IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA22-621

Filed 7 May 2024

Davie County, No. 13 CRS 50876

STATE OF NORTH CAROLINA

v.

LINDSAY BETH SMITH, Defendant.

Appeal by Defendant from order entered 22 January 2020 by Judge April C. Wood in Davie County District Court and orders entered 12 November 2020 by Judge Mark E. Klass in Davie County Superior Court. Heard in the Court of Appeals 6 March 2023.

Attorney General Joshua H. Stein, by Assistant Attorney General Caden William Hayes, for the State-Appellee.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Nicholas C. Woomer-Deters, for the Defendant-Appellant.

STADING, Judge.

Defendant Lindsay Beth Smith appeals the denial of her motion for appropriate relief and petitions for writs of *certiorari*. For the reasons below, we affirm.

I. Background

On 19 June 2013, Trooper Jackson of the North Carolina Highway Patrol came across a vehicle on the side of the road with Defendant asleep in the driver's seat. Trooper Jackson observed that the car appeared to have run off the road and sustained damage to its bumper and left tires. After waking up, Defendant denied consuming alcohol and refused to submit to breath tests—on the scene and at the Davie County Jail. Still, Trooper Jackson observed that Defendant had slurred speech, was unsteady on her feet, and had a "moderate" odor of alcohol on her breath.

On 10 January 2014, Defendant entered a guilty plea to the charge of driving while impaired in Davie County District Court. According to Defendant, her attorney advised that the State obtained a tape from a custody hearing in which Defendant admitted to drinking alcohol on the night in question. Subsequently, Defendant obtained the transcript from the custody hearing, which did not contain an admission to drinking alcohol. Instead, the transcript revealed that Defendant conceded to taking a regular dosage of three prescription medications: Fluoxetine, Buspar, and Ambien. Defendant further contends that she overheard a conversation in the courtroom between her child's father and his attorney on 10 January 2014, wherein it was stated that she would lose custody of her son if she went to jail. After the plea, in a letter dated 5 August 2014, Defendant learned that the Florida Department of Highway Safety and Motor Vehicles revoked her driving privileges due to several impaired driving convictions.

On 19 August 2015, Defendant filed a motion for appropriate relief in district court challenging the January 2014 judgment. Defendant's affidavit stated that her attorney erroneously informed her of the State's evidence and failed to warn her of the effect the conviction would have on her out-of-state driving privileges. Defendant argued that her plea was not "free and voluntary." On 8 July 2016, the district court held an evidentiary hearing and denied Defendant's motion for appropriate relief. The district court entered its order on a form captioned "Judgment/Order or Other Disposition." It did not contain the statutorily required findings of fact or conclusions of law. N.C. Gen. Stat. §§ 15A-1420(c)(4), (7) (2013).

On 23 August 2016, Defendant petitioned for a writ of *certiorari*, requesting that the superior court review the district court's denial of her motion. The superior court denied Defendant's petition on 28 February 2017. Subsequently, Defendant filed several petitions with this Court. This Court granted *certiorari* and remanded the district court's order of denial to the district court "for the entry of a new dispositional order with appropriate findings of fact and conclusions of law[.]" On remand, the district court entered findings of fact and denied Defendant's motion for appropriate relief, concluding that:

> 1. The Defendant knowingly and voluntarily entered the plea of guilty to the charge of Driving While Impaired on January 10, 2014.
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> 2. The Defendant's Due Process rights have not been violated. There is no compelling reason in fact or law to set aside the Defendant's guilty plea and the judgment in this

matter.

3. The Defendant has failed to prove that her plea of guilty was involuntary.

Defendant again petitioned the superior court for writs of *certiorari* on 17 March 2020 and again on 2 May 2020. In these petitions, Defendant sought a belated appeal from the underlying impaired driving judgment and a review of the January 2020 denial of her motion for appropriate relief. On 20 August 2020, Defendant petitioned this Court for mandamus, seeking an order directing the superior court to rule on these two petitions. This Court granted Defendant's petition, in part, directing the superior court to enter dispositive orders ruling on the petitions. The superior court then denied both petitions. On 21 July 2021, Defendant petitioned this Court for a writ of *certiorari*, seeking a review of the denials. This Court granted the petition on 24 August 2021.

