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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-1260

Filed: 17 April 2018

Rockingham County, No. 99 CRS 9781

STATE OF NORTH CAROLINA

v.

TERRANCE KEATTS

Appeal by defendant from order entered 12 August 2015 by Judge Edwin G. Wilson, Jr., in Rockingham County Superior Court. Heard in the Court of Appeals 12 April 2018.

Attorney General Joshua H. Stein, by Assistant Attorney General Joseph L. Hyde, for the State.

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

ZACHARY, Judge.

Terrance Keatts ("defendant") appeals from the trial court's order denying his *pro se* "Motion to Locate and Preserve Evidences [sic] and Motion for Post-Conviction DNA Testing." Based on the reasons stated herein, we affirm the order of the trial court.

On 13 September 1999, defendant was indicted for first-degree statutory rape and indecent liberties with a child. On 2 December 1999, defendant pleaded guilty to first-degree rape of a child and indecent liberties with a child pursuant to a plea agreement. For first-degree rape of a child, defendant was sentenced to a term of 420 to 513 months' imprisonment. For indecent liberties with a child, defendant was sentenced to a consecutive term of 21 to 26 months' imprisonment. Subsequently, defendant's case was remanded for resentencing. On 30 November 2004, the trial court sentenced defendant to 336 to 413 months' for the first-degree rape and a consecutive sentence of 21 to 26 months' imprisonment for the charge of taking indecent liberties.

On 9 July 2015, defendant filed with the trial court a *pro se* "Motion to Locate and Preserve Evidence[] and Motion for Post-Conviction DNA Testing." Defendant sought DNA testing of six items from defendant's case: (1) sexual assault kit; (2) urine and blood samples; (3) hair samples; (4) trace taping; (5) bag of clothes; and (6) a bag of miscellaneous items. Defendant also requested that the trial court appoint counsel to assist him in prosecution of his motion. Defendant alleged that the foregoing evidence "need[ed] to be tested to prove the fact that the Defendant is not the perpetrator of the crime plainly, if this allegation regarding what the testing of potential DNA evidence would prove is accepted as true it would satisfy the requirements that the evidence is material to the defense."

On 12 August 2015, the trial court entered an "Order of Summary Denial on Motion to Locate and Preserve Evidence and Motion for Post-Conviction DNA Testing." The trial court made the following findings and conclusions of law, in pertinent part:

> 4. On March 24, 2011, [defendant] filed a second Motion for Appropriate Relief.
>
> 5. On July 10, 2011, this Court, by written Order, denied the petitioner's Motion for Appropriate Relief and specifically Ordered the following: "the [defendant's] failure to assert any other grounds in this 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."
>
> 6. [Defendant] was poised to adequately raise all issues in his second Motion for Appropriate Relief filed on July 11, 2011.
>
> 7. Further, in [defendant's] present motion, [defendant] has failed to identify how DNA testing of the evidence in his case is material to his defense.
>
> 8. [Defendant] has made no showing as to whether biological evidence was collected in the investigation or prosecution of his case, or if it was DNA tested previously, that the requested DNA test would provide results that are significantly more accurate and probative or have a reasonable probability of contradicting prior test results.

The trial court ordered that "[p]ursuant to this Court's Order dated July 10, 2011, and pursuant to N.C.G.S. § 15A-1419, [defendant's] motions are denied." On 19 August 2015, defendant filed notice of appeal from this order.

Defendant presents two issues on appeal. First, defendant challenges the basis of the trial court's denial of his motion for DNA testing. Second, defendant argues that the trial court erred in refusing to appoint him counsel to assist him in the prosecution of his motion for DNA testing. We address each argument in turn.

"The standard of review for a denial of a motion for postconviction DNA testing is analogous to the standard of review for a motion for appropriate relief." *State v. Cox*, __ N.C. App. __, __, 781 S.E.2d 865, 867 (2016). "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. The lower court's conclusions of law are reviewed *de novo*." *State v. Gardner*, 227 N.C. App. 364, 365-66, 742 S.E.2d 352, 354, *disc. review denied*, 367 N.C. 252, 749 S.E.2d 860 (2013) (citation omitted). "The general rule is that a trial court need only make specific findings of facts and conclusions of law when a party requests the trial court do so in a civil case." *Id.* at 370, 742 S.E.2d at 356 (citation omitted). "N.C. Gen. Stat. § 15A-269 contains no requirement that the trial court make specific findings of facts[.]" *Id.*

First, defendant argues that the trial court erred by basing the denial of defendant's motion for DNA testing on a 10 July 2011 order that barred any claims, assertions, petitions, or motions that defendant might file pursuant to N.C. Gen. Stat. § 15A-1419. Furthermore, defendant contends that because of this error, the

12 August 2015 order of the trial court must be vacated and the case remanded for the trial court to consider the motion anew.

Here, the trial court based the denial of defendant's motion for DNA testing on the fact that he was barred from additional motions for appropriate relief under N.C. Gen. Stat. § 15A-1419. We recognize that the trial court's reasoning was flawed. N.C. Gen. Stat. § 15A-1419 provides a ground for denial of a motion for appropriate relief when "[u]pon a previous motion made pursuant to this Article, the defendant was in a position to adequately raise the ground or issue underlying the present motion but did not do so." N.C. Gen. Stat. § 15A-1419(a)(1) (2017).

