IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-1258

Filed: 6 August 2019

Forsyth County, No. 04 CRS 50501

STATE OF NORTH CAROLINA

v.

DORINDO ESQUIVEL-LOPEZ, Defendant.

Appeal by defendant from order entered 30 May 2018 by Judge Eric C. Morgan in Forsyth County Superior Court. Heard in the Court of Appeals 22 July 2019.

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

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Katy Dickinson-Schultz, for defendant-appellant.

BERGER, Judge.

Dorindo Esquivel-Lopez ("Defendant") appeals from the trial court's order denying his motion for post-conviction DNA testing. We affirm.

On May 13, 2005, a jury found Defendant guilty of first degree sex offense with a child and taking indecent liberties with a child. The trial court sentenced Defendant to consecutive terms of 226 to 281 months and 14 to 17 months in prison.

Defendant appealed, and this Court found no error. *State v. Esquivel-Lopez*, 177 N.C. App. 565, 629 S.E.2d 621 (2006) (unpublished).

On June 25, 2009, Defendant filed a *pro se* motion for post-conviction DNA testing pursuant to N.C. Gen. Stat. § 15A-269 (2017). Defendant requested DNA testing of "all available material evidence" in his case. The trial court denied the motion on August 31, 2009.

Defendant filed another *pro se* motion for post-conviction DNA testing on May 10, 2018. Defendant requested DNA testing of "any and all evidence which was collected by the Winston Salem Police Dept." The trial court denied Defendant's motion without a hearing. The trial court found, *inter alia,* that Defendant had failed to meet his burden of showing materiality as required by N.C. Gen. Stat. § 15-269(a)(1), "because Defendant's conclusory assertions that testing will determine 'who the perpetrator was' and 'will exonerate [him]' are not sufficiently specific to establish that the requested DNA testing would be material to his defense."

Defendant filed a *pro se* written notice of appeal on June 18, 2018. Recognizing the notice of appeal was untimely, *see* N.C.R. App. P. 4(a)(2), counsel appointed to represent Defendant on appeal has filed a petition for writ of certiorari asking this Court to review the trial court's order pursuant to N.C.R. App. P. 21(a)(1). In our discretion, we allow the petition in order to consider Defendant's appeal.

Counsel appointed to represent Defendant has been unable to identify an 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 shown to the satisfaction of this Court that she has complied with the requirements of *Anders v. California*, 386 U.S. 738 (1967) and *State v. Kinch*, 314 N.C. 99, 331 S.E.2d 665 (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 not filed any written arguments on his own behalf with this Court, and a reasonable time for him to do so has passed. In accordance with *Anders* and *Kinch*, we have fully examined the record to determine whether any issues of arguable merit appear therefrom. Our review of potential error in this case is limited to those issues related to the trial court's denial of Defendant's motion to locate and preserve evidence and for DNA testing. We are unable to find any possible prejudicial error and conclude that Defendant's appeal is wholly frivolous. Accordingly, we affirm the trial court's order.

AFFIRMED.

Judges STROUD and ZACHARY concur.

Report per Rule 30(e).