NO. COA10-297

NORTH CAROLINA COURT OF APPEALS

Filed: 7 December 2010

STATE OF NORTH CAROLINA

v. Mecklenburg County
No. 05 CRS 257465

RODRIGUEZ C. MCCLURE

Appeal by defendant from judgment entered 20 January 2010 by Judge W. Robert Bell in Mecklenburg County Superior Court. Heard in the Court of Appeals 11 October 2010.

Attorney General Roy Cooper, by Assistant Attorney General Seth P. Rosebrock, for the State.

James H. Monroe for defendant-appellant.

ELMORE, Judge.

On 12 June 2007, Rodriguez McClure (defendant) pled guilty to one count of attempted trafficking in cocaine and one count of maintaining a vehicle or dwelling place for the use or sale of controlled substances. The trial court consolidated the two charges into one judgment and imposed a suspended sentence of nineteen to twenty-three months' imprisonment, placing defendant on supervised probation for a period of thirty-six months.

On 10 November 2009, defendant's probation officer filed a probation violation report alleging that defendant willfully violated the regular condition of probation which required defendant to "obtain prior approval from the officer for, and

notify the officer of, any change in address . . . ." The report alleged that defendant violated this condition in that

> THE SURVEILLANCE OFFICER ON 11/5/09 WAS INFORMED THAT THE OFFENDER DID NOT LIVE AT 1517 BURTON STREET BY THE RESIDENCE AND ON 11/10/09 THE SUPERVISOR WAS ADVISED AGAIN THAT THE OFFENDER DID NOT LIVE AT THAT ADDRESS. THE OFFENDER DID NOT NOTIFY THE PROBATION OFFICE THAT HE HAD CHANGED RESIDENCE NOR COULD HE PROVIDE A VIABLE ADDRESS.

On 12 November 2009, defendant appeared in court at a pre-trial hearing and signed a waiver-of-counsel form, which was certified by a district court judge.

The trial court held a probation revocation hearing on 20 January 2010, at which defendant appeared *pro se*. At the beginning of the hearing, the court found that defendant had previously waived his right to counsel at a pre-trial hearing and confirmed that defendant wished to represent himself. Defendant admitted his violation. Defendant's probation officer summarized the violation by explaining that defendant "stopped coming in" to the probation office, left his residence of record, "was spending his nights at places where he wasn't supposed to be," and did not notify the probation officer about the change. The probation officer was able to track down defendant after placing him under surveillance by the Charlotte Mecklenburg Police Department. At the hearing, defendant admitted that he "was staying at night somewhere else." The trial court found that defendant willfully violated a condition of probation as set out in the probation violation report. Therefore, the trial court revoked defendant's probation and activated his

suspended sentence of nineteen to twenty-three months' imprisonment. Defendant gave oral notice of appeal in open court.

Defendant raises two arguments on appeal. First, defendant contends that the trial court erred by allowing defendant to proceed *pro se* at his revocation hearing without conducting the inquiry required by N.C. Gen. Stat. § 15A-1242. Second, defendant argues that the trial court erred in revoking defendant's probation based on alleged violations of which defendant did not have notice, in violation of N.C. Gen. Stat. § 15A-1345.

I.

A criminal defendant has a right to counsel during a probation revocation hearing, including the right to refuse counsel and proceed *pro se*. *State v. Evans*, 153 N.C. App. 313, 315, 569 S.E.2d 673, 674-75 (2002). "However, the right to assistance of counsel may only be waived where the defendant's election to proceed *pro se* is 'clearly and unequivocally' expressed and the trial court makes a thorough inquiry as to whether the defendant's waiver was knowing, intelligent and voluntary." *Id.* at 315, 569 S.E.2d at 675 (citations omitted). The trial court's inquiry is only satisfied when the court fulfills these statutory requirements:

> A defendant may be permitted at his election to proceed . . . without the assistance of counsel only after the trial judge makes 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. § 15A-1242 (2009). Where a defendant requests to proceed *pro se*, the provisions of N.C. Gen. Stat. § 15A-1242 are mandatory. *State v. Debnam*, 168 N.C. App. 707, 708, 608 S.E.2d 795, 796 (2005); *Evans*, 153 N.C. App. at 315, 569 S.E.2d at 675.

