IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA15-271

Filed: 15 December 2015

Rutherford County, No. 12 CRS 53457

THE STATE OF NORTH CAROLINA

v.

FRED BOBO McCURRY, III, Defendant.

Appeal by defendant from judgment entered 16 December 2013 by Judge W. Robert Bell in Rutherford County Superior Court. Heard in the Court of Appeals 10 September 2015.

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

Appellate Defender Staples Hughes, by Assistant Appellate Defender Hannah H. Love, for defendant-appellant.

DIETZ, Judge.

Defendant Fred Bobo McCurry appeared at his probation violation hearing on 4 November 2013 represented by appointed counsel. McCurry then informed the trial court that he wanted to fire his appointed lawyer and retain private counsel of his choosing. The trial court granted his request and agreed to continue the hearing to 16 December 2013 to permit McCurry to retain new counsel. The court, however, warned McCurry that he must find representation by the next hearing date because

it would not be willing to grant another continuance based on a failure to retain counsel.

Six weeks later, McCurry appeared at the rescheduled hearing by himself, without a retained lawyer present. When the court asked if he had retained counsel, McCurry said that he had hired a local attorney. The court asked him if he had paid that attorney and McCurry said that he had.

The court then indicated that it would find the attorney and bring him into court. After realizing that the court intended to track down the attorney, McCurry admitted that he had not yet paid him for representation. The attorney later confirmed that he had not been retained.

In light of McCurry's failure to obtain counsel in the six weeks since the 4 November 2013 hearing, his false claim that he had paid an attorney, and the court's previous warning that there would be no more continuances, the court found that McCurry had forfeited his right to counsel and proceeded with the hearing.

McCurry contends on appeal that it was error for the court to force him to proceed *pro se* and that the court's findings in its violation order are an abuse of its discretion. We reject these arguments and affirm. Under our precedent, McCurry's failure to diligently attempt to retain counsel for six weeks, his false statements to the court relating to such failure, and the court's earlier warning that there would be no further continuances are sufficient to establish forfeiture. With regard to the

court's findings at the hearing, most of the arguments McCurry asserts on appeal were not raised in the trial court and are therefore waived. We reject the remaining arguments and conclude that the trial court's findings are not an abuse of discretion. Accordingly, we affirm the trial court's order imposing 90 days of confinement for violations of the conditions of McCurry's probation.

Facts and Procedural History

On 7 November 2012, McCurry pled guilty to numerous counts of possession with intent to sell various illegal drugs. The trial court consolidated judgment and imposed a 6 to 17 month term of imprisonment. The court then suspended McCurry's prison sentence upon completion of 24 months of supervised probation.

On 7 August 2013, McCurry's probation officer, Terrence Lenyear, filed a sworn violation report, alleging that McCurry had willfully violated the terms of his probation by testing positive for methamphetamines on two separate occasions, missing appointments for his substance abuse program, and violating other conditions of his probation. On 5 September 2013, Lenyear filed an addendum to the August violation report, alleging that McCurry had admitted to the use of methamphetamines and had failed to report to his probation officer as directed. On 24 October 2013, Lenyear filed a second addendum, alleging that McCurry once again had tested positive for methamphetamines and had failed to report to his probation officer.

On 8 August 2013, the trial court found McCurry indigent and appointed him counsel. At his probation violation hearing on 4 November 2013, McCurry moved to release his appointed counsel so that he could hire his own attorney. Following this motion, McCurry signed a written waiver of appointed counsel and the trial court continued the probation violation hearing until 16 December 2013, informing McCurry that he would not "have grounds for a continuance next time."

McCurry appeared at the 16 December 2013 hearing without counsel present but informed the court that he had hired Bobby Mosely to represent him. McCurry then moved for a continuance so that Mr. Mosely could be present to represent him at a later date. When the trial court asked McCurry whether he had paid Mr. Mosely for his representation, McCurry said that he had done so. Once it became apparent that the trial court intended to summon Mr. Mosely to the courtroom, McCurry changed his answer and stated, "I get disability, so he will get his first payment on the 3rd." Mr. Mosely then came before the court and stated that he had only given McCurry a price quote regarding his services and had not been retained. The State then requested the case proceed immediately on the basis that McCurry had ample time to hire an attorney before the hearing but failed to do so. The trial court denied McCurry's motion to continue and proceeded with the hearing.

