IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA23-6

Filed 19 September 2023

Wake County, Nos. 21CRS200683–86

STATE OF NORTH CAROLINA

v.

KAYLORE FENNER, Defendant.

Appeal by defendant from judgments entered 11 March 2022 by Judge Paul C. Ridgeway in Wake County Superior Court. Heard in the Court of Appeals 5 September 2023.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Sherri Horner Lawrence, for the State.

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

FLOOD, Judge.

Kaylore Fenner ("Defendant") appeals from judgments entered 11 March 2022, arguing the trial court erred in failing to adequately advise him of the full sentencing range he faced were he to be convicted of all crimes charged. After careful review, we find no error.

I. Factual and Procedural Background

On 9 February 2021, Defendant was indicted by a Wake County Grand Jury for two counts of first-degree forcible rape and one count of attempted first-degree forcible rape, in violation of N.C. Gen. Stat. § 14-21 (2021); three counts of first-degree forcible sex offense, in violation of N.C. Gen. Stat. § 14-27.26 (2021); one count of breaking or entering to terrorize or injure, in violation of N.C. Gen. Stat. § 14-54(A1) (2021); one count of first-degree kidnapping, in violation of N.C. Gen. Stat. § 14-39 (2021); and one count of common law robbery, in violation of N.C. Gen. Stat. § 14.87.1 (2021).

On 26 January 2022, Judge Keith O. Gregory held a hearing on Defendant's request to release his court-appointed counsel and represent himself at trial. At the hearing, Judge Gregory questioned Defendant extensively to determine whether Defendant understood the consequences of representing himself at trial without the assistance of counsel. When explaining the sentencing range Defendant faced if convicted, Judge Gregory asked Assistant District Attorney Pomeroy ("Pomeroy") to "state for the record the exposure Defendant" would face were he to be convicted of all charges. Pomeroy stated, "I mean, all told, total he is facing a life sentence." The following exchange then took place between Judge Gregory and Defendant:

> THE COURT: Okay. I'm going to deal with the B1s, I do believe that's pertinent. So, therefore, his exposure if he were convicted by a jury of his peers on the high end of the aggravated range would be 300 months minimum, I believe, to 420 months maximum and that's for each charge

of the B1 felonies.

. . .

THE COURT: Now, you further understand that you've been indicted for attempted first degree forcible rape, that you've been indicted for first degree rape, first degree sex offense, breaking and entering with the intent to terrorize slash injure [sic], first degree kidnapping, two counts of first degree sex offense, another count of first degree forcible rape and common law robbery; do you understand all of that?

THE DEFENDANT: Yeah. Yep.

THE COURT: And do you understand that if you were convicted—and I believe it's appropriate to focus on the B1 felonies. If you were convicted of the B1 felonies and if the State gives notice of aggravating factors and if a jury— I'm not saying they're going to, but if a jury of your peers were to convict you of the substantive offenses and also agree that there are aggravating factors, that a court could impose a sentence of 300 months minimum to 420 months maximum on each of the B1 felonies.

THE DEFENDANT: Yes

MS. POMEROY: And, Your Honor, it appears as though there's actually five [B1 felonies], I apologize.

THE COURT: You're fine. Apparently— so there are five [B1 felonies], and the court did read the charges. So there are five B1 felonies. At a minimum, that's 900 months at a minimum. So, therefore, that is 75 years that you could receive at a minimum if convicted of the B1 felonies if it's an aggravated offense and if a court were to run those consecutively. Do you understand that?

THE DEFENDANT: Right. Yep. Yes.

THE COURT: And I'm going to honor what the Supreme Court has said. I've given you the minimum. I'm going to

also give you the maximum. And the maximum is 175 years. So now, with all of these things in mind, do you now wish to ask me any questions about what I've just said to you.

THE DEFENDANT: No.
. . . .

THE COURT: Now, that being said, do you now waive your right to the assistance of a lawyer and voluntarily and intelligently decide to represent yourself in this case?

