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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA20-103

Filed: 6 October 2020

Lincoln County, Nos. 12 CRS 52687-88

STATE OF NORTH CAROLINA

v.

WILBERT LESTER FAIR

Appeal by defendant from order entered 18 October 2018 by Judge Forrest D. Bridges in Lincoln County Superior Court. Heard in the Court of Appeals 8 September 2020.

*Attorney General Joshua H. Stein, by Assistant Attorney General Robert C. Ennis, for the State.*

*Appellate Defender Glenn Gerding, by Assistant Appellate Defender Kathryn L. VandenBerg, for defendant-appellant.*

ZACHARY, Judge.

Defendant Wilbert Lester Fair appeals from an order denying his motion for postconviction DNA testing. After careful review, we deny his petition for a writ of certiorari, and dismiss his appeal.

***Background***

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On 13 September 2013, Defendant pleaded guilty to two counts of second-degree murder. Pursuant to the terms of the plea bargain, Defendant was sentenced to two consecutive terms of 251-314 months in the custody of the North Carolina Division of Adult Correction.

On 3 October 2018, Defendant filed a petition requesting postconviction DNA testing. On 9 October 2018, Defendant's petition came on for hearing before the Honorable Forrest D. Bridges in Lincoln County Superior Court. The trial court denied Defendant's request in an order filed 18 October 2018. On 2 November 2018, Defendant filed a notice of appeal and motion for appointment of appellate counsel. Defendant subsequently wrote to the clerk of superior court in December 2018, and again in April 2019, inquiring about the status of his appeal and requesting a hearing on his motion. On 24 April 2019, Judge Bridges entered appellate entries, and on 3 June 2019, the Appellate Defender appointed counsel for Defendant. On 5 March 2020, Defendant filed with this Court a petition for writ of certiorari. For the foregoing reasons, we deny Defendant's petition and dismiss his appeal.

***Discussion***

“The writ of certiorari may be issued in appropriate circumstances . . . to permit review of the judgments and orders of trial tribunals when the right to prosecute an appeal has been lost by failure to take timely action[.]” N.C.R. App. P. 21(a)(1). Defendant concedes that his notice of appeal was not timely filed. *See* N.C.R. App. P.

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4(a)(2) (providing that notice of appeal in criminal cases must be filed “within fourteen days after entry of the judgment or order”); N.C. Gen. Stat. § 1A-1, Rule 58 (2019) (“[A] judgment is entered when it is reduced to writing, signed by the judge, and filed with the clerk of court . . .”).

“*Certiorari* is a discretionary writ, to be issued only for good and sufficient cause shown.” *State v. Grundler*, 251 N.C. 177, 189, 111 S.E.2d 1, 9 (1959), *cert. denied*, 362 U.S. 917, 4 L. Ed. 2d 738 (1960). “A petition for the writ must show merit or that error was probably committed below.” *Id.* Defendant’s petition focuses primarily on the appropriateness of our issuing the writ under these circumstances, asserting that he “filed his notice of appeal as soon as he was able” and “[t]he one-day delay has not prejudiced the State.” However, Defendant’s petition offers scant showing of merit.

Defendant claims that he presents “a meritorious and important issue,” namely: “Whether denying a cognitively impaired prisoner counsel to help present his DNA testing claim violates the intent of the DNA testing statute and due process of law?” Although Defendant referenced the Fourteenth Amendment to the United States Constitution in his underlying petition to the trial court, and requested the “Appointment of a Post-Conviction DNA Probono Attorney,” Defendant did not make any argument in that petition about cognitive impairment, the intent of the DNA testing statute, or due process of law. “This Court will not consider arguments based

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upon matters not presented to or adjudicated by the trial court. Even alleged errors arising under the Constitution of the United States are waived if [the] defendant does not raise them in the trial court.” *State v. Haselden*, 357 N.C. 1, 10, 577 S.E.2d 594, 600 (citations and internal quotation marks omitted), *cert. denied*, 540 U.S. 988, 157 L. Ed. 2d 382 (2003); *see also State v. Monroe*, 256 N.C. App. 565, 569, 822 S.E.2d 872, 875 (2017) (denying a petition for writ of certiorari based on a different argument than that presented in the motion before the trial court, as “the issue would not be properly before us due to his failure to raise this argument to the trial court”).

Further, Defendant did not include a sworn affidavit of innocence with his underlying petition requesting postconviction DNA testing, as required by N.C. Gen. Stat. § 15A-269(b)(3). Defendant admits as much, and the trial court specifically referenced this failure to comply with the statutory requirements in its order denying his request. Defendant argues that “he did assert his innocence in his pro se motion,” but his failure to comply with the statutory prerequisite is an obstacle to a showing of merit in his petition for writ of certiorari.

Finally, in a petition for postconviction DNA testing, a criminal defendant is statutorily required to demonstrate that “there exists a reasonable probability that the verdict would have been more favorable to the defendant” if “the DNA testing being requested had been conducted on the evidence[.]” N.C. Gen. Stat. § 15A-269(b)(2). In this case, Defendant pleaded guilty to two counts of second-degree

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murder and, at the hearing on his plea agreement, did not “dispute the facts as they [were] presented by the State.” This Court has recognized that “a guilty plea increases a defendant’s burden to show materiality.” *State v. Tilghman*, 261 N.C. App. 716, 719, 821 S.E.2d 253, 256 (2018). Combined with the other issues previously discussed, this factor contributes to our conclusion that Defendant has failed to show merit in his petition for writ of certiorari.

***Conclusion***

As Defendant has failed to show merit in his petition for writ of certiorari, we deny his petition, and dismiss this appeal.

DISMISSED.

Judges BRYANT and ARROWOOD concur.

Report per Rule 30(e).