UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 20-7758

JASON ROBERT VICKERS,

Petitioner - Appellant,

v.

KENNETH DIGGS,

Respondent - Appellee.

Appeal from the United States District Court for the Eastern District of North Carolina, at Raleigh. Terrence W. Boyle, District Judge. (5:19-hc-02300-BO)

Submitted: February 23, 2021 Decided: February 26, 2021

Before MOTZ, KEENAN, and HARRIS, Circuit Judges.

Dismissed by unpublished per curiam opinion.

Jason Robert Vickers, Appellant Pro Se.

PER CURIAM:

Jason Robert Vickers seeks to appeal the district court's order dismissing as untimely his 28 U.S.C. § 2254 petition. *See Gonzalez v. Thaler*, 565 U.S. 134, 148 & n.9 (2012) (explaining that § 2254 petitions are subject to one-year statute of limitations, running from latest of four commencement dates enumerated in 28 U.S.C. § 2244(d)(1)). The order is not appealable unless a circuit justice or judge issues a certificate of appealability. 28 U.S.C. § 2253(c)(1)(A). A certificate of appealability will not issue absent "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). When, as here, the district court denies relief on procedural grounds, the prisoner must demonstrate both that the dispositive procedural ruling is debatable and that the petition states a debatable claim of the denial of a constitutional right. *Gonzalez*, 565 U.S. at 140-41 (citing *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)).

We have independently reviewed the record and conclude that Vickers has not made the requisite showing. Accordingly, we deny a certificate of appealability and dismiss the appeal. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

DISMISSED

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

NO. 5:19-HC-2300-BO

JASON ROBERT VICKERS,	)	
	)	
Petitioner,	)	
	)	
v.	)	ORDER
	)	
KENNETH DIGGS,	)	
	)	
Respondent.	)	

Petitioner Jason Robert Vickers ("petitioner") petitions this court for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. The matter now comes before the court on respondent's motion for summary judgment (DE 16) pursuant to Federal Rule of Civil Procedure 56. Also before the court are petitioner's motion for discovery (DE 26) and motion to appoint counsel (DE 31). The issues raised have been fully briefed and are ripe for adjudication. For the following reasons, the court denies petitioner's motions, but grants respondent's motion for summary judgment.

STATEMENT OF CASE

On November 2, 2015, petitioner pleaded guilty in the Wake County Superior Court to first-degree sexual exploitation of a minor and first-degree sexual offense with a child. ((DE 18-1), pp. 10-14). Petitioner then was sentenced, pursuant to the terms of his plea agreement, to 144-233 months imprisonment. (Id. p. 19). Petitioner did not file a direct appeal.

Petitioner next filed two post-conviction motions in the Wake County Superior Court. Petitioner first filed a motion to locate and preserve evidence on March 24, 2017, and then a motion

for post-conviction DNA testing pursuant to N.C. Gen. Stat. § 15A-269 on April 11, 2017. ((DE 18-7), pp. 139-40, 149-50). On June 30, 2017, the superior court denied petitioner's motion for post-conviction DNA testing, and found as follows: "During the police investigation a computer was seized and a child medical evaluation was conducted. However, there was no physical evidence seized capable of DNA testing for the purpose of comparison. 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." (Id. pp. 139-40). Petitioner appealed, and the North Carolina Public Defender was appointed to represent petitioner. State v. Vickers, No. COA17-1216, 2018 WL 3734373 (N.C. App. Aug. 7, 2018).

On October 2, 2017, the trial court denied petitioner's motion to locate and preserve evidence. ((DE 18-7), pp. 149-150). The superior court provided as follows:

> The offense was committed by Defendant inserting his fingers into the minor victim's vagina and taking a video of that act which he downloaded to his computer and the victim's mother later saw the video while using Defendant's computer.
>
> The Defendant has failed to allege and show that the location and preservation of any physical or biological evidence exists that would be material to any defense to these charges.
>
> Wherefore, the Defendant's motion is denied and dismissed.

