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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-279

Filed: 19 December 2017

Robeson County, No. 11 CRS 57549

STATE OF NORTH CAROLINA

v.

PAUL BROOKS, III

Appeal by Defendant from order entered 6 May 2016 by Judge James Gregory Bell in Robeson County Superior Court. Heard in the Court of Appeals 7 December 2017.

Attorney General Joshua H. Stein, by Assistant Attorney General Tracy Nayer, for the State.

Sarah Holladay for the Defendant.

DILLON, Judge.

Defendant Paul Brooks, III, appeals from the trial court's order denying his "Motion to Locate and Preserve Evidences [sic] and Motion for Post-Conviction DNA Testing." We affirm in part and vacate in part.

I. Background

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On 8 August 2013, Defendant entered an *Alford* plea pursuant to a plea arrangement with the State to second degree murder, first degree kidnapping, and attempted robbery with a dangerous weapon. In accordance with the arrangement, the trial court consolidated the offenses for judgment and sentenced Defendant to 189 months to 236 months of imprisonment. Defendant did not appeal.

Immediately after Defendant entered his *Alford* plea, the State gave notice of its intent to dispose of the evidence in the case. Almost two years later, the superior court entered an order directing the evidence to be “delivered to the sheriff to be disposed of according to law.”

On 29 March 2016, Defendant filed a *pro se* “Motion to Locate and Preserve Evidences [sic] and Motion for Post-Conviction DNA Testing” in superior court. The motion listed forty pieces of physical evidence from Defendant’s case that “need to be tested and preserved for the purpose of DNA Testing, where the results would prove that the Defendant was NOT the perpetrator of the crime and the requested DNA testing IS MATERIAL to the Defendant’s exoneration.” Defendant requested the appointment of counsel to help prosecute the motion.

On 6 May 2016, the superior court entered an order summarily denying Defendant’s motion. The order found that “the motion sets forth no probable grounds for the relief requested, either in law or in fact.” The court also ordered that “[t]he defendant/petitioner’s failure to assert any grounds in his motion shall be subject to

being treated in the future as BAR to any other claims, assertions, petitions, or motions that he might hereafter file in this case, pursuant to G.S. 15A-1419.”

On 24 May 2016, Defendant filed a written notice of appeal from the superior court’s order.

II. Analysis

As an initial matter, we must determine whether Defendant’s appeal is properly before this Court. Defendant acknowledges that his notice of appeal was untimely since it was not filed within fourteen days of the entry of the superior court’s order, as required by N.C. R. App. P. 4(a)(2). However, he has also filed a petition for writ of *certiorari* seeking review of the order. *See* N.C. R. App. P. 21(a)(1). In our discretion, we allow the petition and consider the merits of Defendant’s appeal. *See State v. Turner*, 239 N.C. App. 450, 452, 768 S.E.2d 356, 358 (2015).

Defendant’s sole argument on appeal is that the superior court erred by ordering his motion for DNA testing to operate as a procedural bar to other forms of post-conviction motions. We agree.

Defendant’s motion was made pursuant to N.C. Gen. Stat. § 15A-269 (2015), which permits a convicted criminal defendant to request post-conviction DNA testing of evidence if certain criteria are met. This statute is part of Article 13 of Chapter 15A, the Criminal Procedure Act. *See id.* A motion for post-conviction DNA testing is not equivalent to a post-conviction motion for appropriate relief (“MAR”), which is

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part of Article 89 of the Act. *See State v. Brown*, 170 N.C. App. 601, 607, 613 S.E.2d 284, 288 (“Defendant’s motion for post-conviction DNA testing cannot, however, be deemed a motion for appropriate relief.”), *superseded by statute on other grounds*, *State v. Norman*, 202 N.C. App. 329, 332-33, 688 S.E.2d 512, 515 (2010).

The superior court denied Defendant’s motion and then ordered that “[t]he defendant/petitioner’s failure to assert any grounds in his motion shall be subject to being treated in the future as BAR to any other claims, assertions, petitions, or motions that he might hereafter file in this case, pursuant to G.S. 15A-1419.” However, N.C. Gen. Stat. § 15A-1419, which deals with MAR’s, by its plain language, is not applicable to defendant’s motion for post-conviction DNA testing. N.C. Gen. Stat. § 15A-1419 governs circumstances under which an MAR may be denied due to a procedural bar, such as by a prior appeal or prior MAR. *See* N.C. Gen. Stat. § 15A-1419(a) (2015). But, as the State concedes, the filing of a motion for post-conviction DNA testing is not equivalent to the filing of an MAR, and its denial does not operate as a procedural bar to a subsequent MAR. Because the superior court lacked authority to order Defendant’s motion to act as a procedural bar for future MARs, we must vacate that portion of the superior court’s order. The remainder of the order is not challenged by Defendant and is therefore affirmed.

AFFIRMED IN PART AND VACATED IN PART.

Chief Judge McGEE and Judge STROUD concur.

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Report per Rule 30(e).