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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-92

Filed: 20 September 2016

Columbus County, No. 13 CRS 50034

STATE OF NORTH CAROLINA

v.

CONNIE PRENTICE REAVES

Appeal by defendant from judgment entered 7 August 2015 by Judge Douglas B. Sasser in Columbus County Superior Court. Heard in the Court of Appeals 22 August 2016.

Roy Cooper, Attorney General, by Kathleen N. Bolton, Assistant Attorney General, for the State.

Glenn Gerding, Appellate Defender, by David W. Andrews, Assistant Appellate Defender, for defendant-appellant.

DAVIS, Judge.

Connie Prentice Reaves (“Defendant”) appeals from the trial court’s judgment resentencing him in connection with his prior conviction for assault with a deadly weapon inflicting serious injury. On appeal, he contends that he was denied his right to counsel at the resentencing hearing. After careful review, we vacate the trial court’s sentence and remand for a new sentencing hearing.

Factual Background

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On 24 June 2014, Defendant was found guilty of assault with a deadly weapon inflicting serious injury and sentenced as a prior record level V offender to a term of 40-60 months imprisonment. Defendant filed a petition for *certiorari* with this Court along with his appeal due to the fact that he did not give timely notice of appeal.

On appeal, we granted Defendant's *certiorari* petition and proceeded to address his arguments, including his assertion that he was incorrectly sentenced as a prior record level V offender as opposed to a prior record level IV offender. We determined that Defendant's prior record level had indeed been improperly calculated and therefore remanded the case to the trial court for a new sentencing hearing. *State v. Reaves*, __ N.C. App. __, 775 S.E.2d 693 (2015) (unpublished).

On 9 July 2015, a new sentencing hearing was held before the Honorable Douglas B. Sasser in Columbus County Superior Court. At the 9 July 2015 hearing, Judge Sasser inquired of Defendant if he wanted a court-appointed attorney. Defendant replied in the affirmative, and the trial court appointed William Gore ("Mr. Gore") to represent him and continued the hearing until 14 July 2015. The following day, the trial court entered an order substituting Kevin Bullard ("Mr. Bullard") for Mr. Gore as Defendant's counsel.

At the outset of the 14 July 2015 hearing, Mr. Bullard informed the trial court that Defendant had advised him that Defendant did not want Mr. Bullard to represent him. Defendant then refused to definitively answer the trial court's

questions as to whether he wished to proceed with Mr. Bullard as his attorney or instead waive his right to counsel and proceed *pro se*. The trial court continued the hearing until 7 August 2015 to allow Defendant additional time to make a decision. Mr. Bullard was never released or moved to the status of standby counsel.

On 7 August 2015, Defendant appeared in court for his resentencing hearing without counsel and proceeded *pro se*. At the conclusion of the hearing, the trial court sentenced defendant to 40-60 months imprisonment.¹ Defendant gave oral notice of appeal in open court.

Analysis

Defendant's sole argument on appeal is that the trial court erred by requiring him to proceed *pro se* at the 7 August 2015 resentencing hearing because he did not clearly and unequivocally waive his right to counsel and did not forfeit his right to counsel as a result of his conduct at the 14 July 2015 hearing. The State concedes error on this point and we agree.

“A criminal defendant facing imprisonment has a Sixth Amendment right to counsel under the United States Constitution. This right applies to the states through the Fourteenth Amendment to the United States Constitution.” *State v. Phillips*, 365 N.C. 103, 112, 711 S.E.2d 122, 131 (2011) (internal citation omitted),

¹ Between the issuance of our prior opinion in this case and Defendant's resentencing hearing, the State discovered additional out-of-state convictions to apply towards the calculation of Defendant's prior record level, thereby elevating him to a prior record level V offender.

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cert. denied, __ U.S. __, 182 L.Ed.2d 176 (2012). This right is also granted by Article I, Sections 19 and 23 of the North Carolina Constitution. *Id.* “Implicit in this right to counsel is the constitutional right to refuse the assistance of counsel and proceed *pro se.*” *State v. Leyshon*, 211 N.C. App. 511, 514-15, 710 S.E.2d 282, 286 (citation and quotation marks omitted), *appeal dismissed*, 365 N.C. 338, 717 S.E.2d 566 (2011). The right to counsel must be waived “clearly and unequivocally.” *Id.* at 515, 710 S.E.2d at 286 (citation and quotation marks omitted). A trial court must determine that a defendant’s waiver of counsel is “knowing, voluntary, and intelligent.” *Id.* (citation and quotation marks omitted). In order to fulfill the applicable constitutional requirements, the trial court must conduct a thorough inquiry and be 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); *Leyshon*, 211 N.C. App. at 515, 710 S.E.2d at 286.

Our review of whether a defendant waived or forfeited his right to counsel is *de novo*.

