IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-467

Filed: 20 November 2018

Pitt County, No. 07 CRS 59512

STATE OF NORTH CAROLINA

v.

JAIME LOUIS BROWN, Defendant.

Appeal by Defendant from judgment entered 6 July 2017 *nunc pro tunc* 21 March 2017 by Judge Marvin K. Blount III in Pitt County Superior Court. Heard in the Court of Appeals 9 November 2018.

Attorney General Joshua H. Stein, by Assistant Attorney General Kimberly N. Callahan, for the State.

Meghan Adelle Jones, for defendant-appellant.

MURPHY, Judge.

On 9 October 2008, Defendant, Jaime Louis Brown, entered into a plea agreement in which he agreed to enter an *Alford* plea to the charge of conspiracy to commit robbery with a dangerous weapon. Judgment was continued "until at such time as the State shall pray judgement [sic]." Defendant agreed to be available "to

testify truthfully if called upon by the State in any matter to which he has knowledge." In exchange, Defendant was to be placed on probation.

On 9 July 2009, an arrest warrant was issued charging Defendant with failure to appear. The arrest warrant was not served on Defendant until 21 March 2015. On 5 May 2015, Judge Blount entered judgment and sentenced Defendant to a suspended term of 20 to 24 months of imprisonment and placed him on supervised probation for 24 months.

On 4 June 2015, the State filed a probation violation report in which it alleged that Defendant had violated the terms of his probation by: (1) failing to report to complete intake and failing to provide a DNA sample; and (2) absconding. On 21 March 2017, a probation violation hearing was held before Judge Thomas D. Haigwood in Pitt County Superior Court. Judge Haigwood revoked Defendant's probation and activated his suspended sentence. On 6 July 2017, Judge Blount amended both the 5 May 2015 judgment imposing Defendant's suspended sentence and the 21 March 2017 judgment upon revocation of Defendant's probation to reflect an active term of 20 to 33 months. Defendant gave oral notice of appeal in open court.

On 31 May 2018, Defendant filed a Petition for Writ of Certiorari. Defendant notes that N.C.R. App. P. 4 requires oral notice of appeal to be given "at trial." N.C. R. App. P. 4(a)(1) (2017). To the extent this Court concludes that the proceeding before Judge Blount on 6 July 2017 does not qualify as "at trial" for purposes of Rule

4, Defendant asks this Court to review the amended judgment by writ of certiorari. *See* N.C. R. App. P. 21(a)(1); *see also State v. Holanek*, 242 N.C. App. 633, 640, 776 S.E.2d 225, 231 (2015) (holding that defense counsel's oral notice of appeal given "six days after the conclusion of Defendant's trial . . . in open court before the judge who had presided over Defendant's criminal trial . . . was legally ineffective"), *disc. review denied*, 368 N.C. 429, 778 S.E.2d 95 (2015), *cert. denied*, __ U.S. __, 136 S.Ct. 2493, 195 L. Ed. 2d 824 (2016). In our discretion, we grant Defendant's Petition for Writ of Certiorari for the purpose of reviewing the judgment entered.

Defendant first argues the trial court erred in allowing him to represent himself without establishing that his waiver of counsel was knowing, voluntary, and intelligent as required by N.C.G.S. § 15A-1242 (2017). We are not persuaded.

A criminal defendant has a right to be assisted by counsel during a probation revocation hearing, as well as the right to refuse the assistance of counsel and to proceed *pro se*. *State v. Evans*, 153 N.C. App. 313, 315, 569 S.E.2d 673, 675 (2002) (citations omitted). "However, the right to assistance of counsel may only be waived where the defendant's election to proceed *pro se* is 'clearly and unequivocally' expressed and the trial court makes a thorough inquiry as to whether the defendant's waiver was knowing, intelligent and voluntary." *Id.* at 315, 569 S.E.2d at 675 (quoting *State v. Carter*, 338 N.C. 569, 581, 451 S.E.2d 157, 163 (1994), *cert. denied*, 515 U.S. 1107, 132 L. Ed. 2d 263 (1995)). "A trial court's inquiry will satisfy this

constitutional requirement if conducted pursuant to N.C.G.S. § 15A-1242." *State v. Moore*, 362 N.C. 319, 322, 661 S.E.2d 722, 724 (2008) (citation omitted). Pursuant to N.C.G.S. § 15A-1242, a defendant may be permitted to proceed *pro se* after the trial court makes a thorough inquiry and is satisfied that 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.G.S. § 15A-1242 (2017). Furthermore, this Court has stated:

> where the defendant has executed a written waiver of counsel which is certified by the trial court, a presumption arises that the waiver by the defendant was knowing, intelligent and voluntary. Nevertheless, where the record indicates otherwise, that presumption is rebutted. The execution of a written waiver of the right to assistance of counsel does not abrogate the trial court's responsibility to ensure the requirements of [N.C.G.S.] § 15A-1242 are fulfilled.

Evans, 153 N.C. App. at 315-16, 569 S.E.2d at 675 (citations omitted).

Here, Defendant executed a written waiver of counsel on 21 March 2017 that was certified by Judge Haigwood. However, no verbatim transcript of the probation revocation hearing exists because the recording of the hearing was distorted and completely inaudible. Defendant contends that because the record does not reflect

that the trial court conducted a proper inquiry pursuant to N.C.G.S. § 15A-1242, we should reverse the judgment revoking Defendant's probation. We do not agree.

