

NO. COA14-960

NORTH CAROLINA COURT OF APPEALS

Filed: 7 April 2015

STATE OF NORTH CAROLINA

v.

Halifax County
Nos. 96 CRS 328-29

ROBERT STEVEN¹ DOISEY

On *certiorari* review of an order entered 13 August 2013 by Judge Phyllis Gorham in Halifax County Superior Court. Heard in the Court of Appeals 5 February 2015.

Attorney General Roy Cooper, by Assistant Attorney General Amy Kunstling Irene, for the State.

Kimberly P. Hoppin for Defendant.

STEPHENS, Judge.

Factual and Procedural Background

Defendant Robert Steven Doisey appeals from the denial of his "Motion to Locate and Preserve Evidence" and "Motion for Post-Conviction DNA Testing." We dismiss.

¹ The order from which Defendant appeals lists his middle name as "Steven," while Defendant's appellate counsel refers to Defendant as "Robert Stevenson Doisey." In the *pro se* filings by Defendant in this matter, Defendant styles himself "Robert S. Doisey."

In April 1997, a jury convicted Defendant of two counts of first-degree statutory sex offense, and the trial court sentenced Defendant to 339-416 months in prison. The charges against Defendant arose from his statutory rape of D.H.,² the then-12-year-old daughter of Defendant's girlfriend. Defendant appealed from the judgment entered upon his convictions. *See State v. Doisey*, 138 N.C. App. 620, 532 S.E.2d 240, *disc. review denied*, 352 N.C. 678, 545 S.E.2d 434 (2000), *cert. denied*, 531 U.S. 1177, 148 L. Ed. 2d 1015 (2001). While that appeal was pending, Defendant filed a motion for appropriate relief ("MAR") in the trial court, alleging that D.H. had recanted her trial testimony. *Id.* at 623, 532 S.E.2d at 243. This Court accordingly remanded the matter to the trial court, which held a hearing in July 1998. *Id.* At that hearing, D.H. recanted her trial testimony. *Id.* At the close of the first hearing, Judge Louis B. Meyer took the matter under advisement. *Id.* Subsequently, Judge Meyer became seriously ill and was unable to rule on Defendant's MAR. *Id.* The matter was reassigned to Judge Thomas D. Haigwood, who held a second hearing in December 1999. *Id.* At the second hearing, D.H. recanted her recantation, stating that her trial testimony had been accurate. *Id.* at 624, 532 S.E.2d at 243. The trial court denied Defendant's

² We use initials to protect the identity of the juvenile victim.

MAR. *Id.* Defendant appealed from the denial of his MAR, and this Court considered that ruling along with Defendant's arguments on direct appeal. *Id.* at 624-25, 532 S.E.2d at 243-44.

In its opinion, this Court found that certain evidence was improperly admitted at Defendant's trial, but the admission of that evidence did not constitute plain error. *Id.* at 627, 532 S.E.2d at 245. This Court also determined that the trial court did not abuse its discretion in concluding that it was "not well satisfied that the testimony of [D.H.] given at trial was false," and thus, did not err in denying Defendant's MAR. *Id.* at 628, 532 S.E.2d at 245-46.

In 2001 and 2002, Defendant filed *pro se* MARs based on changes in the law regarding expert testimony on sexual abuse and requesting post-conviction DNA testing. Each MAR was summarily denied. In 2002, this Court denied Defendant's petitions for *certiorari* review of the denial of his MARs. Subsequent MARs in 2004 and 2006 were also denied in the trial court. The appeal now before this Court arises from *pro se* motions to locate and preserve evidence and for post-conviction DNA testing which Defendant filed on 17 September 2012. The trial court summarily denied both motions by order entered 13 August 2013. Defendant gave timely

written notice of appeal and requested assignment of appellate counsel. However, Defendant did not timely perfect his appeal.

On 10 April 2014, through appointed counsel, Defendant filed a petition for writ of *certiorari* in this Court for review of the trial court's denial of "the Order Denying Post-Conviction DNA Testing entered . . . August 13, 2013."³ By order entered 23 April 2014, this Court issued a writ of *certiorari* to review that order.

However, Defendant does not bring forward on appeal any argument that the trial court erred in denying his motion for DNA testing. Where a party makes no argument in his brief concerning a particular issue, it is deemed abandoned. See N.C.R. App. P. 28(b)(6). Thus, Defendant has abandoned any arguments that the trial court erred in denying his request for DNA testing, and we do not consider the merits of that ruling.

Discussion

Defendant argues only that the trial court erred in failing to order preparation of an inventory of biological evidence. In

³ Defendant's petition did not explicitly reference his motion to locate and preserve, but that document was included as an attachment. In addition, the 23 April 2014 order this Court issued allowing Defendant's petition for a writ of *certiorari* provides for "review [of] the order entered on 13 August 2013" without limiting the scope of that review to the denial of the motion for DNA testing. Accordingly, herein we address Defendant's argument regarding the trial court's denial of his motion to locate and preserve evidence.

support of his contention, Defendant relies on N.C. Gen. Stat. §§ 15A-268(a7) and 15A-269(f), two related, but distinct provisions of our State's DNA Database and Databank Act of 1993 ("the Act"). See N.C. Gen. Stat. § 15A-266 *et seq.* (2013).

