IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-186

Filed: 20 November 2018

McDowell County, Nos. 16 CRS 51400, 51395; 17 CRS 362

STATE OF NORTH CAROLINA

v.

RAYMOND JOINER

Appeal by defendant from judgment entered 14 August 2017 by Judge J. Thomas Davis in McDowell County Superior Court. Heard in the Court of Appeals 17 September 2018.

Attorney General Joshua H. Stein, by Special Deputy Attorney General James Bernier, Jr., for the State.

Mary McCullers Reece for defendant.

DIETZ, Judge.

Defendant Raymond Joiner appeals his convictions for two counts of malicious conduct by a prisoner and attaining habitual felon status, all stemming from an incident in which he threw urine on two correctional officers. Joiner argues that the trial court failed to conduct a sufficient inquiry to determine whether his waiver of his right to counsel was knowing, intelligent, and voluntary.

As explained below, we hold that the trial court conducted a sufficient inquiry. Although Joiner often refused to answer the court's questions or gave nonresponsive answers, his answers indicated that he understood the consequences of waiving counsel and understood the charges and possible punishments he faced. Joiner simply believed that the arguments he intended to assert—that the court had no jurisdiction over him and thus could not enter judgment against him—would fare better than the arguments that would be asserted by a court-appointed lawyer. That decision was knowing, intelligent, and voluntary, and thus the trial court properly permitted Joiner to waive his right to counsel. *See State v. Jastrow*, 237 N.C. App. 325, 333–34, 764 S.E.2d 663, 669 (2014).

Facts and Procedural History

Defendant Raymond Joiner was an inmate at Marion Correctional Institution. Two correctional officers, Virginia Brookshire and Sergeant Dwight Morgan, arrived at Joiner's cell to deliver mail. Morgan opened a small trap door at the entryway and handed Joiner a book for him to sign for his mail. Joiner signed the book, then extended his arm through the trap door and threw a yellowish brown liquid at Brookshire and Morgan. The liquid hit Brookshire in her eyes and all over her face. The liquid hit Morgan in the right arm and the right side of his body. Both Morgan and Brookshire reported that the liquid smelled like urine.

On 12 December 2016, the State indicted Joiner on two counts of malicious conduct by a prisoner. On 6 February 2017, the trial court conducted a hearing to question Joiner regarding his desire to represent himself. Due to Joiner's incoherent and contradictory responses to the trial court's questioning, the court appointed him an attorney and ordered a capacity evaluation.

On 1 May 2017, the trial court held another hearing and, after reviewing the results of the evaluation and conducting a thorough inquiry with Joiner, found Joiner capable of representing himself.

Later, on 10 July 2017, the State added a charge of attaining habitual felon status to the indictment. The trial court then conducted a second hearing with Joiner concerning the new charges. Again, the trial court questioned Joiner about his desire to represent himself. But this time, Joiner refused to answer the trial court's questions, provided nonresponsive answers, and repeatedly asserted that the trial court lacked jurisdiction over him. The trial court again permitted Joiner to waive counsel and represent himself.

The jury ultimately convicted Joiner on all charges, including attaining the status of a habitual felon. The trial court sentenced Joiner to 146 to 188 months in prison, consecutive to the sentences Joiner currently is serving. Joiner moved to arrest the judgment, but the trial court denied his motion. On 20 August 2017, Joiner filed a *pro se* written notice of appeal, but did not include a certificate of service.

Court-appointed counsel later appeared for Joiner in this appeal and filed a conditional petition for a writ of certiorari, noting the defect in the notice of appeal.

Analysis

I. Petition for a Writ of Certiorari

Joiner filed a petition for a writ of certiorari because his written *pro se* notice of appeal failed to include a certificate of service indicating that it was served on the State as required by the Rules of Appellate Procedure.

"[A] defect in a notice of appeal should not result in loss of the appeal as long as the intent to appeal . . . can be fairly inferred from the notice and the appellee is not misled by the mistake." *State v. Springle*, 244 N.C. App. 760, 763, 781 S.E.2d 518, 521 (2016). Moreover, unlike the failure to timely *file* a notice of appeal, this Court has held that failure to timely *serve* a notice of appeal is not a jurisdictional defect that cannot be waived or excused. *Lee v. Winget Rd., LLC*, 204 N.C. App. 96, 100, 693 S.E.2d 684, 688 (2010). Accordingly, the defect in Joiner's notice of appeal does not deprive this Court of jurisdiction to hear his appeal. *Id.*

In its appellate brief and its response to the petition for a writ of certiorari, the State does not assert that it was prejudiced by the lack of service or that the Court should dismiss this appeal. Accordingly, this Court has appellate jurisdiction and we dismiss the petition for a writ of certiorari as moot.