Under similar circumstances, this Court stated in *Kinlock* that

> Although there is no transcript of the waiver proceeding, "[t]here is a presumption of regularity accorded the official acts of public officers." In North Carolina the burden is on the appellant to show error and to show that the error was prejudicial. "An appellate court is not required to, and should not, assume error by the trial [court] when none appears on the record before the appellate court." "When 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."

State v. Kinlock, 152 N.C. App. 84, 89-90, 566 S.E.2d 738, 741 (2002) (alteration in original) (citations omitted), *aff'd per curiam*, 357 N.C. 48, 577 S.E.2d 620 (2003). In this case, there is no evidence to rebut the presumption of regularity other than Defendant's speculative claims that the inquiry *might* not have been conducted. *See State v. Wall*, 184 N.C. App. 280, 285, 645 S.E.2d 829, 833 (2007) (holding that "defendant's assertion alone is insufficient to rebut the presumption of validity of the waivers under *Kinlock*").

Defendant cites this Court's opinion in *State v. Pena*, ___ N.C. App. ___, 809 S.E.2d. 1 (2017), *disc. review denied*, ___ N.C. ___, 813 S.E.2d 236 (2018), and argues that "a defective recording and the lack of a verbatim transcript prevent this Court from being able to conduct a meaningful review and to determine whether the trial

court conducted the inquiry mandated by Section 15A-1242." We disagree and find *Pena* to be distinguishable from the instant case.

In *Pena*, the defendant executed a written waiver, and the trial court inquired into his waiver of counsel on the same day. This Court found that the inquiry failed to comply with N.C.G.S. § 15A-1242, and that the written waiver alone was insufficient to demonstrate compliance with the requirements of N.C.G.S. § 15A-1242. *Pena* ___ N.C. App. at ___, 809 S.E.2d. at 7. Although the trial court conducted another inquiry prior to the start of trial, this Court stated that while it appeared the second inquiry may have been more thorough, "due to the extremely poor quality of the recording and transcript, we simply cannot find this second waiver fulfilled the requirements of [N.C.G.S.] § 15A-1242 either." *Id.* at ___, 809 S.E.2d at 9. Thus, in *Pena*, there was affirmative evidence in the record that the trial court failed to comply with the requirements of N.C.G.S. § 15A-1242, whereas here Defendant's contentions are entirely speculative. Accordingly, we conclude that Defendant has failed to rebut the presumption that his waiver of counsel was knowing, intelligent, and voluntary.

We next consider Defendant's argument that the trial court erred by revoking his probation and activating his suspended sentences because he was not subject to absconding as a condition of his probation. The State concedes error, and we agree.

This Court has stated:

> A hearing to revoke a defendant's probationary sentence only requires that the evidence be such as to reasonably

> satisfy the judge in the exercise of his sound discretion that the defendant has willfully violated a valid condition of probation or that the defendant has violated without lawful excuse a valid condition upon which the sentence was suspended. The judge's finding of such a violation, if supported by competent evidence, will not be overturned absent a showing of manifest abuse of discretion.

State v. Jones, 225 N.C. App. 181, 183, 736 S.E.2d 634, 636 (2013) (citation omitted). "Nonetheless, when a trial court's determination relies on statutory interpretation, our review is *de novo* because those matters of statutory interpretation necessarily present questions of law." *State v. Johnson*, 246 N.C. App. 139, 142, 783 S.E.2d 21, 24 (2016).

The Justice Reinvestment Act ("JRA") limits the trial court's discretion to revoke a defendant's probation. For probation violations occurring on or after 1 December 2011, a trial court may only revoke probation where a defendant: (1) commits a new crime in violation of N.C.G.S. § 15A-1343(b)(1); (2) absconds from supervision in violation of N.C.G.S. § 15A-1343(b)(3a); or (3) violates any condition of probation after serving two prior periods of confinement in response to violation under N.C.G.S. § 15A-1344(d2). N.C.G.S. § 15A-1344(a) (2017).

Here, it is undisputed that the trial court revoked Defendant's probation and activated his suspended sentences based on its determination that Defendant absconded. However, absconding was not made a regular condition of probation until enactment of the JRA. While initially the JRA made absconding

> effective for probation violations occurring on or after 1 December 2011. . . The effective date clause was later amended, however, to make the new absconding condition applicable only to *offenses* committed on or after 1 December 2011, while the limited revoking authority remained effective for probation violations occurring on or after 1 December 2011. See 2011 N.C. Sess. Laws 412, sec. 2.5.

State v. Nolen, 228 N.C. App. 203, 205, 743 S.E.2d 729, 731 (2013) (emphasis in original) (quoting *State v. Hunnicutt*, 226 N.C. App. 348, 354-55, 740 S.E.2d 906, 911 (2013)).

In the instant case, while Defendant's probation violations occurred after the effective date of the JRA, his underlying offenses were committed in 2007, before the JRA's effective date. Thus, Defendant was "not yet subject to the new absconding condition of probation set out in [N.C.G.S.] § 15A-1343(b)(3a)." *Nolen*, 228 N.C.App. at 206, 743 S.E.2d at 731. Consequently, we conclude the trial court erred by revoking Defendant's probation and activating his suspended sentences. Accordingly, we reverse the trial court's judgment and remand to the trial court for entry of an appropriate judgment for Defendant's admitted probation violation consistent with the provisions of N.C.G.S. § 15A-1344.

REVERSED AND REMANDED.

Judges STROUD and DIETZ concur.

Report per Rule 30(e).