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NO. COA09-1231

NORTH CAROLINA COURT OF APPEALS

Filed: 17 August 2010

STATE OF NORTH CAROLINA

v. Guilford County
No. 07 CRS 102528

NECUS ANTHONY JACKSON

Appeal by defendant from judgment entered 19 December 2008 by Judge Lindsay R. Davis, Jr., in Guilford County Superior Court. Heard in the Court of Appeals 24 March 2010.

Attorney General Roy Cooper, by Assistant Attorney General Rufus C. Allen, for the State.

Michele Goldman, for defendant-appellant.

CALABRIA, Judge.

Necus Anthony Jackson ("defendant") appeals a judgment entered upon a jury verdict finding him guilty of false imprisonment. Defendant is entitled to a new trial.

I. BACKGROUND

On 16 January 2007, defendant lived with his wife, Pauline Jackson ("Mrs. Jackson"), and attacked her with a fireplace poker. Mrs. Jackson called law enforcement. Later, Mrs. Jackson was granted a domestic violence protection order ("DVPO") against defendant for one year. During that year, defendant and Mrs. Jackson separated.

On 1 October 2007, when defendant returned their children to Mrs. Jackson after a weekend visit, he became violent. He barricaded the front door of the house and refused to allow anyone to leave. Mrs. Jackson attempted to photograph defendant when he bent her hand back and took the camera away from her. Defendant also grabbed Mrs. Jackson by the hair and dragged her to the back of the house. Mrs. Jackson's neighbor called law enforcement.

Defendant was arrested and indicted on a charge of second degree kidnapping.[1] On 2 October 2007, the trial court determined that defendant was unable to provide the necessary expense of legal representation, ordered that defendant be declared indigent, and appointed the public defender to represent defendant. On 30 May 2008, the trial court allowed the appointed counsel's motion to withdraw because defendant "advised he was not satisfied with his attorney during examination of the plea transcript." The trial court then appointed Jack Hatfield ("Hatfield") as defendant's counsel.

Subsequently, an impasse developed between defendant and Hatfield, and defendant requested the trial court remove Hatfield and appoint another attorney. On 15 July 2008, The Hon. Carl Fox held a hearing on defendant's motion to remove Hatfield as counsel. Defendant and Assistant Public Defender John Nieman ("Nieman") were present. During the hearing, Nieman stated that defendant was charged with second degree kidnapping, describing it as a "Class E"

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[1]Defendant was also charged with domestic criminal trespass, violation of a DVPO, and assault on a female. However, the indictments for these offenses are not in the record.

crime. After hearing from defendant and Nieman, the trial court appointed Charles White ("White") as defendant's counsel and granted defendant's motion to remove Hatfield as counsel of record.

Defendant then attempted to engage the trial court in a discussion about the facts of his case and elements of his trial strategy. The trial court cautioned defendant to "reevaluate" his trial strategy by conferring with his new attorney because defendant might reach another impasse with his new attorney and end up "sitting at that table by yourself." The trial court warned defendant that, "charged with second-degree kidnapping, sitting at that table, by yourself, may be tantamount to just going ahead and asking the sheriff to ship you to Central Prison." The trial court recounted a story of a prior defendant who "insisted on representing himself" and ended up "doing life in prison."

Defendant then stated that he had some documents he wished to file with the court. The trial court told defendant, "talk to your attorney about that. If you want to file them and your attorney doesn't agree, then I'm afraid you'll have to represent yourself." The trial court subsequently asked defendant if he wanted White appointed as standby counsel so that defendant could represent himself. Defendant replied in the affirmative. The trial court then appointed White as standby counsel and set defendant's case for trial on 28 July 2008. After defendant left the courtroom, defendant was escorted back into the courtroom at the trial court's request to sign a waiver of counsel and affirm his waiver under oath.

On 17 December 2008, defendant's case was called for trial in Guilford County Superior Court before The Hon. Lindsay R. Davis, Jr. Defendant proceeded *pro se*. On 19 December 2008, the jury returned a verdict finding defendant guilty of the lesser included charge of false imprisonment.[2] The trial court sentenced defendant to a term of forty-five days in the custody of the North Carolina Department of Correction, suspended the sentence, and placed defendant on supervised probation for eighteen months. As a condition of his probation, defendant was ordered to receive a mental health evaluation, and to have no contact with Mrs. Jackson except for visitation with their children as set out by the court. Defendant was also given credit for 135 days that he spent in confinement prior to the date of judgment. Defendant appeals.

II. RIGHT TO SELF-REPRESENTATION

Defendant argues that the trial court erred in accepting his waiver of counsel where he never made a request to represent himself, and where the trial court failed to conduct the statutorily required inquiry necessary to assure that his waiver of his constitutional right to counsel was knowing, intelligent and voluntary. We agree.