On 17 November 2014, the State filed a motion to dismiss Defendant's appeal. By order filed 4 December 2014, the State's motion to dismiss was referred to this panel. In its motion, the State contends that Defendant has no right to appeal any issue related to his most recent *pro se* motions under either section 15A-268(a7) or 15A-269(f). We agree that Defendant's arguments must be dismissed, but for reasons other than those argued by the State.

Section 15A-269(f)

We first consider Defendant's claim under section 15A-269, arguably the centerpiece of the Act, which in pertinent part states:

(a) A defendant may make a motion before the trial court that entered the judgment of conviction against the defendant for performance of DNA testing and, if testing complies with FBI requirements and the data meets NDIS criteria, profiles obtained from the testing shall be searched and/or uploaded to CODIS⁴ if the biological evidence meets all of the following conditions:

⁴ "CODIS is the acronym for the 'Combined DNA Index System' and is

(1) Is material to the defendant's defense.

(2) Is related to the investigation or prosecution that resulted in the judgment.

(3) Meets either of the following conditions:

a. It was not DNA tested previously.

b. It was tested previously, but the requested DNA test would provide results that are significantly more accurate and probative of the identity of the perpetrator or accomplice or have a reasonable probability of contradicting prior test results.

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(f) *Upon receipt of a motion for post[-] conviction DNA testing, the custodial agency shall inventory the evidence pertaining to that case and provide the inventory list, as well as any documents, notes, logs, or reports relating to the items of physical evidence, to the prosecution, the petitioner, and the court.*

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the generic term used to describe the FBI's program of support for criminal justice DNA databases as well as the software used to run these databases. The National DNA Index System or NDIS is considered one part of CODIS, the national level, containing the DNA profiles contributed by federal, state, and local participating forensic laboratories." See Frequently Asked Questions (FAQs) on the CODIS Program and the National DNA Index System, <http://www.fbi.gov/about-us/lab/biometric-analysis/codis/codis-and-ndis-fact-sheet> (last visited 16 March 2015).

N.C. Gen. Stat. § 15A-269 (2013) (emphasis added).

The stated policy behind the Act is "to assist federal, State, and local criminal justice and law enforcement agencies in the identification, detection, or exclusion of individuals who are subjects of the investigation or prosecution of felonies or violent crimes against the person. . . ." N.C. Gen. Stat. § 15A-266.1 (2013). Thus, in applying the Act in any particular case, we must strive to harmonize its provisions while being mindful of this legislative intent and seeking to avoid nonsensical interpretations. See *State v. Harvey*, 281 N.C. 1, 19-20, 187 S.E.2d 706, 718 (1972) ("In seeking to discover and give effect to the legislative intent, an act must be considered as a whole, and none of its provisions shall be deemed useless or redundant if they can reasonably be considered as adding something to the act which is in harmony with its purpose.") (citations omitted). Both the plain language of section 15A-269 as quoted *supra*, and the express intent of the Act as stated in section 15A-266.1, make absolutely clear that its ultimate focus is to help solve crimes through DNA *testing*. All provisions of the Act must be understood as facilitating that ultimate goal.

Against this backdrop, we begin by addressing the State's assertion that we should dismiss this appeal because Defendant

made no request for an inventory of biological evidence under section 15A-269(f). This contention ignores the plain language of section 15A-269(f) which states that a request for post-conviction DNA testing triggers an obligation for the custodial agency to inventory relevant biological evidence: "*Upon receipt of a motion for post[-]conviction DNA testing, the custodial agency shall inventory the evidence* pertaining to that case and provide the inventory list, as well as any documents, notes, logs, or reports relating to the items of physical evidence, to the prosecution, the petitioner, and the court." N.C. Gen. Stat. § 15A-269(f) (emphasis added). Thus, a defendant who requests DNA testing under section 15A-269 need not make any additional written request for an inventory of biological evidence.

Here, it is undisputed that Defendant moved for post-conviction DNA testing. That motion triggered a requirement to "inventory the [biological] evidence pertaining to that case and provide the inventory list . . . to the prosecution, the petitioner, and the court." *Id.* Further, the Act explicitly provides that a "defendant may appeal an order denying the defendant's motion for DNA testing" N.C. Gen. Stat. § 15A-270.1 (2013). Therefore, had Defendant brought forward an argument on appeal that the trial court erred in denying his motion

for DNA testing, we could have possibly considered, in conjunction therewith, any failure of the relevant custodial agency to conduct an inventory of biological evidence as required in section 15A-269(f).

