IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-43

Filed: 16 July 2019

Mecklenburg County, Nos. 14-CRS-238731, 15-CRS-22911

STATE OF NORTH CAROLINA

v.

MARIO DONYE GULLETTE, Defendant.

Appeal by Defendant from orders entered 4 June 2018 and 29 June 2018 by Judge Hugh B. Lewis in Mecklenburg County Superior Court. Heard in the Court of Appeals 4 June 2019.

*Attorney General Joshua H. Stein, by Assistant Attorney General Kristin J. Uicker, for the State.*

*Appellate Defender Glenn Gerding, by Assistant Appellate Defender Katherine Jane Allen, for the Defendant.*

DILLON, Judge.

Defendant Mario Donye Gullette appeals from the trial court's order denying his motion for post-conviction DNA testing. Defendant contends that the trial court erred by not appointing counsel to represent him during his motion proceedings and

by denying his request for an inventory of the biological evidence in his case. After careful review, we affirm.

## I. Background

In January 2016, Defendant was found guilty of trafficking in heroin in a jury trial. During Defendant's trial, an officer testified to having purchased heroin from Defendant on the street and positively identified Defendant as the perpetrator of the crime. Defendant appealed, and this Court found no error. Additional background can be found in this Court's prior opinion in this case. *State v. Gullette*, ___ N.C. App. ___, 796 S.E.2d 396 (2017).

On 14 May 2018, Defendant filed a *pro se* motion for post-conviction DNA testing, also requesting production of an inventory of all biological evidence in his case pursuant to Sections 15A-268 and 15A-269 of our General Statutes. On 4 June 2018, the trial court denied Defendant's motion.

Two days later, on 6 June 2018, Defendant filed an addendum to his motion for post-conviction DNA testing.

On 15 June 2018, Defendant filed written notice of appeal from the trial court's June 4 denial of his initial motion for post-conviction DNA testing. On the same day, Defendant sent a letter addressed to the "Chief Evidence Custodian" of Mecklenburg County requesting an inventory of the biological evidence in his case, copying both the prosecutor in his case and the Mecklenburg County Clerk of Court.

On 29 June 2018, the trial court denied Defendant's June 6 addendum. Also on June 29, the Mecklenburg County Judges' Office sent Defendant a letter explaining that it had received his notice of appeal and letter to the custodian of evidence, but both documents were being placed in his file and no further action would be taken.

On 13 July 2018, Defendant filed a *pro se* petition for writ of certiorari with this Court, asking that we review the trial court's June 4 and June 29 orders. We granted Defendant's petition.

## II. Analysis

Defendant makes two arguments on appeal. First, he argues that the trial court erred under Section 15A-269 of our General Statutes in not appointing counsel to represent him during the course of his motion. Second, he argues that the trial court erred under Section 15A-268 in refusing to rule on his request for inventory of the biological evidence in his case.

Pursuant to Section 15A-269(a) of our General Statutes, a defendant may acquire post-conviction DNA testing of the biological evidence in his case where the results will be *material* to his defense. N.C. Gen. Stat. § 15A-269(a) (2017). And, pursuant to Section 15A-269(c), an indigent defendant seeking post-conviction DNA testing is entitled to appointed counsel "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).

Pursuant to Section 15A-268(a7), upon receipt of a written request, any custodial agency in custody of biological evidence in a defendant's case shall prepare an inventory of all biological evidence and any other information related to the biological evidence. N.C. Gen. Stat. § 15A-268(a7) (2017); *see also* N.C. Gen. Stat. § 15A-269(f) (2017). But this Court has held that the trial court is under no obligation to obtain and review an agency's inventory prior to ruling on whether a defendant has shown materiality in his effort to obtain post-conviction DNA testing. *State v. Byers*, ___ N.C. App. ___, ___, 822 S.E.2d 746, 751 (2018) ("The trial court's ability to analyze whether the conditions in [Section 15A-269] were met is not contingent on the results of an inventory of the evidence. Whether the requested evidence is still in the possession of the custodial agency is immaterial to the trial court's determination under [Section 15A-269]."), *cert. granted*, 822 S.E.2d 42 (2019).

