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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA23-357

Filed 5 December 2023

Randolph County, Nos. 20CRS52132-43

STATE OF NORTH CAROLINA

v.

RONALD WAYNE MACON, JR., Defendant.

Appeal by defendant from judgments entered 26 May 2023 by Judge Gale M. Adams in Randolph County Superior Court. Heard in the Court of Appeals 18 October 2023.

Attorney General Joshua H. Stein, by Assistant Attorney General Caden W. Hayes, for the State-appellee.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Wyatt B. Orsbon, for defendant-appellant.

GORE, Judge.

Defendant Ronald Wayne Macon, Jr., appeals from five judgments entered upon twenty-two convictions for second-degree sexual exploitation of a minor. This Court has jurisdiction pursuant to N.C.G.S. §§ 7A-27(b)(1) and 15A-1444(a) (2023). On appeal, defendant argues the trial court prejudicially erred by allowing him to

waive counsel and represent himself at trial without first conducting a proper inquiry under N.C.G.S. § 15A-1242. After careful review, we discern no error.

I.

On 7 May 2020, the National Center for Missing and Exploited Children submitted a "cyber tip" to the North Carolina Bureau of Investigation that "child sexual abuse material" had "come across [Verizon Wireless's] network." Subsequent investigation revealed that defendant had uploaded these images from his cell phone. On 11 June 2020, detectives went to defendant's home to speak with him. Defendant told police that he had "all kinds of weird shit," including "people with animals[,] older people[,] and younger people." Police arrested defendant the next day.

During his arrest, defendant gave consent to a search of his phone. Law enforcement discovered that defendant had twenty-five category one images—*i.e.*, "a nude prepubescent or pubescent minor" "engag[ing] in sexual activity or a lewd, lascivious act"—and ten category two images—*i.e.*, "a prepubescent or pubescent minor either fully nude or partially [nude]." Police also found nine unique category one videos. Based on this misconduct, a Randolph County grand jury indicted defendant on twenty-four counts of second-degree sexual exploitation of a minor.

On 15 June 2020, the trial court found defendant indigent and appointed him counsel. The State offered defendant a plea deal, which defendant rejected in open court on 31 January 2022. Right before defendant rejected the plea, the trial court informed defendant:

> THE COURT: Now, if you were to be convicted – I have to give you a worst case scenario. If you were to be convicted on all 24 counts, then you would face a maximum, according to my calculation, of some 3,264 months, which is 272 years. . . . Do you understand?
>
> THE DEFENDANT: I'm fully aware.

On the last day of trial, defendant's appointed attorney paused mid-way through questioning the State's second witness, Detective Hartong, and informed the court outside the presence of the jury that defendant wished to waive his right to counsel and proceed *pro se*. Defendant subsequently confirmed to the court that he wished to represent himself. The court then conducted the requisite inquiry pursuant to § 15A-1242 to ensure that defendant's waiver of counsel was knowing, voluntary, and intelligent.

Relevant to the instant appeal, the trial court addressed the charges and potential punishment defendant was facing if convicted:

> THE COURT: Do you understand that you are charged with 24 counts of second-degree sexual exploitation of a minor?
>
> THE DEFENDANT: Yes, ma'am.
>
> THE COURT: Do you also understand that you could face . . . a maximum punishment of 63 months on each count?
>
> THE DEFENDANT: Yes, ma'am.
>
> THE COURT: And that would be a total of 1,512 months? Do you understand that –
>
> THE DEFENDANT: Yes.

> THE COURT: — is the maximum? Let me make sure I did that calculation correctly. Are there mandatory minimums?
>
> [PROSECUTOR]: No, Your Honor, I don't believe so.

Defendant confirmed his desire to proceed *pro se*, and he executed a written waiver of counsel. The trial court countersigned the waiver and assigned defense counsel as stand-by counsel. Defendant, representing himself, cross-examined Detective Hartong and the State's remaining witnesses.

At the close of evidence, the court *sua sponte* dismissed two of the pending counts. The jury otherwise found defendant guilty as charged after thirty-two minutes of deliberation. The court found defendant to be a Prior Record Level V and sentenced him to five consecutive sentences totaling 180 to 520 months' imprisonment. Defendant gave oral notice of appeal in open court.

II.

As a preliminary matter, defendant initially argued the trial court failed to comply with subsection (1) of § 15A-1242 but withdrew this argument in light of our Supreme Court's decision in *State v. Dunlap*, 318 N.C. 384 (1986). We, therefore, limit our review to his related but separate argument on appeal: whether the trial court violated subsection (3) of § 15A-1242. Specifically, defendant contends the trial court understated the maximum possible sentence that he could receive upon his conviction, and thus, prejudicially erred by allowing him to waive counsel and represent himself at trial. We disagree.

A.

