IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-340

Filed: 20 November 2018

Wayne County, Nos. 01 CRS 57628-29

STATE OF NORTH CAROLINA

v.

SAMUEL APPLEWHITE

Appeal by defendant from order entered 13 March 2017 by Judge William W. Bland in Wayne County Superior Court. Heard in the Court of Appeals 1 November 2018.

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

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Daniel Shatz, for defendant-appellant.

DAVIS, Judge.

Samuel Applewhite ("Defendant") appeals from an order denying his motion for post-conviction DNA testing. After a thorough review of the record and applicable law, we vacate the trial court's order and remand for further proceedings.

Factual and Procedural Background

Defendant was indicted on 5 August 2002 by a Wayne County grand jury on charges of first-degree rape, first-degree kidnapping, felony breaking or entering, armed robbery, conspiracy to commit rape, conspiracy to commit armed robbery, and attempted first-degree sex offense. On 15 October 2002, Defendant pled guilty to the offenses of first-degree kidnapping, armed robbery, conspiracy to commit armed robbery, and felony breaking or entering before the Honorable Jerry Braswell in Wayne County Superior Court. Judge Braswell imposed four consecutive terms of imprisonment: 125 to 159 months for first-degree kidnapping, 95 to 123 months for armed robbery, 36 to 53 months for conspiracy to commit armed robbery, and 10 to 12 months for felony breaking or entering.

On 5 January 2017, Defendant filed a *pro se* "Motion to Locate and Preserve Evidences [sic] and Motion for Post-Conviction DNA Testing." This motion listed 21 items of evidence relating to the crimes for which Defendant was convicted that he alleged "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 crimes." Defendant also requested that the trial court appoint counsel in order to assist him with his motion.

A hearing was held on Defendant's motion on 8 March 2017 in Wayne County Superior Court before the Honorable William W. Bland. Although the State was represented by an assistant district attorney at the hearing, Defendant was neither

brought to the hearing nor represented by counsel. During the hearing, counsel for the State gave a brief description of its version of the factual and procedural history of the case, discussed the merits of Defendant's motion, and tendered to the trial court a proposed order, which the trial court also requested in electronic form. On 13 March 2017, the Court entered an order denying Defendant's motion. Defendant gave notice of appeal to this Court.

Analysis

On appeal, Defendant argues that the trial court erred by (1) conducting an improper *ex parte* hearing on his motion; and (2) denying the motion without appointing counsel to represent him. With regard to his first argument, Defendant contends that the 8 March 2017 hearing violated his right to be present at all stages of his case and that the trial court's discussion of his motion with the prosecutor in his absence — along with the court's receipt of a proposed order from the prosecutor that Defendant never saw — resulted in the denial of his right to an impartial tribunal.

In support of his argument, Defendant cites several cases addressing *ex parte* communications between a tribunal and a litigant. *See, e.g., State v. McHone*, 348 N.C. 254, 259, 499 S.E.2d 761, 764 (1998) (reversing trial court's order denying defendant's motion for appropriate relief and remanding for finding of fact as to whether State improperly submitted proposed order to trial court on *ex parte* basis);

Mission Hospitals, Inc. v. N.C. Dep't of Health & Human Servs., 189 N.C. App. 263, 269, 658 S.E.2d 277, 281 (2008) (holding that appellant's right to fair and impartial hearing was violated where agency engaged in *ex parte* communications with counsel for petitioner).

The State, conversely, asserts that the Defendant was not entitled to be present at the 8 March 2017 hearing because it involved a post-conviction motion and that the right to be present only applies during a defendant's actual trial. *See, e.g., State v. Rannels*, 333 N.C. 644, 653, 430 S.E.2d 254, 259 (1993) ("Defendant's constitutional right to be present at all stages of the trial is by definition a right pertaining to the trial itself."); *State v. Buchanan*, 330 N.C. 202, 219, 410 S.E.2d 832, 842 (1991) (noting that capital defendant's right to be present does not extend to "the argument of a motion for a new trial and other similar motions" (citation omitted)). The State concedes, however, that it "has found no law authorizing the procedure followed" at Defendant's hearing and suggests that "[t]o the extent this Court is troubled by the irregularity of conducting a hearing in Defendant's absence . . . the proper remedy would be [a] remand for reconsideration either absent a hearing or at a hearing attended by Defendant."

Based on our review of the record, we conclude that it constituted error for the trial court to conduct a hearing on Defendant's motion in the absence of either him or counsel representing him. We agree with the State that the appropriate remedy is

for this Court to vacate the trial court's order and remand this matter for ruling on Defendant's motion by a different superior court judge. In the event it is determined that a hearing is appropriate,[1] either Defendant or any attorney appointed for him by the court shall be entitled to be present. We express no opinion on the merits of Defendant's underlying motion or on the issue of whether Defendant is entitled to the appointment of counsel.

Conclusion

For the reasons stated above, we vacate the trial court's 13 March 2017 order and remand for further proceedings not inconsistent with this opinion.

VACATED AND REMANDED WITH INSTRUCTIONS.

Judges HUNTER, JR. and MURPHY concur.

Report per Rule 30(e).

[1] This Court has noted that while a trial court *may* hold a hearing before ruling on a motion for post-conviction DNA testing, "it is not required to do so in every case." *State v. Floyd*, 237 N.C. App. 300, 302, 765 S.E.2d 74, 77 (2014).