NO. COA12-507
NORTH CAROLINA COURT OF APPEALS

Filed: 18 December 2012

STATE OF NORTH CAROLINA

v. Buncombe County
Nos. 07 CRS 60506-08,
07 CRS 0638, 07 CRS 12446

JESSE VIRGIL PATTON

Appeal by Defendant from order entered 8 March 2012 by Judge Alan Z. Thornburg in Buncombe County Superior Court. Heard in the Court of Appeals 10 October 2012.

Attorney General Roy Cooper, by Assistant Attorney General Kimberly N. Callahan, for the State.

Merritt, Webb, Wilson & Caruso, PLLC, by Andrew L. Farris, for Defendant.

BEASLEY, Judge.

Jesse Virgil Patton (Defendant) appeals from an order denying his motion for postconviction DNA testing under N.C. Gen. Stat. § 15A-269). For the following reasons, we affirm.

On 25 August 2007, S.B.[1] was awakened in her Asheville home and forcibly raped. S.B. called the Asheville Police Department and described her assailant in great detail. Asheville Police later observed Defendant, a male matching S.B.'s detailed description, walking on a street one block from S.B.'s home. Defendant was carrying a bag that contained a Nikon camera belonging to S.B. S.B. identified Defendant as her assailant at a "show up." DNA was collected from the rape kit submitted by S.B. Police obtained a search warrant for Defendant's DNA on 25 August 2007. Defendant's DNA matched the sperm found inside S.B.'s body. S.B.'s clothing was not tested for DNA.

Defendant was indicted on 7 January 2008 on charges of first degree burglary, common law robbery, second degree rape, possession of drug paraphernalia, and habitual felon status. Defendant eventually pleaded guilty to the charges on 17 November 2008.

Defendant filed a ***pro se*** motion on or about 30 March 2011 requesting the preservation of DNA evidence and post-conviction DNA testing under N.C. Gen. Stat. § 15A-269. The trial court appointed counsel for Defendant on 6 May 2011 prior to a hearing on the materiality of the DNA testing. Pursuant to a 5 May 2011

[1] We will use initials to protect the victim's identity.

court order, the State produced two State Bureau of Investigation (SBI) lab reports, one listing which items of evidence were or were not tested for DNA and the other stating that Defendant's DNA could not be eliminated as a donor to the sample collected in the rape kit. Defendant requested that the DNA from the rape kit be re-tested. Defendant also requested that S.B.'s clothing be tested for the first time for DNA.

On 3 November 2011, the trial court held a hearing on Defendant's motion and denied the same in open court. Defendant gave oral notice of appeal immediately after the denial of the motion. A written order was entered *nunc pro tunc* on 7 March 2012. We have jurisdiction to hear this appeal under N.C. Gen. § 15A-270.1 (2011).

Defendant argues that the trial court erred in denying his postconviction motion for DNA testing. The North Carolina courts have not yet decided whether our statute providing for postconviction DNA testing applies to defendants who have pleaded guilty.[2] Because Defendant fails to meet his burden

[2] North Carolina's postconviction DNA testing statute is relatively similar to New York's postconviction DNA testing statute. *Compare* N.C. Gen. Stat. § 15A-259 (2011)("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*[.]") *with*, N.Y. Crim. Pro. § 440.30(1-a)(a) (McKinney 2005)("[I]f a DNA test had been conducted on such evidence, and if the results had been admitted in the trial resulting in the judgment, *there exists a reasonable probability that the verdict would have been more*

under N.C. Gen. Stat. § 15A-269(a) (2011), regardless of whether he pled guilty or was convicted by a jury, his motion was properly denied. *See State v. Foster*, ___ N.C. App. ___, ___, 729 S.E.2d 116, 120 (2012)(declining to consider the State's argument that defendant was not entitled to seek postconviction DNA testing because he pleaded guilty where defendant did not meet statute's requirements).

Our standard of review of a denial of a motion for postconviction DNA testing is analogous to the standard of review for a motion for appropriate relief. 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. Wilkins*, 131 N.C. App. 220, 223, 506 S.E.2d 274, 276 (1998). The lower court's conclusions of law are reviewed *de novo*. *Id.*

Section 15A-269(a) and (b) of the General Statutes reads:

> (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 and[] . . . profiles obtained from the testing shall be

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favorable to the defendant."). In *People v. Byrdsong*, 820 N.Y.S.2d 296 (N.Y. App. Div. 2006), the Appellate Division held that New York's postconviction DNA testing statute did not apply to defendants who pleaded guilty. In support of the holding, *Byrdsong* points out the language requiring a reasonable probability that the verdict would have been more favorable if the postconviction DNA test results had been admitted, which is similar to North Carolina's statutory language. *Id.* at 299.

> 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.
> (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)-(b) (2011). A defendant must meet all of the requirements of subsection (a) before the judge is required to grant the motion pursuant to the mandate in subsection (b). *Id.* Materiality means a "reasonable probability" that the jury would render a different verdict. *State v. Hewson*, __ N.C. App. __, __, 725 S.E.2d 53, 56 (2012)(internal quotation marks omitted). "The burden is on

defendant to make the materiality showing required in N.C. Gen. Stat. § 15A-269(a)(1)." *Foster*, __ N.C. App. at __, 729 S.E.2d at 120. A "conclusory statement" that "[t]he ability to conduct the requested DNA testing is material to the Defendant's defense" fails to establish materiality. *Id.*

Here, Defendant requested that two items of evidence be tested for DNA: the DNA from the rape kit and S.B.'s clothing. As to the rape kit, retesting the DNA found in the rape kit is not material to Defendant's defense. There was a wealth of evidence against Defendant—Defendant matched S.B.'s specific description of her assailant, was found in close proximity to the crime scene, possessed S.B.'s camera, and matched the DNA from the rape kit. Given the wealth of evidence, there is no reasonable probability of a different result had Defendant proceeded to trial. The trial court did not abuse its discretion in finding that Defendant failed to make the required showing under N.C. Gen. Stat. § 15A-269(a)(1).[3]

As to S.B.'s clothing, Defendant also failed to show that the results from such DNA testing would be material.

