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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-909

Filed: 6 June 2017

Forsyth County, No. 10 CRS 55397

STATE OF NORTH CAROLINA

v.

VICTOR MANUEL TAPIA

Appeal by defendant from order entered 7 January 2016 by Judge Eric C. Morgan in Forsyth County Superior Court. Heard in the Court of Appeals 8 May 2017.

Attorney General Joshua H. Stein, by Assistant Attorney General Tracy Nayer, for the State.

Guy J. Loranger for defendant-appellant.

ZACHARY, Judge.

Defendant appeals from an order denying his motion to locate and preserve evidence and for post-conviction DNA testing. We affirm the order.

Defendant pleaded guilty on 2 August 2011 to one count each of trafficking in cocaine by transportation, trafficking in cocaine by possession, and possession with intent to sell or distribute cocaine in exchange for consolidation of the offenses into

one count of trafficking in cocaine for purposes of sentencing. Defendant testified that he was guilty of the offenses. The court accepted the plea, consolidated the offenses, and sentenced defendant to a prison term of 175 to 219 months.

On 4 January 2016, defendant filed a motion to locate and preserve evidence and for post-conviction DNA testing. On 7 January 2016, Judge Eric C. Morgan filed an order denying the motion without an evidentiary hearing for the following reasons: (1) defendant failed to show that DNA testimony might be material to his claim of wrongful conviction; (2) defendant pleaded guilty of his own volition; and (3) defendant failed to show that a reasonable probability of a more favorable verdict existed. The court found that defendant admitted that he was actually guilty of the offense; that defendant did not plead no contest or guilty pursuant to the *Alford* decision; that defendant did not challenge the constitutionality of the plea proceeding prior to entry of the plea; and that defendant stated that he was satisfied with the services of counsel and was aware of the impact his plea would have upon how long biological evidence might be preserved. On 21 January 2016, defendant filed notice of appeal pursuant to N.C. Gen. Stat. § 15A-270.1 (2015).

Attorney Guy Loranger subsequently filed an appellant's brief on defendant's behalf in which he states that "[a]fter close, repeated examination of the record and relevant law, [he] has been unable to identify any justiciable, non-frivolous issue that could be raised in this appeal." Counsel requests this Court to "conduct an

independent, full examination of the record and briefs . . . to determine whether any justiciable, non-frivolous issue has been overlooked by counsel that would merit an argument that prejudicial error occurred[.]” In accordance with *Anders v. California*, 386 U.S. 738, 18 L.E. 2d 493 (1967) and *State v. Kinch*, 314 N.C. 99, 331 S.E.2d 665 (1985), appellate counsel notified defendant that he was unable to identify any issue that would provide meaningful relief, and advised defendant that he could file his own written arguments directly with this Court. To assist defendant, counsel attached to the letter a copy of the brief and the record on appeal. Counsel also identified to this Court eight specific issues that might support an appeal, notwithstanding counsel’s opinion that they lack merit.

Defendant filed his own written arguments. He states that he never waived his right to have DNA testing performed, that there is a reasonable possibility that DNA testing of biological evidence taken from a toolbox and the wrapper in which the alleged substance was wrapped would have resulted in a different outcome and that, as a Spanish-speaking person, he was not provided with a translator to help him understand his rights or to investigate these issues. We conclude that defendant is not entitled to relief on the basis of these arguments.

“The standard of review for a denial of a motion for post-conviction DNA testing is ‘analogous to the standard of review for a motion for appropriate relief. Findings of fact are binding on this Court if they are supported by competent evidence and may

not be disturbed absent an abuse of discretion.’” *State v. Collins*, 234 N.C. App. 398, 407, 761 S.E.2d 914, 920 (2014) (quoting *State v. Gardner*, 227 N.C. App. 364, 365, 742 S.E.2d 352, 354 (2013)). Findings that are not challenged on appeal are presumed to be supported by competent evidence and are binding on appeal. *State v. Hensley*, 201 N.C. App. 607, 613, 687 S.E.2d 309, 314 (2010). In this case, defendant has not challenged the evidentiary support for the trial court’s findings of fact, which are therefore conclusively established on appeal. “The lower court’s conclusions of law are reviewed *de novo*.” *Gardner*, 227 N.C. App. at 365-66, 742 S.E.2d at 354. “Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal.” *State v. Williams*, 362 N.C. 628, 632-33, 669 S.E.2d 290, 294 (2008) (quotation omitted).

A defendant may move for post-conviction DNA testing of biological evidence if it (1) is material to the defense, (2) is related to the investigation or prosecution that resulted in the judgment, and (3) was not DNA tested previously, or if it was tested previously 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. N.C. Gen. Stat. § 15A-269(a) (2015). The court must grant the motion if it determines that (1) all of the conditions above have been met; (2) DNA testing would have resulted in a reasonable probability that the verdict would have been more favorable to the defendant; and (3)

the defendant signed a sworn affidavit of innocence. N.C. Gen. Stat. § 15A-269(b) (2015).

The defendant bears the burden of showing that all of the conditions under N.C. Gen. Stat. § 15A-269(a) have been met. *State v. Foster*, 222 N.C. App. 199, 205, 729 S.E.2d 116, 120 (2012). The defendant must “establish[] the facts essential to his claim by a preponderance of the evidence.” *State v. Hardison*, 143 N.C. App. 114, 120, 545 S.E.2d 233, 237 (2001) (internal quotation omitted). General assertions that DNA evidence would prove the defendant’s innocence are insufficient. *State v. Cox*, __N.C. App. __, __, 781 S.E.2d 865, 868-69 (2016). “Rather, the defendant must provide *specific* reasons that the requested DNA test would be significantly more accurate and probative of the identity of the perpetrator or accomplice or that there is a reasonable probability of contradicting the previous test results.” *Collins*, 234 N.C. App. at 411-12, 761 S.E.2d at 922-23 (emphasis in original).

As discussed above, the trial court’s findings of fact are not challenged and are binding on appeal. We hold that the trial court’s conclusions are supported by its findings of fact, and agree with the court’s conclusions that defendant failed to show that the DNA testing might be material to his claim of wrongful conviction or lead to a reasonable probability of a more favorable verdict. Defendant has not articulated any specific, objective facts to show otherwise.

We affirm the court’s order.

STATE V. TAPIA

Opinion of the Court

AFFIRMED.

Judges BRYANT and DAVIS concur.

Report per Rule 30(e).