IN THE COURT OF APPEALS OF NORTH CAROLINA

2021-NCCOA-122

No. COA20-349

Filed 6 April 2021

Gaston County, Nos. 03 CRS 62555-56, 58-59; 03 CRS 18275; 03 CRS 19233-34

STATE OF NORTH CAROLINA,

v.

KEITH LAVORIS HALL, Defendant.

Appeal by Defendant from order entered 12 July 2019 by Judge Jesse B. Caldwell, III in Gaston County Superior Court. Heard in the Court of Appeals 26 January 2021.

Attorney General Joshua H. Stein, by Special Attorney General Jonathan P. Babb, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender David W. Andrews, for Defendant-Appellant.

WOOD, Judge.

¶ 1 Keith Lavoris Hall ("Defendant") appeals an order denying his second motion for post-conviction DNA testing. Defendant's appeal is untimely, and he requests this Court issue a writ of certiorari granting appellate review. In our discretion, we grant Defendant's petition for writ of certiorari. After careful review, we affirm the decision of the trial court.

I. Facts

¶ 2 On September 2, 2003, a Gaston County Grand Jury indicted Defendant on four counts of first-degree murder; robbery with a dangerous weapon; and conspiracy to commit robbery with a dangerous weapon. On November 14, 2006, a jury in the Gaston County Superior Court convicted Defendant of all charges. The trial court entered judgment on the verdicts and sentenced Defendant to four consecutive terms of life in prison without parole. Defendant appealed. On December 2, 2008, this Court arrested judgment on the armed robbery conviction, but otherwise affirmed Defendant's convictions.

¶ 3 Defendant filed a *pro se* motion for post-conviction DNA testing on April 8, 2010, seeking DNA testing of a pair of jeans that officers found during the first-degree murder investigation. The trial court granted the motion and ordered DNA testing. A forensic analyst reported the presence of one of the victims, Crystal Ellis's, blood, Defendant's DNA, and the DNA of two unknown, unrelated individuals. All four contributed to the mixture of DNA found on the jeans. After reviewing the analyst's report, the trial court ruled on September 21, 2016, that the results of DNA testing were unfavorable to Defendant.

¶ 4 On June 26, 2019, Defendant filed a second *pro se* motion for post-conviction DNA testing. Defendant sought DNA testing of a fingerprint lifted from a Pepsi can that officers found during the investigation. On July 12, 2019, the trial court

considered Defendant's motion in chambers, and entered a one-page order denying Defendant's motion. The trial court found "no legal basis" for Defendant's motion. As Defendant was incarcerated and not present at the time the trial court ruled on the motion, Defendant was unable to give oral notice of appeal.

¶ 5 Thereafter, Defendant mailed his *pro se* written notice of appeal on July 26, 2019. The notice of appeal was file-stamped by the clerk of court on August 19, 2019, thirty-eight days after the court entered judgment in chambers. On December 16, 2019, Defendant filed a petition for writ of certiorari ("PWC") with this Court**.** This Court dismissed Defendant's PWC without prejudice on December 31, 2019, as to the right to refile the petition upon the docketing of the settled record on appeal. Defendant filed the PWC presently before us on June 30, 2020.

¶ 6 Defendant acknowledges his appeal is untimely because he did not give oral notice of appeal or make written notice of appeal "within fourteen days after the entry of judgment." N.C. R. App. P. 4(a). Consequently, Defendant asks this Court to exercise its discretion and issue a writ of certiorari to permit appellate review. In our discretion, we allow the petition to consider the merits of Defendant's appeal.

II. Analysis

¶ 7 Defendant contends the trial court erred by denying his second motion for post-conviction DNA testing. ". . . [W]here a defendant brings a motion for post-conviction DNA testing pursuant to N.C. Gen. Stat. § 15A-269, the trial court's task is to rule on

the motion in accordance with the applicable substantive law as set forth in N.C. Gen. Stat. § 15A-269(b)." *State v. Shaw*, 259 N.C. App. 703, 706, 816 S.E.2d 248, 250 (2018). Pursuant to N.C. Gen. Stat. § 15A-269,

> (a) A defendant may make a motion before the trial court that entered the judgment of conviction against the defendant for performance of DNA testing . . . 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) and (b) (2017) (emphasis added).

¶ 8 As Defendant requested relief pursuant to N.C. Gen. Stat. § 15A-269, the trial court was obliged to resolve various questions under Section 15A-269(b). The trial court fulfilled this obligation by considering Defendant's motion and issuing its order, wherein it found "no legal basis" for Defendant's motion.

¶ 9 Nevertheless, Section 15A-269 permits a defendant to obtain post-conviction DNA testing if he meets his burden of showing that the results of such testing, among other things, would be "material" to his defense. N.C. Gen. Stat. § 15A-269.

¶ 10 Whether evidence is "material" to a defendant's defense is determined by whether "there exists a reasonable probability that the verdict would have been more favorable to the defendant." *State v. Lane*, 370 N.C. 508, 519, 809 S.E.2d 568, 575 (2018). It is the defendant's burden to show such materiality is present. *Id.* at 518, 809 S.E.2d at 574.

¶ 11 Defendant contends that the requested DNA and fingerprint testing is material because the evidence "would provide results that are significantly more accurate and probative of the identity of the perpetrator or accomplice [and] have a reasonable probability of contradicting prior test results" regarding Defendant's involvement in the murders. However, there was substantial evidence of Defendant's guilt, including Defendant's DNA on a portion of jeans tested pursuant to Defendant's first motion for post-conviction DNA testing; and Defendant's statement to Deputy

Sheriff Donny Baynard that "I've killed four people already, what's one more . . . ."

¶ 12 We conclude Defendant has failed to show how it is reasonably probable that he would not have been convicted of first-degree murder based on the results of the DNA and fingerprint testing. As we have previously held in *State v. Alexander*, 270 N.C. App. ____, 843 S.E.2d 294 (2020), ". . . the presence of another's DNA or fingerprints on this or other evidence would not necessarily exclude Defendant's involvement in the crime. The presence of another's DNA or fingerprints could be explained by the possibility that someone else handled the [ ] [Pepsi can] prior to the crime . . . ." 270 N.C. App. at ____, 843 S.E.2d at 297. That same analysis is applicable here. Thus, we conclude that Defendant has failed to meet his burden of showing materiality.

¶ 13 While the trial court's order was not extensive, "N.C. Gen. Stat. § 15A-269 contains no requirement that the trial court make specific findings of fact[]." *State v. Gardner*, 227 N.C. App. 364, 370, 742 S.E.2d 352, 356, *disc. review denied*, 367 N.C. 252, 749 S.E.2d 860 (2013). The trial court need not mention materiality or even cite Section 15A-269. *State v. Tilghman*, 261 N.C. App. 716, 720 n.2, 821 S.E.2d 253, 257 n.2 (2018). It is sufficient for the trial court to find, as it does here, the motion to be without merit. *Id.*; *see also State v. Cox*, 245 N.C. App. 307, 310, 781 S.E.2d 865, 867 (2016) (upholding oral denial of defendant's motion for post-conviction DNA testing).

III. Conclusion

¶ 14 We conclude the trial court properly determined Defendant's second motion for post-conviction DNA testing was without merit. Accordingly, we affirm the decision of the trial court.

AFFIRMED.

Judges DIETZ and ARROWOOD concur.

Report per Rule 30(e).