An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-952

Filed: 5 June 2018

Forsyth County, No. 14CRS053555

STATE OF NORTH CAROLINA

v.

JAMES DANIEL SIMMONS, Defendant.

Appeal by Defendant from judgment entered 30 August 2015 by Judge Edwin G. Wilson, Jr., in Forsyth County Superior Court. Heard in the Court of Appeals 25 January 2018.

Attorney General Joshua H. Stein, by Assistant Attorney General Kindelle M. McCullen, for the State.

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

DILLON, Judge.

James Daniel Simmons ("Defendant") appeals from the trial court's judgment entered upon a jury verdict finding him guilty of driving while impaired.

I. Background

In April 2014, Defendant was pulled over by an officer at approximately 3:30 in the morning while driving a vehicle and was subsequently charged with DWI.[1] Defendant pleaded guilty to the DWI charge in district court. Defendant appealed the conviction to superior court, stating that he was dissatisfied with his attorney's representation in district court.

In superior court, Defendant told the judge that he wished to fire his attorney and represent himself. The trial judge conducted the waiver colloquy required by N.C. Gen. Stat. § 15A-1242 (2015), but failed to inform Defendant of the possible fine he could face if convicted of DWI. Defendant proceeded to trial *pro se*.

After a jury trial, Defendant was convicted of a single count of DWI and sentenced as a Level 4 offender to a prison term of 120 days. Defendant appealed.[2]

II. Analysis

Defendant argues that the trial court erred by allowing Defendant to represent himself after he fired his trial counsel. Specifically, he argues that his waiver was not made knowingly, intelligently, and voluntarily. Based on our holding in *State v. Taylor*, 187 N.C. App. 291, 652 S.E.2d 741 (2007), we are compelled to agree.

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[1] Defendant was also charged with driving with a revoked license. However, the trial court ultimately dismissed this charge based on the lack of evidence showing that Defendant lived at the address to which the notice of revocation had been mailed.

[2] Defendant has filed a petition for writ of *certiorari* with our Court in order to remedy defects in his notice of appeal. In our discretion, pursuant to appellate Rule 21, we hereby grant Defendant's petition for writ of *certiorari* and proceed to consider the merits of Defendant's appeal. N.C. R. App. P. 21(a)(1).

Accordingly, we vacate the judgment against Defendant and remand the matter for further proceedings consistent with this opinion.

Our General Statutes allow a defendant to represent himself in a criminal matter where the trial court is satisfied that the defendant:

> (1) Has been 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 (2015); *see also State v. Jacobs*, 233 N.C. App. 701, 705, 757 S.E.2d 366, 369 (2014) (citing *State v. Pruitt*, 322 N.C. 600, 604, 369 S.E.2d 590, 593 (1988)) ("The trial [court] ha[s] an unequivocal duty to . . . disclose the range of permissible punishments.").

Defendant makes a number of valid arguments concerning errors made during the colloquy between the trial court and Defendant regarding his waiver of counsel. One of these arguments is that while the trial court informed Defendant of the possible jail time he might face, it failed to inform him of the fine which could be imposed: $4,000 for a level one conviction and $2,000 for a level two conviction. While an argument could be made that such error is minor and should not invalidate

Defendant's otherwise knowing and voluntary waiver of counsel, we held the opposite in *Taylor*. Specifically, in *Taylor*, we stated as follows:

> [W]e conclude that the trial court failed to comply with N.C. Gen. Stat. § 15A-1242 such that defendant is entitled to a new trial.
>
> First, the trial court failed to properly inform defendant regarding "the range of possible permissible punishments" that he faced. While the trial court correctly informed defendant of the maximum [] imprisonment penalty [], *it failed to inform defendant that he also faced a maximum $1,000.00 fine for each of the charges.*

Taylor, 187 N.C. App. at 294, 652 S.E.2d at 743 (emphasis added) (internal citation omitted). Like Defendant here, the defendant in *Taylor* was not fined by the trial court. *Id.* at 292, 652 S.E.2d. at 742.

The cases cited by the State are inapposite. The State cites *State v. Gentry*, 227 N.C. App. 583, 743 S.E.2d 235 (2013), in which our Court held that the trial court erred by informing the defendant that the maximum punishment for a particular charge was 740 months instead of 912 months. *State v. Gentry*, 227 N.C. App. 583, 600, 743 S.E.2d 235, 246 (2013). However, in *Gentry*, our Court specifically distinguished *Taylor*, concluding that the error in *Gentry* was harmless because the defendant faced what was effectively a life sentence for either maximum punishment such that the error did not invalidate the defendant's otherwise knowing and voluntary waiver of counsel. *Id.* That is, the Court based its decision on the likelihood that the defendant would not live long enough to serve even 740 months, much less

912 months. In the present case, though, the trial court failed to inform Defendant of an additional punishment—the fine—which Defendant *could* possibly have faced.

The State also cites *State v. Paterson*, 208 N.C. App. 654, 703 S.E.2d 755 (2010), noting that our Court "upheld a waiver colloquy in [*Paterson*] where the trial court advised the defendant of the two-year maximum term of imprisonment and made no mention of the potential $4,000.00 fine." But a review of *Paterson* shows that the defendant in that case made no argument on appeal concerning any failure by the trial court to inform him of a fine, nor did our Court make any mention of this issue, nor did our Court discuss *Taylor*. Rather, the defendant in *Paterson* based his appeal on entirely different arguments. *See id.*

Neither our research, nor the State's brief, has revealed any case from our Supreme Court which has overruled *Taylor*. Therefore, we are bound by *Taylor* and, accordingly, conclude that the judgment against Defendant be vacated and the matter be remanded for further proceedings consistent with this opinion. We decline to address Defendant's other arguments on appeal because they may not arise upon retrial. *See State v. Pruitt*, 322 N.C. 600, 601, 369 S.E.2d 590, 591 (1988).

VACATED AND REMANDED.

Judges STROUD and INMAN concur.

Report per Rule 30(e).