Here, defendant signed a written waiver, which is "presumptive evidence that a defendant wishes to act as his or her own attorney." *See State v. Whitfield*, 170 N.C. App. 618, 620, 613 S.E.2d 289, 291 (2005) (citation omitted). "Once given, a waiver of counsel is good and sufficient until the proceedings are terminated or until the defendant makes known to the court that he desires to withdraw the waiver and have counsel assigned to him." *State v. Hyatt*, 132 N.C. App. 697, 700, 513 S.E.2d 90, 93 (1999) (citation omitted). "The burden of showing [a] change in the desire of the defendant for counsel rests upon the defendant." *State v. Watson*, 21 N.C. App. 374, 379, 204 S.E.2d 537, 540-41, (1974).

Here, defendant executed a waiver of his right to counsel at a pretrial hearing on 12 November 2009, in which he "freely, voluntarily, and knowingly declare[d]" the following: "I waive my right to all assistance of counsel which includes my right to assigned counsel and my right to the assistance of counsel. In all respects, I desire to appear in my own behalf, which I understand I have the right to do." The waiver was certified by Judge Reagan A. Miller:

> I certify that the above named defendant has been fully informed in open court of the charges against him/her, the nature of and the statutory punishment for each charge, and the nature of the proceeding against the defendant and his/her right to have counsel assigned by the court and his/her right to have the assistance of counsel to represent him/her in this action; that the defendant comprehends the nature of the charges and proceedings and the range of punishments; that he/she understands and appreciates the consequences of his/her decision and that the defendant has voluntarily, knowingly, and intelligently elected in open court to be tried in this action[] . . . without the assistance of counsel, which includes the right to assigned counsel and the right to assistance of counsel.

Defendant argues that the trial court should have conducted a N.C. Gen. Stat. § 15A-1242 colloquy at the revocation hearing because there was no transcript from the 12 November 2009 pre-trial proceeding at which defendant waived his right to counsel. Defendant cites to *State v. Debnam*, 168 N.C. App. 707, 608 S.E.2d 795 (2005), in support of his argument. We disagree with defendant's contention and find *Debnam* distinguishable from the instant case. In *Debnam*, the defendant executed a waiver of ***assigned*** counsel at a pre-trial hearing and sought to hire his own attorney. Seven months later, at the revocation hearing, the defendant had failed to retain counsel and ultimately proceeded *pro se*. *Id.* at 708, 608 S.E.2d at 795. At the revocation hearing, the trial court failed to fully comply with the N.C. Gen. Stat. § 15A-1242 inquiry, and we held that the trial court's colloquy was insufficient, explaining:

> Although the record shows that defendant executed a written waiver of counsel form

> waving his right to *assigned* counsel and informed the trial court that he wanted to represent himself, the trial court failed to advise defendant of the consequences of his decision to represent himself or of the "nature of the charges and proceedings and the range of permissible punishments."

Id. at 709, 608 S.E.2d at 796. Here, defendant previously executed a waiver of his right to counsel, unlike *Debnam*, in which the defendant previously executed a waiver of only *assigned* counsel. Therefore, *Debnam* is not controlling.

Instead, we find that the instant case is controlled by *State v. Kinlock*, 152 N.C. App. 84, 566 S.E.2d 738 (2002), *aff'd per curiam*, 357 N.C. 48, 577 S.E.2d 620 (2003), in which this Court held that a pre-trial certification conducted by a judge different from the judge who presided over the trial satisfied the statutory requirement under N.C. Gen. Stat. § 15A-1242. In *Kinlock*, we explained:

> Here, defendant signed a waiver of counsel and that waiver was certified by Judge James E. Ragan after a pre-trial proceeding on 11 December 2000. Although there is no transcript of the waiver proceeding, "there is a presumption of regularity accorded the official acts of public officers." *State v. Kornegay*, 313 N.C. 1, 19, 326 S.E.2d 881, 895 (1985). In North Carolina the burden is on the appellant to show error and to show that the error was prejudicial. *State v. Murphy*, 100 N.C. App. 33, 41, 394 S.E.2d 300, 305 (1990). "An appellate court is not required to, and should not, assume error by the trial [court] when none appears on the record before the appellate court." *State v. Williams*, 274 N.C. 328, 333, 163 S.E.2d 353, 357 (1968). "When a defendant executes a written waiver which is in turn certified by the trial court, the waiver of counsel will be presumed to have been knowing, intelligent, and voluntary, unless the rest of the record indicates

> otherwise." *State v. Warren*, 82 N.C. App. 84, 89, 345 S.E.2d 437, 441 (1986).

