IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-182

Filed: 20 September 2016

Transylvania County, No. 14 CRS 51028

STATE OF NORTH CAROLINA

v.

IAN SCOTT BANKS

Appeal by defendant from judgment entered 19 June 2015 by Judge Zoro J. Guice in Transylvania County Superior Court. Heard in the Court of Appeals 22 August 2016.

Roy Cooper, Attorney General, by Susannah P. Holloway, Assistant Attorney General, for the State.

Charlotte Gail Blake for defendant-appellant.

DAVIS, Judge.

Ian Scott Banks ("Defendant") appeals from his conviction for violation of a domestic violence protective order. On appeal, he contends that the trial court erred by allowing him to waive counsel and to represent himself without making the inquiry mandated by N.C. Gen. Stat. § 15A-1242. After careful review, we vacate Defendant's conviction and remand for a new trial.

Factual Background

The State presented evidence at trial tending to establish the following facts: Defendant married Glyn Case ("Case") on 15 March 2005. However, their relationship began to deteriorate thereafter, and in April of 2014, Case obtained a domestic violence protective order ("DVPO") against Defendant as a result of an altercation in which Defendant "held [Case] and [her] arms down by [her] side[.]" Defendant and Case subsequently separated.

The DVPO mandated that Defendant not come onto Case's property or have any contact with her. On 25 June 2014, however, Case was standing outside of her house with her children when Defendant arrived and began walking up the driveway towards her. Case called 911, and law enforcement officers arrived shortly thereafter and arrested Defendant for violating the conditions of the DVPO.

That same day, a magistrate's order was entered charging Defendant with violation of a DVPO. On 9 December 2014, a bench trial was held before the Honorable Thomas M. Brittain in Transylvania County District Court. Defendant was found guilty of violating a DVPO and was sentenced to 75 days imprisonment. On 16 December 2014, Defendant filed a notice of appeal for a trial *de novo* in Transylvania County Superior Court.

On 15 June 2015, a jury trial was held before the Honorable Zoro J. Guice in Transylvania County Superior Court. Prior to trial, Defendant's counsel of record, William Sullivan ("Sullivan"), moved to withdraw as Defendant's trial counsel:

> THE COURT: All right. Do you wish to be heard?
>
> MR. SULLIVAN: On the motion? I believe Mr. Banks and I have reached -- and I don't mean to speak for my client. But I believe after discussing both my trial strategy and the trial strategy that Mr. Banks would prefer to see, he has elected -- and again, I don't want to speak for him, he is sitting right here -- but he has elected to proceed on the matter representing himself.

The following exchange then occurred between Defendant and the trial court:

> THE COURT: All right. Mr. Banks, I will hear from you.
>
> THE DEFENDANT: Your Honor, I would like under 15A-1242 to dismiss counsel and move for self-representation. However, I would also like to request that you consider Will Sullivan to be standby counsel under 15A-1243.
>
> THE COURT: So you're actually asking that you be allowed to represent yourself but that Mr. Sullivan be kept in the case as standby counsel?
>
> THE DEFENDANT: That's correct, Your Honor.
>
> THE COURT: And that's what you want to do?
>
> THE DEFENDANT: Yes, sir.
>
> . . . .
>
> THE COURT: The Court -- if that's what you want to do. And I need to make sure that's what you want to do. And you and your lawyer have talked about this case, and I take it not just this morning but on several previous occasions?
>
> THE DEFENDANT: A couple of times, yes, Your Honor.
>
> THE COURT: And you feel that after conferring with your lawyer that you want to represent yourself; however, you

> wish to have him as standby counsel. And you and he have discussed that?
>
> THE DEFENDANT: I don't think that I had discussed standby counsel with Will in length. But otherwise, yes, we have discussed previously.
>
> THE COURT: Do you need to discuss that issue with him before the Court makes any final ruling?
>
> THE DEFENDANT: I don't see that there's a need for more discussion.
>
> THE COURT: Let the record reflect that the defendant moves that the Court allow him to represent himself, but requests that the Court allow Mr. Sullivan, the defendant's present attorney, to remain in the case as standby counsel.
>
> The Court after hearing from the defendant and the attorney and allowing the State to respond is of the opinion that the request should be granted. And the Court will allow the defendant to represent himself. And the Court is of the opinion that the defendant makes such request freely, voluntarily and understandingly, but will allow and keep Mr. Sullivan in the case as standby counsel for the defendant.
>
> MR. SULLIVAN: Thank you, Your Honor.
>
> THE COURT: Now, with that do we need to do anything else before we get ready to select the jury? We need to arraign the defendant.

