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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA21-643

Filed 18 April 2023

New Hanover County, Nos. 13 CRS 3278, 8301, 50987

STATE OF NORTH CAROLINA

v.

MARTEZ JAQUIL BRACEY, Defendant.

Appeal by Defendant from order entered 20 July 2020 by Judge Phyllis M. Gorham in New Hanover County Superior Court. Heard in the Court of Appeals 5 April 2022.

Attorney General Joshua H. Stein, by Assistant Attorney General Robert C. Ennis, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender David W. Andrews, for defendant-appellant.

MURPHY, Judge.

Defendant's motion for appropriate relief and the materials supporting it did not set forth a claim of newly discovered evidence as the evidence was available to Defendant at the time of trial. Further, they did not make out a claim of ineffective assistance of counsel where Defendant's trial counsel was aware of the potential

defense but could not locate evidence to support it and therefore did not present the defense at trial. The trial court did not err in summarily denying Defendant's motion for appropriate relief, and we affirm.

BACKGROUND

The State's evidence showed Defendant was previously convicted of a felony on 12 May 2011. Its evidence further showed the following:

At approximately 3:10 a.m. on 1 February 2013, Wilmington Police Officer Ronald Phillips was driving eastbound on Hurst Street in the Creekwood area when he passed a westbound black Volvo C70 sedan. Officer Phillips saw in his rearview mirror that the Volvo "accelerated to a high rate of speed, approached the stop sign at 30th and Hurst[,] . . . ran a stop sign, [and] took a left onto 30th Street." He pursued the vehicle down 30th Street where it drove over a curb and then Officer Phillips lost sight of it. Officer Phillips radioed his fellow officers to canvass the area for the black sedan.

Sergeant Bryan Needham heard the radio call, responded, and at a nearby stop sign observed a black car "come off of Hurst to [his] left, run the stop sign[,] and park immediately into a parking spot." Sergeant Needham then saw a black male with a short haircut and dark clothing exit the car and run between buildings on North 30th Street. Sergeant Needham chased after the individual and Officers Phillips and Melody Escarsega joined in the pursuit. Officers saw an individual again with "the exact same clothing description" running between houses off 30th Street and Emory

Street. They saw no one else in the area other than the suspect and one other individual at an address on East Stewart Circle. Officers then lost sight of the suspect on Emory Street. Officer Escarsega described the suspect as “a male with short hair” wearing “a black Adidas jacket.” Officer Phillips described the suspect as “a black male, very average build, wearing jeans and a black sweatshirt[,] . . . [and o]ne thing that was very distinctive was he was wearing a pair of black and red sneakers.”

While they were chasing the suspect, another officer approached the vehicle, which was left with the driver’s side door open, and found a firearm on the front floorboard as well as a cellphone in the front seat and a credit card belonging to David Hurr. There was another cellphone located on the rear driver’s side floorboard, and the vehicle was registered to Dallas Cherry. Neither of the cellphones belonged to Defendant.¹

Officer Thomas Poelling arrived with K-9 Drake, a Belgian Malinois certified in human scent tracking. The K-9 and Officer Poelling tracked the suspect from

the last place the officers had seen the suspect running, roughly the 1000 block of North 30th. We crossed the northwest direction to a fence line, then crossed over Emory, behind some apartments on Emory Street[,] . . . through a path through the woods there which then led to East Stewart Circle.

The K-9 led Officer Poelling to the west side of Defendant’s residence. As they

¹ It was later confirmed from processing of the Volvo that the fingerprint from the second cellphone found in the Volvo was not Defendant’s fingerprint, nor was the only other fingerprint found in or on the Volvo, on the rearview mirror.

came around to the front of the house, the K-9 raised his nose indicating “he scent[ed] the suspect” nearby and the K-9 proceeded toward a grey Ford Crown Victoria parked in Defendant’s driveway.