Leyshon, 211 N.C. App. at 514, 710 S.E.2d at 286.

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In the present case, while Defendant expressed discontent with his court-appointed counsel at the 14 July 2015 hearing, nowhere in the applicable transcripts is there any indication that he waived his right to counsel or stated that he wanted to proceed *pro se*. Although he waived his right to counsel during the original trial, *State v. Reaves*, __ N.C. App. __, 775 S.E.2d 693 (2015) (unpublished), such waiver did not carry over to his resentencing hearing. See *State v. Boyd*, 205 N.C. App. 450, 456, 697 S.E.2d 392, 395-96 (2010) (“Defendant’s forfeiture ended with his first trial and did not continue through the resentencing hearing resulting from our decision stemming from Defendant’s prior appeal. . . . As a result, since Defendant’s initial forfeiture did not carry over to his resentencing hearing, a new inquiry conducted pursuant to N.C. Gen. Stat. § 15A-1242 was required in order for Defendant to properly waive his right to counsel at the resentencing hearing. Since no such inquiry occurred, Defendant was deprived of his right to counsel at the resentencing hearing and is entitled to be resentenced.”). Moreover, there is no indication that a § 15A-1242 inquiry was held or that Defendant signed a waiver of counsel form at any point.

Furthermore, although the 7 August 2015 hearing proceeded without Defendant’s counsel being present, nothing in the record before us indicates that Mr. Bullard was ever removed or otherwise excused as Defendant’s counsel. To the contrary, at the conclusion of the 14 July 2015 hearing, the following exchange took place between the trial court and Mr. Bullard:

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THE COURT: . . . All right. Mr. Bullard, I'm leaving you hanging in there.

MR. BULLARD: Yes, sir.

THE COURT: At this point -- [Defendant] may choose to talk to you at this point.

MR. BULLARD: Right.

THE COURT: If he wants to talk to you, that's fine. But right now, let him figure it out. Apparently, he's having trouble speaking. So let's see if he can figure it out back there.

The 7 August 2015 hearing then commenced without any mention of removing Mr. Bullard as Defendant's trial counsel or explanation for his absence. As a result, nothing in the record supports a conclusion that Defendant waived his right to counsel.

Furthermore, we do not believe that Defendant forfeited his right to counsel. This Court has previously held that a defendant who does not waive his right to counsel may forfeit his right by conduct when he obstructs or delays the trial. *Leyshon*, 211 N.C. App. at 517-18, 710 S.E.2d at 287-88.

While a review of the transcript reveals that Defendant was uncooperative and obstructed or delayed the 14 July 2015 hearing which resulted in the trial court ordering a continuance until 7 August 2015, his behavior did not rise to the level of serious misconduct that our caselaw requires for a forfeiture of a defendant's right to counsel. *See, e.g., id.* at 518-19, 710 S.E.2d at 288-89 (defendant forfeited his right to

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counsel where he refused to respond to trial court's inquiries, instead only repeatedly stating that court lacked jurisdiction, forcing court to hold three additional hearings); *see also State v. Boyd*, 200 N.C. App. 97, 102-03, 682 S.E.2d 463, 467 (2009) (holding that defendant forfeited right to counsel by refusing to cooperate, causing two court-appointed attorneys to withdraw); *State v. Montgomery*, 138 N.C. App. 521, 525, 530 S.E.2d 66, 69 (2000) (defendant who used profanity, was held in contempt, and assaulted his appointed counsel forfeited his right to counsel).

Although Defendant was uncooperative and at times rude during the 14 July 2015 hearing, his conduct was insufficient to trigger a forfeiture of his right to counsel, and there is no indication that the trial court believed such a forfeiture had occurred. Indeed, the trial court did not make any findings at the various hearings that Defendant had forfeited his right to counsel.

Defendant's conduct, although not extreme enough to constitute forfeiture of counsel, could conceivably have been sufficient to meet the "hybrid" standard of waiver by conduct as defined in *State v. Blakeney*, __ N.C. App. __, 782 S.E.2d 88 (2016), which provides that "[o]nce a defendant has been warned that he will lose his attorney if he engages in dilatory tactics, any misconduct thereafter may be treated as an implied request to proceed *pro se* and, thus, as a waiver of the right to counsel." *Id.* at __, 782 S.E.2d at 96 (citation omitted).

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However, waiver by conduct requires the court to warn the defendant that he will lose his right to counsel if he continues to be disruptive and uncooperative, thereby enabling the court to interpret any further misconduct as an implied request to proceed *pro se*. *Id.* Here, the trial court provided no such warning during the hearings. Therefore, the record does not support a conclusion that Defendant waived his right to counsel under this theory.

Conclusion

For the reasons stated above, we vacate the trial court's sentence and remand for a new sentencing hearing.

VACATED AND REMANDED.

Judges ELMORE and DIETZ concur.

Report per Rule 30(e).