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NO. COA06-232

NORTH CAROLINA COURT OF APPEALS

Filed: 5 December 2006

STATE OF NORTH CAROLINA

v.

JOSEPH CASEY MCGHEE,
Defendant.

Person County
Nos. 02 CRS 3576
03 CRS 1919

Appeal by defendant from judgments dated 12 September 2005 by Judge W. Osmond Smith, III, in Person County Superior Court. Heard in the Court of Appeals 30 October 2006.

Attorney General Roy Cooper, by Assistant Attorney General Ebony J. Pittman, for the State.

James N. Freeman, Jr., for defendant-appellant.

BRYANT, Judge.

Joseph Casey McGhee (defendant) appeals the revocation of his probation and activation of his sentences by judgments dated 12 September 2005, entered after a hearing before the Honorable W. Osmond Smith, III. We affirm the judgments of the trial court.

Facts and Procedural History

Defendant was convicted of possession with intent to sell/deliver a counterfeit controlled substance on 13 November 2002 and possession of stolen goods on 13 August 2003. The trial court suspended defendant's sentences and placed defendant on supervised probation for thirty-six months. Defendant's probation officer

filed probation violation reports on 22 March 2005 and 26 May 2005 alleging that defendant violated the conditions of his probation.

Defendant's probation violation hearing was held before Judge W. Osmond Smith, III, on 12 September 2005. At the beginning of the hearing, defendant's trial counsel, Daniel Long, informed the court that he had been privately retained by defendant's family to represent him in the probation violation matters and had been court-appointed in other pending criminal charges. Mr. Long then informed the trial court that defendant "wishes to represent himself and wants me to withdraw." The trial court asked Mr. Long about the issue of defendant's capacity to proceed and was informed defendant had been found competent to proceed by judicial order.

The trial court asked what defendant had to say and the following occurred:

[DEFENDANT]: On these case[s], right here, on the probation, I'd rather take my chances and try all of them because, really, I didn't know what I was getting into taking these plea bargains. I was really just manipulated by other people with these plea bargains, not realizing what I was getting into.

I'll take my chances and face whatever I've got to face as far as just trying the whole cases on both of them for what they are.

THE COURT: Okay. That's what you want me to consider?

[DEFENDANT]: I'm not interested in an attorney. I'd just like to get it all over with.

THE COURT: You already have an attorney.

[DEFENDANT]: Well, that's what he said.

THE COURT: It's what I said. So you still got

one.

Mr. Long noted that he had not made a written notice to withdraw and informed the court he was making " a formal motion to withdraw, with him being present, to withdraw as his attorney in all matters that are pending." Mr. Long further informed the court that he was prepared to proceed if defendant chose Mr. Long to represent him.

The trial court then asked Mr. Long what was the basis of his motion to withdraw and Mr. Long responded, "He's saying that he wants to fire me, basically, is my understanding, that he wants to proceed on his own without an attorney." When given an opportunity to speak on his counsel's formal motion to withdraw, defendant stated:

I'd rather get it all over with. I've been held in the jail too long for not to get these cases over with, and I'm tired of hearing him coming to me with a plea bargain, trying to bribe me with a plea bargain.

I'm willing to face it, for all of it, the probation violation and all of it. I want to try it for what it's worth.

The following colloquy then took place:

THE COURT: That does not appear to me to be a sufficient basis to consider - - - [his] motion to discharge or waive his rights to an attorney. With that being said, I don't consider it sufficient for counsel to be discharged on the probation violations. I'll let you take up next week's cases with the trial judge presiding at that time.

MR. LONG: I would ask to have just a few minutes with the defendant, but then I think we'll be ready to proceed on - - -

THE COURT: All right.

MR. LONG: - - on the probation violations.

THE COURT: All right.

THE COURT: As I said, the Court does not consider that the defendant has asked to waive his rights to a lawyer.

The probation violation hearing proceeded, with Mr. Long representing defendant.

After the trial court concluded that defendant had willfully violated conditions of probation, the State asked the trial court to revoke defendant's probation and activate defendant's sentences. Defendant's counsel noted that defendant had 234 days in jail credit and that defendant spent "60 days on house arrest as a result of another previous violation." The trial court revoked defendant's probation and activated his sentences, to run concurrently. The trial court gave defendant credit for 234 days spent in confinement on his activated sentence. Defendant appeals.

