

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA06-605

NORTH CAROLINA COURT OF APPEALS

Filed: 20 March 2007

STATE OF NORTH CAROLINA

v.

Harnett County  
No. 04 CR 56520

JUSTIN DANSON TUCKER

Appeal by defendant from judgment entered 16 November 2005 by Judge James B. Ethridge in Harnett County District Court. Heard in the Court of Appeals 26 February 2007.

*Attorney General Roy Cooper, by Assistant Attorney General Charlene Bell Richardson, for the State.*

*John Keating Wiles for defendant-appellant.*

ELMORE, Judge.

On 16 November 2004, defendant pled guilty pursuant to a plea agreement to manufacture of marijuana, possession of drug paraphernalia, and possession of marijuana. As part of the plea agreement, defendant agreed to be placed into the "Drug Diversion and Education Program (Program) through Re[E]ntry" and pay restitution. The plea agreement further provided that "[s]hould the defendant, for any reason, fail to successfully complete the Program, the Court will impose judgment at the first term of Court one year from the entry of judgment[.]" Defendant and his court-

appointed attorney, Jason O. Wunsch, signed the plea agreement.

On 14 November 2005, through ReEntry Drug Diversion Program (ReEntry) filed a "Treatment Termination Report" alleging defendant's non-compliance with his community service hours, case management appointments, and monetary obligations. ReEntry recommended that "the Court proceed with prosecution" and listed 15 November 2005 as the "[d]ate [the] case returns to court." Defendant was returned to court for the hearing on 16 November 2005. Defendant's court-appointed counsel was not present at the hearing.

When defendant's case was called for hearing, the prosecutor informed the trial court that defendant "was returned here today for review on his drug diversion which was entered [] on November 16<sup>th</sup> of 2004." The trial court asked defendant if he knew why he was in court and defendant replied, "Yes, sir." The trial court then asked defendant about the allegations in the termination report. Defendant informed the trial court that he had asked for an extension of time because he is married with four children, a full-time student, and has one vehicle. Defendant then admitted that he had not completed all of his community service hours and had not paid all of his monetary obligations. Afterwards, the trial court found defendant in violation of the program. The trial consolidated the misdemeanors with the Class I felony, sentenced defendant to four to six months' imprisonment, suspended the sentence, and placed defendant on probation for twenty-four months. Defendant appeals.

Defendant contends, and the State concedes, that the trial court erred by conducting a hearing and sentencing defendant without his court-appointed attorney. We agree.

It is well-settled that a criminal defendant enjoys the right to counsel, as guaranteed by the Sixth and Fourteenth Amendments of the United States Constitution and Article I of the North Carolina Constitution. *State v. McFadden*, 292 N.C. 609, 234 S.E.2d 742 (1977). Inherent in that right is the right of an indigent defendant to appointed counsel. *State v. Montgomery*, 138 N.C. App. 521, 524, 530 S.E.2d 66, 68 (2000). A criminal defendant also has the right to represent himself without having the assistance of counsel forced upon him against his wishes. *State v. Fulp*, 355 N.C. 171, 174, 558 S.E.2d 156, 158 (2002). Before a defendant can waive counsel and represent himself, the trial court must conduct the inquiry required by N.C. Gen. Stat. § 15A-1242 to make certain that defendant's waiver of counsel is done knowingly, intelligently, and voluntarily. *State v. Evans*, 153 N.C. App. 313, 315, 569 S.E.2d 673, 675 (2002).

Here, the transcript shows that defendant appeared at the hearing without appointed counsel, that defendant did not state that he wished to waive counsel and proceed *pro se*, and that the trial court did not make the required inquiry pursuant to section 15A-1242. Although the judgment entered in defendant's case indicates that defendant waived counsel, the record does not show that defendant executed a written waiver of counsel form. Accordingly, the judgment entered is vacated and the matter remanded for a new review of defendant's drug diversion.

Vacated and remanded.

Judges WYNN and GEER concur.

Report per Rule 30(e).