II. Waiver of Right to Counsel

Joiner argues that the trial court failed to conduct a sufficient inquiry to ensure that Joiner's waiver of his right to counsel was knowing, intelligent, and voluntary. We reject this argument.

This Court reviews *de novo* a trial court's ruling permitting a defendant to proceed *pro se*. *State v. Watlington*, 216 N.C. App. 388, 393–394, 716 S.E.2d 671, 675 (2011). The trial court "must insure that constitutional and statutory standards are satisfied before allowing a criminal defendant to waive in-court representation. First, a criminal defendant's election to proceed *pro se* must be clearly and unequivocally expressed." *State v. Hyatt*, 132 N.C. App. 697, 702, 513 S.E.2d 90, 94 (1999) (citations omitted). "Second, the trial court must make a thorough inquiry into whether the defendant's waiver was knowingly, intelligently and voluntarily made." *Id.*

By statute, "[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. "It is prejudicial error to allow a criminal defendant to proceed *pro se* at any critical stage of criminal proceeding without making the inquiry required by N.C. Gen. Stat. 15A–1242." *State v. Reid*, 224 N.C. App. 181, 189, 735 S.E.2d 389, 396 (2012). "North Carolina has not set out any specific requirements for how the statutory inquiry must be carried out. What is required is that the statutorily required information [be] communicated in such a manner that defendant's decision to represent himself is knowing and voluntary." *State v. Paterson*, 208 N.C. App. 654, 661, 703 S.E.2d 755, 759 (2010) (citations omitted).

Although no specific line of questioning is required, our Supreme Court has approved a list of fourteen questions designed to satisfy the statutory requirements of N.C. Gen. Stat. § 15A-1242. *State v. Moore*, 362 N.C. 319, 327–28, 661 S.E.2d 722, 727 (2008). At the 1 May 2017 hearing, the trial court reviewed the results of Joiner's capacity evaluation and asked Joiner the questions approved by the Supreme Court in *Moore* after Joiner expressed his desire to represent himself at trial:

> COURT: I am going to ask you a few questions to make sure that you want to do this. First of all, you can hear and understand me okay. Is that correct?
>
> DEFENDANT: No.
>
> COURT: You can't hear and understand me? Are you saying that just because you don't want to understand me?
>
> DEFENDANT: You are acting under the code of law.
>
> COURT: So you question that. Are you now under the influence

of any alcoholic beverages, drugs, narcotics, medicines, or any other pills?

DEFENDANT: No, sir.

COURT: Have you completed high school, college?

DEFENDANT: No.

COURT: Do you know how to read and write?

DEFENDANT: Yes, I do.

COURT: So you believe you can represent yourself in that regard?

DEFENDANT: Yes, I can.

COURT: Do you think you suffer from any mental or physical handicap that will get in the way of your ability to represent yourself?

DEFENDANT: No, sir.

COURT: Do you understand that you may request that a lawyer may be appointed for you. If you are unable to hire one, the Court will appoint one for you. Do you understand that?

DEFENDANT: Yeah, I understand that.

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

DEFENDANT: Yes, unless you force me into a contract agreement.

COURT: Also, too, if you decide to represent yourself, do you understand that the Court can't give you any legal advice in regard to any issues that may be raised about jury instructions or

any other issues that may be raised in the trial of this case if it goes to trial. Do you understand that?

DEFENDANT: Yes, sir.

COURT: Do you understand that I must act as an impartial judge, as well as any other judge that might be hearing your case, and we must treat you like any other lawyer in this matter. Do you understand that?

DEFENDANT: Yes, sir.

COURT: Sir, it looks like you have been charged with three counts of malicious conduct by a prisoner. Each of those is a Class F felony; each of those does carry a potential maximum punishment of 59 months in the Department of Corrections. I just tell you that to inform you of what they accuse you of. Do you understand that?

DEFENDANT: I understand that.

COURT: With all these things in mind, is there any questions you have of me?

DEFENDANT: I would like to move for emergency petition written mandamus to get access to the law library.

. . .

COURT: Also, too, you don't want a lawyer. You want to represent yourself?

DEFENDANT: Proper at this time as to juries (phonetic).

COURT: Do you voluntarily and intelligently decide to represent yourself in this case?

DEFENDANT: Yes, sir.

Based on this thorough inquiry, and Joiner's responses, the trial court properly determined that Joiner's decision to represent himself was knowing, intelligent, and voluntary. N.C. Gen. Stat. § 15A-1242.