THE DEFENDANT: Yes, though I am incarcerated and keeping my [court appointed attorney] as standby counsel.
. . . .

THE COURT: And in conclusion, what is the reason why you do not want [your court appointed attorney] to be your lead counsel in these matters?

THE DEFENDANT: It's just a familiarity with the case, means that I'll make a likely better—a likely better defendant of myself than a third party of a court-appointed party. I have better familiarity with the case, with the witness, and I just —it's my intelligent decision that it's the best move going forward.
. . . .

THE COURT: . . . . Well, sir, you have the right to an attorney. . . . This is your last opportunity. I will adhere to your request, but are you sure that you want me to release [your lawyer] as the attorney of record? . . . So are you sure you want me to release [your lawyer] given your exposure of 75 years at a minimum to 175 years maximum? Which a court of competent jurisdiction can give you all of that. So is that what you want me to do? Do you want to keep your lawyer?

THE DEFENDANT: No, I'll be waiving my right to— full representation almost exclusively for the reasons that you named, aside from the exposure. Yeah, I'm competent—or

I'm sure of my decision.

Following this exchange, the State clarified the extent of the evidence they had against Defendant, which included expert testimony of a match of Defendant's DNA found on the vaginal swab of the victim, a fingerprint match found in the victim's home, and the testimony of the victim who could identify Defendant as the perpetrator. Following this clarification, Judge Gregory asked:

> THE COURT: So once again, sir, I want to make sure—and I think [Pomeroy] is smart to point out in reference to potential DNA experts and so forth that will be called—is it your intention to ask the court to allow for [your lawyer] to withdraw as the lead attorney in this matter?
>
> THE DEFENDANT: Yes, and if also possible—yes, just answering your question, yeah, I'm sure.

At the conclusion of the hearing, Defendant signed a Waiver of Counsel releasing his court-appointed counsel.

On 11 March 2022, a jury found Defendant guilty of all nine charges set forth in the indictment. Judge Ridgeway sentenced Defendant to a minimum of 121 years and a maximum 177 years' imprisonment—two years more than Judge Gregory advised Defendant he could receive. Defendant gave oral notice of appeal at the conclusion of the trial.

II. Jurisdiction

This Court has jurisdiction to review this appeal from a final judgment pursuant to N.C. Gen. Stat. § 7A-27(b) (2021).

III. Analysis

The sole issue presented on appeal is whether the trial court erred by allowing Defendant to waive counsel and represent himself without first advising him of the permissible range of punishments he faced. Specifically, Defendant argues the trial court erred by advising him of the range of punishments for the five B1 felonies and not for all nine charges on which he was indicted and by misinforming Defendant of the possible maximum punishments for the five B1 felonies, because he was not advised that each B1 felony could result in life imprisonment. We disagree.

"We review the question of whether the trial court complied with N.C. Gen. Stat. § 15A-1242 *de novo*." *State v. Frederick*, 222 N.C. App. 576, 581, 730 S.E.2d 275, 279 (2012). Under the North Carolina Constitution, a criminal defendant has the right to "handle his own case without interference by, or the assistance of, counsel forced upon him against his wishes." *State v. Moore*, 362 N.C. 319, 321, 661 S.E.2d 722, 724 (2008) (citation and internal quotation marks omitted); *see also* N.C. Const. art. I, § 23. The trial judge, however, must ensure the defendant "voluntarily made a knowing and intelligent waiver of his constitutional right to counsel in order to exercise his constitutional right to represent himself." *State v. Stanback*, 137 N.C. App. 583, 585, 529 S.E.2d 229, 230 (2000) (citation and internal quotations marks omitted). Thus, to permit a criminal defendant to represent himself at trial, the trial judge must comply with the requirements of N.C. Gen. Stat. § 15A-1242:

