IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA23-813

Filed 16 April 2024

Union County, No. 20CRS52006

STATE OF NORTH CAROLINA

v.

JIMEL EDDIE TAMBA, Defendant.

Appeal by defendant from judgment entered 14 October 2022 by Nathan H. Gwyn III in Union County Superior Court. Heard in the Court of Appeals 19 March 2024.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Arneatha James, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender James R. Grant, for defendant-appellant.

FLOOD, Judge.

Jimel Eddie Tamba ("Defendant") appeals from the trial court's judgment in a jury trial where Defendant proceeded *pro se*. On appeal, Defendant argues the trial court erred by permitting him to waive counsel without first advising him of his maximum sentence. After careful review, we conclude Defendant knowingly,

voluntarily, and intelligently waived his right to counsel, and affirm the trial court's judgment.

I. Factual and Procedural Background

On 18 May 2020, North Carolina Highway Patrol Trooper Brett Mullis was traveling in the left lane of Highway 74 bypass in Union County. Trooper Mullis observed a "red [or] burgundy" Toyota Corolla with a tinted license plate cover traveling in the right lane of Highway 74 bypass. Trooper Mullis activated his blue lights and pulled over the vehicle. Prior to stopping the vehicle, Trooper Mullis ran the Corolla's license plate number, and found the vehicle was registered to a Charlotte business called "U.S. Private Military Police Incorporated."

After stopping the Corolla, Trooper Mullis approached the vehicle and noticed "emergency lighting" on the outside of the license plate and "some type of bar" in the back windshield. He further observed that there were two occupants in the vehicle, and that Defendant was in the passenger seat. The driver provided his identification to Trooper Mullis, but Defendant initially refused to do the same. Once Trooper Mullis established Defendant was the owner of U.S. Private Military Police Incorporated, and that the vehicle they were in was owned by the company, Defendant agreed to provide his identification.

During the stop, Trooper Mullis observed a "remote" beside Defendant in the seat, along with a "laptop stand or stand for an iPad." Trooper Mullis accessed the remote and pressed it, which "activated several tones and sirens from the front of the

[Corolla]. It also displayed flashing red and blue lights in the back window[,]" flashing red and white lights around the rear license plate, and "two red flashing lights at the front of the vehicle around the" license plate. Trooper Mullis then asked Defendant about his company, and Defendant initially declined to answer any questions, but later indicated he was a "consultant." Trooper Mullis placed Defendant under arrest for unlawful possession of a blue light, and he then searched the Corolla.

On the same day as the stop, Defendant was charged via magistrate's order with unlawful possession of a blue light. On 4 August 2020, Defendant's counsel filed a motion to dismiss, and on 14 October 2020, a motion to suppress evidence. On 11 March 2021, this matter came on for bench trial before Union County District Court, where the court denied counsel's motions, and Defendant was convicted as charged. Defendant gave notice of appeal to the superior court.

On 21 April 2021, before Union County Superior Court Judge Tanya T. Wallace, Defendant executed a written waiver of his right to all assistance of counsel. Judge Wallace certified Defendant's waiver of counsel and, in her certification, provided:

> I certify that . . . [D]efendant has been fully informed of the charges against him[], the nature of and the statutory punishment for each charge, and the nature of the proceeding against . . . [D]efendant and his[] right to have counsel assigned by the court and his[] right to have the assistance of counsel to represent him[] in this action; that . . . [D]efendant comprehends the nature of the charges and

> proceedings and the range of punishments; that he[] understands and appreciates the consequences of his[] decision and that . . . [D]efendant has voluntarily, knowingly, and intelligently elected in open court to be tried in this action . . . without the assistance of counsel, which includes the right to assigned counsel and the right to assistance of counsel.

On 14 September 2022, this matter came on for a jury trial. At trial, the State made two motions, and prior to addressing the motions the trial court had the following colloquy with Defendant:

> THE COURT: Okay. Before we get addressing the merits of either of those two motions, I just want to have an understanding, you've already waived your right to counsel[?] . . . .
>
> THE DEFENDANT: Yes, your Honor.
>
> THE COURT: Please stand up so I can hear you better. You have every right to represent yourself, that's guaranteed to you under the United and North Carolina State Constitutions. You also have the right to hire an attorney and/or ask for court appointed counsel. And I think we've already been past this but my point is that I hope and I want you to understand that I can't treat you any differently because you are a pro se litigant. In other words, I can't – there will be some questions that I simply cannot answer that you may have. I can't give you tips, legal advice. I can't coach you. I am here to make sure simply that there is a level playing field. Think of it this way, if you will, if the State, the Assistant DA were to start asking me questions about how best to proceed or what they should do or should not do, I certainly wouldn't give them any advice, and I am bound by doing that the same as I am bound by not giving you advice. So if you choose to act as your own attorney, that's fine, but you have to do so knowing that I will expect of you the same behavior and responsibilities as I would a lawyer and an officer of the

[c]ourt.

