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NO. COA10-1166

NORTH CAROLINA COURT OF APPEALS

Filed: 7 June 2011

STATE OF NORTH CAROLINA

v.

Rowan County
No. 08 CRS 53569

TAMI BURR MCCLARTY

Appeal by Defendant from judgment entered 7 January 2010 by Judge Theodore S. Royster, Jr. in Rowan County Superior Court. Heard in the Court of Appeals 2 May 2011.

Attorney General Roy Cooper, by Assistant Attorney General Larissa S. Williamson, for the State.

J. Edward Yeager, Jr. for Defendant.

BEASLEY, Judge.

Tami Burr McClarty (Defendant) appeals from the revocation of her probation and activation of her suspended sentence. She contends

the trial court (1) erred by failing to conduct a proper colloquy pursuant to N.C. Gen. Stat. § 15A-1242 before allowing Defendant to waive counsel, and (2) abused its discretion in revoking Defendant's probationary sentence where the evidence did not support a finding of willfulness. We agree and reverse and remand for a new hearing.

On 2 July 2008, Defendant pleaded guilty to common law forgery. The trial court entered judgment suspending the eight to ten month sentence, placing Defendant on supervised probation for 18 months, and ordering Defendant to pay \$660.00 plus the probation supervision fee. Subsequently, on 30 October 2009, Defendant's probation officer filed a probation violation report alleging two violations: (1) an arrearage of \$709.99 on her court-ordered fees; and (2) an arrearage of \$406.01 on her monthly probation supervision fee.

The probation violation matter was heard briefly on 30 November 2009. The following exchange took place:

THE COURT: Ladies and gentlemen, again, you have heard the previous instructions relating to counsel. For those who wish to hire their own lawyer, you have that right. If you wish to waive counsel and represent yourself, you have that right also. If you feel that you need a lawyer but cannot afford one, you may ask me to consider appointing one based on your financial condition.

First of all, is it Ms. McClarty?

THE DEFENDANT: Yes.

THE COURT: What is your wish today, please?

THE DEFENDANT: I'm going to waive counsel.

THE COURT: All right. Thank you, ma'am.

Defendant signed a written waiver of assigned counsel and the trial court continued the case to a later date.

On 7 January 2010, the case came on for hearing. The issue of counsel was not raised again, except to note that Defendant had previously waived her right to counsel. Defendant, proceeding *pro se*, admitted to the violations as outlined in the probation violation report. The trial court found that Defendant willfully and without cause violated the terms and conditions of her probation, and revoked her probation. The trial court entered judgment activating the original sentence of eight to ten months. From the judgment entered, Defendant appeals.

First, Defendant contends the trial court committed reversible error by failing to make a thorough inquiry of Defendant's decision to proceed *pro se* as required by N.C. Gen. Stat. § 15A-1242 (2009). We agree.

A defendant at a probation revocation hearing "is entitled to be represented by counsel at the hearing and, if indigent, to have counsel appointed." N.C. Gen. Stat. § 15A-1345(e) (2009). Any waiver of that right "must be 'clearly and unequivocally' expressed." *State v. Hyatt*, 132 N.C. App. 697, 702, 513 S.E.2d 90, 94 (1999) (quoting *State v. Carter*, 338 N.C. 569, 581, 451 S.E.2d 157, 163 (1994)). Moreover, before allowing a defendant to proceed *pro se*,

the "court must make a thorough inquiry into whether the defendant's waiver was knowingly, intelligently and voluntarily made." *Id.* A trial court meets its obligation if, after making its inquiry, it is satisfied that 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. "The execution of a written waiver is no substitute for compliance by the trial court with the statute." *State v. Evans*, 153 N.C. App. 313, 315, 569 S.E.2d 673, 675 (2002).

In this case, Defendant signed a written waiver of her right to counsel. However, the trial court failed to make a detailed inquiry of whether Defendant understood the consequences of revocation of her probation, including having to serve an active sentence, or whether she understood the nature of the charges and the possible range of punishment. Moreover, it is not apparent whether the trial court "clearly advised" Defendant of her right to the assistance of counsel, including appointed counsel, where it appears such rights were explained off the record to a courtroom

full of people, and the explanation was not directed specifically to Defendant.

We conclude, therefore, that the trial court failed to conduct a proper inquiry as enumerated in section 15A-1242, and that “the trial court failed to determine whether defendant’s waiver of [her] right to counsel was knowing, intelligent, and voluntary.” See *Evans*, 153 N.C. App. at 316, 569 S.E.2d at 675. Thus, the judgment of the trial court activating Defendant’s sentence is reversed, and the matter remanded to the trial court for a new probation revocation hearing.

Since the matter is to be remanded for a new hearing, we need not address Defendant’s remaining argument regarding the trial court’s determination of the willfulness of the violations.

Reversed and Remanded.

Judges STEPHENS and ERVIN concur.

Report per Rule 30(e).