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NO. COA12-400
NORTH CAROLINA COURT OF APPEALS

Filed: 6 November 2012

STATE OF NORTH CAROLINA

v.

Burke County
No. 08 CRS 1251, 08 CRS 5779-
5780, 09 CRS 205, 09 CRS 673,
09 CRS 4796

DENNIS JAMES ARROWOOD, JR.,
Defendant.

Defendant appeals the judgment entered 15 November 2011 by Judge Hugh B. Lewis in Burke County Superior Court. Heard in the Court of Appeals 26 September 2012.

Attorney General Roy Cooper, by Assistant Attorney General Ann Stone, for the State.

Marie Hare Mobley, for defendant.

ELMORE, Judge.

Defendant appeals the judgment entered revoking his probation on the basis that he never made a voluntary, knowing, and intelligent waiver of counsel. It is by writ of certiorari that we review defendant's judgments. After careful

consideration, we vacate the third judgment and remand for a new revocation hearing.

I. Background

On 3 March 2009, Dennis James Arrowood (defendant) pled guilty to multiple criminal charges. On 18 September 2009, defendant was sentenced for these offenses in two separate judgments (judgments one and two). In judgments one and two, defendant's sentences were suspended and he was placed on supervised probation. The sentences were ordered to run consecutively. On 27 September 2010, defendant pled guilty to felony breaking and entering 09 CRS 4796 (the third judgment). His prison sentence was suspended and he was again placed on supervised probation.

Thereafter, defendant failed to report for a scheduled compliance review with his probation officer. Orders of arrest for felony probation violations were issued on 17 August 2011 in judgments one and two. Attorney Nancy Einstein (Einstein) was appointed as counsel for defendant to handle the probation violations stemming from judgments one and two. On 23 October 2011, defendant was served with a violation report in judgment three. Defendant was not appointed counsel for judgment three.

On 15 November 2011, defendant, represented by Einstein,

came before the trial court for the probation violations resulting from judgments one and two. After defendant pled guilty to the probation violations, his probation officer alerted the court that a third violation was before the court. The following exchange occurred:

THE COURT: Please answer the following question: Do you admit or deny the violations, yes or no?

THE DEFENDANT: I admit it.

THE COURT: Okay, we'll deem that we have an admission. And do I understand that he wishes to activate his time at this point?

EINSTEIN: I'm not sure what he wants to do, Your Honor. He's got one, one sentence -- about four months credit for pretrial -- and then he was picked up -

THE COURT: (Inaudible) four weeks.

EINSTEIN: Yeah, he's probably got about five weeks on this bout in custody. So I'm sure you'd like to hear from the probation officer and then I'd like to briefly be heard.

THE PROBATION OFFICER: Your Honor, actually, there's three cases. There's one on the add-on that he was served with and cited after he was picked up. So we have three cases on the calendar this morning, Your Honor.

EINSTEIN: He may not have a court-appointed attorney for that new one.

THE COURT: Was that the '08 case? Which one

is on that -- ?

THE PROBATION OFFICER: 09-4796.

EINSTEIN: All right, Your Honor, he said that he would waive his right to a court-appointed attorney on that.

THE COURT: Thank you, that'll be so noted so we can go forward on all three.

The court revoked defendant's probation and sentenced him consecutively on all three judgments. He received 10 to 12 months for judgments one and two and 8 to 10 months for judgment three. After sentencing, defendant executed a waiver of his right to court-appointed counsel for the third judgment. Defendant now appeals.

II. Waiver of Counsel

Defendant argues that the trial court erred in revoking his probation without first obtaining a voluntary, knowing, and intelligent waiver of counsel from him for judgment three. We agree.

"Conclusions of law are reviewed de novo and are subject to full review." *State v. Biber*, 365 N.C. 162, 168, 712 S.E.2d 874, 878 (2011); *see also Carolina Power & Light Co. v. City of Asheville*, 358 N.C. 512, 517, 597 S.E.2d 717, 721 (2004) ("Conclusions of law drawn by the trial court from its findings

of fact are reviewable *de novo* on appeal.”) (citation omitted).

A defendant charged with the violation of conditions of a probation sentence is entitled to representation by an attorney. *See State v. Atkinson*, 7 N.C. App. 355, 358, 172 S.E.2d 249, 252 (1970). However, our Supreme Court has concluded that a defendant may handle his own case without the assistance of counsel provided certain constitutional and statutory standards are met. *See State v. Fulp*, 355 N.C. 171, 174-75, 558 S.E.2d 156, 158-59 (2002).

