IN THE COURT OF APPEALS OF NORTH CAROLINA

2021-NCCOA-646

No. COA21-154

Filed 16 November 2021

Mecklenburg County, No. 7-CRS-249546

STATE OF NORTH CAROLINA

v.

MARKESE DONNELL RICE, Defendant.

Appeal by Defendant from order entered 12 May 2020 by Judge W. Robert Bell in Mecklenburg County Superior Court. Heard in the Court of Appeals 21 September 2021.

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.

INMAN, Judge.

¶ 1 Markese Donnell Rice ("Defendant") appeals from an order denying his motion for post-conviction DNA testing and has filed a motion for appropriate relief on appeal. After careful review of the record, we affirm the trial court's order and deny in part and dismiss in part without prejudice Defendant's motion for appropriate

relief.

I. FACTS & PROCEDURAL HISTORY

¶ 2 The record tends to show the following:

¶ 3 Defendant was convicted of first-degree murder on 10 March 2009. The trial court sentenced him to life in prison without the possibility of parole. This Court affirmed his criminal judgment on direct appeal. *State v. Rice*, 203 N.C. App. 573, 692 S.E.2d 890, 2010 WL 1542170, at *8 (2010) (unpublished).

¶ 4 Defendant filed a motion for post-conviction DNA testing on 2 October 2018 and the trial court denied his motion. Again, Defendant appealed to this Court. We vacated the order denying his motion and remanded to the trial court to review the motion pursuant to N.C. Gen. Stat. § 15A-269 (2019). *State v. Rice*, 271 N.C. App. 180, 840 S.E.2d 535, 2020 WL 1921736, at *3 (2020) (unpublished). On remand, the trial court denied Defendant's motion for post-conviction DNA testing on 12 May 2020. The trial court dismissed Defendant's subsequent *pro se* notice of appeal and appointed legal counsel "to assist in pursuit of his desire to appeal the denial of his motion for post-conviction DNA testing."

¶ 5 On 23 November 2020, Defendant filed a petition for writ of certiorari to reinstate Defendant's appeal and we allowed it on 8 December 2020. On appeal, Defendant filed a *pro se* brief on 12 May 2021 and a separate motion for appropriate relief on 28 July 2021 with this Court.

II. ANALYSIS

A. Defendant's Direct Appeal

¶ 6 Defendant's counsel has filed a brief explaining that she was unable to identify any issue with sufficient merit to support a meaningful argument for relief on appeal and asking this Court to engage in an independent review under *Anders v. California*, 386 U.S. 738, 18 L. E. 2d 493 (1967). *See State v. Velasquez-Cardenas*, 259 N.C. App. 211, 225, 815 S.E.2d 9, 18 (2018) ("Our precedent establishes that this Court has *both* jurisdiction *and* the authority to decide whether *Anders*-type review should be prohibited, allowed, or required in appeals from [the statute providing the right to appeal the denial of a motion for post-conviction DNA testing]. Exercising this discretionary authority, we hold that *Anders* procedures apply to appeals pursuant to [Section] 15A–270.1."). Counsel also identified arguments she considered making on appeal but rejected as lacking merit. We are satisfied that counsel complied with the requirements of *Anders* 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.

¶ 7 Defendant filed a *pro se* brief with this Court on 12 May 2021. He contends that new DNA testing would be material to his defense because (1) "the [State Bureau of Investigation] has engaged in widespread and long-lasting practice[s] of misstating the results of forensic tests . . . and withholding material and potentially exculpatory evidence" and (2) the original DNA tests were "insufficient" and newer testing

methods could "go a long way" to prove his innocence. But Defendant confessed to police that he shot the victim. In light of that confession, we cannot conclude that additional DNA results would be material to his defense. In accordance with *Anders* and *Kinch*, we have fully examined the record for any possible prejudicial error and found none.

B. Defendant's Motion for Appropriate Relief

¶ 8 In his motion for appropriate relief, Defendant alleges that (1) he was without effective assistance of trial counsel, (2) the trial court did not have jurisdiction to hear his case because the indictment fails to list the victim's correct name, and (3) he had ineffective assistance of appellate counsel.