However, it is evident that defendant's 6 July 2015 motion was made pursuant to N.C. Gen. Stat. § 15A-269, which permits a convicted criminal defendant to request post-conviction DNA testing of evidence if certain criteria are met. N.C. Gen. Stat. § 15A-269(a) (2017). We have previously held that a motion for post-conviction DNA testing is not deemed a motion for appropriate relief. *State v. Brown*, 170 N.C. App. 601, 607, 613 S.E.2d 284, 288 (2005), *superseded by statute on other grounds, State v. Norman*, 202 N.C. App. 329, 332-33, 688 S.E.2d 512, 515 (2010).

Nevertheless, this Court has held that "[a] correct ruling by a trial court will not be set aside merely because the court gives a wrong or insufficient reason for its ruling. The ruling must be upheld if it is correct upon any theory of law." *Manpower, Inc. v. Hedgecock*, 42 N.C. App. 515, 519, 257 S.E.2d 109, 113 (1979) (internal

citations omitted). Therefore, we must now determine whether the trial court's denial of defendant's motion for DNA testing was "correct upon any theory of law." *Id.*

N.C. Gen. Stat. § 15A-269 provides:

> (a) A defendant may make a motion before the trial court . . . if the biological evidence meets all of the following conditions:
>
> (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.
>
> (b) The court shall grant the motion for DNA testing . . . upon its determination that:
>
> (1) The conditions set forth in subdivisions (1), (2) and (3) of subsection (a) of this section have been met;
>
> (2) If the DNA testing being requested had been conducted on the evidence, there exists a reasonable probability that the verdict would have been more favorable to the defendant; and
>
> (3) The defendant has signed a sworn affidavit of innocence.

N.C. Gen. Stat. § 15A-269(a)-(b) (2017). With regard to the materiality element in subsection (a)(1), the burden is on the defendant to make the required showing. *State v. Turner*, 239 N.C. App. 450, 453, 768 S.E.2d 356, 359 (2015). This burden requires more than a conclusory statement that "[t]he ability to conduct the requested DNA testing is material to the Defendant's defense." *State v. Foster*, 222 N.C. App. 199,

205, 729 S.E.2d 116, 120 (2012). "[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." *Cox*, __ N.C. App. at __, 781 S.E.2d at 869 (citation and quotation marks omitted). "Absent the required showing, the trial court is not statutorily obligated to order postconviction DNA testing." *Turner*, 239 N.C. App. at 454, 768 S.E.2d at 359 (citation omitted).

Here, the trial court found that defendant had "failed to identify how DNA testing of the evidence in his case is material to his defense." In his motion for DNA testing, defendant stated as follows:

> In the case at bar, defendant is preasserting [sic] the fact that the alleged evidences need to be tested to prove the fact that the defendant is not the perpetrator of the crime plainly, if this allegation regarding what the testing of potential DNA evidence would prove is accepted as true it would satisfy the requirements that the evidence is material to the defense.

Defendant did not provide any other explanation as to why DNA testing would be material to his defense. This bare assertion is conclusory and incomplete. *See Foster*, 222 N.C. App. at 205, 729 S.E.2d at 120 (holding that the defendant's conclusory statement that "[t]he ability to conduct the requested DNA testing is material to the Defendant's defense[]" did not establish materiality). Defendant has failed to meet his burden of showing materiality, a condition precedent to the trial court granting

his motion. Thus, we find that the trial court properly denied his motion for DNA testing. *Turner*, 239 N.C. App. at 455, 768 S.E.2d at 359 (holding that although the trial court's reasoning for denying the motion for DNA testing was flawed, the result should be affirmed because the trial court reached the correct conclusion). Accordingly, we affirm the trial court's denial of defendant's motion for DNA testing.

In his second argument on appeal, defendant argues that the trial court erred by failing to appoint counsel to assist him in the prosecution of his motion for DNA testing. We disagree.

N.C. Gen. Stat. § 15A-269(c) provides that

> [i]n 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). "Thus, to be entitled to counsel, defendant must first establish that (1) he is indigent and (2) DNA testing may be material to his wrongful conviction claim." *Cox*, __ N.C. App. at __, 781 S.E.2d at 868 (citation omitted).

As we previously discussed, defendant failed to meet his burden of establishing materiality. This Court has stated that the materiality threshold to appoint counsel under subsection (c), that the testing "may be material," is no less demanding than

the materiality threshold to bring a motion under subsection (a)(1), that the testing "is material" to his claim. *Gardner*, 227 N.C. App. at 368, 742 S.E.2d at 355. Therefore, the trial court did not err by denying defendant's request for appointed counsel under N.C. Gen. Stat. § 15A-269(c).

For the foregoing reasons, we affirm the order of the trial court denying defendant's motion for DNA testing.

AFFIRMED.

Judges ELMORE and TYSON concur.

Report per Rule 30(e).