IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA 19-1158

Filed: 17 November 2020

Buncombe County, No. 18 CRS 84420, 84422–24, 84426

STATE OF NORTH CAROLINA

v.

SHAWN ALAN BEHAR

Appeal by defendant from judgment entered 26 April 2019 by Judge R. Gregory Horne in Buncombe County Superior Court. Heard in the Court of Appeals 6 October 2020.

Attorney General Joshua H. Stein, by Assistant Attorney General Nicholas R. Sanders, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Andrew DeSimone, for defendant-appellant.

BRYANT, Judge.

This appeal arises out of the trial court's denial of a motion for appropriate relief and refusal to consider a motion for withdrawal of counsel. The trial court did not err by denying defendant's motion for appropriate relief and did not deny

defendant's constitutional right to counsel by failing to rule on defense counsel's motion to withdraw. Accordingly, we affirm the order of the trial court.

Factual and Procedural History

On 6 May 2018, law enforcement officers were dispatched to the home of defendant Shawn Alan Behar after a woman reported to 911 "that she was inside the residence [and] that someone was trying to kill her." When officers arrived at the home, the woman and defendant were at the front of the home, and the officers observed an unidentified male in "the back wash room" who "took off running through the house." When officers entered the home to locate that individual, they observed a white powdery substance believed to be methamphetamine, a large quantity of clear plastic baggies, syringes and scales. Once officers secured the home, they applied for and obtained a search warrant for the home.

During the execution of the search warrant officers recovered: glass smoking pipes; rectangular pieces of glass with a white powdery substance on them; a grocery bag containing a gallon-sized plastic bag with a crystalline substance believed to be methamphetamine; several plastic baggies containing what officers believed to be "heroin, crack cocaine, and MDMA"; a "20 caliber rifle in the closet"; and $641.00 and two cell phones on defendant's person.

Defendant waived indictment and was charged by information for trafficking in methamphetamine (400 grams or more), possession with intent to sell or deliver

(PWISD) a Schedule II controlled substance (cocaine), PWISD a Schedule I controlled substance (heroin), PWISD a Schedule VI controlled substance (marijuana), and PWISD a Schedule I controlled substance (MDMA).

On 21 May 2018, defendant pled guilty to all charges in exchange for the convictions to be consolidated for judgment with the State dismissing any remaining and related charges. Per the plea agreement, judgment was continued. On 17 July 2018, the matter again came on for plea hearing and the bill of information charging defendant with trafficking in methamphetamine was amended to reflect Class E rather than a Class C felony. Defendant pled guilty to all charges, and the terms of the plea otherwise stayed the same. Per the plea agreement, judgment was again continued.

On 25 April 2019, the trial court found that defendant provided substantial assistance, and sentenced defendant to a minimum 90, maximum 120 months of imprisonment and ordered him to pay a fine of $5,000.00 (reduced from $100,000.00). Defendant entered oral notice of appeal.

On 6 May 2019, defendant's counsel entered a notice of "limited appearance for the purposes of filing a 10-day motion for appropriate relief (MAR) pursuant to N.C. Gen. Stat. [§] 15A-1414," and filed the MAR the same day. On 9 July 2019, counsel filed a motion to withdraw. In an order dated 20 August 2019, the trial court denied

the MAR. The trial court did not consider the motion to withdraw "because the 10[-]day MAR was denied[.]"

Motion for Appropriate Relief

Defendant contends the trial court erred as a matter of law by denying the MAR. We disagree.

"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)). "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)).

There are two types of MARs that a defendant may file—those filed after the verdict but not more than ten days after entry of judgment and those filed at any time after the verdict. N.C. Gen. Stat. §§ 15A-1414, 1415 (2019). If an attorney files a

MAR in superior court, that attorney must certify in writing that (1) "there is a sound legal basis for the motion and that it is being made in good faith;" (2) "the attorney has notified both the district attorney's office and the attorney who initially represented the defendant of the motion;" and (3) "the attorney has reviewed the trial transcript or made a good-faith determination that the nature of the relief sought in the motion does not require that the trial transcript be read in its entirety." *Id.* § 15A-1420(a)(1)c1. "An oral or written motion for appropriate relief made in superior court and made by an attorney may not be granted by the court unless the attorney has complied with the requirements of [N.C. Gen. Stat. § 15A-1420(a)(1)(c1)]." *Id.* § 15A-1420(a)(5).