Defendant’s sister emerged from the driver’s side of the Crown Victoria and walked toward Officer Poelling and the K-9 and asked what they were doing. Officer Poelling then took the K-9 and brought him “almost into the neighbor’s yard to get away from [Defendant’s sister]” Officer Poelling walked the K-9 “all the way around Emory to come back” and conduct a second track. The K-9 tracked back to the scene at Defendant’s driveway and the Crown Victoria and alerted again at the vehicle. Officer Poelling looked in the Crown Victoria and saw that Defendant was lying down in the passenger seat. There were no weapons found in the Crown Victoria. Defendant was “wearing a navy blue sweatshirt, blue jeans, and . . . black and red sneakers.” Officer Phillips arrested Defendant and indicted him for possession of a firearm by a felon and resisting a public officer, among other charges.

Authorities did not process fingerprints or DNA on the firearm due to “how many [officers] had had their hands on it just trying to get it rendered safe.” The white Samsung cellphone found with the debit card was also not processed, and Officer Phillips retained that cellphone for five days before turning it in as evidence.

Officer Phillips testified that in the booking room “Defendant was very nervous, very talkative, . . . going from being very angry, yelling at [him], to being very emotional, crying.” According to Officer Phillips, Defendant asked him: “If my

fingerprints are found inside the vehicle but not on the gun, can I be charged?” He said Defendant then asked, “how do you know you weren’t chasing two cars? Did one of them hit the curb?” At trial, Officer Phillips identified Defendant as the suspect he saw running from the other officer.

The jury convicted Defendant of possession of a firearm by a felon and resisting a public officer, and Defendant pleaded guilty to attaining habitual felon status. By judgment dated 27 August 2014,² the trial court consolidated Defendant’s offenses and sentenced him to an active term of 84 to 113 months. Defendant did not appeal.

About five-and-a-half years after his sentencing, on 14 January 2020, Defendant filed a motion for appropriate relief in New Hanover County Superior Court. Defendant’s motion for appropriate relief raised several grounds for relief, including the following: (1) that he received ineffective assistance of counsel due to trial counsel’s failure to “insist on DNA and fingerprint testing” and “introduce . . . [D]efendant’s medical records to prove [he] could not have run away from the police as they testified”; (2) there existed newly discovered evidence in the form of statements by Clifford Grady and Ronald Brunson explaining Defendant was not the driver of the Volvo; (3) the indictment for possession of a firearm by a felon was fatally defective because “[n]o file number is alleged in the indictment for the qualifying felony”; (4) Defendant’s convictions of possession of a firearm by a felon and attaining

² The judgment in this case is not file stamped.

habitual felon status amounted to double jeopardy, because the same 12 May 2011 felony conviction used to establish his status as a convicted felon for the firearm charge was also used to establish his habitual felon status; (5) the State violated his right to due process by failing to disclose “vital exculpatory evidence in violation of the doctrine announced by the U.S. Supreme Court in [*Brady v. Maryland*, 373 U.S. 83, 10 L. Ed. 2d 215 (1963)]”; and (6) Defendant was otherwise denied a fair trial because the State and Wilmington Police failed to test the handgun for DNA, failed to disclose exculpatory evidence to Defendant prior to trial, including the identity of the fingerprints found in the vehicle, and committed other “improprieties” casting doubt on Defendant’s guilt.

The trial court ordered the State to respond to Defendant’s motion for appropriate relief, which the State did along with supporting documentation on 4 June 2020. The State’s materials included an affidavit from Defendant’s trial counsel, and documents from each of their case files.

