

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-32

Filed: 20 August 2019

Transylvania County, No. 18 CRS 72

STATE OF NORTH CAROLINA

v.

JAMES ALLEN RUTLEDGE

Appeal by defendant from judgment entered 14 August 2018 by Judge R. Gregory Horne in Transylvania County Superior Court. Heard in the Court of Appeals 8 August 2019.

Attorney General Joshua H. Stein, by Assistant Attorney General John Tillery, for the State.

Jeffrey William Gillette for defendant-appellant.

TYSON, Judge.

James Allen Rutledge (“Defendant”) appeals from judgment entered after the trial court found him guilty of one count of possession of methamphetamine, a Schedule II controlled substance. We affirm.

I. Background

In late 2017, the Brevard Police Department received complaints about suspected drug trafficking occurring at a Transylvania County home. On 29 November 2017, officers executed a search warrant for the home at 54 Camp Harley

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Farm Drive in Transylvania County. Officers observed Defendant and another male standing outside the home. As part of the process of executing the search warrant, the officers secured the men. The officers conducted a pat-down search of Defendant and found a small purple case containing a crystal-like substance. Testing revealed the substance to be one-tenth of a gram of methamphetamine. Defendant was indicted on 12 February 2018 for one count of possession of methamphetamine, a Schedule II controlled substance.

Defendant's case was called for trial on 14 August 2018. At the start of trial, Defendant requested to waive his right to a trial by jury and have the judge hear the evidence and adjudicate the charge. Defendant's attorney stated: "Good Afternoon. May it please the Court, at this point in time we do have and do request a waiver of jury trial in this matter." Defendant's attorney also confirmed engaging in prior discussions with the prosecutor about the waiver, and asserted the State had no objections.

The following colloquy then occurred:

THE COURT: All right. . . . Mr. Rutledge, if you would just stand up where you are, sir. Mr. Rutledge, good afternoon, sir. Sir, you are charged with possession of methamphetamine. Mr. Barton represents you in this matter. Is that correct?

DEFENDANT: Yes, sir.

THE COURT: Possession of methamphetamine is a felony. It's a Class I felony. The maximum possible punishment for

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any Class I felony under North Carolina law is up to 24 months. That would be the maximum. If your prior record level if it is not a VI, the maximum you would face would be correspondingly lower. Have you had an opportunity to talk with Mr. Barton and review the maximum that you actually would face given your prior record, sir?

DEFENDANT: Yes, sir.

THE COURT: All right. And I will ask you a couple of questions about that. I'm advised that, by Mr. Barton, that it is your desire to waive a jury trial in this matter and have a bench trial; is that correct?

DEFENDANT: Yes, sir.

THE COURT: And you do understand, sir, that you have the right to have 12 jurors, jurors of your peers, selected, that you have the right to participate in their selection pursuant to the rules set forth in our law and that any verdict by the jury would have to be a unanimous verdict, unanimous of the 12? Do you understand that?

DEFENDANT: Yes, sir.

THE COURT: You have the right to waive that and instead have a bench trial, which would mean that the judge alone would decide guilt or innocence and the judge alone would determine any aggravating factors that may be present were you to waive your right to a jury trial. Do you understand that?

DEFENDANT: Yes, sir.

THE COURT: Have you talked with Mr. Barton about your rights in this regard and the ramifications of waiving a jury trial?

DEFENDANT: Yes, sir.

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THE COURT: Do you have any questions about the jury trial or your rights therein?

DEFENDANT: No, sir.

THE COURT: All right. And, sir, is it your decision then that you wish, and your request, that the jury trial be waived and that you be afforded a bench trial?

DEFENDANT: Yes, sir.

THE COURT: All right. Thank you, sir.

The court granted Defendant's motion to waive his right to a jury trial. The court and Defendant signed form AOC-CR-405 ("Waiver of Jury Trial form"). The document was not signed by the State. After the waiver was entered, Defendant's attorney requested that Defendant be arraigned. After arraignment, Defendant's trial began.

The State offered testimony from the two police officers who found the drugs on Defendant's person on 29 November 2017. Defendant stipulated that the substance found in the purple case was methamphetamine without further testimony from employees of the State Crime Lab. Defendant testified and asserted he had never before seen the small purple case. Following trial, the court entered a verdict of guilty, and imposed a split sentence of four months' imprisonment followed by thirty months' supervised probation. Defendant timely filed written notice of appeal.

II. Jurisdiction

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Jurisdiction lies in this Court pursuant to N.C. Gen. Stat. §§ 7A-27(b) and 15A-1444(a) (2017).

