NO. COA07-1471

NORTH CAROLINA COURT OF APPEALS

Filed: 18 November 2008

STATE OF NORTH CAROLINA

v. Rutherford County
Nos. 05-CRS-52602, 05-CRS-52603, 05-CRS-52604

JACK MEREDITH MARTIN

Appeal by Defendant from judgments entered 12 June 2007 and 13 June 2007 by Judge Ronald K. Payne in Superior Court, Rutherford County. Heard in the Court of Appeals on 19 August 2008.

Attorney General Roy Cooper, by Special Deputy Attorney General Robert C. Blum, for the State.

Leslie C. Rawls for Defendant.

McGEE, Judge.

Jack Meredith Martin (Defendant) was arrested on 28 May 2005 and charged with one count of first-degree murder for the shooting and killing of Lehi Moore (Moore), and two counts of attempted first-degree murder for the shootings of Phillip Chiasson (Chiasson) and Philip Salks (Salks). Defendant was indicted on these charges on 26 September 2005. Defendant represented himself at trial with the assistance of standby counsel. Defendant was tried on all three charges at the 4 June 2007 Criminal Session of Rutherford County Superior Court. A jury found Defendant guilty of the lesser included offense of second-degree murder for the killing

of Moore, and guilty of both counts of attempted first-degree murder, on 11 June 2007.

Defendant's sentencing hearing was held on 12 June 2007. Defendant was sentenced to 189 months to 236 months' imprisonment for his second-degree murder conviction. Defendant's two convictions for attempted first-degree murder were consolidated for judgment, and Defendant was sentenced to 250 months to 309 months' imprisonment, to run consecutive to his sentence for second-degree murder. Defendant appeals.

I.

In Defendant's sixth argument, he contends he was denied the right to a speedy trial in violation of the Sixth and Fourteenth Amendments to the United States Constitution. We disagree.

"The fundamental law of this [S]tate provides every individual charged with a crime has the right to a speedy trial . . . . This right is also protected by the Sixth Amendment to the Constitution of the United States as applied to the states through the Fourteenth Amendment[.]" *State v. Pippin*, 72 N.C. App. 387, 390, 324 S.E.2d 900, 903 (1985) (citations omitted). "The determination of whether the right to a speedy trial has been abridged requires a case by case balancing of four interrelated factors: (1) length of delay; (2) reason for delay; (3) [the] defendant's assertion of the right to a speedy trial; and (4) prejudice to [the] defendant resulting from the delay." *Id.* at 391, 324 S.E.2d at 903; *see also Barker v. Wingo*, 407 U.S. 514, 530-33, 33 L. Ed. 2d 101, 115-19 (1972).

First, we consider the length of delay. We note that "the length of the delay is not *per se* determinative of whether the defendant has been deprived of his right to a speedy trial." *State v. Grooms*, 353 N.C. 50, 62, 540 S.E.2d 713, 721 (2000) (citation omitted). Rather, the length of delay, as it reaches one year, triggers an examination of the other factors. *Id.* (citing *Doggett v. United States*, 505 U.S. 647, 652 n.1, 120 L. Ed. 2d 520, 528 n.1 (1992)). In the present case, the time from Defendant's arrest to Defendant's trial was more than two years. This delay is enough to trigger an examination of the remaining factors.

Second, we consider the reason for the delay.

> [The] [d]efendant has the initial burden of presenting a *prima facie* case that the delay was caused by the willful acts or negligence of the prosecution. [The] [d]efendant must show that the delay was unjustified and engaged in "for the impermissible purpose of gaining a tactical advantage over the defendant."

State v. Webster, 111 N.C. App. 72, 77, 431 S.E.2d 808, 811 (1993) (citations omitted).

Defendant makes no specific argument that the delay was caused by "the willful acts or negligence of the prosecution," nor that "the delay was unjustified and engaged in for the impermissible purpose of gaining a tactical advantage" over him. *Id.* It is Defendant's burden to make a *prima facie* case against the State on this issue, and he has failed to do so.