The trial court determined in its 20 July 2020 *Order Denying Defendant’s Motion for Appropriate Relief* an evidentiary hearing was not required to resolve Defendant’s claims. The trial court found based on the record before it Defendant’s claim of ineffective assistance of counsel lacked merit in that “CSI M. Mahamadou testified that she did not swab the firearm recovered from the black sedan for DNA purposes or process it for latent fingerprints because it had been handled by multiple officers as they rendered it safe,” and in that the North Carolina “State Crime Lab

did not accept evidence submissions for DNA on weapons when the charge involved weapon possession only.” The trial court further found Defendant’s trial counsel “investigated Defendant’s prior leg injury by conducting interviews with Defendant’s doctor as well as family members and neighbor. . . . [However, he] was unable to locate an individual who could testify that Defendant was unable to run on [1 February 2013].”

The trial court further concluded Defendant “fail[ed] to make the necessary showings” for a newly discovered evidence claim³ under N.C.G.S. § 15A-1415(c) inasmuch as

[s]everal different individuals with connections to Defendant have claimed to be the driver of the black sedan in the years since Defendant’s arrest. These statements are often contradictory and at least one seems to have been motivated by a promise of payment. . . . With respect to the newly submitted affidavits of Mr. Grady and Mr. Brunson, both affidavits contradict prior statements and Mr. Grady’s contradicts Defendant’s own statements made at the time of his arrest. It follows that the affidavits are not probably true as the standard requires. Additionally, Mr. Grady was Defendant’s neighbor at the time [of the 2013 arrest] and his statement likely could have been uncovered with due diligence.

³ The trial court likewise determined Defendant’s indictment for possession of a firearm by a felon was not fatally defective in that, under N.C.G.S. § 14-415.1(c), the indictment need only allege “the date that the prior offense was committed, the type of offense and its penalty, the date that the defendant was convicted or [pleaded] guilty, the court in which the conviction or plea of guilty took place, and the verdict rendered.” The trial court also concluded Defendant was not subjected to double jeopardy by the use of the same prior felony conviction to indict him for possession of a firearm by a felon and attaining habitual felon status. Finally, the trial court concluded Defendant failed to show the existence of any potentially exculpatory evidence withheld by the State in violation of *Brady*, or any other discovery-related improprieties.

Defendant gave notice of his intent to seek review of the order denying his motion for appropriate relief and moved for appointment of the Appellate Defender “so that they may evaluate whether it would be appropriate to file a Petition for Writ of Certiorari on his behalf” in light of his indigency. Judge Gorham signed appellate entries appointing the Appellate Defender on 5 August 2020 “to determine the merit to file a Petition for Writ of Certiorari.” Defendant thereafter filed in this Court a *Petition for Writ of Certiorari* seeking review of the trial court’s denial of his motion for appropriate relief. This Court allowed Defendant’s petition for writ of certiorari by order entered 23 August 2021.

ANALYSIS

Defendant argues he was entitled to an evidentiary hearing on his motion for appropriate relief and that the trial court erred in summarily denying the motion. He also challenges the trial court’s findings of fact and ultimate ruling on the motion for appropriate relief, the discussion of which we include in our analysis of the summary denial of Defendant’s motion.

A. Evidentiary Hearing—Newly Discovered Evidence

Defendant first argues the trial court erred in denying his motion for appropriate relief without a hearing because there existed material conflicts in the parties’ documents and materials that needed resolving and therefore the trial court

was required under N.C.G.S. § 15A-1420(c)(4) to conduct an evidentiary hearing before ruling on the motion. Defendant argues the trial court instead made credibility determinations without the benefit of a live hearing and therefore requests that order be remanded for the trial court to hold an evidentiary hearing on the allegations Defendant raised in his motion for appropriate relief. The State argues the materials lacked any material evidentiary conflict on a dispositive issue of fact and thus Defendant was not entitled to an evidentiary hearing and the trial court correctly awarded it summary relief.⁴ We agree with the State the trial court properly entered a summary denial of Defendant's motion for appropriate relief and therefore find no error.

"The decision of whether to grant a new trial in a criminal case on the ground of newly discovered evidence is within the trial court's discretion and is not subject to review absent a showing of an abuse of discretion." *State v. Rhodes*, 366 N.C. 532, 535 (2013) (quoting *State v. Wiggins*, 334 N.C. 18, 38 (1993)).

