapons were used and thus that there were possibly multiple shooters, thereby contradicting the testimony of the State's eyewitness who testified to seeing only one shooter. Defendant's Motion also recited Section 15A-269's requirements, stating DNA testing was required because (1) it was "material to the defendant[s] defense[,]"; (2) it was "related to the investigation and/or [prosecution,]" and (3) although some items were previously tested, the requested DNA retesting "could provide results that are significantly more accurate and probative of the identity of the perpetrator or have a reasonable probability of contradicting the [previous] results." Defendant also provided a sworn affidavit maintaining his innocence.

On 1 April 2019, the trial court entered its Order denying Defendant's Motion. Although Defendant's Motion was captioned "Motion for Post Conviction DNA Testing" and expressly cited Section 15A-269, the trial court's Order begins by stating, "Defendant's *pro se* Motion for Appropriate Relief . . . is before the undersigned Resident Superior Court Judge, in chambers, *pursuant to N.C.G.S. § 15A-1413.*" (emphasis added). Noting Defendant had previously filed several motions for appropriate relief, which were all denied, the trial court then determined Defendant's Motion

should be denied on grounds of procedural default, as required by N.C.G.S. Section 15A-1419(b), because he either raised the grounds or issues contained herein in his prior appeals and/or motions which were decided on the merits, or he was in a position to adequately raise the grounds or issues underlying the present motion in his prior appeals and motions but did not do so.

Accordingly, the trial court denied Defendant's Motion.

On 12 April 2019, Defendant filed his Notice of Appeal from the trial court's Order. Defendant's Notice of Appeal, however, failed to indicate "the court to which appeal is taken[.]" N.C.R. App. P. 4(b). Realizing this error, Defendant filed a Petition for Writ of Certiorari with our Court on 11 October 2019. In our discretion, we grant Defendant's Petition. *See id.* 21(a)(1); *see also State v. Shaw*, 259 N.C. App. 703, 704, 816 S.E.2d 248, 250 (2018) (granting a defendant's petition for writ of certiorari to review the trial court's order denying the defendant's motion for post-conviction DNA testing).

**Issue**

The dispositive issue on appeal is whether the trial court erred in denying Defendant's Motion.

**Analysis**

Section 15A-269 of our General Statutes permits a convicted defendant to submit requests for post-conviction DNA testing. Under this Section,

- (a) A defendant may make a motion before the trial court that entered the judgment of conviction against the defendant for performance of DNA testing . . . 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.
- (b) The court shall grant the motion for DNA testing . . . upon its determination that:
  - (1) The conditions set forth in subdivisions (1), (2), and (3) of subsection (a) of this section have been met;
  - (2) If the DNA testing being requested had been conducted on the evidence, there exists a reasonable probability

that the verdict would have been more favorable to the defendant; and

- (3) The defendant has signed a sworn affidavit of innocence.

N.C. Gen. Stat. § 15A-269(a)-(b) (2019).

Our Court’s decision in *Shaw* addressed a similar situation to the present case and controls our analysis. In *Shaw*, the defendant filed a *pro se* motion requesting DNA testing of certain evidence pursuant to N.C. Gen. Stat. § 15A-269. 259 N.C. App. at 704, 816 S.E.2d at 249. The defendant’s motion tracked the statutory requirements of Section 15A-269 and included a sworn affidavit maintaining his innocence. *Id.* Interpreting the defendant’s motion as a motion for appropriate relief, the trial court denied the motion because the “defendant had not complied with the service and filing requirements provided for motions for appropriate relief in N.C. Gen. Stat. § 15A-1420(a)(2)” and because “ ‘[the d]efendant does not allege newly discovered evidence or other genuine issues that would require an evidentiary hearing, and that the claims raised either were or could have been raised upon direct appeal[,]’ which are grounds for denial of a motion for appropriate relief pursuant to N.C. Gen. Stat. § 15A-1419.” *Id.* (alteration in original).

On appeal, our Court explained:

A motion for post-conviction DNA testing pursuant to N.C. Gen. Stat. § 15A-269 is distinct from a motion for appropriate relief under N.C. Gen. Stat. § 15A-1411, -1420. Wholly separate from the post-conviction procedures that govern motions for

appropriate relief, N.C. Gen. Stat. § 15A-269 “provide[s] a specific procedural vehicle for asserting, and obtaining relief on, claims for relief based on post-conviction DNA testing.” In fact, even where a defendant files a motion for appropriate relief that contains multiple claims, one of which involves post-conviction DNA testing, the trial court must still “evaluat[e] each individual claim on the merits and under the applicable substantive law.” Accordingly, where a defendant brings a motion for post-conviction DNA testing pursuant to N.C. Gen. Stat. § 15A-269, the trial court’s task is to rule on the motion in accordance with the applicable substantive law as set forth in N.C. Gen. Stat. § 15A-269(b). A trial court may not supplant the analysis contemplated by N.C. Gen. Stat. § 15A-269(b) with the evaluation applicable to motions for appropriate relief.

*Id.* at 706, 816 S.E.2d at 250 (alterations in original) (citations omitted).

The *Shaw* Court then noted the trial court’s order did not address whether the defendant’s motion complied with the requirements of Section 15A-269 and “denied [the] defendant’s motion on the grounds set forth in N.C. Gen. Stat. § 15A-1420(a)(2) and 1419(a) for evaluation of motions for appropriate relief.” *Id.* at 706-07, 816 S.E.2d at 250-51. Because the trial court did not evaluate the factors in Section 15A-269, the *Shaw* Court could not “determine whether [the] defendant’s motion for post-conviction DNA testing was properly denied” and therefore vacated the order and remanded for “the trial court’s review consistent with the provisions of N.C. Gen. Stat. § 15A-269.” *Id.* at 707, 816 S.E.2d at 251.

Here, the trial court conducted a similar analysis as the trial court in *Shaw*, which was vacated and remanded by this Court. Although Defendant’s Motion recited Section 15A-269’s factors and requested DNA testing pursuant to that

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Statute, “the trial court conducted no such inquiry” into these factors, instead denying Defendant’s Motion on grounds of procedural default under Section 15A-1419. *Id.* at 706, 816 S.E.2d at 251. As in *Shaw*, because the trial court failed to address the requisite factors in Section 15A-269, “we cannot determine whether [Defendant’s Motion] was properly denied. Accordingly, we vacate the trial court’s [O]rder and remand for the trial court’s review consistent with the provisions of N.C. Gen. Stat. § 15A-269.” *Id.* at 707, 816 S.E.2d at 251.<sup>1</sup>

**Conclusion**

Accordingly, for the foregoing reasons, we vacate the trial court’s Order and remand for the trial court’s review consistent with the provisions of N.C. Gen. Stat. § 15A-269.

VACATED AND REMANDED.

Judges ARROWOOD and COLLINS concur.

Report per Rule 30(e).

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<sup>1</sup> Defendant also argues the trial court erred by not appointing counsel to help Defendant prosecute his Motion, citing N.C. Gen. Stat. § 15A-269(c). Because, given its analysis below, the trial court did not address this issue and because we remand this matter for the trial court’s review consistent with N.C. Gen. Stat. § 15A-269, we do not address this argument. *See id.*