

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA24-576

Filed 5 February 2025

Mecklenburg County, Nos. 07-CRS-211736, -737, -738

STATE OF NORTH CAROLINA

v.

WALTER T. GAUSE

Appeal by Defendant from order entered 24 January 2024 by Judge W. Robert Bell in Mecklenburg County Superior Court. Heard in the Court of Appeals 15 January 2025.

Attorney General Jeff Jackson, by Special Deputy Attorney General Stuart (Jeb) M. Saunders, for the State-Appellee.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender David W. Andrews, for Defendant-Appellant.

COLLINS, Judge.

Defendant Walter T. Gause appeals from the trial court's order denying his motion for post-conviction DNA testing. Defense counsel filed an *Anders* brief asking this Court to conduct an independent review of the proceedings to determine whether any justiciable issue exists to support Defendant's appeal. Defense counsel also filed

a petition for writ of certiorari asking this Court to issue a writ to permit review of Defendant's appeal after he failed to timely notice appeal from the trial court's order. After careful review, we find no justiciable issue on appeal; we therefore deny Defendant's petition for writ of certiorari and dismiss the appeal.

I. Background

Defendant was indicted on 9 April 2007 on the charges of robbery with a dangerous weapon, conspiracy to commit robbery with a dangerous weapon, and assault with a deadly weapon inflicting serious injury. The case proceeded to trial, and a jury returned guilty verdicts on each charge on 20 February 2014. The trial court consolidated the armed robbery and conspiracy convictions into one judgment for the purposes of sentencing, and it sentenced Defendant to 146-185 months' imprisonment. The trial court imposed a sentence of 59-80 months' imprisonment for the assault conviction and ordered the sentences to run consecutively. Defendant appealed his convictions to this Court, which found no error with the convictions in an opinion filed on 7 April 2015.

On 17 November 2023, Defendant filed a motion for post-conviction DNA testing. The trial court denied Defendant's motion via written order filed 24 January 2024. Defendant filed a written notice of appeal from the trial court's order on 27 February 2024.

II. Discussion

Petition for Writ of Certiorari & *Anders* Briefs

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Defense counsel petitioned this Court on 29 July 2024 pursuant to N.C. Gen. Stat. § 7A-32(c) and N.C. R. App. P. 21 to issue a writ of certiorari to permit appellate review of the trial court’s order denying Defendant’s motion for post-conviction DNA testing. In criminal cases, a party entitled to appeal an order of a superior court “may take appeal by . . . filing notice of appeal with the clerk of superior court and serving copies thereof upon all adverse parties within fourteen days after entry of the . . . order[.]” N.C. R. App. P. 4(a), (a)(2). Here, Defendant’s written notice of appeal was filed on 27 February 2024 – thirty-four days after the trial court entered its order. As Defendant “has not properly given notice of appeal, this Court is without jurisdiction to hear the appeal.” *State v. McCoy*, 171 N.C. App. 636, 638 (2005) (citations omitted).

Following the filing of the petition for writ of certiorari, counsel filed an *Anders* brief with this Court, stating that he had been “unable to identify an issue with sufficient merit to support a meaningful argument for relief on appeal” and asking this Court to conduct an independent review of the record on appeal to determine if there were “any justiciable issues” therein. Consistent with the requirements set forth in *Anders v. California*, 386 U.S. 738 (1967) and *State v. Kinch*, 314 N.C. 99 (1985), counsel advised Defendant of his right to file supplemental written arguments with this Court and provided Defendant with the documents necessary to do so. Defendant, on his own behalf, filed the following documents with this Court: “Defendant Supplement Claim. ‘Cohere’ with Appellant Brief filed,” filed on 19 August 2024, and “Supplemental Brief on Merits INC, Cohere with Others filed,” filed

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on 7 October 2024.

This Court may, in its discretion, issue a writ of certiorari “in appropriate circumstances . . . 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). “Under our review pursuant to *Anders* and *Kinch*, we must determine from a full examination of all the proceedings whether the appeal is wholly frivolous.” *State v. Frink*, 177 N.C. App. 144, 145 (2006) (quotation marks and citation omitted). “In carrying out this duty, we will review the legal points appearing in the record, transcript, and briefs, not for the purpose of determining their merits (if any) but to determine whether they are wholly frivolous.” *Id.* (citation omitted).

In the four unpublished opinions to which Defendant cites in his petition for writ of certiorari, our Court explained that the defendants in those cases failed to allege any specific facts showing “materiality” to their defense in their motions for post-conviction DNA testing. *See State v. Denny*, 281 N.C. App. 628 (2022) (unpublished); *State v. Esquivel-Lopez*, 266 N.C. App. 618 (2019) (unpublished); *State v. Asbury*, 271 N.C. App. 804 (2020) (unpublished); *State v. Rangel*, 901 S.E.2d 272 (2024) (unpublished). N.C. Gen. Stat. § 15A-269(a)(1) requires that, when a defendant makes a motion for post-conviction DNA testing, the biological evidence that the defendant wants tested must be “material” to his defense. N.C. Gen. Stat. § 15A-269(a)(1) (2023). The term “material” in the statute means that there is a “reasonable probability that had the evidence been disclosed to the defense the result

of the proceeding would have been different[.]” *State v. Byers*, 375 N.C. 386, 398 (2020). “The burden is on [the] defendant to make the materiality showing required in [the statute],” *State v. Foster*, 222 N.C. App. 199, 205 (2012), and that showing “requires more than the conclusory statement that the ability to conduct the required DNA testing is material to the defendant’s defense.” *State v. Cox*, 245 N.C. App. 307, 312 (2016) (quotation marks and citations omitted). Merely asserting that DNA testing is material and “would exonerate defendant” is insufficient to meet the burden of proof to show materiality under the statute. *State v. Tilghman*, 261 N.C. App. 716, 719 (2018) (citation omitted).

Here, counsel’s *Anders* brief states that he could find no meritorious issue on appeal. In his supplemental *Anders* briefs, Defendant offers nothing but conclusory assertions that DNA testing of the “money US currency” would exonerate him. Defendant states his innocence and claims that DNA testing will “exculpate exonerate” him. However, Defendant offers no specific facts to show materiality under the statute and his single conclusory sentence that DNA testing would “exculpate exonerate” him is insufficient to meet the burden of proof to show materiality. *See Tilghman*, 261 N.C. App. at 719. Additionally, while Defendant argues that some evidence was destroyed by the State, the “money US currency” that Defendant wants tested actually was tested by the State, was used by the State as an exhibit during the trial, and was not destroyed. Moreover, the DNA found on the money matched Defendant’s DNA.

III. Conclusion

After fully examining the record, we determine that there is no justiciable issue on appeal and that the appeal is wholly frivolous. Accordingly, these are not “appropriate circumstances” under which to permit review via certiorari of the challenged order. We, therefore, deny Defendant’s petition for writ of certiorari and dismiss Defendant’s appeal.

DISMISSED.

Judges ARROWOOD and STADING concur.

Report per Rule 30(e).