A motion for appropriate relief "must be supported by affidavit or other documentary evidence if based upon the existence or occurrence of facts which are not ascertainable from the records and any transcript of the case or which are not within the knowledge of the judge who hears the motion." N.C.G.S. § 15A-1420(b)(1)

⁴ The State also argues the trial court properly entered summary denial of Defendant's motion for appropriate relief because the materials Defendant submitted to support it were insufficient in that the statements were not sworn affidavits. Because we agree with the State the trial court entered a proper summary denial of Defendant's motion, we need not address this issue.

(2021). Our Supreme Court recently reaffirmed the evidentiary requirement of N.C.G.S. § 15A-1420(b)(1) as a threshold to avoid summary denial of a motion for appropriate relief in *State v. Allen*, stating as follows: “When the factual allegations would entitle the defendant to relief if true, and the defendant’s filings provide some evidentiary basis for the allegations, then the MAR court must conduct an evidentiary hearing to determine the facts necessary to resolve the claim on its merits.” *State v. Allen*, 378 N.C. 286, 297 (2021).

N.C.G.S. § 15A-1420(c)(1) mandates that “the court must determine whether an evidentiary hearing is required to resolve questions of fact.” If the trial court “cannot rule upon the motion without the hearing of evidence, it must conduct a hearing for the taking of evidence, and must make findings of fact.”

State v. McHone, 348 N.C. 254, 258 (1998) (citing N.C.G.S. § 15A-1420(c)(4) (1997)).

However, “when a defendant’s MAR ‘presents only questions of law . . . the trial court *must* determine the motion without an evidentiary hearing.’” *Allen*, 378 N.C. at 296 (citing *McHone*, 348 N.C. at 257); *see also* N.C.G.S. § 15A-1420(c)(3) and *State v. Bush*, 307 N.C. 152, 166-67 (1982). For a motion for appropriate relief filed more than ten days after judgment, “an evidentiary hearing is required unless the motion presents assertions of fact which will entitle the defendant to no relief even if resolved in his favor, or the motion presents only questions of law[.]” *McHone*, 348 N.C. at 258. “[I]f the trial court can determine from the motion and any supporting or opposing information presented that the motion is without merit, it may deny the

motion without any hearing either on questions of fact or questions of law” *Id.* at 257 (emphasis omitted) (citing N.C.G.S. § 15A-1420(c)(1) (1997)).

[W]hen a motion for appropriate relief presents only a question of . . . law and it is clear to the trial court that the defendant is not entitled to prevail, “the motion is without merit” within the meaning of [N.C.G.S. § 15A-1420(c)(1)] and may be dismissed by the trial court without any hearing.

Id. And,

where facts are in dispute but the trial court can determine that the defendant is entitled to no relief even upon the facts as asserted by him, the trial court may [likewise] determine that the motion “is without merit” within the meaning of [N.C.G.S. § 15A-1420(c)(1)] and deny it without any hearing on questions of law or fact.

Id. at 257-58. “[T]he ultimate question that must be addressed in determining whether a motion for appropriate relief should be summarily denied is whether the information contained in the record and presented in the defendant’s motion for appropriate relief would suffice, if believed, to support an award of relief.” *State v. Jackson*, 220 N.C. App. 1, 6 (2012).

Regardless of the form of the materials supporting a defendant’s motion for appropriate relief based on grounds of newly discovered evidence, “[w]hen the information presented by the purported newly discovered evidence was known or available to the defendant at the time of trial, the evidence does not meet the requirements of N.C.G.S. § 15A-1415(c).” *Rhodes*, 366 N.C. at 537.

