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NO. COA12-1509  
NORTH CAROLINA COURT OF APPEALS

Filed: 15 October 2013

STATE OF NORTH CAROLINA

v.

Forsyth County  
No. 11 CRS 17156

LANCE ADAM GOLDMAN

Appeal by defendant from judgment entered 24 February 2012 by Judge William Z. Wood, Jr. in Forsyth County Superior Court and an order entered 16 May 2012 by Judge Edgar B. Gregory in Forsyth County Superior Court. Heard in the Court of Appeals 14 August 2013.

*Attorney General Roy Cooper, by Assistant Attorney General Kimberly N. Callahan, for the State.*

*Guy Loranger for defendant-appellant.*

HUNTER, Robert C., Judge.

Defendant Lance Adam Goldman ("defendant") appeals from judgment entered against him activating a suspended sentence of 16-20 months imprisonment for one count of possession of five or more counterfeit instruments and one count of felonious breaking and entering a motor vehicle. Additionally, defendant appeals

from an order denying his motion for appropriate relief ("MAR"). On appeal, defendant argues that the trial court erred in activating his suspended sentence because the record does not show that the trial court conducted a proper inquiry under N.C. Gen. Stat. § 15A-1242 before allowing him to proceed *pro se* at the 24 February 2012 sentencing and plea hearing. After careful review, we vacate the judgments entered in cases 07 CRS 50537 and 08 CRS 338 and remand for a new trial.

#### **Background**

On 19 February 2007, defendant was charged with possession of five or more counterfeit instruments ("possession of counterfeit instruments") in case 07 CRS 425. On 12 December 2007, defendant was charged with another count of possession of counterfeit instruments in case 07 CRS 50537. On 18 February 2008, defendant was also indicted for felonious breaking and entering a motor vehicle ("B&E") in case 08 CRS 338. All three charges came on for plea on 14 July 2008 before the Honorable J. Richard Parker. At the hearing, the prosecutor informed the trial court that although defendant had waived his right to counsel already in 07 CRS 425 and 07 CRS 50537, he had not done so in 08 CRS 338. The court then engaged defendant in the

following exchange before allowing him to sign the waiver and accepting his guilty plea:

The Court: All right, Mr. Goldman, you are here today charged with some offenses for which you could be imprisoned if you either plead guilty or you're found guilty. You have a right to be represented by an attorney. If you cannot afford one, the Court will appoint one to represent you. You also have a right to either represent yourself or hire an attorney to represent you. Which one of those would you choose?

Goldman: I'm just taking care of it today by myself.

The Court: You're going to represent yourself?

Goldman: Yes, sir.

The Court: All right. Let him sign a waiver then.

(The Defendant signed a waiver.)

Madam Clerk: Do you swear you understand the affidavit you just signed regarding your right, so help you God?

Goldman: I do.

The record on appeal does not include a transcript for the hearings where defendant purportedly waived his right to counsel in 07 CRS 425 and 50537.

Following defendant's execution of the waiver but before the trial court's acceptance of his guilty plea, the trial judge

confirmed that defendant understood the nature of the charges he faced, that he had a right to plead not guilty and be tried by a jury, and that he was giving up constitutional rights. The trial judge also ensured that defendant understood that he was "pleading guilty to two counts of possession of five or more counterfeit instruments, each of which carries a maximum punishment of 44 months in prison and one count of felonious breaking and entering of a motor vehicle which carries a maximum punishment of fifteen months in prison for a total maximum punishment of 103 months in prison."

After accepting defendant's guilty pleas, the trial court sentenced defendant to an active term of 16-20 months imprisonment for 07 CRS 425. The trial court consolidated the other two convictions into a single judgment and imposed a sentence of 16-20 months imprisonment in 07 CRS 50537 and 08 CRS 338, but suspended the sentence and placed defendant on supervised probation for 36 months, which would start after the completion of his active sentence.

Later that same day, defendant appeared again before the trial court and moved to withdraw his guilty pleas and to plead guilty only to the B&E charge, claiming that he did not understand what had happened during the earlier plea and

sentencing hearing. The trial court denied defendant's motion, and defendant gave oral notice of appeal.<sup>1</sup> Defendant served his active prison sentence for 07 CRS 425 and was subsequently put on 36 months of probation pursuant to the judgments entered in 07 CRS 50537 and 08 CRS 338.<sup>2</sup>

On 6 December 2011, defendant's probation officer filed a violation report in Forsyth County, alleging that defendant had violated the terms and conditions of his probation. At a probation violation hearing on 24 February 2012 before the Honorable William Z. Wood, Jr., the trial court entered judgment finding defendant had willfully violated the terms and conditions of his probation, as alleged in the violation report, and activated his suspended sentence of 16 to 20 months imprisonment.<sup>3</sup>

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<sup>1</sup> On 10 March 2009, defendant moved to withdraw his appeal, and, on 12 March 2009, this Court allowed the motion and dismissed it.