N.C. Gen. Stat. § 15A-1242 (2008) states:

> 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

[2]Prior to the close of its case, the State dismissed the charge of violation of a DVPO. At the close of all evidence, the trial court dismissed the charge of domestic criminal trespass. The jury was unable to reach a verdict on the charge of assault on a female, and the trial court declared a mistrial on that charge.

> 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.

Id.

The Sixth and Fourteenth Amendments of the United States Constitution guarantee persons accused of serious crimes the right to counsel, and implicit in this right "is the right of a defendant to refuse counsel and to conduct his or her own defense." *State v. Pruitt*, 322 N.C. 600, 602, 369 S.E.2d 590, 592 (1988) (citation omitted). "However, '[b]efore allowing a defendant to waive in-court representation by counsel . . . the trial court must insure that constitutional and statutory standards are satisfied.'" *State v. Moore*, 362 N.C. 319, 322, 661 S.E.2d 722, 724 (2008) (quoting *State v. Thomas*, 331 N.C. 671, 673, 417 S.E.2d 473, 475 (1992)). "Once a defendant clearly and unequivocally states that he wants to proceed *pro se*, the trial court . . . must determine whether the defendant knowingly, intelligently, and voluntarily waives the right to in-court representation by counsel." *Thomas*, 331 N.C. at 674, 417 S.E.2d at 476 (citations omitted). "[T]he record must show that the defendant was literate and competent, that he understood the consequences of his waiver, and that, in waiving his right, he was voluntarily exercising his own free

will." *State v. Thacker*, 301 N.C. 348, 354, 271 S.E.2d 252, 256 (1980).

In order to determine whether the defendant's waiver meets this constitutional standard, the trial court must conduct a thorough inquiry, and perfunctory questioning is not sufficient. *Thomas*, 331 N.C. at 674, 417 S.E.2d at 476. "It is the trial court's duty to conduct the inquiry of defendant to ensure that defendant understands the consequences of his decision." *Pruitt*, 322 N.C. at 604, 369 S.E.2d at 593. "A trial court's inquiry will satisfy this constitutional requirement if conducted pursuant to N.C.G.S. § 15A-1242." *Moore*, 362 N.C. at 322, 661 S.E.2d at 724 (citation omitted). The trial court's inquiry under N.C. Gen. Stat. § 15A-1242 "is mandatory and failure to conduct such an inquiry is prejudicial error." *Pruitt*, 322 N.C. at 603, 369 S.E.2d at 592. "Furthermore, 'neither the statutory responsibilities of standby counsel, N.C.G.S. § 15A-1243, nor the actual participation of standby counsel . . . is a satisfactory substitute for the right to counsel in the absence of a knowing and voluntary waiver.'" *Id.* (quoting *State v. Dunlap*, 318 N.C. 384, 389, 348 S.E.2d 801, 805 (1986)).

In *Dunlap*, the defendant was charged with first-degree kidnapping and first-degree rape. 318 N.C. at 385, 348 S.E.2d at 802. The defendant was subsequently adjudicated indigent and the trial court appointed counsel. *Id.* at 386, 348 S.E.2d at 803. Because of a conflict of interest, appointed counsel withdrew and was replaced by a private attorney, who was subsequently replaced

by another attorney. *Id.* The defendant stated he was dissatisfied with the new attorney's services, and the new attorney moved to withdraw. *Id.* The trial court allowed the defendant to proceed *pro se*. *Id.* at 386-87, 348 S.E.2d at 803. In ordering a new trial for the defendant, our Supreme Court stated that "nothing in the record before this Court shows that the trial judge made any inquiry to satisfy himself that the defendant understood and appreciated the consequence of his decision or comprehended 'the nature of the charges and proceedings and the range of permissible punishments.'" *Id.* at 389, 348 S.E.2d at 804 (quoting N.C. Gen. Stat. § 15A-1242).

In *State v. Taylor*, the defendant was issued citations for speeding in excess of fifteen miles per hour. 187 N.C. App. 291, 292, 652 S.E.2d 741, 742 (2007). The defendant was convicted on each of the charges in District Court and appealed to Superior Court. *Id.* At the defendant's initial appearance, he engaged in the following conversation with the trial court:

> The Court: It appears that you were convicted of a couple of speeding tickets and appealed it to Superior Court; is that correct?
>
> Defendant: Yes, I did.
>
> The Court: All right. Both of the cases are class 2 misdemeanors. They carry up to 60 days in jail. I wouldn't give you any jail time on them even if the jury convicted you because they're regular speeding tickets, do you understand that?
>
> Defendant: Yes, sir.