THE DEFENDANT: Yes, your Honor. I'm aware of that.

THE COURT: Do you have any questions about that?

THE DEFENDANT: No, your Honor.

THE COURT: Okay. Just want to get that out there.

After trial, the jury found Defendant guilty of unlawful possession of a blue light, and the trial court sentenced Defendant as a prior record level II to a forty-five day active sentence. Defendant provided oral notice of appeal.

II. Jurisdiction

Defendant's appeal is properly before us, as this Court has jurisdiction to review a final judgment of a superior court. N.C. Gen. Stat. §§ 7A-27(b)(1) and 15A-1444(a) (2023).

III. Analysis

Defendant argues on appeal that the trial court erred by permitting him to waive counsel and proceed *pro se* without first advising him of the maximum sentence under N.C. Gen. Stat. § 15A-1242(3) (2023). Defendant specifically contends his colloquy with the trial court failed to satisfy the requirement that Defendant, prior to waiving counsel, be advised of the range of permissible punishments, and Defendant's written waiver of counsel, standing alone, does not cure the trial court's error. 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 (2023). "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. *See 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).

Regarding the trial court's duty of inquiry under N.C. Gen. Stat. § 15A-1242, our Supreme Court has provided that there are no "specific guidelines relating to how the statutorily mandated inquiry must proceed." *State v. Carter,* 338 N.C. 569, 583, 451 S.E.2d 157, 164 (1994). For instance, even if a trial judge does not make the statutory inquiry, "[w]here the inquiry required by N.C. Gen. Stat. § 15A-1242 has been made during a *preliminary proceeding by a different judge*, it is *not necessary* for the trial judge to repeat" the inquiry. *State v. Wall*, 184 N.C. App. 280, 282–83, 645 S.E.2d 829, 831 (2007) (emphasis added) (citation omitted). Furthermore,

> there is a *presumption of regularity* accorded the official acts of public officers, such that 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.

Id. at 283, 645 S.E.2d 829, 831–32 (emphasis added) (citation and internal quotation marks omitted) (cleaned up). The burden is on the defendant to rebut this presumption of regularity. *See State v. Kinlock*, 152 N.C. App. 84, 89, 566 S.E.2d 738,

741 (2002) ("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." (citation and internal quotation marks omitted) (cleaned up)).

In *Wall*, the defendant argued to this Court that the trial court erred when it failed to make an inquiry to ensure the defendant comprehended the "range of permissible punishments" as required by N.C. Gen. Stat. § 15A-1242(3). 184 N.C. App. at 282, 645 S.E.2d at 831. In that case, the record indicated the defendant executed two written waivers of counsel, each at preliminary proceedings and certified by judges different than the one who presided over the defendant's jury trial. *Id.* at 284–85, 645 S.E.2d at 832–33. The certified waivers provided, *inter alia*, that the defendant "comprehend[ed] the nature of the charges and proceedings and the range of punishments[,]" but the record on appeal contained no transcript of the waivers' proceedings. *Id.* at 283, 285, 645 S.E.2d at 832–33. Upon our *de novo* review, we affirmed the trial court's judgment, and in doing so provided:

> [The trial court] questioned the defendant about whether he still wished to represent himself. This inquiry was not intended to be a full counsel inquiry as provided in N.C. Gen. Stat. § 15A-1242, but rather to confirm [the] defendant's prior waiver[s] of counsel to make sure [the] defendant had not changed his mind about wanting counsel. The above-cited colloquy between [the trial court] and [the] defendant in no way invalidated [the] defendant's prior waiver[s] of counsel[.]

Id. at 284–85, 645 S.E.2d at 832–33. We further provided that, although the record contained no transcript of the earlier two waivers' proceedings, the defendant failed

to meet his evidentiary burden to rebut our presumption of the waivers' validity, and the defendant's waivers of counsel were therefore knowing, intelligent, and voluntary. *See id.* at 285, 645 S.E.2d at 833.

Here, in the trial court's colloquy with Defendant, the trial court did not ask whether Defendant comprehended the range of permissible punishments pursuant to N.C. Gen. Stat. § 15A-1242(3). While this would therefore appear to be an impermissible surface inquiry such that the trial court did not conform to its N.C. Gen. Stat. § 15A-1242(3) duty of inquiry, the Record on appeal reveals that Defendant executed a written waiver of counsel at a prior proceeding and before a different judge—namely, Judge Wallace of Union County Superior Court. *See Wall*, 184 N.C. App. at 282–83, 645 S.E.2d at 831. Further, as in *Wall*, the Record here does not contain a transcript of this written waiver's proceeding.