McCurry represented himself *pro se* at the hearing and denied that he willfully violated the terms and conditions of his probation. Lenyear testified

and addressed each violation alleged in the August violation report and the September addendum. McCurry, in his cross-examination of Lenyear, sought to establish that the allegations were unsupported by the evidence.

The trial court pronounced its ruling from the bench and found that McCurry was willfully and without lawful excuse "in violation of the terms and conditions of his probation as delineated in paragraphs 1 and 2 of the violation report dated 24 October 2013 and 5 September 2013." The trial court's written order, however, found McCurry in violation of the conditions set out in the original August violation report, not just those set out in the later addendums.

The trial court ordered McCurry to serve a 90-day confinement in response to the violations. On 27 June 2014, McCurry filed a petition for a writ of certiorari challenging the trial court's confinement order. On 18 July 2014, this Court entered an order allowing McCurry's petition for a writ of certiorari.

Analysis

I. Denial of Request for Continuance

McCurry first challenges the trial court's denial of his motion to continue, which forced him to proceed with the hearing *pro se*. McCurry argues that his failure to retain counsel for six weeks was not misconduct serious enough to result in the forfeiture of his constitutional right to counsel. McCurry also argues that the trial

court did not conduct the inquiry required by N.C. Gen. Stat. § 15A-1242 before permitting McCurry to proceed *pro se*. We reject these arguments.

The right to counsel is guaranteed by the Sixth and Fourteenth Amendments of the United States Constitution and Article I of the North Carolina Constitution. *State v. Montgomery*, 138 N.C. App. 521, 524, 530 S.E.2d 66, 68-69 (2000). If an indigent defendant elects to hire private counsel, he loses the right to appointed counsel and "must be granted a reasonable time in which to obtain counsel of his own choosing, and must be granted a continuance to obtain counsel of his choosing where, through no fault of his own, he is without counsel." *Id.* A defendant's right to counsel, however, may be forfeited by willful conduct on his part that results in the absence of counsel. *See State v. McFadden*, 292 N.C. 609, 615, 234 S.E.2d 742, 746-47 (1977).

Here, the trial court concluded that McCurry forfeited his right to counsel when he, after being specifically informed at the 4 November 2013 hearing that he would not be granted any further continuances, failed to retain counsel over the six weeks between hearings and subsequently lied to the trial court about this failure. McCurry claims that the six-week period between the November hearing and the December hearing was too short to provide him a fair opportunity to seek counsel. *State v. Sampley*, however, precludes this argument, as this Court held that a period of one month constituted "a fair opportunity to secure counsel of [one's] own choice." 60 N.C. App. 493, 496, 299 S.E.2d 460, 462 (1983). Moreover, instead of offering the

trial court an explanation of why he had not retained counsel for the hearing, McCurry chose to lie and say that he had hired an attorney. This conduct, particularly in the absence of evidence that McCurry diligently attempted to retain counsel and in light of the trial court's warning that no further continuances would be permitted, is sufficient to constitute forfeiture of the right to counsel. *Id.*

McCurry also argues that the trial court never discussed with him the statutory factors listed in N.C. Gen. Stat. § 15A-1242. This statute, however, governs a defendant's voluntary decision to waive counsel entirely and proceed *pro se*; it does not apply where the defendant forfeited his right to counsel. *See Montgomery*, 138 N.C. App. at 525, 530 S.E.2d at 69. Accordingly, we reject McCurry's arguments.

