IN THE COURT OF APPEALS OF NORTH CAROLINA

2021-NCCOA-380

No. COA20-755

Filed 20 July 2021

Rockingham County, Nos. 11 CRS 50264-65

STATE OF NORTH CAROLINA

v.

JOE WESLEY CARTER, Defendant.

Appeal by Defendant from order entered 19 February 2016 by Judge Edwin G. Wilson, Jr., in Rockingham County Superior Court. Heard in the Court of Appeals 9 June 2021.

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

Appellate Defender Glenn Gerding, by Assistant Appellate Defender David W. Andrews, for Defendant-Appellant.

INMAN, Judge.

¶ 1 Joe Wesley Carter ("Defendant") appeals from an order denying his motion for post-conviction DNA testing and barring Defendant from filing further motions seeking the same relief. After careful review, we affirm the trial court's denial of Defendant's motion but hold the trial court erred in imposing a bar on future motions.

I. FACTS & PROCEDURAL HISTORY

¶ 2 Evidence in the record tends to show the following:

¶ 3 On the night of 22 January 2011, Defendant broke into the house of his ex-girlfriend, Mary Ann Russell ("Ms. Russell"), told her that he was there to kill her, and attacked her with a knife, striking her in the head until she lost consciousness. While Ms. Russell was unconscious, Defendant put her in his car and drove to a body of water. When she woke up, he warned her that if he threw her body into the water no one would ever find her. Defendant then returned Ms. Russell to her house and threatened to hurt her family if she told anyone what had happened.

¶ 4 On 5 October 2011, a jury found Defendant guilty of assault with a deadly weapon with intent to kill inflicting serious injury, first-degree kidnapping, and felony breaking and entering. The trial court sentenced Defendant to consecutive active sentences of 20 to 24 months for breaking and entering, 146 to 185 months for first-degree kidnapping, and 146 to 185 months for assault with a deadly weapon with intent to kill inflicting serious injury. Defendant appealed the criminal judgments against him to this Court, and we upheld his convictions. *State v. Carter*, 223 N.C. App. 521, 735 S.E.2d 452, 2012 WL 5857389, at *3-4 (2012).

¶ 5 Four years after his convictions were upheld, Defendant filed a motion for post-conviction DNA testing. The trial court denied the motion, concluding, in relevant part, that "the motion sets forth no probable grounds for the relief requested, either in law or in fact." The trial court further concluded that "the petitioner's failure to

assert any other grounds in this motion shall be subject to being treated in the future as a BAR to any other claims, assertions, petitions, or motions that he might hereafter file in this case, pursuant to [Section] 15A-1419."

¶ 6 Defendant, who has remained in prison since his conviction, appealed the trial court's order, filing two written notices of appeal, both dated 24 February 2016. One notice was not file-stamped by the Rockingham County Clerk's Office until 16 March 2016, and the file stamp on the other notice is illegible.

¶ 7 The State filed a motion to dismiss Defendant's appeal for lack of jurisdiction because Defendant did not file his written notice "within fourteen days after entry of the judgment or order." N.C. R. App. P. 4(a) (2021); *see also State v. McCoy*, 171 N.C. App. 636, 638, 615 S.E.2d 319, 320 (2005) ("[W]hen a defendant has not properly given notice of appeal, this Court is without jurisdiction to hear the appeal."). On appeal, Defendant, concurrently with his brief, has filed a Petition for Writ of Certiorari in the event he has lost his right to appeal by failure to take timely action under North Carolina Rule of Appellate Procedure 4(a).

II. ANALYSIS

1. State's Motion to Dismiss

¶ 8 Defendant did not file his written notice of appeal within fourteen days of the entry of the order, as required by Rule 4(a). Defendant's motion for post-conviction

DNA testing was denied on 19 February 2016, and his appeal was not file-stamped until 16 March 2016.

¶ 9 Defendant contends he wrote and mailed his notice of appeal from prison five days after the trial court entered its order, on 24 February 2016, but that the clerk failed to file stamp the notice for almost a month.

¶ 10 Defendant would have this Court adopt the holding of the United States Supreme Court in *Houston v. Lack*, 487 U.S. 266, 101 L. Ed. 2d. 245 (1988), which deemed an inmate's notice of appeal filed at the time the inmate "delivered it to the prison authorities for forwarding to the court clerk." 487 U.S. at 276, 101 L. Ed. 2d at 255; *see also* Fed. R. App. P. 4(c)(1) (2016) ("If an inmate files a notice of appeal in either a civil or a criminal case, the notice is timely if it is deposited in the institution's internal mail system on or before the last day for filing . . .").[1] Based on federal precedent, Defendant's notice of appeal would be timely despite the clerk's delayed file stamping.

