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NO. COA05-985

NORTH CAROLINA COURT OF APPEALS

Filed: 15 August 2006

STATE OF NORTH CAROLINA

v.

EUGENE LITTLE

Rowan County  
Nos. 04 CRS 54573  
04 CRS 12112

Appeal by Defendant from judgment entered 2 March 2005 by Judge Mark E. Klass in Rowan County Superior Court. Heard in the Court of Appeals 19 April 2006.

*Attorney General Roy Cooper, by Special Deputy Attorney General Marc Bernstein, for the State.*

*Staples Hughes, Appellate Defender, by Katherine Jane Allen, Assistant Appellate Defender, for Defendant-Appellant.*

STEPHENS, Judge.

Eugene Little ("Defendant") appeals from judgments entered consistent with jury verdicts finding him guilty of obtaining property by false pretense and of being an habitual felon. Defendant contends the trial court (1) violated his right to due process when Defendant failed to receive notice of the bill of indictment for the offense of obtaining property by false pretense; (2) committed reversible error by permitting Defendant to proceed *pro se*; and (3) committed plain error by not complying with the statutory mandates of North Carolina General Statutes Section

15A-1242. For the reasons stated herein, we find no error by the trial court.

The State presented evidence tending to show that on 6 May 2004, Defendant entered "A Friend Indeed" check cashing service in Salisbury, North Carolina. Defendant presented the cashier, Amy Wallace ("Wallace"), with a check for \$2,656.67 from Blue Cross/Blue Shield ("BCBS") payable to Defendant. Wallace confirmed that the payor linked to the routing number on the check was in fact BCBS and took a photograph of Defendant. Defendant also made a thumb print on the check when directed to do so by Wallace. Wallace paid the amount of the check to Defendant, minus the five percent fee retained by "A Friend Indeed" for cashing an insurance check.

The bank refused to honor the check when "A Friend Indeed" presented it for payment because the amount written on the check as well as the payee did not match the information provided by BCBS in their positive pay system used to verify checks. The check was originally issued by BCBS for \$656.67 payable to Piedmont Digestive Disease.

Rita Rule, an investigator with the Salisbury Police Department, testified the check was reported missing or stolen from the mailbox of a medical facility. Investigator Rule further testified that an examination of the check revealed the check had been "washed," meaning the payee and amount of the check had been altered or changed. Investigator Rule also stated she had investigated several similar checks in other recent cases involving

a street gang from Charlotte who stole checks from medical facilities and used homeless people to cash them.

Defendant testified he met a woman who told him her husband left her and she needed a male to help her cash a check. After Defendant agreed to help, the woman drove Defendant to "A Friend Indeed" and gave him the check with Defendant's name on it. Defendant testified he gave the entire proceeds of the check to the woman.

The jury found Defendant guilty of obtaining property by false pretense and being an habitual felon. Defendant was sentenced to 90 to 117 months of imprisonment. Defendant appeals.

Defendant first contends his due process rights were violated when the trial court failed to give him notice that an indictment was returned and when it failed to give a copy of the indictment to him prior to trial. Defendant argues the lack of notice violated his constitutional right to due process of law because it prevented him from being informed of the charges against him. Defendant contends he based his defense at trial on his arrest warrant, which alleged Defendant altered the original amount of the check, and as a result he was unable to effectively prepare his defense for trial.

Defendant's complaint that his due process rights were violated is a constitutional claim. "[C]onstitutional error will not be considered for the first time on appeal." *State v. Chapman*, 359 N.C. 328, 366, 611 S.E.2d 794, 822 (2005) (citing *State v. Lloyd*, 354 N.C. 76, 552 S.E.2d 596 (2001) and *State v. Cummings*,

352 N.C. 600, 536 S.E.2d 36 (2000), *cert. denied*, 532 U.S. 997, 149 L. Ed. 2d 641 (2001)). As Defendant never raised the issue of a violation of his due process rights at trial, he is precluded from raising it on appeal. *State v. Jones*, \_\_ N.C. App. \_\_, \_\_, 627 S.E.2d 265, 269 (2006). Accordingly, we decline to consider Defendant's due process argument.

Next, Defendant argues the trial court failed to comply with the statutory mandates of North Carolina General Statutes Section 15A-1242 in allowing him to proceed *pro se*. Defendant contends that the trial court did not make a sufficient inquiry as to whether his waiver of counsel was knowingly, intelligently, and voluntarily made. Defendant argues it was obvious at trial that he believed he was charged with forgery rather than obtaining property by false pretense. Defendant cites this evidence as proof he did not comprehend the charges against him.

A defendant may proceed *pro se*

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 (2005).

In the present case, the trial court held a waiver of counsel

hearing on 3 November 2004. After noting that Defendant had signed a waiver of counsel, the court engaged Defendant as follows:

THE COURT: . . . . Now, you have waived your right to counsel on September 9 of this year. That is, court-appointed counsel. You have the perfect right to hire your own attorney. Is that what you want to do?

