IN THE COURT OF APPEALS OF NORTH CAROLINA

2021-NCCOA-285

No. COA20-361

Filed 15 June 2021

Harnett County, No. 02 CRS 52697

STATE OF NORTH CAROLINA

v.

KENNETH EARL BYRD, Defendant.

Appeal by Defendant from order entered 17 October 2019 by Judge Claire V. Hill in Harnett County Superior Court. Heard in the Court of Appeals 9 March 2021.

Attorney General Joshua H. Stein, by Assistant Attorney General Nicholas R. Sanders, for the State-Appellee.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender James R. Grant, for Defendant-Appellant.

GORE, Judge.

¶ 1 Kenneth Earl Byrd ("Defendant") argues that the trial court erroneously denied his *pro se* motion for post-conviction DNA testing without first appointing him counsel. Under N.C. Gen. Stat. § 15A-269(c), a *pro se* petitioner is entitled to court-appointed counsel "upon a showing that the DNA testing *may* be material to the petitioner's claim of wrongful conviction." N.C. Gen. Stat. § 15A-269(c) (2020) (emphasis added). We conclude that Defendant has not met the standard necessary

for the appointment of counsel in this action. Accordingly, we affirm the trial court's order.

I. Factual and Procedural Background

¶ 2 On 8 May 2003, Defendant was convicted for first-degree murder and sentenced to life without parole. Defendant appealed, and by unpublished opinion filed 7 December 2004, this Court found no error. *State v. Byrd*, 167 N.C. App. 371, 605 S.E.2d 266, slip op. *7 (2004) (unpublished) ("*Byrd I*").

¶ 3 This Court provided factual background of this case in *Byrd I*:

> Defendant was arrested on 7 May 2002 in connection with the disappearance of Brenda Renee Lancaster. After being advised of his rights, defendant gave a statement to Lieutenant Joseph C. Webb, a detective with the Harnett County Sheriff's Department. In the statement, defendant indicated that Lancaster pointed a gun at him and threatened to kill him. Defendant grabbed the barrel of the gun and twisted it away from himself. The gun went off, shooting Lancaster in the neck. The statement then continues as follows:
>
> > Blood was everywhere, and Renee was gagging for breath. It was a mess, and I panicked. Renee was holding her neck, and the gun fell into my hands. She was still standing. I panicked, and I pointed the gun at her and shot her three to four more times. I don't know where I shot her at. I'm not sure if I was angry. I don't remember being angry. I was just scared and didn't want to go back to prison. The first thing I thought was, "I don't want to go back to prison."
>
> According to his statement, defendant then hid Lancaster's

> body in a ditch in the woods. The next day defendant returned and buried the body deeper into the ground. Several weeks later, defendant was apprehended in a hotel room in South Carolina and charged with first-degree murder.

Id. at *1-3.

¶ 4 Defendant was convicted based on this version of the homicide, but he was not alone at the time Brenda Renee Lancaster ("Lancaster") was murdered. Defendant's then girlfriend Roswitha Federlein Morrison ("Morrison") was driving her car with Defendant as the passenger when the altercation with Lancaster ensued. Morrison was later indicted and tried separately for Lancaster's murder. *See State v. Morrison*, 170 N.C. App. 198, 613 S.E.2d 531, slip op. *1 (2005) (unpublished).

¶ 5 After Defendant was tried and convicted, but prior to Morrison's trial, Defendant altered his story for the first time and claimed that Morrison was the shooter. The State presented Defendant as a witness in Morrison's trial, despite the trial judge expressing concern over the prosecution switching factual theories for the same crime. Defendant and Morrison offered the following testimony in *State v. Morrison*:

> [Defendant] testified for the State and admitted dating both [Morrison] and Lancaster. He stated that he purchased a .22 caliber rifle a few weeks before the incident. He intended on selling it to a friend and had placed it in [Morrison's] car. He testified that [Morrison] killed Lancaster after they fought on the shoulder of the Interstate 95 on-ramp. [Defendant] admitted helping

> [Morrison] after the killing.
>
> [Morrison] testified that [Defendant] shot and killed Lancaster. She claimed Lancaster emerged from her truck with something in her hand after forcing [Morrison] and [Defendant] off the road. [Morrison] could not tell what it was, but [Defendant] later told her it was a gun. She further testified that she followed [Defendant's] orders from the moment after Lancaster was shot until they were taken into custody at Carolina Beach. Those orders included burying Lancaster, burning Lancaster's truck, burning their clothes, and leaving town.

