

STATE OF NORTH CAROLINA
COUNTY OF MONTGOMERY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
Nos. 99 CRS 3818, 3820

STATE OF NORTH CAROLINA

v.

SCOTT DAVID ALLEN
Defendant.

2019 FEB 16 P 3:42
MONTGOMERY CO., C.S.C.
BVA

FILED

ORDER DENYING DEFENDANT'S PRO SE MOTION TO DISCHARGE POST-CONVICTION COUNSEL AND ALLOWING DEFENDANT TO WITHDRAW HIS PRO SE MOTION TO WITHDRAW CLAIMS 7, 8, AND 9 OF HIS MAR AND SMAR

THIS MATTER came before the undersigned Senior Resident Superior Court Judge on December 19, 2018 in the Superior Court of Montgomery County for a hearing on Defendant's handwritten letters to the Court, filed July 23, 2018 and November 13, 2018, which the Court construed as Defendant's pro se motions to (1) discharge current post-conviction counsel and (2) withdraw Claims 7, 8, and 9 of his motion for appropriate relief ("MAR") and supplemental motion for appropriate relief ("SMAR"). Defendant Scott David Allen ("Defendant") was present and represented by his appointed counsel, Mr. Michael L. Unti and Ms. Margaret C. Lumsden, and the State was represented by Assistant Attorney General Nicholaos G. Vlahos and Special Deputy Attorney General Jonathan P. Babb. Upon review of the court file, transcripts, and record in this case, as well as the evidence presented at the December 19, 2018 competency hearing at which this Court found Defendant competent to proceed, the arguments of counsel, and the Defendant's sworn testimony regarding his pro se motions, the Court makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. Defendant was convicted of first-degree murder on November 13, 2003 and sentenced to death on November 18, 2003, after a capital sentencing proceeding conducted pursuant to North Carolina law.

2. On March 3, 2006, the Supreme Court of North Carolina upheld the conviction and sentence, finding that Defendant received a fair trial free of reversible error in both the guilt and sentencing phases and that Defendant's death sentence was not disproportionate. State v. Allen, 360 N.C. 297, 626 S.E.2d 271, cert. denied, 549 U.S. 867, 166 L. Ed. 2d 116 (2006).

3. On July 2, 2007, Defendant's post-conviction counsel filed a MAR with this Court. On September 19, 2013, Defendant's post-conviction counsel filed a SMAR with this Court, supplementing MAR Claims 1, 2, 3, 8, and 9 and adding two claims, for a total of twelve claims for relief.

4. After the State filed an answer and motion for summary denial, this Court conducted a thorough review of the record and post-conviction pleadings and entered an order on August 18, 2016 granting the State's motion to dismiss Claims 1, 2, 4, 5, 6, 10, 11, and 12 of Defendant's MAR and SMAR. (08/18/16 Order Dismissing Certain Claims of Defendant's MAR and SMAR) In that order, this Court also summarily dismissed Claim 3 of Defendant's MAR and all subparts of Claim 3 of Defendant's SMAR except for Claims 3H, 3J, 3K, and that portion of 3I that related to the in camera examination of the sealed mental health and substance abuse records of State's trial witness Vanessa Smith ("Smith").

5. After conducting a limited evidentiary hearing on August 25, 2017, this Court entered an order on January 4, 2018 concluding that a further evidentiary hearing on SMAR Claims

3H, 3J, 3K, and that portion of 3I that relates to the in camera examination of Smith's sealed mental health and substance abuse records was unnecessary and that Defendant failed to establish any sufficient prejudice to warrant a full evidentiary hearing on those claims; therefore, this Court dismissed those claims in its January 4, 2018 order. (01/04/18 Order Granting State's Motion to Dismiss Claims 3H, 3J, 3K and a portion of 3I of Defendant's SMAR)

6. This Court denied the State's motion to dismiss and granted Defendant an evidentiary hearing on Claims 7, 8, and 9 of his MAR and SMAR, which are all claims alleging ineffective assistance of counsel regarding the sentencing phase of Defendant's trial. (08/18/16 Order on State's Summary Denial Motion on Claims 7, 8, and 9) That evidentiary hearing began on February 12, 2018, concluded on February 15, 2018, and Defendant was present for the entire hearing.

7. At the conclusion of the February 12, 2018 hearing, this Court granted the parties' request to file post-hearing briefs at a later date, after the parties could obtain access to a transcript of the hearing. Subsequently, this Court via email directed both parties to prepare proposed orders in MS Word format to submit with their briefs.

8. On July 2, 2018, the parties submitted copies of their post-hearing briefs to the Court via email and sent the briefs to the Montgomery County Clerk of Superior Court for filing. The State's email to the Court requested that the time for submitting the proposed orders be extended, and Mr. Unti's email to the Court acknowledged that Defendant's post-conviction counsel agreed to the State's request for additional time to submit the proposed orders.