Our Criminal Procedure Act provides that

a defendant at any time after verdict may by a motion for appropriate relief, raise the ground that evidence is available which was unknown or unavailable to the defendant at the time of trial, which could not with due diligence have been discovered or made available at that time, including recanted testimony, and which has a direct and material bearing upon the defendant's guilt or innocence.

This section of the statute codifies substantially the rule previously developed by case law for the granting of a new trial for newly discovered evidence. Our case law stated:

In order for a new trial to be granted on the ground of newly discovered evidence, it must appear by affidavit that (1) the witness or witnesses will give newly discovered evidence; (2) the newly discovered evidence is probably true; (3) the evidence is material, competent and relevant; (4) due diligence was used and proper means were employed to procure the testimony at trial; (5) the newly discovered evidence is not merely cumulative or corroborative; (6) the new evidence does not merely tend to contradict, impeach or discredit the testimony of a former witness; and (7) the evidence is of such a nature that a different result will probably be reached at a new trial.

Id. at 536 (quoting N.C.G.S. § 15A-1415(c) (2011) and *State v. Beaver*, 291 N.C. 137, 143 (1976)) (other citations and marks omitted). In addition, “[u]nder the rule as codified, the defendant has the burden of proving that the new evidence could not with due diligence have been discovered or made available at the time of trial.” *Id.* at 537 (marks omitted).

In *Rhodes*, our Supreme Court affirmed a prospective witness's statement was

not newly discovered evidence because the defendant was aware of the information and could have otherwise elicited it at trial, including by his own testimony:

Even though [the witness] invoked the Fifth Amendment at trial, the information implicating him as the sole possessor of the drugs could have been made available by other means. On the direct examination of [another witness and relative of the first witness], [the] defendant did not pursue a line of questioning about whether the drugs belonged to [the witness instead of the defendant]. In addition, though [the] defendant testified at trial, he gave no testimony regarding the ownership of the drugs. . . . The purported newly discovered evidence was not evidence which was unknown or unavailable to the defendant at the time of trial, which could not with due diligence have been discovered or made available at that time.

Our Criminal Procedure Act requires a showing of due diligence so that the adversarial process functions properly. Because information implicating [the witness] was available to [the] defendant before his conviction, the trial court erred in concluding that [the] defendant had newly discovered evidence under N.C.G.S. § 15A-1415(c).

Id. at 538 (citation and marks omitted).

Defendant's motion for appropriate relief in this case contained a 5 December 2018 signed and notarized, but unsworn, statement by Mr. Grady affirming as follows: He and Defendant were together at Mr. Grady's grandmother's home the night of 31 January 2013. Mr. Grady drove from the home for maybe twenty minutes and was stopped by officers as he returned to the home's driveway. Officers released him and he went inside. About twenty minutes later, he saw officers "had [Defendant] outside." Mr. Grady also stated that at the time of the incident, "i[t] was

not possible for [Defendant] to run from anybody due to [a] leg injury” Defendant had. Mr. Grady’s 5 December 2018 statement was executed before a notary but is not sworn or affirmed to be true.

Defendant’s motion for appropriate relief next included a 30 April 2016 signed but unsworn statement by Mr. Brunson. Mr. Brunson admitted in his statement he was the driver of the Volvo and the one who had possession of the handgun that officers found. Mr. Brunson also provided Theodore “Trey” Hardy was with him in the Volvo during the 1 February 2013 incident, and that Mr. Brunson drove away from officers, parked near some apartments, “jumped out of the car and ran west toward a family member’s house on Emory Street,” and that Mr. Hardy “ran in a different direction.” Mr. Brunson stated he did not discuss the incident with Mr. Hardy until February 2016 and that he first met with Defendant’s counsel in March 2016 and “never told anyone that [he] was the operator of the black Volvo, or that the firearm found in the Volvo was [his] firearm,” prior to spring 2016. Mr. Brunson’s 30 April 2016 statement is signed but it is neither sworn, affirmed, or notarized. Mr. Grady and Mr. Brunson did not express in their statements a willingness to testify under oath at a hearing.

