IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-1296

Filed: 18 September 2018

Rockingham County, Nos. 11 CRS 50300-01, 50518

STATE OF NORTH CAROLINA

v.

FRANK CATALDO

Appeal by defendant by petition for writ of certiorari from order entered 5 October 2016 by Judge Edwin G. Wilson, Jr. in Rockingham County Superior Court. Heard in the Court of Appeals 15 May 2018.

Attorney General Joshua H. Stein, by Assistant Attorney General Sherri H. Lawrence, for the State.

North Carolina Prisoner Legal Services, Inc., by Christopher J. Heaney, for defendant-appellant.

CALABRIA, Judge.

Where defendant, in a motion for post-conviction discovery, requested disclosure of evidence which may have been material to his defense, the trial court erred in denying the motion. We reverse the denial of defendant's motion, and

remand for an *in camera* hearing for the trial court to determine whether the evidence was material, and whether its exclusion prejudiced defendant's case.

I. Factual and Procedural Background

T.B. was born on 1 October 1996 to R.B. and T.C.[1] R.B. and T.C. had another child, J.C. In 2003, T.B.'s mother, R.B., moved in with Frank Cataldo ("defendant"). R.B. and defendant have two sons, A.C. and K.C. From 2003 to 2009, T.B. and J.C. visited R.B. and defendant every other weekend. They permanently moved in with R.B., defendant, A.C., and K.C. in 2009.

In January of 2011, when T.B. was in eighth grade, she told her guidance counselor that she had been having sex with defendant and was concerned about pregnancy. On 14 January 2011, Detective Ronnie Markham ("Det. Markham"), an officer with the Eden Police Department, and Jacqueline Strand ("Strand"), a social worker with Rockingham County DSS, met with T.B. at her middle school. T.B. informed them that defendant had penetrated her orally and vaginally several times. Det. Markham and Strand then met R.B. at the police department and informed her of T.B.'s allegations against defendant. They also interviewed defendant, who claimed that a physical exam would show that T.B. was probably having sex at school, but not with him.

[1] Pseudonyms for the juvenile and related parties are used to protect their privacy.

On 18 February 2011, Dr. Gina Abbruzzi Martin ("Dr. Martin"), an emergency room physician at Alamance Regional Hospital, conducted a medical examination of T.B. Dr. Martin observed that T.B.'s hymen exhibited "a lot of swelling" and a split known as a "transection." According to Dr. Martin, a transection is a defect, "not something you'd be born with." She stated that T.B.'s hymen was "much more swollen than would typically be seen . . . [s]o it looked like there had been some rubbing." Dr. Martin further opined that the defect in T.B.'s hymen was "really indicative of vaginal penetration." Dr. Martin acknowledged that T.B.'s mother had informed her that T.B. masturbated daily with a hairbrush, but noted that, while most children masturbate to some extent, "when a child starts masturbating daily or several times a week, it's – often it's indicative of some type of abuse."

On 7 March 2011, defendant was indicted for two counts of statutory sex offense and one count of statutory rape. Defendant declined to present evidence at trial. On 8 May 2013, the jury returned verdicts finding defendant guilty of all charges. The trial court consolidated the two charges of statutory sex offense, and sentenced defendant to a minimum of 240 months and a maximum of 297 months for statutory rape, and a minimum of 240 months and a maximum of 297 months for statutory sex offense, to run consecutively.

Defendant appealed to this Court. In an unpublished opinion filed 3 June 2014, this Court found no error in the proceeding below. *State v. Cataldo*, 234 N.C. App. 329, 762 S.E.2d 2 (2014) (unpublished).

On 7 July 2015, defendant filed a motion for appropriate relief ("MAR") with the trial court. Defendant alleged that T.B.'s father had been accused of sexually abusing her from 2000 to 2001, and again in 2008, and that she had accused her uncle of sexually abusing her in 2009. He argued that he received ineffective assistance of counsel at trial, due to (1) counsel's failure to subpoena T.B.'s DSS records regarding prior claims of abuse; (2) counsel's failure to cross-examine T.B.'s therapist regarding prior claims of abuse; and (3) counsel's failure to impeach T.B. regarding her prior claims of abuse. That same day, defendant filed a motion for post-conviction discovery, seeking an *in camera* review of T.B.'s DSS records regarding prior claims of abuse.