Further, it appears that much of the delay can be attributed to Defendant, and we note that "[t]he State is not responsible for delays caused by [a] defendant." *Id.* (citation omitted).

The trial court determined Defendant was indigent and appointed counsel for Defendant on 31 May 2005, three days after Defendant's arrest. Defendant filed a motion on 27 July 2005, requesting that his court-appointed attorney be removed and further requesting that he be allowed to proceed *pro se*. The trial court held a hearing on Defendant's motion on 3 August 2005, and in an order dated 3 August 2005 (but not filed until 6 January 2006), allowed Defendant's motion, but appointed advisory counsel for Defendant. Defendant then filed a motion on 16 September 2005, requesting that "his Assistant Court Appointed Counsel" be dismissed. In his motion, Defendant alleged, *inter alia*, that the appointed counsel was "too connected to the 'system'".

Defendant filed a motion on 14 March 2006, requesting that the trial court calendar *thirty-nine* "[m]otions, [b]riefs, etc..." that Defendant had previously submitted to the trial court. The vast majority of these submissions were unrelated to any serious matter regarding Defendant's trial; they merely constituted a continuing barrage of complaints that Defendant lodged against the judicial system, Central Prison, and his court-appointed counsel. A sampling of these submissions include:

> 2. Brief: The Flawed Grievance System
> 3. Brief: The Dilemma - What One Can and Cannot Do
> 4. Brief: The Psychology of the Psychology of the Cuckoo Nest
> . . . .
> 6. Brief: A Case for Jury Nullification
> . . . .
> 8. Motion: Preliminary Injunction to Stop All Plea Bargaining in U.S. Pending Hearing on Unconstitutionality of Plea Bargain System

9. Brief: Voodoo, Black Magic, Fear and Loathing at Safekeeping
10. Brief: Bad Day at Black Hole
. . . .
25. Brief: Abu Grab West (RCJ)
. . . .
33. Drawing: Good Dog

Defendant was committed to Dorthea Dix on 8 August 2006 for an examination to determine his capacity to proceed to trial. Defendant received a second court-appointed attorney in August 2006. Defendant was found competent to proceed to trial by the medical staff of Dorothea Dix Hospital on or about 15 September 2006. Defendant's court-appointed counsel then filed a motion to suppress in November 2006 and two motions to suppress in December 2006. Defendant wrote his second court-appointed attorney a letter dated 11 February 2007, in which Defendant explained why he wanted to discharge that attorney and proceed *pro se*. Defendant's second court-appointed attorney filed a motion to withdraw dated 19 February 2007. The trial court granted the motion in an order dated 26 February 2007. The Office of Indigent Services then named a third court-appointed attorney as Defendant's standby counsel on 2 March 2007. It is apparent that much of the delay in Defendant's case was caused by Defendant's own actions, including Defendant's indecision concerning whether to proceed to trial *pro se*, or to proceed with a court-appointed attorney.

Third, we consider Defendant's assertion of his right to a speedy trial. Defendant submitted a brief to the trial court in December 2005, in which he complained of the delays in his case. Defendant then filed a motion for a speedy trial on 28 February

2006. Defendant also complained to the trial court at the 8 August 2006 hearing that he had not had a hearing on his case in the past eleven months. We hold that Defendant adequately asserted his right to a speedy trial. However, Defendant's assertion of the right, by itself, does not entitle Defendant to relief. *See Barker*, 407 U.S. at 533, 33 L. Ed. 2d at 118 (holding that none of the factors alone is sufficient to establish a violation, and that all of the factors must be considered together).

Fourth, we consider whether Defendant has been prejudiced as a result of the delay.

> Prejudice, of course, should be assessed in the light of the interests of defendants which the speedy trial right was designed to protect. This Court has identified three such interests: (i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired. Of these, the most serious is the last, because the inability of a defendant adequately to prepare his case skews the fairness of the entire system.

