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NO. COA08-827

NORTH CAROLINA COURT OF APPEALS

Filed: 7 July 2009

STATE OF NORTH CAROLINA

v.

Montgomery County
Nos. 03 CRS 050646,-48

BRENT RENARD CHRISTIAN,
Defendant.

Appeal by defendant from judgments entered 10 January 2008 by Judge Thomas D. Haigwood in Superior Court, Montgomery County. Heard in the Court of Appeals 5 May 2009.

Attorney General Roy Cooper, by Assistant Attorney General Tracy C. Curtner, for the State.

D. Tucker Charns, for defendant-appellant.

WYNN, Judge.

The record in this case shows that Defendant twice waived his right to appointed counsel and forfeited his right to counsel of his choice by delaying the case on multiple occasions to find new representation. Because we find that Defendant forfeited his right to counsel of his choice, we uphold the trial court's decision to require him to proceed *pro se*.

Defendant Brent Renard Christian was arrested on 18 April 2003 and charged with resisting an officer, fleeing in a motor vehicle to elude arrest, exceeding safe speed, and failure to stop for a blue light or siren. On 20 May 2003, he executed a waiver of

assigned counsel.

On 17 December 2003, Charles W. Parnell, Jr. filed a notice of limited representation. On 17 July 2006, Mr. Parnell filed a motion to withdraw as counsel of record for Defendant, stating that an unspecified "ethical conflict" had arisen. Defendant executed a second waiver of assigned counsel on 17 July 2006.

In April 2007, Defendant retained Charles T. Browne as his attorney. Mr. Browne filed a discovery request on Defendant's behalf; however, on 30 April, Defendant discharged Mr. Browne as his attorney.

In November 2007, Defendant obtained Duane K. Bryant as counsel. Mr. Bryant filed a motion to dismiss on Defendant's behalf and appeared in court with Defendant in connection with a plea offer made by the State. After conferring with Mr. Bryant and the State prosecutor, the trial court informed Defendant in open court of the risks he faced if he rejected the plea and elected to proceed to trial. The trial court stated:

But I really would hope that you would sit down and put your head together with Mr. Bryant because he's so frustrated, he's wanting to withdraw because he thinks this is such a good deal for you that he just can't believe you won't take it. And he wants to get out of the case. If that happens, I'm going to agree not to -- I've already told Mr. Greene [the prosecutor] I've agreed I won't try it. I won't force you to try the case by yourself today because you basically have to do all the things that an attorney would do. I wouldn't force you to do that. But Mr. Greene has said he wants to put it on the January trial calendar and it would be up to you to either find another lawyer or to be ready to act as your own attorney and try the case to twelve people, which is hard for

anybody to do without an attorney.

Thereafter, the court recessed to permit Defendant to confer with Mr. Bryant; however, when the proceedings resumed, Mr. Bryant informed the court that Defendant rejected the offer, and moved to withdraw as Defendant's counsel. The trial court allowed the motion, set the matter for trial in January 2008, and instructed Defendant, "You need to understand now, Mr. Christian, that if you are not able to hire an attorney, that you would be expected to come into court and represent yourself and handle the entire jury trial by yourself." Defendant responded affirmatively.

However, when Defendant's case was called for trial on 9 January 2008, he informed the court that he was not ready to proceed because he was still trying to hire an attorney. He stated that he had called the office of an attorney on Monday, and the attorney's secretary advised him that the attorney would be unavailable that week. The trial court noted the extensive procedural history of the case, and asked Defendant why he waited until the week of the trial to try to hire someone. Defendant replied that it was the "[h]oliday season."

In response to the court's inquiry, the prosecutor stated that his witnesses were present and the State was ready to proceed to trial. Defendant remarked that he had "no problem with going to trial, but I want to hire a lawyer." The trial court allowed Defendant the opportunity to talk to the attorneys present in the courtroom. Failing to find an attorney to represent him, Defendant asked the court for a one-week continuance so he could hire an

attorney. Defendant stated:

I'm not trying to dodge this case. I've been coming to court for four or five years for this case. I'm not trying to dodge anyone. I just want to try the case. And if you would allow me a week, I'll have - I'll have me a lawyer here Monday.

The trial court then denied his continuance motion. At Defendant's request, the trial court allowed Defendant to confer with the State prosecutor about the possibility of a plea. Although the State again offered Defendant a plea, he rejected the offer, and proceeded to trial representing himself.

On 10 January 2008, the jury entered verdicts finding Defendant guilty of resisting an officer, fleeing in a motor vehicle to elude arrest, exceeding safe speed, and failure to stop for a blue light or siren. The trial court sentenced him to a suspended term of 45 days on the resisting conviction, and to an active term of 8 to 10 months (work release recommended) on the consolidated remaining convictions. Defendant appeals, arguing the trial court erred by (I) "failing to make a thorough inquiry of Defendant's decision to proceed *pro se*," and (II) denying his motion to continue. We disagree.