The State included in its response an 11 February 2015 signed but unsworn statement from Theodore R. Hardy, III, which stated that he was in the Volvo with Laquan Chandler, not Mr. Brunson, and that Mr. Chandler was driving and the one who ran from officers with Mr. Hardy. Mr. Hardy claimed to have left his white cell

phone in the Volvo but claimed he did not know there was a gun in the vehicle. He further provided Mr. Chandler hid in a vehicle on a nearby street while Mr. Hardy ran to Defendant's home. Mr. Hardy stated he told Defendant the police were "outside looking for someone," and that Defendant went outside. Mr. Hardy changed out of his burgundy Adidas sweatshirt and showered and when he finished, Defendant's mother told him officers had arrested Defendant for violating his probation.

Defendant did not provide his own affidavit but instead filed a verified motion for appropriate relief verifying the truth of his allegations. *See Page v. Sloan*, 281 N.C. 697, 705 (1972) ("A verified [pleading] may be treated as an affidavit if it (1) is made on personal knowledge, (2) sets forth such facts as would be admissible in evidence, and (3) shows affirmatively that the affiant is competent to testify to the matters stated therein.").

Notwithstanding the State's arguments concerning the form of Defendant's supporting materials, in the instant case the materials reveal the information proffered was known to Defendant at the time of his trial. As the trial court concluded in its order denying Defendant's motion for appropriate relief on the basis of the alleged newly discovered evidence:

Several different individuals with connections to Defendant have claimed to be the driver of the black sedan in the years since Defendant's arrest. These statements are often contradictory and at least one seems to have been motivated by the promise of payment [from Defendant's

family]. With respect to the newly submitted affidavits of Mr. Grady and Mr. Brunson, both affidavits contradict prior statements and Mr. Grady's contradicts Defendant's own statements made at the time of his arrest. It follows that the affidavits are not probably true Additionally, Mr. Grady was Defendant's neighbor at the time and his statement likely could have been uncovered with due diligence.

(Record citation omitted). Moreover, Defendant could have presented evidence at his trial that (1) he was incapable of running from police on 1 February 2013 due to a leg injury, or (2) he was with Mr. Grady at the time of the alleged incident. The trial court did not err in summarily denying Defendant's motion for relief.

B. Evidentiary Hearing—Ineffective Assistance of Counsel

We likewise conclude Defendant's allegations and supporting materials were insufficient to require a hearing and that the trial court did not err in summarily denying Defendant's motion for appropriate relief based on his claim of ineffective assistance of counsel. The trial court concluded in its order denying Defendant's motion for appropriate relief Defendant's trial attorney "declined to introduce evidence of Defendant's medical history based on pre-trial interviews with relevant parties which is well within the bounds of reasonable performance by an attorney."

To make out a claim of ineffective assistance of counsel, a defendant must show "that counsel's representation fell below an objective standard of reasonableness" and "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland v. Washington*,

466 U.S. 660, 688, 694, 80 L. Ed. 2d 674, 693, 698 (1984); *State v. Braswell*, 312 N.C. 553, 562-63 (1985) (adopting *Strickland* standard for state constitutional claims). “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Strickland*, 466 U.S. at 694, 80 L. Ed. 2d at 698. “[I]f a reviewing court can determine at the outset that there is no reasonable probability that in the absence of counsel’s alleged errors the result of the proceeding would have been different, then the court need not determine whether counsel’s performance was actually deficient.” *Braswell*, 312 N.C. at 563; *accord Strickland*, 466 U.S. at 697, 80 L. Ed. 2d at 699-700.