[3] We also note that Defendant failed to meet the requirements of subsection (a)(3)b. Since the DNA from the rape kit had been previously tested and defense counsel conceded that he did not know of any newer testing methods (T. p. 9-10), Defendant's request essentially was for retesting of the DNA, rather than a request for testing that would be "significantly more accurate and probative of the identity of the perpetrator . . . or have a reasonable probability of contradicting prior test results."

Defendant's motion unconvincingly states that "[t]he ability to conduct the requested DNA testing is material to the Defendant's defense." This statement is identical to the statement found lacking in *Foster*. The hearing transcript also fails to elucidate the materiality of testing S.B.'s clothing. Considering the weight of the evidence against Defendant, there is no reasonable probability of a different result even if Defendant had proceeded to trial rather than pleaded guilty. We find no abuse of discretion in the trial court's denial of Defendant's motion to test S.B.'s clothing for DNA.

Defendant next argues that he was denied effective assistance of counsel because the State failed to turn over the entire SBI file. We disagree.

Much of Defendant's argument on this issue, and indeed much of Defendant's brief, is based upon general assertions regarding errors and improprieties in testing done in other cases by the SBI as discussed in the "Swecker-Wolf Review" an "independent review of the activities and performance of the Forensic Biology Section of the State Bureau of Investigation (SBI) Crime Laboratory commissioned by the North Carolina Attorney General," which began in March 2010. We also take this opportunity to note that Defendant cites to trial proceedings another criminal

case, in which the appeal is currently pending, that is entirely unrelated to this case, again making general accusations of improprieties by the SBI Lab. Although the documents Defendant has cited were included in the record on appeal, they should not have been, as there is absolutely no indication that any of this information was presented to or considered by the trial court. In addition, other than casting general aspersions upon the work of the SBI Lab, Defendant has failed to show any direct relevance of the Swecker-Wolf Review or the entirely unrelated case to his own. Defendant's motion for DNA testing does not present any issues regarding SBI Lab procedures, and there is also no indication in our record that Defendant presented any argument regarding the Swecker-Wolf Review or any other information regarding SBI Lab procedures to the trial court for its consideration.

"Our Supreme Court has long held that where a theory argued on appeal was not raised before the trial court, the law does not permit parties to swap horses between courts in order to get a better mount in the appellate courts." *State v. Holliman*, 155 N.C. App. 120, 123, 573 S.E.2d 682, 685 (2002)(citations and internal quotation marks omitted). "According to Rule of Appellate Procedure 10(b)(1), in order to preserve a question

for appellate review, the party must state the specific grounds for the ruling the party desires the court to make." *Id.* The defendant may not change his position from that taken at trial to obtain a "steadier mount" on appeal. *State v. Woodard*, 102 N.C. App. 687, 696, 404 S.E.2d 6, 11 (1991) ["steadier mount" is not a quote even though *Woodard* says it is quoting *State v. Benson*]. Thus, we will not consider Defendant's arguments regarding improprieties of the SBI Lab, as these were not presented to the trial court nor is there any relevant information of record in this regard. Defendant attempts to connect his argument regarding ineffective counsel to his claims regarding the SBI file by contending that he was denied effective assistance of counsel "because no lawyer could successfully challenge DNA results without access to the raw data and bench notes contained in the SBI case file." We disagree and dismiss Defendant's argument.

Subsection (c) of N.C. Gen. Stat. § 15A-269 requires the judge to appoint counsel for a petitioner who has filed a pro se postconviction motion for DNA testing upon a showing that the testing would be material to the petitioner's claim. N.C. Gen. Stat. § 15A-269(c). Where there is no right to counsel, there can be no ineffective assistance of counsel claim. *See State v.*

Grooms, 353 N.C. 50, 74-75, 540 S.E.2d 713, 728-29 (2000)(finding there can be no ineffective assistance of counsel when defendant was not entitled to have counsel present during the execution of a search warrant); *State v. Simpson*, 176 N.C. App. 719, 724, 627 S.E.2d 271, 275-76 (2006) (finding no ineffective assistance of counsel since there is no right to counsel beyond the initial appeal).

Here, Defendant failed to meet the threshold showing of materiality to warrant the appointment of counsel. Although the trial court appointed counsel prior to a materiality hearing, Defendant was not entitled to have counsel appointed and cannot now claim ineffective assistance of counsel. We dismiss this argument.

Defendant contends that the trial court erred by failing to make specific findings of fact in its order denying his motion for postconviction DNA testing. Again, we disagree.

Defendant argues that N.C. Gen. Stat. § 15A-259 requires the trial court to make specific findings of fact. We find no such requirement in the statute. The trial court need not make specific findings of fact and conclusions of law unless requested by one of the parties in a civil case. *Couch v. Bradley*, 179 N.C. App. 852, 855-56, 635 S.E.2d 492, 494 (2006).

We see no reason to deviate from that general rule in this case where the statute fails to command the trial court to make specific findings. The trial court's order stated that it conducted a hearing regarding the requirements of N.C. Gen. Stat. § 15A-269(a) and (b) and concluded that Defendant failed to meet the requirements necessary to justify testing under those subsections. We find this order to be sufficient.

For the reasons stated above, we affirm the trial court's denial of Defendant's motion for postconviction DNA testing.

Affirmed.

Judges ELMORE and STROUD concur.

Report per Rule 30(e).