III. Issue

The sole issue on appeal is whether the trial court erred in granting Defendant's request to waive a jury trial and to proceed to a bench trial in violation of N.C. Gen. Stat. § 15A-1201 (2017).

IV. Standard of Review

The Court conducts a *de novo* review of a question of law to determine whether a trial court has violated a statutory mandate. *State v. Mumma*, ___ N.C. App. ___, ___, 811 S.E.2d 215, 220 (2018).

V. Analysis

The North Carolina Constitution affirmatively confirms a defendant's right to request a bench trial, subject to the trial court's approval. N.C. Const. art. I, § 24. In 2014, the North Carolina General Assembly amended N.C. Gen. Stat. § 15A-1201 to allow criminal defendants in non-capital cases to waive their right to a trial by jury. In 2015, the statute was again amended to include provisions regarding advance notice, revocation period, and judicial consent. *Id.*

A. Statutory Violation

Defendant argues the trial court committed reversible error in violation of N.C. Gen. Stat. § 15A-1201 in three ways: (1) by failing to require the statutory notice

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provision set out in N.C. Gen. Stat. § 15A-1201(c); (2) by failing to comply with N.C. Gen Stat. § 15A-1201(d)(1), which requires the trial court to “determine whether the defendant fully understands and appreciates the consequences of the defendant’s decision to waive the right to trial by jury”; and, (3) by failing to provide Defendant the statutory 10-day revocation period before starting the trial as required by N.C. Gen. Stat. § 15A-1201(e).

1. Advance Notice

Defendant argues the trial court erred when it failed to require Defendant’s compliance with the notice provision outlined by N.C. Gen. Stat. § 15A-1201(c). The statute allows a defendant charged with a non-capital offense to give notice of his intent to waive his right to a trial by jury in any of the three following ways:

(1) Stipulation, which may be conditioned on each party’s consent to the trial judge, [and] signed by both the State and the defendant . . .

(2) Filing a written notice of intent to waive a jury trial with the court . . . within the earliest of (i) 10 working days after arraignment, (ii) 10 working days after service of a calendar setting under G.S. 7A-49.4(b), or (iii) 10 working days after the setting of a definite trial date under G.S. 7A-49.4(c).

(3) Giving notice of intent to waive a jury trial on the record in open court by the earlier of (i) the time of arraignment or (ii) the calling of the calendar under G.S. 7A-49.4(b) or G.S. 7A-49.4(c).

N.C. Gen. Stat. § 15A-1201(c).

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The critical times under the statute for filing a waiver of a jury trial are the date of arraignment, the date of service of a calendar setting, and the date of calendar call. Nothing in the record before us indicates when either the calendar setting under N.C. Gen. Stat. § 7A-49.4(b) (2017) or the setting of the definite trial date under N.C. Gen. Stat. § 7A-49.4(c) (2017) occurred in this case.

Defendant was not formally arraigned until the day of trial. Apparently, a formal arraignment was not requested by Defendant at any time prior to the scheduled trial date. Formal arraignment may be waived. Pursuant to N.C. Gen. Stat. § 15A-941(d) (2017), “[a] defendant will be arraigned in accordance with this section only if the defendant files a written request with the clerk of superior court for an arraignment not later than 21 days after service of the bill of indictment.”

This Court addressed similar issues to those at bar in both *State v. Swink*, 252 N.C. App. 218, 797 S.E.2d 330 (2017) and *State v. Jones*, 248 N.C. App. 418, 789 S.E.2d 651 (2016). In *Jones*, the defendant never requested a formal arraignment pursuant to N.C. Gen. Stat. § 15A-941. *Id.* at 423, 789 S.E.2d at 655. This Court held the defendant never requested a formal arraignment, and his right to be formally arraigned was deemed waived twenty-one days after he was indicted. *Id.*

In *Swink*, the defendant never entered a “not guilty” plea to trigger informal arraignment. Defendant’s request for a bench trial functioned as an implicit plea of not guilty. *Swink*, 252 N.C. App. at 222, 797 S.E.2d at 333. This Court held in *Swink*

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no violation of the statutory notice provision of N.C. Gen. Stat § 15A-1201(c) occurred when no stipulation was provided and the defendant was arraigned on the day of his trial. *Id.* The defendant's actions barred the court from enforcing technical compliance with the provision. This Court found no error in *Swink. Id.* We find none here.