On 5 October 2015, the State filed an answer to defendant's motions, and moved to deny defendant's MAR and for summary judgment. The State noted that the entire basis for defendant's MAR was his allegation that T.B. made prior "unfounded" claims of abuse, that defendant provided no evidence to support his contention, and that defendant failed to show prejudice. The State included with its answer and motions a signed affidavit from defendant's former trial counsel, stating

that, during her representation of defendant, he never told her about T.B.'s prior claims of abuse.

On 13 October 2015, defendant filed a motion to stay the decision on his MAR. Defendant contended that he needed his motion for post-conviction discovery to succeed before he could pursue the MAR.

On 5 October 2016, the trial court entered an order denying defendant's MAR and motion for post-conviction discovery on several grounds. The trial court found that defendant had the burden of showing actual prejudice by a preponderance of the evidence.

With respect to defendant's first claim, that counsel was ineffective due to a failure to subpoena DSS records, the court noted that defendant made bare allegations without evidentiary support, and failed to show that any such records exist, let alone that they were material to his defense. The trial court concluded that defendant could establish neither deficient performance nor prejudice.

With respect to defendant's second claim, that counsel was ineffective for failure to cross-examine T.B.'s therapist, the trial court noted that "[t]he allegations the Defendant complains should have been inquired of not only do not involve the Defendant but the allegations are separated by a large gap of years[,]" and that the trial court in the original case ultimately excluded testimony on this point – which defendant sought to inquire regarding – on the grounds that it was too remote. The

trial court further noted that it was not T.B.'s testimony alone which led to defendant's conviction, but also the testimony of Dr. Martin which suggested a high likelihood that T.B. was abused by defendant. The court again found that defendant had failed to show prejudice. Further, the trial court noted that this claim could have been raised in defendant's appeal to this Court, and that his failure to do so constituted a procedural bar to this claim.

With regard to defendant's third claim, that counsel was ineffective for failure to impeach T.B., the trial court found much the same. The trial court noted that the allegations defendant sought to introduce did not involve him, and were separated from the charges against him by some years, and that the trial court at the prior hearing had specifically precluded defendant from inquiring as to T.B.'s prior abuse. The court further noted this Court's appellate opinion, in which we held that the trial court did not err in precluding counsel from inquiring as to T.B.'s prior abuse. The court once more concluded that defendant had failed to show prejudice, and that this argument was procedurally barred.

On 9 August 2017, defendant filed a petition for writ of certiorari with this Court, seeking review of the 5 October 2016 order. On 1 September 2017, we granted certiorari.

II. Motion for Appropriate Relief

In his first argument, defendant contends that the trial court erred in denying his MAR because he made a plausible showing that material, favorable DSS records exist. We agree.

A. Standard of Review

A trial court's ruling on a motion for appropriate relief pursuant to N.C. Gen. Stat. § 15A-1415 "is subject to review . . . [i]f the time for appeal has expired and no appeal is pending, by writ of certiorari." *State v. Morgan*, 118 N.C. App. 461, 463, 455 S.E.2d 490, 491 (1995) (citation and quotation marks omitted); N.C. Gen. Stat. § 15A-1422(c)(3) (2017).

"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) (citation and quotation marks 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) (citation and quotation marks omitted).

B. Analysis

In his MAR, defendant argued that his "[t]rial counsel was aware that T.B. had made prior allegations of sexual abuse that were investigated by DSS[,]" that these prior allegations were found to be false, and that trial counsel therefore provided ineffective assistance by failing to properly subpoena these documents. Defendant contends that he was entitled to an *in camera* review and the disclosure of these DSS documents proving that T.B. had falsely accused others of sexual abuse.

