IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA15-941

Filed: 18 October 2016

Nash County, No. 09CRS057101

STATE OF NORTH CAROLINA

v.

DANIEL HOPKINS, Defendant.

Appeal by defendant from judgments entered 30 October 2012 by Judge Walter H. Godwin, Jr. in Superior Court, Nash County. Heard in the Court of Appeals 22 February 2016.

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

Glover & Petersen, P.A., by Ann B. Petersen, for defendant-appellant.

STROUD, Judge.

Defendant appeals his convictions for assault with a deadly weapon with intent to kill inflicting serious injury and possession of a firearm by a felon. Defendant had waived his court-appointed counsel and then withdrawn his waiver and properly requested appointment of new counsel prior to trial, but the trial court denied his request and required him to proceed to trial *pro se*. Requiring defendant to proceed to trial without counsel violated his right to counsel, as he had previously been

determined to be indigent and was currently unable to secure sufficient funds to hire retained counsel. We therefore reverse defendant's judgment and remand for a new trial.

I. Background

In November of 2009, defendant was arrested and assigned counsel because the trial court determined that he was indigent. On or about 14 June 2010, defendant was indicted for assault with a deadly weapon with intent to kill inflicting serious injury ("AWDWIKISI") and possession of a firearm by a felon. In June of 2012, the trial court entered an order removing defendant's counsel upon defendant's motion requesting his counsel be removed due to an alleged conflict of interest; defendant signed a waiver form for his appointed counsel. Thereafter, in October of 2012 defendant sent a handwritten letter to the Nash County District Attorney's Office from jail in Nash County requesting court-appointed representation. On 11 October 2012, during a hearing on his request for court-appointed counsel, defendant stated,

> I was going to hire an attorney, but he wanted like $4,000. I came up with about half of that. That was hard for me to come up with and he said that I wasn't coming up with the money fast enough so he wasn't going to take the case. Now, I haven't got nobody to represent me and I don't [want] to go to trial without an attorney.

The trial court responded,

> Well, I believe, that all of that was – my recollection is that all of that was explained to you and you were quite positive in your remarks to me that you did not want a court

> appointed attorney that you were going to hire one.
>
> You say that you were able to come up with $2,000 to hire an attorney or the particular attorney you were talking to would not accept the case for that amount of money?
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> . . . .
>
> . . . Well, I think, that if you have the ability to raise-up that sufficient amount of money that would lean toward that you're able to hire an attorney. Well the request to have a Court Appointed Attorney provided to him in this matter is denied, and the case is set for October 29th. I would suggest that you consult with other attorneys.

On 30 October 2012, defendant's jury trial began; defendant proceeded *pro se*. The jury convicted defendant of AWDWIKISI and possession of a firearm by a felon, and the trial court entered judgments. Thereafter, it appears that defendant failed to give proper notice of appeal and then petitioned this Court for certiorari. On 1 December 2014, this Court allowed defendant's petition for certiorari for this Court to review the judgments.

II. Lack of Counsel

Defendant first contends that "it was error to require defendant . . . to stand alone without any assistance of counsel at his trial for major felonies." (Original in all caps.) We review this issue *de novo*. *See State v. Watlington*, 216 N.C. App. 388, 393-94, 716 S.E.2d 671, 675 (2011) ("Defendant argues that the standard of review for the trial court's ruling permitting defendant to proceed *pro se* is *de novo*, as it raises a question of constitutional rights. The State also argues that the standard of review is *de novo*, as whether the trial judge conducted a thorough inquiry is a

question of statutory interpretation. Prior cases addressing waiver of counsel under N.C. Gen. Stat. § 15A–1242 have not clearly stated a standard of review, but they do, as a practical matter, review the issue *de novo*. We will therefore review this ruling *de novo*." (citations and quotation marks omitted)). As to the issue on appeal, it is important to note that defendant never waived his right to the assistance of counsel; when his first court-appointed attorney withdrew based upon a conflict of interest, he waived his right to appointed counsel with the explicit caveat that he planned to hire an attorney. Once defendant realized he would not be able to hire an attorney he requested appointed counsel again. Second, even if defendant did waive his right to all assistance of counsel, it is clear that he changed his mind. In *Scott*, this Court addressed a similar case, and discussed other cases dealing with defendants who have waived counsel and then later changed their minds:

> A criminal defendant may waive his constitutional right to be represented by counsel so long as he voluntarily and understandingly does so. Once given, however, a waiver of counsel is good and sufficient until the proceedings are terminated or until the defendant makes known to the court that he desires to withdraw the waiver and have counsel assigned to him. The burden of establishing a change of desire for the assistance of counsel rests upon the defendant.
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> *State v. Sexton*, 141 N.C. App. 344, 346–47, 539 S.E.2d 675, 676–77 (2000) . . . .
>
> In *Sexton*, the defendant waived his right to appointed counsel at his first appearance. Two months

later, when the matter was called for hearing, the defendant specifically asked the trial court to appoint him counsel. The defendant made his request because he lost his job, but the trial court denied the request based on the prior waiver. On appeal, this Court held that the defendant had carried his burden of showing a change in his desire for assigned counsel, and the record reflects his request was for good cause. Therefore, this Court determined, the trial court's denial of the request for assistance violated defendant's constitutional right to an attorney.