"The right to assistance of counsel is guaranteed by the Sixth Amendment to the Federal Constitution and by Article I, Sections 19 and 23 of the Constitution of North Carolina." *State v. Harvin*, 382 N.C. 566, 584 (2022) (citation omitted). "It is well-established that the right to counsel also provides the right to self-representation." *State v. Faulkner*, 250 N.C. App. 412, 414 (2016) (cleaned up). "Nonetheless, there are certain circumstances in which a criminal defendant may relinquish . . . his or her constitutional right to assistance of counsel." *Harvin*, 382 N.C. at 584.

"One of the methods by which a criminal defendant may surrender the right to assistance of counsel is through voluntary waiver." *Id.* at 585. Our "General Assembly has enacted a carefully crafted statutory framework to ensure that a criminal defendant's right to counsel is protected and that its entrenchment can only be waived where the trial court is satisfied that the waiver is knowing, intelligent, and voluntary." *Id.* (citing N.C.G.S. § 15A-1242 (2021)).

> Under North Carolina law, once a defendant clearly and unequivocally states that he wants to proceed *pro se*, the trial court must determine whether the defendant knowingly, intelligently, and voluntarily waives the right to representation by counsel. A trial court's inquiry will satisfy this constitutional requirement if conducted pursuant to N.C.G.S. § 15A-1242.

Faulkner, 250 N.C. App. at 414 (cleaned up).

North Carolina General Statutes section 15A-1242 provides:

> 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.G.S. § 15A-1242 (2022).

Furthermore, "[w]hen 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. Warren*, 82 N.C. App. 84, 89 (1986). Nevertheless, "[t]he 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." *State v. Evans*, 153 N.C. App. 313, 316 (2002).

"It is well established that 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." *State v. Lindsey*, 271 N.C. App. 118, 125 (2020) (alteration in original) (citations omitted). "We review a trial court's decision to permit a defendant to represent himself *de*

novo." *Faulkner*, 250 N.C. App. at 414 (citation omitted). "In North Carolina the burden is on the appellant to show error and to show that the error was prejudicial." *State v. Kinlock*, 152 N.C. App. 84, 89 (2002) (citation omitted).

B.

Under N.C.G.S. § 15A-1242, subsection (3), "[t]he trial court must specifically advise a defendant of the possible maximum punishment [and] of the range of permissible punishments . . . ." *Lindsey*, 271 N.C. App. at 127 (internal citations omitted). "Warning a defendant of the harshest possible outcome ensures that the defendant is fully advised of the implications of the charge against him or her and, if pleading, is aware of the possible consequences of the plea." *State v. Lucas*, 353 N.C. 568, 596 (2001), *overruled in part on other grounds by State v. Allen,* 359 N.C. 425 (2005). The possible maximum punishment "focus[es] on the theoretical maximum sentence any defendant could receive rather than the actual maximum sentence a particular defendant is facing . . . ." *Id.*

> Accordingly, . . . unless the statute describing the offense explicitly sets out a maximum sentence, the statutory maximum sentence for a criminal offense in North Carolina is that which results from: (1) findings that the defendant falls into the highest criminal history category for the applicable class offense and that the offense was aggravated, followed by (2) a decision by the sentencing court to impose the highest possible corresponding minimum sentence from the ranges presented in the chart found in N.C.G.S. § 15A-1340.17(c). The statutory maximum sentence is then found by reference to the chart set out in N.C.G.S. § 15A-1340.17(e).

Id.

Second-degree sexual exploitation of a minor is a Class E felony under § 14-190.17(d), and a reportable conviction under § 14-208.6(4). Consistent with *Lucas*, if the jury returned guilty verdicts on all 24 counts of second-degree sexual exploitation of a minor, and the trial court found defendant was a Prior Record Level VI for felony sentencing purposes and selected the highest possible sentence from the aggravated range, then the theoretical maximum punishment for each conviction would have been 136 months under § 15A-1340.17(f). Based on this calculation, defendant asserts he faced a theoretical maximum of 3,264 months' imprisonment (272 years) as stated prior to his rejection of the plea offer, and not 1,512 months (126 years) as stated by the trial court prior to the execution and certification of his written waver. Thus, defendant contends, the trial court's inquiry under § 15A-1242 was deficient, and as such, sufficient to rebut the presumption that his waiver was knowing and voluntary. Defendant argues he is entitled to a new trial on grounds of structural error.

In contrast, the State argues this Court's decision in *State v. Gentry*, 227 N.C. App. 583, *rev. denied*, 367 N.C. 228 (2013), forecloses defendant's argument. In *Gentry*, the defendant faced several drug related charges and, separately, was found to have attained habitual felon status. 227 N.C. App. at 584. The defendant sought to waive his right to counsel, and the trial court told the defendant that "he could receive a sentence of as long as 60 years in prison." *Id.* at 591. On appeal, we

determined that the trial court "understated the amount of term to which [the] [d]efendant was subject to being imprisoned by 172 months." *Id.* at 599.

