NO. COA07-1415

NORTH CAROLINA COURT OF APPEALS

Filed: 1 July 2008

STATE OF NORTH CAROLINA

v. Guilford County
No. 03 CRS 70952, 54, 56

JEFFREY McARTHUR CARTER

Appeal by defendant from judgment entered 17 July 2007 by Judge William Z. Wood, Jr. in Guilford County Superior Court. Heard in the Court of Appeals 30 April 2008.

Attorney General Roy Cooper, by Special Deputy Attorney General Ted R. Williams, for the State.

Kathleen Arundell Widelski, for defendant-appellant.

STEELMAN, Judge.

A defendant has the burden of demonstrating that he clearly communicated to the trial court a desire to revoke his prior waiver of all counsel. The trial court did not abuse its discretion by conducting an evidentiary hearing on whether defendant had violated the terms and conditions of his probation. However, the revocation of defendant's probation requires findings of fact by the trial court. We therefore affirm in part and remand in part the judgment of the trial court.

On 30 June 2003, Jeffrey McArthur Carter ("defendant") pled guilty to conspiring to trafficking in marijuana, trafficking in

marijuana, and maintaining a vehicle/dwelling place for controlled substances in Guilford County Superior Court. Judgment was continued to a later term. On 27 May 2005, defendant was sentenced to 25-30 months imprisonment. Because the court found that defendant had provided substantial assistance pursuant to N.C. Gen. Stat. § 90-95(h)(5), this sentence was suspended and defendant was placed on supervised probation for 36 months upon regular and special conditions of probation, which included intensive probation.

On 27 November 2006, a probation violation report was filed. This report alleged that defendant had willfully violated the terms and monetary conditions of his probation, and failed to complete the TASC program. The report further stated that:

> As of 11/21/06, the defendant reported that he will no longer report to probation. He stated that he is no longer under the jurisdiction of North Carolina and the United States.

The matter was set for hearing on 22 January 2007.

On 22 January 2007, defendant executed a Waiver of Counsel that waived his right to all assistance of counsel. The written waiver was entered by Judge Frye. There is no transcript of this hearing in the record on appeal.

On 5 July 2007, defendant appeared before Judge Wood on a contempt citation and the probation matter. The record is silent as to the details of the contempt citation, and the court later dismissed it. Defendant challenged the court's jurisdiction to hear the matters, stating that: (1) he was "appearing *in propria persona*[,] . . . not pro se[;]" (2) he was not a citizen of North

Carolina or the United States but rather a "sovereign indigenous Moabite[;]" and (3) the State had failed to respond to his Bill of Particulars, seeking "full disclosure for everything brought against me."

The court held that it had jurisdiction and treated defendant's statement as a denial of the allegations contained in the violation report. After hearing testimony, the court found defendant in willful violation of the terms of his probation and activated his suspended sentence. Defendant appeals.

In his first two arguments, defendant contends that the trial court erred in allowing him to proceed without counsel without complying with the provisions of N.C. Gen. Stat. § 15A-1242. We disagree.

Defendant argues that the transcript of the hearing before Judge Wood rebuts the presumption of a knowing, intentional, and voluntary waiver of counsel, and that the provisions of N.C. Gen. Stat. § 15A-1242 should have been implicated where "a defendant is brought before the court almost seven months after executing a defective waiver, he is cited for contempt, and he states he is not proceeding *pro se* and indicates he doesn't understand."

"The burden of showing [a] change in the desire of the defendant for counsel rests upon the defendant." *State v. Watson*, 21 N.C. App. 374, 379, 204 S.E.2d 537, 540-41 (1974)(quoted in *State v. Kinlock*, 152 N.C. App. 84, 566 S.E.2d 738 (2002)). This matter is controlled by *Kinlock*, where this Court upheld a similar

pre-trial certification by a judge other than the one who presided at trial, stating:

> Although there is no transcript of the waiver proceeding, "[t]here is a presumption of regularity accorded the official acts of public officers." *State v. Kornegay*, 313 N.C. 1, 19, 326 S.E.2d 881, 895 (1985). In North Carolina the burden is on the appellant to show error and to show that the error was prejudicial. *State v. Murphy*, 100 N.C. App. 33, 41, 394 S.E.2d 300, 305 (1990). "An appellate court is not required to, and should not, assume error by the trial [court] when none appears on the record before the appellate court." *State v. Williams*, 274 N.C. 328, 333, 163 S.E.2d 353, 357 (1968). "When a defendant executes a written waiver which is in turn certified by the trial court, the waiver of counsel will be presumed to have been knowing, intelligent, and voluntary, unless the rest of the record indicates otherwise." *State v. Warren*, 82 N.C. App. 84, 89, 345 S.E.2d 437, 441 (1986).
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> Defendant's contention that N.C.G.S. § 15A-1242 required Judge Braswell, the judge who presided over defendant's trial, to conduct an inquiry into defendant's decision to represent himself is not supported by prevailing case law. Judge Ragan's certification of defendant's signed waiver of counsel attested that defendant had been informed of all the requirements set forth in N.C.G.S. § 15A-1242. At trial before Judge Braswell, defendant never indicated a desire to be represented by counsel. *See Watson*, 21 N.C. App. at 379, 204 S.E.2d at 540-41. After careful consideration of the record and briefs, we hold that defendant's waiver of counsel was in accordance with the requirements set forth in N.C.G.S. § 15A-1242 and consistent with defendant's Sixth Amendment rights.

Kinlock, 152 N.C. App. at 89-90, 566 S.E.2d at 741-42 (alteration in original).

As in *Kinlock*, Judge Frye's certification of defendant's signed waiver of counsel attested that defendant had been informed of all requirements set forth in N.C. Gen. Stat. § 15A-1242. We hold that the record in this matter fails to rebut the presumption that defendant's waiver before Judge Frye was knowing, intelligent, and voluntary. The record is devoid of an express revocation of the waiver in the hearing before Judge Wood. *See Watson*, 21 N.C. App. at 379, 204 S.E.2d at 540-41. Defendant's argument that a contempt citation or his statement to the court that "I don't understand" distinguishes this case from *Kinlock* is unpersuasive. We hold that a passing reference to Sixth Amendment rights, made with reference to "a treaty" and without mention of a desire for counsel, is insufficient to revoke a validly executed waiver or to implicate N.C. Gen. Stat. § 15A-1242. This argument is without merit.

In his next argument, defendant contends that the trial court's failure to seriously consider his request for a bill of particulars and treating the request as a "denial" of the violation was an abuse of discretion. We disagree.

In signing the probation violation report, defendant acknowledged that "I have received a copy of this Violation Report and understand its contents and that I must appear in Court as directed by my Probation/Parole Officer." When asked in court if he admitted the violation, defendant responded, "I don't understand."

A thorough review of the record, including the transcript, demonstrates that defendant had a complete command of the English language and that he sought only to obfuscate the issues before the court. The alleged probation violations were clearly and specifically stated in the violation report. Consequently, we do not find his bill of particulars argument persuasive. In light of the record before this Court, we cannot say that the trial court's decision to treat his response as a denial was "manifestly unsupported by reason." *Briley v. Farabow*, 348 N.C. 537, 547, 501 S.E.2d 649, 656 (1998). This argument is without merit.

In two other arguments, defendant contends that the 17 July 2006 order revoking his probation and remanding him to the custody of the Department of Corrections was insufficient as a matter of law. We agree.

Defendant contends that the trial court wrongly concluded that he "freely, voluntarily and understandingly" elected to serve out his sentence in lieu of probation, or, in the alternative, the court's conclusion that a violation occurred cannot be affirmed because the order lacked findings to support that conclusion.

The revocation judgment entered in this matter concluded that the "defendant has freely, voluntarily and understandingly elected to serve the defendant's suspended sentence of imprisonment in lieu of the remainder of the defendant's probation." This conclusion is not supported by the record in this case. At the conclusion of the hearing, the following exchange between Judge Wood and defendant took place:

> COURT: Okay, Mr. Carter, anything else?
>
> DEFENDANT: No, sir.
>
> COURT: I take it you don't want to be on probation?
>
> DEFENDANT: No, sir. I need this dismissed, because it's terminated. It's not – it's not real.
>
> COURT: I'm sorry. I have to find a violation of your probation. Activate the sentence.

We cannot construe this exchange to constitute a free, voluntary, and understanding election by defendant to serve his sentence. Rather, the court found defendant had violated the terms and conditions of his probation. The revocation judgment does not contain any findings of fact as to the specific violations by defendant, or as to willfulness. While the lack of findings may be merely a clerical oversight, we cannot afford effective appellate review to defendant's remaining arguments without specific findings supporting the trial court's judgment. *State v. Robinson*, 248 N.C. 282, 288, 103 S.E.2d 376, 380 (1958) ("The judge's findings of fact should be definite, and not mere conclusions."). We therefore remand this matter to the trial court for entry of a judgment containing appropriate findings of fact and conclusions of law.

AFFIRMED in part, REMANDED in part.

Judges HUNTER and STEPHENS concur.

Report per Rule 30(e).