The filing of a written notice of intent to waive a jury trial on the date of the arraignment and subsequent trial is proper where: (1) the defendant gives notice of his intent to waive his right to a jury trial at the date of trial; (2) consent is given to waive jury trial by both the trial court and the State; and (3) the defendant invites noncompliance with the timeline requirements of N.C. Gen. Stat § 15A-1201(c) by his own failure to request a separate arraignment prior to the date of trial. *See* N.C. Gen. Stat § 15A-1201. It is not necessary to postpone the subsequent trial by ten working days, due to a defendant's decision to not request prior arraignment until the trial date itself. *See Swink*, 252 N.C. App. at 222, 797 S.E.2d at 333.

2. Judicial Consent

Defendant argues the trial court ignored procedural safeguards when it failed to "solicit much of the information normally required in order to determine if a waiver is [made] knowing[ly] and voluntar[ily]." The trial court did not specifically ask Defendant whether he was literate, whether he was satisfied with his lawyer's work, or whether anyone had made promises or threats to induce him to waive a jury trial.

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Neither N.C. Gen. Stat. § 15A-1201(d)(1) nor applicable case law has established a script for the colloquy that should occur between a superior court judge and a defendant seeking to exercise his right to waive a jury trial.

In *Swink*, where the defendant sought to waive his right to trial by jury, the trial court never specifically asked the defendant whether or not he was satisfied with his lawyer's work or whether anyone had made promises or threats to induce him to waive a jury trial. *Swink*, 252 N.C. App. at 219-20, 797 S.E.2d at 331-32.

N.C. Gen. Stat. § 15A-1201(d)(1) requires the trial court to: “[a]ddress the defendant personally and determine whether the defendant fully understands and appreciates the consequences of the defendant’s decision to waive the right to trial by jury.” N.C. Gen. Stat. § 15A-1201(d)(1). No other specific inquiries are required in the statute to make the determination of Defendant’s understanding and appreciation of the consequences “to waive his trial by jury.” *Id.* This Court will not read such further specifications into law.

Here, Defendant appeared in court with his attorney on the day of trial, who initiated and informed the trial judge of Defendant’s specific desire to waive a jury trial and proceed with a bench trial. The trial court clearly explained to Defendant that waiving his right to a trial by jury meant “the judge alone would decide guilt or innocence and the judge alone would determine any aggravating factors that may be present.” The judge also inquired whether Defendant had the opportunity to discuss

his rights and the ramifications of the waiver with his attorney. As noted above, in response to each question, Defendant answered “yes.”

The trial court also confirmed that Defendant knew the offense was non-capital and knew the maximum sentence that could be imposed. Defendant responded he had no other questions about the waiver, trial, or his rights. Defendant swore that by signing the form, he was freely, voluntarily, and knowingly waiving his right to a jury trial.

The trial court’s colloquy mirrored the acknowledgements made on the Waiver of Jury Trial form. The colloquy between the trial court and Defendant established that Defendant “fully underst[ood] and appreciate[d] the consequences of the defendant’s decision to waive the right to trial by jury.” *Id.*

3. Revocation Period

N.C. Gen. Stat § 15A-1201(e) provides that: “[o]nce waiver of a jury trial has been made and consented to by the trial judge pursuant to subsection (d) of this section, the defendant may revoke the waiver one time as of right within 10 business days of the defendant’s initial notice[.]” Defendant argues N.C. Gen. Stat. § 15A-1201(e) mandates a ten-day “cooling-off” period, wherein defendants are permitted ten working days to reflect upon their choice to waive. This revocation period is granted following the required notice outlined in N.C. Gen. Stat § 15A-1201(c).

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A plain reading of the statute does not compel a mandatory ten-day cooling-off period for a waiver made on the eve of trial. Rather, the statute provides a period when the waiver was provided in advance of trial during which a defendant has an absolute right to revoke a waiver. If a defendant moves to revoke such a waiver after the ten-day period has lapsed, N.C. Gen. Stat. § 15A-1201(e) provides that “the defendant may only revoke the waiver of a trial by jury upon the trial judge finding the revocation would not cause unreasonable hardship or delay to the State.” To interpret and enforce this power to revoke within ten days as a “mandatory cooling-off period” is inconsistent with the text of the statute and the prior actions of Defendant.

Allowing a ten-day revocation period when defendant has declared intent to waive a jury trial at an informal arraignment, contemporaneous with the start of trial, would allow a defendant to *force* a mandatory ten-day continuance. The General Assembly, in drafting N.C. Gen. Stat. § 15A-1201(e), anticipated a defendant may improperly attempt to waive his right to a trial by jury on the scheduled day of trial. Nothing shows the General Assembly intended for the revocation period provision to create or to allow such a loophole and cause unnecessarily delays.