Defendant argues the trial court erred by: (I) denying defendant's trial counsel's motion to withdraw; and (II) failing to credit defendant's time spent under house arrest towards his activated sentences. For the reasons below, we disagree.

I

Defendant first assigns as error the trial court's denial of "trial counsel's Motion to Withdraw as counsel for Defendant in contravention of Defendant's stated wishes to no longer have counsel represent him in violation of the Sixth and Fourteenth Amendments[.]" In his brief, defendant argues that by denying his attorney's motion to withdraw, the trial court denied defendant's

right to represent himself. Defendant asserts that the trial court should have conducted a hearing pursuant to N.C. Gen. Stat. § 15A-1242 to determine whether defendant wished to represent himself once Mr. Long moved to withdraw. We disagree.

"A criminal defendant has a [federal] constitutional right to the assistance of counsel in his defense, which implicitly includes the right to refuse the assistance of counsel and to conduct his own defense." *State v. Johnson*, 341 N.C. 104, 110, 459 S.E.2d 246, 249 (1995) (citation omitted). In North Carolina, this right of self-representation is also guaranteed by Article I, Section 23 of the North Carolina Constitution and by Chapter 15A, Section 1242 of the North Carolina General Statutes. *State v. LeGrande*, 346 N.C. 718, 725, 487 S.E.2d 727, 730 (1997), *reh'g denied*, 351 N.C. 365, 542 S.E.2d 650-51 (2000). N.C. Gen. Stat. § 15A-1242 sets forth the prerequisites necessary before a defendant may waive his constitutional right to counsel and represent himself at trial. N.C. Gen. Stat. § 15A-1242 (2005).

A defendant's waiver of the right to counsel and concomitant election to proceed *pro se* must be clearly and unequivocally expressed. *State v. Thomas*, 331 N.C. 671, 673-74, 417 S.E.2d 473, 475 (1992). In the absence of a clear expression of desire to have counsel removed and proceed *pro se*, the trial court need not make an inquiry under N.C. Gen. Stat. § 15A-1242 to determine if the defendant understands the consequences of his election and voluntarily and intelligently waives his right to representation. *Johnson*, 341 N.C. at 111, 459 S.E.2d at 250. In the absence of a

clear expression by the defendant of a desire to proceed *pro se*, a trial judge faced with a claim of conflict between defendant and his attorney "must determine only that the defendant's present counsel is able to render competent assistance and that the nature of the conflict will not render such assistance ineffective." *Id.*

Here, defendant initially stated, "I'm not interested in an attorney." However, when asked to respond to his counsel's formal motion to withdraw, defendant stated that he was "tired of hearing him coming to me with a plea bargain" and "would rather get it all over with." The trial court then found that defendant had set forth no legal or factual basis for Mr. Long's dismissal and denied the motion. Defendant did not unequivocally state that he wanted to represent himself. As appellate counsel notes in his brief, defendant's "statements to the Court were not completely clear as to his intentions." Although defendant expressed his dissatisfaction with the plea bargains, at no time did he request that his retained attorney be removed from his case and that he be allowed to represent himself.

Based on the record, we conclude that defendant did not clearly and unequivocally request to proceed *pro se*. Thus, the trial court's determination that defendant's counsel had provided competent assistance was sufficient and no further inquiry was necessary. The trial court's inquiry into defendant's reasons for wishing to dismiss Mr. Long and its determination that defendant's counsel was ready to proceed and provide competent assistance with the probation violation hearing was sufficient. Having failed to

properly assert the right to represent himself, defendant cannot successfully claim that he was denied that right. This assignment of error is overruled.

II

Defendant also assigns error to the trial court "not counting the sixty days defendant spent under house arrest as part of his suspended sentence as time served and crediting to those days of confinement towards his sentence" However, this Court has held that house arrest does not constitute confinement and therefore "does not qualify as time that can be credited against a defendant's sentence pursuant to section 15-196.1." *State v. Jarman*, 140 N.C. App. 198, 206, 535 S.E.2d 875, 880 (2000). Thus, the trial court properly did not credit defendant's sixty days of house arrest toward defendant's sentence. This assignment of error is overruled.

Affirmed.

Judges TYSON and LEVINSON concur.

Report per Rule 30(e).