(Id.) Petitioner again appealed, and the North Carolina Public Defender was appointed to represent him. (Id. pp. 157-58).

On August 7, 2018, the North Carolina Court of Appeals affirmed the superior court's denial of petitioner's motion for post-conviction DNA testing. State v. Vickers, No. COA17-1216, 2018 WL 3734373 (N.C. App. Aug. 7, 2018). The court of appeals provided:

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. . . .

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.

(Id. at * 2-3). The North Carolina Supreme Court subsequently denied petitioner's petition for discretionary review. State v. Vickers, 371 N.C. 574, 819 S.E.2d 387 (2018).

On September 18, 2018, the court of appeals dismissed petitioner's appeal of the superior court's order denying his motion to locate and preserve evidence for DNA testing. State v. Vickers, No. COA18-35, 2018 WL 4441289 (2018). The court of appeals provided:

> In this matter, Defendant simultaneously filed with the trial court two motions: (1) a motion for post-conviction DNA testing of certain items and (2) a motion to locate and preserve those items. The trial court denied both motions by separate opinions. Defendant appealed each order separately, and both appeals were pending before this Court earlier this year.
>
> We heard the first appeal (COA 17-1216) this past May, and on 7 August 2018 we filed an opinion in that appeal which affirmed the trial court's order denying Defendant's motion for post-conviction DNA testing. Specifically, in that appeal, we concluded that Defendant had failed to show how DNA testing of the items he listed in his motions would be material to his defense. We further held that it was Defendant's burden, pursuant to N.C. Gen. Stat. § 15A-268, to contact custodial agencies for an inventory of items.
>
> In this present appeal (COA 18-35), Defendant challenges the trial court's denial of his motion to locate and preserve the items listed in his motion for DNA testing. But in our 7 August 2018 opinion, we held that the items Defendant sought to test would not be material to his defense. Therefore, we dismiss this present appeal as moot.

Id. at *1. The North Carolina Supreme Court subsequently denied petitioner's motion for discretionary review. See States v. Vickers, 371 N.C. 790, 821 S.E.2d 171 (2018).

On February 20, 2019, petitioner filed a *pro se* motion for appropriate relief ("MAR") in the Wake County Superior Court, which was denied on May 2, 2019. (((DE 18-14, 18-15)). On June

26, 2019, petitioner filed a petition for a writ of certiorari seeking review of the superior court's denial of the MAR, which the court of appeals denied on July 11, 2019. (DE 18-17). On November 1, 2019,[1] petitioner filed the instant petition for a writ of habeas corpus pro se pursuant to § 2254. Petitioner raised the following claims: (1) "The State irreparably prejudiced the Petitioner when it destroyed potentially exculpatory evidence after his conviction;" (2) "The evidence in this case does not correspond to the material allegations of the indictment and/or judgment;" (3) "Petitioner presents new evidence exonerating him of these crimes;" and (4) he received ineffective assistance of trial counsel. Petitioner, additionally, contends that he is actually innocent of the offenses for which he was convicted.

On April 29, 2020, respondent filed a motion for summary judgment pursuant to Rule 56, arguing, inter alia, that petitioner's § 2254 petition should be dismissed as time-barred. On May 26, 2020, petitioner responded to respondent's motion for summary judgment. That same day, petitioner filed a motion for an evidentiary hearing and motion to appoint counsel, which the court denied. Petitioner also filed a motion to compel respondent to produce "petitioner's [motion for appropriate relief] ("MAR"), in its entirety, filed in Wake County Superior Court along with the fifty-two (52) exhibits attached therewith." See (DE 26). Respondent, in turn, opposed petitioner's motion as untimely, and argued that petitioner has not shown the requisite good cause for discovery because the habeas petition is time-barred. In any event, respondent contacted the superior court regarding petitioner's discovery request, and, in turn, filed the only document related to petitioner's MAR