¶ 11 In North Carolina, a defendant has a statutory right to appeal an order denying a motion for post-conviction DNA testing pursuant to N.C. Gen. Stat. § 15A-

[1] Other states have adopted the reasoning of the United States Supreme Court in *Lack*. *See Shelton v. La. Dep't of Corr.*, 691 So. 2d 159, 163 (La. App. 1 Cir. 2018); *Holland v. State*, 621 So. 2d 373, 375 (Ala. Crim. App. 1993); *State v. Williamson*, 226 N.E.2d 735, 736 (Ohio 1967). No court in North Carolina has held the same. Because we grant Defendant's petition for writ of certiorari, we need not address this issue here.

270.1. The defendant must give either oral notice of appeal at trial or written notice of appeal within fourteen days after entry of the order. N.C. R. App. P. 4(a). If a defendant cannot show compliance with Rule 4, we are without jurisdiction to hear the appeal. *State v. Hughes*, 210 N.C. App. 482, 484, 707 S.E.2d 777, 778 (2011). North Carolina Rule of Appellate Procedure 27(c) provides that this Court cannot grant any time extensions. N.C. R. App. P. 27(c) (2021); *see also McCoy*, 171 N.C. App. at 638, 615 S.E.2d at 320.

¶ 12 Even though Defendant alleges he wrote and dated the appeal only five days after the order, it was not file stamped by the clerk of court until almost a month later. It is impossible to determine when Defendant's other notice of appeal was filed, since the time stamp is unreadable.

¶ 13 Defendant cannot show he filed his appeal within the required time. Therefore, we grant the State's motion to dismiss and now consider Defendant's Petition for Writ of Certiorari.

2. Defendant's Petition for Writ of Certiorari

¶ 14 This Court may issue a writ to review a trial court's judgment when the right to appeal has been lost by failure to take timely action. N.C. R. App. P. 21(a)(1) (2021). We have issued this writ to review appeals by defendants who lost the ability to appeal through no fault of his or her own. *E.g, State v. Perez*, __ N.C. App. __ , __, 854 S.E.2d 15, 20 (2020); *McCoy*, 171 N.C. App. at 638-39, 615 S.E.2d at 320-21. In

our discretion, and because Defendant's appeal is in part meritorious, as explained below, we issue the writ of certiorari.

3. Denial of Motion for Post-Conviction DNA Testing

¶ 15 Defendant contends the trial court failed to follow the criteria set forth under N.C. Gen. Stat § 15A-269 when it denied his motion for post-conviction DNA testing.

¶ 16 A defendant may file a motion for post-conviction DNA testing where the testing:

> (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. Gen. Stat § 15A-269(a) (2019).

¶ 17 The trial court should allow the motion if the conditions in Section 15A-269(a) are met, if there is a reasonable probability that any DNA testing would have resulted in a more favorable verdict for the defendant, and the defendant has sworn an affidavit of innocence. *Id.* at § 15A-269(b). In its order, the trial court must correctly identify a motion for post-conviction DNA testing as such, and it cannot consider the motion as another kind of motion, like a Motion for Appropriate Relief. *See State v.*

Shaw, 259 N.C. App. 703, 706, 816 S.E.2d 248, 250 (2018) ("A trial court may not supplant the analysis contemplated by [Section] 15A-269(b) with the evaluation applicable to motions for appropriate relief."). However, the trial court is not required to make any specific findings of fact regarding the factors provided in Section 15A-269(a). *State v. Gardner*, 227 N.C. App. 364, 370, 742 S.E.2d 352, 356 (2013) (holding no error when the trial court did not make "findings of fact and conclusions of law demonstrating that it analyzed the requirements set forth in [S]ection 15A-269").

¶ 18 The State relies on *State v. Tilghman*, 261 N.C. App. 716, 821 S.E.2d 253 (2018). In that case, this Court explained that a trial court's order must state that it reviewed the allegations in the defendant's motion, cite the relevant law, and conclude that the defendant did not establish any grounds for relief. *Id.* at 720 n.2, 821 S.E.2d at 257 n.2. This Court upheld the trial court's order which found, "The Defendant's Motion is frivolous[,] and no hearing is necessary. The Defendant's Motion fails to set forth any credible basis in law or fact to support his requests." *Id.* at 719, 821 S.E.2d at 255 (quotation marks omitted).