Id. at 89-90, 566 S.E.2d at 741. There is no evidence in the record to indicate that defendant attempted to withdraw his waiver, obtain appointed counsel, or retain his own counsel. To the contrary, at the revocation hearing, the trial court confirmed that defendant signed the waiver and still wished to represent himself. Therefore, defendant has failed to rebut the presumption that he knowingly, voluntarily, and intelligently waived his right to counsel.

II.

Next, defendant argues that the trial court improperly considered facts outside the allegations contained in the violation report in finding that defendant violated a condition of probation. Specifically, defendant claims that the trial court relied on testimony that defendant stopped coming into the probation office, disappeared, and failed to make restitution payments. Defendant argues that this violates N.C. Gen. Stat. § 15A-1345(e), which requires the State to "give the probationer notice of the hearing and its purpose, including a statement of the violations alleged." N.C. Gen. Stat. § 15A-1345(e)(2009).

Defendant cites to *State v. Cunningham*, 63 N.C. App. 470, 305 S.E.2d 193 (1983), in support of his argument. In *Cunningham*, the probation violation report alleged that the defendant violated the "good behavior" condition of his probation by playing loud music that disturbed his neighbors. *Id.* at 474, 305 S.E.2d at 196. However, this Court held that the defendant's conduct did not

amount to a violation. *Id.* at 474-75, 305 S.E.2d at 196. The State also sought to prove additional conduct in violation of defendant's probation -- that defendant trespassed upon and damaged real property belonging to his neighbors -- of which defendant had not been given notice in the violation report. *Id.* at 475, 305 S.E.2d at 196. This Court held that the evidence regarding the defendant's actions in damaging his neighbors' property should not have been considered because the defendant was not given notice of the alleged violation in the violation report. *Id.* at 475, 305 S.E.2d at 196-97. Therefore, this Court held that the evidence was insufficient to support the trial court's revocation of the defendant's suspended sentence. *Id.* at 475, 305 S.E.2d at 197.

We find the instant case distinguishable from *Cunningham*. Even assuming *arguendo* that the trial court improperly allowed evidence concerning facts outside the allegations contained in the report, the State nevertheless presented sufficient evidence to support the probation violation contained in the violation report. While we acknowledge that the trial court and the probation officer engaged in some dialogue regarding defendant's additional conduct, defendant admitted his violation, and the probation officer's testimony further established that defendant changed residences without providing notice, which constitutes a violation of a valid condition of probation. "Any violation of a valid condition of probation is sufficient to revoke defendant's probation." *State v. Tozzi*, 84 N.C. App. 517, 521, 353 S.E.2d 250, 253 (1987) (citations omitted). Furthermore, we reject defendant's assertion that the

trial court must have relied on the additional conduct to find a willful violation because the trial court made no specific findings of fact. At the hearing and in the order, the trial court specified that it was finding a willful violation as set out in the violation report. Given the trial court's reference to the violation report, we find no support for defendant's assertion. Therefore, we conclude that the trial court's findings are supported by competent evidence, and we find no abuse of discretion in the trial court's revocation of defendant's probation. *State v. Tennant*, 141 N.C. App. 524, 526, 540 S.E.2d 807, 808 (2000) ("'The findings of the judge, if supported by competent evidence, and his judgment based thereon are not reviewable on appeal, unless there is a manifest abuse of discretion.'" (quoting *State v. Guffey*, 253 N.C. 43, 45, 116 S.E.2d 148, 150 (1960))). Accordingly, we affirm the trial court's judgment revoking defendant's probation and activating his suspended sentence.

Affirmed.

Chief Judge MARTIN and Judge JACKSON concur.

Report per Rule 30(e).