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NO. COA08-200

NORTH CAROLINA COURT OF APPEALS

Filed: 17 February 2009

STATE OF NORTH CAROLINA

v.

Wake County
No. 06 CRS 025593

LARRY BERNARD HARRIS

Appeal by Defendant from judgments and commitments entered 5 September 2007 by Judge Kenneth C. Titus in Wake County Superior Court. Heard in the Court of Appeals 22 September 2008.

Attorney General Roy Cooper, by Assistant Attorney General Roberta A. Ouellette, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender David W. Andrews, for Defendant.

STEPHENS, Judge.

Defendant Larry Harris was indicted on 19 June 2006 for breaking and entering a motor vehicle and misdemeanor larceny. The case came on for trial on 5 September 2007 in Wake County Superior Court. On 5 September 2007, the jury returned guilty verdicts on both charges. The trial court entered judgments on the jury verdicts and imposed consecutive sentences of 9 to 11 months in prison for breaking and entering a motor vehicle and 120 days for misdemeanor larceny. From these judgments and commitments, Defendant appeals.

Facts

Defendant was arrested on 21 March 2006 and charged with felonious breaking and entering a motor vehicle and misdemeanor larceny. On 15 May 2006, the trial court appointed the Wake County Public Defender to represent Defendant. On 19 June 2006, Defendant was indicted for breaking and entering a motor vehicle and misdemeanor larceny. On 10 July 2006, Defendant signed a Waiver of Counsel form, "freely, voluntarily and knowingly" waiving his right to all assistance of counsel and desiring to appear on his own behalf. The Honorable Carl R. Fox certified that Defendant had elected to proceed "without the assignment of counsel."

On 17 August 2006, Defendant appeared *pro se* at his arraignment before Judge Fox and pled not guilty to the charges. The State proposed a trial date of 30 October 2006. Judge Fox inquired if Defendant desired to continue to represent himself in the case, and Defendant answered affirmatively.

On 15 September 2006, at a pretrial hearing before the Honorable Kenneth C. Titus, Defendant's motion for funds to hire a private investigator was granted. Judge Titus also ordered that Defendant be evaluated at Dorothea Dix Hospital to determine his competency to stand trial.

On 21 February 2007, the Honorable J.B. Allen, Jr. reviewed the report from Dorothea Dix Hospital, which indicated that Defendant had a personality disorder but that he was competent to proceed. Judge Allen accepted the findings in the report and determined that Defendant was competent. Judge Allen also acknowledged that Defendant had appeared before Judge Fox on 10

July 2006 and waived his right to counsel. After attempting to explain the charges to Defendant, Judge Allen urged Defendant to get a lawyer. At that time, Defendant announced, "I'd like to ask the Court for a court-appointed lawyer at this time." Judge Allen appointed the Wake County Public Defender to represent Defendant. A trial date was subsequently set for 25 June 2007.

On 15 June 2007, Defendant's appointed attorney, Theodore Dardess, appeared before the Honorable Paul C. Ridgeway to file a motion for a bond reduction on Defendant's behalf. Defendant refused to appear at the proceeding, however, and a hearing on the matter was continued until Defendant was willing to appear. Mr. Dardess also told the trial court that Defendant refused to talk or meet with him or anyone from his staff, and that Defendant wanted to fire him. Mr. Dardess explained that Defendant wished to represent himself in the matter. The trial court declined to rule at that time on Defendant's request to represent himself and instead asked Mr. Dardess to deliver to Defendant a form indicating that he wished to relieve Mr. Dardess of his representation of Defendant.

On 18 June 2007, Mr. Dardess sent a letter to Katherine Edmiston, the Assistant District Attorney assigned to prosecute the case, indicating that, pursuant to Judge Ridgeway's instruction, he had attempted to have Defendant sign a Motion to Relieve the Public Defender as his counsel, but that Defendant refused to sign the document and would not let Mr. Dardess visit him. Mr. Dardess asked Ms. Edmiston to remove the case from the trial calendar and

to return the matter to court so that Defendant could be questioned by the judge to determine how Defendant wished to proceed, and if Mr. Dardess should be permitted to withdraw. Mr. Dardess also stated that if ordered to continue to represent Defendant, he would move to have Defendant reexamined to determine his competency to proceed, as Defendant's conduct since his last examination had changed.

The matter came on for trial before Judge Titus on 4 September 2007. Prior to the selection of the jury, Mr. Dardess explained to Judge Titus that Defendant had refused to meet with him since March and that Defendant wished to relieve him as his counsel. Mr. Dardess thus moved to be allowed to withdraw from the case, or, in the alternative, for a continuance to allow the court to communicate with Defendant or to order a reevaluation of Defendant's capacity to proceed. The trial court denied Defendant's motion to replace Mr. Dardess and denied Mr. Dardess's motion to withdraw.