Barker, 407 U.S. at 532, 33 L. Ed. 2d at 118. There is little doubt that Defendant's incarceration caused him anxiety and concern, and that these feelings were heightened during the time between his initial incarceration and his trial. Concerning the third and most important factor in deciding prejudice, "[t]he test used to determine whether or not [a] defendant has been prejudiced by the delay is 'whether significant evidence or testimony that would have been helpful to the defense was lost due to delay.'" *Webster*, 111 N.C. App. at 77, 431 S.E.2d at 811-12 (citation omitted).

Defendant was taken from the Rutherford County Jail to Central Prison in Raleigh for medical safekeeping in September 2005. Defendant argues that his incarceration at Central Prison significantly impaired his ability to prepare for trial in that: (1) Defendant lacked access to legal material and investigative services; (2) Defendant lacked reasonable contact with his standby counsel; and (3) Defendant lacked adequate support staff. Defendant's focus is misplaced. Defendant argues that his transfer from the Rutherford County Jail to Central Prison prejudiced him, but he fails to argue that the delay itself prejudiced him. Defendant's argument contains no assertion that any evidence or testimony that would have been helpful to him at trial was lost as a result of the delay.

After balancing the four factors, we hold that Defendant's right to a speedy trial was not violated. The length of delay triggered an examination of the other factors. Defendant asserted his right to a speedy trial early in the proceedings. However, Defendant did not show that the delay was caused by the willfulness or negligence of the State, nor did Defendant show that he was actually prejudiced by the delay. This argument is without merit.

II.

In Defendant's seventh argument, he contends that the trial court erred in allowing Defendant to represent himself at trial without conducting the necessary inquiry mandated by N.C. Gen. Stat § 15A-1242. We agree.

> The Sixth Amendment of the Constitution of the United States as applied to the states through

> the Fourteenth Amendment guarantees an accused in a criminal case the right to the assistance of counsel for his defense. "The right to counsel is one of the most closely guarded of all trial rights." Implicit in the right to counsel is the right of a defendant to refuse the assistance of counsel and conduct his own defense.

State v. White, 78 N.C. App. 741, 744-45, 338 S.E.2d 614, 616 (1986) (citations omitted).

> However, the 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. *This mandated inquiry is satisfied only where the trial court fulfills the requirements of N.C. Gen. Stat. § 15A-1242.*

State v. Evans, 153 N.C. App. 313, 315, 569 S.E.2d 673, 675 (2002) (citations omitted) (emphasis added). The provisions of N.C. Gen. Stat. § 15A-1242 (2007) are mandatory where a defendant requests to proceed *pro se*. *Evans*, 153 at 315, 569 S.E.2d at 675. "'[G]iven the fundamental nature of the right to counsel, we ought not to indulge in the presumption that [the right to counsel] has been waived by anything less than an express indication of such an intention.'" *State v. Johnson*, 341 N.C. 104, 111, 459 S.E.2d 246, 250 (1995) (citation omitted).

> N.C.G.S. § 15A-1242 sets forth the prerequisites necessary before a defendant may waive his constitutional right to counsel and represent himself at trial as follows:
>
> "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."

Johnson, 341 N.C. at 111, 459 S.E.2d at 250 (quoting N.C. Gen. Stat. § 15A-1242 (1988)); *see also State v. Lamb*, 103 N.C. App. 646, 647-48, 406 S.E.2d 654, 655 (1991).

> "A criminal defendant may waive his [constitutional] right to be represented by counsel so long as he voluntarily and understandingly does so. Once given, however, a waiver of counsel is good and sufficient until the proceedings are terminated *or until the defendant makes known to the court that he desires to withdraw the waiver and have counsel assigned to him*."

State v. Scott, __ N.C. App. __, __, 653 S.E.2d 908, 909 (2007) (citations omitted) (emphasis added).

