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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-68

Filed: 15 August 2017

Forsyth County, Nos. 14 CRS 111-12, 54508, 54510-13, 15

STATE OF NORTH CAROLINA

v.

JOHN H. SAYRE

Appeal by defendant from order entered 2 May 2016 by Judge Eric C. Morgan in Forsyth County Superior Court. Heard in the Court of Appeals 31 July 2017.

*Attorney General Joshua H. Stein, by Assistant Attorney General Tracy Nayer, for the State.*

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

CALABRIA, Judge.

John H. Sayre (“defendant”) appeals from the trial court’s order denying his *pro se* “Motion to Locate and Preserve Evidences [sic] and Motion for Post-Conviction DNA Testing.” We affirm.

**I. Background**

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On 8 December 2014, defendant pleaded guilty to fourteen counts of taking indecent liberties with a child, two counts of second degree sexual offense, and two counts of felony child abuse. The offenses were consolidated for judgment according to the terms of the plea agreement. The trial court sentenced defendant to seven consecutive terms of imprisonment: one term of 12 years, one term of three years, and five terms of 13 to 25 months each. Defendant did not appeal from the trial court's judgments.

On 12 April 2016, defendant filed with the trial court a *pro se* "Motion to Locate and Preserve Evidences [sic] and Motion for Post-Conviction DNA Testing." The motion listed 12 pieces of physical evidence from defendant's case that he alleged "need to be tested and preserved for the purpose of DNA Testing, where the results would prove that the Defendant is not the perpetrator of the crimes and the requested DNA testing is material to the Defendant's exoneration." Defendant also requested that the trial court appoint counsel in order to help him prosecute his motion.

On 2 May 2016, the trial court entered an order denying defendant's motion. The court found and concluded, *inter alia*, that defendant had "not made a showing that the DNA testing maybe [sic] material to [defendant]'s claim of wrongful conviction[.]" As a result, the court declined to either appoint counsel for defendant or conduct an evidentiary hearing on the motion. Defendant timely appealed from the order.

## II. *Anders* Review

Counsel appointed to represent defendant on appeal has been “unable to identify an issue with sufficient merit to support a meaningful argument for relief” and asks that this Court conduct its own review of the record for possible prejudicial error. Counsel has shown to the satisfaction of this Court that he has complied with the requirements of *Anders v. California*, 386 U.S. 738, 18 L. Ed. 2d 493 (1967), and *State v. Kinch*, 314 N.C. 99, 331 S.E.2d 665 (1985), by advising defendant of his right to file written arguments with this Court and providing him with the documents necessary for him to do so.

On 17 March 2017, defendant filed with this Court a handwritten, *pro se* “Addendum to Defendant-Appellant’s Brief” in which he raises his own arguments. Defendant contends that the items cited in his motion “represent evidentiary components that either clearly contain or could possibly contain biological evidence relevant to his prosecution” and that “failure to allow for DNA testing in the matter at bar could effectively prevent Defendant from having an opportunity to exercise his fundamental right to present a complete defense, as such could possibly establish his innocence.”

Defendant’s motion for post-conviction DNA testing was made pursuant to N.C. Gen. Stat. § 15A-269, which provides in relevant part:

- (a) A defendant may make a motion before the trial court that entered the judgment of conviction against the

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defendant for performance of DNA testing and, if testing complies with FBI requirements and the data meets NDIS criteria, profiles obtained from the testing shall be searched and/or uploaded to CODIS 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.

N.C. Gen. Stat. § 15A-269(a) (2015).

Defendant's burden of showing materiality "requires more than the conclusory statement that '[t]he ability to conduct the requested DNA testing is material to the [d]efendant's defense.'" *State v. Gardner*, 227 N.C. App. 364, 369, 742 S.E.2d 352, 356 (quoting *State v. Foster*, 222 N.C. App. 199, 205, 729 S.E.2d 116, 120 (2012)), *disc. rev. denied*, 367 N.C. 252, 749 S.E.2d 860 (2013). "Rather, the defendant must provide *specific reasons* that the requested DNA test 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." *State v. Collins*, 234 N.C. App. 398, 411-12, 761 S.E.2d 914, 922-23 (2014).