First, defendant’s waiver of the right to counsel and election to proceed pro se must be expressed clearly and unequivocally. Second, . . . the trial court must determine whether defendant knowingly, intelligently, and voluntarily waives his right to counsel. . . . In order to determine whether the waiver meets [this constitutional] standard, the trial court must conduct a thorough inquiry. This Court has held that N.C.G.S. § 15A-1242 satisfies any constitutional requirements by adequately setting forth the parameters of such inquiries.

Id. at 175, 558 S.E.2d at 159 (citations and quotations omitted).

In order to meet the first requirement, the defendant must have clearly and unequivocally expressed his desire to proceed pro se for the third probation violation. Our Supreme Court has held that “[g]iven the fundamental nature of the right to

counsel, we ought not to indulge in the presumption that it has been waived by anything less than an express indication of such an intention." *State v. Hutchins*, 303 N.C. 321, 339, 279 S.E.2d 788, 800 (1981). The record reflects that Einstein's statement to the trial court that defendant waived his right to court-appointed counsel for the third probation violation is the only indication that defendant waived his right to counsel.

Here, Einstein provided that defendant waived his right to a *court-appointed* attorney. However, defendant was entitled to representation by private counsel of his own choosing should he so wish. There is no indication that defendant stated that he waived his right to counsel *completely* and was electing to proceed pro se. Furthermore, the trial court never directly asked defendant whether he wished to waive counsel. As a result, he never had the opportunity to clearly and unequivocally waive his right to counsel.

We note that defendant's written waiver of counsel is not enough to establish that he clearly and unequivocally expressed his desire to proceed pro se. A written waiver of counsel is considered a further safeguard for the trial court. See *State v. Thomas*, 331 N.C. 671, 674-75, 417 S.E.2d 473, 476 (1992). It is not a "substitute for actual compliance by the trial court

with G.S. 15A-1242." *State v. Wells*, 78 N.C. App. 769, 773, 338 S.E.2d 573, 575 (1986).

Accordingly, we conclude that the State failed to provide any competent evidence that defendant clearly and unequivocally expressed his desire to waive his right to counsel as to judgment three.

As mentioned, *supra*, the trial court shall determine whether defendant knowingly, intelligently, and voluntarily waived his right to counsel. 355 N.C. at 174-75, 558 S.E.2d at 158-59. In order to make such determination, the trial court must thoroughly question the defendant to see whether defendant "(1) [h]as 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) [u]nderstands and appreciates the consequences of this decision; and (3) [c]omprehends the nature of the charges and proceedings and the range of permissible punishments." N.C. Gen. Stat. § 15A-1242 (2011). "The inquiry required [by this section] is mandatory and must be made in every case in which a defendant elects to proceed without counsel." *State v. Callahan*, 83 N.C. App. 323, 324 350 S.E.2d 128, 129 (1986) (citations and quotations omitted).

Here, there is no indication that the trial court informed

defendant of his right to counsel for judgment three. After defendant pled guilty to judgments one and two, Einstein stated that defendant "may not have a court-appointed attorney" for judgment three. At this point, the trial court was required to inform defendant that he was, in fact, entitled to representation, whether by a private attorney or by appointed counsel. As there is no indication that the trial court informed defendant of his right to the assignment of counsel, we conclude that the trial court failed to satisfy prong 1 above.

Furthermore, the trial court made no inquiry as to whether defendant understood the consequences of his decision to proceed pro se. Thus, prong 2 was not satisfied. Finally, the trial court failed to ask defendant whether he understood the nature of the charges against him and the range of permissible punishments. Therefore, the trial court failed to satisfy prong 3.

As the trial court failed to comply with N.C. Gen. Stat. § 15A-1242 in its entirety, the trial court was unable to determine whether defendant voluntarily, knowingly, and intelligently waived his right to counsel. Accordingly, we vacate the third judgment and remand for a new revocation hearing.

III. Conclusion

In sum, we conclude that the trial court erred by failing to comply with the requirements set out in N.C. Gen. Stat. § 15A-1242. Therefore, we vacate 09 CRS 4796 and remand for a new revocation hearing.

Reversed.

Judges CALABRIA and STEPHENS concur.

Report per Rule 30(e).