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NO. COA03-1451

NORTH CAROLINA COURT OF APPEALS

Filed: 7 September 2004

STATE OF NORTH CAROLINA

v.  
CRITINA VERNETRA JONES and  
CEDRIC LANIER GRIFFIN,  
Defendants.

Currituck County  
Nos. 02 CRS 50698  
02 CRS 50699

Appeal by defendants from judgments entered 5 June 2003 by Judge W. Russell Duke in the Superior Court in Currituck County. Heard in the Court of Appeals 17 June 2004.

*Attorney General Roy Cooper, by Assistant Attorney Generals Richard G. Sowerby and Mary S. Mercer, for the State.*

*Sofie W. Hosford, for defendant-appellant Critina Vernetra Jones.*

*Terry W. Alford, for defendant-appellant Cedric Lanier Griffin.*

HUDSON, Judge.

Defendants Cedric Lanier Griffin ("Griffin") and Critina Vernetra Jones ("Jones") were tried on drug charges at the 2 June 2003 Criminal Session of the Superior Court in Currituck County. The jury convicted Griffin of possession with intent to sell and deliver cocaine, and of possession of drug paraphernalia, and convicted Jones of possession with intent to sell and deliver cocaine, and maintaining a vehicle for the purpose of using or selling cocaine. The court sentenced Griffin to six to eight

months imprisonment followed by a term of 45 days, suspended, and 36 months probation. Jones received a sentence of six to eight months imprisonment, followed by a term of six to eight months imprisonment, suspended, and 36 months probation. Defendants appeal. For the reasons discussed below, we hold that defendants are entitled to a new trial.

This case was initially on the December 2002 calendar, and Griffin and Jones waived appointment of counsel on 11 December 2002. In addition, Jones had previously waived counsel in June 2002 as to her possession of drug paraphernalia charge. Following a continuance, the District Attorney in Currituck County called this case for trial on 2 June 2003. The State informed the court that H.P. Williams, the attorney named as counsel of record, denied representing Griffin or Jones due to lack of payment. Griffin and Jones told the prosecutor that Mike Sanders represented them. However, when contacted, Mr. Sanders also denied representing defendants due to lack of payment. The State then told the court that defendants had previously waived court-appointed counsel.

Jones informed the court that she and Griffin had not yet been able to meet with Mr. Sanders, and asked for a continuance in order to get a lawyer. The court told defendants that their case would be tried that week whether they had counsel or not, and advised defendants to contact Mr. Williams. Mr. Williams appeared in court that afternoon, informed the court that defendant Jones did not want him to represent her, and asked to withdraw. Jones asked if defendants could get another lawyer before Mr. Williams was allowed

to withdraw. The court told defendants that it would entertain a motion to continue filed by an attorney, but that otherwise the case was for trial. Jones asked if she would be forced to proceed *pro se* because she knew she could not get Mr. Sanders to court that week. The court told her the case was for trial that week, and allowed Mr. Williams to withdraw.

On 4 June 2003, the case was called for trial. Jones asked about court-appointed counsel, but the court replied, "I think you waived your right," and proceeded to try the case. Both defendants appeared *pro se*.

The State's evidence tended to show that the offenses occurred on 18 June 2002. Officer Joey Davidson of the Currituck County Sheriff's Department received a tip from an informant that Barbara Thomas and her drug supplier would be in Currituck County in a Nissan Maxima that day. Officer Davidson saw a Nissan Maxima with three occupants pull into a grocery store parking lot at 6 p.m. Based on undisclosed corroborative information, Officer Davidson stopped the car.

Jones was driving, with Griffin in the front passenger seat and Thomas in the back seat. Officer Davidson, Corporal Dodd and Detective Beickert approached the car, and instructed all three occupants to get out. Officer Davidson noticed a plastic bag of off-white powder sitting between the driver's seat and door. Testing later confirmed that the bag contained 3.9 grams of cocaine base. Defendants and Thomas were arrested, and each was interviewed by Officer Davidson after he informed them of their

rights. Thomas claimed that Griffin intended to sell drugs to someone in the grocery store parking lot where they were arrested.

During Jones' closing argument, the court interrupted her and told her that she could not testify because it deprived the State of the chance to cross-examine her. The court asked the jury to disregard Jones' comments. The jury convicted defendants.

Defendants argue that court erred in failing 1) to allow withdrawal of their waivers of court-appointed counsel, and 2) to make the inquiry as to their indigency status and desire to proceed *pro se* per N.C. Gen. Stat. § 15A-1242. We agree.