Here, the trial court order stated that it "reviewed the filed MAR together with the attachments and the court file [and it] has not found any required certification either in the body of the motion, as an attachment, or filed as a separate document. Defendant does not contest that counsel failed to comply with the above certification requirements. The evidence supports the finding that counsel failed to certify the MAR, and that finding supports the denial of the MAR. Accordingly, the trial court did not err in denying Defendant's MAR.

Motion to Withdraw as Counsel

Defendant contends that the trial court erred when it refused to consider the motion to withdraw as counsel. More specifically, defendant contends that the trial

court deprived defendant of his constitutional right to counsel of his choice. We disagree.

"An attorney enters a criminal proceeding when he . . . [a]ppears in a criminal proceeding for a limited purpose and indicates the extent of his representation by filing written notice thereof with the clerk[.]" *Id.* § 15A-141(3). "An attorney who appears for a limited purpose under the provisions of [N.C. Gen. Stat. §] 15A-141(3) undertakes to represent the defendant only for that purpose and is deemed to have withdrawn from the proceedings, without the need for permission of the court, when that purpose is fulfilled." *Id.* § 15A-143.

In addition to the notice of limited purpose, "[t]he court may allow an attorney to withdraw from a criminal proceeding upon a showing of good cause." *Id.* § 15A-144. The decision whether to permit withdrawal of counsel is left to the trial court's discretion. *State v. McGee*, 60 N.C. App. 658, 662, 299 S.E.2d 796, 798 (1983).

"An accused's right to counsel in a criminal prosecution is guaranteed by the Sixth Amendment of the United States Constitution and is applicable to the states through the Fourteenth Amendment, Sections 19 and 23 of the North Carolina Constitution." *State v. Shores*, 102 N.C. App. 473, 474, 402 S.E.2d 162, 163 (1991) (citing *McMann v. Richardson*, 397 U.S. 759, 25 L. Ed. 2d 763 (1970); *State v. Wise*, 64 N.C. App. 108, 306 S.E.2d 569 (1983)). This right includes the right to select an attorney of the accused's choice. *State v. Yelton*, 87 N.C. App. 554, 361 S.E.2d 753

(1987). However, this constitutional right to counsel does not extend to post-conviction proceedings. *Pennsylvania v. Finley*, 481 U.S. 551, 555, 95 L. Ed. 2d 539, 545 (1987) ("We have never held that prisoners have a constitutional right to counsel when mounting collateral attacks upon their convictions, and we decline to so hold today." (internal citation omitted)).

In this case, defendant was sentenced on 26 April 2019. On 6 May 2019, Jen 'Niki' Foster filed entry of limited appearance "for the purposes of filing a 10-day motion for appropriate relief pursuant to [N.C. Gen. Stat. §] 15A-1414." On the same date, Ms. Foster filed a "10 Day Motion for Appropriate Relief" pursuant to N.C. Gen. Stat. § 15A-1414." Ms. Foster filed a motion to withdraw on 9 July 2019, seeking to withdraw as counsel and have new counsel appointed.

As Defendant had no constitutional right to an attorney while the MAR was pending, the trial court's decision to deny the MAR prior to considering Counsel's motion to withdraw did not deprive defendant of any constitutional right to select an attorney of his choice. Additionally, the trial court's alleged failure to rule on the motion to withdraw when the MAR was denied was immaterial. Ms. Foster was deemed to have withdrawn from the proceedings, without the need for permission of the court upon accomplishing the goal of her limited representation. *See* N.C.G.S. § 15A-143. Accordingly, defendant's argument is overruled.

AFFIRMED.

Judges TYSON and COLLINS concur.

Report per Rule 30(e).