[1] Providing petitioner the benefit of the mailbox rule, the court deems his petition, dated November 1, 2019, but filed on November 5, 2019, to be filed on November 1, 2019. See Houston v. Lack, 487 U.S. 266, 276 (1988) (holding that a *pro se* prisoner's notice of appeal is filed at the moment it is delivered to prison authorities for mailing to the district court).

which was in the superior court's record, but not already part of the federal court record. See ((DE 29), pp. 2-3; (DE 30)). On July 6, 2020, petitioner filed a second motion to appoint counsel, a reply to his motion to compel discovery, and a supplemental appendix.

DISCUSSION

A. Motion to Appoint Counsel and Motion to Compel

The court begins with petitioner's motion to compel discovery. As stated, respondent has provided petitioner with a copy of petitioner's MAR and all attachments within the North Carolina State Court record. See (DE 29, 30). Additionally, petitioner has not shown good cause for further discovery is this action because, as set forth in more detail below, the action is time-barred. See Stephens v. Branker, 570 F.3d 198, 213 (4th Cir. 2009). Thus, petitioner's motion to compel is DENIED.

The court next addresses petitioner's motion to appoint counsel. Petitioner asserts that he requires counsel because respondent is "unable or unwilling to provide complete discovery in this case." (DE 31). As stated, respondent has provided petitioner with all of the discovery material in the superior court's record, and the court has determined that further discovery is unnecessary. Thus, petitioner's motion for the appointment of counsel is DENIED.

B. Motion for Summary Judgment

1. Standard of Review

Summary judgment is appropriate when there exists no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a); Anderson v. Liberty Lobby, 477 U.S. 242, 247 (1986). The party seeking summary judgment bears the burden of initially coming forward and demonstrating an absence of a genuine issue of material fact.

Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). Once the moving party has met its burden, the nonmoving party then must affirmatively demonstrate that there exists a genuine issue of material fact requiring trial. Matsushita Elec. Industrial Co. Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986). There is no issue for trial unless there is sufficient evidence favoring the non-moving party for a jury to return a verdict for that party. Anderson, 477 U.S. at 250.

2. Analysis

Under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), a writ of habeas corpus by a person in custody pursuant to the judgment of a state court must be filed within one year. 28 U.S.C. § 2244(d)(1). The period begins to run from the latest of several dates:

> A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review; B) the date on which the impediment to filing an application . . . is removed . . .; C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

Id.

In this case, petitioner contends that he is entitled to belated commencement of the one-year period under § 2244(d)(1)(D). The statute of limitation period is triggered pursuant to § 2244(d)(1)(D) on the date which the exercise of due diligence would have led a petitioner to discover the factual predicate of his claim. Green v. Johnson, 515 F.3d 290, 305 (4th Cir. 2008) (citing Wade v. Robinson, 327 F.3d 328, 331 (4th Cir. 2003)). In evaluating a petitioner's diligence, a court must consider that the "statute's clear policy calls for promptness." Johnson v. United States, 544 U.S. 295, 311 (2005).

Petitioner first asserts that he is entitled to belated commencement of the one-year period because he did not learn of the factual predicate for his first claim–that the Cary Police Department destroyed "potentially exculpatory" evidence–until June 20, 2017. See ((DE 1), p. 14). Importantly, petitioner has not identified any exculpatory evidence. The record, additionally, reflects that petitioner was aware that his cell phone and other electronic equipment seized pursuant to the search warrant were in the possession of law enforcement prior to the date of his guilty plea. ((DE 18-1), pp. 83-86). With this information, petitioner could have used due diligence to pursue any additional records from the Cary Police Department prior to the expiration of the one-year period of limitation, but there is no evidence to suggest that petitioner did so.[2] Finally, petitioner agreed in his plea agreement that his "plea of guilty may impact how long biological evidence related to [his] case" would be preserved," which again should have prompted petitioner to investigate whether there was any potentially exculpatory evidence. (Id. pp. 11, 78). Thus, petitioner is not entitled to belated commencement of the statute of limitations for this claim.