Defendant filed a motion to remove his first court-appointed attorney, John Byrd (Mr. Byrd) on 27 July 2005, and to represent himself. Judge Zoro Guice heard the matter on 3 August 2005. Judge Guice conducted a lengthy and thorough interview of both Defendant and Mr. Byrd. Defendant concedes that Judge Guice's examination of Defendant adhered to all the requirements of N.C. Gen. Stat. § 15A-1242, and that Judge Guice could have properly allowed Defendant to proceed *pro se* at that time. However, Judge Guice did not settle the question at the 3 August 2005 hearing, and conducted the following inquiry at the hearing

THE COURT: Let me ask you, Mr. Martin [Defendant]. Why don't we do this. At the present time let me enter this provisional [o]rder that I just entered or [t]emporary [o]rder and reserve the matter for further [o]rders at the Rule 24 [h]earing which they're going to have on September 6th during that term and give you an opportunity to think about it further and if you change your mind or something else you want to bring to the [c]ourt's attention then reopen the matter at that time. I know this is the most important matter you will ever have in your lifetime. Would you be agreeable to that?

[DEFENDANT:] I would be agreeable to that.

THE COURT: And then you can confer with Mr. Byrd and make a final ultimate decision at the Rule 24 [h]earing and if this turns out to be a capital case, I mean you're talking about life or death when you get to a capital case. So don't you think you really ought to think about [it] a little bit further?

[DEFENDANT]: I appreciate the opportunity to think further like you suggested.

THE COURT: Right now I'll allow your [m]otion to be reopened at the Rule 24 [h]earing. Let me say this to you. If it's determined to be a capital case and the [c]ourt finds it will proceed as a capital case, you're entitled to have a second lawyer appointed. Do you understand that?

. . . .

[DEFENDANT]: I understand that. I'll consider it between now and then.

THE COURT: And I think that we really ought to leave it open until that determination is made for the [c]ourt to have a chance to review it and you a chance to consider it and review it and discuss it further with Mr. Byrd.

[DEFENDANT]: I appreciate the opportunity, your Honor.

. . . .

> [ASSISTANT DISTRICT ATTORNEY]: [W]ould [the court] consider holding your ruling in obeyance [sic] until the Rule 24 hearing and have another hearing at that time or - - - - I just want some document in writing that . . . [D]efendant does not want a [c]ourt [a]ppointed [a]ttorney. And I think the earlier we do that, the better.
>
> THE COURT: I think we might be a bit premature because there's not even a [b]ill of [i]ndictment here. I think we need to just let [Defendant] think about it and make sure what he wants to do and then come the Rule 24 [h]earing and then he can say definitely what he wants to do. [Defendant] can say "I'm positive, we discussed this at the last hearing and I know what I want to do now and I reaffirm my decision or I've changed my mind."
>
> [DEFENDANT]: I would like a clarification. when he says he wants a waiver for a [c]ourt [a]ppointed [a]ttorney, as I understand ----
>
> THE COURT: I'm not going to require you to do that.
>
> . . . .
>
> THE COURT: The [c]ourt is going to allow [Defendant] to represent himself and I did appoint you [Mr. Byrd] as standby counsel at this time but then I want you to think about it and the [c]ourt will review and then the [c]ourt can make a final decision at the Rule 24 [h]earing.

However, following the 3 August 2005 hearing, no further hearing was held to make a final determination as to whether Defendant wished to represent himself or wished to obtain court-appointed counsel. Judge Guice signed an order dated 3 August 2005 allowing Defendant to represent himself and appointing Mr. Byrd as standby counsel, but the order was not filed until 6 January 2006.

The issue next came up at an 8 August 2006 hearing before Judge Laura Bridges. At the 8 August 2006 hearing, Defendant

stated:

> I think the real issue here is the fact that the last eleven months I've not had a hearing on any matter related to my case in spite of the fact that numerous things occurred, such as the indictment, an order signed by Judge Guice presented me as an absolute *pro se* litigant, but in fact the minutes and the printout, what is the court printout of August the 3rd, clearly explicitly states that Mr. Guice said it was provisional pending another hearing as to whether or not I would be a *pro se* litigant and the thing would be decided at the other hearing which never occurred.

(Emphasis added).