Like the defendant in *Sexton*, Defendant in this case withdrew his prior waiver by explicitly asking the trial court to appoint counsel to represent him. Defendant indicated that he had sought to hire an attorney, but that he didn't know it would be that much. The State's contention to the contrary, that Defendant made no inquiry into the cost of retaining counsel, is simply not supported by the transcript. Moreover, we disagree with the State's suggestion that Defendant's request for appointed counsel was a tactic to delay and frustrate the orderly processes of the trial court, and that, thus, Defendant forfeited his right to an attorney. *See State v. Montgomery*, 138 N.C. App. 521, 524, 530 S.E.2d 66, 69 (2000) (stating that a defendant may forfeit his right to counsel when he uses that right for the purpose of obstructing and delaying his trial.) . . . . In *Montgomery*, this Court held that the trial court did not err in requiring the defendant to proceed *pro se* where the defendant was afforded ample opportunity over the course of fifteen months to obtain counsel, the defendant was disruptive in the courtroom on two occasions, and the defendant refused to cooperate with his attorney and assaulted him. Defendant's tactic in this case, by contrast, amounted to an attempt to withdraw his waiver at his second appearance, less than one month after signing the waiver form. In sum, Defendant carried his burden of proving a change in his desire for the assistance of counsel, and his request was for good cause.

State v. Scott, 187 N.C. App. 775, 777–78, 653 S.E.2d 908, 909–10 (2007) (citations,

quotation marks, and brackets omitted).

Here, within approximately 90 days of waiving appointed counsel and well in advance of the scheduled trial, defendant wrote a letter requesting court-appointed representation. During hearing on the matter, defendant explained that he had hoped to hire an attorney and had managed to get $2,000 but was unable to secure enough funds to pay the full cost for privately retained counsel, just as the defendant in *Scott* who waived counsel, but later decided he would like appointed representation because "he didn't know it would be that much" to hire an attorney. *Id.* at 778, 653 S.E.2d at 909. The trial court did not inquire into defendant's financial status or expenses or the source of the funds he had been able to obtain, either at the hearing on his request for court-appointed counsel or prior to trial. We also note that defendant had been in jail and was found to be indigent when he was arrested; it would be quite unusual for his financial circumstances to improve while imprisoned.

The State has brought forth numerous arguments regarding why defendant's original waiver of court-appointed counsel was valid and should stand but the State does not cite any authority for the proposition that defendant may not change his mind in a case such as this where no delay or other wrongful tactics have been shown. Furthermore, the State argues that the denial of defendant's right to be represented by counsel was harmless beyond a reasonable doubt contending that

> [t]here was overwhelming evidence of defendant's guilt presented at trial. As such, any error was harmless beyond

> a reasonable doubt. See State v. Bunch, 363 N.C. 841, 845-46, 689 S.E.2d 866, 869 (2010) ("[T]he presence of overwhelming evidence of guilt may render error of constitutional dimension harmless beyond a reasonable doubt." (quotation omitted)).

However, *State v. Bunch*, was a case about jury instructions, 363 N.C 841, 845-46, 689 S.E.2d 866, 869 (2010). *Bunch* cites *State v. Autry* regarding a warrantless search. *Autry*, 321 N.C. 392, 399-400, 364 S.E.2d 341, 345-46 (1988). *Autry* cites *State v. Brown*, regarding defendant's right to view a crime scene. *Brown*, 306 N.C. 151, 162-64, 293 S.E. 2d 569, 577-78 (1982). The issues raised in *Bunch*, *Autry*, and *Brown*, are vastly different than the total lack of counsel throughout defendant's trial at issue here. *Contrast Bunch*, 363 N.C at 845-46, 689 S.E.2d 869; *Autry*, 321 N.C. at 399-400, 364 S.E.2d at 345-46; *Brown*, 306 N.C. at 162-64, 293 S.E.2d at 577-78.

We have no way of knowing what counsel for defendant may have found through discovery or if his counsel could have raised valid objections to any of the "overwhelming evidence" noted by the State. Although we agree that the evidence against defendant seems quite convincing, we cannot find that the denial of defendant's right to counsel was harmless beyond a reasonable doubt. We conclude that the trial court erred in requiring defendant to proceed without counsel and grant defendant a new trial.

III. Conclusion

For the foregoing reasons, we reverse the trial court's judgments and remand

for a new trial. As we are granting defendant a new trial, we need not consider his other issue on appeal regarding restitution.

REVERSED and REMANDED for NEW TRIAL.

Chief Judge MCGEE and Judge ZACHARY concur.

Report per Rule 30(e).