A criminal defendant can waive his right to be represented by counsel so long as he voluntarily and understandingly does so. *State v. Hyatt*, 132 N.C. App. 697, 700, 513 S.E.2d 90, 93 (1999). "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." *Id.* The defendant bears the burden of showing the change in the desire for counsel. *Id.* "[T]he burden is on the defendant not only to move for withdrawal of the waiver, but also to show good cause for the delay." *State v. Smith*, 27 N.C. App. 379, 381, 219 S.E.2d 277, 279 (1975).

This Court has granted a new trial to a defendant who had previously waived counsel where the trial court subsequently failed to appoint counsel after defendant "requested that the court 'get someone to assist me in [my] case.'" *State v. Graham*, 76 N.C. App. 470, 474, 333 S.E.2d 547, 549 (1985); see also *State v. McCrowre*,

312 N.C. 478, 480, 322 S.E.2d 775, 776 (1984). In both *Graham* and *McCrowre*, "it was determined that the defendant was entitled to a new trial because the record showed that the defendant waived his right to appointed counsel, not to his right to all counsel." *Hyatt*, 132 N.C. App. at 701-2, 513 S.E.2d at 93. Specifically, in both cases "there is no evidence that defendant ever intended to proceed to trial without the assistance of some counsel." *Id.* at 701, 513 S.E.2d at 93 (quoting *McCrowre*, 312 N.C. at 480, 322 S.E.2d at 776-77). See also *Graham*, 76 N.C. App. at 475, 333 S.E.2d at 549.

When a defendant clearly indicates that she desires to proceed *pro se*, the trial court must inquire to determine whether 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 (2001); *McCrowre*, 312 N.C. at 481, 322 S.E.2d at 777. Without such an inquiry, it is error to permit defendant to go to trial without the assistance of counsel. U.S. Const. amend. VI; *Gideon v. Wainwright*, 372 U.S. 335, 9 L.Ed. 2d 799 (1963).

Here, defendants waived their rights to court-appointed counsel, but not their right to all counsel, on 11 December 2002.

They contend that they sufficiently brought to the court's attention that they wanted counsel, and that the court should have allowed them to withdraw their waivers when they came on for trial in June 2003. For this reason, defendants contend they are entitled to a new trial.

On 2 June 2003, defendants appeared in court without counsel. The calendar listed a Mr. Williams as defendants' counsel, but Jones stated that, while Mr. Williams represented her in another matter, a Mr. Sanders represented defendants in the instant case. The court called Mr. Williams into court that afternoon, and Mr. Williams moved to withdraw. When the court asked defendant if she had anything to say, Jones inquired, "I just wonder if we can get an attorney before he withdraws." After ascertaining the trial schedule for the week, the court and defendant Jones had the following exchange:

The court: Ma'am, when you can have your lawyer come in here and make a motion to continue, I will consider it. Otherwise it will be for trial.

Defendant Jones: So if I can get him here for a motion for continuance--

The court: I will look at it at that point. I'm not telling you I'm going to continue it. How old are these cases?

Mr. Williams: It was on the December calendar originally.

Prosecutor: I'll tell you the date of the offense.

The court: I would be ready for trial.

Defendant Jones: Today?

The court: Not today, probably tomorrow and the next day.

Defendant Jones: Can I have him here in the next day or so to do that?

The court: Not or so. Do you know how long this court is going to last? It's probably going to last until Friday but that is not a guarantee. Let me explain it to you. If your case is the next case called for trial--in other words, if the rest of the cases including this case and your case go by the wayside with pleas, that is the way it's going to be.

Defendant Jones: So you're telling me then I won't have any representation? Because I'm not going to be able to get him to do it--

The court: Not if you don't have a lawyer.

Defendant Jones: So that's the way justice is going to stand? Can I get counsel?

The court: Don't interrupt me. Do you want to go to jail for thirty days?

Defendant Jones: No, sir, I don't.

The court: Then you listen to me and listen well. Your case is on the calendar for trial. You either try it with or without a lawyer, that is your choice. It is not my choice. And you have known this case was on the--on this trial calendar for some time. I found out about it today. Now it makes no difference to me how you try the case. But it will be tried more than likely this week. Now is there anything about that you don't understand?

Defendant Jones: No sir.

The court then allowed Mr. Williams to withdraw.

On 4 June 2003, the cases were called for trial, and defendants again appeared without counsel. After clarifying that neither defendant had representation, the court asked defendants if

they were ready for trial. Defendant Jones then asked, " We can't ask for court-appointed, can we?" The court responded, "I think you waived your right." The trial then went forward with defendants acting *pro se*.

Defendants made it clear that they were not represented and that they did not wish to proceed without counsel. The court here failed to either consider allowing defendants to withdraw their waiver of court-appointed counsel or to make the required inquiry under N.C. Gen. Stat. § 15A-1242, before letting them proceed *pro se*. On this record, we conclude that the court erred and defendants are entitled to a new trial.

New trial.

Judges GEER and THORNBURG concur.

Report per Rule 30(e).