Petitioner next asserts that he did not discover the factual predicates underlying his second, third, and fourth claims until his trial counsel sent him the case file in May 2017. See ((DE 1), p. 14). Simply put, there is no evidence to suggest that petitioner could not have discovered the factual predicate for any of these claims prior to May 2017, or that he exercised due diligence in attempting to discover these claims. See (DE 18-1), pp. 9, 80-86). Moreover, as stated, petitioner's guilty plea hearing provided him notice of the evidence against him, and he stipulated to the factual

[2] As stated, the court of appeals held that petitioner failed to show that there was biological evidence related to his case which would be material to his defense. See, Vickers, 2018 WL 3734373, at *2. Petitioner has not provided any evidence to the contrary. Petitioner, moreover, has not shown that the North Carolina State court rulings regarding post-conviction DNA testing or the preservation of evidence reached a result contrary to clearly established federal law, or were based on an unreasonable determination of facts.

basis underlying his guilty plea. Accordingly, petitioner either knew or should have known, through the exercise of due diligence from his actual knowledge or the public record, the factual predicates for all of these claims since at least the date his judgment was entered on November 2, 2015. Finally, as discussed in more detail below, petitioner has not presented any new or exonerating evidence. Based upon the foregoing, § 2244(d)(1)(D) does not provide the starting date for the period of limitation.

Because petitioner does not qualify for belated commencement of the statutory period, the statutory period began to run on the date petitioner's judgment became final. Judgment in this case was entered on November 2, 2015. Petitioner thereafter had 14 days to file an appeal. N.C.R. of App. P. 4(a) (amended October 18, 2001, to allow fourteen (14) days to file notice of appeal). Petitioner did not file an appeal. Therefore, petitioner's judgment became final on November 16, 2015. As a result, petitioner's one-year statutory period began to run on November 16, 2015, and ran for 365 days until it expired on November 16, 2016.

None of petitioner's subsequently filed post-conviction motions operate to toll the running of the statutory period because under § 2244(d)(2) the statutory period is tolled during the time "a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending." 28 U.S.C. § 2244(d)(2); see Taylor v. Lee, 186 F.3d 557, 560 (4th Cir. 1999). Tolling is not permitted after the expiration of the statutory period. See Minter v. Beck, 230 F.3d 663, 665–66 (4th Cir. 2000); Streater v. Beck, No. 3:05CV284-MU-02, 2006 WL 1877149, *2 (W.D.N.C. Jul. 6, 2006) ("[I]t is well settled that a . . . motion or petition [filed subsequent to the close of the statutory period] for collateral review in State court cannot somehow breathe new life into an already expired federal limitations period[.]"), appeal dismissed, 207 F.

App'x 271, 2006 WL 3407741 (4th Cir. 2006). Thus, petitioner is not entitled to statutory tolling after the statutory period expired.

As a defense to the running of the statute of limitations, petitioner contends that he is entitled to equitable tolling. Even though the purpose of the AEDPA is to "reduce delays in the execution of state and federal criminal sentences . . . and to further the principles of comity, finality, and federalism," the Fourth Circuit has held that "the AEDPA statute of limitations is subject to equitable tolling." Rouse v. Lee, 339 F.3d 238, 246 (4th Cir. 2003) (en banc). Nonetheless, the Fourth Circuit has noted the rarity in which equitable tolling applies. "Any invocation of equity to relieve the strict application of a statute of limitations must be guarded and infrequent, lest circumstances of individualized hardship supplant the rules of clearly drafted statutes. . . . Principles of equitable tolling do not extend to garden variety claims of excusable neglect." Id. at 246 (citing Irwin v. Dep't of Veterans Affairs, 498 U.S. 89, 96 (1990)). Rather, equitable tolling only is "appropriate when . . . extraordinary circumstances beyond [the petitioner's] control prevented him from complying with the statutory time limit." Id. (citation and quotations omitted).

