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NO. COA02-783

NORTH CAROLINA COURT OF APPEALS

Filed: 31 December 2002

STATE OF NORTH CAROLINA

v.

Davidson County
Nos. 01 CRS 15763-71

DANIEL ALBERT MOORE, JR.

Appeal by defendant from judgments dated 7 March 2002 by Judge Kimberly S. Taylor in Davidson County Superior Court. Heard in the Court of Appeals 30 December 2002.

Attorney General Roy Cooper, by Assistant Attorney General Sonya M. Calloway, for the State.

Nancy R. Gaines for defendant appellant.

GREENE, Judge.

Daniel Albert Moore, Jr. (Defendant) appeals judgments dated 7 March 2002 revoking his probation.

In January 2001, Defendant was convicted of attempted larceny and sentenced to a suspended term of six to eight months imprisonment. Defendant was also convicted of seven counts of felony larceny, for which he received eight consecutive suspended sentences of ten to twelve months imprisonment, and one count of possession of stolen goods, for which he received a suspended sentence of eight to ten months. Defendant was placed on probation

for all of these offenses.

On 11 December 2001, nine separate violation reports were filed alleging Defendant had violated the terms of his probation. Counsel was appointed to represent Defendant in January 2002. Defendant appeared in court on 18 February 2002 seeking leave to discharge his appointed attorney and retain private counsel. Upon Defendant's execution of a written waiver of assigned counsel, the trial court entered an order on 19 February 2002 removing Defendant's appointed counsel and continuing the matter to allow Defendant time to retain private counsel.

On 7 March 2002, Defendant's case was heard by the trial court. Defendant appeared at the hearing without counsel. The State apprised the trial court of Defendant's circumstances as follows:

My reading of the file says [counsel] was appointed. [D]efendant asked that [appointed counsel] be removed. He signed a Superior Court waiver. [Defendant] indicated that his family is still trying to get Miss Baker to represent him in these matters. The State is ready to proceed.

Upon confirming that the proceeding involved an alleged probation violation, the trial court announced: "We will proceed today." When asked to admit or deny the alleged probation violations, Defendant responded: "I thought I would have legal representation before I say anything." The trial court treated Defendant's response as a denial of the charges and went forward with the hearing.

Defendant's probation officer testified for the State,

detailing Defendant's non-compliance with the terms of his probation. Defendant did not cross-examine the State's witness or offer any rebuttal evidence. The trial court then found Defendant in willful violation of probation as charged in the reports, revoked Defendant's probation, and activated his suspended sentences.

The issue is whether the probation hearing was conducted in violation of Defendant's statutory right to counsel under N.C. Gen. Stat. § 15A-1345(e).

Defendant contends both the State and the trial court were aware of his desire to be represented by counsel at the hearing. Accordingly, Defendant argues, the trial court should have allowed him additional time to retain counsel or appointed a new attorney to represent him.

A defendant at a probation revocation hearing has a statutory right to counsel akin to the right enjoyed in a criminal trial. See N.C.G.S. § 15A-1345(e) (2001); *State v. Warren*, 82 N.C. App. 84, 85, 345 S.E.2d 437, 439 (1986). A waiver of that right to counsel must be expressed "clearly and unequivocally." *State v. Carter*, 338 N.C. 569, 581, 451 S.E.2d 157, 163 (1994). Moreover, before accepting a waiver of counsel, "the trial court must make a thorough inquiry into whether the defendant's waiver was knowingly, intelligently and voluntarily made." *State v. Hyatt*, 132 N.C. App. 697, 702, 513 S.E.2d 90, 94 (1999). A trial court meets its obligation if it makes the inquiry required under N.C. Gen. Stat.

§ 15A-1242. *Id.*

Under section 15A-1242:

A defendant may be permitted at his election to proceed . . . 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.

"The execution of a written waiver is no substitute for compliance by the trial court with the statute." *State v. Evans*, --- N.C. App. ---, ---, 569 S.E.2d 673, 675 (2002).

In this case, Defendant only executed a written waiver of his right to *assigned* counsel. "There is no evidence that [D]efendant ever intended to proceed . . . without the assistance of some counsel." *State v. McCrowre*, 312 N.C. 478, 480, 322 S.E.2d 775, 776-77 (1984); *see also State v. Hutchins*, 303 N.C. 321, 339, 279 S.E.2d 788, 800 (1981) ("[s]tatements of a desire not to be represented by court-appointed counsel do not amount to expressions of an intention to represent oneself"). At the beginning of the probation hearing, the State notified the trial court Defendant's family was "still trying to get [counsel] to represent him in these matters." Moreover, when asked to plead to the charges against him, Defendant replied, "I thought I would have legal

representation before I say anything.” We further note the trial court did not inquire into the reasons for Defendant’s failure to retain private counsel and failed to notify Defendant of the consequences of proceeding *pro se* as required by section 15A-1242. Accordingly, it was error for the trial court to proceed with the hearing without providing Defendant with the assistance of counsel, see *State v. Stanback*, 137 N.C. App. 583, 586, 529 S.E.2d 229, 230-31 (2000); *State v. McCrowre*, 312 N.C. at 481, 322 S.E.2d at 776-77, entitling Defendant to a new hearing.

Reversed and remanded.

Judges TIMMONS-GOODSON and TYSON concur.

Report per Rule 30(e).