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IN THE COURT OF APPEALS OF NORTH CAROLINA

2022-NCCOA-186

No. COA21-487

Filed 15 March 2022

Martin County, No. 09-CRS-413

STATE OF NORTH CAROLINA

v.

ALBERT GREY GURKIN, SR., Defendant.

Appeal by Defendant from order entered on 27 January 2021 by Judge Wayland J. Sermons, Jr., in Martin County Superior Court. Heard in the Court of Appeals 25 January 2022.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Robert C. Montgomery, for the State.

Jason Christopher Yoder for Defendant.

JACKSON, Judge.

¶ 1 Albert Grey Gurkin, Sr., ("Defendant") has filed an *Anders* brief asking this Court to conduct an independent review to determine whether the record discloses prejudicial error in the trial court's denial of his motion for postconviction DNA testing. After careful review, we affirm the order of the trial court.

I. Background

¶ 2 A jury found Defendant guilty of the second-degree murder of his wife on 7 February 2013. This Court upheld Defendant's conviction on direct appeal in *State v. Gurkin*, 234 N.C. App. 207, 758 S.E.2d 450, *disc. review denied*, 367 N.C. 527, 762 S.E.2d 212 (2014). The facts and procedural history of the case are fully set out in that prior opinion, and we recount only those necessary for resolution of the present appeal here.

¶ 3 During his trial, Defendant testified that on 14 May 2009, his wife attacked him from behind with a stun gun; that it was the most intense pain he had ever experienced; that he struggled with his wife over the stun gun; and that he turned the stun gun on his wife during the struggle. The struggle resulted in Mrs. Gurkin's death. According to an autopsy, the cause of Mrs. Gurkin's death was strangulation.

¶ 4 After Defendant's arrest in connection with Mrs. Gurkin's death, he sent his son a letter in which he asked his son for forgiveness and stated, "you will see that she did this, not me."

¶ 5 The trial court sentenced Defendant to 189 to 236 months in prison for his second-degree murder conviction. He entered notice of appeal in open court, and our Court found no error in his trial in a 3 June 2014 published opinion. *Id.* at 217, 758 S.E.2d at 457. Our Supreme Court denied his petition for discretionary review on 19 August 2014. *State v. Gurkin*, 367 N.C. 527, 762 S.E.2d 212 (2014).

¶ 6 On 20 August 2015, Defendant filed a motion for appropriate relief in Martin

County Superior Court. In it, he argued that he received ineffective assistance of counsel from both his trial and appellate counsel.

¶ 7 On 25 February 2019, the trial court conducted an evidentiary hearing on the motion. In his testimony at the evidentiary hearing, Defendant gave essentially the same account of the events leading up to the death of his wife he had during his trial six years earlier. Regarding his representation by counsel, Defendant testified that he retained his trial counsel approximately 90 days after his arrest and told him about the stun gun immediately; that his trial counsel did not seem to think the stun gun defense was particularly promising; that trial counsel believed a defense theory that Defendant's son was the true perpetrator was more promising than a self-defense theory involving the stun gun; and that trial counsel was angry when the letter Defendant wrote his son after his arrest surfaced because it ruled out the viability of a defense theory that Defendant's son was the perpetrator.

¶ 8 Defendant's trial counsel testified at the 25 February 2019 hearing that it was Defendant's idea, not counsel's, to implicate Defendant's son as the perpetrator; that both the self-defense theory and the theory that someone else was responsible for Mrs. Gurkin's death were discussed by his private investigator and retained experts at length; that he became aware of the letter from Defendant to his son in 2012 after it was served in discovery to a previous attorney; and that the letter ruled out the viability of a theory that someone other than Defendant was responsible for Mrs.

Gurkin's death.

¶ 9 The trial court denied the 20 August 2015 motion for appropriate relief in a 12 September 2019 order. The court concluded that Defendant's "lack of any other possible defense regarding the cause of death of the victim resulted in [] Defendant testifying in the manner he did at trial[,]" and that "self-defense d[id] not apply in th[e] case given [] Defendant's testimony." The court therefore concluded that Defendant had failed to establish that he received ineffective assistance of counsel.

¶ 10 In late 2020, Defendant prepared two *pro se* motions: (1) a motion to locate and preserve evidence and for postconviction DNA testing; and (2) a second motion for appropriate relief. Only the second motion for appropriate relief bears a file stamp in the record on appeal, reflecting a filed date of 27 January 2021. The State filed responses to Defendant's motions on 31 December 2020, consenting to the motion to preserve evidence, but otherwise opposing postconviction DNA testing or any relief requested in the motion for appropriate relief. The trial court denied both motions in a 27 January 2021 order.

¶ 11 On 1 February 2021, Defendant filed a *pro se* written notice of appeal from the trial court's denial of his motion for postconviction DNA testing. Defendant was subsequently appointed appellate counsel. Counsel thereafter filed a Petition for Writ of Certiorari on Defendant's behalf in the event there were any defects in Defendant's 1 February 2021 *pro se* notice of appeal.

