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IN THE COURT OF APPEALS OF NORTH CAROLINA

2022-NCCOA-247

No. COA21-180

Filed 5 April 2022

Currituck County, Nos. 15 CRS 624; 16 CRS 21, 24

STATE OF NORTH CAROLINA

v.

GORDON HENDRICKS

Appeal by defendant by writ of certiorari from order entered 30 July 2019 by Judge Jerry R. Tillett in Currituck County Superior Court. Heard in the Court of Appeals 14 December 2021.

Attorney General Joshua H. Stein, by Assistant Attorney General Narcisa Woods, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Jillian C. Katz, for defendant-appellant.

ZACHARY, Judge.

¶ 1 Defendant Gordon Hendricks appeals from the trial court's order denying his motion for appropriate relief as procedurally barred. After careful review, we affirm.

Background

¶ 2 On 14 November 2016, Defendant appeared in Currituck County Superior Court and, pursuant to a plea arrangement with the State, pleaded guilty to two

counts of first-degree sexual exploitation of a minor and one count of indecent liberties with a child. In exchange, the State dismissed the 13 remaining charges against Defendant. On the transcript of plea was a handwritten note, stating that "[e]ach charge [is] to receive a consecutive, active sentence."

¶ 3 The trial court conducted the requisite plea colloquy with Defendant, during which Defendant acknowledged his understanding of the agreement's terms, as well as his satisfaction with the agreement and the services of his counsel. The court accepted the plea and entered judgment sentencing Defendant to a term of 21 to 35 months' imprisonment for the indecent liberties conviction, and 96 to 176 months' imprisonment for each sexual exploitation of a minor conviction, with all sentences to run consecutively. The court also found Defendant to be a recidivist sex offender and ordered that he enroll in satellite-based monitoring for the remainder of his natural life upon his release from prison.

¶ 4 Sometime after the trial court entered judgment, Defendant wrote a letter[1] to the court (the "Undated Letter MAR"), asking to be resentenced and requesting that the court amend its judgment to order that his sentences run concurrently, rather than consecutively. In addition, Defendant reported that he had been experiencing

[1] The Record does not reflect whether Defendant filed the Undated Letter MAR and served it upon the State. The original Undated Letter MAR is not in the court file and cannot be located. The Record contains Defendant's copy of the Undated Letter MAR, which has not been file-stamped and does not certify service.

mental-health concerns at the time of his plea. He also complained of his appointed trial attorney's services: he asserted that his lawyer's behavior "sent [him] into panic attacks"; that she "never talked in sentencing court"; that she "put her hand up in [his] face twice" when he tried to notify her in court that he believed he was receiving an incorrect sentence; and that he felt that his lawyer had worked against him.

¶ 5 The trial court construed Defendant's handwritten letter as a motion for appropriate relief challenging the "plea agreement [and] sentencing[,] and [alleging] ineffective assistance of counsel regarding sentencing[.]" On 5 October 2017, the court entered an order titled "ORDER ON MOTION FOR APPROPRIATE RELIEF" (the "2017 Order") denying Defendant's motion. The trial court made the following findings and conclusions in support of its denial of Defendant's Undated Letter MAR:

> Defendant's guilty plea was heard in open court and upon the record, being adjudicated in accord with legal requirements including [N.C. Gen. Stat. §] 15A-1022.
>
> [Defendant] was specifically addressed in open court concerning specific provisions of his plea including those regarding sentencing.
>
> The plea agreement specifically provided for consecutive active sentences for "each charge".
>
> [Defendant] acknowledged that this was correct as his full plea agreement, that he accepted such arrangement, and entered the plea of his own free will fully understanding what he was doing. Defendant also acknowledged that he was satisfied with his lawyer's services.

> The plea was not ambiguous.
>
> The sentence was consistent with the agreement. Defendant received the benefit of his bargain.
>
> No argument regarding sentencing was required in light of the specific plea.
>
> [Defendant]'s counsel was not ineffective as alleged.

Defendant did not appeal the 2017 Order.