Rather than viewing the trial court's deficient colloquy as structural error, our inquiry "focused upon the trial court's failure to advise the defendant of *the nature of the punishment* to which he was actually exposed . . . ." *Id.* (emphasis added). We held "that a mistake in the number of months which a trial judge employs during a colloquy with a defendant contemplating the assertion of his right to proceed *pro se* [does not] constitute[ ] a *per se* violation of [N.C.G.S.] § 15A-1242." *Id.* at 599–600. "Instead, such a calculation error would only contravene [N.C.G.S.] § 15A-1242 if there was a reasonable likelihood that the defendant might have made a different decision with respect to the issue of self-representation had he or she been more accurately informed about 'the range of permissible punishments.'" *Id.* at 600.

We concluded that although the trial court's statement of the maximum possible punishment was technically erroneous, the defendant failed to demonstrate prejudice "given that either term of imprisonment mentioned in the trial court's discussions with [the] [d]efendant was, given [the] [d]efendant's age, tantamount to a life sentence. Simply put, the practical effect of either sentence on [the] [d]efendant would have been identical in any realistic sense." *Id.*

In this case, consistent with our reasoning in *Gentry*, we conclude that defendant fails to demonstrate a reasonable likelihood that he "would have been materially influenced by the possibility that he would be incarcerated . . ." for a period

of 3,264 months (272 years), as opposed to 1,512 months (126 years). *Id*. Regardless of defendant's age at the time of his trial (32 years old in this case), the understated term of 126 years' imprisonment was functionally a life sentence, just as the purportedly correct maximum sentence of 272 years' imprisonment. Further, while defendant's rejection of plea occurred well before the trial court's requisite inquiry on the final day of trial, the trial court informed defendant that he faced a term of 272 years in prison if convicted on all 24 counts, and he responded, "I'm fully aware."

Defendant asks this Court to disavow our holding in *Gentry* because, in his estimation: (i) it conflicts with established Supreme Court precedent and (ii) its logic leads to absurd results.

We first note that our Supreme Court declined to permit discretionary review of our decision in *Gentry*. Nevertheless, the discretionary denial of appellate review is not equivalent to an affirmance, despite its practical effects. A denial of discretionary review could be based on various considerations other than wholesale agreement with the lower court's reasoning and ultimate disposition.

As such, defendant first argues *Gentry's* "substantially proper inquiry" deviates from decades of our Supreme Court precedent. 227 N.C. App. at 598. However, defendant relies on several cases that are inapposite to the facts before us; a line of cases in which the record is silent as to any inquiry conducted by the trial court under § 15A-1242, and which maintain that any subsequent colloquy, appointment of standby counsel, or written waiver is no substitute for the statutorily

mandated inquiry itself. *See State v. Moore*, 362 N.C. 319, 326 (2008); *State v. Pruitt*, 322 N.C. 600, 603 (1988); *Dunlap*, 318 N.C. at 389; *State v. Bullock*, 316 N.C. 180, 185 (1986); *State v. McCrowre*, 312 N.C. 478, 480 (1984). Defendant's attempt to broaden the scope of the cases cited to impute structural error into all matters concerning waiver of counsel falls flat. It is our determination that our decision in *Gentry* does not present a conflict between an opinion of this Court and one from our Supreme Court.

Further, defendant asserts "*Gentry's* substantial compliance exception to § 15A-1242 has the perverse effect of removing the statute's protection from those defendants who need it most. According to *Gentry's* logic, . . ." defendant continues, "the longer a defendant's potential sentence, the less likely the defendant is to get relief for a violation of § 15A-1242."

To the contrary, as previously discussed, *Gentry* contemplates a specific circumstance where the understated punishment and actual maximum theoretical punishment are functionally identical. In *Gentry*, we specified:

> "[a]lthough such a fourteen year difference would be sufficient, in many instances, *to preclude a finding* that [a] [d]efendant waived his right to counsel knowingly and voluntarily as the result of a trial court's failure to comply with [N.C.G.S.] § 15A-1242, *it does not have such an effect in this instance* given that either term of imprisonment mentioned in the trial court's discussions with [the] [d]efendant was, given [the] [d]efendant's age, tantamount to a life sentence."

227 N.C. App. at 600 (emphasis added).

In this case, defendant elected to proceed *pro se* after learning that he may be incarcerated until the age of 158. He articulates no reasoning for his implicit assertion that his decision "to waive his right to the assistance of counsel and represent himself would have been materially influenced by the possibility . . ." that he would be incarcerated until age 304 instead. *Id.* Simply put, this is not a case where the trial court failed to conduct any inquiry under § 15A-1242, nor has defendant meet his burden in rebutting the presumption that the certified written waiver was knowing, intelligent, and voluntary based on the requisite inquiry as it appears on the record.

III.

For the foregoing reasons, we discern no prejudicial error in the trial court's judgment.

NO ERROR.

Judges COLLINS and FLOOD concur.

Report per Rule 30(e).