DEFENDANT LITTLE: Well, I can't afford to.

THE COURT: All right. Do you wish to ask the Court for a court-appointed attorney?

DEFENDANT LITTLE: No, sir, I will not.

THE COURT: All right. Let me -- let me advise you then as to, once again, you understand that you're charged in this case with Obtaining Property by False Pretenses? That's a Class H felony. The maximum punishment for that is 30 months. The State intends to indict you for being -- to having a status of habitual felon. The maximum punishment for that, depending on your record, could amount to as much as 261 months. Knowing that, sir, do you wish to -- now, first of all, if you do not have an attorney and cannot afford an attorney, and you want an attorney, the Court will appoint one. You may proceed without an attorney or you may hire an attorney. What do you wish to do about an attorney now knowing that the State intends to obtain an indictment for being a[n] habitual felon?

DEFENDANT LITTLE: Well, sir, if I can afford, I would like to hire one, but I can't afford one, so I might as well proceed without one due to the public defenders do not give you all -- they do not represent you properly.

THE COURT: Okay, my question -- my question is this. Do you want to apply for court-appointed counsel, yes or no?

DEFENDANT LITTLE: No, sir.

THE COURT: All right, then. Sign a waiver of court-appointed counsel, again.  
(Defendant signs waiver.)

THE COURT: Swear him, please.  
(Waiver sworn to by Defendant.)

The waiver of counsel form signed and sworn to by Defendant reads as follows:

As the undersigned party in this action, I freely and voluntarily declare that I have been fully informed of the charges against me, the nature of and the statutory punishment for each such charge, and the nature of the proceedings against me; that I have been advised of my right to have counsel assigned to assist me and my right to have the assistance of counsel in defending against these charges or in handling these proceedings, and that I fully understand and appreciate the consequences of my decision to waive the right to assigned counsel and the right to assistance of counsel.

I freely, voluntarily and knowingly declare that:

*(check only one)*

1. I waive my right to assigned counsel and that I, hereby, expressly waive that right.

x 2. 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 trial judge then certified the waiver as follows:

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:

(check only one)

1. without the assignment of counsel.

x 2. without the assistance of counsel, which includes the right to assigned counsel and the right to assistance of counsel.

Defendant argues the trial court failed to sufficiently inquire whether Defendant comprehended the nature of the charges and proceedings against him. See N.C. Gen. Stat. § 15A-1242(3). The trial court, however, clearly informed Defendant that he was charged with obtaining property by false pretense and of the State's intention to seek an habitual felon indictment, along with the possible punishment he faced if he were found guilty. It also informed Defendant of his right to appointed counsel. Despite this information, Defendant declined a court-appointed attorney due to his belief that such an attorney would "not represent [him] properly." Defendant signed and swore to the written waiver, which the trial court then certified. "[W]here both the defendant and trial judge properly completed the form, the signed and certified written waiver creates a presumption that the waiver was knowing, intelligent and voluntary." *State v. Hill*, 168 N.C. App. 391, 396, 607 S.E.2d 670, 673, *disc. review denied*, 359 N.C. 324, 611 S.E.2d 839 (2005) (citing *State v. Kinlock*, 152 N.C. App. 84, 89-90, 566 S.E.2d 738, 741 (2002), *aff'd*, 357 N.C. 48, 577 S.E.2d 620 (2003)). Although the trial court never directly asked Defendant if he was "aware of the nature of the charges and proceedings," the trial

court clearly informed him of the nature of the charges and the potential punishment he faced. See *Hill*, 168 N.C. App. at 397, 607 S.E.2d at 674 (holding that the trial court complied with the statutory mandates of section 15A-1242 although it made no inquiry into whether the defendant was aware of the nature of the charges and proceedings against him where the charges were read in open court and the defendant understood the possible punishment he faced).

Defendant nevertheless argues it was apparent at trial that he believed he was charged with forgery, in addition to the charges of obtaining property by false pretense and habitual felon status. While Defendant's assertion may be correct, it does not alter the sufficiency of the trial court's inquiry under N.C. Gen. Stat. § 15A-1242. Although Defendant may have been confused as to what elements constitute the crime of obtaining property by false pretense, the court had no duty to assess Defendant's technical legal knowledge. *State v. LeGrande*, 346 N.C. 718, 726, 487 S.E.2d 727, 731 (1997), *reh'g denied*, 351 N.C. 365, 542 S.E.2d 650 (2000) ("[A] defendant's technical legal knowledge is not relevant to the determination of whether he knowingly waives the right to counsel.") (citing *Faretta v. California*, 422 U.S. 806, 45 L. Ed. 2d 562 (1975)). Having carefully reviewed the hearing transcript, we conclude that the trial court complied with the requirements of N.C. Gen. Stat. § 15A-1242 in determining that Defendant "voluntarily, knowingly and intelligently" waived his right to counsel. Accordingly, we overrule these assignments of error.



In conclusion, we find no error by the trial court.

NO ERROR.

Judges MCGEE and HUNTER concur.

Report per Rule 30(e).