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In the instant case, defendant's bare assertion that testing the identified evidence would "prove that [he] is not the perpetrator of the crimes" is not sufficiently specific to establish that the requested DNA testing would be material to his defense. *See State v. Cox*, \_\_ N.C. App. \_\_, \_\_, 781 S.E.2d 865, 868-69 (2016) (holding that the defendant's claim that "there is a very reasonable probability that the DNA testing would have shown that the Defendant was not the one who had sex with the alleged victim and, thus, completely contradict the judgment convicting the Defendant for statutory rape" did not establish materiality (internal brackets omitted)). Moreover, by entering into a plea agreement with the State and pleading guilty, defendant presented no "defense" pursuant to N.C. Gen. Stat. § 15A-269(a)(1). Accordingly, the trial court did not err by summarily denying defendant's request for post-conviction DNA testing and court-appointed counsel to prosecute his motion. *Cox*, \_\_ N.C. App. at \_\_, 781 S.E.2d at 869.

In accordance with *Anders* and *Kinch*, we have fully examined the record to determine whether any issues of arguable merit appear therefrom. We have been unable to find any possible prejudicial error, and we conclude that the appeal is wholly frivolous. Consequently, we affirm the trial court's order denying defendant's motion to locate and preserve evidence and for DNA testing.

AFFIRMED.

Judge TYSON concurs.

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Judge MURPHY dissents in a separate opinion.

Report per Rule 30(e).

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MURPHY, Judge, dissenting.

Although the crimes of which Defendant was convicted “are among the most disturbing and damaging of all crimes[,]” *State v. Bowditch*, 364 N.C. 335, 353, 700 S.E.2d 1, 13 (2010) (Hudson, J., dissenting), the General Assembly has chosen to enact a means of obtaining post-conviction DNA testing to prove innocence. Subsection (c) of N.C.G.S. § 15A-269 (2015) allows defendants to request the assistance of counsel in petitioning for such testing; however, this Court has never held that one such defendant has sufficiently demonstrated that the testing is “material” to his defense, as required by statute. Based on the specific allegations of materiality by Defendant in this case, I would hold that Defendant is statutorily entitled to the assistance of counsel for the prosecution of his petition. Therefore, I respectfully dissent.

In accordance with N.C.G.S. § 15A-269, a defendant may request post-conviction DNA testing of evidence if certain criteria are met. The statute states in relevant part:

(a) A defendant may make a motion before the trial court . . . 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.

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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.G.S. § 15A-269 (emphasis added).

Defendant bears the burden of showing “materiality” under subdivision (a)(1). *State v. Gardner*, 227 N.C. App. 364, 369, 742 S.E.2d 352, 356 (2013). 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. Floyd*, 237 N.C. App. 300, 301, 765 S.E.2d 74, 76 (2014) (emphasis in original) (quoting *State v. Hewson*, 220 N.C. App. 117, 122, 725 S.E.2d 53, 56 (2012)). The only guidance that has been given by this Court in determining whether evidence is material is that a defendant may not set forth a “conclusory statement,” such as “[t]he ability to conduct the requested DNA testing is material to the [d]efendant’s defense.” *State v. Foster*, 222



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N.C. App. 199, 205, 729 S.E.2d 116, 120 (2012).<sup>1</sup> This Court has never held that a defendant’s petition for post-conviction DNA testing is material to his defense, nor have we provided any guidance as to what would meet our standard.

For example, in *State v. Cox* the defendant was indicted on twelve counts of statutory rape and one count of taking indecent liberties with a child. \_\_\_ N.C. App. \_\_\_, \_\_\_, 781 S.E.2d 865, 866 (2016). Pursuant to a plea agreement, Cox pleaded guilty to one charge of statutory rape and the rest of the charges against him were dismissed. *Id.* at \_\_\_, 781 S.E.2d at 866. When requesting post-conviction DNA testing, Cox asked for DNA testing “to compare DNA from the hairs, blood, and spermatozoa from the victim’s underwear to the swabbings (DNA Swabbings) taken from [Cox].” *Id.* at \_\_\_, 781 S.E.2d at 866. Cox claimed “there is a very reasonable probability that [the DNA testing] would have shown that [he] was not the one who had sex with the alleged victim and, thus, completely contradict the judgment convicting [him] for [sic] statutory rape.” *Id.* at \_\_\_, 781 S.E.2d at 868. Cox also claimed that the testing “would be ‘material’ because if the DNA did not match, then that would have shown that someone else had sex with the alleged victim and not