Defendant's trial then proceeded without any further discussion of his waiver of trial counsel and decision to proceed *pro se*.

The jury found Defendant guilty of violation of a DVPO. The trial court sentenced Defendant to 75 days imprisonment. Defendant gave oral notice of appeal in open court.

Analysis

Defendant's sole argument on appeal is that the trial court erred by allowing him to waive counsel and to represent himself without making the inquiry mandated by N.C. Gen. Stat. § 15A-1242. The State concedes error on this point, and we agree.

It is well settled that

> waiver of the right to counsel and election to proceed *pro se* must be expressed clearly and unequivocally. Given 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. By requiring an unequivocal election to proceed *pro se*, courts can avoid confusion and prevent gamesmanship by savvy defendants sowing the seeds for claims of ineffective assistance of counsel.
>
> Once a defendant clearly and unequivocally states that he wants to proceed *pro se*, the trial court, to satisfy constitutional standards, must determine whether the defendant knowingly, intelligently, and voluntarily waives the right to in-court representation by counsel. In order to determine whether the waiver meets that standard, the trial court must conduct a thorough inquiry. This Court has held that the inquiry required by N.C.G.S. § 15A-1242 satisfies constitutional requirements.

State v. Thomas, 331 N.C. 671, 673-74, 417 S.E.2d 473, 475-76 (1992) (internal citations and quotation marks omitted).

N.C. Gen. Stat. § 15A-1242 states:

> 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 the 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 (2015). "The inquiry under N.C.G.S. § 15A-1242 is mandatory, and failure to conduct it is prejudicial error. In conducting such inquiries, perfunctory questioning is not sufficient. As a further safeguard, the trial court must obtain a written waiver of the right to counsel." *Thomas*, 331 N.C. at 674-75, 417 S.E.2d at 476 (internal citations, quotation marks, and brackets omitted). Moreover, the record must affirmatively show that the court conducted the inquiry in order for a waiver of counsel to be valid even when the defendant has signed a written waiver of counsel. *State v. Sorrow*, 213 N.C. App. 571, 573-74, 713 S.E.2d 180, 182 (2011).

Here, the record does not show that the court complied with N.C. Gen. Stat. § 15A-1242. Instead, the trial court merely confirmed — as illustrated by the above-

quoted exchange between Defendant and the trial court — that Defendant had discussed proceeding *pro se* with Sullivan before granting his motion to represent himself. At no point did the trial court inquire whether Defendant (1) had been clearly advised of his right to assistance of counsel; (2) understood or appreciated the consequences of his decision to proceed *pro se*; or (3) comprehended the nature of the charges and proceedings and the range of permissible punishments.

Moreover, though a signed waiver of counsel form is included in the record, as noted above, "[w]hen a defendant executes a written waiver which is in turn certified by the trial court, the waiver of counsel will be presumed to have been knowing, intelligent, and voluntary, *unless the rest of the record indicates otherwise*." *Id.* at 574, 713 S.E.2d at 182 (citation omitted). Additionally, the fact that Sullivan served as standby counsel does not cure the trial court's failure to conduct the mandatory § 15A-1242 inquiry. "[N]either the statutory responsibilities of standby counsel nor the actual participation of standby counsel is a satisfactory substitute for the right to counsel in the absence of a knowing and voluntary waiver." *State v. Stanback*, 137 N.C. App. 583, 586, 529 S.E.2d 229, 230-31 (2000) (citation, quotation marks, and ellipses omitted).

Consequently, the trial court's failure to properly conduct a § 15A-1242 inquiry in the present case prejudiced Defendant. We must therefore vacate Defendant's conviction and remand to the trial court for a new trial. *See id.* at 586, 529 S.E.2d at

231 ("[T]he trial court's failure to comply with section 15A-1242 is plain error. Furthermore, because it is prejudicial error to allow a criminal defendant to proceed *pro se* without making the inquiry required by section 15A-1242, Defendant must be granted a new trial.").

Conclusion

For the reasons stated above, we vacate Defendant's conviction and remand for a new trial.

NEW TRIAL.

Judges ELMORE and DIETZ concur.

Report per Rule 30(e).