> 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 (2021). "The record must affirmatively show that the inquiry was competent, [the defendant] understood the consequences of his waiver, and voluntarily exercised his own free will." *Frederick*, 222 N.C. App. at 582, 730 S.E.2d at 280 (citation omitted). The inquiry set forth in N.C. Gen. Stat. § 15A-1242 is mandatory, and failure to comply will result in a new trial. *State v. Mahatha*, 267 N.C. App. 355, 361, 832 S.E.2d 914, 920 (2019). This Court "demand[s] more than [a] surface inquiry" to ensure the safeguards of N.C. Gen. Stat. § 15A-1242 are preserved. *State v. Doisey*, 277 N.C. App. 270, 272, 858 S.E.2d 133, 136 (2021). "[P]erfunctory questioning is not sufficient." *State v. Thomas*, 331 N.C. 671, 674, 417 S.E.2d 473, 476 (1992). With these constitutional and statutory safeguards firmly in mind, we turn to Defendant's arguments.

A. Sentence Range and Charges Against Defendant

First, Defendant argues the trial court erred by incorrectly informing him of the possible maximum sentence he faced and advising him only as to the possible

sentence range for the five B1 felonies, and not for all nine charges.

A "calculation error" in the maximum sentence a defendant is facing violates N.C. Gen. Stat. § 15A-1242 only "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.'" *State v. Gentry*, 227 N.C. App. 583, 600, 743 S.E.2d 235, 246 (2013) (internal quotation marks omitted). Our precedent in *Gentry* is informative. In *Gentry*, the trial judge erroneously informed the defendant he could be sentenced to a maximum of 740 months' imprisonment when he actually faced 912 months. *Id.* at 599, 743 S.E.2d at 246. In affirming the trial court's decision to allow the defendant to waive his court-appointed counsel, this Court reasoned:

> Although such a fourteen year difference would be sufficient, in many cases, to preclude a finding that [the defendant] waived his right to counsel knowingly and voluntarily as the result of a trial court's failure to comply with N.C. Gen. Stat. § 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 defendant] was, given [the defendant's] age, *tantamount to a life sentence*.

Id. at 600, 743 S.E.2d at 246–47 (emphasis added).

We are unpersuaded by Defendant's assertions that the holding in *Gentry* contravenes our Supreme Court's prior precedents. To distinguish *Gentry* from the case at hand, Defendant cites to several of our Supreme Court's precedents for the proposition that "noncompliance with [N.C. Gen. Stat.] § 15A-142 requires a new

trial." The cases cited by Defendant, however, involve factual circumstances where there was little to no inquiry made by the trial judge. *See State v. McCrowre*, 312 N.C. 478, 48–81, 322 S.E.2d 775, 776–77 (1984) (concluding the defendant was entitled to a new trial when there was no evidence the defendant wanted to represent himself but had instead waived his right to have appointed counsel with the expectation that he would hire private counsel); *see also State v. Bullock*, 316 N.C. 180, 185, 340 S.E.2d 106, 108 (1986) (ordering a new trial where the defendant did not waive his right to counsel but only sought to employ his own counsel and was subsequently denied the opportunity to have counsel present at his trial); *State v. Dunlap*, 318 N.C. 384, 386–89, 348 S.E.2d 801, 804 (1986) (ordering a new trial where the defendant informed the trial judge he wanted to represent himself solely for the purpose of having a speedy trial, which the trial judge allowed without conducting any further inquiry); *Moore*, 362 N.C. at 322, 661 S.E.2d at 724 (holding the trial judge erred by assigning the defendant's counsel to inform him of the adequate constitutional safeguards instead of personally advising the defendant of the charges against him or the full breadth of punishment he was facing); *State v. Pruitt*, 322 N.C. 600, 604, 369 S.E.2d 590, 593 (1988) (ordering a new trial where "the trial court failed to make *any* inquiry of [the] defendant concerning whether he understood and appreciated the dangers and disadvantages of self-representation or whether he understood the nature of the charges, proceedings, and the range of permissible punishments he faced" (emphasis added)). These cases are strikingly different from

the case before us.