Id. at *4-5. After weighing the discrepancies and judging the credibility of the testimony, the jury ultimately found Morrison not guilty of first-degree murder and convicted her as an accessory after the fact to murder. *Id.* at *6.

¶ 6 On 29 September 2014, Defendant filed a motion for appropriate relief ("MAR") through counsel, which the trial court denied by written order on 6 January 2016. Defendant filed a *pro se* MAR on 1 February 2019, which the trial court denied by written order on 1 April 2019.

¶ 7 On 10 October 2019, Defendant filed a *pro se* "Motion to Locate and Preserve Evidence, and a Motion for DNA testing, and a[n] Affidavit of Actual Innocence." Defendant asked the trial court to order the location and preservation of all physical evidence obtained during the investigation of his case. He listed several pieces of evidence he wanted tested, including a shovel, bullet fragments, Lancaster's shirt, her hair, and her blood specimens. In his motion, Defendant reiterated his claim that

it was Morrison who had murdered Lancaster. He asserted that DNA testing of this material "could go a long way towards proving [his] innocence", "showing the actual identity of who pulled the trigger," how many times the trigger was pulled, and the gender of the shooter. Moreover, Defendant stated that "[t]he ability to conduct the requested DNA testing is material to [his] defense of innocence[,]" and "[he] requests the appointment of counsel" pursuant to N.C. Gen. Stat. §§ 15A-269(c) and 15A-270.1 (2020).

¶ 8 On 17 October 2019, the trial court entered an order denying Defendant's motion for post-conviction DNA testing. The trial court found that "Defendant confessed to shooting the victim and cooperated with law enforcement by showing them where the overwhelming evidence against him was. The Defendant showed law enforcement where the victim's body was hidden, where the victim's truck was abandoned, and where the shovel was thrown." Further, the trial court concluded that Defendant's statement that DNA testing "is material" to his claim was conclusory and insufficient to carry his burden, and it declined to appoint counsel. On 31 October 2019, Defendant entered written notice of appeal.

II. Discussion

¶ 9 On appeal, Defendant argues that the trial court erred by denying his *pro se* motion for post-conviction DNA testing before appointing counsel pursuant to N.C. Gen. Stat. § 15A-269(c) (2020). We disagree.

A. Standard of Review

¶ 10

> 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. The lower court's conclusions of law are reviewed *de novo*. A trial court's determination of whether defendant's request for postconviction DNA testing is "material" to his defense, as defined in N.C.G.S. § 15A-269(b)(2), is a conclusion of law, and thus we review *de novo* the trial court's conclusion that defendant failed to show the materiality of his request.

State v. Lane, 370 N.C. 508, 517-18, 809 S.E.2d 568, 574 (2018) (*purgandum*).

B. Post-conviction DNA

¶ 11

Under N.C. Gen. Stat. § 15A-269, a defendant can request post-conviction 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.

N.C. Gen. Stat. § 15A-269(a) (2020) *(*emphasis added). The heightened standard of

"is material" in subsection (a) is contrasted with the lower standard in subsection (c) of the same statute. N.C. Gen. Stat. § 15A-269(c) provides that "[i]f the petitioner has filed pro se, the court shall appoint counsel for the petitioner in accordance with 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." § 15A-269(c) (emphasis added).

¶ 12 Here, "materiality" is defined under subsection (b)(2) of the statute and means that "there exists a reasonable probability that the verdict would have been more favorable to the defendant." § 15A-269(b)(2). "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." *Lane*, 370 N.C. at 519, 809 S.E.2d at 575 (internal citation and quotation marks omitted).

