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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA22-682

Filed 05 July 2023

Mecklenburg County, Nos. 12 CRS 253233–35, 253237, 55383–85, 55387–89, 55391, 55394

STATE OF NORTH CAROLINA

v.

DRAYTON L. THOMPSON

Appeal by defendant by writ of certiorari from order entered 13 December 2019 by Judge W. Robert Bell in Mecklenburg County Superior Court. Heard in the Court of Appeals 6 June 2023.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Nicholas R. Sanders, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Nicholas C. Woomer-Deters, for defendant-appellant.

ZACHARY, Judge.

Defendant Drayton L. Thompson appeals from an order denying his motions for post-conviction discovery, preservation of evidence, and post-conviction DNA testing without appointing counsel to represent him. After careful review, we affirm.

I. Background

The factual background of this case, in which Defendant was convicted of various sex offenses related to three kidnapping and sexual assault cases, was summarized in this Court’s prior opinion in this matter:

The trial evidence established factual similarities among the cases. All of the charged offenses occurred in Charlotte between May and August, 1991. In each case, an African-American woman in her twenties was walking in Charlotte late at night, and was kidnapped by two African-American men driving a car. In each instance, after the victim was in the car she was blindfolded, attacked, and threatened. The two men drove each of the women to a house in an unknown location, where both men sexually assaulted the victim. All three women were subjected to both forced vaginal intercourse and forced oral sex. Following the assaults, the men allowed the victims to get dressed, drove them to a different location, and let them out of the car. In each case, the victim did not recognize either of the attackers, and no suspects were arrested in 1991.

State v. Thompson, 250 N.C. App. 158, 160, 792 S.E.2d 177, 179 (2016), *appeal dismissed and disc. review denied*, 369 N.C. 485, 795 S.E.2d 366 (2017).

In 2011, Defendant provided a biological sample from a buccal swab to an officer of the Charlotte-Mecklenburg Police Department in an unrelated case. DNA testing of the physical evidence obtained from each victim in 1991 revealed that the “DNA profile matched the DNA profile obtained from [Defendant]” in all three cases. On 17 December 2012, Defendant was indicted for a multitude of charges, including several counts of rape, kidnapping, and various sex offenses and conspiracies. *Id.* at 159, 792 S.E.2d at 179.

This matter came on for trial on 26 August 2015. After having the trial court remove his third appointed counsel, Defendant proceeded pro se with standby counsel. *Id.* The State produced expert testimony that there was a statistically significant match between Defendant's DNA profile and the DNA profile obtained from the physical evidence in all three cases: the probability of selecting an unrelated person at random who could be the source of the major DNA profile obtained from the physical evidence was "1 in 60.7 trillion" in the first case, "1 in 1.63 quadrillion" in the second case, and "1 in 323 billion" in the third case. By way of comparison, the State's expert explained that "the [E]arth's population was approximately 7.2 billion." *Id.* at 170, 792 S.E.2d at 185.

Defendant submitted the report of his expert in forensic DNA analysis, Dr. Maher Nouredine. While Dr. Nouredine noted "four main discrepancies that must be taken into account while interpreting the results" of the DNA analysis, he conceded that "[Defendant] cannot be excluded as a potential contributor of DNA in all three cases[.]" and "did not dispute the ultimate results of the [State's] DNA analysis." *Id.* at 170, 792 S.E.2d at 186. The trial court denied Defendant's motion "for funds with which to retain an expert in order to retest the DNA samples." *Id.* at 159, 792 S.E.2d at 179.

On 11 September 2015, the jury found Defendant guilty of numerous sexual offenses against the three victims including: first-degree rape, first-degree rape by actively encouraging or assisting another in the commission of the acts necessary to

engage in first-degree rape, first-degree kidnapping, second-degree kidnapping, conspiracy to commit first-degree kidnapping and first-degree rape, first-degree sex offense by fellatio, and first-degree sex offense by digital penetration. The trial court consolidated the convictions into three judgments, and sentenced Defendant to three consecutive terms of life imprisonment in the custody of the North Carolina Division of Adult Correction.

On 22 November 2019, Defendant filed pro se motions for postconviction discovery, preservation of evidence, and postconviction DNA testing in Mecklenburg County Superior Court. By order entered 13 December 2019, the trial court denied Defendant's motions. Defendant filed with this Court a petition for writ of certiorari to review the 13 December 2019 order, which we allowed on 23 August 2021.

II. Discussion

A. Standard of Review

“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.” *State v. Lane*, 370 N.C. 508, 517, 809 S.E.2d 568, 574 (2018) (citation and internal quotation marks omitted). “The lower court’s conclusions of law are reviewed *de novo*.” *Id.* (citation and internal quotation marks omitted).

B. Analysis

On appeal, Defendant argues that the trial court “erred when it denied [Defendant]’s DNA testing motion without appointing him counsel[,]” to which he would be entitled by his “showing that the results of the requested DNA testing ‘may be material’ ” to his wrongful conviction claim.¹ We disagree.