Here, petitioner contends that he is entitled to equitable tolling for the time period that he was waiting for North Carolina Prisoner Legal Services ("NCPLS") to review his criminal proceedings to determine whether it would provide him assistance in seeking post-conviction relief. However, mere delays in seeking legal advice from NCPLS generally does not warrant equitable tolling. See Lindsay v. Hooks, No. 5:19-HC-2179-FL, 2020 WL 5749999, at * 3 (E.D.N.C. Sept. 25, 2020); Smith v. Dail, No. 1:13CV911, 2014 WL 2442072, at *4 (M.D.N.C. May 30, 2014) ("Petitioner [] fails to explain why–if NCPLS did discourage him from filing–it took him so long to sort through any confusion on this issue and actually file."), appeal dismissed, 584 F. App'x 86 (4th Cir. 2014);

Gray v. Lewis, No. 1:11CV91, 2011 WL 4022787, at *3 (M.D.N.C. Sept. 9, 2011) (concluding that lack of prison libraries and delay in receipt of support from North Carolina Prisoner Legal Services did not warrant equitable tolling). Further, ignorance of the law is not a basis for equitable tolling. See United States v. Sosa, 364 F.3d 507, 512 (2004). Based upon the foregoing, petitioner is not entitled to equitable tolling.

To the extent petitioner asserts his "actual innocence" to overcome the procedural bar of section 2244(d)(1), "tenable actual-innocence gateway pleas are rare: '[A] petitioner does not meet the threshold requirement unless he persuades the district court that, in light of the new evidence, no juror, acting reasonably, would have voted to find him guilty beyond a reasonable doubt.'" McQuiggin v. Perkins, 569 U.S. 383, 386 (2013) (alteration in original) (quoting Schlup v. Delo, 513 U.S. 298, 329 (1995)). To present a credible actual-innocence claim, a petitioner must "support his allegations of constitutional error with new reliable evidence—whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence—that was not presented at trial." Schlup, 513 U.S. at 324.

Here, petitioner's actual innocence claim primarily rests upon a Keystone Forensic Investigation report which petitioner contends proves that he could not have committed the offenses at issue. In particular, petitioner asserts that the report reflects that the video of the alleged sex offense was created on December 3, 2013 at 4:50 p.m. (eastern standard time), at which time he was at work and away from the victim. The report, however, reflects that the video was created at 10:50 p.m. (eastern standard time), and there is no evidence to suggest that petitioner was at work during that time. See ((DE 33-1), p. 5; (DE 21-9), p. 5). The record, instead, supports a finding that petitioner was in the same location as the victim when the video was created. See ((DE 21-11), pp.

6, 8). Moreover, a medical evaluation conducted by SafeChild Advocacy Center reflects the victim reported a pattern of sexual abuse when she was attempting to fall asleep. ((DE 21-7), pp. 11-12, 24). Petitioner's actual innocence claim, additionally, is belied by his sworn in-court admission that he was in fact guilty of the charged offenses, as well as his apology during his plea hearing. ((DE 18-1), pp. 79, 93). Finally, petitioner was aware that his attorney had hired the expert who produced the Keystone Forensic Investigation Report, and has not explained his alleged failure to investigate the contents of the report until May 2017. Rather, it appears petitioner did in fact receive the discovery material, including the Keystone report, in June 2016. See (DE 21-1). Thus, petitioner has not met the exacting standard to establish actual innocence.

CONCLUSION

For the foregoing reasons, petitioner's motion for discovery (DE 26) and motion to appoint counsel (DE 31) are DENIED. Respondent's motion for summary judgment (DE 16) is GRANTED, and the petition is DISMISSED. Additionally, the court DENIES a certificate of appealability. See 28 U.S.C. § 2253(c); Buck v. Davis, 137 S. Ct. 759, 773 (2017); Miller-El v. Cockrell, 537 U.S. 322, 335-38 (2003); Slack v. McDaniel, 529 U.S. 473, 478, 483-85 (2000). The clerk of court is DIRECTED to close this case.