In the present case, the Record indicates Judge Gregory conducted a very thorough inquiry into whether Defendant was sure in his decision to represent himself. Judge Gregory advised Defendant of the charges against him and that he was facing a maximum prison sentence of 175 years. Judge Gregory then asked Defendant three separate times whether he understood his choice, understood the consequences he was facing, and was sure about his decision. To each question, Defendant indicated he was certain about and understood his decision to represent himself. When Judge Gregory asked Defendant for the final time whether he was sure in his decision to represent himself, Defendant responded, "Yes, . . . yes, just answering your question yeah, I'm sure."

While Defendant was ultimately sentenced to 177 years' imprisonment, we do not find this error negates Defendant's knowing and voluntary waiver of his court-appointed counsel. First, there is only a two-year difference between the sentence Defendant was advised of and the sentence he received. Both are "tantamount to life sentences" as Defendant, who was thirty years old at the time of the trial, will be over 200 years old when either sentence expires. *See Gentry*, 227 N.C. App. at 600, 743 S.E.2d at 246. Second, the Record is devoid of evidence Defendant was unsure in his decision, or would have made a different choice had he been told he would be sentenced to 177 years' imprisonment instead of 175 years. *See Frederick*, 222 N.C. App. at 582, 730 S.E.2d at 280.

For this same reasoning, we also conclude it was not an error to advise Defendant only as to his B1 felonies. Based on the evidence in the Record, there is not a "reasonable likelihood" Defendant may have decided against representing himself had he been advised of the possible sentence range for all nine charges against him. *See Gentry*, 227 N.C. App. at 600, 743 S.E.2d at 246.

B. Advisement of Life Sentence

Next, Defendant argues it was insufficient that Pomeroy advised Defendant he was facing life imprisonment because it is the trial court's duty to make the inquiry set forth in N.C. Gen. Stat. § 15A-1242.

Contrary to Defendant's argument, our Supreme Court has concluded there are no "specific guidelines relating to how the statutorily mandated inquiry must proceed. Rather, the 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). In *Carter*, our Supreme Court found the constitutional and statutory standards were satisfied when the trial court informed the defendant of his right to represent himself, advised against it, and asked again after a brief recess whether the defendant was sure in his decision. 338 N.C. 569, 582, 451 S.E.2d 157, 164 (1994). Notably, our Supreme Court further stated in *Carter*: "[d]uring the discussion between Judge Griffin and [the] defendant, [the] defendant clearly indicated that he realized he was facing a possible death sentence, stating, '[I]f I got to get any kind of

death penalty I got to do it [sic] so send [my attorneys] home.'" *Id.* at 583, 451 S.E.2d at 164 (fourth alteration in original). The defendant's knowledge that he was facing the death penalty was sufficient even though the trial judge did not personally tell the defendant he could be sentenced to death. *See id.* at 583, 451 S.E.2d at 164.

Based on *Carter*, we conclude it was sufficient that Defendant was aware he was facing a life sentence even though Pomeroy, not Judge Gregory, advised Defendant he was facing a life sentence. Pomeroy advised Defendant of the possible maximum sentence only after Judge Gregory asked her to "state for the record the exposure" Defendant would face were he to be convicted of all nine charges. We conclude it was an acceptable part of the inquiry required by N.C. Gen. Stat. § 15A-1242 for Judge Gregory to ask Pomeroy to explain the full breadth of the sentence Defendant was facing. *See Carter*, 338 N.C. at 583, 451 S.E.2d at 164.

IV. Conclusion

For the reasons stated above, we hold the trial court did not err in allowing Defendant to waive his court-appointed counsel and represent himself at trial because Judge Gregory sufficiently advised Defendant he was facing a life-sentence if convicted of all charges.

NO ERROR.

Judges ZACHARY and HAMPSON concur.

Report per Rule 30(e).