NO. COA06-981

NORTH CAROLINA COURT OF APPEALS

Filed: 20 March 2007

STATE OF NORTH CAROLINA

v. Wilkes County
Nos. 02CRS51936,
BRANDON RYAN ELLER 04CRS53069-74

Appeal by defendant from judgments entered 15 November 2005 by Judge Richard L. Doughton in Wilkes County Superior Court. Heard in the Court of Appeals 12 March 2007.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Iain Stauffer, for the State.

Haakon Thorsen for defendant-appellant.

HUNTER, Judge.

On 23 September 2002, defendant pled guilty to obtaining property by false pretenses and larceny after breaking and entering. After consolidating the offenses for judgment (02CRS51936) and imposing a sentence of ten to twelve months, the trial court suspended the sentence and placed defendant on supervised probation for thirty-six months. On 18 August 2004, defendant entered pleas of no contest to first degree trespass, two counts of larceny with a firearm, assault on a female, four counts of breaking and entering, four counts of breaking and entering

after larceny, and safecracking. Pursuant to the terms of the plea arrangement, the trial court consolidated the offenses into six Class H felony judgments (04CRS53069-74). After imposing six consecutive sentences of nine to eleven months imprisonment, the trial court suspended the sentences and placed defendant on supervised probation for sixty months.

On 7 July 2005, a probation officer filed and served a violation report on defendant in case number 02CRS51936. The violation report informed defendant that a hearing on the charges was scheduled for 12 September 2005. Defendant failed to appear and was arrested on 19 September 2005. On that same date, a probation officer also filed and served six violation reports on defendant in case numbers 04CRS53069-74. The six violation reports informed defendant that a hearing on those charges was scheduled for 7 November 2005.

In an appearance before Judge Richard L. Doughton on 7 November 2005, defendant informed the trial court that he wanted to hire an attorney. After signing a waiver of appointed counsel, defendant was instructed to return on 14 November 2005. Defendant subsequently returned on that date without counsel. When the trial court asked if defendant had counsel, the following exchange occurred:

> DEFENDANT ELLER: He is not coming.
>
> THE COURT: He's not your lawyer then.
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> DEFENDANT ELLER: He is my lawyer, but he advised me it's not going to do no good.
>
> THE COURT: Is he your lawyer in this case?

DEFENDANT ELLER: No.

THE COURT: All right. And, you've waived your right to an attorney?

DEFENDANT ELLER: Yes, sir.

THE COURT: Let's proceed.

Defendant then admitted willfully violating the conditions of his probation as alleged in the violation reports. After hearing testimony from the probation officer and defendant, the trial court revoked defendant's probation and activated his seven suspended sentences. From the trial court's judgments, defendant appeals.

Defendant first argues the trial court lacked jurisdiction to revoke his probation in case number 02CRS51936 because the probationary period had expired prior to the date of the revocation hearing. We agree.

Defendant's probationary term in case number 02CRS51936 ended approximately three weeks prior to the revocation hearing on 14 November 2005. "Except as provided in N.C. Gen. Stat. § 15A-1344(f), a trial court lacks jurisdiction to revoke a defendant's probation after the expiration of the probationary term." *State v. Burns*, 171 N.C. App. 759, 760, 615 S.E.2d 347, 348 (2005). However, if a trial court "finds that the State has made reasonable effort to notify the probationer and to conduct the hearing earlier[,]" it may then revoke a defendant's probation after the expiration of the probationary term. N.C. Gen. Stat. § 15A-1344(f)(2) (2005); *see also Burns*, 171 N.C. App. at 760, 615 S.E.2d at 348. Because the record on appeal does not show that the trial court made the statutorily required findings, the trial court

lacked jurisdiction to revoke defendant's probation in case number 02CRS51936. The judgment in case number 02CRS51936 is therefore vacated.

Further, as our Supreme Court noted recently in *State v. Bryant*, normally in a case where the trial court failed to make a necessary finding of fact, the case must be remanded so that such a finding can be made. *Bryant*, ___ N.C. ___, ___, ___ S.E.2d ___, ___ (No. 117A06 filed 15 December 2006) (slip op. 6-7) (quoting *N.C. Dep't of Env't & Natural Res. v. Carroll*, 358 N.C. 649, 674-75, 599 S.E.2d 888, 904 (2004)). However, "when the record lacks sufficient evidence to support such a finding, the case should not be remanded in order to conserve judicial resources." *Id.* (slip op. 7).

In the case at hand, the record contains insufficient grounds to support the trial court's making the necessary finding of fact. The only evidence proffered by the State consists of the probation violation report and an arrest of defendant within the probation period, which together do not constitute sufficient grounds for a finding that the State made a reasonable effort to notify defendant of the impending hearing. Thus, as the Court noted in *Bryant*, "although ordinarily this case would be remanded for a proper finding, remand is not a proper remedy . . . because the record lacks sufficient evidence to support such a finding." *Id.* (slip op. 7-8).

Defendant next contends the trial court erred by permitting him to proceed *pro se* without properly determining whether his

waiver of the right to counsel was knowing, intelligent, and voluntary. He argues the trial court failed to comply with the requirements of N.C. Gen. Stat. § 15A-1242 (2005) before accepting his waiver of counsel. As the State correctly concedes in its response, the trial court failed to meet the requirements of the statute as applied in *State v. Evans*, 153 N.C. App. 313, 314-15, 569 S.E.2d 673, 674 (2002).

"[T]he right to assistance of counsel may only be waived where the defendant's election to proceed *pro se* is 'clearly and unequivocally' expressed and the trial court makes a thorough inquiry as to whether the defendant's waiver was knowing, intelligent and voluntary." *Evans*, 153 N.C. App. at 315, 569 S.E.2d at 675. "This mandated inquiry is satisfied only where the trial court fulfills the requirements of N.C. Gen. Stat. § 15A-1242." *Id.* While the record shows that the trial court did properly advise defendant of his right to the assistance of counsel, *see* N.C. Gen. Stat. § 15A-1242(1), prior to defendant's signing of the waiver of assigned counsel on 7 November 2005, the trial court nevertheless failed to inquire as to whether defendant understood and appreciated the consequences of proceeding *pro se* at the probation revocation hearing on 14 November 2005. *See* N.C. Gen. Stat. § 15A-1242(2). At no time during the probation revocation hearing did the trial court determine whether defendant comprehended the nature of the charges and proceedings and the range of permissible punishments which he faced before it permitted him to proceed *pro se*. *See* N.C. Gen. Stat. § 15A-1242(3). By

omitting the second and third inquiries required by the statute, the trial court failed to determine whether defendant's waiver of his right to counsel was knowing, intelligent, and voluntary. The judgments in case numbers 04CRS53069-74 are therefore reversed, and the trial court shall first determine on remand whether defendant is entitled to the assistance of counsel.

In his final argument, defendant contends the trial court erred by imposing sentences for durations not authorized by N.C. Gen. Stat. § 15A-1340.17 (2005). He argues the trial court improperly imposed sentences in the aggravated range without finding any aggravating factors. We agree.

The minimum term imposed for each of the sentences activated in case numbers 04CRS53069-74 was nine months. For a Class H felony at prior record level II, the presumptive range of the minimum term of imprisonment is six to eight months. *See* N.C. Gen. Stat. § 15A-1340.17(c). Because the minimum term for each of those sentences is in the aggravated range and is not supported by findings of any aggravating factors, those judgments are remanded for resentencing.

Vacated in part; reversed and remanded in part.

Chief Judge MARTIN and Judge McGEE concur.

Report per Rule 30(e).