Where a defendant claims to have been wrongfully convicted, N.C. Gen. Stat. § 15A-269 allows postconviction DNA testing under certain limited circumstances:

- (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 On appeal, Defendant raises no arguments concerning the trial court’s denial of his motion for postconviction discovery. Accordingly, any issue regarding that motion is abandoned. *See* N.C.R. App. P. 28(b)(6) (“Issues not presented in a party’s brief, or in support of which no reason or argument is stated, will be taken as abandoned.”).

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- (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) (2021).

N.C. Gen. Stat. § 15A-269(c) provides for court-appointed counsel to assist an indigent defendant in establishing the defendant’s entitlement to postconviction DNA testing:

In 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 . . . upon a showing that the DNA testing may be material to the petitioner’s claim of wrongful conviction.

Id. § 15A-269(c).

In *State v. Byers*, our Supreme Court “set forth the threshold level which a pro se defendant must reach through a sufficient allegation of facts so as to establish materiality as is required by [N.C. Gen. Stat.] § 15A-269(c) in order to be appointed counsel to assist the defendant[.]” 375 N.C. 386, 393, 847 S.E.2d 735, 740 (2020) (emphasis omitted). The Court observed that “the Legislature’s use of the phrase ‘is material to the defendant’s defense’ ” in N.C. Gen. Stat. § 15A-269(a), when coupled

with its use of the phrase “‘may be material to the petitioner’s claim of wrongful conviction’ ” in N.C. Gen. Stat. § 15A-269(c), “would appear to relax the standard to be met by a defendant in order to qualify for the appointment of counsel to assist in the attainment of postconviction DNA testing under subsection (c)[.]” *Id.* at 396, 847 S.E.2d at 742 (emphases omitted). Nonetheless, the Court concluded that the word “‘material’ maintains the same definition in [both] subsections . . . that [the] Court ha[d] attributed to it in [its] cited case decisions.” *Id.* at 397, 847 S.E.2d at 743.

It is well established that in the context of postconviction DNA testing, “material means there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different[.]” *Id.* at 393–94, 847 S.E.2d at 741 (citation and internal quotation marks omitted). Reasonable probability means “a probability sufficient to undermine confidence in the outcome.” *Id.* at 394, 847 S.E.2d at 741 (citation omitted). Ultimately, “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.” *Id.* (citation and internal quotation marks omitted).

The defendant has the burden to show under N.C. Gen. Stat. § 15A-269(c) that “the DNA testing *may* be material to [the] defendant’s claim of wrongful conviction in order for the trial court to grant [the] defendant’s request for the appointment of counsel to assist [the] defendant in the postconviction DNA testing process.” *Id.* at 396, 847 S.E.2d at 742.

In the case at bar, Defendant filed a pro se motion for postconviction DNA testing, and requested appointed counsel to assist him. In his motion, Defendant identified several pieces of evidence, all of which had previously been subject to DNA testing, which could “now be subjected to newer and more accurate testing which would provide result[s] that are significantly more accurate and probative of the identity of the perpetrator or have a reasonable probability of contradicting prior test results.” Therefore, Defendant contended that the DNA testing may be material to his claim of wrongful conviction, and he was entitled to appointed counsel as an indigent defendant.

In its denial of Defendant’s motion, the trial court explained that “Defendant does not provide specific reasons why the requested DNA testing 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.” In that Defendant’s motion “simply contains conclusory allegations[,] Defendant has failed to meet his burden of showing materiality.” We agree.

Beyond conclusory assertions, Defendant does not show how the requested “newer and more accurate testing” of the evidence would result in a more favorable verdict to him; he does not show how the new testing would provide significantly more accurate results, nor how new DNA testing would have a reasonable probability of contradicting prior test results. Defendant provides no evidence or specific reasons

why retesting the evidence would “affect[] the jury’s deliberations.” *Id.* at 394, 847 S.E.2d at 741 (citation omitted).

We conclude that Defendant has not made the requisite showing that additional DNA testing of the previously tested evidence may be material to his claim of wrongful conviction. Consequently, Defendant has failed to “meet his burden to prove by a preponderance of the evidence every fact necessary to establish materiality[.]” *Id.* at 397, 847 S.E.2d at 743 (citation omitted). Accordingly, “pursuant to the operation of the statute, [D]efendant d[id] not satisfy the necessary conditions to obtain the appointment of counsel under [N.C. Gen. Stat.] § 15A-269(c).” *Id.* at 400, 847 S.E.2d at 745.

III. Conclusion

Because Defendant failed to make the requisite showing of materiality pursuant to N.C. Gen. Stat. § 15A-269(c), the trial court did not abuse its discretion in denying Defendant’s request for appointed counsel.

AFFIRMED.

Judges ARROWOOD and GRIFFIN concur.

Report per Rule 30(e).