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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA14-884

Filed: 17 March 2015

STATE OF NORTH CAROLINA

v.

Forsyth County

No. 09 CRS 057873

ALVARO GONZALEZ ROMERO

Appeal by defendant from order entered 24 June 2013 by Judge L. Todd Burke in Forsyth County Superior Court. Heard in the Court of Appeals 3 February 2015.

Attorney General Roy Cooper, by Assistant Attorney General Laura Edwards Parker, for the State.

Jarvis John Edgerton, IV, for defendant.

ELMORE, Judge.

Alvero Gonzalez Romero (defendant) appeals from the trial court's order denying his motion for post-conviction DNA testing. Defendant argues that the trial court erred by failing to appoint counsel to represent him on his motion for post-conviction DNA testing. After careful consideration, we affirm the trial court's order.

I. Background

On or about 22 March 2010, defendant was indicted on one count of first degree rape of a child, N.C. Gen. Stat. § 14.27.2A, and for one count of taking indecent

Opinion of the Court

liberties with a child, N.C. Gen. Stat. § 14-202.1. On 15 June 2010, defendant pled guilty to both counts. That same day, Judge William Z. Wood, Jr. accepted defendant's guilty plea and entered judgment and commitment in the mitigated range, sentencing defendant to a minimum of 180 months, and a maximum term of to 225 months imprisonment.

On 28 May 2013 (file stamped 5 June 2013), defendant mailed to the Forsyth County Clerk of Superior Court a *pro se* motion to locate and preserve DNA test evidence from his case, a motion for post-conviction DNA testing, an affidavit of innocence, and a motion for production of the transcript from his plea hearing. In his motion for post-conviction DNA testing, defendant asserted that up to fifteen pieces of evidence should be submitted for DNA testing “to prove the fact that defendant IS NOT the perpetrator of the crime.” These items included, *inter alia*, two blankets, a pair of shorts, a teddy bear, a pair of underwear, and the white liquid found on the victim's genitalia.

Based on the record evidence, Judge L. Todd Burke denied defendant's motion for post-conviction DNA testing in an order entered 24 June 2013. Judge Burke found that defendant failed to identify how DNA testing of the evidence in his case was material to his defense. More specifically, Judge Burke found that defendant made no showing as to “whether biological evidence was collected in the investigation or prosecution of his case, or if it was DNA tested previously, that the requested DNA

Opinion of the Court

test would provide results that are significantly more accurate and probative . . . or have a reasonable probability of contradicting prior test results.”

Defendant appeals the trial court’s denial of his motion for post-conviction DNA testing of evidence on grounds that the trial court erroneously failed to appoint him counsel in this matter.

II. Analysis

Defendant’s sole argument on appeal is that the trial court erred by failing to appoint counsel to represent him in his motion for post-conviction DNA testing. We disagree.

Our standard of review of a denial of a motion for post-conviction DNA testing is analogous to the standard of review for a motion for appropriate relief. *State v. Gardner*, ___ N.C. App. ___, ___, 742 S.E.2d 352, 354, *review denied*, ___ N.C. ___, ___, 749 S.E.2d 860 (2013). 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.*

N.C. Gen. Stat. § 15A-269 provides that a defendant may request post-conviction DNA testing of evidence, as follows:

(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.

Opinion of the Court

(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.

Pursuant to subsection (c) of the statute:

[T]he 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 in accordance with the rules adopted by the Office of Indigent Defense Services *upon a showing that the DNA testing may be material to the petitioner's claim of wrongful conviction.*

N.C. Gen. Stat. § 15A-269 (2013) (emphasis added). Thus, to be entitled to the appointment of counsel, defendant needed to show (1) that he is indigent, and (2) that the DNA testing may be material to his claim of wrongful conviction. *See id.*

It has been held that the threshold materiality requirement for the appointment of counsel for purposes of N.C. Gen. Stat. § 15A-269(c) is no less demanding than that required for actually ordering DNA testing pursuant to N.C. Gen. Stat. § 15A-269(a)(1). *Gardner*, ___ N.C. App. at ___, 742 S.E.2d at 355. A condition precedent to the trial court's statutory authority to grant a motion under N.C. Gen. Stat. § 15A-269 is that the conditions of subsection (a) be met. *State v.*

Opinion of the Court

Foster, ___ N.C. App. ___, ___, 729 S.E.2d 116, 120 (2012). Therefore, in order to support the appointment of counsel pursuant to N.C. Gen. Stat. § 15A-269(c), a convicted defendant must make an allegation addressing the materiality issue that would, if accepted, satisfy N.C. Gen. Stat. § 15A-269(a)(1). *Gardner*, ___ N.C. App. at ___, 742 S.E.2d at 355.

Favorable biological evidence is “material” for purposes of N.C. Gen. Stat. § 15A-269 “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. Hewson*, 220 N.C. App. 117, 122, 725 S.E.2d 53, 56 (2012) (citation omitted). “Where a motion brought under N.C. Gen. Stat. § 15A-269 provides no indication of how or why the requested DNA testing would be material to the petitioner’s defense, the motion is deficient and it is not error to deny the request for the DNA testing.” *Gardner*, ___ N.C. App. at ___, 742 S.E.2d at 356 (citing *Foster*, ___ N.C. App. at ___, 729 S.E.2d at 120).

We are charged with determining whether defendant made a sufficient showing of materiality such that the trial court was obligated to appoint him counsel. Defendant argues that he met his burden of proving materiality under N.C. Gen. Stat. § 15A-269 because his motion provided that the evidentiary items he listed “need to be tested to prove the fact [he] IS NOT the perpetrator of the crime.” We are not persuaded by defendant’s materiality argument.

In *Gardner* this Court held that the defendant failed to make a sufficient showing of materiality when his statement regarding materiality provided only that

Opinion of the Court

“[t]he ability to conduct the requested DNA testing is material to the [d]efendant’s defense.” *Id.* at ___, 742 S.E.2d at 356. We reasoned that, because the defendant provided no additional explanation as to why the testing was material to his defense, he failed to establish a condition precedent to the trial court’s authority to grant his motion. *Id.*

Here, defendant alleged that certain items such as a blanket, underwear, and shorts, “need[ed] to be tested to prove the fact the defendant [was] NOT the perpetrator of the crime.” However, as in *Gardner*, defendant failed to disclose why or how the DNA testing of these items would prove material to his defense. Importantly, defendant did not allege that, had the case been tried, there was a “reasonable probability” that the biological evidence would have altered the jury’s decision. *Hewson, supra*. Defendant has failed to establish a condition precedent to the trial court’s authority to grant his motion. The trial court was under no obligation to appoint defendant counsel based on the facts before us. We affirm the trial court’s order denying defendant’s motion for post-conviction DNA testing.

Affirmed.

Judges DAVIS and TYSON concur.

Report per Rule 30(e).