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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA 23-157

Filed 17 October 2023

Cumberland County, No. 17 CRS 63313

STATE OF NORTH CAROLINA

v.

KENNETH EDWARD JACKSON, JR.

Appeal by Defendant from judgments entered 22 August 2022 by Judge Claire V. Hill in Cumberland County Superior Court. Heard in the Court of Appeals 6 September 2023.

Attorney General Joshua H. Stein, by Assistant Attorney General Benjamin Szany, for the State.

Appellant Defender Glenn Gerding, by Assistant Appellate Defender Aaron Thomas Johnson, for the Defendant.

WOOD, Judge.

Kenneth Edward Jackson, Jr. (“Defendant”) appeals the trial court’s judgments revoking Defendant’s probation and activating his two sentences to run concurrently. Defendant contends the trial court erred by: (1) revoking his probation and activating his suspended sentences without first obtaining a knowing and voluntary waiver of his right to counsel, and (2) entering the judgment activating

Defendant's sentence for larceny which contains a clerical error. We affirm the trial court's judgments, and remand for the limited purpose to correct a clerical error in the trial court's judgment activating the larceny sentence.

I. Factual and Procedural Background

On 12 February 2018, Defendant was indicted for second-degree burglary and felony larceny pursuant to breaking or entering. On 8 June 2018, Defendant pleaded guilty to the above charges pursuant to a plea agreement. Pursuant to the plea, the trial court sentenced Defendant to consecutive terms of imprisonment for 14-26 months and 8-19 months respectively, suspended for 60 months of supervised probation. Additionally, the trial court ordered Defendant to pay restitution and “[c]ommit no criminal offense in any jurisdiction[.]”

On 7 April 2022, Defendant's probation officer filed a probation violation report alleging Defendant had violated his probation by (1) failing to pay sufficient restitution, and (2) committing new criminal offenses, specifically committing four counts of obtaining property by false pretense between 18 March 2021 and 20 May 2021. The violation report also reflected Defendant's 9 March 2022 convictions for those offenses.

The trial court held a hearing to address the violation report on 22 August 2022. At the hearing, Defendant acknowledged to the court he had received notice of the violation report. Defendant then expressed his desire to waive his right to counsel and proceed *pro se* at the probation hearing.

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Before the trial court moved to a colloquy about Defendant's options for counsel, the court established through discussion with the probation officer and Defendant that: (1) this was not his first appearance on this probation revocation matter; (2) Defendant had appeared in court for the probation violation on 13 June 2022; (3) Defendant had been given a two month continuance to make payments; (4) Defendant had missed a subsequent probation revocation hearing date; and (5) Defendant had turned himself in. However, prior to 22 August 2022, Defendant previously had not signed a waiver of counsel.

The trial court then conducted the following colloquy with Defendant:

COURT: How old are you?

DEFENDANT: 33.

COURT: Are you able to read and write?

DEFENDANT: Yes, ma'am.

COURT: Do you suffer from any physical or mental handicaps?

DEFENDANT: No, ma'am.

COURT: Are you now under the influence of alcohol, drugs, narcotics, medicines, pills or any other substances?

DEFENDANT: No, ma'am.

COURT: Do you understand you have the right to be represented by a lawyer?

DEFENDANT: Yes, ma'am.

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

DEFENDANT: Yes, ma'am.

COURT: Do you understand that you must follow the same rules of evidence and procedure that a lawyer appearing in this court must follow?

DEFENDANT: Yes, ma'am.

COURT: Do you understand that the Court will not be able

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to give you any legal advice?

DEFENDANT: Yes, ma'am.

COURT: Do you understand you are facing two sentences; one of 14 to 26 months, and the second 8 to 19 months which runs at the expiration or the end of the first sentence?

DEFENDANT: Yes, ma'am.

COURT: Do you have any questions about the issue of a lawyer?

DEFENDANT: No, ma'am.

COURT: Do you now waive your right to the assistance of a lawyer and voluntarily and intelligently decide to represent yourself in this probation hearing?

DEFENDANT: Yes, ma'am.

COURT: Sign a waiver please, sir.

Following the colloquy, Defendant completed a written waiver of his right to counsel which read:

I freely and voluntarily declare that I have been fully informed of the charges against me, the nature of and the statutory punishment for each such charge, and the nature of the proceedings against me; that I have been advised of my right to have counsel assigned to assist me and my right to have the assistance of counsel in defending against these charges or in handling these proceedings, and that I fully understand and appreciate the consequences of my decision to waive the right to assigned counsel and the right to assistance of counsel.

Defendant checked the box indicating that he waived his "right to all assistance of counsel," and the trial court certified the waiver. After he completed the waiver, Defendant admitted to the two violations alleged in the 7 April 2022 violation report: (1) he failed to pay his restitution, and (2) he committed new criminal offenses. The probation officer requested revocation because of the new convictions.

The trial court found Defendant had committed the violations as alleged, including the violation of committing a criminal offense. Thereafter, Defendant requested the trial court confine him to “a 90-day terminal” confinement in response to violation (CRV) in lieu of revocation, but the Court declined. The court then announced, “It is the order of this court that his probation is revoked and his sentence[s] [in both the second-degree burglary and larceny after breaking and entering cases] [be] activated.” In doing so, the court explained to Defendant that it would “modify [the sentences] so it runs concurrent and not consecutive.”

On both judgments revoking Defendant’s probation, the trial court noted Defendant’s probation was revocable for the “willful violation of the condition(s) that he/she [does] not commit any criminal offense.” For the judgment activating the second-degree burglary sentence, the trial court found the facts as they had been set out in the two allegations in the violation report. However, on the judgment activating Defendant’s sentence for the larceny after breaking or entering, the trial court included only the allegation regarding restitution in the violation report. Defendant entered oral notice of appeal in open court.

