

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

NO. COA11-341
NORTH CAROLINA COURT OF APPEALS

Filed: 6 December 2011

STATE OF NORTH CAROLINA

v.

Buncombe County
No. 08 CRS 708271

JACOB WIEBE

Appeal by Defendant from judgment entered 5 January 2010 by Judge James L. Baker in Buncombe County Superior Court. Heard in the Court of Appeals 28 September 2011.

Attorney General Roy Cooper, by Assistant Attorney General Katherine A. Murphy, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defenders Mary Cook and Kristen L. Todd, for Defendant.

BEASLEY, Judge.

Jacob Wiebe (Defendant) appeals from the judgment entered on his conviction for driving while license revoked. For the reasons stated below, we find no error.

On 4 December 2008, Defendant was issued citations for three offenses by North Carolina Highway Patrol Trooper Patricia Lord: (1) driving while license revoked, (2) unsafe movement,

and (3) driving with a foreign license while license revoked. On 17 August 2009, Defendant appeared before the Honorable Alan Z. Thornburg in the Superior Court for Buncombe County. Judge Thornburg asked Defendant a series of questions, and Defendant affirmed that he understood (1) that he had the right to an attorney, and if he could not afford an attorney one would be appointed for him; (2) if he represented himself he would be bound by the rules of evidence and procedure, and the judge would not be allowed to advise him on legal issues; and (3) that he was facing a possible sentence of 120 days incarceration. Defendant stated that he was unsure whether he wanted to be represented by counsel, so the court took a thirty minute recess to give him time to decide. After the recess, the trial court announced that Defendant refused to sign any waiver and would therefore proceed *pro se*.

On 4 January and 5 January 2011, Defendant appeared before the Honorable James L. Baker in Buncombe County Superior Court for trial on the aforementioned offenses. Defendant stated that he was representing himself. Defendant had the following exchange with the court:

THE COURT: Mr. Wiebe, do you have an attorney, sir?

[DEFENDANT]: No.

THE COURT: All right. You're appearing on

your own behalf; is that correct?

[DEFENDANT]: Yes.

THE COURT: It looks like, from the court file, sir, that you appeared in Superior Court on or about August 17th, 2009, and that Judge Alan Thornburg explained to you your rights concerning counsel and that you -- it was entered as a waiver of your right to assign counsel. It appears from the court record that you chose not to sign the waiver of counsel. The court, however, did take that as a waiver.

. . . .

THE COURT: Well, I was not present on August 17th. Let me just advise you that you do have those rights. It was determined by the presiding judge in August that you did not wish to be considered for court-appointed counsel. I recognize from the court file that you did not sign a waiver of that right, but I take it you have not requested that an attorney be assigned to represent you on this case. Is that correct?

[DEFENDANT]: That's correct.

THE COURT: And you have not asked for a court-appointed lawyer?

[DEFENDANT]: No.

THE COURT: You understand, though, as I have explained to you, you do have the right to make such a request. You would have to be found to be financially unable to hire your own attorney. That you do have, and have had from the beginning of these charges, the right to hire an attorney of your own choosing if you wish do so. You do have the right to represent yourself. It appears from the court record that you are accused of three offenses. Those charges are: Driving

while license revoked; that's a misdemeanor. It has a possible maximum punishment of 120 days, depending on such things as prior criminal record, if any. The charge of making an unsafe movement, which is an infraction, having a possible sanction of a fine. And the charge of using a foreign license while driving with your license in this state revoked. . . . It has a possible maximum punishment of 60 days. Those are the charges that you are accused of. Mr. Wiebe, I will certainly allow you to represent yourself. You have that right. I will, however, not be allowed to assist you in your representation. I, of course, am required to be impartial. I can't give the State any assistance; I can't give you any assistance, assuming for the moment that I could. You will be bound by the same rules of evidence and courtroom procedure that the State will be bound, and I cannot give you any assistance in that regard.

After again being advised of his rights, Defendant proceeded *pro se*.

On 5 January 2010, Defendant was found guilty of driving while license revoked and not responsible for making an unsafe movement by a Buncombe County jury. The charge of driving with a foreign license while license revoked was dismissed by the court at the close of the State's evidence. The trial court ordered that Defendant serve a suspended sentence of 45 days in the custody of the Buncombe County Sheriff, and be placed on supervised probation for twelve months. Defendant gave notice of appeal in open court on the same day.

