NO. COA01-1541

NORTH CAROLINA COURT OF APPEALS

Filed: 01 October 2002

STATE OF NORTH CAROLINA

v. Chatham County
Nos. 98 CRS 1683
DAVID LEE PERRY 98 CRS 1872

Appeal by defendant from judgment and commitment entered 20 August 2001 by Judge Ola M. Lewis in Chatham County Superior Court. Heard in the Court of Appeals 30 September 2002.

Attorney General Roy Cooper, by Assistant Attorney General Kathy R. Everett-Perry, for the State.

Jarvis John Edgerton, IV for defendant-appellant.

THOMAS, Judge.

Defendant, David Lee Perry, pled guilty on 23 September 1998 to breaking and entering (98CRS1683), larceny (98CRS1683), and attempted assault with a deadly weapon inflicting serious injury (98CRS1872). The trial court consolidated all of the charges and entered a judgment with a suspended sentence. He was ordered to spend 60 days in jail and serve 36 months on supervised probation.

In July and August 2001, defendant's probation officer filed violation reports alleging that defendant had violated the special condition of probation that he "'[n]ot use, possess or control any

illegal drug or controlled substance unless it has been prescribed for the defendant by a licensed physician and is in the original container with the prescription number affixed on it[,]' in that on 7-10-01 defendant tested positive for marijuana, cocaine and benzodiazepine use."

At the hearing, defendant informed the trial court that he would represent himself and executed a waiver of assigned counsel. After a brief recess, the hearing was held with defendant appearing *pro se*. He admitted to violating the terms of his probation, with the trial court then revoking his probation and activating the suspended sentence. Defendant appeals.

By his first assignment of error, defendant contends the trial court failed to make adequate inquiry and elicit sufficient information to establish that he voluntarily and knowingly waived his right to counsel. We disagree.

It is well settled that a defendant may waive his constitutional right to be represented by counsel. *Faretta v. California*, 422 U.S. 806, 45 L. Ed. 2d 562 (1975). However, such waiver must be knowledgeable and voluntary. *Id.* Our Supreme Court has held that the inquiry set out in N.C. Gen. Stat. § 15A-1242 ensures that a defendant's waiver is knowingly and voluntarily made. *State v. Thacker*, 301 N.C. 348, 354, 271 S.E.2d 252, 256 (1980).

> A defendant may be permitted at his election to proceed in the trial of his case without the assistance of counsel only after the trial judge makes a thorough inquiry and is satisfied that the defendant:

> (1) Has been clearly advised of his right to the assistance of counsel, including his right to the assignment of counsel when he is so entitled;
>
> (2) Understands and appreciates the consequences of this decision; and
>
> (3) Comprehends the nature of the charges and proceedings and the range of permissible punishments.

N.C. Gen. Stat. § 15-1242 (1999). "The provisions of [Section 15A-1242] are mandatory and failure to conduct this inquiry constitutes prejudicial error." *State v. Hyatt*, 132 N.C. App. 697, 703, 513 S.E.2d 90, 94 (1999).

In the instant case, defendant was asked by the trial court if he understood the consequences were he to be found guilty of willful violation of his probation. He indicted he did. This question can be seen to fulfill the statutory requirement that defendant comprehend the nature of the charges and proceedings and the range of possible punishments. The court next asked defendant if he wished to be represented by a court-appointed attorney, to hire one of his choice, or to represent himself. He responded that he wished to represent himself. The trial court then indicated he needed to sign a waiver of counsel.

Defendant executed a waiver of counsel which stated, in pertinent part, that he was fully informed of the charges against him, the nature of and the statutory punishment for each such charge, and the nature of the proceedings against him; that he was advised of his right to have counsel appointed to assist him; and that he fully understood and appreciated the consequences of his

decision to waive his right to counsel. Defendant marked the first box on the form which effectively waives the right to "assigned counsel," but not "all assistance of counsel," which is next to the second box.

A written waiver of counsel creates a presumption that a defendant's waiver of counsel is knowing, intelligent, and voluntary. *Hyatt*, 132 N.C. App. at 703, 513 S.E.2d 94. That presumption, however, is rebuttable by evidence of record which demonstrates otherwise. *Id.* "Indeed, our Supreme Court has considered a written waiver as something in addition to the requirements of [Section] 15A-1242, not as an alternative to it." *Id.* Here, defendant informed the trial court he wished to proceed pro se, and then did. Checking the wrong box does not rebut this express intent.

To adequately waive counsel, "the record must reflect that the trial court is satisfied regarding each of the three inquiries listed in the statute." *State v. Stanback*, 137 N.C. App. 583, 586, 529 S.E.2d 229, 230 (2000) (citing *State v. Callahan*, 83 N.C. App. 323, 324, 350 S.E.2d 128, 129 (1986), *disc. review denied*, 319 N.C. 225, 353 S.E.2d 409 (1987)). Also see *State v. Warren*, 82 N.C. App. 84, 85, 345 S.E.2d 437, 438 (1986) (holding that written waiver and verbal statements by defendant were sufficient evidence that statutory requirements were followed). The record must show that defendant was advised of his right to counsel, understood the consequences of his decision, and comprehended the nature of the charges and proceedings and the range of permissible punishments.