Id. at 292-93, 652 S.E.2d at 742. The trial court then allowed the defendant to proceed *pro se*. *Id.* We held that the defendant was

entitled to a new trial because the trial court failed to comply with the statutory mandate of N.C. Gen. Stat. § 15A-1242. *Id.* at 294, 652 S.E.2d at 743 (2007). While the trial court correctly informed the defendant that he was subject to a "maximum 60-day imprisonment penalty for a Class 2 misdemeanor," it "failed to inform defendant that he also faced a maximum $1,000.00 fine." *Id.*

In the instant case, the trial court adjudicated defendant indigent and appointed Hatfield as defendant's counsel. Due to an impasse between defendant and Hatfield, defendant requested the trial court remove Hatfield and appoint another attorney. On 15 July 2008, the trial court held a hearing on defendant's motion to remove Hatfield as counsel. During the hearing, Nieman stated that defendant was charged with second degree kidnapping, and stated that it was a "Class E" crime. The trial court did not explain what a "Class E" crime was. After hearing from defendant and Nieman, the trial court removed Hatfield and appointed White as defendant's counsel.

Defendant then tried to engage the trial court in a discussion about the facts of defendant's case and elements of defendant's trial strategy. Defendant and the trial court had the following dialogue:

> THE COURT: So, that's why I'm stopping you at this point. Because it's not in your best - you don't have an attorney at this point. Mr. Nieman's not going to be representing you. You need to have - you're charged with a serious offense, and you need to have your attorney present when you're in court. I've allowed the - your motion to remove Mr. Hatfield, and put someone else in his place.

> But I'm just saying this to you. And I want you to listen to this real carefully, okay?
>
> THE DEFENDANT: Yes, sir.
>
> ...
>
> THE COURT: So I'm just saying to you, before you single-mindedly think that your way is the only highway, because I get the feeling that that's the road you're on right now, that it has a one-lane road, has no passing zones, and has no turns, that you re-evaluate your position with your new attorney, and decide that maybe there's another way to present your defense, without your - without following your highway, or your theory of, my road or no road. Because I got a bad feeling that, otherwise, you're going to reach another impasse, and you're going to be sitting at that table by yourself. And let me assure you, charged with second-degree kidnapping, sitting at that table, by yourself, may be tantamount to just going ahead and asking the sheriff to ship you to Central Prison.

The trial court subsequently recounted a story of a prior defendant who "insisted on representing himself" and ended up "doing life in prison." The trial court then stated:

> THE COURT: You don't go to law school for three years and then do all that suffering - And let me assure you, there's nothing wonderful about law school. It is all about survival. Just to be - just because it's - it helps you a little bit to do this. And there's nothing you can learn on TV that will save you, if you're representing yourself. Okay?
>
> THE DEFENDANT: I appreciate that.
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> ...
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> THE COURT: So, they'll give you some information to contact your attorney and get in touch with your new attorney, and see if you can set up a meeting with him as soon as possible. And then, you know, let your attorney know about your thoughts about

> subpoenaing this judge. But listen to your attorney once you do that, okay?
>
> THE DEFENDANT: Yes, sir.

Defendant then stated that he had some documents he wished to file with the court. The trial court responded:

> THE COURT: Well, now, see, talk to your attorney about that. If you want to file them and your attorney doesn't agree, then I'm afraid you'll have to represent yourself. Now, you could - do you want me to appoint this attorney as standby counsel? That way, you could represent yourself, and the attorney can just give you - just answer questions for you, but can't represent you.
>
> THE DEFENDANT: Yes, sir. Yes, sir.
>
> THE COURT: You want me to appoint this attorney as standby counsel?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: Okay. All right. I'll appoint this attorney - appoint the attorney as standby counsel.

Without further inquiry, the trial court appointed White as standby counsel and set defendant's case for trial on 28 July 2008. The trial court then had defendant escorted into the courtroom to sign a waiver of counsel, and defendant affirmed his waiver of counsel under oath.

In the instant case, the record shows nothing which would indicate that the trial court made any inquiry to satisfy itself that defendant understood and appreciated the consequence of his decision or comprehended the nature of the charges and proceedings and the range of permissible punishments. *See Dunlap*, 318 N.C. at 389, 348 S.E.2d at 804. During the hearing, an assistant public

defender, not the trial court, stated that defendant was charged with second degree kidnapping, a "Class E" crime. Further, the trial court did not inform defendant as to what a "Class E" crime was, whether it was a misdemeanor or a felony, or the range of permissible punishments for such a crime. *See Moore*, 362 N.C. at 322, 661 S.E.2d at 724 (suggesting that it is error for the trial court to "defer[] to defendant's assigned counsel to provide defendant with adequate constitutional safeguards" rather than conduct "the appropriate inquiry mandated by N.C.G.S. § 15A-1242"); *accord Pruitt*, 322 N.C. at 604, 369 S.E.2d at 593 ("Having a bench conference with counsel is insufficient to satisfy the mandate of the statute.").

