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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-137

Filed: 1 October 2019

Pasquotank County, No. 04CRS052919, 05CRS2578

STATE OF NORTH CAROLINA

v.

RONALD GRAHAM, JR., Defendant.

Appeal by Defendant from order entered 31 October 2018 by Judge J. Carlton Cole in Pasquotank County Superior Court. Heard in the Court of Appeals 3 September 2019.

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

*Appellate Defender Glenn Gerding, by Assistant Appellate Defender Aaron T. Johnson, for Defendant-Appellant.*

BROOK, Judge.

Ronald Graham, Jr., (“Defendant”) appeals from the trial court’s order denying his motion for post-conviction DNA testing. The sole issue Defendant raises on appeal is whether the trial court erred in failing to address Defendant’s claim that the post-

conviction loss or destruction of evidence not introduced at trial violated his Fifth Amendment due process rights. We hold that it did not.<sup>1</sup>

### I. Background

In late 2004 Defendant and James Ferebee were involved in a disagreement with Demetrius Spence. On 20 December 2004, Defendant and Mr. Ferebee got into a fistfight with Mr. Spence. Defendant testified that Mr. Spence was armed with a gun during that fistfight. The following night, on 31 December 2004, Mr. Spence stayed with his mother at her home. Both Mr. Spence and his mother slept in the living room of his mother's home that night.

As Mr. Spence and his mother slept, Defendant and Mr. Ferebee broke into Mr. Spence's mother's home, kicking in the door. Mr. Spence awoke to Defendant and Mr. Ferebee calling his name. Defendant and Mr. Ferebee pointed guns at Mr. Spence and threatened to kill him. However, neither Defendant's nor Mr. Ferebee's gun went off when they pulled the triggers. Mr. Spence began to fight with Defendant and Mr. Ferebee after their attempts to shoot him were unsuccessful. The three men became engaged in a struggle.

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<sup>1</sup> Defendant contemporaneously filed a petition for a writ of mandamus "in the event this Court concludes the relief Mr. Graham seeks is not available through direct appeal." Having reached the merits and concluded that Defendant is not entitled to the relief he seeks, we dismiss the petition for writ of mandamus as moot.

Mr. Ferebee found a knife as Defendant and Mr. Spence continued fighting. He<sup>2</sup> proceeded to stab Mr. Spence in the chest, arms, and torso. Mr. Spence was treated in the hospital for nine stab wounds, including a collapsed lung.

On 1 January 2005, one of Mr. Spence's mother's neighbors found a knife with what appeared to be blood on the blade lying in the street, two blocks from the home. Law enforcement collected the knife; however, the knife was never swabbed or tested for biological evidence. At trial, Mr. Spence's mother confirmed that a detective had shown her the knife found in the street, and that it looked like a knife she kept in her home and used to clean fish. The knife itself was not entered into evidence or shown to the jury, but a photograph of it was entered into evidence.

Defendant was indicted for first-degree burglary and assault with a deadly weapon with the intent to kill and inflicting serious injury (AWDWWITKISI) on 28 February 2005. The jury found Defendant guilty of both charges. The trial court entered judgment on the jury's verdicts and sentenced Defendant to 146 to 185 months' imprisonment for the burglary charge and 133 to 169 months' imprisonment for the assault charge, to run consecutively. Defendant filed a direct appeal, and his

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<sup>2</sup> Mr. Ferebee pleaded guilty to assault with a deadly weapon with intent to inflict serious injury, first degree burglary, and assault with a deadly weapon with intent to kill inflicting serious injury. The facts alleged at Mr. Ferebee's plea hearing show that Defendant took the knife from Mr. Ferebee and stabbed Mr. Spence. At the DNA motion hearing, the State contended that the evidence at trial tended to show that Mr. Ferebee, not Defendant, had stabbed Mr. Spence. However, Mr. Spence testified at trial that Defendant grabbed the knife from Mr. Ferebee and stabbed him. The trial court instructed the jury that it could convict Defendant based on either aiding-and-abetting or as a principal.

convictions were affirmed. *See State v. Graham*, 186 N.C. App. 182, 650 S.E.2d 639 (2007).

