

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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

NO. COA12-281  
NORTH CAROLINA COURT OF APPEALS

Filed: 4 December 2012

STATE OF NORTH CAROLINA

v.

Caldwell County  
No. 93 CRS 3641

HARRY JAMES FOWLER,  
Defendant.

Appeal by defendant from order entered 31 August 2011 by Judge W. Robert Bell in Caldwell County Superior Court. Heard in the Court of Appeals 26 November 2012.

*Attorney General Roy Cooper, by Assistant Attorney General Sherri G. Horner, for the State.*

*Appellate Defender Staples Hughes, by Assistant Appellate Defender Constance E. Widenhouse, for defendant-appellant.*

HUNTER, Robert C., Judge.

Defendant Harry James Fowler appeals from an order denying his motion for post-conviction DNA testing pursuant to N.C. Gen. Stat. § 15A-269 (2011). We affirm.

A jury found defendant guilty of first degree rape, attempted first degree sex offense, and taking indecent liberties with a minor. Judge Beverly T. Beal sentenced

defendant to consecutive terms of imprisonment of life, twenty years, and ten years. Defendant appealed his convictions and, in an unpublished opinion, this Court found no error. *State v. Fowler*, 123 N.C. App. 786, 474 S.E.2d 418, *disc. review denied*, 344 N.C. 736, 478 S.E.2d 10 (1996).

On 3 November 2008, defendant filed a "Motion to Locate and Preserve Evidence" in which he requested that the court order the location and preservation of "Pants - Blue Jeans size 7" and "Panties - Purple? - size 7[.]" Defendant also filed a *pro se* "Motion for DNA Testing Pursuant to N.C. Gen. Stat. §§ 15A-269" requesting that DNA testing be performed on "Pants (size 7)" and "Panties (size 7)[.]" Judge Beal entered an "Order Initiating DNA Testing Procedure" on 26 November 2008. In the order, Judge Beal directed the district attorney, the State Bureau of Investigation (SBI), the Lenoir Police Department, and the Caldwell County Sheriff's Department to report to the court "any DNA testing reports, or tangible evidence of any type in possession"; ordered the Clerk of Court of Caldwell County to preserve any evidence in its custody in regard to the case; and directed each agency to report "the possession or lack of possession" of the two items referred to in defendant's motions. Judge Beal subsequently appointed counsel for defendant and

ordered defendant to prepare "an adequate affidavit of innocence[.]"

Defendant, through counsel, filed a new Affidavit of Innocence on 13 February 2009. In August 2011, defendant's appointed counsel filed a document entitled "Defendant's Contentions[.]" In the document, defendant requested: (1) the court take judicial notice of the DNA testing problems the State Bureau of Investigation has had over recent months; (2) an independent agency determine the location of the pants; (3) any available physical evidence be retested by an agency other than the SBI; (4) his case be referred to the North Carolina Innocence Inquiry Commission; (5) the State turn over notes and documents associated with interviews of the victim and her mother; and (6) a rehearing on all motions denied by Judge Beal.

On 29 August 2011, Judge W. Robert Bell held an evidentiary hearing on defendant's motion for DNA testing, motion to locate and preserve evidence, and "Defendant's Contentions[.]" By order filed 31 August 2011, the court denied defendant's motion for DNA testing after making detailed findings of fact and conclusions of law. The trial court ultimately concluded that all agencies complied with the November 2008 order and that the "'pants (size 7) and panties (size 7)'" do not exist and

therefore are not available for DNA testing." The trial court allowed defendant's request to take judicial notice of "problems the SBI has had with DNA testing" and denied defendant's remaining five requests. Defendant appeals.

Counsel appointed to represent defendant asserts that she has been unable to identify any issue with sufficient merit to support a meaningful argument for relief on appeal and asks that this Court conduct its own review of the record for possible prejudicial error. Counsel has also shown to the satisfaction of this Court that she has complied with the requirements of *Anders v. California*, 386 U.S. 738, 744-45, 18 L. Ed. 2d 493, 498 (1967), and *State v. Kinch*, 314 N.C. 99, 102-03, 331 S.E.2d 665, 666-67 (1985), by advising defendant of his right to file written arguments with this Court and providing him with the documents necessary for him to do so.

Defendant has purported to file a *pro se* brief. Defendant filed two separate documents with this Court. On 29 May 2012, defendant filed a document entitled "Petitioners/Appellants Objection to Counsel's Propose [sic] Aband[on]ment of Errors Stipulated on Appeal" and "In the Alt-Pro-se brief" In this handwritten document, defendant argues that his appellate counsel is biased against him as evidenced by counsel not

briefing the six "Proposed Issues on Appeal" set out on page 177 in the settled record on appeal. In defendant's 16 July 2012 document entitled "Petitioner's objections to the Allegations of the State[']s purported brief filed 21 June 2012[,]" defendant objects to the State's contention that the record is complete and to the State's assumption that his appellate counsel will forward him a copy of the State's brief. These arguments are without merit.

In accordance with *Anders*, we have fully examined the record to determine whether any issues of arguable merit appear therefrom or whether the appeal is wholly frivolous. We conclude the appeal is wholly frivolous. Furthermore, we have examined the record for possible prejudicial error and found none.

Affirmed.

Judges CALABRIA and McCULLOUGH concur.

Report per Rule 30(e).