After these motions were denied, Defendant continued to complain to the trial court about his attorney. The trial court stated to Defendant that "Mr. Dardess will be representing you in this proceeding -- in these proceedings and we will select a jury and begin with the evidence in the case." Nonetheless, the trial court allowed Defendant's request to "read out my motions[,] and Defendant proceeded to make more than 70 oral motions including discovery motions, motions to produce the indictment, a motion for a transcript of his arrest, a "[m]otion to the courts to suppress

Constitutional law as guidelines [sic][,]" and a "[m]otion the courts [sic] to suppress a-r-b-r-i-t-r-a-t-o-r [sic] rulings[.]" The trial court denied these motions.

After further disruption and protest by Defendant, Judge Titus had the following exchange with Defendant:

THE COURT: . . . I would suggest to you, Mr. Harris, that you utilize the services of your attorney.

THE DEFENDANT: Sir, that's not my attorney. That's not my attorney, sir. If you want to proceed we can proceed, but don't say -- that's not my attorney. I don't want anything to do with him.

If anything, I will be smacking him like he was trying to smack me. You know, that's why I don't have nothing to do with him. That's why I try to refer him to you.

Like I said, if you want to go forward you determine I will ask the Court --

THE COURT: Here we go, Mr. Harris. Here is the way it's going to be.

If you want to represent yourself in this proceeding, you are entitled to represent yourself. I would not let Mr. Dardess out of the case. He would have to be standby counsel so that if you had a question on the legal procedures you could ask him.

THE DEFENDANT: I don't need to ask him nothing.

THE COURT: Well, that may be the case sir. Listen to me now. I listened very nicely to you --

THE DEFENDANT: Okay. Yes, sir.

THE COURT: -- as you went through your motions.

THE DEFENDANT: Yes, sir.

THE COURT: Now you listen to me.

THE DEFENDANT: Yes, sir.

THE COURT: I will allow him to be standby counsel.

THE DEFENDANT: I don't want to have nothing to do with him. I don't -- hey, sir --

THE COURT: Mr. Harris.

THE DEFENDANT: No disrespect.

THE COURT: Listen carefully. You are required if you are representing yourself to know exactly what you need to do and when you need to do it. And if you don't do it then, I can't help you.

THE DEFENDANT: Okay.

THE COURT: And I am not going to help you.

THE DEFENDANT: Fine. Fine. Sir, I don't want to speak to this man period. You know, this -- sir.

THE COURT: I heard you.

THE DEFENDANT: Okay.

THE COURT: I don't need to hear you again. He is not going to be doing anything but sitting on that bench right behind you, and if you have a question, you can ask him. Everything else is on you.

You are going to pick the jury, you are going to be able to give your initial statement, you will be able to present any evidence that you wish to present within reason.

It's my job to control the course of the trial, to make sure everything that is sought to be testified to or admitted is permissible, and if not, then I stop it.

So if you want to represent yourself and that's the way you wish to proceed and you think you know enough about the legal procedures to do that, you are welcome to.

THE DEFENDANT: Well, sir, if you -- if you -- if you decide that we are going to go forward today, then that's what we will do. Therefore I am saying I don't want to represent myself.

But if we are going to have trial today, I will represent myself. All I ask for is that what I supposed [sic] to have, and that is my indictment and -- my indictment -- and my -- where I went to Dorothea Dix. I need those papers.

And sir, I am ready for trial if that's what you --

THE COURT: We are going to. Mr. Dardess, if you could give him the copy of the Dorothea Dix record and copies of his indictment, we will proceed in this matter.

Following this exchange, Defendant refused to change out of his jail clothes into street clothes. The trial court then called for a jury. Prior to the entry of the prospective jurors, Defendant made several more *pro se* motions, including a motion "[t]hat the plaintiff got to be here[,]'" which were denied by the trial court. Defendant protested about the trial court's denial of his motions, and explained that he was "just trying not to be railroad [sic] by the judge[.]" The following exchange between the trial court and Defendant then took place:

THE COURT: I can assure you this judge is not going to railroad you.

THE DEFENDANT: But you let this guy right here -- I mean, you know --

THE COURT: You asked for him to. So don't say I railroaded you by letting him sit there -- back there. You didn't want him anywhere near you.

THE DEFENDANT: I sure don't.

THE COURT: You got a question for him? You could ask him and he can give you advice.

THE DEFENDANT: I supposed to have somebody here representing me.