Defendant subsequently filed a motion for appropriate relief, which was denied. He then filed a petition for writ of certiorari, which was also denied. On 26 October 2016, Defendant filed a *pro se* motion seeking post-conviction DNA testing of the knife and a motion to locate and preserve evidence. The trial court appointed counsel to represent Defendant on the motions. Subsequently, Defendant's appointed counsel filed a discovery request and a substitute motion for preservation of any and all evidence. Defense counsel also filed a substitute motion for post-conviction DNA testing.

At the hearing on the DNA motion on 25 June 2018,<sup>3</sup> Defendant argued that, "if the Court were to . . . order that the DNA testing should be done on this knife," but the knife was no longer available, that would be "an obvious violation of Mr. Graham's Fifth Amendment right to due process[.]" Following the hearing, the trial court orally denied Defendant's motion and subsequently entered a written order denying Defendant's motion on 31 October 2018, finding that Defendant had failed to meet the materiality standard of N.C. Gen. Stat. § 15A-269(a)(1).

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<sup>3</sup> Throughout the hearing on the motion for post-conviction DNA testing, both defense counsel and the trial court referred to the motion as a motion for appropriate relief. However, the written order denying Defendant's motion refers to the motion as a motion for post-conviction DNA testing, and the Court refers to the factors set forth in N.C. Gen. Stat. § 15A-269 governing motions for post-conviction DNA testing.

Defendant timely entered written notice of appeal pursuant to N.C. Gen. Stat. § 15A-270.1.<sup>4</sup>

## II. Standard of Review

The standard of review for denial of a motion for post-conviction DNA testing is “analogous [to the] standard of review for a denial of a motion for appropriate relief . . . because the trial court sits as finder of fact in both circumstances.” *State v. Lane*, 370 N.C. 508, 517, 809 S.E.2d 568, 574 (2018). “In reviewing a denial of a motion for postconviction DNA testing, 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*.” *Id.* (internal marks and citations omitted). “A trial court’s determination of whether defendant’s request for postconviction DNA testing is ‘material’ to his defense, as defined in N.C.G.S. § 15A-269(b)(2), is a conclusion of law[.]” *Id.*

## III. Analysis

### a. Preservation

The State asserts that Defendant failed to preserve the issue of whether the

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<sup>4</sup> The State argues that because “Defendant’s notice of appeal failed to designate the court to which appeal was taken,” Defendant’s appeal is subject to dismissal under North Carolina Rule of Appellate Procedure 4. However, “a defendant’s failure to designate this Court in a notice of appeal does not warrant dismissal of the appeal where this Court is the only court possessing jurisdiction to hear the matter and the State has not suggested that it was misled by the defendant’s flawed notice of appeal.” *State v. Sitosky*, 238 N.C. App. 558, 560, 767 S.E.2d 623, 624 (2014). Here, the State does not allege that it did not receive notice of the appeal or that it was misled by Defendant’s failure to designate this Court in its notice. Appeals from denials of orders for which an appeal is authorized by statute lie of right with the Court of Appeals. N.C. Gen. Stat. § 7A-27(b)(4) (2017).

failure to conduct DNA testing of the knife and the loss or destruction of the knife post-trial violated Defendant's due process rights. We disagree.

A constitutional argument such as a due process claim "may not be raised on appeal unless the defense and the facts underlying it are brought first to the attention of the trial court." *State v. White*, 134 N.C. App. 338, 342, 517 S.E.2d 664, 667 (1999) (internal marks and citations omitted). *See also* N.C. R. App. P. 10(a)(1) ("In order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context.").

Defendant argued at the hearing on the motion for post-conviction DNA testing that

if the [c]ourt were to agree and did order that the DNA testing should be done on this knife, now we don't have a knife, so what is the [c]ourt's remedy in this case? I would ask the [c]ourt to consider that it's an obvious violation of Mr. Graham's Fifth Amendment right to due process[.]