I.

A defendant's right to assistance of counsel is guaranteed by the Sixth and Fourteenth Amendments of the United States Constitution and Article I, section 23 of the North Carolina Constitution, and includes the right of an indigent defendant to appointed counsel. U.S. Const. amend. VI, XIV; N.C. Const. art. I, § 23; N.C. Gen. Stat. § 7A-450 (2007). Before a defendant may

waive his right to counsel and represent himself, the trial court must conduct "a thorough inquiry as to whether the defendant's waiver was knowing, intelligent and voluntary." *State v. Evans*, 153 N.C. App. 313, 315, 569 S.E.2d 673, 675 (2002) (citation omitted). Specifically, the court's inquiry must include whether 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 (2007).

However, "[w]hen 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) (emphasis added). "Once given, 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. Hyatt*, 132 N.C. App. 697, 700, 513 S.E.2d 90, 93 (1999) (citation omitted). Moreover, the burden is on the defendant to show a "change in the desire . . . for counsel." *State v. Watson*, 21 N.C. App. 374, 379, 204 S.E.2d 537, 540-41, *cert. denied*, 285 N.C. 595, 206 S.E.2d 866 (1974).

Here, Defendant executed a waiver of his right to court-appointed counsel on two occasions: 20 May 2003 and 17 July 2006. Both waivers were certified by the trial court, attesting that Defendant was "fully informed in open court" as to the charges against him, the right to assistance of counsel, and the consequences of his decision to waive that right. Further, there is no evidence in the record to indicate that Defendant ever attempted to withdraw his waiver or have counsel assigned to him by the trial court. Accordingly, we hold that Defendant failed to rebut the presumption that his waiver of assigned counsel was "knowing, intelligent, and voluntary." *Warren*, 82 N.C. App. at 89, 345 S.E.2d at 441.

II.

Defendant next contends the trial court abused its discretion by denying his request to continue his trial on the grounds that Defendant forfeited his right to counsel by his own actions. We disagree.

A defendant's right to the counsel of his choice is not absolute. *State v. McFadden*, 292 N.C. 609, 612, 234 S.E.2d 742, 745 (1977). Generally, a defendant must be given "a reasonable time in which to obtain counsel of his own choosing, and must be granted a continuance to obtain counsel of his choosing where, through no fault of his own, he is without counsel." *State v. Montgomery*, 138 N.C. App. 521, 524, 530 S.E.2d 66, 68 (2000) (citation omitted). "A defendant may lose his constitutional right to be represented by the counsel of his choice when the right to

counsel is perverted for the purpose of obstructing and delaying a trial." *State v. Quick*, 179 N.C. App. 647, 649, 634 S.E.2d 915, 917 (2006) (holding that defendant's failure to retain counsel over an eight-month period amounted to obstruction and delay) (citation omitted). Further, where a defendant's own willful conduct has resulted in the forfeiture of his right to counsel, a trial judge is not required to conduct a section 15A-1242 inquiry before requiring a defendant to proceed pro se. *Montgomery*, 138 N.C. App. at 525, 530 S.E.2d at 69.

Here, the record reveals that Defendant forfeited his right to the counsel of his choice through his own willful conduct. Defendant's case began in 2003, over five years prior to the time the case finally was called for trial on 9 January 2008. During this period, Defendant retained three different attorneys: Mr. Parnell and Mr. Bryant, who withdrew due to conflicts with the Defendant, and Mr. Browne, whom Defendant discharged. Further, the trial court granted Defendant multiple continuances, including a two-month continuance on 5 November 2007 so that Defendant may obtain counsel. However, on Wednesday, 9 January 2008, Defendant appeared at trial without representation, stating that he first attempted to retain counsel two days earlier, and the "[h]olidays" prevented him from obtaining representation prior to that time. After pausing the proceedings on two occasions to allow Defendant to attempt to find an attorney willing to represent him from within the courtroom, the trial court concluded that Defendant must proceed *pro se*. The trial court stated:

I - I - I'm sorry, sir. I mean, this has been going on since 2003, and you've had - there's [sic] several lawyers that have been in the case. The last lawyer was allowed to withdraw in early November of last year.

I mean, it's been over two months since the last lawyer was allowed to withdraw, and Judge Craig told you then that the case was going on for trial this session, and now you're trying to make an effort to hire a lawyer when the case is called for trial in the courtroom which you certainly, I would hope, understand that that's just - that's a very difficult proposition to get somebody in the case at this point. I mean, if you were serious about it, you'd have done something long before now.

Having found that the Defendant waived his right to the assistance of court appointed counsel on two occasions and forfeited his right to counsel of his choice, we find no abuse of discretion by the trial court in denying Defendant's motion to continue.

No error.

Judges JACKSON and HUNTER, JR. concur.

Report per rule 30(e).