Defendant’s motion for appropriate relief in the instant case included the following verified allegation to support his ineffective assistance of counsel claim:

[Defendant] had been injured severely the year before his arrest. Counsel for [Defendant] was aware of [Defendant’s] medical history that would have proved that [he] could not have been the individual who ran away from police that night. [Defendant’s] injuries were well documented and [he] had been treated for continuing pain shortly before he was arrested. No attempt was made by trial counsel to introduce evidence of [Defendant’s] medical condition that would have shown that [he] did not have the ability to outrun Wilmington Police Department officers or anyone else on the night of [1 February] 2013.

Defendant attached his medical records from New Hanover Regional Medical Center, OrthoWilmington, and Southeastern Healthcare “to prove that [he] could not have run away from the police as they testified” at trial. Defendant also asserted his counsel was ineffective “as shown by his failure to insist on DNA and fingerprint

testing” of the contraband he was charged with possessing.

First, we agree with the State that Defendant does not show in his motion for appropriate relief his trial counsel’s failure to “insist” on additional DNA and fingerprint testing on the firearm was objectively unreasonable or prejudicial in light of CSI Mahamadou’s testimony she did not process the firearm because it had been handled by several officers and the agency had a policy of not conducting those tests for possession charges.⁵ We likewise agree with the trial court that Defendant’s evidence about his medical condition was insufficient to support an evidentiary hearing on his ineffective assistance of counsel claim and a summary denial was proper. Defendant submitted hundreds of pages of medical records and alleged his counsel (1) was aware of his medical condition and (2) made “[n]o attempt . . . to introduce evidence of [his] medical condition that would have shown that [he] did not have the ability to outrun Wilmington Police Department officers” on 1 February 2013. The transcript confirms trial counsel did not attempt to offer evidence of Defendant’s medical condition at trial.

However, in response to Defendant’s motion for appropriate relief, the State adduced a sworn affidavit from Defendant’s trial counsel attesting that (1) Defendant informed him he had sustained a broken leg in May of 2012, (2) he “requested and received [Defendant’s] medical records detailing the nature of the injury to his leg

⁵ She dusted the Volvo’s exterior and interior for fingerprints and recovered two latent prints not belonging to Defendant.

and the months long course of treatment . . . from May of 2012 to January 2013,” (3) he interviewed Defendant’s doctor who confirmed Defendant’s injury was significant but said he “would not have been able to testify that [Defendant] would not have been able to run on [1 February] 2013,” and (4) he also interviewed “several members of [Defendant’s] family as well as neighbors and associates in his neighborhood,” none of whom were willing to testify Defendant was unable to run on the day of the incident. Based on his investigation, Defendant’s trial counsel decided not to call Defendant’s physician as a defense witness or otherwise pursue this defense. Moreover, Defendant’s medical records do not indicate he was unable to run on 1 February 2013.⁶ Trial counsel’s account of his own investigation of the issue, his interviews with Defendant’s physician and others, and his decision-making process support the trial court’s determination as a matter of law Defendant had not made out a claim of ineffective assistance of counsel. The trial court did not err in denying Defendant’s motion for appropriate relief on grounds of ineffective assistance of counsel or in failing to hold an evidentiary hearing.

CONCLUSION

Defendant’s motion for appropriate relief presented only questions of law and

⁶ Defendant had surgery for a fractured right femur and tibia sustained on 1 May 2012 and was discharged on 4 May 2012. He was cleared to begin weightbearing activities on the leg on 19 June 2012. On a questionnaire completed at Southeastern HealthCare on 20 September 2012, he reported “I have no pain while walking”; “I can lift heavy weights without extra pain”; “I get no pain while traveling”; and “I can stand as long as I want without pain.” Defendant continued to receive treatment for his right knee, right hip, and back pain through 14 March 2013. The provider’s notes from 25 January 2013 state Defendant “mainly complains of right knee pain while trying to run.”

STATE V. BRACEY

Opinion of the Court

the trial court properly entered a summary denial of Defendant's motion on the grounds of newly discovered evidence and ineffective assistance of counsel.

AFFIRMED.

Judges GORE and GRIFFIN concur.

Report per Rule 30(e).