II. Appellate Jurisdiction

¶ 12 There is an appeal of right from an order denying a motion for postconviction DNA testing. N.C. Gen. Stat. § 15A-270.1 (2021). Furthermore, under Rule 21(a)(1) of the North Carolina Rules of Appellate Procedure, this Court may issue the writ of certiorari "when the right to prosecute an appeal has been lost by the failure to take timely action[.]" N.C. R. App. P. 21(a)(1). Rule 21 thus authorizes our Court to issue the writ of certiorari to cure defects in a notice of appeal. *Anderson v. Hollifield*, 345 N.C. 480, 482, 480 S.E.2d 661, 663 (1997).

¶ 13 In his petition, Defendant asserts that his *pro se* notice of appeal complied with the requirements of Appellate Rule 4, but requests that we allow review if it did not. In its response, the State does not identify any defects in the 1 February 2021 *pro se* notice of appeal and takes no position on whether we should grant Defendant's petition for certiorari. The *pro se* notice of appeal identifies Martin County Superior Court in the caption rather than our Court and the cover letter included with the notice indicates that Defendant filed the notice in Martin County Superior Court and mailed a copy to our Court. Rule 4(b) requires that a notice of appeal "designate the judgment or order from which appeal is taken *and the court to which appeal is taken*[.]" N.C. R. App. P. 4(b) (emphasis added). The 1 February 2021 *pro se* notice of appeal thus violated Rule 4(b). *See id.*

¶ 14 However, our Court has held that a notice of appeal that technically violates

Rule 4(b) by failing to designate the court to which appeal is taken can still satisfy the jurisdictional requirements of Rule 4(b). *State v. Rouse*, 234 N.C. App. 92, 94, 757 S.E.2d 690, 691-92 (2014). That is, under Rule 4(b), "an appellant's failure to designate this Court in its notice of appeal is not fatal to the appeal where the appellant's intent to appeal can be fairly inferred and the appellees are not misled by the appellant's mistake." *State v. Ragland*, 226 N.C. App. 547, 553, 739 S.E.2d 616, 620, *disc. review denied*, 367 N.C. 220, 747 S.E.2d 548 (2013) (cleaned up). Thus, where the "defendant's intent to appeal is plain, and [] this Court is the only court with jurisdiction to hear [the] appeal," a technical violation of Rule 4(b) for failure to correctly identify the court to which appeal is taken is not a jurisdictional rule violation. *Id.* Accordingly, we hold that we have jurisdiction over this appeal, and deny Defendant's petition for certiorari.

III. *Anders* Brief

¶ 15 Defendant's appellate counsel has filed a brief pursuant to *Anders v. California*, 386 U.S. 738 (1967), indicating that after a close examination of the record and relevant law, he is unable to identify any issue with sufficient merit to support a meaningful argument for relief on appeal. Defendant asks this Court to conduct its own review of the record for possible error.

¶ 16 Counsel has filed documentation with the Court showing that he has complied with the requirements of both *Anders* and *State v. Kinch*, 314 N.C. 99, 102, 331 S.E.2d

665, 666 (1985) (holding that defense counsel's brief had "fully complied with *Anders*" by "stat[ing] in his brief that he found no merit in the assignments of error and request[ing] this Court to review the record for any prejudicial error"). Namely, counsel here advised Defendant in writing on 22 October 2021 of his right to file written arguments with the Court and has provided him with a copy of the documents pertinent to his appeal, including the record on appeal and counsel's brief. As Defendant's motion for postconviction DNA testing was denied without a hearing, there was no transcript related to the motion on appeal.

¶ 17 Unlike the appellant in *Kinch*, Defendant here has not filed a *pro se* brief with this Court, and a reasonable time for him to do so has expired. *Id*. at 102, 331 S.E.2d at 666-67. Further, as in *Kinch*, counsel for Defendant has referred us to three issues that might arguably support an appeal: (1) whether the materiality requirement under N.C. Gen. Stat. § 15A-269(a)(1), the postconviction DNA testing statute, was met; (2) whether the request to locate and preserve evidence triggered a requirement that the evidence be inventoried; and (3) whether the trial court erred in denying Defendant's request for counsel before he filed his notice of appeal (after which, counsel was appointed).

¶ 18 None of these issues have merit. The materiality requirement of the postconviction DNA testing statute was not met. The existence of the letter from Defendant to his son ruled out the viability of a defense that anyone other than

Defendant was responsible for his wife's death; Defendant's trial testimony was overwhelming evidence of his guilt. The inventory provision is triggered upon the filing of a written request for inventory, not by a motion to have evidence located and preserved. *See* N.C. Gen. Stat. § 15A-268(a7) (2021). Defendant did not satisfy his burden of demonstrating that his motion for postconviction DNA testing "may" be material to his wrongful conviction claim; the trial court therefore did not err in denying his request for counsel to be appointed to pursue this claim. *See id.* § 15A-269(c). Finally, the active sentence imposed upon Defendant for the Class B1 felony of second-degree murder was within the presumptive range and was properly authorized under the applicable statutes.

IV. Conclusion

¶ 19 In accordance with our duty under *Anders* and *Kinch*, we have fully examined the record to determine whether any meritorious issues appear to exist and have found none. There is no error in the trial court's order denying Defendant's motion for postconviction DNA testing.

AFFIRMED.

Judges COLLINS and GORE concur.

Report per Rule 30(e).