SO ORDERED, this the 17 day of November, 2020.

Terrence Boyle

TERRENCE W. BOYLE
Chief United States District Judge

FILED

2017 JUN 30 PM 2:41

WAKE CO., C.S.C.

BY _____

STATE OF NORTH CAROLINA	IN THE GENERAL COURT OF JUSTICE
COUNTY OF WAKE	SUPERIOR COURT DIVISION
	14CRS211534
STATE OF NORTH CAROLINA)	
)	
v.)	**ORDER**
)	
JASON ROBERT VICKERS)	
)	
Defendant.)	

This matter is before the Court upon a motion by Defendant for Post-Conviction DNA Testing filed April 11, 2017.

The Defendant entered a plea of guilty to first degree sex offense and first degree sexual exploitation of a minor on November 2, 2015. The State's response to Defendant's motion includes a copy of this transcript of plea hearing. The Defendant admitted guilt, stipulated to the factual evidence described by the Prosecutor and apologized to the victim for these crimes.

The offense was committed by Defendant inserting his fingers into the minor victim's vagina and taking a video of that act which he downloaded to his computer and the victim's mother later saw the video while using Defendant's computer.

During the police investigation a computer was seized and a child medical evaluation was conducted. However, there was no physical evidence seized capable of DNA testing for the purpose of comparison.

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.

Appendix

A

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

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

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.

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).

Supreme Court of North Carolina

STATE OF NORTH CAROLINA

v

JASON ROBERT VICKERS

From N.C. Court of Appeals
(17-1216)
From Wake
(14CRS211534)

ORDER

Upon consideration of the petition filed on the 29th of August 2018 by Defendant in this matter for discretionary review of the decision of the North Carolina Court of Appeals pursuant to G.S. 7A-31, the following order was entered and is hereby certified to the North Carolina Court of Appeals:

"Denied by order of the Court in conference, this the 24th of October 2018."

s/ Morgan, J.
For the Court

Upon consideration of the petition filed on the 26th of September 2018 by Defendant in this matter for discretionary review of the decision of the North Carolina Court of Appeals pursuant to G.S. 7A-31, the following order was entered and is hereby certified to the North Carolina Court of Appeals:

"Denied by order of the Court in conference, this the 24th of October 2018."

s/ Morgan, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 26th day of October 2018.

Amy L. Funderburk
Clerk, Supreme Court of North Carolina

M. C. Hackney
Assistant Clerk, Supreme Court Of North Carolina

Copy to:
North Carolina Court of Appeals
Mr. David W. Andrews, Assistant Appellate Defender, For Vickers, Jason Robert - (By Email)
Mr. Glenn Gerding, Appellate Defender - (By Email)
Mr. Joseph L. Hyde, Assistant Attorney General, For State of North Carolina - (By Email)
Mr. Jason Robert Vickers, For Vickers, Jason Robert
Ms. Kimberly N. Callahan, Assistant Attorney General, For State of North Carolina - (By Email)
Ms. N. Lorrin Freeman, District Attorney
Hon. Jennifer Knox, Clerk
West Publishing - (By Email)
Lexis-Nexis - (By Email)

FILED

2017 OCT -2 PM 4:01

WAKE CO., C.S.C.

BY

STATE OF NORTH CAROLINA

COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
14CRS211534

STATE OF NORTH CAROLINA)
)
v.) **ORDER**
)
JASON ROBERT VICKERS)
)
Defendant.)

This matter is before the Court upon a motion by Defendant to Locate and Preserve Evidence dated March 24, 2017.

The Defendant entered a plea of guilty to first degree sex offense and first degree sexual exploitation of a minor on November 2, 2015. Upon review of a stenographic transcript contained within the court file, the Court finds the Defendant admitted guilt, stipulated to the factual evidence provided by the Prosecutor and apologized to the victim for these crimes.