II. Discrepancy Between Trial Court's Oral and Written Findings

McCurry next argues that this Court should set aside the finding of violations alleged in the August 2013 violation report because the trial court's oral findings announced from the bench did not reference them. McCurry specifically claims that the trial court found in open court that he violated specific conditions of the September and October addendums while the written court order found that he violated the conditions described in the August violation report and the September addendum. McCurry argues that this discrepancy is a clerical error for which his case should be remanded for correction. We disagree.

While the trial court erred by not specifically referencing the August report, we find this to be a textbook example of *lapsus linguae*. *Lapsus linguae* is an error in a court's oral findings that does not align with the facts of the case or the court's actual intent. This typically arises where a court's misspoken oral finding appears inconsistent with the court's more carefully crafted and deliberate written finding. *See State v. Rose*, 339 N.C. 172, 190, 451 S.E.2d 211, 221 (1994).

In this circumstance, a trial court may conform its written judgment to the court's actual intent, notwithstanding its oral ruling. *Id*. "[A] *lapsus linguae* not called to the attention of the trial court does not constitute prejudicial error when it is clear from a contextual reading of the transcript that the defendant reasonably should not have been misled by the misstatement." *State v. Baker*, 338 N.C. 526, 565, 451 S.E.2d 574, 597 (1994) (citations omitted).

Here, although the trial court did not mention the August violation report in its bench ruling, it is clear that the court acted upon Officer Lenyear's testimony that McCurry violated the conditions of his probation set out in the original August report. The trial court later clarified in its written order that McCurry violated his probation as alleged in paragraphs 1-5 in the August violation report. These allegations were supported by ample evidence in the record, which was presented to the trial court at the 16 December 2013 hearing. Accordingly, we reject McCurry's argument and affirm the trial court's written judgment.

III. Trial Court's Findings of Violation

Finally, McCurry challenges the trial court's findings of violation. He contends that the findings in the August violation report, as well as the finding of methamphetamine use in the September addendum, were an abuse of the trial court's discretion. As explained below, we disagree.

An alleged probation violation need not be proven beyond a reasonable doubt. *State v. Duncan*, 270 N.C. 241, 245, 154 S.E.2d 53, 57 (1967). "All that is required is that the evidence be such as to reasonably satisfy the judge in the exercise of his sound discretion that the defendant has violated a valid condition upon which the sentence was suspended." *State v. Robinson*, 248 N.C. 282, 285-86, 103 S.E.2d 376, 379 (1958) (citations omitted).

Here, McCurry's probation officer, Terrence Lenyear, testified that McCurry violated each of the conditions alleged in the violation report and explained how he had done so. On appeal, McCurry asserts a number of challenges to the trial court's findings that he could have asserted—but did not—at the violation hearing before the trial court. This Court has held that a defendant appealing from a probation violation order cannot raise arguments on appeal that were not raised in the trial court proceeding. *State v. Tozzi*, 84 N.C. App. 517, 520, 353 S.E.2d 250, 252 (1987). After disregarding these newly raised arguments, we hold that McCurry has not shown

that the trial court's probation violation order was an abuse of discretion. *See Robinson*, 248 N.C. at 285-86, 103 S.E.2d at 379.

McCurry also claims that the trial court abused its discretion by not making any findings indicating that it considered and evaluated his testimony. This Court has established that when the trial court enters an order stating "[f]rom the evidence presented," there is sufficient proof of analysis to show that the trial court evaluated defendant's testimony. *See State v. Jones*, 78 N.C. App. 507, 510, 337 S.E.2d 195, 197 (1985). Here, the trial court's written order stated that "after considering the record in the above-captioned case, the evidence presented, and statements of the State and defendant," McCurry was in willful violation of his probation. This language satisfies the proof-of-evaluation standard set forth by *Jones* and shows that the trial court adequately considered McCurry's testimony. *Id.*

In sum, we hold that the trial court did not abuse its discretion in finding that McCurry violated the conditions of his probation identified in the court's written order.

Conclusion

We affirm the trial court's challenged order.

AFFIRMED.

Judges HUNTER, JR. and DILLON concur.

Report per Rule 30(e).