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NO. COA10-437

NORTH CAROLINA COURT OF APPEALS

Filed: 2 November 2010

STATE OF NORTH CAROLINA

v.

CHRISTOPHER HOOKER

Lenoir County
Nos. 06 CRS 700394
08 CRS 1299

Appeal by defendant from judgments entered 16 December 2009 by Judge Paul L. Jones in Lenoir County Superior Court. Heard in the Court of Appeals 25 October 2010.

Attorney General Roy Cooper, by Assistant Attorney General Tenisha S. Jacobs, for the State.

Peter Wood, for defendant-appellant.

MARTIN, Chief Judge.

Christopher Hooker ("defendant") appeals from judgments revoking his probation and activating his sentences. He contends the trial court violated his constitutional right to assistance of counsel by failing to conduct a proper inquiry into his waiver of counsel pursuant to N.C.G.S. § 15A-1242 before allowing defendant to proceed *pro se*.

Defendant was convicted in district court of driving while license revoked on 13 November 2006 in case number 06 CR 700394. His sentence of 45 days was suspended, and he was placed on probation for 12 months. This probationary period was extended for

one year by the district court on 25 July 2007, and again for one year on 20 February 2008, each time after defendant committed probation violations. The probationary period was thus extended to 12 November 2009. After additional violations, on 22 October 2008, the district court added several special conditions of probation.

On 9 February 2009, defendant was again convicted in district court of driving while license revoked in case number 08 CR 1299. He was sentenced to 120 days. The sentence was suspended, and he was placed on 24 months probation. On 13 May 2009, the district court revoked defendant's probation and activated his sentence in 06 CR 700394. Defendant appealed to superior court, where probation was extended by an additional 12 months by order entered on 30 September 2009. The new extension of the probationary period was set to expire on 12 November 2010. On 14 December 2009, defendant's probation officer filed a report in case number 06 CR 700394 alleging the following violations: (1) on 9 December 2009, defendant tested positive for marijuana use; (2) defendant failed to pay \$200 to the clerk of superior court; (3) he was in arrears in the amount of \$60 in accrued supervision fees; and (4) he was away from his residence during curfew hours on two occasions. A second report was filed on the same day in case 08 CR 1299 alleging the following violations: (1) the same positive drug test from 9 December 2009; (2) failure to pay \$53 to the clerk of court; and (3) the same two curfew violations as alleged in the first report.

The revocation hearing was held in the superior court on 16 December 2009. At the start of the probation revocation hearing, the following exchange took place:

THE COURT: Okay. Mr. Hooker, do you understand you have two probation violation cases?

DEFENDANT: Yes, sir.

THE COURT: Both misdemeanor; do you understand that?

DEFENDANT: (Nods head up and down.)

THE COURT: And do you understand that if your probation were to be revoked you could be required to serve the sentence in the two cases here?

DEFENDANT: Yes, sir.

THE COURT: Understanding that are you asking me to appoint a lawyer for you if you can't afford one, are you going to hire a lawyer or represent yourself?

DEFENDANT: Represent myself.

THE COURT: Okay. Sign a waiver.

Whereupon, defendant signed a waiver of counsel form indicating his desire to waive counsel and represent himself. Defendant admitted to the violations, and the trial court ordered that probation be revoked and defendant's sentences activated. From the judgments entered, defendant appeals.

Defendant contends the trial court erred by allowing defendant to waive counsel and proceed *pro se* without first conducting a proper colloquy pursuant to N.C.G.S. § 15A-1242 in order to safeguard defendant's constitutional right to the assistance of counsel. We agree.

A criminal defendant has a right to representation at a probation revocation hearing, although he or she may elect to refuse counsel and proceed *pro se*. See *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 (citation omitted). This inquiry is satisfied when the trial court fulfills the requirements of N.C.G.S. § 15A-1242, which provides:

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 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). These provisions are mandatory, and failure to adhere to them constitutes prejudicial error. *Evans*, 153 N.C. App. at 315, 569 S.E.2d at 675; *State v. Hyatt*, 132 N.C. App. 697, 703, 513 S.E.2d 90, 94 (1999).

While a written waiver is permitted, it is not a suitable substitute for a court inquiry. *State v. Wells*, 78 N.C. App. 769,

773, 338 S.E.2d 573, 575 (1986). As the State points out, a defendant's written waiver of counsel which has been certified by the trial court raises a presumption that the waiver was "knowing, intelligent and voluntary." See *Evans*, 153 N.C. App. at 315, 569 S.E.2d at 675. However, "[t]he execution of a written waiver of the right to assistance of counsel does not abrogate the trial court's responsibility to ensure the requirements of N.C. Gen. Stat. § 15A-1242 are fulfilled." *Id.* at 316, 569 S.E.2d at 675.

Here, with regard to subsection (1) of section 15A-1242, which requires a trial court to "clearly advise[]" defendant of his right to assistance of counsel, the trial court's inquiry partially satisfied this requirement. The court asked defendant if he wanted an appointed attorney or whether he was going to hire an attorney or represent himself, and defendant stated that he would represent himself. However, the trial court's question does not so much "clearly advise[]" defendant of his right to the assistance of counsel, as much as ask him what his decision will be as far as obtaining counsel. Putting aside the question of whether subsection (1) of the statutory inquiry was properly fulfilled, we turn to the next two subsections.

Next, the trial court sought to determine whether defendant understood the consequences of the hearing by asking defendant if he was aware that he had two probation violation cases involving misdemeanors; defendant indicated his understanding. The trial court also asked defendant if he understood that the consequences of revocation of his probation meant that he would have to serve

active sentences in the two cases. Defendant replied, "Yes, sir." These questions directly address subsection (2) of N.C.G.S. § 15A-1242 which requires a trial court to determine whether the defendant appreciates the consequences of his decision.

However, regarding the third subsection and the question of whether defendant was properly informed of the nature of the charges and the possible range of punishment, there is no indication from the record or transcript that the trial court specifically referred to the actual charges, or the actual range of punishments. The trial court merely asked defendant if he knew he was subject to serving active time for two misdemeanors, but no further inquiry was made. The omission of detailed questions which directly address the nature of the charges or the possible range of punishment renders the court's colloquy inadequate to safeguard defendant's constitutional right to the assistance of counsel pursuant to N.C.G.S. § 15A-1242.

Therefore, we conclude that the trial court's inquiry fell below the standard required of trial courts as enumerated in section 15A-1242, and that "the trial court failed to determine whether defendant's waiver of his right to counsel was knowing, intelligent and voluntary." See *Evans*, 153 N.C. App. at 316, 569 S.E.2d at 675. Thus, the judgments of the trial court activating defendant's sentences must be reversed, and the matter remanded to the trial court for a new probation revocation hearing.

Reversed and remanded.

Judges ELMORE and JACKSON concur.

Report per Rule 30(e).