In support of his position, defendant cites *Pennsylvania v. Ritchie*, 480 U.S. 39, 94 L. Ed. 2d 40 (1987). In *Ritchie*, the defendant was charged with various sexual offenses against a minor and sought disclosure of the victim's Children and Youth Services ("CYS") records in order to raise a defense. In a plurality decision, the United States Supreme Court noted that, "[i]t is well settled that the government has the obligation to turn over evidence in its possession that is both favorable to the accused and material to guilt or punishment." *Ritchie*, 480 U.S. at 57, 94 L. Ed. 2d at 57 (citations omitted). "[E]vidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." *Id.* (citation omitted). The Court concluded that the defendant was "entitled to know whether the CYS file contains information that may have changed the outcome of his trial had it been disclosed[,]" and remanded for an *in camera* review of the file. *Id.* at 61, 94 L. Ed. 2d at 60.

In his motion for post-conviction discovery, defendant cites numerous cases that support his position. We find their reasoning convincing.

For example, defendant cites *State v. Taylor*, 327 N.C. 147, 393 S.E.2d 801 (1990). In *Taylor*, the defendant filed an MAR, seeking a new trial or new sentencing, and alleging ineffective assistance of counsel. In response, the State moved to remove the public defender, whose assistance the defendant alleged was ineffective, and to grant the State access to her files. The trial court granted the State's motion, and our Supreme Court reviewed the case on certiorari. The Court noted that "our trial judges have inherent authority to order disclosure at trial of relevant facts, where it is in the interest of justice to do so." *Taylor*, 327 N.C. at 153-54, 393 S.E.2d at 806. Accordingly, the Court ordered that the files be subject to an *in camera* inspection, with the understanding that the trial court could order portions to be sealed and placed in the record for appellate review. *Id.* at 155, 393 S.E.2d at 807 (citation omitted).

Similarly, in *State v. Hardy*, 293 N.C. 105, 235 S.E.2d 828 (1977), our Supreme Court addressed the question of the materiality of unknown matters. In *Hardy*, the recorded statement of a witness was provided to the State, but not to the defendants. Despite the defendants' requests for discovery, the trial court ruled that the transcript of this statement was part of the State's work product, and therefore not subject to disclosure. While not disagreeing with the trial court, the Supreme Court

noted that "justice requires the judge to order an *in camera* inspection when a specific request is made at trial for disclosure of evidence in the State's possession that is obviously relevant, competent and not privileged. The relevancy for impeachment purposes of a prior statement of a material State's witness is obvious." *Hardy*, 293 N.C. at 127-28, 235 S.E.2d at 842. The Court further explained:

> [S]ince realistically a defendant cannot know if a statement of a material State's witness covering the matters testified to at trial would be material and favorable to his defense, *Brady* and *Agurs* require the judge to, at a minimum, order an *in camera* inspection and make appropriate findings of fact. As an additional measure, if the judge, after the *in camera* examination, rules against the defendant on his motion, the judge should order the sealed statement placed in the record for appellate review.

Id. at 128, 235 S.E.2d at 842.

Our precedent, as well as that of *Ritchie*, is clear. The DSS records sought by defendant, if in fact they exist, may have permitted him to confront and impeach T.B. Defendant could not be expected to present a showing of this evidence prior to it being released. Its materiality, however, is questionable. Do the records exist? Do they show what defendant contends? These are matters best suited to an *in camera* review. *See Ritchie*, 480 U.S. at 61, 94 L. Ed. 2d at 60 (concluding that *in camera* review by the trial court would serve the defendant's interest while also protecting the confidentiality of individuals involved in child-abuse investigations).

In accordance with all of this precedent, we hold that defendant made the requisite showing to support his motion for post-conviction discovery, and that the trial court erred in denying it. We therefore reverse the trial court's order, and remand for an *in camera* review of the DSS records at issue. Should the trial court determine that these records are in fact material, and would have changed the outcome of defendant's trial, defendant should be granted a new trial.

III. Ineffective Assistance of Counsel

In his second and third arguments, defendant contends that the trial court erred in finding that defendant did not receive ineffective assistance of counsel. However, as we have held that the trial court erred in denying defendant's motion for post-conviction discovery, and have remanded for further proceedings, we decline to address this issue.

REVERSED AND REMANDED.

Judges MURPHY and ARROWOOD concur.

Report per Rule 30(e).