9. Subsequently, Defendant mailed a letter to this Court which he dated "July 10" and in which Defendant claimed he did not personally receive a copy of Defendant's post-hearing brief

until "July 9." The letter was filed in the office of the Montgomery County Clerk of Superior Court on July 23, 2018. In that letter, for the first time before this Court, Defendant raised an objection to his receiving relief in the form of a new capital sentencing proceeding. According to the letter, Defendant claimed he was "in no way whatsoever seek[ing] any relief granted in the form of a sentencing hearing." (emphasis in original) Also, Defendant expressed a desire to discharge his current post-conviction counsel and indicated he may wish to proceed pro se.

10. Defendant sent two additional letters to this Court which he dated August 5, 2018 and October 17, 2018 respectively. In the October 17, 2018 letter, Defendant again expressed a desire to discharge post-conviction counsel, but indicated that he wanted them replaced with new counsel. That letter was filed in the office of the Montgomery County Clerk of Superior Court on November 13, 2018.

11. This Court construed Defendant's letters filed on July 23, 2018 and November 13, 2018 as Defendant's pro se motions to (1) discharge his current post-conviction counsel and (2) withdraw Claims 7, 8, and 9 of his MAR and SMAR.

12. Due to the gravity of Defendant's pro se motions, this Court ordered a forensic evaluation of Defendant, appointed a certified forensic examiner to conduct the evaluation, and held a hearing on December 19, 2018 to determine whether Defendant was competent to proceed in making these decisions. At the conclusion of the hearing, the Court found Defendant competent and ordered the matter to proceed. The Court has signed a separate written order finding Defendant competent to proceed.

13. After finding Defendant competent to proceed, the Court had Defendant sworn and inquired of him, under oath, regarding his pro se motions filed July 23, 2018 and November 13,

2018. The Court finds Defendant acknowledged that he understood the only relief before the Court at the February 12, 2018 evidentiary hearing was the possibility of a new capital sentencing proceeding. Defendant understood that the Court had ruled upon and dismissed all of the guilt phase claims of his MAR and SMAR before the February 12, 2018 evidentiary hearing.

14. Defendant insists he does not want a new sentencing hearing, but is only interested in receiving a new trial. Nevertheless, Defendant claims he elected to proceed with the February 12, 2018 evidentiary hearing because he desired to establish a record to place before the Supreme Court of North Carolina in the hope that the Supreme Court may consider portions of that record in ruling on this Court's dismissal of Defendant's MAR and SMAR guilt phase claims.

15. Defendant continues in his desire to have the record from the February 12, 2018 evidentiary hearing placed before the Supreme Court as it considers this Court's denial of his guilt phase claims. Consequently, Defendant requests this Court to rule on Claims 7, 8, and 9 of his MAR and SMAR. However, Defendant also requests that this Court delay ruling on Claims 7, 8, and 9 of his MAR and SMAR, appoint him new post-conviction counsel, and direct new post-conviction counsel to file a second post-hearing brief.

16. The Court finds Defendant's request in open court that this Court rule on Claims 7, 8, and 9 of his MAR and SMAR constitutes a request to withdraw the pro se motion to withdraw those claims contained in Defendant's letters filed July 23, 2018 and November 13, 2018.

17. Although Defendant did not clearly articulate why he wants new post-conviction counsel to file a second post-hearing brief, the Court finds Defendant's statements indicate he desires to have new post-conviction counsel file a second post-hearing brief that somehow incorporates the evidence presented at the February 12, 2018 evidentiary hearing into his dismissed

guilt phase claims for a new trial. Defendant cannot reopen his dismissed guilt phase claims by arguing them in his post-hearing brief on the sentencing claims of his MAR and SMAR.

18. The Court finds Defendant has no right to direct post-conviction counsel to file a second post-hearing brief incorporating guilt phase claims which have been dismissed into an argument for a new capital sentencing proceeding. Although a client's wishes must control when defense counsel and a fully informed criminal defendant reach an absolute impasse as to tactical decisions, State v. Ali, 329 N.C. 394, 407 S.E.2d 183 (1991), the doctrine of absolute impasse does not apply when a client's wishes are unlawful or when the client seeks to have counsel assert frivolous claims. State v. Williams, 191 N.C. App. 96, 662 S.E.2d 397 (2008); State v. Jones, 220 N.C. App. 392, 725 S.E.2d 415 (2012); State v. Ward, ___ N.C. App. ___, 792 S.E.2d 579 (2016). Therefore, the doctrine of absolute impasse does not govern Defendant's request for substitute counsel.

19. Additionally, the Court finds that Defendant withdrew at this hearing any portion of his pro se motions of July 23, 2018 and November 13, 2018 which could be construed as a request to allow Defendant to proceed pro se. Defendant swore under oath that he did not wish to proceed pro se in this matter and indicated the same in his pro se motion of November 13, 2018.