¶ 6 In the interim, prior to the entry of the 2017 Order, Defendant sent another letter to the trial court (the "Transcript Letter MAR") in support of his motion for the preparation of a stenographic transcript, which he filed on 15 August 2017. In Defendant's motion, he stated that he needed the transcript to resolve issues of fact relating to (1) the "sentence of plea agreement"; (2) the plea agreement; and (3) his claim of "[i]neffective assistance of counsel [b]efore, during, [and a]fter" his sentencing. In the supporting Transcript Letter MAR, Defendant again contested his sentence and alleged that he "had issues with [his] attorney." He said that he twice attempted to talk to his lawyer while the judge was handing down his sentence, but "she put her hand up in my face both times."

¶ 7 The trial court subsequently denied Defendant's motion in an order—titled "SECOND ORDER"—which was entered on 8 November 2018 (the "2018 Order"). First, the court determined that Defendant had not sufficiently demonstrated a "particularized need for a transcript[.]" Further, "reviewing the [Transcript Letter

MAR] broadly as a Motion for Relief after sentencing," the trial court concluded that Defendant had already filed—and the court had ruled upon—a motion for appropriate relief alleging the same issues:

> [D]efendant has, by prior post judgment motion, raised the same generalized conclusory challenges or issues as are contained in paragraph "(3)" of [D]efendant's motion. The Court has previously reviewed [D]efendant's plea adjudication wherein he pled guilty, together with accompanying and appropriate documents and determined that the plea agreement, adjudication and sentence were not inappropriate, nor unfair and were consistent with the [D]efendant's bargain, giving him full benefits thereof. Defendant has made no other proffer, forecast or showing to challenge the charges, factual basis, or appropriateness of the plea agreement. The Court has previously entered an Order Denying Relief on substantially, if not identically, the same grounds now generally and vaguely asserted.

The court "incorporate[d] its earlier [2017 Order] herein as if fully set forth" and concluded that Defendant's motion was subject to procedural default. Additionally, the court "d[id] not find actual prejudice or good cause excusing grounds for denial provided by law, nor that failure [to] consider these claims will result in a fundamental miscarriage of justice." Defendant did not appeal the 2018 Order.

¶ 8 On 8 July 2019, Defendant filed a verified motion for appropriate relief (the "2019 MAR") setting forth the same sentencing issues that he raised in his prior motions, together with an ineffective assistance of counsel claim. Defendant again requested that the trial court "review the sentence structure and change it from consecutive to concurrent[,]" alleging that "[t]he Plea Agreement was for the sentence

to be concurrent[,] but . . . it was handwritten in to be consecutive after [Defendant] signed it[.]" Defendant asserted that he was "wrongly charged" with first-degree sexual exploitation of a minor based on "the evidence of record"; he also reiterated that at the time of his plea, he was suffering from mental-health issues, which resulted in health problems. The ineffective assistance of counsel claim arose from Defendant's prior allegations regarding his issues with his attorney, as well as Defendant's contention that his attorney had been representing one of Defendant's victims while representing Defendant, which he alleged created a conflict of interest. In support of this new allegation, Defendant contended that, while Defendant and the victim were in jail awaiting their respective trials, the victim informed Defendant of a conversation that he had with their shared attorney, during which the attorney reportedly stated that "if [the victim] would turn evidence against [Defendant] she could get [the victim] off his charges."

¶ 9 On 30 July 2019, the trial court entered an order titled "OTHER ORDER ON MOTION FOR APPROPRIATE RELIEF" (the "2019 Order") denying Defendant's motion and concluding that Defendant was "subject to procedural default[.]" In support of this conclusion, the court found that it had "previously entered orders denying relief to Defendant, upon the same or substantially similar arguments" and that "the issue[s] raised were or could have been raised in earlier motions."

¶ 10 Defendant did not give notice of appeal from the 2019 Order. However, on 11

June 2020, he petitioned this Court to issue a writ of certiorari to review the 2019 Order. This Court allowed Defendant's petition for writ of certiorari on 17 June 2020.

Discussion

¶ 11 On appeal, Defendant argues that the trial court erred by (1) concluding that Defendant's 2019 MAR was procedurally barred, and (2) denying Defendant's 2019 MAR without conducting an evidentiary hearing where "his motion alleged a conflict of interest with his attorney." We disagree.

