An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA17-1142

Filed: 6 November 2018

New Hanover County, Nos. 01CRS18969-78; 01CRS25484-87; 01CRS28577; 02CRS04353

STATE OF NORTH CAROLINA

v.

JASON J. MILLHOUSE, Defendant.

Appeal by Defendant from order entered 3 March 2017 by Judge Jay D. Hockenbury in New Hanover County Superior Court. Heard in the Court of Appeals 6 June 2018.

Attorney General Joshua H. Stein, by Assistant Attorney General Ebony J. Pittman, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Nicholas C. Woomer-Deters, for the Defendant.

DILLON, Judge.

Jason J. Millhouse ("Defendant") appeals from the trial court's order denying his *pro se* "Motion to Locate and Preserve Evidence and Motion for Post-Conviction DNA Testing." After careful consideration, we affirm the portion of the order denying

his motion, but we vacate the portion of the order which bars Defendant from filing any motion for appropriate relief in the future.

I. Background

In 2002, Defendant pleaded guilty to a number of felonies, including armed robbery and assault with a deadly weapon inflicting serious injury. Defendant was sentenced to a term of 192 to 258 months.

Almost fifteen (15) years later, in January 2017, Defendant filed a *pro se* "Motion to Locate and Preserve Evidence and Motion for Post-Conviction DNA Testing." The motion listed thirteen (13) pieces of physical evidence, including a firearm, that Defendant alleged were collected and catalogued by the Wilmington Police Department pursuant to a search warrant. Defendant contends that DNA testing of the firearm and other items listed were crucial in determining "that he was NOT the perpetrator[.]" Defendant further contends that DNA testing would support Defendant's contention that he "was forced by his co-defendant to plead guilty . . . to protect his family who were under threat of death should Defendant implicate his co-defendant."

Two months later, in March 2017, the New Hanover Superior Court entered an order summarily denying Defendant's motion. Furthermore, the court declared that Defendant's failure to assert any other grounds for the relief requested "shall be treated in the future as a BAR to any other claims, assertions, petitions or motions that he might hereafter file in this case."

Weeks later, Defendant appealed. There is some issue as to whether Defendant's notice of appeal was timely. We note that Defendant has also filed a petition for writ of *certiorari* with our Court in the event that he has failed to properly preserve his right of appeal. We hereby grant Defendant's petition in order to reach the merits of Defendant's appeal.

II. Analysis

On appeal, Defendant contends that the trial court (1) committed errors in denying his motion for post-conviction DNA testing and (2) erred by ordering that he was procedurally barred from filing any future motion for appropriate relief ("MAR"). We address each argument in turn.

A. Denial of Motion for Post-Conviction DNA Testing

To be eligible for post-conviction DNA testing, a defendant has the burden to demonstrate in his motion that the testing would be material to his defense. N.C. Gen. Stat. § 15A-269 (2017). The trial court below denied Defendant's motion based on its determination that Defendant failed to meet this burden. Our Supreme Court has recently instructed that a trial court's determination of whether DNA testing would be material is a question of law, to be reviewed *de novo* on appeal. *State v. Lane*, 370 N.C. 508, 517, 809 S.E.2d 568, 574 (2018).

Our Supreme Court has reiterated that "evidence is material if there is a 'reasonable probability' that its disclosure to the defense would result in a different outcome in the jury's deliberation". *State v. Canady*, 355 N.C. 242, 252, 559 S.E.2d

762, 767 (2002). The determination of materiality of evidence must be made by examining the record as a whole. *State v. Howard*, 334 N.C. 602, 605, 433 S.E.2d 742, 744 (1993).

Here, in his motion concerning his request for DNA testing, Defendant contends that the firearm used to commit the crimes is material to his defense because it would not contain his fingerprints, or other DNA, but rather the DNA of his co-defendant. Defendant states that he felt pressure to plead guilty to protect his family from threats by his co-defendant. He further states that he would not have pleaded guilty had the DNA testing been performed and shown his co-defendant's DNA.