At the 8 August 2006 hearing, the State requested that Defendant be sent to Dorothea Dix Hospital to be evaluated for his overall competence, and further requested that the trial court appoint an attorney to represent Defendant. Judge Bridges asked Defendant if he wanted a new attorney appointed, and Defendant's answer indicated that he did, because he was unable to access the materials he felt he needed to provide an adequate defense for himself. Judge Bridges ordered Defendant sent to Dorothea Dix Hospital, and she stated that she would contact Indigent Defense Services about having a new attorney appointed to represent Defendant. Tony Dalton (Mr. Dalton) was appointed to represent Defendant in August of 2006, presumably as a result of the 8 August 2006 hearing. Mr. Dalton acted as Defendant's attorney until Mr. Dalton filed a motion to withdraw on 19 February 2007, apparently with the approval of Defendant. The motion was heard on 26 February 2007 before Judge Karl Adkins. At this hearing, Mr. Dalton informed the trial court that Defendant wished to proceed

pro se. The following colloquy resulted:

> THE COURT: All right. All right. Mr. Martin [Defendant], do you understand that you are giving up your right to a lawyer by doing this?
>
> [DEFENDANT]: No, [y]our Honor, I don't understand that. I understand that I have the right to a standby counsel.
>
> THE COURT: Right. But I mean for --
>
> [DEFENDANT]: Yeah, an actual full-time lawyer, yes, [y]our Honor.
>
> THE COURT: Right. Okay. All right. I will allow your motion.

The record indicates that Defendant was provisionally granted the right to proceed *pro se* at the 3 August 2005 hearing, though Defendant never signed a waiver. Judge Guice expressly held final determination of the matter pursuant to a hearing to be conducted in the future, which never occurred. Furthermore, at the 8 August 2006 hearing, Defendant complained about the eleven months that had passed without any additional hearing on this matter. Defendant stated his frustration that an order granting him the right to proceed *pro se* had been entered 6 January 2006, without the additional hearing ordered by Judge Guice providing Defendant the opportunity to make a final decision on the matter.

Defendant indicated to Judge Bridges that he felt unable to adequately represent himself, due to limitations on access to materials he felt he required, as a result of his incarceration in Central Prison. Mr. Dalton was subsequently appointed as counsel for Defendant and represented Defendant for approximately six months. Mr. Dalton filed a motion to withdraw as Defendant's

attorney and Judge Karl Adkins granted Mr. Dalton's motion on 26 February 2007. After granting the motion, Judge Adkins purported to grant Defendant the right to proceed *pro se*, and Douglas Hall was appointed as Defendant's standby counsel on 2 March 2007.

Notwithstanding Judge Guice's thorough inquiry at the 3 August 2005 hearing into Defendant's understanding of his rights and the risks of proceeding *pro se*, it is unclear to this Court that Defendant's desire to proceed *pro se* was ever "'clearly and unequivocally' expressed and [that] the trial court [made] 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 (quoting *State v. Carter*, 338 N.C. 569, 581, 451 S.E.2d 157, 163 (1994)); *see also Johnson*, 341 N.C. at 111, 459 S.E.2d at 250; *Scott*, __ N.C. App. at __, 653 S.E.2d at 909; *White*, 78 N.C. App. at 744-46, 338 S.E.2d at 616-17.

Defendant made clear at the 8 August 2006 hearing that, based upon Judge Guice's statements, he did not voluntarily waive his right to counsel for the duration of the trial. Defendant was waiting for the hearing ordered by Judge Guice to make that final determination. For these reasons, we are reluctant to treat Judge Guice's 3 August 2005 order, which was entered 6 January 2006, as evidence that Defendant ever voluntarily agreed to proceed *pro se*.