I. Standard of Review

¶ 12 Our standard of review of a trial court's ruling on a defendant's motion for appropriate relief ("MAR") is "whether the findings of fact are supported by evidence, whether the findings of fact support the conclusions of law, and whether the conclusions of law support the order entered by the trial court." *State v. Stevens*, 305 N.C. 712, 720, 291 S.E.2d 585, 591 (1982). "When a trial court's findings on a motion for appropriate relief are reviewed, these findings are binding if they are supported by competent evidence and may be disturbed only upon a showing of manifest abuse of discretion. However, the trial court's conclusions are fully reviewable on appeal." *State v. Lane*, 271 N.C. App. 307, 311, 844 S.E.2d 32, 37 (citation omitted), *disc. review denied and cert. dismissed*, 376 N.C. 540, 851 S.E.2d 624 (2020).

II. Procedural Default

¶ 13 N.C. Gen. Stat. § 15A-1419(a) (2021) provides, *inter alia*, the following

procedural bars to the assertion of a criminal defendant's MAR, rendering the MAR subject to mandatory procedural default:

> (1) *Upon a previous motion* made pursuant to this Article, *the defendant was in a position to adequately raise the ground or issue underlying the present motion but did not do so.* This subdivision does not apply when the previous motion was made within 10 days after entry of judgment or the previous motion was made during the pendency of the direct appeal.
>
> (2) *The ground or issue underlying the motion was previously determined on the merits* upon an appeal from the judgment or upon a previous motion or proceeding in the courts of this State or a federal court, unless since the time of such previous determination there has been a retroactively effective change in the law controlling such issue.

N.C. Gen. Stat. § 15A-1419(a)(1)–(2) (emphases added).

¶ 14 "The court *shall deny* the motion under any of the circumstances specified in this section . . . ." *Id.* § 15A-1419(b) (emphasis added). However, procedural default is unwarranted where the defendant can show: "(1) [g]ood cause for excusing the grounds for denial listed in subsection (a) of this section and can demonstrate actual prejudice resulting from the defendant's claim; or (2) [t]hat failure to consider the defendant's claim will result in a fundamental miscarriage of justice." *Id.* § 15A-1419(b)(1)–(2).

¶ 15 Here, the State contends that Defendant was procedurally barred pursuant to N.C. Gen. Stat. § 15A-1419(a) from advancing the issues presented in his 2019 MAR

because the issues were raised or could have been raised in his previous MARs. Defendant asserts that the 2019 MAR was the only MAR that he filed; he argues that the Undated Letter MAR was not actually an MAR because there is no evidence that Defendant ever filed it or served it upon the State, and the Transcript Letter MAR was merely a request for a transcript.

¶ 16 Regardless of whether Defendant intended the Undated Letter MAR and the Transcript Letter MAR to be reviewed as MARs, it is evident from the trial court's orders that that is how they were construed, and Defendant has waived any argument to the contrary. Defendant failed to appeal or otherwise challenge either the 2017 Order or the 2018 Order, in which the trial court made plain that it interpreted his submissions as MARs. Indeed, the trial court specifically referred to them as such: in the 2017 Order, the court wrote that the matter came before it "upon Defendant's Motion for Appropriate Relief," and in the 2018 Order, the court specified that it "review[ed] the [Transcript Letter MAR] broadly as a Motion for Relief after sentencing," and then referenced and incorporated the court's 2017 Order. In addition, the 2017 Order was titled "ORDER ON MOTION FOR APPROPRIATE RELIEF" and the 2018 Order was titled "SECOND ORDER."

¶ 17 Therefore, our analysis concerns solely whether the trial court erred in summarily denying Defendant's 2019 MAR on the grounds that (1) the court had "previously entered orders denying relief to Defendant, upon the same or

substantially similar arguments[,]" and (2) "the issue[s] raised were or could have been raised in earlier motions."

