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IN THE COURT OF APPEALS OF NORTH CAROLINA

2022-NCCOA-401

No. COA21-535

Filed 7 June 2022

Wake County, Nos. 98 CRS 102469-70

STATE OF NORTH CAROLINA

v.

KENNETH LOUIS WALKER

Appeal by defendant from order entered 8 April 2020 by Judge Paul C. Ridgeway in Wake County Superior Court. Heard in the Court of Appeals 23 March 2022.

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

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

ARROWOOD, Judge.

¶ 1 On 2 October 2020, this Court allowed Kenneth Louis Walker's ("defendant") *pro se* Petition for *Writ of Certiorari* for the purpose of reviewing the 8 April 2020 order of the Wake County Superior Court denying defendant's motion for appropriate relief ("MAR"). For the following reasons, we affirm.

I. Background

¶ 2 On 20 October 1999, a jury found defendant guilty of first-degree murder for the murder of Stephanie V. Keith, for which he was sentenced to life imprisonment without parole. Defendant timely appealed. On appeal, defendant's appellate attorney filed an *Anders* brief. On 5 June 2001, this Court filed an opinion finding no error had occurred at trial. *See State v. Walker*, 143 N.C. App. 718, 548 S.E.2d 201 (2001) (unpublished).

¶ 3 Over a decade later, on 1 April 2020, defendant filed a *pro se* MAR, along with a memorandum of law in support of his MAR and a motion to amend his MAR. In these filings, defendant raised, among other arguments, the following issues for the first time: that his trial counsel had not informed him of his right to testify, that his trial counsel had denied him the opportunity to testify, and that his trial counsel had prevented him from testifying despite defendant's desire to do so.

¶ 4 Defendant also claimed the trial court had erred in limiting the testimony of defendant's expert witness, forensic psychiatrist Doctor Holly B. Rogers ("Dr. Rogers"), and that defendant had been denied effective assistance of appellate counsel because his appellate counsel had filed an *Anders* brief instead of raising issues on appeal.

¶ 5 On 8 April 2020, having reviewed defendant's three filings collectively, the trial court returned an order in which it found that, because defendant's MAR only raised issues of law, there was no need for an evidentiary hearing on the matter.

Then, because defendant had "not shown that he was unable, at the time of his appeal, to raise the issues he now raises in his present M[AR,]" the trial court denied the MAR. On 20 April 2020, defendant submitted a *pro se* petition to reconsider the denial of his MAR. On 30 April 2020, the trial court entered an order denying defendant's request.

¶ 6 On 28 September 2020, defendant filed a *pro se* Petition for *Writ of Certiorari* in this Court. On 2 October 2020, this Court allowed defendant's petition "for the purpose of granting defendant an appeal from the order denying his [MAR,]" and remanded for the trial court to determine whether defendant was indigent and entitled to appointment of counsel. Appellate counsel was appointed on 27 October 2020.

II. Discussion

¶ 7 On appeal, defendant contends: that his trial counsel was ineffective for refusing to abide by defendant's wish to testify; that his prior appellate counsel was ineffective for failing to challenge the trial court's restrictions on Dr. Rogers's testimony; that the trial court erred in finding defendant's ineffective assistance of counsel claims were procedurally barred; and that the trial court erred in concluding that defendant's MAR and filings related thereto only raised questions of law.

A. Standard of Review

¶ 8 "Our review of a trial court's ruling on a defendant's 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. Peterson*, 228 N.C. App. 339, 343, 744 S.E.2d 153, 157 (2013) (citations and quotation marks omitted). "When a trial court's findings on a [MAR] 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. Lutz*, 177 N.C. App. 140, 142, 628 S.E.2d 34, 35 (2006) (citation and quotation marks omitted).

B. Ineffective Assistance of Trial Counsel

¶ 9 A defendant's right to counsel, as guaranteed by the Sixth Amendment to the United States Constitution, includes the right to effective assistance of counsel. *State v. Braswell*, 312 N.C. 553, 561, 324 S.E.2d 241, 247-48 (1985) (citation omitted). When challenging a conviction on the basis that counsel was ineffective, a defendant must show that counsel's conduct "fell below an objective standard of reasonableness." *Strickland v. Washington*, 466 U.S. 668, 688, 80 L. Ed. 2d 674, 693 (1984). *Strickland* requires that a defendant first establish that counsel's performance was deficient. *Id.* at 687, 80 L. Ed. 2d at 693. This first prong requires a showing that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* Second, a

defendant must demonstrate that the deficient performance prejudiced the defense, which requires a showing that "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.* "Thus, both deficient performance and prejudice are required for a successful ineffective assistance of counsel claim." *State v. Todd*, 369 N.C. 707, 711, 799 S.E.2d 834, 837 (2017).

¶ 10 Defendant argues that his trial counsel was ineffective by not allowing him to testify despite his wish to do so. However, defendant here concedes that at trial, after defendant's colloquy and before jury selection, defendant's trial counsel informed the trial court that defendant had not yet decided whether he wanted to testify. Defendant nevertheless contends that this fact, taken together with defendant's MAR in which he claimed that he actually did intend to testify, "if believed, are sufficient to show that [defendant]'s attorneys committed unprofessional errors which fell below an objective standard of reasonableness." Thus, defendant's entire argument here hinges on a presumption of believing his intention to testify at trial from his MAR alone. We are not persuaded.

