An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-942

Filed: 17 April 2018

Robeson County, Nos. 00 CRS 16318-19, 16322; 01 CRS 4251-52

STATE OF NORTH CAROLINA

v.

BARRY McPHAUL, Defendant.

Appeal by defendant from order entered 1 December 2016 by Judge James Gregory Bell in Robeson County Superior Court. Heard in the Court of Appeals 12 April 2018.

Attorney General Joshua H. Stein, by Assistant Attorney General Teresa M. Postell, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Jillian C. Katz, for defendant-appellant.

ZACHARY, Judge.

Barry McPhaul ("defendant") appeals from an order denying his "Motion to Locate and Preserve Evidence[] and Motion for Post-Conviction DNA Testing." We affirm in part and vacate in part.

On 13 April 2004, a jury found defendant guilty of first-degree murder under the felony murder rule, first-degree burglary, assault with a deadly weapon inflicting serious injury, attempted robbery with a firearm, and conspiracy to commit armed robbery. The trial court sentenced defendant to life imprisonment without parole for first-degree murder and consecutive terms of 64 to 86 months' for first-degree burglary, 25 to 39 months' for assault with a deadly weapon inflicting serious injury, and 25 to 39 months' for conspiracy to commit armed robbery. The charge of attempted robbery with a firearm merged into the conviction for felony murder, and the trial court arrested judgment on that charge. Defendant appealed to this Court, which found no error. *State v. McPhaul*, 177 N.C. App. 287, 628 S.E.2d 260 (unpublished), *disc. review denied and appeal dismissed*, 361 N.C. 176, 641 S.E.2d 6 (2006).

On 20 October 2016, defendant filed a *pro se* "Motion to Locate and Preserve Evidence[] and Motion for Post-Conviction DNA Testing" in Robeson County Superior Court. The motion listed twenty-six pieces of physical evidence from defendant's case that "need to be tested and preserved for the purpose of DNA Testing where the results would prove that the Defendant was not the aggressor nor the perpetrator of the crime." Defendant requested the appointment of counsel to help him prosecute his motion.

On 1 December 2016, the superior court entered an order summarily denying defendant's motion. The order found that "the motion sets forth no probable grounds for the relief requested, either in law or in fact." The court also ordered that "[t]he defendant/petitioner's failure to assert any grounds in his motion shall be subject to being treated in the future as [a] BAR to any other claims, assertions, petitions, or motions that he might hereafter file in this case, pursuant to G.S. 15A-1419." On 8 December 2016, defendant filed a written notice of appeal from the superior court's order.

Defendant argues that the superior court erred by denying his request for the appointment of counsel to assist in the prosecution of his motion for postconviction DNA testing. We disagree.

N.C. Gen. Stat. § 15A-269(c), which governs postconviction motions for DNA testing, provides:

> In accordance with rules adopted by the Office of Indigent Defense Services, the court shall appoint counsel for the person who brings a motion under this section if that person is indigent. If the petitioner has filed pro se, the court shall appoint counsel for the petitioner in accordance with rules adopted by the Office of Indigent Defense Services *upon a showing that the DNA testing may be material to the petitioner's claim of wrongful conviction*.

N.C. Gen. Stat. § 15A-269(c) (2017) (emphasis added). "This Court has previously stated that the materiality threshold to appoint counsel under subsection (c) (that the testing 'may be material' to his claim) is no less demanding than the materiality

threshold to bring a motion under subsection (a)(1) (that the testing 'is material' to his claim)." *State v. Cox*, ___ N.C. App. ___, ___, 781 S.E.2d 865, 868 (2016). Defendant's burden of showing materiality "requires more than the conclusory statement that '[t]he ability to conduct the requested DNA testing is material to the [d]efendant's defense.' " *State v. Gardner*, 227 N.C. App. 364, 369, 742 S.E.2d 352, 356 (quoting *State v. Foster*, 222 N.C. App. 199, 205, 729 S.E.2d 116, 120 (2012)), *disc. rev. denied*, 367 N.C. 252, 749 S.E.2d 860 (2013). "[T]he 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." *State v. Collins*, 234 N.C. App. 398, 411-12, 761 S.E.2d 914, 922-23 (2014)(emphasis in original)(citation omitted).

In this case, defendant contends that the allegations in his motion were sufficient to demonstrate that DNA testing would be material to his defense. In the motion, he argued that testing the identified evidence would "prove the fact that the Defendant <u>is not</u> the perpetrator of the crime." He further alleged that "this is exactly the kind of case where DNA evidence is MATERIAL and can result in EXONERATION." These conclusory statements do not provide the specific reasons required to establish that the requested DNA testing would be material. *See Cox*, ___ N.C. App. at ___, 781 S.E.2d at 868 (quotation marks and citation omitted) (holding

that the defendant's assertion that "there is a very reasonable probability that [the DNA testing] would have shown that the Defendant was not the one who had sex with the alleged victim and, thus, completely contradict[s] the judgment convicting the Defendant for statutory rape" did not establish materiality).

Nonetheless, defendant contends that his motion "included a more robust contention of materiality" than in previous cases in that he also argued that DNA testing of gunshot residue kits and latent fingerprints would prove that he acted in self-defense. Defendant's theory in untenable, as DNA evidence, in and of itself, cannot be used to "prove" an individual acted in self-defense. Defendant admitted he was at the scene of the crime. At best, DNA testing would corroborate this statement; it would not exonerate him. In that defendant failed to meet his burden for showing materiality, he was not entitled to the appointment of counsel. This argument is overruled.

Defendant also argues that the superior court erred by ordering his motion for DNA testing to operate as a procedural bar to other postconviction motions. We agree.

Defendant's motion was made pursuant to N.C. Gen. Stat. § 15A-269, which is part of Article 13 of Chapter 15A, the Criminal Procedure Act. *See id.* A motion for postconviction DNA testing is not equivalent to a postconviction motion for appropriate relief, which is part of Article 89 of the Act. *See State v. Brown*, 170 N.C.

App. 601, 607, 613 S.E.2d 284, 288 ("Defendant's motion for post-conviction DNA testing cannot, however, be deemed a motion for appropriate relief."), *disc. review denied*, 360 N.C. 68, 621 S.E.2d 882 (2005), *superseded by statute on other grounds, State v. Norman*, 202 N.C. App. 329, 332-33, 688 S.E.2d 512, 515 (2010).

The superior court denied defendant's motion and then ordered that "[t]he defendant/petitioner's failure to assert any other grounds in his motion shall be subject to being treated in the future as [a] BAR to any other claims, assertions, petitions, or motions that he might hereafter file in this case, pursuant to G.S. 15A-1419." However, N.C. Gen. Stat. § 15A-1419, by its plain language, does not apply to defendant's motion. That statute governs circumstances under which a motion for appropriate relief may be denied due to a procedural bar, such as by a prior appeal or prior motion for appropriate relief. *See* N.C. Gen. Stat. § 15A-1419(a) (2017). As the State concedes, the filing of a motion for postconviction DNA testing "was not a motion pursuant to N.C.G.S. 15A-1419[.]" Accordingly, it does not operate as a procedural bar to a subsequent motion for appropriate relief. Because the superior court lacked authority to order that defendant's motion would act as a procedural bar for future motions for appropriate relief, we must vacate that portion of the court's order. *See State v. Felmet*, 302 N.C. 173, 176, 273 S.E.2d 708, 711 (1981). The remainder of the order is affirmed.

AFFIRMED IN PART AND VACATED IN PART.

Judges ELMORE and TYSON concur.

Report per Rule 30(e).