II. Jurisdiction

This Court allowed Defendant's petition for a writ of *certiorari* to review the orders of the superior and district courts. N.C. Gen. Stat. §§ 7A-32(c), 15A-1422(c)(3) (2023); N.C. R. App. P. 21(a)(1).

III. Analysis

Defendant argues that the district court erred in denying her motion for appropriate relief because of the circumstances in which she entered her guilty plea. Defendant also contends that the superior court's orders denying *certiorari* should be

reversed. For the reasons stated below, we hold that the district court did not err and affirm the superior court's orders.

A. The District Court's Motion for Appropriate Relief

If a defendant seeks to withdraw a guilty plea after sentencing, this Court will treat it as a motion for appropriate relief. *State v. Konakh*, 266 N.C. App. 551, 556, 831 S.E.2d 865, 869 (2019) (citation omitted). "When considering rulings on motions for appropriate relief, we review the trial court's order to determine '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. Frogge*, 359 N.C. 228, 240, 607 S.E.2d 627, 634 (2005) (quoting *State v. Stevens*, 305 N.C. 712, 720, 291 S.E.2d 585, 591 (1982)). "In addition, the trial court's unchallenged findings of fact are binding on appeal." *State v. Ramseur*, 226 N.C. App. 363, 366, 739 S.E.2d 599, 602 (2013) (citation omitted). "'When a trial court's findings on a motion for appropriate relief 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) (quoting *State v. Wilkins*, 131 N.C. App. 220, 223, 506 S.E.2d 274, 276 (1998)). That is, "[c]onclusions of law drawn by the trial court from its findings of fact are reviewable de novo on appeal." *State v. Wilkerson*, 232 N.C.

App. 482, 489, 753 S.E.2d 829, 834 (2014) (quoting *Carolina Power & Light Co. v. City of Asheville*, 358 N.C. 512, 517, 597 S.E.2d 717, 721 (2004)).

The district court's order denying Defendant's motion for appropriate relief, entered 22 January 2020, contained these findings of fact:

> 1. The Defendant was arrested and charged with Driving While Impaired on June 19, 2013.
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> 2. On January 10, 2014, the Defendant entered a plea of Guilty to the charge of Driving While Impaired and was convicted of the same by Judge Wayne Michael. The Court imposed a Level 5 sentence of [ ] 60 days suspended for 18 months with substance abuse assessment, community service, fines, and costs.
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> . . .
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> 6. As stated on the form, the Court found that "the impairment of the defendant's faculties was caused primarily (the Court underlined the word primarily) by a lawfully prescribed drug for an existing medical condition, and the amount of the medical drug was taken within the prescribed dosage." The Court identified the drug as Ambien.
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> 7. The Court further found that "the negligent driving of the defendant led to an accident causing property damage of $1,000 or more, or property damage of any amount to seized pursuant to G.S. 20-28.3." The Court denoted on the form that the damage was to "her vehicle only."
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> 8. The Defendant filed a Motion for Appropriate Relief on August 19, 2015 seeking to have her guilty plea set aside.
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> . . .
>
> 10. The Defendant testified that she did not understand that upon conviction of Driving While Impaired in North Carolina her driver's license would be revoked in Florida.

11. The Defendant's Florida driver's license was revoked due to four (4) convictions of "Driving Under the Influence." The Defendant was convicted of three (3) offenses in Maryland, specifically on January 19, 1999, November 10, 2005, and April 6, 2006. The Defendant was convicted in North Carolina on January 10, 2014.

12. The Defendant testified that the revocation of her Florida license is causing her great hardship and is one of her reasons for seeking the relief requested. The notice sent to the Defendant by the [S]tate of Florida provides that she may request a "hardship driver license" in Florida.