¶ 11 The record does not support defendant's contention. For example, at trial, defendant's colloquy with the trial court proceeded as follows:

> THE COURT: [Defendant], do you understand, sir, you have the right to remain silent, you don't need to make any statement at this point.
>
> THE DEFENDANT: Yes, sir.

THE COURT: And you understand that you're charged here today with first degree murder allegedly occurring on November 4, 1998, in which you were charged with malice [a]forethought, premeditation, murdering one Stephanie V. Keith. Do you understand that you're charged with that, sir?

THE DEFENDANT: Yes, sir.

THE COURT: State is calling this as a first degree murder case.

THE DEFENDANT: Yes, sir.

THE COURT: Your attorneys advised me, sir, that they don't intend to contest certain aspects of that charge; that is to say they anticipate that they would not contest that decedent Ms. Keith was, in fact, shot by you and that she died as a result thereof. Have they discussed that with you prior to trial?

THE DEFENDANT: Yes, sir.

THE COURT: And you understand that they don't want to contest those two aspects on your behalf.

THE DEFENDANT: Yes, sir.

THE COURT: That is, they're not pleading guilty to any particular offense at this point on your behalf, but they don't intend to contest the fact that she was shot and that you were the person that shot her. Have they discussed that with you, sir?

THE DEFENDANT: Yes, sir.

THE COURT: Have you given them your specific permission to do that during the course of the trial?

> THE DEFENDANT: Yes, sir.
>
> THE COURT: Any other questions or concerns about that issue at this point?
>
> THE DEFENDANT: No, sir.
>
> THE COURT: All right. Be seated.

¶ 12 Then, defendant's trial counsel made the following statement, which defendant presently cites in his appellate brief:

> Just one other matter, I don't know exactly what your intentions were in the discussion of -- preliminary discussion with jurors, and we have not made a decision yet on whether [defendant] will testify or not, but if there's something particular you would address with the jurors regarding his right not to testify.

The trial court responded:

> I hadn't planned to. I have apparently pretty lengthy preliminary instructions to them about their potential role in the case and the charges, but I had intended to mention that since I obviously didn't know, might not necessarily know until the end of the State's evidence about what your intent was, so I don't know normally -- would not normally do that. I would do it at the close of the trial. If, in fact, he wanted -- he did not testify, I would certainly make emphasis of that in my jury instructions.

¶ 13 During jury selection, the trial court made a few statements regarding defendant's right not to testify:

> [I]t could be that the Defendant himself will not testify in this trial. If he does not, the Court would instruct you that that is his right not to testify.

> . . . .
>
> [T]he Defendant has no obligation to testify or to present any evidence in this case. Should he cho[o]se not to testify . . . the Court would instruct you not to hold that against him.

¶ 14 At no point during trial did defendant or his trial counsel specifically indicate that defendant intended to testify. Although defendant's trial counsel stated at the outset of trial that defendant had not made a decision about whether to testify, the transcript reflects that defendant neither testified nor expressed his intention to testify. Finally, during jury instructions, the trial court stated:

> The Defendant . . . in this case has not testified. The law of North Carolina gives him this privilege. The same law also ensures him that his decision not to testify creates no presumption against him. Therefore, his silence is not to influence your decision in any way.

¶ 15 Because defendant has neither shown that he intended to testify at trial nor that his trial counsel's conduct fell below an objective standard of reasonableness, defendant has failed to meet his burden. Furthermore, we find nothing in the record to support defendant's bare assertions. Accordingly, this argument is without merit. *See Strickland*, 466 U.S. at 688, 80 L. Ed. 2d at 693.

C. Ineffective Assistance of Appellate Counsel

¶ 16 The same standard used to address claims of ineffective assistance of trial counsel applies to claims of ineffective assistance of appellate counsel. *State v.*

Baskins, 260 N.C. App. 589, 596, 818 S.E.2d 381, 389 (2018) (citations omitted), *writ denied, disc. review denied,* 372 N.C. 102, 824 S.E.2d 409 (2019).

¶ 17 Defendant alleges his prior appellate counsel was ineffective for failing to challenge the trial court's limitation on the testimony of Dr. Rogers. Specifically, defendant contends his appellate counsel failed to challenge the trial court's ruling prohibiting Dr. Rogers from testifying about whether defendant could form the specific intent necessary to warrant a charge of first-degree murder.

¶ 18 Defendant states in his present brief that, during *voir dire* at trial, Dr. Rogers, who had been retained by defendant to evaluate his mental condition, "had formed the opinion that [defendant] was unable to form the specific intent to kill as a result of [a] depressive disorder and anger attacks . . . ." "Yet," defendant contends, "the trial court refused to allow her to testify to this."