THE COURT: You have chosen to represent yourself. I have allowed Mr. Dardess to stay as standby counsel so that he will remain available to you if you have questions.

THE DEFENDANT: Sir, I make motion to the courts I feel like I am being railroaded. I know what's right is right and what's wrong is wrong, you know. But at the same time, you know, I ain't trying to stop, you know --

THE COURT: Mr. Harris, when the jury comes in you are going to have to be quiet.
You understand that?

THE DEFENDANT: Sir?

THE COURT: Until it's your turn to ask questions.

THE DEFENDANT: Sir, like I said, I ain't got no problem with that because, you know, whether or not I go home today or not wouldn't make any difference.

What I am trying to let you know is that, you know, I am not going -- I accept, you know, being the judge and respect the Court and all that.

But at the same time, you know, as far as, you know, railroading -- you know, you let this guy represent me after what he has done is not right after four months when he had appropriate time for -- you know what I am saying, get another lawyer.

. . . .

THE COURT: Okay. Mr. Harris, you are going to have to be quiet. The jury's going to come in through the back door and you will not be allowed to talk until you are allowed to address the jury by questioning during jury voir dire. So you will have to be quiet.

The prospective jurors subsequently entered the courtroom. The trial court announced that Defendant had chosen to wear his jail attire, even though street clothes had been provided, that Defendant had "also chosen to represent himself in this matter as

we proceed to the trial of the case[,]” and that Mr. Dardess had been appointed as standby counsel.

Before *voir dire* began, Defendant attempted to argue to the jury that the only reason he still had jail clothes on was because “they would not allow me . . . to get my own clothes.” After Defendant’s continued rant, and the trial court’s unheeded warning that Defendant would be removed from the courtroom if he continued to talk, Defendant was removed from the courtroom. The trial court then asked Mr. Dardess to take his seat and Mr. Dardess proceeded with jury selection.

The trial court called for an afternoon recess before jury selection had been completed. The trial court then addressed Defendant outside the presence of the jury to explain that he would like Defendant to participate in the proceedings but that in order to be allowed to do so, he had to be quiet until it was his turn to speak, ask questions, or testify. Defendant indicated that he understood these rules and asked the court, “I mean do you have any procedures that I -- you know, when I do, you know -- when I -- you know, I can have to go by when to - you know, when I supposed to or whatever? Because --[.]” The trial court told Defendant,

[t]hat’s what standby counsel can tell you or what Mr. Dardess is picking the jury on your behalf at this point. That’s what he is for. He knows the procedures.

. . . .

So if you choose to represent yourself, you are expected to know what you need to do. That’s why we let Mr. Dardess out so he could advise you if you have questions of him. But he is going to be proceeding representing you

in this case if you are not present in the courtroom.

Defendant indicated that he understood these rules.

The following morning, the trial court asked Defendant if he wished to participate in the proceedings and Defendant indicated that he did. He also indicated that he had "one or two motions." The trial court told Defendant to "[l]et your lawyer know what those motions are and I will entertain them if they are appropriate to be heard at the right time." The trial court also advised Defendant that during jury selection he was "not allowed to talk until it's your turn to ask questions[,]" and that "if I were in your shoes, I would probably advise to you, allow Mr. Dardess to continue with that jury selection process." The following exchange then took place:

THE DEFENDANT . . . what did you appoint [Mr. Dardess] to be?

THE COURT: He was appointed to represent you a long time ago, sir.

THE DEFENDANT: Okay. Well, we disregarded that. You know, he made it clear -- he made a statement yesterday that he didn't want to be my lawyer and I also made the statement yesterday, too.

THE COURT: Yes, sir. And that motion for him to withdraw on both your motions was denied by the Court. So he is your lawyer.

THE DEFENDANT: No.

THE COURT: We are not going to revisit that issue, Mr. Harris.

THE DEFENDANT: I know. Well, we made that clear yesterday that he was not -- that I was going to represent myself if I had to. If you --

THE COURT: Do you wish to continue with the jury selection process, sir?

THE DEFENDANT: Yes, sir.

THE COURT: Okay.

THE DEFENDANT: But what I am saying is --

THE COURT: Mr. Dardess will remain as the standby counsel

The trial court resumed jury selection and ordered Mr. Dardess to "participate as standby counsel[.]" After the State had chosen three more jurors, the trial court informed the prospective jurors that "Mr. Harris has requested that he participate in the jury selection process as his own counsel. I will allow him to do that. Mr. Dardess is still his standby counsel." After some confusion on Defendant's part, the trial court informed him that "if you choose to represent yourself, you are expected to know what you need to do." After continued confusion on Defendant's part over which six of the twelve jurors impaneled had been picked by Defendant, Defendant referred to the jurors as "poor white trash" and "[n]asty looking white people." Thereupon, the trial court again removed Defendant from the courtroom and ordered Mr. Dardess to resume his role as counsel for Defendant. Mr. Dardess conducted cross-examination of the State's witnesses, made motions to dismiss at the close of the State's evidence and all the evidence, offered evidence on Defendant's behalf, and made opening and closing arguments.