In consideration of these relevant facts, which are nearly identical to those in *Wall*, we conclude under our *de novo* review that Defendant knowingly, intelligently, and voluntarily waived his right to counsel. *See Stanback*, 137 N.C. App. at 585, 529 S.E.2d at 230; *see Frederick*, 222 N.C. App. at 581, 730 S.E.2d at 279; *see also Wall*, 184 N.C. App. at 284–85, 645 S.E.2d at 832–33. As this Court has provided, "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[,]" and the presumption remains intact even where there is no transcript of the waiver's proceeding. *Wall*, 184 N.C. App. at 283, 285, 645 S.E.2d at 831–33.

In certification of Defendant's written waiver of counsel, Judge Wallace provided, *inter alia*, that Defendant "comprehends the nature of the charges and proceedings and the range of punishments." Although the Record contains no transcript of the proceeding of Defendant's waiver, given the language of Judge Wallace's certification, we presume regularity in Defendant's written waiver of counsel—specifically, that Judge Wallace made the requisite inquiry under N.C. Gen. Stat. § 15A-1242(3). *See id.* at 283, 285, 645 S.E.2d at 831–32.

Defendant, while acknowledging this Court's presumption of regularity, argues that the Record "is silent" as to what questions were asked of him in his execution of the written waiver, and that we therefore cannot presume he knowingly, voluntarily, and intelligently waived his right to counsel. Defendant grossly misstates the applicable burden of proof—while our presumption of a waiver's validity *may be rebutted* by Record evidence, the *burden* is on the *defendant* to defeat this presumption. *See Kinlock*, 152 N.C. App. at 89, 566 S.E.2d at 741. As set forth above, given the contents of Defendant's certified waiver of counsel, we presume Judge Wallace made the requisite statutory inquiries. *See Wall*, 184 N.C. App. at 283, 285, 645 S.E.2d at 831–32. Defendant cites in his brief no Record evidence in rebuttal to this presumption, and therefore has failed to meet his evidentiary burden. *See Kinlock*, 152 N.C. App. at 89, 566 S.E.2d at 741. We must conclude Defendant's written waiver of counsel was knowing, voluntary, and intelligent. *See Wall*, 184 N.C. App. at 283, 285, 645 S.E.2d at 831–32.

Defendant further contends, however, that this case is "indistinguishable" from *State v. Frederick*, where the defendant executed a written waiver of counsel, and the trial court, in a later colloquy with the defendant, failed to make the requisite N.C. Gen. Stat. § 15A-1242(3) inquiry. 222 N.C. App. at 582, 730 S.E.2d at 280. This Court concluded the defendant's waiver of counsel was not knowing, voluntary, and intelligent, and in making this conclusion provided, "where the record is silent as to what questions were asked of [the] defendant and what his responses were, . . . we cannot presume that the defendant knowingly and intelligently waived his right to counsel." *Id.* at 582, 730 S.E.2d 275, 280 (2012) (citation and internal quotation marks omitted) (cleaned up).

Despite Defendant's contention, the instant case *is* factually distinguishable from *Frederick*—the defendant's written waiver in *Frederick* contained no certification from the judge before whom it was executed, whereas the written waiver here, like the waiver in *Wall*, contains a certification from Judge Wallace that Defendant "comprehends the nature of the charges and proceedings and the range of punishments." *See id.* at 578–79, 730 S.E.2d at 277–78; *see Wall*, 184 N.C. App. at 283, 285, 645 S.E.2d at 832–33. As such, the Record here is not "silent" as to what questions were asked of Defendant and what his responses were. *Frederick*, 222 N.C. App. at 582, 730 S.E.2d at 280. Rather, the Record demonstrates that Defendant was advised, and knew, of his maximum sentence per N.C. Gen. Stat. § 15A-1242(3), and that Defendant's written waiver of counsel was therefore knowing, voluntary, and

intelligent. *See Wall*, 184 N.C. App. at 283, 285, 645 S.E.2d at 831–32.

As Defendant properly waived his right to counsel at a prior Union County Superior Court proceeding before Judge Wallace, who we presume made the requisite N.C. Gen. Stat. § 15A-1242 inquiries for certifying the waiver, the trial court was under no obligation to ask whether Defendant comprehended the range of permissible punishments for unlawful possession of a blue light. *See Wall*, 184 N.C. App. at 282–83, 645 S.E.2d at 831; *see also Carter*, 338 N.C. at 583, 451 S.E.2d at 164; N.C. Gen. Stat. § 15A-1242(3). We conclude the Record shows Defendant understood the consequences of his waiver and voluntarily exercised his own free will, and as such, the trial court did not fail to discharge its constitutional and statutory duties in allowing Defendant to proceed *pro se*. *See Frederick*, 222 N.C. App. at 582, 730 S.E.2d at 280; *see also Moore*, 362 N.C. at 321, 661 S.E.2d at 724. The trial court did not err.

IV. Conclusion

Defendant has failed to demonstrate his written waiver of counsel was not knowing, voluntary, and intelligent, and therefore failed to show the trial court erred in allowing him to proceed *pro se*. We affirm the trial court's judgment.

AFFIRMED.

Judges STROUD and MURPHY concur.

Report per Rule 30(e).