NO. COA10-254

NORTH CAROLINA COURT OF APPEALS

Filed: 7 September 2010

STATE OF NORTH CAROLINA

v. Onslow County
No. 09 CRS 52382

JASON CLIFTON WHITNEY,
Defendant.

Appeal by defendant from judgment entered 21 September 2009 by Judge Charles H. Henry in Onslow County Superior Court. Heard in the Court of Appeals 24 August 2010.

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

Betsy J. Wolfenden for defendant-appellant.

HUNTER, Robert C., Judge.

Defendant Jason Clifton Whitney appeals from the trial court's judgment revoking his probation and activating his suspended sentence. After careful review, we affirm.

Facts

On 22 July 2009, defendant pled guilty to one count of selling marijuana. Defendant was sentenced to a presumptive-range term of seven to nine months imprisonment. The trial court suspended defendant's sentence and placed him on supervised probation for 24 months. On 3 September 2009, defendant's probation officer filed a probation violation report, alleging that defendant violated the

conditions of his probation in that he: (1) tested positive for marijuana on 30 July 2009; (2) failed to report in for his scheduled office visit on 19 August 2009 and failed to contact his probation officer with a reason; (3) did not live at the address he provided to his probation officer; (4) failed to comply with his scheduled TASC appointment; and (5) provided a false address and absconded supervision.

At defendant's probation revocation hearing on 21 September 2009, defendant executed a written waiver of his right to counsel and proceeded *pro se*. Defendant admitted that he tested positive for marijuana on 30 July 2009, but denied the other four allegations. The State elected to proceed on only the allegation that defendant had tested positive for marijuana. When asked by the trial court to explain "why the Court should not revoke [his] probation," defendant stated that the last time he had smoked marijuana was 4 July 2009, prior to his pleading guilty to the drug charge and being placed on probation. The trial court found that defendant had violated a condition of his probation and that the "violation was willful and without valid excuse." Accordingly, the trial court revoked defendant's probation and activated his sentence. Defendant timely appealed to this Court.

I

Defendant first argues that his waiver of counsel at the probation revocation hearing was "was not knowing, intelligent, or voluntary because the trial court failed to comply with N.C. Gen. Stat. § 15A-1242 by making a 'thorough inquiry.'" "A defendant has

a right to assistance of counsel during probation revocation hearings." *State v. Evans*, 153 N.C. App. 313, 315, 569 S.E.2d 673, 674-75 (2002); N.C. Gen. Stat. § 15A-1345(e) (2009). "Implicit in [a] defendant's constitutional right to counsel is the right to refuse the assistance of counsel and conduct his [or her] own defense." *State v. Gerald*, 304 N.C. 511, 516, 284 S.E.2d 312, 316 (1981) (citing *Faretta v. California*, 422 U.S. 806, 45 L. Ed. 2d 562 (1975)). The right to assistance of counsel may only be waived, however, "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." *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), *cert. denied*, 515 U.S. 1107, 132 L. Ed. 2d 263 (1995)). This mandatory inquiry is satisfied only where the trial court fulfills the requirements of N.C. Gen. Stat. § 15A-1242, *State v. Moore*, 362 N.C. 319, 322, 661 S.E.2d 722, 724 (2008), which 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.

"[T]the critical issue is whether the statutorily required information has been communicated in such a manner that defendant's decision to represent himself is knowing and voluntary." *Carter*, 338 N.C. at 583, 451 S.E.2d at 164.

In this case, the following exchange occurred at the probation revocation hearing:

> [PROSECUTOR]: . . . . It looks like an appointed counsel was declined. And this situation needs to be addressed.
>
> THE COURT: Okay.
>
> . . . .
>
> THE COURT: . . . . Mr. Whitney, you were given a suspended sentence of a minimum seven months, maximum nine months.
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: You recall that?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: You're entitled to be represented by an attorney, hire your own attorney if you wish, or if you feel you cannot afford to hire an attorney, you can request again for court-appointed counsel. Can you tell the Court how you would like to proceed?
>
> THE DEFENDANT: Represent myself.
>
> THE COURT: Okay. You applied for court-appointed counsel earlier and were turned down. Okay. Looks like he was declined court-appointed counsel.
>
> [PROSECUTOR]: Oh, I'm sorry.

> THE COURT: You wish to proceed this morning with the disposition of your case without an attorney; is that correct?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: How old are you?
>
> THE DEFENDANT: 27.
>
> THE COURT: How far did you go in school?
>
> THE DEFENDANT: I got my diploma in 2006 or 2007.
>
> THE COURT: High school diploma?
>
> THE DEFENDANT: Uh-huh.
>
> THE COURT: Okay. Good. . . .

Here, the trial court explained to defendant that he had the right to assistance of counsel and that although he had previously been denied court-appointed counsel, he could "request again for court-appointed counsel." The court asked defendant twice if he wished to proceed without the assistance of counsel and each time defendant responded that he intended to "[r]epresent [him]self." The court also reminded defendant that he had received a suspended sentence of seven to nine months imprisonment and again asked defendant if he wished to represent himself. Defendant responded affirmatively. The court then asked defendant about his age and educational background. The trial court complied with the statutory requirements of N.C. Gen. Stat. § 15A-1242 in determining that defendant knowingly, intelligently, and voluntarily waived his right to assistance of counsel. *See State v. Proby*, 168 N.C. App. 724, 726-27, 608 S.E.2d 793, 794 (2005) (concluding that "the court's inquiry elicited the information necessary for it to make

a determination that defendant's decision to represent herself was knowing and voluntary" where transcript indicated that trial court "clearly informed defendant that she had the right to the assistance of an attorney," "clearly informed defendant that if she is found to have violated probation, then she faced the possible consequence of active service of the sentences," and "[d]efendant's responses clearly indicated that she understood"). Defendant's argument is overruled.

II

Defendant next contends that the trial court abused its discretion in revoking his probation solely because he tested positive for marijuana, eight days after he was placed on probation. Probation has been described as "an act of grace to one convicted of, or pleading guilty to, a crime." *State v. Duncan*, 270 N.C. 241, 245, 154 S.E.2d 53, 57 (1967). "All that is required in revoking a suspended sentence is evidence which reasonably satisfies the judge in the use of his sound discretion that a condition of probation has been willfully violated." *State v. Monroe*, 83 N.C. App. 143, 145, 349 S.E.2d 315, 317 (1986). The trial court's decision to revoke probation and impose an active sentence is reviewed for an abuse of discretion. *State v. Guffey*, 253 N.C. 43, 45, 116 S.E.2d 148, 150 (1960).

Here, defendant admitted that he tested positive for marijuana on 30 July 2009. Although defendant stated that he had not smoked marijuana since 4 July 2009, roughly two weeks before he pled guilty to the drug charge and was placed on probation, "[t]he trial

judge, as the finder of the facts, is not required to accept defendant's evidence as true." *State v. Young*, 21 N.C. App. 316, 321, 204 S.E.2d 185, 188 (1974). As "[t]he breach of any single valid condition upon which the sentence was suspended will support an order activating the sentence[,]" *State v. Braswell*, 283 N.C. 332, 337, 196 S.E.2d 185, 188 (1973), the trial court did not abuse its discretion in revoking defendant's probation and activating his sentence. Accordingly, the trial court's judgment is affirmed.

Affirmed.

Judges BRYANT and STEELMAN concur.

Report per Rule 30(e).