13. The Defendant testified that she had not consumed any alcohol at the time that she obtained the DWI charge but that she believed that her attorney had told her that she had admitted to drinking during her testimony in her child custody trial. The Defendant alleges that there was a miscommunication between herself and her attorney and that is why she decided to enter the guilty plea. The Defendant alleges that because she never consumed alcohol the evening that she was charged with DWI, she should [sic] have been convicted of DWI. It is clear from the record that at the time that the Defendant entered her guilty plea, [the judge] was informed by the parties that the Defendant was taking Ambien. As evidenced by the Impaired Driving Determination of Sentencing Factors form prepared by [the judge], the Court found that "the impairment of the defendant's faculties was caused primarily (the Court underlined the word primarily) by a lawfully prescribed drug for an existing medical condition, and the amount of the medical drug taken was within the prescribed dosage." The Court identified the drug as Ambien.

14. The Defendant was not convicted of Driving While Impaired for having consumed too much alcohol as she would have the Court believe today. The record is clear as to the basis for the charge of Driving While Impaired.

15. The Defendant testified that the case had been

> continued a number of times and that she just wanted to get it over and that is why she entered a guilty plea.
>
> 16. The Defendant also testified that she was suffering from post-traumatic stress [ ] as a result of domestic abuse and did not know what she was doing at the time that she entered the guilty plea.
>
> 17. The Court does not find the testimony of the Defendant compelling or credible.
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> 18. The Defendant knowingly and voluntarily entered the plea of guilty to the change of Driving While Impaired on January 10, 2014, and just because she regrets the decision now, there is not a compelling reason in fact or law to set aside the Defendant's guilty plea and the judgment in this matter.

1. Challenged Findings of Fact

First, we address Defendant's challenge to findings of fact numbers 14, 15, and 17 contained in the trial court's order. Defendant contends that absent a verbatim transcript of the district court evidentiary hearing, "it is impossible to determine if some of the court's findings were supported by competent evidence." North Carolina's Criminal Procedure Act imposes no such recordation requirement in district court. *See* N.C. Gen. Stat. §§ 15A-1101, 7A-191.1 (2023). Absent a proper request for recordation at the district court level, the record before us does not include a transcript of the proceedings, and "[t]he appellate courts can judicially know only what appears of record." *Jackson v. Hous. Auth. of High Point*, 321 N.C. 584, 586, 364 S.E.2d 416, 417 (1988). And "[a]n appellate court cannot assume or speculate that there was prejudicial error when none appears on the record before it." *State v.*

Moore, 75 N.C. App. 543, 548, 331 S.E.2d 251, 254 (1985). Furthermore, the unchallenged findings of fact are binding on appeal. *Ramseur*, 226 N.C. App. at 366, 739 S.E.2d at 602.

Defendant maintains that the trial court's finding number 14, that "Defendant was not convicted of Driving While Impaired for having consumed too much alcohol as she would have the Court believe today," is wholly unsupported by the record. Defendant points to Trooper Jackson's report, noting a "moderate odor of alcohol about [her] person" while not mentioning the other listed indicia of impairment. However, the record contains the district court's determination of sentencing factors, which explicitly lists Ambien as the drug impairing Defendant's faculties. This sentencing factor corresponds with Defendant's admission of consuming Ambien, as evidenced by the transcript contained in the affidavit attached to her motion for appropriate relief. Here, the record contains competent evidence underpinning finding of fact number 14. *See Carter*, 66 N.C. App. at 25, 311 S.E.2d at 8.

Defendant also claims that the trial court's finding number 15, that "Defendant testified that the case has been continued a number of times and that she just wanted to get it over and that is why she entered a guilty plea," is unsupported by competent evidence. In making this argument, Defendant proffers that there is a contradiction between this finding and her subsequent denial of the statement, as well as a portion of finding number 13, reciting her testimony of alternate reasons underlying the plea. Likewise, Defendant challenges the trial court's finding number 17, that "[t]he Court

does not find the testimony of the Defendant compelling or credible," is "wholly conclusory" and unsupported by competent evidence. Defendant challenges the trial court's finding number 17 as follows: "[t]o the extent this finding operates as a general rejection of all of Ms. Smith's factual allegations, it is unsupported by the record. . . ." However, trial courts hold evidentiary hearings and make factual findings when ruling on motions for appropriate relief. In doing so, trial courts have the authority to make credibility determinations. *See* N.C. Gen. Stat. § 15A-1415 (2023); *see also State v. Reid*, 380 N.C. 646, 656, 869 S.E.2d 274, 283 (2022). Here, the record shows that the district court considered Defendant's testimony, old and new, along with other evidence, and acted within its discretion to determine the credibility of each piece of evidence. We hold that the trial court's findings of fact are supported by competent evidence.