<sup>2</sup> Defendant was originally released from prison nine months early because he was erroneously given credit for jail time served after he "participated in[,] brought about and/or facilitated a fraudulent scheme to falsify documents to obtain the unauthorized early release . . . from prison." On 16 March 2010, defendant was ordered to return to prison to serve the nine months remaining under his sentence in 07 CRS 425.

<sup>3</sup> The file number on the judgment sheet revoking defendant's probation for 07 CRS 50537 and 07 CRS 338 is 11 CRS 17156. For purposes of this opinion, we refer to the original file numbers.

Defendant filed a written notice of appeal, which he later withdrew to make an oral MAR on 27 February 2012. Judge Wood recused himself, and defendant's MAR was subsequently denied by Judge Edgar B. Gregory on 16 May 2012. On 15 May 2012, defendant filed a written notice of appeal from the judgment entered on 24 February 2012 revoking his probation and activating his suspended sentence; he also gave notice of appeal from the order denying his MAR.

### **Arguments**

Defendant appealed the denial of his MAR along with the judgment activating his sentence. However, defendant puts forth no argument regarding this issue on appeal. "It is not the role of the appellate courts, however, to create an appeal for an appellant." *Viar v. N.C. Dep't of Transp.*, 359 N.C. 400, 402, 610 S.E.2d 360, 361 (2005). Thus, it is deemed abandoned in accordance with Rule 28(a) of the North Carolina Rules of Appellate Procedure. See N.C. R. App. P. 28(a) (2011) ("Issues not presented and discussed in a party's brief are deemed abandoned."). As such, defendant's sole argument on appeal is that the trial court erred by activating his suspended sentence when he was improperly allowed to represent himself at the plea and sentencing hearing on 14 July 2008. Specifically, defendant

contends that the trial court failed to conduct the proper inquiry pursuant to N.C. Gen. Stat. § 15A-1242. We agree.

As an initial matter, we note that, generally, “[q]uestioning the validity of the original judgment where [a] sentence was suspended on appeal from an order activating the sentence is . . . an impermissible collateral attack.” *State v. Noles*, 12 N.C. App. 676, 678, 184 S.E.2d 409, 410 (1971) (internal citation omitted). However, “when a court activates a suspended prison sentence, defendant may, upon appeal of such activation, raise the claim that he was unconstitutionally denied counsel at his original trial.” *State v. Neeley*, 307 N.C. 247, 250, 297 S.E.2d 389, 392 (1982). Here, since defendant is contending that the trial court’s inquiry regarding his waiver of right to counsel failed to comply with N.C. Gen. Stat. § 15A-1242 and was, therefore, insufficient under the Sixth Amendment, his appeal is not an impermissible collateral attack but is properly before us.

This Court reviews whether the trial court complied with the statutory provisions of N.C. Gen. Stat. § 15A-1242 *de novo*. *State v. Watlington*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 716 S.E.2d 671, 675 (2011). Our Supreme Court has noted that a defendant’s waiver of his right to counsel must be expressed “clearly and

unequivocally" and that the defendant's decision to proceed *pro se* must be knowing, intelligent, and voluntary. *State v. Fulp*, 355 N.C. 171, 175, 558 S.E.2d 156, 159 (2002). "Before allowing a defendant to waive in-court representation by counsel, however, the trial court must insure that constitutional and statutory standards are satisfied." *State v. Thomas*, 331 N.C. 671, 673, 417 S.E.2d 473, 475 (1992). The inquiry required by N.C. Gen. Stat. § 15A-1242 satisfies constitutional requirements, *id.* at 674, 417 S.E.2d at 476, and provides that:

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.

With regard to 08 CRS 338, we initially note that there is no executed waiver of counsel form included in the record on appeal. Although the State contends that it included a copy of the executed waiver in the supplement to the record on appeal



and the transcript of the 14 July 2008 plea and sentencing hearing indicates that defendant purportedly executed a waiver with regard to this charge, the only waiver of counsel form from the 14 July hearing has an incomplete file number which reads only "07 CRS 4". Thus, we are unable to definitively establish that defendant actually executed a waiver in 08 CRS 338.