The offense was committed by Defendant inserting his fingers into the minor victim's vagina and taking a video of that act which he downloaded to his computer and the victim's mother later saw the video while using Defendant's computer.

During the police investigation a computer was seized and a child medical evaluation was conducted. However, there was no physical evidence seized capable of DNA testing for the purpose of comparison.

The Defendant has failed to allege and show that the location and preservation of any physical or biological evidence exi ny defense to these charges.

Appendix
B

Wherefore, the Defendant's motion is denied and dismissed.

So ORDERED this, the 2 day of October, 2017.

DONALD W. STEPHENS
SENIOR RESIDENT SUPERIOR COURT JUDGE

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-35

Filed: 18 September 2018

Wake County, No. 14CRS211534

STATE OF NORTH CAROLINA

v.

JASON ROBERT VICKERS, Defendant.

Appeal by Defendant from order entered 2 October 2017 by Judge Donald W. Stephens in Wake County Superior Court. Heard in the Court of Appeals 8 August 2018.

Attorney General Joshua H. Stein, by Assistant Attorney General Kimberly N. Callahan, 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 entered by the trial court denying his motion to locate and preserve evidence for DNA testing.

In this matter, Defendant simultaneously filed with the trial court two motions: (1) a motion for post-conviction DNA testing of certain items and (2) a

motion to locate and preserve those items. The trial court denied both motions by separate opinions. Defendant appealed each order separately, and both appeals were pending before this Court earlier this year.

We heard the first appeal (COA 17-1216) this past May, and on 7 August 2018 we filed an opinion in that appeal which affirmed the trial court's order denying Defendant's motion for post-conviction DNA testing. Specifically, in that appeal, we concluded that Defendant had failed to show how DNA testing of the items he listed in his motions would be material to his defense. We further held that it was Defendant's burden, pursuant to N.C. Gen. Stat. § 15A-268, to contact custodial agencies for an inventory of items.

In this present appeal (COA 18-35), Defendant challenges the trial court's denial of his motion to locate and preserve the items listed in his motion for DNA testing. But in our 7 August 2018 opinion, we held that the items Defendant sought to test would not be material to his defense. Therefore, we dismiss this present appeal as moot.

DISMISSED AS MOOT.

Judges DAVIS and INMAN concur.

Report per Rule 30(e).

Supreme Court of North Carolina

STATE OF NORTH CAROLINA

v

JASON ROBERT VICKERS

From N.C. Court of Appeals
(17-1216 18-35)
From Wake
(14CRS211534)

ORDER

Upon consideration of the petition filed on the 22nd of October 2018 by Defendant in this matter for discretionary review of the decision of the North Carolina Court of Appeals pursuant to G.S. 7A-31, the following order was entered and is hereby certified to the North Carolina Court of Appeals:

"Denied by order of the Court in conference, this the 5th of December 2018."

s/ Morgan, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 12th day of December 2018.

Amy L. Funderburk
Clerk, Supreme Court of North Carolina

M. C. Hackney
Assistant Clerk, Supreme Court Of North Carolina

Copy to:
North Carolina Court of Appeals
Mr. David W. Andrews, Assistant Appellate Defender, For Vickers, Jason Robert - (By Email)
Mr. Glenn Gerding, Appellate Defender - (By Email)
Mr. Joseph L. Hyde, Assistant Attorney General, For State of North Carolina - (By Email)
Mr. Jason Robert Vickers, For Vickers, Jason Robert
Ms. Kimberly N. Callahan, Assistant Attorney General, For State of North Carolina - (By Email)
Ms. N. Lorrin Freeman, District Attorney
Hon. Jennifer Knox, Clerk
West Publishing - (By Email)
Lexis-Nexis - (By Email)

Additional material from this filing is available in the Clerk's Office.