Following the jury deliberations, Defendant was brought back into the courtroom for the jury verdicts. The jury reached

unanimous verdicts as to Defendant's guilt on both charges. At the sentencing hearing, the trial court instructed Defendant that "if you want to represent yourself in the sentencing hearing, you are willing to do so or you may rely on counsel if you choose to do so." Defendant replied, "I will represent myself, sir." The court then ordered Mr. Dardess "back as standby counsel." Defendant was sentenced to 9 to 11 months followed by 120 days, and immediately released as he had already been in custody for 18 months. Defendant appealed the convictions in open court and made "a motion to get a lawyer to represent me on that appeal." The Appellate Defender's office was appointed to represent Defendant.

Discussion

Defendant first argues that the trial court erred by allowing him to represent himself without obtaining a voluntary, knowing, and intelligent waiver of counsel and by permitting him to engage in hybrid representation.

A defendant "has a right to handle his own case without interference by, or the assistance of, counsel forced upon him against his wishes." *State v. Thomas*, 346 N.C. 135, 138, 484 S.E.2d 368, 370 (1997) (quotation marks and citation omitted). However, "[b]efore allowing a defendant to waive in-court representation by counsel, . . . the trial court must [e]nsure that constitutional and statutory standards are satisfied." *State v. Thomas*, 331 N.C. 671, 673, 417 S.E.2d 473, 475 (1992). First, a defendant's "waiver of the right to counsel and election to proceed *pro se* must be expressed 'clearly and unequivocally.'" *Id.*

(quoting *State v. McGuire*, 297 N.C. 69, 81, 254 S.E.2d 165, 173, cert. denied, 444 U.S. 943, 62 L. Ed. 2d 310 (1979)).

"Once a defendant clearly and unequivocally states that he wants to proceed *pro se*, the trial court, to satisfy constitutional standards, must determine whether the defendant knowingly, intelligently, and voluntarily waives the right to in-court representation by counsel." *Id.* at 674, 417 S.E.2d at 476. In order to determine whether the waiver met that standard, the trial court must conduct a thorough inquiry. *Id.* N.C. Gen. Stat. § 15A-1242 satisfies any constitutional requirements by adequately setting forth the parameters of such inquiry. *Id.* (citing *State v. Gerald*, 304 N.C. 511, 519, 284 S.E.2d 312, 317 (1981)).

N.C. Gen. Stat. § 15A-1242 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.

N.C. Gen. Stat. § 15A-1242 (2005). The inquiry under N.C. Gen. Stat. § 15A-1242 is mandatory, and failure to conduct it is prejudicial error. *State v. Pruitt*, 322 N.C. 600, 603, 369 S.E.2d 590, 592 (1988). As a further safeguard, if a defendant is

indigent, N.C. Gen. Stat. § 7A-457 provides that the defendant "may, in writing, waive the right to in-court representation by counsel . . . if the court finds of record that at the time of waiver the indigent person acted with full awareness of his rights and of the consequences of the waiver." N.C. Gen. Stat. § 7A-457(a) (2005). However, this statute has been construed as directory, not mandatory, and an indigent defendant's waiver of counsel is not invalid simply because there was no written record of the waiver. *State v. Heatwole*, 344 N.C. 1, 18, 473 S.E.2d 310, 318 (1996), *cert. denied*, 520 U.S. 1122, 137 L. Ed. 2d 339 (1997). N.C. Gen. Stat. § 7A-457 further provides:

Any waiver of counsel shall be effective only if the court finds of record that at the time of waiver the indigent person acted with full awareness of his rights and of the consequences of the waiver. In making such a finding, the court shall consider, among other things, such matters as the person's age, education, familiarity with the English language, mental condition, and the complexity of the crime charged.

N.C. Gen. Stat. § 7A-457(a). These provisions are met as long as the inquiry required under N.C. Gen. Stat. § 15A-1242 has been satisfied. *Heatwole*, 344 N.C. at 18, 473 S.E.2d at 318.