¶ 18 In the instant case, Defendant's claim that his trial counsel had a conflict of interest falls squarely within the grounds articulated in N.C. Gen. Stat. § 15A-1419(a)(1). *See id.* § 15A-1419(a)(1) ("[T]he defendant was in a position [in a previous MAR] to adequately raise the ground or issue underlying the present motion but did not do so."). As he stated in his petition for writ of certiorari, Defendant learned of his trial attorney's alleged conflict of interest while she was representing him. Therefore, Defendant could have raised the issue of his attorney's alleged conflict of interest as part of his claim for ineffective assistance of counsel in either of his previous MARs. However, he chose not to raise the conflict-of-interest argument until his third submission. In that Defendant had the opportunity in his previous MARs to "adequately raise the ground or issue underlying the [2019 MAR] but did not do so[,]" *id.*, the trial court properly denied Defendant's 2019 MAR as procedurally barred, *id.* § 15A-1419(b).

¶ 19 Defendant's claim concerning his appointed counsel's alleged conflict of interest is also procedurally barred pursuant to N.C. Gen. Stat. § 15A-1419(a)(2). Defendant stated in the Undated Letter MAR that he felt that his lawyer worked against him. He then alleged in the 2019 MAR that his attorney sought others' help to collect evidence against him, and that his attorney represented one of his victims

while representing him in this matter, indicating a conflict of interest. As the trial court concluded, Defendant's 2019 conflict-of-interest allegation was "the same or substantially similar" to the ineffective-assistance-of-counsel claim advanced in his previous MARs, which were "previously determined on the merits" by the court. *Id.* § 15A-1419(a)(2). Thus, Defendant's conflict-of-interest claim was subject to procedural default on this basis as well. *See id.* § 15A-1419(b).

¶ 20 Defendant's remaining claims—regarding his sentence, charges, health and mental-health status, and ineffective assistance of counsel—were also subject to procedural default pursuant to § 15A-1419(a)(2), in that they were "previously determined on the merits" by the court. *Id.* § 15A-1419(a)(2). In the Undated Letter MAR, Defendant requested that the trial court run his sentences concurrently rather than consecutively, and in the Transcript Letter MAR, Defendant asserted that he had been improperly sentenced. Defendant also previously contended that he had been unable to properly represent himself due to health and mental-health problems. The trial court declined to modify Defendant's sentence after review on the merits in both its 2017 Order and its 2018 Order, which incorporated the 2017 Order; after examining "[D]efendant's plea adjudication wherein he pled guilty, together with accompanying and appropriate documents[,]" the court "determined that the plea agreement, adjudication and sentence were not inappropriate, nor unfair and were consistent with the [D]efendant's bargain[.]" Consequently, the trial court properly

denied the relief requested in the 2019 MAR on these issues as procedurally barred because the "ground or issue underlying the motion was previously determined on the merits[.]" *Id.*

¶ 21 In sum, we conclude that Defendant's 2019 MAR was procedurally barred because, with regard to the conflict-of-interest claim, Defendant had the opportunity in his previous MARs to "adequately raise the ground or issue underlying the [2019 MAR] but did not do so[,]" *id.* § 15A-1419(a)(1), and because, with regard to the remaining issues, the "issue[s] underlying the [2019 MAR were] previously determined on the merits . . . upon a previous motion[,]" *id.* § 15A-1419(a)(2). Furthermore, the circumstances excusing mandatory procedural default were not present here, *see id.* § 15A-1419(b)(1)–(2); in its 2018 Order, the trial court explicitly "d[id] not find actual prejudice or good cause excusing grounds for denial provided by law, nor that failure [to] consider these claims will result in a fundamental miscarriage of justice." Accordingly, the court did not err in summarily denying Defendant's 2019 MAR as procedurally barred pursuant to N.C. Gen. Stat. § 15A-1419(a).

¶ 22 In that Defendant's 2019 MAR was subject to procedural default, we need not address Defendant's remaining arguments.

Conclusion

¶ 23 For the reasons stated herein, we conclude that the trial court did not err by

summarily denying Defendant's 2019 MAR as procedurally barred.

AFFIRMED.

Judges WOOD and GRIFFIN concur.

Report per Rule 30(e).