The record demonstrates those requirements were met in the present case, and we therefore reject defendant's first assignment of error.

In his second assignment of error, defendant contends the trial court erred in revoking his probation. He argues that his due process rights guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution were violated by the trial court's finding that the defendant waived the probation violation hearing, when there was no evidence in the record to support the conclusion that the defendant knowingly and voluntarily did so. Defendant further argues that, since there was no valid waiver, a probation hearing in accordance with N.C. Gen. Stat. § 15A-1345(e) was required, and his probation was erroneously revoked. We disagree.

While a probation revocation hearing is not a stage of the criminal prosecution, the potential loss of liberty requires the probationer be afforded due process. *Gagnon v. Scarpelli*, 411 U.S. 778, 782, 36 L. Ed. 2d 656, 661-62 (1973). However, the due process requirements for such a hearing are not as extensive as those required in a criminal trial. In *Morrissey v. Brewer*, 408 U.S. 471, 33 L. Ed. 2d 484 (1972), the United States Supreme Court held that termination of parole required due process in the form of "some orderly process, however informal" in determining if a violation had occurred. *Id.* at 482, 33 L. Ed. 2d at 495 (1972); *see also Gagnon*, 411 U.S. at 782, 36 L. Ed. 2d at 661-61 (extending the *Morrissey* holding to probation violations as well).

The holdings in *Morrissey* and *Gagnon* have been codified by the General Assembly in N.C. Gen. Stat. § 15A-1345, which provides for such an orderly, though informal process. "[A] defendant is given the election between imprisonment and probation in the first instance; and once he chooses probation, [Section 15A-1345] guarantees full due process before there can be a revocation of probation and a resulting prison sentence." *State v. Hunter*, 315 N.C. 371, 377, 338 S.E.2d 99, 104 (1986).

Section 15A-1345(e) specifies the requirements for a revocation hearing in North Carolina.

> Before revoking or extending probation, the court must, *unless the probationer waives the hearing*, hold a hearing to determine whether to revoke or extend probation and must make findings to support the decision and a summary record of the preceding.

N.C. Gen. Stat. § 15A-1345(e) (2001) (emphasis added). The right to counsel in a revocation hearing is specifically granted by North Carolina statute beyond the federal due process requirements and requires an affirmative showing that such a waiver is made knowingly and voluntarily. However, there is no such statutory guarantee concerning admissions in such a hearing. N.C. Gen. Stat. § 15A-1345(e). The issue of whether a trial court must acquire a formal waiver of hearing in accepting an admission from a probationer is one of first impression in our jurisdiction. However, cases decided at the federal appellate level are instructive.

In *U.S. v. Stehl*, the Fourth Circuit Court of Appeals held that a trial court's failure to inform the defendant of the

procedural rights waived as a result of an admission in a probation revocation hearing does not create a due process violation. *U.S. v. Stehl*, 665 F.2d 58, 59 (4th Cir. 1981). Such a warning is not one of the procedural safeguards required for a revocation hearing. *Id.* While such a failure would violate due process in a criminal proceeding, "[t]he rights which a probationer or parolee enjoy during a revocation proceeding are simply not co-extensive with those enjoyed by a defendant during a prosecution for a substantive offense." *Id.*

In *U.S. v. Pelensky*, the Second Circuit Court of Appeals held "due process of law does not require a court to elicit a formal waiver from a defendant who has admitted to violating the terms of probation or supervised release." *U.S. v. Pelensky*, 129 F.3d 63, 68 (2nd Cir. 1997). The Eighth Circuit Court of Appeals concluded in *U.S. v. Rapert*, that the "theoretical justifications for the due process safeguards assured in *Boykin v. Alabama* do not manifest themselves at the probation revocation hearing." *U.S. v. Rapert*, 813 F.2d 182, 184-185 (8th Cir. 1987), *but see Boykin*, 395 U.S. 238, 242 23 L. Ed. 2d 274, 279 (1969) (holding that it was error for a state trial judge to accept a guilty plea without an affirmative showing that the plea was knowing and voluntary).

In the instant case, defendant admitted he tested positive for marijuana, cocaine and benzodiazepine. Further, although he possessed a prescription for benzodiazepine, he said he used the other substances in violation of his probation. The silence of the record here as to specific findings that there was a formal,

knowing and voluntary waiver of hearing does not constitute constitutional due process error in the trial court's finding of a waiver.

The requirements of Section 15A-1345(e) were properly followed in revoking defendant's probation. We therefore find defendant's second assignment of error to be without merit.

AFFIRMED.

Judges WALKER and BIGGS concur.

Report per Rule 30(e).