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NO. COA10-56

NORTH CAROLINA COURT OF APPEALS

Filed: 20 July 2010

STATE OF NORTH CAROLINA

v.

Cabarrus County
No. 09 CRS 8903

MICHAEL BRANDON LONG

Appeal by defendant from judgment entered 5 November 2009 by Judge Paul G. Gessner in Cabarrus County Superior Court. Heard in the Court of Appeals 19 July 2010.

Attorney General Roy Cooper, by Assistant Attorney General Bethany A. Burgon, for the State.

Betsy J. Wolfenden for defendant-appellant.

BRYANT, Judge.

On 23 June 2008, defendant Michael Brandon Long ("defendant") pled guilty to attempted trafficking of an opiate, along with six other drug-related offenses. On this judgment, the trial court imposed a suspended sentence of 16 to 20 months and placed defendant on 24 months of supervised probation. Defendant entered a guilty plea to another drug-related offense and received an active sentence of 13 to 16 months imprisonment. The trial court ordered defendant's suspended sentence to begin at the expiration of the active sentence.

Defendant completed his active sentence and was released on or about 11 March 2009. On 1 October 2009, defendant's probation officer filed a probation violation report alleging defendant willfully violated the special condition of probation which prohibited him from using, possessing, or controlling any illegal drug or controlled substance, in that he: (1) tested positive for marijuana on 15 June 2009; (2) tested positive for marijuana and opiates (hydrocodone and hydromorphone) on 18 August 2009; and (3) on 30 September 2009, admitted to using hydrocodone and marijuana during the preceding three weeks.

The trial court held a probation revocation hearing on 5 November 2009, at which defendant waived his right to counsel, signed a written waiver, and represented himself *pro se*. Defendant admitted his violations. Defendant's probation officer summarized the violations, explaining that, after the first positive test, he had given defendant the opportunity to "get clean" and go to a treatment program, but that defendant again tested positive for controlled substances. As a result, the probation officer recommended revocation. Defendant testified that, prior to his arrest, he had made an appointment at a treatment facility. Therefore, he requested that his probation be continued. However, the trial court found that defendant willfully violated the conditions of his probation. The trial court revoked defendant's probation and activated his suspended sentence of 16 to 20 months imprisonment. Defendant appeals.

Defendant argues one issue on appeal: that the trial court erred in allowing him to proceed *pro se* at his revocation hearing without making a thorough inquiry as to whether his waiver of counsel was knowing and voluntary and thus failed to comply with the mandate of N.C. Gen. Stat. § 15A-1242 (2009). We disagree.

A criminal defendant has a right to counsel during a probation revocation hearing, including the right to refuse counsel and proceed *pro se*. *State v. Evans*, 153 N.C. App. 313, 315, 569 S.E.2d 673, 674-75 (2002). "However, the right to assistance of counsel may only be waived 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." *Id.* at 315, 569 S.E.2d at 675 (citations omitted). Here, defendant signed a written waiver, which is "presumptive evidence that a defendant wishes to act as his or her own attorney." *See State v. Whitfield*, 170 N.C. App. 618, 620, 613 S.E.2d 289, 291 (2005) (internal citation omitted). However, "[a] written waiver is something in addition to the requirements of N.C. Gen. Stat. § 15A-1242, not . . . an alternative to it." *Evans*, 153 N.C. App. at 315, 569 S.E.2d at 675 (internal quotation marks omitted). The trial court's inquiry is only satisfied when the court fulfills the statutory requirements:

A defendant may be permitted at his election to proceed . . . 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 (2009). Where a defendant seeks to proceed *pro se*, compliance with the provisions of § 15A-1242 are mandatory. *State v. Debnam*, 168 N.C. App. 707, 708, 608 S.E.2d 795, 796 (2005); *Evans*, 153 N.C. App. at 315, 569 S.E.2d at 675.

Defendant contends that the trial court failed to clearly advise him of his right to counsel and failed to ascertain whether he understood and appreciated the consequences of his decision to waive counsel, as required by § 15A-1242 (1) and (2).

The following exchange occurred between defendant and the trial court:

THE COURT: Sir, you're here on a probation violation. If your probation is revoked and your sentence is activated, you could receive a term of sixteen to twenty months in the Department of Corrections. Did you want to hire a lawyer, represent yourself or ask for court-appointed?

THE DEFENDANT: Again, I mean, if reinstatement's an option, I'd like to represent myself. If not, then I would like to get a court-appointed.

THE COURT: I don't know if it's an option or not and that's something that I don't need to get into, but the primary or first thing we need to resolve is the issue of counsel.

THE DEFENDANT: Then I'd like to represent myself, sir.

THE COURT: Okay. Do you understand that if your probation is revoked and your sentence is activated, you could receive a term of sixteen to twenty months in prison?

THE DEFENDANT: (Nods head affirmatively)

THE COURT: Do you understand that you have the right to an attorney?

THE DEFENDANT: Yes, sir.

THE COURT: And do you understand if you can't afford one, one will be appointed to represent you?

THE DEFENDANT: Yes, sir.

THE COURT: Do you understand that I can't give you any kind of legal advice; Ms. Cook can't give you any kind of legal advice and -- well, do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: All right. Do you understand that -- well, how old are you?

THE DEFENDANT: Twenty-one.

THE COURT: How far'd you get in school?

THE DEFENDANT: I got my GED, sir.

THE COURT: Can you read and write?

THE DEFENDANT: Yes, sir.

THE COURT: Are you under the influence of alcohol, drugs, narcotics, medicines, pills or any other intoxicant?

THE DEFENDANT: No, sir.

THE COURT: Has anybody promised you or threatened you in any way to cause you to come in here today to give up your rights to all counsel and represent yourself?

THE DEFENDANT: No, sir.

THE COURT: I am going to find that the defendant has freely, voluntarily and understandingly waived his rights to all counsel in this matter, court-appointed and retained, and that this was the informed choice of the defendant.

Defendant argues that the trial court's statement "I don't know if [reinstatement]'s an option or not and that's something that I don't need to get into, but the primary or first thing we need to resolve is the issue of counsel" was the equivalent of making defendant waive counsel before the trial court "could ascertain the statutory disposition options."

After reviewing the transcript, we believe that the dialogue following defendant's question about the possibility of continuing probation shows that defendant's waiver was made knowingly, voluntarily, and intelligently and satisfied the three prongs of § 15A-1242. See *Whitfield*, 170 N.C. App. at 622, 613 S.E.2d at 291-92 (finding that waiver of counsel was knowing, intelligent, and voluntary despite question by defendant regarding right to counsel, which was made after waiver). The trial court twice explained that defendant had the option to hire an attorney or have one appointed, satisfying the first prong. Additionally, the trial court made it clear that the proceeding was a probation violation, which could result in the revocation of defendant's probation and the activation of a 16 to 20 month sentence in the Department of Correction, satisfying the third prong. Finally, the trial court adequately ensured that defendant understood and appreciated the consequences of his decision by informing defendant he faced possible activation of his suspended sentence, was entitled to

appointed counsel, and would not receive legal advice from the district attorney or trial court. Taken together, the court's inquiries were sufficient to ascertain whether defendant understood the consequences of proceeding without counsel. *Id.* Therefore, defendant's waiver of counsel was knowing and voluntary.

Affirmed.

Judges HUNTER, Robert C., and STEELMAN concur.

Report per Rule 30(e).