The conditions for obtaining post-conviction DNA testing and receiving an appointment of counsel throughout one's motion each include a requirement of materiality, and the standard of materiality for each is the same. *See State v. Gardner*, 227 N.C. App. 364, 368, 742 S.E.2d 352, 355 (2013) (rejecting the argument that "the materiality threshold to appoint counsel . . . is less than the materiality threshold to bring a [post-conviction DNA testing] motion"); *see also State v. Cox*, 245

N.C. App. 307, 312, 781 S.E.2d 865, 868 (2016). To establish materiality, the defendant's motion must show that, had DNA testing been done on the evidence in his case, "there exists a reasonable probability that the verdict would have been more favorable to the defendant." *State v. Lane*, 370 N.C. 508, 518-19, 809 S.E.2d 568, 575 (2018) (citing N.C. Gen. Stat. § 15A-269(b)(2) (2017)). "A trial court's determination of whether defendant's request for post[-]conviction DNA testing is 'material' to his defense, as defined in [Section] 15A-269(b)(2), is a conclusion of law, and thus we review de novo the trial court's conclusion that defendant failed to show the materiality of his request." *Id.* at 517-18, 809 S.E.2d at 574.

The State argues that we should not consider either of Defendant's arguments because, for a number of reasons, neither is properly before us on appeal. Assuming that each argument is properly before us, we hold that Defendant cannot succeed on either claim because his motions and subsequent addendum each failed to show materiality.[1]

In denying Defendant's motion, Judge Lewis stated that it was "immaterial whether the Defendant's DNA is on the packet due to overwhelming evidence that []

[1] We note that Defendant has filed a petition for writ of mandamus with this Court alongside his appeal. In the event that we find his appeal improperly positioned, Defendant asks that we instead order the Chief Evidence Custodian of Mecklenburg County, whomever that may be, to perform the inventory he requested. Because we reach the merits of his appeal, we deny Defendant's petition for writ of mandamus.

[D]efendant placed the heroin onto the rear bumper of the vehicle during the 'hand to hand transaction' with [the officer]." We agree with Judge Lewis's assessment.

In his motion for post-conviction DNA testing, Defendant states that DNA testing is material to his defense because it would reveal that someone else sold heroin to the officer. Specifically, Defendant asserts that the State's evidence tending to prove his identity as the perpetrator who sold heroin to a police officer was weak and that DNA testing would reveal the presence of another individual's DNA on the heroin packet, not his own. *See Byers*, ___ N.C. App. at ___, 822 S.E.2d at 752 (stating that "show[ing] the presence of an alternative perpetrator's DNA" may indicate materiality, where simply alleging a "lack of biological evidence" certainly would not). And, Defendant contends, the State's evidence was that a single person sold heroin to the officer and the presence of another's DNA on the packet would rule out Defendant's identity as that single perpetrator.

But even if the heroin packet was tested and revealed the fingerprints or other DNA of another individual, such evidence would not necessarily exclude Defendant as the one who engaged in the transaction with the officer that day. Such evidence would only show that another person may have touched the heroin packet at some point between its creation and its sale to the officer. It is conceivable that someone else packaged the drugs into the packets before Defendant took them to the sale.

The officer who purchased heroin confirmed "without hesitation" that Defendant was the individual who sold him the heroin. During the transaction, Defendant and the officer stood a few feet apart and had a short conversation. Defendant placed the heroin packet on the trunk of a car, the officer confirmed the contents of the package, and then the officer placed money into the trunk of the car before picking up the packet. Defendant was a known associate of Mr. Ivey, a third party with whom the officer set up the heroin exchange. The officer was able to provide a number of physical descriptions that matched Defendant, including Defendant's height, weight, and a unique irregularity in the color and shape of Defendant's right eye. Though Defendant was wearing a hat and often looked down during the transaction, the officer testified that he still had a clear view of Defendant's face.

The chance that someone else's DNA may have been on the heroin packet is unlikely to outweigh the State's evidence of Defendant's identity as the perpetrator of the crime. "The determination of materiality must be made in the context of the entire record, and hinges upon whether the evidence would have affected the jury's deliberations." *Lane*, 370 N.C. at 519, 809 S.E.2d at 575 (internal citations and quotations omitted). We conclude that, in light of the other evidence presented at trial, the presence of another person's DNA on the heroin packet was unlikely to sway the jury's ultimate decision. Judge Lewis did not err by not appointing Defendant

counsel, and further did not err in refusing to take action regarding an inventory of biological evidence because any such action would be futile in light of Defendant's failure to show materiality.

AFFIRMED.

Chief Judge MCGEE and Judge ZACHARY concur.

Report per Rule 30(e).