Defendant first argues that he was not competent to stand trial, and that the trial court erred by failing to inquire into his competency. We disagree.

Our Supreme Court has recognized that “[i]t is beyond question that a conviction cannot stand where the defendant lacks capacity to defend himself.” *State v. King*, 353 N.C. 457, 467, 546 S.E.2d 575, 585 (2001) (citations omitted). “[A] trial court has a constitutional duty to institute, *sua sponte*, a competency hearing *if there is substantial evidence before the court* indicating that the accused may be mentally incompetent.” *State v. Young*, 291 N.C. 562, 568, 231 S.E.2d 577, 581 (1977) (internal quotation marks and citations omitted).

“[T]he standard for competence to stand trial is whether the defendant has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and has a rational as well as factual understanding of the proceedings against him.” *State v. Badgett*, 361 N.C. 234, 259, 644 S.E.2d 206, 221 (2007) (internal quotation marks and citations omitted). Even where there is some evidence that could suggest incompetence, if that evidence is outweighed by substantial evidence indicating a defendant is competent to stand trial, the court is not required to institute a competency hearing. *See id.* at 260, 644 S.E.2d at 221.

Defendant argues that there were several "red flags" which should have raised a *bona fide* doubt about whether he was competent to stand trial. Although some of Defendant's arguments and motions were indeed peculiar, there is no evidence in the record that raises a *bona fide* doubt as to Defendant's competence. Defendant acted with a rational and factual understanding of the proceedings both prior to and during the trial, as he made motions and objections and called, examined, and cross-examined witnesses. Defendant even made a successful motion to dismiss the charge of driving with a foreign license while license revoked at the close of the State's evidence. Finally, Defendant convinced the jury that he was not responsible for the infraction of unsafe movement. The record contains substantial evidence that Defendant was competent to stand trial. Accordingly, this argument is overruled.

II.

Defendant next argues that the trial court erred by allowing him to represent himself. We disagree.

If a defendant is competent to stand trial and wishes to proceed *pro se*, a trial court

has two choices: (1) it may grant the motion to proceed *pro se*, allowing the defendant to exercise his constitutional right to self-representation, if and only if the trial court is satisfied that he has knowingly and voluntarily waived his corresponding right

to assistance of counsel, or . . . (2) it may deny the motion. . . .

State v. Lane, 365 N.C. 7, 22, 707 S.E.2d 210, 219 (2011). To determine that the defendant has knowingly and voluntarily waived his right to assistance of counsel, the trial court must

make[] thorough inquiry and [be] 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).

It is important to note that "the competence that is required of a defendant seeking to waive his right to counsel is the competence to *waive the right*, not the competence to represent himself,' meaning that 'a criminal defendant's ability to represent himself has no bearing upon his competence to *choose self-representation.*'" *Lane*, 365 N.C. at 20, 707 S.E.2d at 218-19 (quoting *Godinez v. Moran*, 509 U.S. 389, 399-400, 125 L. Ed. 2d 321, 332-33 (1993)).

Both Judges Thornburg and Baker respectively conducted inquiries pursuant to N.C. Gen. Stat. § 15A-1242. Defendant

does not dispute this fact. Defendant instead argues that neither judge should have been satisfied with Defendant's answers, and therefore should not have concluded, respectively, that he knowingly and willingly waived his right to counsel. In support of this assertion, Defendant essentially rehashes the arguments that he was not competent to stand trial and that the trial court erred by not holding a competency hearing.

In making this argument, Defendant relies on the decision of the United States Supreme Court in *Indiana v. Edwards*, 554 U.S. 164, 174, 171 L. Ed. 2d 345, 355 (2008), which held that a defendant's Constitutional right to self-representation can be abridged by the court ordering that defendant be represented by counsel. Defendant's reliance on *Edwards* is misplaced, because *Edwards* only held that the court can order that a defendant be represented by counsel when his competency is at issue. In the instant case, the trial court was satisfied that Defendant was capable of representing himself. This decision was not violative of *Edwards*, and this argument is also overruled.

No error.

Judges STEPHENS and ERVIN concur.

Report per Rule 30(e).