1. Ineffective Assistance of Trial Counsel Claim

¶ 9 Defendant claims he had ineffective assistance of trial counsel because his counsel failed to move to suppress his confession to law enforcement or object to its admission at trial as given involuntarily and without understanding under *Miranda v. Arizona*, 384 U.S. 436, 16 L. Ed. 2d 694 (1966). We cannot resolve this claim based on the record on appeal. And Defendant concedes that whether he had ineffective assistance of trial counsel "can only be properly determined through testimony at an evidentiary hearing" below under N.C. Gen. Stat. § 15A-1420(c)(1), (4) (2019). We dismiss the motion for appropriate relief on this issue without prejudice to Defendant's right to file a motion for appropriate relief requesting an evidentiary

hearing with the trial court. *See State v. King*, 218 N.C. App. 347, 360, 721 S.E.2d 336, 345-46 (2012) (citation omitted).

2. Sufficiency of the Indictment

¶ 10 Defendant argues the trial court was without jurisdiction to hear his case because the indictment fails to list the victim's correct name.

¶ 11 We review a challenge to the sufficiency of the indictment *de novo*. *State v. Pendergraft*, 238 N.C. App. 516, 521, 767 S.E.2d 674, 679 (2014). "An indictment is not facially invalid as long as it notifies an accused of the charges against him sufficiently to allow him to prepare an adequate defense and to protect him from double jeopardy." *State v. Haddock*, 191 N.C. App. 474, 476-77, 664 S.E.2d 339, 342 (2008) (citation omitted).

¶ 12 The indictment in this case listed the victim as Richard Louis Deas. Defendant asserts his real name is Richard Charles Lewis Deas. We cannot confirm the victim's legal name on this record. However, under the doctrine of *idem sonans*,[1] the variance in the spelling between one of the victim's middle names, "Louis" and "Lewis," is immaterial. *See, e.g., State v. Williams*, 269 N.C. 376, 384, 152 S.E.2d 478, 484 (1967) (holding the spelling of the first name of the victim as "Mateleane" in the indictment and the spelling of "Madeleine" in testimony fell under the rule of *idem sonans* and

[1] "The term 'idem sonans' means sounding the same." *State v. Vincent*, 222 N.C. 543, 544, 23 S.E.2d 832, 833 (1944).

was immaterial).

¶ 13 Further, Defendant does not assert he was uncertain about the identity of the victim and he does not allege he has been prejudiced by the discrepancy between the victim's name such that he could not prepare an adequate defense or be protected from double jeopardy. *See Haddock*, 191 N.C. App. at 476-77, 664 S.E.2d at 342. In fact, in Defendant's motion *in limine* with the trial court, he referred to the victim only by his first and last name, "Richard Deas."[2] The omission of one of the victim's middle names, "Charles," cannot render the indictment fatally defective. Therefore, we overrule Defendant's contention that the trial court was without jurisdiction to hear his case.

3. Ineffective Assistance of Appellate Counsel Claim

¶ 14 Defendant also alleges ineffective assistance of appellate counsel because his counsel did not raise the issues of ineffective assistance of trial counsel or dispute whether the indictment was defective. As discussed above, Defendant's challenges to the indictment and the trial court's jurisdiction fail, and his only remaining ground for appropriate relief, ineffective assistance of trial counsel, must be resolved through

[2] We take judicial notice of Defendant's motion *in limine* from the record filed in his earlier appeal with this Court. *See West v. G.D. Reddick, Inc.*, 302 N.C. 201, 203, 274 S.E.2d 221, 223 (1981) ("[G]enerally a judge or a court may take judicial notice of a fact which . . . is capable of demonstration by readily accessible sources of indisputable accuracy." (citations omitted)).

an evidentiary hearing with the trial court. Accordingly, Defendant cannot demonstrate any prejudice under his ineffective assistance of appellate counsel claim.

III. CONCLUSION

¶ 15 For the foregoing reasons, we affirm the trial court's order denying Defendant's petition for post-conviction DNA testing. We deny in part and dismiss without prejudice in part Defendant's motion for appropriate relief.

AFFIRMED IN PART; DENIED IN PART; DISMISSED WITHOUT PREJUDICE IN PART.

Judges MURPHY and HAMPSON concur.

Report per Rule 30(e).