¶ 19 Here, the trial court, "having considered the allegations contained in the motion and the case file, finds as fact that the motion sets forth no probable grounds for the relief requested, either in law or in fact." The trial court accurately labeled its order "Order of Summary Dismissal on Motion for Post-Conviction DNA Testing." The order demonstrates the trial court reviewed the allegations in Defendant's

motion for post-conviction DNA testing and concluded there were no grounds for relief. The trial court did not expressly consider the steps of Section 15A-269 but explained that there were no grounds for relief "in law or in fact." The trial court's failure to expressly analyze the factors in Section 15A-269 was not determinative in *Tilghman*, 261 N.C. App. at 720, 821 S.E.2d at 257-58, and is not determinative here.

¶ 20 Applying the governing statute and caselaw to the order, we hold the trial court did not err by denying Defendant's motion for post-conviction DNA testing.

4. Bar against Future Motions for DNA Testing

¶ 21 Defendant argues the trial court erred in imposing a bar on any future motions for post-conviction DNA testing that he might file. The trial court's order provides, in relevant part: "the petitioner's failure to assert any other grounds in this motion shall be subject to being treated in the future as a BAR to any other claims, assertions, petitions, or motions that he might hereafter file in this case, pursuant to [Section] 15A-1419."

¶ 22 The State characterizes the trial court's bar as "prospective in nature and immaterial," and argues that because the bar would only take effect if Defendant filed another motion for DNA testing, the issue is "not ripe for appellate review."

¶ 23 In *State v. Blake*, __ N.C. App. __ , __, 853 S.E.2d 838 (2020), our Court vacated the trial court's bar against a criminal defendant's future motions for appropriate

relief.[2] *Id.*, 853 S.E.2d at 847-48. We expressly rejected the same argument made by the State that an appeal is not ripe until the defendant has filed another motion. *Id.*, 853 S.E.2d at 848. This Court further emphasized "[g]atekeeper orders are normally entered only where a defendant has previously asserted numerous frivolous claims." *Id.* (citation omitted).

¶ 24 In this case, Defendant has not filed multiple frivolous motions; this motion was Defendant's first seeking post-conviction DNA testing. The trial court's order provides no explanation of why Defendant's motion warrants gatekeeping.[3] Defendant has the right to appeal the trial court's order pursuant to Section 15A-270.1, so his appeal is ripe for our review.

¶ 25 The State further argues that even if the trial court erred in entering such a bar, any future motions for DNA testing by Defendant would automatically be barred by the doctrine of *res judicata*.

¶ 26 The defense of *res judicata* prevents a second suit based on the same cause of action between the same parties. *Thomas M. McInnis & Assocs., Inc. v. Hall*, 318

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[2] We recognize that a motion for DNA testing is distinct from a motion for appropriate relief. *Compare* N.C. Gen. Stat. § 15A-269 ("Request for postconviction DNA testing") *with* N.C. Gen. Stat. § 15A-1419 (2019) ("When motion for appropriate relief denied").

[3] We also note the trial court claimed to impose the bar under Section 15A-1419, which explicitly governs motions for appropriate relief, not motions for DNA testing. This Court has repeatedly clarified a motion for post-conviction DNA testing is distinct from a motion for appropriate relief. *See Shaw*, 259 N.C. App. at 706, 816 S.E.2d at 250 ("A trial court may not supplant the analysis contemplated by [Section] 15A-269(b) with the evaluation applicable to motions for appropriate relief.").

N.C. 421, 428, 349 S.E.2d 552, 556 (1986). Since Defendant has yet to file another motion for DNA testing, this argument is premature.

¶ 27 We hold the trial court erred by imposing a bar on Defendant's future motions for DNA testing. Accordingly, we vacate this portion of the trial court's order.

III. CONCLUSION

¶ 28 For the foregoing reasons, we hold the trial court did not err by denying Defendant's motion for post-conviction DNA testing, but we vacate that portion of the order imposing a bar on similar future motions.

NO ERROR IN PART; VACATED IN PART.

Judges TYSON and ARROWOOD concur.

Report per Rule 30(e).