However, even though there is no executed waiver in the record, we must still determine whether the trial court conducted an adequate inquiry under N.C. Gen. Stat. § 15A-1242. See *State v. Heatwole*, 344 N.C. 1, 18, 473 S.E.2d 310, 318 (1996) (noting that a waiver of counsel form is not mandatory and the failure to execute one does not invalidate a waiver if the provisions of N.C. Gen. Stat. § 15A-1242 have been followed).

Here, the record discloses that the trial court failed to conduct a thorough inquiry with regard to the second two requirements of N.C. Gen. Stat. § 15A-1242. Although the trial court advised defendant of his right to the assignment and assistance of counsel just before he executed the waiver, there is no indication in the record that the trial court, at any time, made an inquiry as to whether defendant understood or appreciated the consequences of his decision to represent

himself, which is the second requirement of N.C. Gen. Stat. § 15A-1242. Furthermore, the trial court did not ascertain whether defendant comprehended the nature of the charges and proceedings and the range of permissible punishments that he faced until after he purportedly executed the written waiver. Since "it is prejudicial error to allow a criminal defendant to proceed *pro se* without making the inquiry required by N.C. Gen. Stat. § 15A-1242[,]" *State v. Hyatt*, 132 N.C. App. 697, 704, 513 S.E.2d 90, 95 (1999), defendant's judgment in 08 CRS 338 is vacated, and defendant is entitled to a new trial.<sup>4</sup> *State v. Seymore*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 714 S.E.2d 499, 502 (2011) (concluding that the defendant was entitled to a new trial when the trial court failed to conduct a thorough inquiry pursuant to N.C. Gen. Stat. § 15A-1242).

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<sup>4</sup> In support of its argument, the State relies on *State v. Patterson*, 208 N.C. App. 654, 662, 703 S.E.2d 755, 760 (2010), *disc. review denied*, 365 N.C. 196, 710 S.E.2d 36 (2011), where this Court held that a waiver was not rendered ineffective because the trial court did not conduct the statutory inquiry of N.C. Gen. Stat. § 15A-1242 prior to the defendant executing the waiver. Instead, the *Patterson* Court held that "given the fact that this [waiver] form is not mandatory, we see no prejudice so long as the trial court does, in fact, provide that information in accordance with the statute and the defendant subsequently asserts his right to represent himself." *Id.* (emphasis added). However, *Patterson* is easily distinguishable given that the trial court here made no inquiry into whether defendant understood or appreciated the consequences of proceeding *pro se* in 08 CRS 338 and defendant never reasserted his right to proceed *pro se* after a thorough and complete inquiry.

With regard to 07 CRS 50537, the record includes a copy of defendant's waiver of counsel form, dated 30/31 January 2008. In *Hyatt*, 132 N.C. App. at 703, 513 S.E.2d at 94, this Court noted that a written waiver is "something in addition to the requirements of N.C. Gen. Stat. § 15A-1242, not as an alternative to it." "[A]lthough a written waiver sets forth a presumption of a knowing, intelligent and voluntary waiver, that presumption can be overcome if the record demonstrates otherwise." *Id.* Here, the record contains no transcript for the hearing at which defendant signed this waiver, and we are unable to ascertain whether the trial court conducted a thorough inquiry as to defendant's decision to proceed *pro se*. "The record must affirmatively show that the inquiry [made pursuant to N.C. Gen. Stat. § 15A-1242] was made and that the defendant, by his answers, was literate, competent, understood the consequences of his waiver, and voluntarily exercised his own free will." *State v. Callahan*, 83 N.C. App. 323, 324, 350 S.E.2d 128, 129 (1986). In *Seymore*, \_\_ N.C. App. at \_\_, 714 S.E.2d at 501, this Court noted that:

[W]here the record is silent as to what questions were asked of defendant and what his responses were this Court has held, we cannot presume that the defendant knowingly and intelligently waived his right to counsel. When there is no transcription of

those proceedings, the defendant is entitled to a new trial.

Accordingly, the judgment in 07 CRS 50537 is also vacated, and defendant is entitled to a new trial.

**Conclusion**

Since the trial court failed to inquire as to all three requirements under N.C. Gen. Stat. § 15A-1242, we vacate defendant's conviction in 08 CRS 338 and remand for a new trial. Because the record is silent as to whether defendant knowingly and voluntarily waived his right to counsel in 07 CRS 50537, we vacate this judgment and remand for a new trial.

NEW TRIAL.

Judges GEER and McCULLOUGH concur.

Report per Rule 30(e).