In the case *sub judice*, we are of the opinion that Defendant did not "clearly and unequivocally" state a desire to proceed *pro se*. On 10 July 2006, Defendant executed a Waiver of Counsel form that waived his right to appointed assistance of counsel. However, Defendant revoked this waiver on 21 February 2007 when he announced to the trial court, "I'd like to ask the Court for a

court-appointed lawyer at this time." The trial court thus appointed the Public Defender to represent Defendant.

On 15 June 2007, Defendant's appointed attorney, Mr. Dardess, appeared before the court and said that Defendant wished to fire him. Defendant refused to attend the hearing, however, and the trial court declined to rule on Defendant's request to represent himself. Furthermore, Defendant refused to sign a form dismissing Mr. Dardess as his attorney.

When the matter came on for trial before Judge Titus on 4 September 2007, Defendant had not waived his right to counsel and was represented by Mr. Dardess. The trial court immediately denied Defendant's motion to replace Mr. Dardess as well as Mr. Dardess's motion to withdraw. After disruption and protest by Defendant, Judge Titus suggested that Defendant utilize the services of his attorney. Defendant objected to Mr. Dardess being his attorney. The trial court then had the following exchange with Defendant:

THE COURT: Here we go, Mr. Harris. Here is the way it's going to be.

If you want to represent yourself in this proceeding, you are entitled to represent yourself. I would not let Mr. Dardess out of the case. He would have to be standby counsel so that if you had a question on the legal procedures you could ask him.

. . . .

THE DEFENDANT: I don't want to have nothing to do with him. I don't -- hey, sir --

. . . .

THE COURT: I don't need to hear you again. He is not going to be doing anything but sitting on that bench right behind you, and if you

have a question, you can ask him. Everything else is on you.

You are going to pick the jury, you are going to be able to give your initial statement, you will be able to present any evidence that you wish to present within reason.

It's my job to control the course of the trial, to make sure everything that is sought to be testified to or admitted is permissible, and if not, then I stop it.

So if you want to represent yourself and that's the way you wish to proceed and you think you know enough about the legal procedures to do that, you are welcome to.

THE DEFENDANT: Well, sir, if you -- if you -- if you decide that we are going to go forward today, then that's what we will do. Therefore I am saying I don't want to represent myself.

But if we are going to have trial today, I will represent myself. All I ask for is that what I supposed [sic] to have, and that is my indictment and -- my indictment -- and my -- where I went to Dorothea Dix. I need those papers.

And sir, I am ready for trial if that's what you --

THE COURT: We are going to. . . .

Just prior to jury selection, Defendant stated, "I supposed to have somebody here representing me." The trial court responded, "You have chosen to represent yourself." Defendant was subsequently removed from the courtroom for improper behavior and jury selection proceeded without him. Upon the continuation of jury selection the following day, Defendant protested to being represented by Mr. Dardess and told the trial court, "Well, we made that clear yesterday that he was not -- that I was going to represent myself if I had to. If you -- [.]" Defendant was subsequently removed from the courtroom for improper behavior for the remainder of the trial. Upon his return for the sentencing

hearing, the trial court instructed Defendant that "if you want to represent yourself in the sentencing hearing, you are willing to do so or you may rely on counsel if you choose to do so." Defendant replied, "I will represent myself, sir."

After Defendant was appointed counsel on 21 February 2007, Defendant never clearly or unequivocally asserted his desire to conduct his own defense until his sentencing hearing. While Defendant had expressed his desire to replace his appointed counsel, and indicated that he would not cooperate with his appointed counsel, "[s]tatements of a desire not to be represented by court-appointed counsel do not amount to expressions of an intent to represent oneself." *State v. White*, 349 N.C. 535, 562, 508 S.E.2d 253, 270 (1998) (quoting *State v. Hutchins*, 303 N.C. 321, 339, 279 S.E.2d 788, 800 (1981)), *cert. denied*, 527 U.S. 1026, 144 L. Ed. 2d 779 (1999). Furthermore, Defendant's statement that "I am saying I don't want to represent myself. But if we are going to have trial today, I will represent myself" exhibits his preference not to represent himself. In fact, the record reveals that the trial judge was not sure throughout the trial if Defendant wished to represent himself.

"Given the fundamental nature of the right to counsel, we ought not to indulge in the presumption that it has been waived by anything less than an express indication of such an intention." *Hutchins*, 303 N.C. at 339, 279 S.E.2d at 800. In this case, as Defendant did not clearly and unequivocally express his desire to represent himself, the trial court erred in requiring or allowing

him to do so. Accordingly, we must vacate Defendant's convictions and remand the case for a new trial. In light of this holding, we need not address Defendant's remaining arguments.

NEW TRIAL.

Chief Judge MARTIN and Judge McGEE concur.

Report per Rule 30(e).