20. The Court finds that, since the end of September 2017, Defendant understood that the hearing to be held the week of February 12, 2018 concerned only Claims 7, 8, and 9 of his MAR and SMAR which are all claims alleging ineffective assistance of counsel at his capital sentencing proceeding and that the only relief he could receive if he prevailed on those claims was a new capital sentencing proceeding.

21. Counsel for both the State and Defendant submitted post-hearing briefs regarding the February 12, 2018 evidentiary hearing, arguing their respective positions about the evidence presented at the hearing, by the deadline established pursuant to the orders of this Court. This Court has read the post-hearing briefs submitted by the parties, has reviewed the post-conviction pleadings in this matter, and has presided over the post-conviction proceedings in this case.

22. The Court finds that Defendant's current post-conviction counsel, throughout the entire post-conviction proceedings, have diligently, meticulously, and with great effort pursued Defendant's claims, in both the filing of written motions and briefs and in active litigation in open court. The Court finds that Defendant's current post-conviction counsel have far and above exceeded the standard of being reasonably competent to prosecute Defendant's MAR and SMAR in this Court and to pursue the claims raised therein before the North Carolina Appellate Courts.

23. Although Defendant stated at this hearing that he had not seen post-conviction counsel since March 6, 2018, he went on to recount his meetings with Mr. Unti, one of his current post-conviction counsel, numerous times, perhaps as many as a half dozen, between March 6, 2018 and the filing of his first pro se motion on July 23, 2018.

24. Defendant is not entitled to pick and choose appointed counsel at any stage of the criminal proceedings in the State of North Carolina. State v. Thacker, 301 N.C. 348, 271 S.E.2d 252 (1980) (finding that an indigent defendant does not have the right to have counsel of his choice appointed to represent him). There has been no assertion by current post-conviction counsel that any disagreements with Defendant have risen to a level that counsel believes, in their professional opinion, prohibits them from representing Defendant zealously.

25. The Court finds that current post-conviction counsel through their efforts as noted above are well-schooled in this case, having reviewed the voluminous trial transcript, conducted a post-conviction factual investigation, and retained mental health experts, among other things, in their efforts to represent Defendant zealously in this matter.

26. The Court finds that appointment of substitute counsel at this juncture would inevitably run the risk of causing substantial possible delay in new counsel familiarizing themselves with the issues in this case and preparing to file either a second post-hearing brief on Claims 7, 8, and 9 of Defendant's MAR and SMAR or an appellate brief on all of Defendant's post-conviction claims.

27. The Court finds Defendant has failed to show good cause for current post-conviction counsel to be discharged. The Court finds current post-conviction counsel are more than reasonably competent to represent Defendant.

CONCLUSIONS OF LAW

1. This matter and these parties are properly before this Court pursuant to N.C. Gen. Stat. §§ 15A-1411, 15A-1415, and 15A-1420.

2. Defendant has failed to show good cause to discharge his current post-conviction counsel. As an indigent, Defendant does not have the right to have counsel of his choice appointed to represent him. The doctrine of absolute impasse does not govern Defendant's request for substitute counsel.

3. By swearing under oath at this hearing that he did not wish to proceed pro se in this matter, Defendant withdrew any portion of his pro se motions of July 23, 2018 and November 13, 2018 which could be construed as a request to allow Defendant to proceed pro se.

4. Defendant's request in open court that this Court rule on Claims 7, 8, and 9 of his MAR and SMAR constitutes a request to withdraw the pro se motion to withdraw those claims contained in Defendant's letters filed July 23, 2018 and November 13, 2018.

IT IS THEREFORE ORDERED:

1. Defendant's motion to discharge his current post-conviction counsel is DENIED. Defendant's request for substitute counsel, made either through his request in open court or through his pro se motions filed July 23, 2018 and November 13, 2018, is DENIED.

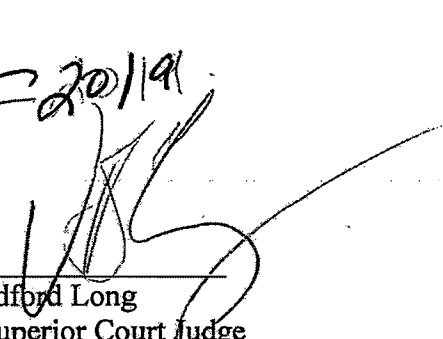
2. The Court decrees Defendant has withdrawn his request to proceed pro se.

3. Defendant's request in open court to withdraw his pro se motion to withdraw Claims 7, 8, and 9 of his MAR and SMAR is ALLOWED. The Court will rule on Claims 7, 8, and 9 of Defendant's MAR and SMAR.

4. To the extent Defendant has moved this Court in his pro se motions to reconsider its orders dismissing Defendant's guilt phase MAR and SMAR claims, the motion to reconsider is DENIED.

5. To the extent Defendant has moved this Court in his pro se motions to reopen the February 12, 2018 evidentiary hearing on Defendant's sentencing hearing claims, the motion to reopen is DENIED.

This the 6 day of February, 2018



Honorable V. Bradford Long
Senior Resident Superior Court Judge