2. Withdrawal of Plea

"When a defendant seeks to withdraw a guilty plea after sentencing, his motion should be granted only where necessary to avoid manifest injustice." *State v. Suites*, 109 N.C. App. 373, 375, 427 S.E.2d 318, 320 (1993) (citation omitted). In addition,

> The stricter standard applied to post-versus pre-sentence motions to withdraw is warranted by the likelihood that, after sentencing, the defendant will view the plea bargain as a tactical mistake or that other portions of the plea bargain agreement already will have been performed by the prosecutor, such as the dismissal of additional charges, and by the settled policy of giving finality to criminal sentences which result from a voluntary and properly counseled guilty plea.

Id. at 376, 427 S.E.2d at 320 (citation and quotation marks omitted). Although the *Handy* factors speak to the withdrawal of a guilty plea before sentencing, we can look at its withdrawal factors to consider whether an appellant had suffered manifest injustice. *State v. Handy*, 326 N.C. 532, 535, 391 S.E.2d 159, 161 (1990); *see also State v. Shropshire*, 210 N.C. App. 478, 481, 708 S.E.2d 181, 183 (2011) (applying *Handy* factors to determine whether the defendant suffered manifest injustice when entering their guilty plea); *see also State v. Russell*, 153 N.C. App. 508, 509, 570 S.E.2d 245, 247 (2002). Thus, "[f]actors to be considered in determining the existence of manifest injustice include whether: defendant was represented by competent counsel; defendant is asserting innocence; and defendant's plea was made knowingly and voluntarily or was the result of misunderstanding, haste, coercion, or confusion." *Id.* (citation, quotation marks, and brackets omitted). Further, we consider "the length of time between entry of plea and desire to change it." *Handy*, 326 N.C. at 539, 391 S.E.2d at 163. "[M]ere dissatisfaction with one's sentence does not give rise to manifest injustice in this context." *State v. Zubiena*, 251 N.C. App. 477, 488, 796 S.E.2d 40, 48 (2016) (citation omitted).

Defendant argues that the district court failed to identify and apply the proper legal standard in adjudicating her motion for appropriate relief. Defendant contends that the trial court erred by looking at the voluntariness of the plea as opposed to whether Defendant showed manifest injustice to support a post-sentencing

withdrawal of the plea. We disagree.

Here, Defendant's motion for appropriate relief contended that her plea was involuntary, which is one of the factors that a court may weigh when analyzing manifest injustice under *Russell* and *Handy*. Notably, Defendant did not raise any additional arguments pertaining to the factor of whether she asserted innocence. *Russell,* 153 N.C. App. at 509, 570 S.E.2d at 247. Indeed, Defendant's motion for appropriate relief concludes that "her miscommunication with trial counsel regarding the nature of the evidence and lack of understanding of the overall consequence of her plea renders her plea involuntary." Thus, the trial court's order was focused primarily on whether the plea entered voluntarily.

Defendant also argues that the district court failed to determine whether her counsel's failure to advise her about "potential collateral consequences of pleading guilty" rendered her counsel incompetent. *Handy*, 326 N.C. at 539, 391 S.E.2d at 163. An attorney must advise her client of the consequences of a guilty plea if they have "a definite, immediate and largely automatic effect on the range of the defendant's punishment for the crime charged." *State v. Marshburn*, 109 N.C. App. 105, 109, 425 S.E.2d 715, 718 (1993) (internal quotation marks and citations omitted). However, "an attorney is not required to advise his client of the myriad collateral consequences of pleading guilty." *State v. Goforth*, 130 N.C. App. 603, 605, 503 S.E.2d 676, 678 (1998) (internal quotation marks and citations omitted). To prevail on her contention that her attorney was required to inform her of such consequences:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, *a trial whose result is reliable*.