II. Analysis

On appeal, Defendant contends the trial court erred by: (1) revoking his probation and activating his suspended sentences without first obtaining a sufficiently knowing, intelligent, and voluntary waiver of his right to counsel pursuant to N.C. Gen. Stat. § 15A-1242, and (2) the judgment activating Defendant’s

sentence for larceny contains a clerical error. We address each in turn.

A. Colloquy between Defendant and trial court.

According to Defendant, the trial court failed to inform him that “it had the discretion to reduce those previously imposed active sentences, or to restructure them to run concurrently rather than consecutively” in violation of N.C. Gen. Stat. § 15A-1242’s statutory requirement that Defendant comprehend the nature of the charges and proceedings and the range of permissible punishments he was facing. N.C. Gen. Stat. § 15A-1242. Defendant contends the trial court did not properly engage in the colloquy and thus erred by allowing Defendant to proceed *pro se*, which is reversible error. We disagree.

We “review the question of whether a trial court complied with [N.C. Gen. Stat.] § 15A-1242 *de novo*.” *State v. Mahatha*, 267 N.C. App. 355, 360, 832 S.E.2d 914, 919 (2019) (citation omitted). “Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal.” *State v. Biber*, 365 N.C. 162, 168, 712 S.E.2d 874, 878 (2011) (citation and internal quotation marks omitted).

While “[t]here is a statutorily recognized right to counsel at a probation revocation hearing in North Carolina[.]” *State v. Warren*, 82 N.C. App. 84, 85, 345 S.E.2d 437, 439 (1986), it is not a constitutional right to counsel. *State v. Bailey*, 286 N.C. App. 701, 702, 881 S.E.2d 746, 747 (2022). “Inherent to the right to assistance of counsel at a probation revocation hearing is the right to refuse the assistance of

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counsel and 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.* (citation and internal quotation marks omitted).

Under N.C. Gen. Stat. § 15A-1242, our General Assembly has provided certain protections to guarantee that a defendant’s waiver of his right to counsel is knowing, intelligent, and voluntary:

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. “[T]he 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). Additionally, when a defendant completes a written waiver of counsel which is certified by the trial court, such waiver “will be presumed to have been knowing, intelligent, and voluntary, unless the rest of the record indicates

otherwise.” *State v. Sorrow*, 213 N.C. App. 571, 574, 713 S.E.2d 180, 182 (2011). Defendant bears the burden to show that the waiver executed was not knowing and voluntary. *Warren*, 82 N.C. App. at 88, 345 S.E.2d at 440.

Defendant argues the trial court’s colloquy was inadequate to satisfy the statutory mandates to inform him that his sentences could be reduced or restructured to run concurrently. In activating sentences upon revocation of probation, trial courts have long enjoyed the discretion to consolidate consecutive sentences into concurrent sentences, *State v. Paige*, 90 N.C. App. 142, 143, 369 S.E.2d 606, 606 (1988), and to reduce an activated sentence within the same range. In *State v. Moore*, our Supreme Court suggested a list of fourteen potential questions a trial court might use in conducting the § 15A-1242 colloquy. 362 N.C. 319, 327-28, 661 S.E.2d 722, 727 (2008). The Court made clear that “these specific questions are in no way required to satisfy the statute.” *Id.* at 328, 661 S.E.2d at 727.

In this case, during the colloquy between Defendant and the trial court, the trial court informed Defendant that he was facing “two sentences; one of 14 to 26 months, and the second 8 to 19 months which runs at the expiration or end of the first sentence.” This accurately summarized the judgments imposed against Defendant, including the potential maximum punishments. Defendant told the court he understood the sentences he was facing. The trial court, therefore, satisfied N.C. Gen. Stat. § 15A-1242(3).

B. Clerical Error in trial court judgment activating the larceny sentence.

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Next, Defendant contends the trial court made a clerical error in the written findings for the judgment in Defendant's larceny case, and therefore, this case must be remanded to superior court for correction. The State concedes a clerical error likely exists in the judgment and requests this Court to "remand the case to the trial court for the limited purpose of allowing the trial court to correct its written findings for the larceny judgment." We agree.

"When, on appeal, a clerical error is discovered in the trial court's judgment or order, it is appropriate to remand the case to the trial court for correction because of the importance that the record speak the truth." *State v. Smith*, 188 N.C. App. 842, 845, 656 S.E.2d 695, 696 (2008) (citation and internal quotation marks omitted). A clerical error in a judgment is "an error resulting from a minor mistake or inadvertence, especially in writing or copying something on the record, and not from judicial reasoning or determination." *State v. Gillespie*, 240 N.C. App. 238, 245, 771 S.E.2d 785, 790 (2015) (cleaned up).

In the present case, the trial court announced during the revocation hearing that it was revoking probation and activating Defendant's sentences on the two judgments from 2018. The court found "the violations . . . include the commission of a criminal offense as evidenced by convictions on March the 9th, 2022" and made this finding for both judgments. However, when the court issued the written revocation judgments, this finding was left off the judgment in Defendant's larceny case. In the second-degree burglary judgment, the court noted that it found both violations as

alleged in the violation report. In the larceny judgment, the court only included one violation alleged in the report, specifically the one regarding restitution. In order to correct the clerical error in the larceny judgment, we remand the case to the trial court for the limited purpose of making the correction.

III. Conclusion

For the foregoing reasons, we affirm the trial court's determination to revoke Defendant's probation and to activate his sentences, as well as the modification to allow the sentences to run concurrently. We remand the judgment activating the larceny judgment for the sole purpose of correcting the clerical error contained in such judgment.

AFFIRMED AND REMANDED.

Judges GRIFFIN and STADING concur.

Report per Rule 30(e).