

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-402

Filed: 6 December 2016

Transylvania County, No. 15 CRS 51516

STATE OF NORTH CAROLINA

v.

IAN SCOTT BANKS, Defendant.

Appeal by Defendant from judgment entered 10 December 2015 by Judge Mark E. Powell in Transylvania County Superior Court. Heard in the Court of Appeals 17 November 2016.

*Attorney General Roy Cooper, by Assistant Attorney General Ryan C. Zellar, for the State.*

*Charlotte Gail Blake for Defendant-Appellant.*

INMAN, Judge.

Ian Scott Banks (“Defendant”) appeals from a judgment entered upon a jury verdict finding him guilty of knowingly violating a domestic violence protective order. On appeal, Defendant contends that the trial court erred in finding defendant knowingly, voluntarily and intelligently waived counsel. After careful review, we find no error.

*Opinion of the Court*

On 23 September 2015, a magistrate issued a warrant for Defendant's arrest for violating a domestic violence protective order. Defendant waived counsel and, on 8 October 2015, the district court found defendant guilty of the charge. Defendant appealed to the superior court. On 15 October 2015, Defendant appeared at an administrative session of superior court before Judge Mark E. Powell, who appointed the public defender to represent defendant on the charge of violating a domestic violence protective order. At the call of Defendant's case for trial on 9 December 2015, the following transpired:

THE COURT: Mr. Banks, the trial ahead of you, the fellow didn't show up. He might have had some car trouble, I don't know. So you are up now. But I need to ask you a few questions after looking through the file.

When I looked at the file it appeared that you had Mr. McKusick, I don't know if I'm pronouncing his name correctly or not, and then you signed a waiver of your right to counsel. But the waiver of your right to counsel was not signed by a judge. So I need to ask you some questions about that. And I'm not trying to be demeaning or anything, just I have a list of questions that the folks that train judges ask us to ask folks that plan to represent themselves before we go forward with that.

Do you still plan to represent yourself?

THE DEFENDANT: I do, yeah.

THE COURT: I'm going to go through these questions now. Are you able to hear and understand me?

THE DEFENDANT: Yes, Your Honor.

*Opinion of the Court*

THE COURT: Are you under the influence of any alcoholic beverage, drug, narcotic or other pills?

THE DEFENDANT: No.

THE COURT: How old are you?

THE DEFENDANT: I am 38.

THE COURT: Have you completed high school?

THE DEFENDANT: Yes.

THE COURT: And you know how to read and write then?

THE DEFENDANT: Yes.

THE COURT: There's motions in the file that show that. Do you suffer from any mental handicap or physical handicap?

THE DEFENDANT: No.

THE COURT: All right. Do you understand you have the right to be represented by an attorney?

THE DEFENDANT: Yes.

THE COURT: Do you understand that you may request that a lawyer be appointed for you if you are unable to hire an attorney and one will be appointed if you cannot afford to pay for one?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Even though you are on for trial right now and you're asking for an attorney, I will consider appointing you one and the trial will be continued. Is it correct you don't want that?

*Opinion of the Court*

THE DEFENDANT: It is correct that I have chosen to represent myself.

THE COURT: All right. Do you understand that if you decide to represent yourself, you must follow the same rules of evidence and procedure that a lawyer appearing in this court must follow?

THE DEFENDANT: Yes.

THE COURT: Okay. Do you understand that if you decide to represent yourself, I will not give you legal advice concerning defenses, jury instructions or other legal issues that may be raised in the trial?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Do you understand that I must act as an impartial judge in this case and I will not be able to offer you legal advice, that I must treat you just as I would treat a lawyer?

THE DEFENDANT: Yes.

THE COURT: Do you understand that you are charged with -- well, the original charge is felony violation of protective order, but I think the way it's worded it has to be misdemeanor violation of domestic violence protective order, and that if you are convicted of this charge, you could be in prison for a maximum 150 days, but there's no mandatory minimum sentence if you are convicted? Do you understand that?

THE DEFENDANT: Yes, Your Honor.

THE COURT: With all of this in mind, do you wish to ask me any questions about what I've just said to you?

THE DEFENDANT: No, Your Honor.

*Opinion of the Court*

THE COURT: Do you now give up your right to the assistance of an attorney and voluntarily and intelligently decide to represent yourself in this case?

THE DEFENDANT: Yes, sir.

THE COURT: I will ask you again if you have any questions?

THE DEFENDANT: No.

THE COURT: Sir, I will ask you to sign a waiver for your assistance of counsel. That's the second box to check. Please look at the form, and then our clerk will swear you to it.

(The waiver was signed and sworn to.)

The trial proceeded, and defendant represented himself. The jury found Defendant guilty and the court entered judgment imposing an active term of incarceration of 75 days. Defendant appealed.

Defendant contends that Judge Powell failed to ensure that he knowingly, voluntarily and intelligently waived counsel. He submits that Judge Powell ignored the fact that he had requested, and the court had appointed, counsel for Defendant on this charge less than two months prior to the trial date. He also argues that Judge Powell did not completely comply with the statutory inquiry required by N.C. Gen. Stat. § 15A-1242 because he failed to ensure that Defendant comprehended the complete range of possible punishments he faced. He acknowledges that the court did advise him that the maximum punishment for the charged offense is 150 days in

jail, but he argues the court should have also advised him that a fine could also be imposed.

The statute governing waiver of counsel is N.C. Gen. Stat. § 15A-1242, which provides:

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.

N.C. Gen. Stat. § 15A-1242 (2015). The court's failure to make this inquiry is prejudicial error. *State v. Thomas*, 331 N.C. 671, 674, 417 S.E.2d 473, 476 (1992). The record must affirmatively show that the court conducted the inquiry 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). Whether the trial court complied with N.C. Gen. Stat. § 15A-1242 is a question of law reviewable *de novo* by this Court. *State v. Watlington*, 216 N.C. App. 388, 393-94, 716 S.E.2d 671, 675 (2011). In reviewing the trial court's inquiry, "the critical issue is whether the statutorily required information has been communicated in such a

manner that defendant's decision to represent himself is knowing and voluntary." *State v. Carter*, 338 N.C. 569, 583, 451 S.E.2d 157, 164 (1994), *cert. denied*, 515 U.S. 1107, 132 L. Ed. 2d 263 (1995).

We conclude the court's inquiry satisfied the requirements of N.C. Gen. Stat. § 15A-1242 and supported a determination that Defendant's decision to represent himself was knowing and voluntary. The court advised Defendant that he had the right to an attorney. The court also made Defendant aware of the consequences of a decision to waive counsel and represent himself and the possible maximum term of incarceration he faced. Defendant responded without any hesitation or equivocation that he understood and that he chose to represent himself. Moreover, because Defendant was not ordered to pay any fines, the court's omission of the possible fines Defendant faced was not prejudicial.

We find no error.

NO ERROR.

Judges STROUD and TYSON concur.

Report per Rule 30(e).