State v. Braswell, 312 N.C. 553, 561–62, 324 S.E.2d 241, 248 (1985) (quoting *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984)). "[T]o satisfy the prejudice requirement" in the context of a guilty plea, the Supreme Court emphasized that "the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty. . . ." *Hill v. Lockhart*, 474 U.S. 52, 106 S. Ct. 366, 370 (1985).

Defendant contends that Florida's revocation of her driving privileges is a material collateral consequence of the guilty plea that permits her to withdraw her plea. However, by Defendant's admission, she pleaded guilty to avoid certain consequences (jail time and the effect on her custodial rights) in exchange for other possible collateral consequences (loss of driving privileges). Moreover, Defendant's attempt to analogize her Florida driving privilege revocation to the concerns addressed by the United States Supreme Court in *Padilla v. Kentucky* fails. 559 U.S. 356, 130 S. Ct. 1473 (2010). *Padilla* concerned the collateral consequence of deportation of "a lawful permanent resident of the United States for more than 40 years [who] served this Nation with honor as a member of the U. S. Armed Forces

during the Vietnam War. *Id.* at 359, 130 S. Ct. at 1477. The Court noted that "[w]e . . . have never applied a distinction between direct and collateral consequences to define the scope of constitutionally 'reasonable professional assistance' required under *Strickland*, 466 U.S. at 689, 104 S. Ct. at 2052. Whether that distinction is appropriate is a question we need not consider in this case because of the unique nature of deportation." *Padilla*, 559 U.S. at 365, 130 S. Ct. at 1481. Unlike driving privileges, the Supreme Court has "long recognized that deportation is a particularly severe penalty. . . ." *Id.* (citation and quotation marks omitted). We decline to extend the reasoning of *Padilla* to the present matter. *See State v. Bare*, 197 N.C. App. 461, 479, 677 S.E.2d 518, 531 (2009) (defense counsel need not inform all of the possible indirect and collateral consequences of their plea) (internal quotation marks and citations omitted); *see also Goforth*, 130 N.C. App. at 605, 503 S.E.2d at 678 (in instances where the client asks for advice about a "collateral consequence" and relies on it when deciding whether to plead guilty, the attorney must not grossly misinform his client about the law) (citation marks and internal quotations omitted).

We also consider Defendant's argument that she was subject to misunderstanding and confusion regarding the consequences of her actions, causing her plea to be entered involuntarily.

> When accepting a plea of guilty, a trial court must make sure that the defendant has a full understanding of what the plea connotes and of its consequence. The record must show that the plea was voluntary and that it was intelligently and understandingly given. However, if

> evidence supports a finding of the trial court that the defendant freely, understandingly, and voluntarily pled guilty, the plea will not be disturbed.

State v. Bass, 133 N.C. App. 646, 648, 516 S.E.2d 156, 158 (1999) (internal quotation marks and citations omitted). Here, Defendant's mistaken belief regarding the evidence is insufficient to strike her guilty plea. *See State v. Bell*, 14 N.C. App. 346, 350, 188 S.E.2d 593, 595 (1972) (citation omitted) ("The fact . . . that defendant may have thought that incompetent evidence would be used against him upon a plea of not guilty is not sufficient grounds to strike a plea of guilty that the defendant swore, and the court found, was freely, understandingly and voluntarily entered."). Nor does the record support the contention that Defendant's counsel advised her to plead guilty based on misinformation relating to the State's evidence. *Cf. State v. Mercer*, 84 N.C. App. 623, 628, 353 S.E.2d 682, 685 (1987) (holding defendant may have his guilty plea withdrawn because it resulted from "misunderstanding due to misinformation from his attorney regarding the existence or terms of any such promise" by the district attorney). What is apparent from the record, through her affidavit to the district court, is that Defendant pleaded guilty because she feared losing custody of her son if she went to jail. Further, the district court did not rely on whether Defendant had consumed alcohol. It noted as much in findings of fact numbers 13 and 14:

> 13. It is clear from the record that at the time that the Defendant entered her guilty plea, Judge Michael was informed by the parties that the Defendant was taking Ambien. As evidenced by the Impaired Driving Determination of Sentencing Factors form prepared by

> Judge Michael, the Court found that "the impairment of the defendant's faculties was caused primarily (the Court underlined the word primarily) by a lawfully prescribed drug for an existing medical condition, and the amount of the medical drug taken was within the prescribed dosage." The Court identified the drug as Ambien.
>
> 14. The Defendant was not convicted of Driving While Impaired for having consumed too much alcohol as she would have the Court believe today. The record is clear as to the basis for the charge of Driving While Impaired.

Therefore, we see no reason to disturb the trial court's conclusion that Defendant's plea was voluntary.

To complete our analysis, we also consider the length of time between the entry of the plea and the desire to change it. *Id.* While no single *Handy* factor is determinative, "courts have historically placed a 'heavy reliance on the length of time between a defendant's entry of a guilty plea and a motion to withdraw the plea.'" *State v. Crawford*, 278 N.C. App. 104, 111, 861 S.E.2d 18, 25 (2021) (quoting *State v. Robinson*, 177 N.C. App. 225, 229, 628 S.E.2d 252, 255 (2006)). Defendant seeks to withdraw the entry of her guilty plea after nineteen months and only after she discovered Florida's revocation of her driving privileges. Such circumstances do not demonstrate a "swift change of heart" or a wavered decision to plead guilty at "a very early stage of the proceedings." *Compare Handy*, 326 N.C. at 540–41, 391 S.E.2d at 163–64 (granting the defendant's motion to withdraw his plea less than 24 hours) *with Robinson*, 177 N.C. App. at 230, 628 S.E.2d at 255 (denying the defendant's motion to withdraw his guilty plea three-and-a-half months after its entry).

Our analysis of the district court's order denying Defendant's motion for appropriate relief shows that the findings are supported by competent evidence. *Lutz*, 177 N.C. App. at 142, 628 S.E.2d at 35. And since the record did not display a manifest abuse of discretion by the district court, the order will not be disturbed on appeal. *Id.* Accordingly, we affirm the district court's denial of Defendant's motion for appropriate relief.

B. The Superior Court's Denials of *Certiorari*

In Defendant's final argument, she contends that the superior court abused its discretion in denying *certiorari*. "A *petition* for the writ must show merit or that error was probably committed below." *State v. Grundler*, 251 N.C. 177, 189, 111 S.E.2d 1, 9 (1959) (emphasis added) (citation omitted). "*Certiorari* is a discretionary writ, to be issued only for good or sufficient cause shown, and it is not one to which the moving party is entitled as a matter of right." *Womble v. Moncure Mill & Gin Co.*, 194 N.C. 577, 579, 140 S.E. 230, 231 (1927). "And discretion in a legal sense means the power of free decision; undirected choice; the authority to choose between alternative courses of action." *Burton v. Reidsville*, 243 N.C. 405, 407, 90 S.E.2d 700, 702 (1956) (citation omitted). A trial court's grant or denial of *certiorari* is reviewed for abuse of discretion, and it will be disturbed only if the court's "determination is manifestly unsupported by reason and is so arbitrary that it could not have been the result of a reasoned decision." *State v. Cummings*, 361 N.C. 438, 447, 648 S.E.2d 788, 794 (2007) (internal citations and quotation marks omitted). Our review of the district court's

order reveals that the superior court did not abuse its discretion in denying Defendant's petitions for writs of *certiorari*.

IV. Conclusion

The district court's denial of Defendant's motion for appropriate relief and the superior court's denial of Defendant's petitions for writs of *certiorari* are affirmed.

AFFIRMED.

Judges COLLINS and GRIFFIN concur.

Report per Rule 30(e).