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<sup>1</sup> Other examples of insufficient conclusory statements can be found in the following cases: *State v. Cox*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 781 S.E.2d 865, 868-69 (2016); *State v. Turner*, 239 N.C. App. 450, 454, 768 S.E.2d 356, 359 (2015); *State v. Collins*, 234 N.C. App. 398, 412, 761 S.E.2d 914, 923 (2014); *Floyd*, 237 N.C. App. at 303, 765 S.E.2d at 77; *Gardner*, 227 N.C. App. at 369, 742 S.E.2d at 356; *Hewson*, 220 N.C. App. at 124, 725 S.E.2d at 57-58.

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[him].” *Id.* at \_\_\_, 781 S.E.2d at 866. Cox’s claims were held insufficient under N.C.G.S. § 15A-269(a)(1). *Id.* at \_\_\_, 781 S.E.2d at 869.

We have previously held that “[a] defendant must provide *specific reasons* that the requested DNA test 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” to demonstrate materiality. *Id.* at \_\_\_, 781 S.E.2d at 869 (emphasis in original) (quoting *State v. Collins*, 234 N.C. App. 398, 411-12, 761 S.E.2d 914, 922-23 (2014)).

In the present case, Defendant pleaded guilty to fourteen counts of indecent liberties with a child, two counts of second-degree sexual offenses and two counts of felony child abuse occurring between January 1980 and December 2012. **R. pp. 14-32, 35-38.** When requesting post-conviction DNA testing, Defendant asked, *inter alia*, for such items to be tested as blood, saliva, bodily fluids, underwear, and t-shirts. **R. pp. 54-55.** He claimed:

[T]he alleged evidence[ ] need[s] to be TESTED to prove the fact that the Defendant is not the perpetrator of the crime. Plainly, if this allegation regarding what the testing of [p]otential DNA evidence would prove is accepted as TRUE, it would satisfy the requirements that the evidence is material to the Defense.

**R. p. 58** (Emphasis in original). He then concluded, “[s]imply put, this is exactly the kind of case where DNA evidence is MATERIAL and can result in EXONERATION.”

**R. p. 59** (Emphasis in original). The trial court found that this did not meet

Defendant's burden of establishing materiality, **R. pp. 65-66**, and the Majority affirms. This begs the question: what would our courts consider material?

DNA testing of bodily fluids like blood and semen, as well as clothes associated with the crimes, is often the evidence most material to a defense against an accusation of sexual assault. DNA obtained from the scene of a crime that does not match the DNA of the suspect is often exonerating. What more do we expect defendants to offer if statements like those made here are insufficient to meet the burden of showing materiality? Materiality requires only a "reasonable probability" that the evidence would cause a different outcome with the jury. Reasonable probability has always been a relatively low standard. *See e.g., U.S. v. Bagley*, 473 U.S. 667, 682, 87 L. Ed. 2d 481, 494 (1985) ("A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome."). However, our prior holdings construing N.C.G.S. § 15A-269 establish "reasonable probability" as an impossibly high burden for defendants to overcome.

In order for Defendant, a confined indigent, to be appointed an attorney pursuant to this statute he must "show[ ] that the DNA testing may be *material* to the petitioner's claim of wrongful conviction." N.C.G.S. 15A-269(c) (emphasis added). In order to appoint an attorney for post-conviction DNA testing, we are requiring indigent defendants to meet this illusory burden of materiality, with no guidance or examples of what actually constitutes materiality. Under our caselaw, therefore, this

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it would be difficult for even an experienced criminal defense attorney to plead these petitions correctly.

I respectfully dissent from the Majority's opinion because Defendant made allegations sufficient under the plain language of the statute entitling him to the appointment of counsel to maintain his motion for post-conviction DNA testing.