Based on our Supreme Court's recent holding in *State v. Sayre*, we disagree. In *Sayre,* our Supreme Court affirmed *per curiam* a 2-1 decision by our Court in which the majority held that a defendant had failed to show materiality when he requested that twelve (12) pieces of evidence be tested. *State v. Sayre*, ___ N.C. ___, ___, ___ S.E.2d ___, ___ (2018). In that case, the defendant pleaded guilty to multiple counts of indecent liberties with a child and other crimes. *See State v. Sayre*, No. COA17-68, 2017 N.C. App. LEXIS 696 (N.C. Ct. App. Aug. 15, 2017). The defendant later moved for certain physical evidence to be tested, contending that the DNA test results "would prove that [he was] not the perpetrator[.]" *Id.* The majority held that the defendant had failed to meet his burden of showing materiality for two reasons: (1) the defendant's bare assertion that the DNA of another person on the items would

show he did not commit the crime did not meet the defendant's burden to show materiality; and, separately, (2) "by entering into a plea agreement with the State and pleading guilty, [the] defendant presented no 'defense' pursuant to N.C. Gen. Stat. § 15A-269(a)(1)." *Id.* Our Supreme Court affirmed our majority's opinion.

Defendant, like the appellant in *Sayre*, presents a bare assertion that DNA testing would exclude him as the perpetrator of the crimes, after entering into a plea agreement and pleading guilty to the crimes. Although neither this Court's opinion in *Sayre* nor the Supreme Court's *per curiam* decision in that case articulates how the materiality standard applies, this Court held in *State v. Tilghman* that a defendant who has pleaded guilty bears an increased burden to show materiality. *State v. Tilghman*, ___ N.C. App. ___, ___, ___ S.E.2d ___, ___, 2018 N.C. App. LEXIS 989, *5 (2018). We, therefore, conclude that the trial court did not err in denying Defendant's motion for post-conviction DNA testing.

B. Production of Inventories

Defendant argues that the trial court erred by denying his motion before inventories were produced. We disagree.

Our Court has held that under Section 15A-268 of our General Statutes, it is the defendant's burden to determine what biological evidence still exists and, if necessary, to make requests to custodial agencies for inventories of the evidence that may be available for testing. *See Tilghman*, ___ N.C App. at ___, ___ S.E.2d at ___. Here, though, Defendant made no such request on any agency pursuant to this

statute. Nor does the record reflect that Defendant served his motion for DNA testing on any custodial agency.

Defendant argues that under N.C. Gen. Stat. § 15A-269(f), upon the filing of his motion, there was a duty on the trial court to serve the motion on custodial agencies and receive the items from those agencies *before* considering the motion. As in *Tilghman*, we do not decide this issue because Defendant has failed to show materiality:

> [G.S. 15A-269(f)] is silent as to whether a defendant or the trial court bears the burden of serving the motion for inventory on the custodial agency.
>
> Here, the record lacks proof either Defendant or the trial court served the custodian agency with the motion for inventory. Assuming *arguendo* it is the trial court's burden to serve the custodial agency with the motion, any error by the court below is harmless error. [] Defendant failed to meet his burden of showing materiality. Accordingly, the trial [court] did not err by denying his motion for DNA testing prior to an inventory under N.C. Gen. Stat. § 15A-269(f).

Id. at *10-11.

C. Procedural Bar to Future Motion for Appropriate Relief

Defendant argues that the trial court erred by ordering that he be barred from bringing any motion in the future for appropriate relief. 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. "A motion for post-conviction DNA testing pursuant to N.C. Gen. Stat. § 15A-269 is distinct from a

motion for appropriate relief," which is part of Article 89 of the Act. *State v. Shaw*, ___ N.C. App. ___, ___, 816 S.E.2d 248, 250 (2018).

Here, the Superior Court denied Defendant's motion, then ordered that "pursuant to G.S. 15A-1419(a)(1)(2)(3)(4) Defendant's failure to assert any other grounds in this motion shall be treated in the future as a BAR to any other claims, assertions, petitions or motions that he might hereafter file in this case." However, N.C. Gen. Stat. § 15A-1419, which deals with MARs, by its plain language is not applicable to defendant's motion for post-conviction DNA testing. N.C. Gen. Stat. § 15A-1419 governs circumstances under which an MAR may be denied due to a procedural bar, such as by a prior appeal or a prior MAR. See N.C. Gen. Stat. § 15A-1419(a) (2015). Since the filing of a motion for post-conviction DNA testing is not equivalent to the filing of an MAR, and its denial does not operate as a procedural bar to a subsequent MAR; the superior court erred by ordering that Defendant be barred from filing claims, assertions, petitions, or motions in the future. Accordingly, we must vacate that portion of the superior court's order.

AFFIRMED IN PART AND VACATED IN PART.

Judges DAVIS and INMAN concur.

Report per Rule 30(e).