

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA01-659

NORTH CAROLINA COURT OF APPEALS

Filed: 4 June 2002

STATE OF NORTH CAROLINA

v.

Durham County
Nos. 99 CRS 65167, 67965

KYJAHRE HASAN RILEY

Appeal by defendant from judgments entered 12 December 2000 by Judge Henry W. Hight, Jr., in Durham County Superior Court. Heard in the Court of Appeals 28 May 2002.

Attorney General Roy Cooper, by Assistant Attorney General Harriet F. Worley, for the State.

Douglas T. Simons for defendant appellant.

McCULLOUGH, Judge.

Defendant appeals from judgments revoking his probation. In light of our holding in *State v. Sexton*, 141 N.C. App. 344, 539 S.E.2d 675 (2000), we reverse and remand to the trial court for further proceedings.

On 6 July 2000, defendant pled guilty to possession of a stolen vehicle, felony speeding to elude arrest, reckless driving, and two counts of second-degree burglary. The trial court consolidated the burglary counts for judgment, suspending a sentence of 11 to 14 months' imprisonment and placing defendant on supervised probation for two years. Defendant's remaining offenses

were consolidated into a separate judgment imposing an identical suspended sentence and probation period.

In violation reports dated 8 September and 9 October 2000, defendant was charged with the following infractions: (1) operating a motor vehicle without a license; (2) failing a drug test; and (3) violating curfew on two occasions. Defendant appeared before Judge Hight on 13 November 2000 and signed a form waiving his right to assignment of counsel. Defendant's revocation hearing was continued until 11 December 2000, in order to allow him to retain private counsel.

At the beginning of the revocation hearing, defendant informed the court that he had not yet raised the \$7,500 he needed to hire counsel. He claimed that "arrangements have been made for the middle of January for the attorney to represent me[.]" The court denied defendant's motion for a continuance. Defendant asked, "[S]o I'm not entitled to any representation, Your Honor?" The court replied that it had given defendant a chance to retain an attorney. Defendant again inquired, "So I have to represent myself?" The court responded, "Yes, sir, I'll let you do that." As the State prepared to call its first witness, defendant had the following exchange with the trial court:

[DEFENDANT]: Excuse me, Your Honor, can I ask a question? Is it possible that I can ask for a court appointed lawyer to represent me? I cannot represent myself.

THE COURT: You've waived that.

The court proceeded with the hearing, ultimately finding defendant

in willful violation of the terms of his probation. The court entered judgments activating defendant's suspended sentences.

Relying on *Sexton*, defendant argues the trial court violated his constitutional rights to due process and effective assistance of counsel by denying his request for appointed counsel. See U.S. Const. amends. VI, XIV; N.C. Const. art. I, §§ 19, 23. The defendant in *Sexton* was charged with violating his probation. *Sexton*, 141 N.C. App. at 345, 539 S.E.2d at 676. At his initial appearance, the defendant waived his right to assigned counsel with the intention of retaining private counsel. *Id.* However, the defendant informed the trial court at his probation hearing that he had lost his job and was unable to afford private counsel. He "requested a continuance and appointment of counsel. The trial court denied both requests, finding defendant previously waived his right to an attorney." *Id.* Because a waiver of the constitutional right to counsel may be revoked upon notice to the trial court, see *State v. Hyatt*, 132 N.C. App. 697, 700, 513 S.E.2d 90, 93 (1999), we found error as follows:

The trial court was aware of defendant's desire for assistance of counsel, but denied the request based on defendant's prior waiver. Defendant carried his burden of showing a change in his desire for assigned counsel, and the record reflects his request was for good cause. Thus, the trial court's denial of the request for assistance violated defendant's constitutional right to an attorney.

Sexton, 141 N.C. App. at 347, 539 S.E.2d at 677. We reversed the order extending defendant's probation and remanded the cause for a new hearing. *Id.* at 348, 539 S.E.2d at 677.

The State concedes it is unable to distinguish *Sexton* from the facts of this case. We agree with the parties that our holding in *Sexton* applies with equal force here. Defendant gave clear notice to the court of his desire to revoke his waiver and obtain appointed counsel. The trial court's refusal to honor the revocation was erroneous. Accordingly, we reverse the judgments and remand for a new hearing.

Reversed and remanded.

Chief Judge EAGLES and Judge TIMMONS-GOODSON concur.

Report per Rule 30(e).