¶ 19 "If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion, or otherwise[.]" N.C. Gen. Stat. § 8C-1, Rule 702(a) (2021). "An expert witness is competent to render an opinion concerning whether a defendant was able to formulate the prerequisite intent in a criminal matter." *State v. Fisher*, 336 N.C. 684, 703, 445 S.E.2d 866, 877 (1994) (citation omitted).

¶ 20 "An expert witness may not, however, testify to a particular legal conclusion or that a legal standard has or has not been met, at least when the standard is a legal term which carries a specific meaning not readily apparent to the witness." *Id.* at 703-704, 445 S.E.2d at 877 (citation omitted). Additionally, "[a] trial court is afforded wide latitude of discretion when making a determination about the admissibility of expert testimony. The trial court's decision regarding what expert testimony to admit will be reversed only for an abuse of discretion." *State v. Paddock*, 204 N.C. App. 280, 288, 696 S.E.2d 529, 535 (2010) (citation and quotation marks omitted).

¶ 21 In *State v. Fisher*, our Supreme Court found it proper for the defense counsel to ask the expert witness at issue "if he had an opinion as to the ability of [the] defendant to formulate and carry out a plan[,]" after which "the [expert] witness was permitted to respond that '[the defendant's] state coupled with his personality organization, his general intellectual level, rendered him to be very difficult to carry out any sort of concerted intellectually based plan.' " *Fisher,* 336 N.C. at 704, 445 S.E.2d at 877. However, our Supreme Court found it improper for the defense counsel to have asked, "[o]n redirect examination," whether the expert witness "had an opinion as to whether [the] defendant would have killed the victim 'but for the influence of alcohol and cocaine[,]' " because, "[e]ssentially, [the] defendant was asking [the expert witness] to opine as to why the murder was committed." *Id.* Accordingly, because the expert witness was not "in any better position than the jury

to make this determination[,]" our Supreme Court concluded that "the trial court did not err in refusing to admit this testimony." *Id.*

¶ 22 Similarly, in the case *sub judice*, following *voir dire*, the trial court allowed Dr. Rogers "to talk about . . . an anger attack, and that [defendant's] condition could have contributed to an anger attack[,]" but did not allow her "to use the word rage" or "other conclusory terms" such as "provocation" so as to avoid the use of "legal terminology" during her expert testimony. Accordingly, the trial court acted appropriately, and did not abuse its discretion.

¶ 23 Because the trial court did not abuse its discretion in limiting Dr. Rogers's testimony, defendant's appellate counsel did not prejudice defendant by not raising this issue on appeal. Defendant's argument that he received ineffective assistance of appellate counsel is without merit. *See Strickland*, 466 U.S. at 688, 80 L. Ed. 2d at 693.

D. Whether Defendant's MAR Was Procedurally Barred

¶ 24 Next, defendant takes issue with the fact that the trial court held that his MAR was procedurally barred because defendant could have raised the issues therein in his previous appeal. Defendant contends that his "factual allegations that he wanted to testify but that his attorneys either failed to allow him to or failed to properly advise him of his right to testify would not have been apparent from the cold record on appeal." As to his claim for ineffective assistance of appellate counsel, defendant

argues that, because this claim could not "even exist at the time the direct appeal [wa]s going forward," it was not procedurally barred. Thus, defendant argues, the trial court should have considered all of his claims.

¶ 25 A MAR will be denied if "[u]pon a previous appeal the defendant was in a position to adequately raise the ground or issue underlying the present motion but did not do so." N.C. Gen. Stat. § 15A-1419(a)(3) (2021). Here, we agree with the trial court that defendant could have raised his claims of ineffective assistance of trial counsel when he appealed from his 1999 judgment. However, with respect to defendant's claim for ineffective assistance of *appellate* counsel, we find that the trial court erred in making the same conclusion, for, as defendant correctly argues, that claim arose—and could have only arisen—as a result of the appeal. Nonetheless, based upon the foregoing analysis regarding the lack of merit of defendant's claim for ineffective assistance of appellate counsel, we find that this amounts to harmless error.

E. Whether Defendant's MAR Only Provided Questions of Law

¶ 26 Finally, defendant argues that his trial court erred by concluding that his MAR only raised questions of law.

¶ 27 In a MAR,

> [a]ny party is entitled to a hearing on questions of law or fact arising from the motion and any supporting or opposing information presented unless the court

> determines that the motion is without merit. The court must determine, on the basis of these materials and the requirements of this subsection, whether an evidentiary hearing is required to resolve questions of fact. Upon the motion of either party, the judge may direct the attorneys for the parties to appear before him for a conference on any prehearing matter in the case.

N.C. Gen. Stat. § 15A-1420(c)(1) (2021).

¶ 28 We agree with defendant that the trial court misapprehended the applicable law when it concluded that defendant was not entitled to a hearing because his MAR only raised questions of law. However, per the foregoing discussion, because we ultimately conclude that each of the issues raised by defendant is without merit, again, the trial court's error was harmless.

III. Conclusion

¶ 29 For the foregoing reasons, the order denying defendant's MAR is affirmed.

AFFIRMED.

Judges TYSON and CARPENTER concur.

Report per Rule 30(e).