IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-1216

Filed: 7 August 2018

Wake County, No. 14CRS211534

STATE OF NORTH CAROLINA

v.

JASON ROBERT VICKERS, Defendant.

Appeal by Defendant from order entered 30 June 2017 by Judge Donald W. Stephens in Wake County Superior Court. Heard in the Court of Appeals 2 May 2018.

Attorney General Joshua H. Stein, by Assistant Attorney General Joseph L. Hyde, for the State.

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

DILLON, Judge.

Jason Robert Vickers ("Defendant") appeals from an order denying his motion for post-conviction DNA testing. We affirm.

I. Background

In 2014, Defendant's live-in girlfriend brought Defendant's laptop to the Cary Police Department. The laptop contained a video of an adult male touching a minor

victim's genitals. The girlfriend identified the minor as her daughter based on the clothes the minor in the video was wearing and the linens in the video as being from her daughter's bed. The girlfriend identified the adult male hand in the video as belonging to Defendant.

The minor underwent a child medical examination (a "CME") by Safe Child Advocacy Center. The minor indicated during the evaluation that Defendant digitally penetrated her vagina in different rooms of their home.

Defendant was arrested and charged with various crimes. He eventually pleaded guilty to first-degree sexual exploitation of a minor and first-degree sexual offense with a child and sentenced to 144-233 months pursuant to his plea agreement.

In early 2017, Defendant filed a motion seeking post-conviction DNA testing under N.C. Gen. Stat. § 15A-269 and a motion to locate and preserve evidence. On 30 June 2017, the trial court entered an order denying Defendant's motion for post-conviction DNA testing. Defendant timely appealed.

II. Analysis

On appeal, Defendant contends that the trial court erred by (1) denying his motion for post-conviction DNA testing and (2) failing to order an inventory of biological evidence. We address each contention in turn.

A. Motion for Post-Conviction DNA Testing

The standard of review for denial of a motion for post-conviction DNA testing is "analogous [to the] standard of review for a denial of a motion for appropriate relief . . . because the trial court sits as finder of fact in both circumstances." *State v. Lane*, 370 N.C. 508, 517, 809 S.E.2d 568, 574 (2018) (citations omitted). Accordingly, the trial court's findings of fact are "binding on [our] Court if they are supported by competent evidence and may not be disturbed absent an abuse of discretion." *Id*.

In his motion, Defendant alleged that there were a number of items which might contain biological evidence which would have been material to his defense. He alleges that the minor's vagina and anus were swabbed during the CME and that the swabs would show that his DNA was not present and, therefore, that he was not the perpetrator of the crime. Further, he alleged that fingerprints on certain cell phones would show someone else's fingerprints overlaying his, showing that someone else shot the video and transferred the video to his online account.

Our Supreme Court has recently reiterated that the determination of materiality must be made "in the context of the entire record[.]" *Lane*, 370 N.C. at 519, 809 S.E.2d at 575.

A Defendant may make a motion before the trial court for the performance of DNA testing if the biological evidence at issue meets a number of requirements, primarily that it "[i]s material to the defendant's defense." N.C. Gen. Stat. § 15A-269(a) (2013). According to the plain language of the statute, the Defendant has the

burden to make the required showing that the biological evidence is material. *State v. Turner*, 239 N.C. App. 450, 453, 768 S.E.2d 356, 358-59 (2015).

Our Supreme Court has defined materiality in a post-conviction DNA context as follows: "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." *Lane*, 370 N.C. at 519, 809 S.E.2d at 575. Where a defendant has pleaded guilty, the trial court must consider the facts surrounding a defendant's decision to plead guilty in addition to other evidence, in the context of the entire record of the case, in order to determine whether the evidence is "material." *Id.* at 519, 809 S.E.2d at 575 (concluding that "[w]here ample evidence, including eyewitness testimony and defendant's own admission to law enforcement, supported a finding of defendant's guilt, defendant's motion for post-conviction DNA testing did not allege a 'reasonable probability that the verdict would have been more favorable to the defendant'"); *State v. Randall*, ___ N.C. App. ___, ___, ___ S.E.2d ___, ___ (2018).

We note that the trial court's order clearly indicates its consideration of the circumstances surrounding Defendant's guilty plea. The trial court found, in relevant part, as follows:

> 1. The Defendant entered a plea of guilty to first degree sex offense and first degree sexual exploitation of a minor . . . [t]he Defendant admitted guilt, stipulated to the factual evidence described by the Prosecutor and apologized to the victim for these crimes.

2. The Defendant has failed to allege and show that any physical or biological evidence exists capable of DNA testing that would be material to any defense to these charges.

Our Court has held that a Defendant's burden to show materiality "requires more than the conclusory statement that the ability to conduct the requested DNA testing is material to the defendant's defense." *State v. Cox*, 245 N.C. App. 307, 312, 781 S.E.2d 865, 868 (2016) (internal marks and citation omitted). In *Cox*, we concluded that the defendant's statement 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" was insufficient to establish materiality. *Id*.

In conclusion, we agree with the trial court that Defendant failed to show that there was biological evidence related to his case which would be "material to [his] defense." N.C. Gen. Stat. § 15A-269(a)(1) (2013); *see also State v. Floyd*, 237 N.C. App. 300, 303, 765 S.E.2d 74, 77 (2014) ("Defendant failed to show how DNA testing would produce 'material' evidence; that is, he failed to show how such testing would produce evidence sufficient to create a reasonable probability of a different result, given the evidence already in the trial record.") Here, there is substantial evidence of Defendant's guilt including the video on Defendant's computer showing Defendant's hand fondling with the child's private part, the identification made by Defendant's girlfriend of the individual in the video; the statement by the victim that Defendant was the perpetrator; and Defendant's own admission.

There is not a reasonable probability that the absence of Defendant's DNA on blood, swabs, hairs, and clothing alleged to have been collected during the victim's CME weeks after the abuse occurred would be significantly probative in identifying the perpetrator. *See Cox*, 245 N.C. App. at 312, 781 S.E.2d at 868-69. Moreover, there is not a reasonable probability that the presence of other fingerprints on Defendant's computers and cell phones months after the videos were recorded would be significantly probative in identifying the perpetrator. Any result from DNA testing which showed the lack of Defendant's DNA or the presence of another's DNA on the items would not conclusively prove that Defendant was not the man depicted in the video with the minor child or the man identified by the victim as the perpetrator. Accordingly, we affirm the trial court's denial of Defendant's motion for post-conviction DNA testing.

B. Request for Inventory of DNA Evidence

Defendant argues that the trial court erred in failing to order an inventory of biological evidence. Assuming that the trial court even ruled on this portion of Defendant's motion, we conclude that the trial court did not err by not ordering an inventory. Under N.C. Gen. Stat. § 15A-268 (2015), it is the burden of the defendant to contact custodial agencies to prepare an inventory of evidence which the defendant can use to help him prepare a motion which meets his burden of showing materiality. N.C. Gen. Stat. § 15A-269(f) (2013) provides that *after* a defendant has filed his

motion, a custodial agency served with the motion is required to provide an inventory and *also* "documents, notes, logs, or reports relating to the items of physical evidence." *Id.* There is no requirement that a court *order* a custodial agency to prepare an inventory where the agency has not received a request or the motion. Here, any error in this regard in this present case is harmless since Defendant has failed to meet his burden of showing materiality.

AFFIRMED.

Judges DIETZ and ARROWOOD concur.

Report per Rule 30(e).