However, as noted *supra*, despite requesting and being granted the right to *certiorari* review, Defendant has not brought forward any argument that the trial court erred in denying his motion for DNA testing.⁵ Accordingly, there is no longer any request for DNA testing under section 15A-269 at issue in Defendant's case. As such, Defendant's motion for an inventory of biological evidence likewise cannot proceed under that section. Simply put, the required inventory under section 15A-269 is merely an ancillary procedure to an underlying request for DNA testing. Since Defendant has abandoned his right to appellate review of the denial

⁵ Defendant may have elected not to make such an argument because, in order to obtain DNA testing under the Act, "[t]he burden is on [the] defendant to make the materiality showing required in N.C. Gen. Stat. § 15A-269(a)(1)." *State v. Foster*, __ N.C. App. __, __, 729 S.E.2d 116, 120 (2012). In *Foster*, the defendant made only a conclusory statement that "[t]he ability to conduct the requested DNA testing is material to the [d]efendant's defense . . . [and] provided no other explanation of why DNA testing would be material to his defense." *Id.* This Court held that, because the "defendant failed to establish the condition precedent to the trial court's granting his motion, the trial court properly denied the motion." *Id.* Similarly, here, Defendant's motion for DNA testing alleges only that "the [r]equested DNA testing is material to" Defendant's defense.

of his request for DNA testing, there is no need for the inventory required by section 15A-269(f). To hold otherwise would be "useless" and not "in harmony with [the Act's] purpose." See *Harvey*, 281 N.C. at 20, 187 S.E.2d at 718. Accordingly, we dismiss Defendant's argument that the trial court erred in failing to order an inventory of biological evidence as provided for under section 15A-269.

Section 15A-268

Defendant also argues that the trial court erred in failing to order preparation of an inventory of biological evidence under section 15A-268 of the Act. Section 15A-268 is entitled "Preservation of biological evidence" and requires the preservation of "any physical evidence, regardless of the date of collection, that is reasonably likely to contain any biological evidence collected in the course of a criminal investigation or prosecution." N.C. Gen. Stat. § 15A-268(a1) (2013). The statute also provides that,

[u]pon written request by the defendant, the custodial agency shall prepare an inventory of biological evidence relevant to the defendant's case that is in the custodial agency's custody. If the evidence was destroyed through court order or other written directive, the custodial agency shall provide the defendant with a copy of the court order or written directive.

N.C. Gen. Stat. § 15A-268(a7) (emphasis added).⁶

The wording and provisions which our General Assembly chose to include in the Act reflect an important difference between sections 15A-269 and 15A-268 with regard to the preparation of an inventory of biological evidence. As noted *supra*, under the former, a request for DNA testing triggers an automatic requirement for the custodial agency to prepare an inventory, with no further request or action by a defendant needed. Under the latter, the custodial agency is always required to preserve biological evidence under the terms of the section. However, the plain language of subsection 15A-268(a7) requires that a defendant who wishes to go further and have an inventory of such evidence prepared must make that request in writing.

Here, Defendant never made any written request for an inventory of biological evidence relevant to his case. Rather, in his written motion under section 15A-268, he sought only that

⁶ We note that the showing required to trigger an inventory per written request under this section of the Act is that evidence be "relevant to the defendant's case[.]" *Id.* We express no opinion as to whether this standard differs from the materiality showing required under section 15A-269 or whether either section of the Act might permit a defendant to request an inventory of biological evidence where he argues that such information is necessary for him to determine and then establish before a court its materiality so as to entitle him to DNA testing. Those issues are not before the Court in this case.

certain "physical evidence obtained during the investigation of his criminal case *be located and preserved*." (Emphasis added). Defendant then specified the biological evidence that he wanted to have located and preserved: "a rape kit-sexual assault kit, containing vaginal, anal, and oral swabs and smears from the alleged victim."⁷ After alleging his innocence and recounting factual and procedural aspects of his case, Defendant concluded by again requesting "the court to order *the location and preservation of the above evidence* so that DNA testing can be conducted pursuant to [sections] 15A-269 and 15A-270."⁸ Defendant's failure to request any inventory of biological evidence relevant to his case is not surprising as he was fully aware of the identity of the evidence the testing of which he believed was material to his claim of innocence, to wit, the sexual assault kit.

Because Defendant did not make any written request for an inventory under section 15A-268(a7), it follows that the trial court did not consider or rule on such a request. Thus, there is

⁷ Defendant refers to the same evidence in identical terms in his motion for DNA testing.

⁸ Section 15A-270 governs procedures following DNA testing under section 15A-269 and requires, as an initial step, "a hearing to evaluate the results and to determine if the results are unfavorable or favorable to the defendant." N.C. Gen. Stat. § 15A-270(a) (2013).

no ruling under section 15A-268(a7) for this Court to review. Accordingly, we agree with the State that Defendant's appellate argument under this section of the Act is not properly before this Court.

DISMISSED.

Judges GEER and DILLON concur.