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IN THE COURT OF APPEALS OF NORTH CAROLINA

2022-NCCOA-74

No. COA21-384

Filed 1 February 2022

Forsyth County, Nos. 18 CRS 58385-87

STATE OF NORTH CAROLINA

v.

DUSTIN RYAN DENNY, Defendant.

Appeal by Defendant from order entered 2 February 2021 by Judge David Hall in Forsyth County Superior Court. Heard in the Court of Appeals 1 December 2021.

*Attorney General Joshua H. Stein, by Assistant Attorney General Benjamin Szany, for the State.*

*Appellate Defender Glenn Gerding, by Assistant Appellate Defender Heidi Reiner, for Defendant.*

GRIFFIN, Judge.

¶ 1

Dustin Ryan Denny (“Defendant”) appeals from an order denying his *pro se* motion for post-conviction DNA testing without an evidentiary hearing. If we find Defendant’s written notice of appeal to be untimely, Defendant asks this Court to grant his petition for writ of certiorari (“PWC”) and requests an *Anders* review of the Record. After review, we grant Defendant’s PWC and affirm the trial court’s order.

**I. Factual and Procedural Background**

¶ 2

In September 2019, Defendant pled guilty to three counts of indecent liberties, two counts of failure to report change of address as a sex offender, one count of resisting an officer, and one count of a sex offender employment violation, pursuant to *North Carolina v. Alford*, 400 U.S. 25 (1970). The plea agreement between Defendant and the State included dismissal of a habitual felon charge, consolidation of all charges into one count of attempted first-degree sex offense, and that Defendant would receive an active sentence of 220-273 months. The trial court sentenced Defendant in the mitigated range.

¶ 3

On 22 January 2021, Defendant filed a *pro se* motion for postconviction DNA testing, which included an “Affidavit of Actual Innocence.” Collectively, in his motion and in his affidavit, Defendant stated, “Testing[] will prove the outcome of facts to show [Defendant’s] Innocence[,]” and he asserted “his factual and actual innocence.”

¶ 4

On 2 February 2021, the trial court entered an order denying Defendant’s motion without an evidentiary hearing. In the order, the trial court found that “Defendant only makes the conclusory assertion that [by] granting the Motion ‘[t]esting will prove the outcome of facts to show [Defendant’s] innocence.’” Accordingly, the trial court denied Defendant’s motion because “Defendant has failed to meet his burden of showing materiality because Defendant’s conclusory assertions that testing will ‘show his factual innocence’ is not sufficiently specific to establish that the requested DNA testing would be material to his defense[,]” and “because the

contention in Defendant's Motion is both bared [sic] by the validly-executed plea agreement and otherwise lacks merit[.]”

¶ 5

Defendant's written notice of appeal was dated 15 February 2021, but was not filed until 22 February 2021. The Appellate Defender was appointed to represent Defendant. Due to the likelihood that Defendant's notice of appeal would be found untimely, Defendant filed a PWC and requested an *Anders* review of the Record.

## II. Analysis

### A. Jurisdiction

¶ 6

First, we must determine whether this Court has jurisdiction over Defendant's appeal. North Carolina Rules of Appellate Procedure dictate that a party filing written notice of appeal should do so “within fourteen days after entry of the judgment or order[.]” N.C. R. App. P. 4(a)(2). The Record reflects that Defendant's *pro se* notice of appeal was dated thirteen days after the trial court's order was entered, but was not filed in the clerk's office until six days after the requisite deadline. However, “[t]he writ of certiorari may be issued in appropriate circumstances by either appellate court to permit review of the judgments and orders of trial tribunals when the right to prosecute an appeal has been lost by failure to take timely action[.]” N.C. R. App. P. 21(a)(1). While the *pro se* notice of appeal was not timely filed in the clerk's office, it appears Defendant attempted to give timely written notice and would otherwise lose his right to appeal. Therefore, we exercise our discretion and grant

Defendant's PWC.

## B. Anders Review

¶ 7 Defendant's counsel has informed this Court that they are "unable to identify any issue with sufficient merit to support meaningful argument for relief on appeal." As a result, Defendant's counsel asks this Court to independently review the Record for possible prejudicial error in conformity with *Anders v. California*, 386 U.S. 738 (1967), and *State v. Kinch*, 314 N.C. 99, 331 S.E.2d 665 (1985).

¶ 8 Under *Anders*,

a defendant may appeal even if defendant's counsel has determined the case to be "wholly frivolous." In such a situation[,] counsel must submit a brief to the court "referring to anything in the record that might arguably support the appeal." Counsel must furnish the defendant with a copy of the brief, the transcript, and the record and inform the defendant of his or her right to raise any points he or she desires and of any time constraints related to such right.

*State v. Dobson*, 337 N.C. 464, 467, 446 S.E.2d 14, 16 (1994) (citing *Anders*, 386 U.S. at 744). We conclude that Defendant's counsel fulfilled their obligations under *Anders* and *Kinch* by advising Defendant of his right to file his own supplemental arguments and furnished Defendant with the necessary documents to do so.

¶ 9 Defendant has not filed any additional arguments with this Court within a reasonable amount of time. However, to aid in our review, Defendant's counsel refers us to two areas in the Record that might arguably support Defendant's appeal: (1) the

denial of Defendant's motion for DNA testing; and, (2) the denial of Defendant's request to appoint counsel.

**1. Denial of Defendant's Motion for DNA Testing**

¶ 10 Defendant's counsel suggests this Court should determine whether the denial of the DNA motion was supported. N.C. Gen. Stat. § 15A-269(a)(1) states, in part, that "[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 . . . [i]s material to the defendant's defense." N.C. Gen. Stat. § 15A-269(a)(1) (2019).

¶ 11 A showing of 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.'" *State v. Cox*, 245 N.C. App. 307, 312, 781 S.E.2d 865, 868 (2016) (citations omitted). "Merely asserting conclusory statements that DNA testing could be material and, if tested, would exonerate defendant are insufficient to meet this burden." *State v. Tilghman*, 261 N.C. App. 716, 719, 821 S.E.2d 253, 256 (2018) (citations omitted).

¶ 12 Defendant failed to allege any specific facts showing materiality to his defense in his motion for DNA testing. Rather, Defendant made numerous conclusory statements in his motion and in his "Affidavit of Factual Innocence," such as "[t]esting will prove the outcome of facts to show [Defendant's] Innocence[.]" Thus, we find no

error in the trial court's denial of Defendant's motion for DNA testing.

## **2. Denial of Defendant's Request to Appoint Counsel**

¶ 13 Next, Defendant's counsel suggests this Court to determine whether the denial of Defendant's request for appointed counsel was supported. For a defendant to be appointed counsel upon a motion for post-conviction DNA testing, the defendant must establish "that (1) he is indigent and (2) DNA testing may be material to his wrongful conviction claim." *Cox*, 245 N.C. App. at 312, 781 S.E.2d at 868 (citing N.C. Gen. Stat. § 15A-269(c) (2019)). "[T]he materiality threshold to appoint counsel under subsection (c) . . . is no less demanding than the materiality threshold to bring a motion under subsection (a)(1)." *Id.* While the Record indicates that Defendant is indigent, Defendant is unable to satisfy the materiality requirement, as has been shown above. Consequently, we affirm the trial court's denial of Defendant's request for appointed counsel.

## **III. Conclusion**

¶ 14 After a full examination of the Record, we are unable to find any issues that would constitute prejudicial error in Defendant's case. We affirm the trial court's order.

AFFIRMED.

Judges TYSON and ARROWOOD concur.

Report per Rule 30(e).