During the trial court's colloquy with defendant in deciding whether to replace Hatfield with White, the trial court stated that if defendant represented himself, it "may be tantamount to just going ahead and asking the sheriff to ship you to Central Prison." However, the trial court's telling a defendant that he could be "shipped to prison" if he proceeded *pro se* is not sufficient to satisfy the statutory mandate that the court must make a "thorough inquiry" to satisfy itself that the defendant "comprehends the nature of the charges and proceedings and the range of permissible punishments." N.C. Gen. Stat. § 15A-1242; *see also State v. Gordon*, 79 N.C. App. 623, 625-26, 339 S.E.2d 836, 838 (1986) ("While there is some evidence that defendant understood that the charges were serious, there is no evidence that he was informed of the nature of the charges and the range of permissible punishments

or that he understood and appreciated the consequences of proceeding without counsel. Absent such evidence, the court should not have permitted him to proceed *pro se*[.]"). "For failure of the trial judge to make the inquiry mandated by N.C.G.S. § 15A-1242 before permitting the defendant to proceed to trial without counsel, the defendant is entitled to a new trial." *Dunlap*, 318 N.C. at 389, 348 S.E.2d at 805 (citing *State v. Bullock*, 316 N.C. 180, 340 S.E.2d 106 (1986) and *State v. McCrowre*, 312 N.C. 478, 322 S.E.2d 775 (1984)).

We also note with approval the language of our Supreme Court in *Moore*:

> Although not determinative in our decision, we take this opportunity to provide additional guidance to the trial courts of this State in their efforts to comply with the "thorough inquiry" mandated by N.C.G.S. § 15A-1242. The University of North Carolina at Chapel Hill School of Government has published a fourteen-question checklist "designed to satisfy requirements of" N.C.G.S. § 15A-1242:
>
> 1. Are you able to hear and understand me?
>
> 2. Are you now under the influence of any alcoholic beverages, drugs, narcotics, or other pills?
>
> 3. How old are you?
>
> 4. Have you completed high school? college? If not, what is the last grade you completed?
>
> 5. Do you know how to read? write?
>
> 6. Do you suffer from any mental handicap? physical handicap?
>
> 7. Do you understand that you have the right to be represented by a lawyer?

> 8. Do you understand that you may request that a lawyer be appointed for you if you are unable to hire a lawyer; and one will be appointed if you cannot afford to pay for one?
>
> 9. Do you understand that, if you decide to represent yourself, you must follow the same rules of evidence and procedure that a lawyer appearing in this court must follow?
>
> 10. Do you understand that, if you decide to represent yourself, the court will not give you legal advice concerning defenses, jury instructions or other legal issues that may be raised in the trial?
>
> 11. Do you understand that I must act as an impartial judge in this case, that I will not be able to offer you legal advice, and that I must treat you just as I would treat a lawyer?
>
> 12. Do you understand that you are charged with , and that if you are convicted of this (these) charge(s), you could be imprisoned for a maximum of and that the minimum sentence is ? (Add fine or restitution if necessary.)
>
> 13. With all these things in mind, do you now wish to ask me any questions about what I have just said to you?
>
> 14. Do you now waive your right to assistance of a lawyer, and voluntarily and intelligently decide to represent yourself in this case?
>
> *See* 1 Super. Court Subcomm., Bench Book Comm. & N.C. Conf. of Super. Court Judges, *North Carolina Trial Judge's Bench Book* § II, ch. 6, at 12-13 (Inst. of Gov't, Chapel Hill, N.C., 3d ed. 1999) (italics omitted). While these specific questions are in no way required to satisfy the statute, they do illustrate the sort of "thorough inquiry" envisioned by the General Assembly when this statute was enacted and could provide useful guidance for trial courts when discharging their responsibilities under N.C.G.S. § 15A-1242.

Moore, 362 N.C. at 327-28, 661 S.E.2d at 727.

III. CONCLUSION

"Because we dispose of this case on one assignment of error and because the other assigned errors may not arise at retrial, we need not address them." *Pruitt*, 322 N.C. at 601, 369 S.E.2d at 591. Defendant is entitled to a new trial.

New trial.

Judges HUNTER, Robert C. and HUNTER, Jr., Robert N. concur.

Report per Rule 30(e).