Later in the proceedings, after the State added the charge of attaining habitual felon status, the trial court held another hearing. Joiner again stated that he wanted to represent himself. But this time, the trial court's attempt to ask Joiner the *Moore* questions did not go as smoothly. The court explained to Joiner that the State had charged him with new offenses and that "I need to find out, first, what you want to do about an attorney. You can hire your own, represent yourself, or ask for a court-appointed counsel." Joiner refused to respond, leading to this exchange:

> THE COURT: Mr. Joiner, you can hire your own, represent yourself, or ask for court-appointed counsel.
>
> (No answer)
>
> THE COURT: Are you not wanting to talk to me today? Let the record reflect that Mr. Joiner is here in court; he is approximately 20- to 25-feet away from me he is able to hear and understand me; he refuses to answer my questions.
>
> THE DEFENDANT: Assumption, man. I got the right to remain silent, man.
>
> THE COURT: That's fine. That's okay, Mr. Joiner.
>
> THE DEFENDANT: I got my rights under the constitution. So it's not forcing me into your jurisdiction.

> THE COURT: All right. He refuses to communicate with the Court and to waive counsel. The Court will therefore appoint counsel. Who is next on your list?
>
> THE DEFENDANT: I am representing myself. Ain't nobody got no contract or agreement with me.
>
> THE COURT: So you want to represent yourself?
>
> THE DEFENDANT: I am myself.

After this exchange, the trial court attempted to walk through the *Moore* factors but could not do so because Joiner repeatedly refused to answer or gave nonresponsive answers such as "I don't give consent to your venue or your jurisdiction. I am a private American citizen" and "May I see a negotiable instrument, please?" Joiner's responses to the court's inquiry indicate that he concluded he was no longer subject to the court's jurisdiction and, as a result, could not be convicted of the charges he faced. But, importantly, the court explained to Joiner the consequences of waiving counsel, including that the habitual felon charge added to the indictment "will elevate malicious conduct by a prisoner four classes. . . . So for each Class F felony it gets elevated four classes. The maximum sentence is a Class C felony which carries a maximum punishment of 279 months."

Joiner argues that his nonresponsive answers to this second inquiry "did not indicate that Mr. Joiner was making a knowing, intelligent, and voluntary waiver of counsel." This argument is precluded by our decision in *State v. Jastrow*, 237 N.C. App. 325, 764 S.E.2d 663 (2014).

In *Jastrow*, we held that, even where the trial court did not precisely follow the *Moore* line of questioning, and where the defendant gave nonresponsive answers or refused to answer altogether, "the trial court conducted the necessary inquiry and properly permitted [the defendant] to represent himself under N.C. Gen. Stat. § 15A-1242." *Id.* at 334, 764 S.E.2d at 669. We held in *Jastrow* that the defendant's "obstinate behavior and his insistence that the trial court had no jurisdiction over him made it difficult for the court to succinctly walk through the Section 15A–1242 factors. But we are satisfied that, when the record is reviewed as a whole, the trial court's discussion with [the defendant] was sufficient to satisfy the statutory criteria." *Id.* "First, the trial court informed [the defendant] that his appointed counsel was willing to continue representing him and described the benefits of keeping his counsel." *Id.* "Second, the trial court fully informed [the defendant] of the charges he faced and the possible range of punishment he could receive if convicted, stressing that he could receive 'up to 201 months' for the Class D felonies and 'up to 85 months' for the class E felony." *Id.* We thus held that the defendant's "conduct and his responses to the court's questions demonstrated that he understood the consequences of waiving counsel and that he chose to do so because he believed his own legal arguments and defense at trial would be better than those provided by his appointed counsel. That decision was knowing, intelligent, and voluntary." *Id. at* 333–34, 764 S.E.2d at 669.

Here, after having discussed the *Moore* factors with Joiner at an earlier hearing, the trial court attempted to do so again and, in doing so, explained the consequences of waiving counsel as well as the charges and possible punishments that Joiner faced. In this context, under *Jastrow*, Joiner's responses to the court's inquiry were not an indication that his decision to represent himself was not knowing and voluntary. Instead, it simply reflected Joiner's conclusion that, although he had access to a court-appointed lawyer if he wanted one, "his own legal arguments and defense at trial would be better than those provided by his appointed counsel." *Id.* That decision was knowing, intelligent, and voluntary and thus we hold that the trial court did not err in allowing Joiner to waive his right to counsel.

Conclusion

We find no error in the trial court's judgment.

NO ERROR.

Chief Judge McGEE and Judge CALABRIA concur.

Report per Rule 30(e).