More relevantly, subsequent to the order entered 6 January 2006, Defendant clearly indicated that he wanted a court-appointed attorney to represent him at trial, and Mr. Dalton was appointed as Defendant's counsel. Mr. Dalton represented Defendant in that

capacity for approximately six months. Assuming, *arguendo*, that Defendant had voluntarily waived his right to appointed counsel on 3 August 2005, Mr. Dalton's subsequent appointment constituted a revocation of that waiver. *Scott*, __ N.C. App. at __, 653 S.E.2d at 909, *see also State v. Hoover*, 174 N.C. App. 596, 598, 621 S.E.2d 303, 304 (2005). At this point, upon Defendant's request to proceed *pro se*, the trial court was obligated to conduct the inquiry mandated by N.C. Gen. Stat. § 15A-1242. *See Evans*, 153 N.C. App. at 315-16, 569 S.E.2d at 675; *see also Johnson*, 341 N.C. at 111, 459 S.E.2d at 250. Failure to conduct this inquiry requires that Defendant receive a new trial. *State v. Thomas*, 331 N.C. 671, 417 S.E.2d 473 (1992); *State v. Pruitt*, 322 N.C. 600, 604, 369 S.E.2d 590, 592 (1988); *Lamb*, 103 N.C. App. at 648, 406 S.E.2d at 655; *White*, 78 N.C. App. at 746, 338 S.E.2d at 617.

The inquiry mandated by N.C. Gen. Stat. § 15A-1242 was not conducted by Judge Adkins when he was confronted with Defendant's request to proceed *pro se*. This error was prejudicial to Defendant, and we remand to the trial court for a new trial.

III.

We next address Defendant's eighth argument because Defendant may be faced with this issue on remand. In Defendant's eighth argument, he contends the trial court erred by refusing to grant Defendant's request for a court-appointed investigator. We disagree.

N.C. Gen. Stat. § 7A-450(b) (2007) provides that "[w]henever a person . . . is determined to be an indigent person entitled to

counsel, it is the responsibility of the State to provide him with counsel and the other necessary expenses of representation." N.C. Gen. Stat. § 7A-454 (2007) provides that "[f]ees for the services of an expert witness for an indigent person and other necessary expenses of counsel shall be paid by the State in accordance with rules adopted by the Office of Indigent Defense Services." In *State v. Fletcher*, this Court stated that the two aforementioned statutes required "that a private investigator be provided upon a showing by the defendant that there is a reasonable likelihood that it will materially assist the defendant in the preparation of his defense or that without such help more likely than not the defendant will not receive a fair trial." *State v. Fletcher*, 125 N.C. App. 505, 509-10, 481 S.E.2d 418, 421-22 (1997) (citation omitted). "Caution is to be exercised in the appointment of an investigator, and an investigator should be provided only upon a clear showing that specific evidence is reasonably available and necessary for a proper defense." *Id.* at 510, 481 S.E.2d at 422 (citation omitted).

> There is no criminal case in which defense counsel would not welcome an investigator to comb the countryside for favorable evidence. Thus, such appointment should be made with caution and only upon a clear showing that specific evidence is reasonably available and necessary for a proper defense. Mere hope or suspicion that such evidence is available will not suffice. For a trial judge to proceed otherwise would be to impede the progress of the courts and to saddle the State with needless expense.

State v. Tatum, 291 N.C. 73, 82, 229 S.E.2d 562, 568 (1976). Whether a private investigator should be appointed at the expense

of the State to assist an indigent defendant rests in the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of that discretion. Fletcher, 125 N.C. App. at 510, 481 S.E.2d at 422 (citation omitted). "[O]ur courts have ruled that a defendant who chooses to proceed *pro se* 'does so at his peril and acquires as a matter of right no greater privilege or latitude than would an attorney acting for him.'" *State v. Poindexter*, 69 N.C. App. 691, 694, 318 S.E.2d 329, 331 (1984) (citations omitted).

Defendant argues only that an investigator would have helped him interview State's witnesses and prepare for trial. Defendant makes no argument beyond "mere hope or suspicion" that an investigator would have turned up any specific evidence necessary for a proper defense. *Tatum*, 291 N.C. at 82, 229 S.E.2d at 568; *see also Fletcher*, 125 N.C. App. at 510, 481 S.E.2d at 422. We hold that the trial court did not abuse its discretion in denying Defendant's request for a court-appointed investigator. This argument is without merit.

The factual situations giving rise to Defendant's additional arguments are not likely to occur again at Defendant's new trial. We therefore do not address them.

New trial.

Judges McCULLOUGH and STROUD concur

Report per Rule 30(e).