

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA06-251

NORTH CAROLINA COURT OF APPEALS

Filed: 5 September 2006

STATE OF NORTH CAROLINA

v.

Rowan County  
Nos. 04 CRS 54246,  
54247, 54248

MANDILYN ARCHIE BAXTER

Appeal by defendant from judgments entered 28 April 2005 by Judge Mark E. Klass in Rowan County Superior Court. Heard in the Court of Appeals 21 August 2006.

*Attorney General Roy Cooper, by Special Deputy Attorney General Dorothy Powers, for the State.*

*Robert W. Ewing for defendant-appellant.*

CALABRIA, Judge.

Mandilyn Archie Baxter ("defendant") appeals from judgments entered 28 April 2005 upon jury verdicts finding him guilty of burning an unoccupied building and burning personal property. We reverse and remand.

At trial, the State presented the testimony of Anthony A. Miller ("Miller"), owner of Miller Trucking Company. Miller maintained his business on property he owned in Rowan County, North Carolina. Miller first hired defendant to drive a dump truck in May of 2004. Soon thereafter, Miller inquired whether defendant

would drive from Georgia to Maine to carry frozen chickens for one of Miller's brokers. During the drive, the truck's windshield and bumper were damaged and defendant reported this damage to Miller. Miller had his mechanic inspect the damage at a rest stop in Connecticut. Miller's mechanic reported the windshield was damaged from the inside and advised Miller to allow defendant to drive the truck back to North Carolina empty. Upon defendant's return, Miller wrote defendant a five-hundred dollar (\$500.00) check explaining he did "not pay for empty miles." Defendant grew angry at the amount Miller paid and told him "he [was] going to burn my truck[s] one by one." Miller fired the defendant and called 911. Miller testified defendant called him approximately six times with threatening messages. On the evening of 13 May 2004, when Miller returned to his business from a club, he noticed a truck was missing and that "somebody tried to break into my house." Miller entered his home, heard a "fuzzy" sound and soon thereafter "the back room exploded." Miller escaped through the back door and called the fire department. Once the fire department arrived, Miller determined several of his trucks were burned as well.

Arthur Delaney ("Delaney"), the Rowan County Fire Marshall, testified he responded to the report of a fire at Miller's residence at approximately 1:30 a.m. on 14 May 2004. Delaney determined three separate fires occurred: a house trailer; a tractor trailer; and a dump truck. Delaney, along with David Earnhardt, a Detective with the Rowan County Sheriff's Office ("Detective Earnhardt") and arson investigator, investigated the

cause of the three separate fires. Detective Earnhardt concluded the home trailer fire was not an accident and determined the fire originated in the bedroom. Further, Detective Earnhardt concluded the fire in the tractor trailer started on the floorboard which was littered with paper debris. Finally, Detective Earnhardt determined the fire in the dump truck, which smelled of gasoline, started on the floorboard and "was set by hand."

On 28 April 2005, defendant was found guilty of a single count of burning an unoccupied building and two counts of burning personal property. Defendant was sentenced to the North Carolina Department of Correction to a minimum of 25 months to a maximum of 30 months for burning an unoccupied building and a minimum of 11 months to a maximum of 14 months for burning personal property. Defendant appeals.

Defendant argues the trial court erred by failing to conduct a sufficient inquiry as to whether he knowingly, intelligently and voluntarily waived his right to counsel. Defendant contends the court failed to follow the statutory prescription provided in N.C. Gen. Stat. § 15A-1242. We agree.

N.C. Gen. Stat. § 15A-1242 (2005) provides

[a] defendant may be permitted at his election to proceed in the trial of his case without the assistance of counsel 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.

"The provisions of N.C. Gen. Stat. § 15A-1242 are mandatory where the defendant requests to proceed *pro se*." *State v. Evans*, 153 N.C. App. 313, 315, 569 S.E.2d 673, 675 (2002). Further, "[a] written waiver of counsel is *no substitute* for actual compliance by the trial court with [N.C. Gen. Stat. §] 15A-1242." *State v. Wells*, 78 N.C. App. 769, 773, 338 S.E.2d 573, 575 (1986) (emphasis added). "A written waiver is 'something in addition to the requirements of N.C. Gen. Stat. § 15A-1242, not ... an alternative to it.'" *Evans*, 153 N.C. App. at 315, 569 S.E.2d at 675 (quoting *State v. Hyatt*, 132 N.C. App. 697, 703, 513 S.E.2d 90, 94 (1999)). Though "we have held ... a written waiver sets forth a presumption of a knowing, intelligent and voluntary waiver," we have also determined "that presumption can be overcome if the record demonstrates otherwise." *Hyatt*, 132 N.C. App. at 703, 513 S.E.2d at 94.

In the instant case, on 6 June 2004, the State appointed J. Stephen Gray ("Gray") to represent defendant. On 3 March 2005, Gray filed a motion to withdraw as counsel for defendant. The trial court held a hearing on the motion the same day. However, a transcript of the hearing could not be prepared because the court reporter could not locate a recording of the proceeding. Consequently, pursuant to N.C. R. App. 9(c)(1), both Gray and the State Prosecutor agreed to narrate the proceedings and further stipulated the narration was accurate.

At the 3 March 2005 hearing, the trial court asked defendant if he "agreed with Counsel's motion." Defendant concurred and subsequently provided "reasons for his feelings." The trial court granted the motion and stated substitute counsel would be appointed. Defendant responded that he did not want an attorney and wished to represent himself. The trial court "advised the Defendant that due to the seriousness of the charges, and the complexity of the rules of evidence, that it would be in his advantage to have an attorney to represent him." Defendant again stated his desire to represent himself. The trial court told defendant the State would call his case for trial shortly, and that defendant "needed to be prepared." Defendant again declined to have counsel appointed. That same day, defendant executed a waiver of counsel form, waiving his right to all assistance of counsel. The trial court also signed the waiver.

Here, the narration of the 3 March 2005 hearing reveals that immediately subsequent to the trial court's granting of Gray's motion to withdraw, the court offered to appoint defendant new counsel. The trial court repeated this offer several times. Each time, defendant rejected the offer. The trial court then advised defendant that it would be in his best interests to have an attorney represent him. According to the narration, the trial court clearly and repeatedly informed defendant of his right to the assistance of counsel, thus satisfying the first prong of N.C. Gen. Stat. § 15A-1242. It is also clear that defendant understood the nature of the charges and the proceeding. What is not clear from

the narration is whether defendant understood and appreciated the consequences of his decision to represent himself or that he understood the range of permissible punishment in order to fully comply with the second or third prongs of 15A-1242. Similarly, in *State v. Callahan*, 83 N.C. App. 323, 324-25, 350 S.E.2d 128, 129 (1986), this Court noted "[a]bsent a transcription of those proceedings, this Court cannot presume that defendant knowingly and intelligently waived his right to counsel." Here, although both parties stipulated to a narration of the hearing, we lack a transcription of the proceedings. The narration fails to clearly indicate whether the trial court complied with all three prongs of 15A-1242. Consequently, pursuant to *Callahan, supra*, absent contrary evidence in the record, we cannot infer defendant knowingly and intelligently waived his right to counsel. In an abundance of caution, we remand for a new trial.

Reversed and remanded.

Chief Judge MARTIN and Judge JACKSON concur.

Report per Rule 30(e).