Were defendants unilaterally permitted to force such a continuance, the provisions of N.C. Gen. Stat. § 15A-1201 would lead to absurd results. Under the absurdity doctrine, “where a literal interpretation of the language of a statute will

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lead to absurd results, or contravene the manifest purpose of the Legislature, as otherwise expressed, the reason and purpose of the law shall control.” *State v. Beck*, 359 N.C. 611, 614, 614 S.E.2d 274, 277 (2005) (quoting *Mazda Motors of Am., Inc. v. Sw. Motors, Inc.*, 296 N.C. 357, 361, 250 S.E.2d 250, 253 (1979)).

In 2015, a proposed amendment to N.C. Gen. Stat § 15A-1201(e) was introduced in the North Carolina Senate to expressly allow a defendant to “revoke [his waiver of jury trial] until such time as the first witness is sworn.” That proposed amendment failed. *See An Act to Establish Procedure for Waiver of The Right to a Jury Trial in Criminal Cases in Superior Court: Hearing on H.B. 215 Before the Subcomm. on the Judiciary B of the H. Comm. On the Judiciary, 2015 Leg.*

The intent of our General Assembly was to prevent a defendant from forcing undue delays by invoking the revocation period provision as late as the day of his trial. If Defendant wanted to take advantage of the ten-day revocation rule, he should have given advance notice and requested arraignment prior to trial. *See N.C. Gen. Stat § 15A-1201(e).*

B. Prejudice

Even were we to presume Defendant could show the trial court erred by granting his requested waiver of a jury trial, Defendant must also show the actions of the trial court prejudiced him to receive a new trial. *See Swink*, 252 N.C. App. at 221, 797 S.E.2d at 332; *see also State v. Ashe*, 314 N.C. 28, 39, 331 S.E.2d 652, 659

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(1985) (“when a trial court acts contrary to a statutory mandate and a defendant is prejudiced thereby, the right to appeal the court’s action is preserved, notwithstanding [the] defendant’s failure to object at trial.”). In *State v. Love*, this Court stated: “However, a new trial does not necessarily follow a violation of statutory mandate. Defendants must show not only that a statutory violation occurred, but also that they were prejudiced by this violation.” 177 N.C. App. 614, 623, 630 S.E.2d 234, 240-41 (2006) (citations omitted).

N.C. Gen. Stat. § 15A-1443 places the burden on Defendant to show a “reasonable possibility that, had the error in question not been committed, a different result would have been reached at trial.” N.C. Gen. Stat. § 15A-1443(a) (2017). “A defendant is not prejudiced by the granting of relief which he has sought or by error resulting from his own conduct.” N.C. Gen. Stat. § 15A-1443(c) (2017). *See also State v. Barber*, 147 N.C. App. 69, 74, 554 S.E.2d 413, 416 (2001) (“a defendant who invites error has waived his right to all appellate review concerning the invited error, including plain error review”).

If Defendant wanted to waive his jury trial in accordance with N.C. Gen. Stat. § 15A-1201, he needed to request a formal arraignment prior to trial and deliver notice of intent to waive at either that arraignment time, or the time of the calling of the calendar. Defendant failed to do either.

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Defendant waited until the day of trial to announce his intention to waive his right to trial by jury. Presuming, without finding, the trial court's grant of Defendant's requested waiver was error under N.C. Gen. Stat. § 1201, Defendant has failed to and cannot show prejudice under N.C. Gen. Stat. § 15A-1443.

The record is devoid of any indication tending to show a jury would have been privy to exculpatory evidence that this trial court did not consider. Defendant initiated and requested the waiver of a jury trial on the day of trial. Defendant made the strategic choice to request a bench trial and was informed of the potential consequences of his request and proceeded to trial. The trial court's grant of such request, even if it was shown to be in technical violation of N.C. Gen. Stat. § 15A-1201, was not prejudicial. Defendant's arguments are overruled.

VI. Conclusion

Defendant clearly initiated his choice for a bench trial and proceeded to trial and testified after being fully advised and counseled on the potential consequences. He has not shown that his own strategic choice to waive his right to a jury trial on the day of trial prejudiced him in any way.

We hold the trial court did not commit any error to warrant a new trial by allowing Defendant to waive his right to a jury trial and proceed to trial on the scheduled trial date. Defendant's conviction and the judgment entered thereon are affirmed. *It is so ordered.*

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AFFIRMED.

Judges INMAN and HAMPSON concur.