

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA17-613

Filed: 19 December 2017

Wake County, No. 09-CRS-210668

STATE OF NORTH CAROLINA

v.

JACQUES CRAIG FLOYD, Defendant.

Appeal by Defendant from order entered 24 October 2016 by Judge Donald W. Stephens in Wake County Superior Court. Heard in the Court of Appeals 7 December 2017.

*Attorney General Joshua H. Stein, by Assistant Attorney General Joseph L. Hyde, for the State.*

*Appellate Defender G. Glenn Gerding, by Assistant Appellate Defender John F. Carella, for the Defendant.*

DILLON, Judge.

Jacques Craig Floyd (“Defendant”) appeals from the trial court’s order denying his second motion for post-conviction DNA testing. After review of the record, we dismiss the appeal.

I. Background

STATE V. FLOYD

*Opinion of the Court*

On 27 October 2010, a jury found Defendant guilty of robbery with a dangerous weapon. The trial court sentenced Defendant to an active term of 108 to 139 months of imprisonment. Defendant appealed to this Court, which found no error. *State v. Floyd*, 215 N.C. App. 391, 716 S.E.2d 90 (unpublished), *discretionary review denied*, 365 N.C. 364, 718 S.E.2d 629 (2011).

On 13 December 2010, Defendant filed a motion for post-conviction DNA testing, seeking to test a hair follicle sample taken from him along with any other biological evidence taken from the crime scene. In May 2011, the superior court denied Defendant's motion. Defendant appealed the denial of his motion to this Court. In affirming the court's order, we noted that Defendant failed to show the existence of any biological evidence which could be tested, including a cup that contained a latent fingerprint of Defendant, as the cup, according to the State's response, was not seized by law enforcement. *State v. Floyd*, 220 N.C. App. 524, 725 S.E.2d 675 (2012) (unpublished).

In October 2016, Defendant filed another motion for post-conviction DNA testing, asserting that at the time he filed his prior motion, "it was not known that there was an unidentified print on the cup not belonging to Defendant or the cashier." On 24 October 2016, the trial court filed an order summarily denying the motion. On 10 November 2016, Defendant filed notice of appeal from the order.

II. Analysis

STATE V. FLOYD

*Opinion of the Court*

Defendant's appointed counsel filed a record on appeal in this Court on 9 June 2017. He also filed a petition for writ of *certiorari* on 13 July 2017 in which he acknowledged that the notice of appeal was not timely, as it was not filed within 14 days after entry of the order as required by N.C. R. App. P. 4(a)(2). *See State v. Oates*, 366 N.C. 264, 266, 732 S.E.2d 571, 573 (2012) (an order is entered in a criminal case when it is filed with the clerk of superior court). He also acknowledged that failure to give timely notice of appeal is a jurisdictional default precluding appellate review. *See State v. McCoy*, 171 N.C. App. 636, 638, 615 S.E.2d 319, 320 (2005). He asks this Court, in our discretion, to review the order. He notes that although the order was entered on 24 October 2016, the order was not mailed to him until 26 October 2016, thereby giving him two fewer days within which to file the notice of appeal. He also points out that the notice of appeal, according to the certificate of service, was mailed on 28 October 2016 but was not filed by the clerk until 10 November 2016.

Defendant had a full appeal from the order denying the first motion for post-conviction DNA testing, and we discern no significant difference in the second motion. Accordingly, in our discretion, we decline to issue the writ.

DISMISSED.

Chief Judge McGEE and Judge STROUD concur.

Report per Rule 30(e).