During the hearing, counsel for the State indicated that the knife could not be located.

The State contends that because defense counsel conditioned Defendant's due process claim on the trial court's granting of Defendant's motion, the issue raised on appeal was not properly preserved. However, in Defendant's motion for preservation of any and all evidence filed 15 August 2017, Defendant invoked N.C. Gen. Stat. § 15A-268 (2013), which states in relevant part as follows:

(g) . . . If the evidence that is required to be preserved pursuant to this section has been destroyed, the court may conduct a hearing to determine whether obstruction of justice and contempt proceedings are in order. If the court finds the destruction violated the defendant's due process rights, the court shall order an appropriate remedy, which may include dismissal of charges.

We therefore conclude, based on defense counsel's reference to Defendant's due process rights during the 25 June 2018 hearing and citation of N.C. Gen. Stat. § 15A-268 in the 15 August 2017 motion, that Defendant properly preserved this issue for our review.

b. Defendant's Due Process Claim

The sole issue on appeal is whether the trial court erred in failing to address Defendant's claim that the loss or destruction of the knife, in violation of N.C. Gen. Stat. § 15A-268, violated Defendant's due process rights. We hold that the trial court did not err by failing to address whether Defendant's due process rights were violated by the absence of DNA testing, and subsequent loss or destruction, of the knife.

A motion for post-conviction DNA testing requires a "conclusion that the requested DNA testing is material to the defense." *Lane*, 370 N.C. at 524, 809 S.E.2d at 578 (2018). "As used in N.C. Gen. Stat. § 15A-269(a)(1), our Court has adopted the *Brady* definition of materiality." *State v. McLean*, 232 N.C. App. 111, 118, 753 S.E.2d 235, 240 (2014). Under *Brady v. Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 1196-97, 10 L. Ed.2d 215, 218 (1963), materiality requires "some logical connection" to the defense and that the evidence be "significant or essential to that defense."

*McLean*, 232 N.C. App. at 118, 753 S.E.2d at 240 (internal marks and citations omitted). *Brady* also holds that “the suppression by the prosecution of evidence favorable to an accused . . . violates due process *where the evidence is material either to guilt or to punishment.*” *Brady*, 373 U.S. at 87, 83 S. Ct. at 1196-97, 10 L. Ed.2d at 218 (emphasis added).

The trial court denied Defendant’s motion on the grounds that the knife to be tested was immaterial to his defense. *See In re Hall*, 238 N.C. App. 322, 329, 768 S.E.2d 39, 44 (2014) (denial of petition constituted “implicit[] reject[ion] [of] petitioner’s *ex post facto* argument”). Specifically, the court found that Defendant had been “convicted on the testimony of two eyewitnesses who knew him[,]” and therefore the identity of the perpetrators was not at issue. The court also found that Defendant was tried and convicted under a theory of aiding and abetting Ferebee, and that in fact it was undisputed that Ferebee stabbed the victim; therefore, whether the knife could be linked to Defendant’s DNA, Ferebee’s DNA, or to neither, would not be material to Defendant’s defense.<sup>5</sup> Adopting the logic of *Brady* here, we hold that the trial court’s finding necessarily and rightly rejects a claim that the loss or destruction of immaterial evidence *post-trial* violated Defendant’s due process rights. Therefore,

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<sup>5</sup> As noted above, there are conflicting facts and arguments regarding whether Defendant or Ferebee stabbed Spence. *Supra* n. 2. This dispute was ultimately insignificant as a legal matter as the trial court instructed the jury it could convict based on either a principal or accomplice liability theory.



STATE V. GRAHAM

*Opinion of the Court*

Defendant's contention that the trial court failed to consider Defendant's claim is without merit.

IV. Conclusion

Given that the trial court denied Defendant's motion for post-conviction DNA testing by finding the evidence in question was immaterial, we reject Defendant's Fifth Amendment claim and affirm.

AFFIRMED.

Chief Judge McGEE and Judge BRYANT concur.

Report per Rule 30(e).