¶ 13 Defendant argues he has met his burden in showing that DNA testing *may* be material because his request to test specific items—a shovel, bullet fragments, Lancaster's shirt, hair, blood specimens, and "similar evidence currently unknown to defendant"—"could go a long way towards proving [his] innocence." Defendant asserts that DNA testing could reveal the identity of the shooter, who he claims is Morrison. Accordingly, Defendant argues he has met his minimum burden under the less stringent "may be material" standard required by N.C. Gen. Stat. § 15A-269 subsection (c), and he is entitled to the appointment of counsel to assist him in

meeting the heightened requirement of "is material" under subsection (a).

¶ 14 We find our Supreme Court's decision in *State v. Byers* controlling on the issue of materiality, and whether Defendant made a minimum showing that entitles him to counsel. In *Byers*, the "[d]efendant was convicted of first-degree murder and first-degree burglary." 375 N.C. 386, 387, 847 S.E.2d 735, 737 (2020). The defendant subsequently filed a *pro se* motion for post-conviction DNA testing in which he

> asserted that DNA testing of defendant's and [victim's] previously untested clothing could reveal the identity of the actual perpetrator, noting that the State's DNA expert witness had reported, but not testified to, the presence of human blood in various locations in [the victim's] apartment that did not match the blood of either defendant or [victim]. Defendant requested that the items of clothing be preserved and that an inventory of the evidence be prepared. Defendant also asked for the appointment of counsel to assist defendant in his postconviction DNA-testing process pursuant to N.C.G.S. § 15A-269(c).

Id. The trial court denied the defendant's motion "on grounds that 'the evidence of his guilt is overwhelming' and that defendant has 'failed to show how conducting additional DNA testing is material to his defense.'" *Id.* This Court reversed the trial court's order concluding "that defendant sufficiently pleaded the materiality of his requested postconviction DNA testing so as to be entitled to the appointment of counsel in order to assist him in obtaining the testing." *Id.* The defendant appealed to the Supreme Court.

¶ 15 The Supreme Court reversed this Court's decision and upheld the trial court's

denial of the defendant's motion. The Court held that,

> in his effort to obtain the appointment of counsel by the trial court, defendant has not sufficiently shown that the postconviction DNA testing may tend to exculpate him because there is not a *reasonable probability* that, had the evidence been disclosed to the defense, the result of the proceeding may have been different, in the context of the entire record and hinging upon whether the evidence may have affected the jury's deliberations, as to petitioner's claim of wrongful conviction.

Id. Furthermore, the Court adopted its analysis in an earlier decision, *State v. Lane*, 370 N.C. 508, 809 S.E.2d 568 (2018), concluding,

> despite the defendant's contentions that the requested postconviction DNA testing was material to his defense, that the overwhelming evidence of defendant's guilt presented at trial and the dearth of evidence at trial pointing to a second perpetrator, along with the unlikely prospect that DNA testing of the biological evidence at issue would establish that a third party was involved in the crimes charged, together created an insurmountable hurdle to the success of the defendant's materiality argument.

Byers, 375 N.C. at 400, 847 S.E.2d at 745 (citation omitted).

¶ 16 In the present case, we also find that Defendant has not satisfied his less stringent burden of showing that DNA testing may be material to his claim pursuant to N.C. Gen. Stat. § 15A-269(c). Accordingly, he is not entitled to appointed counsel.

¶ 17 The trial court's unchallenged and binding finding of fact 10 states:

> It appears to this Court that the Defendant confessed to shooting the victim and cooperated with law enforcement

> by showing them where the overwhelming evidence against him was. The Defendant showed law enforcement where the victim's body was hidden, where the victim's truck was abandoned, and where the shovel was thrown.

In *Bryd I*, Defendant confessed to the murder. He "grabbed the barrel of the gun and twisted it away from himself. The gun went off, shooting Lancaster in the neck." *Byrd I* at *2. He further stated, "I panicked, and I pointed the gun at her and shot her three to four more times. I don't know where I shot her at. I'm not sure if I was angry. I don't remember being angry. I was just scared and didn't want to go back to prison." *Id.*

¶ 18 Defendant confessed to burying Lancaster's body in a ditch and returning the next day to bury it deeper. *Id.* After he was apprehended by law enforcement, he presented them with "the overwhelming evidence against him." Defendant has not demonstrated a reasonable probability that the result of the proceeding would have been different had the proposed evidence been tested.

AFFIRMED.

Judges TYSON and MURPHY concur.

Report per Rule 30(e).