IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-69

Filed: 2 October 2018

Tyrrell County, No. 17 CRS 50015

STATE OF NORTH CAROLINA

v.

CARL COMBS

Appeal by defendant from judgment entered 7 June 2017 by Judge Wayland J. Sermons Jr. in Tyrrell County Superior Court. Heard in the Court of Appeals 21 August 2018.

*Attorney General Joshua H. Stein, by Assistant Attorney General Lisa B. Finkelstein, for the State.*

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

ARROWOOD, Judge.

Carl Combs ("defendant") appeals from judgment entered upon his conviction for disorderly conduct in a public building. For the following reasons, we vacate defendant's conviction.

## I. Background

Defendant was arrested for disorderly conduct in a public building on 1 February 2017 and charged for the misdemeanor by a warrant for arrest. The warrant for arrest provided that there was probable cause to believe that defendant "unlawfully and willfully did CAUSE DISRUPTION IN NATIONWIDE BUILDING AND PROBATION OFFICE, BY CAUSING A DISTURBANCE THAT WAS DISRUPTING CLIENTS AND MANGEMENT IN THE INSURANCE BUILDING."

Defendant signed a waiver of his right to assigned counsel in Tyrrell County District Court on 13 February 2017. Defendant's case was then tried in Tyrrell County District Court before the Honorable George G. Braddy, who entered judgment on defendant's conviction for disorderly conduct in a public building on 9 March 2017. Defendant appealed to superior court.

Defendant signed a waiver of his right to assigned counsel in Tyrrell County Superior Court on 22 April 2017. The matter then came on for an administrative hearing on 27 April 2017. At that time, defendant asked for a continuance and stated he did not want to represent himself. The trial court set the matter for trial on 5 June 2017.

The matter came on to be tried as scheduled on 5 June 2017 in Tyrrell County Superior Court before the Honorable Wayland J. Sermons Jr. At that time, defendant asked for a continuance because of anxiety. The trial court denied the continuance, but allowed defendant time to decide whether he wanted to go to trial or accept the

district court judgment. Upon defendant's decision, the matter proceeded to a jury trial. Jury selection was completed before the trial court recessed the proceedings for the evening.

The following morning, on 6 June 2017, defendant did not return for trial and an order was issued for his arrest. It was determined that defendant was seeking medical treatment. On 7 June 2017, defendant was present and the case was tried before a jury.

The evidence at the trial tended to show that defendant was on probation and scheduled to meet with a community service coordinator ("CSC") on 1 February 2017 at a probation office in a building shared by a Nationwide Insurance office. Defendant's probation officer met defendant at the probation office and was present during the meeting. The probation officer testified that defendant was loud, disruptive, and argumentative as the probation officer performed a warrantless search of defendant upon entering the probation office. Defendant continued to be loud and disruptive during his meeting with the CSC. The probation officer testified that defendant was upset that he was searched and that the probation officer was present for the meeting with the CSC. Defendant claimed he was being mistreated. Defendant was back and forth between the probation office and the main hallway in the building between the probation office and the Nationwide office, "[j]ust yelling and talking loudly." Defendant claimed he could do what he wanted in the building.

The probation officer spoke with the building manager from the Nationwide office about the disruption and, while defendant was finishing his meeting with the CSC, the probation officer had the sheriff's department called because the probation officer believed there would be an issue when he asked defendant to leave following the meeting. Upon the conclusion of defendant's meeting, the probation officer explained to defendant that he was only to be in the building when he was scheduled for a meeting or had business with Nationwide. At that point, defendant attempted to enter the Nationwide office to speak with the building manager. The probation officer escorted defendant out of the building, telling defendant that he needed an appointment to speak with the building manager. Once outside, defendant began yelling, stated he was going back inside to see the building manager "to get her ass straight," and then attempted to re-enter the building. The probation officer testified that defendant "just kept getting further and further out of hand." At that point, the probation officer detained defendant until the sheriff's department arrived. A sheriff's deputy took defendant before a magistrate.

On 7 June 2017, the jury found defendant guilty of disorderly conduct. The trial court entered judgment on the jury verdict sentencing defendant to a term of 45 days of imprisonment suspended on condition that defendant be placed on supervised probation for 24 months.

Defendant filed a *pro se* notice of appeal on 14 and 21 June 2017. Appellate counsel was appointed on 10 July 2017.

## II. Discussion

On appeal, defendant contends the trial court lacked jurisdiction and the trial court failed to ensure his waiver of counsel was knowing, voluntary, and intelligent.

### 1. Jurisdiction

Regarding the trial court's jurisdiction, defendant first contends the trial court lacked jurisdiction because the warrant for his arrest failed to sufficiently charge him with misdemeanor disorderly conduct in a public building. We agree.

Our statutes provide that "[t]he citation, criminal summons, warrant for arrest, or magistrate's order serves as the pleading of the State for a misdemeanor prosecuted in the district court . . . ." N.C. Gen. Stat. § 15A-922(a) (2017). A conviction on an offense charged in a warrant in district court may than be appealed to superior court for a trial de novo. *See State v. Chappell*, 18 N.C. App. 288, 290, 196 S.E.2d 558, 559 (1973) ("Only after there has been a trial and appeal from a conviction by an inferior court having jurisdiction may a defendant be tried upon a warrant in superior court.") No matter the type of criminal pleading, N.C. Gen. Stat. § 15A-924(a)(5) requires that a criminal pleading contain "[a] plain and concise factual statement in each count which, without allegations of an evidentiary nature, asserts facts supporting every element of a criminal offense and the defendant's commission

thereof with sufficient precision clearly to apprise the defendant . . . of the conduct which is the subject of the accusation." N.C. Gen. Stat. § 15A-924(a)(5) (2017). Similarly, our Supreme Court has held that "[N.C. Gen. Stat. §] 15-153 provides that every criminal proceeding by warrant is sufficient for all intents and purposes if it expresses the charge against the defendant in plain, intelligible, and explicit manner." *State v. Sparrow*, 276 N.C. 499, 510, 173 S.E.2d 897, 904 (1970).

"Without a valid warrant or indictment, a court lacks jurisdiction to proceed. Challenges to the validity of an indictment may be raised at any stage in the proceedings and we review the challenge *de novo*." *State v. Dale*, 245 N.C. App. 497, 502, 783 S.E.2d 222, 226 (2016) (citing *State v. McKoy*, 196 N.C. App. 650, 652, 675 S.E.2d 406, 409 (2009)).

Our Appellate Courts are most often tasked with assessing the sufficiency of an indictment. However, this Court has recognized that the requirements of a valid indictment apply equally to other criminal pleadings. *See Dale*, 245 N.C. App. at 502, 783 S.E.2d at 226. Thus, in reviewing the warrant in this case, we are mindful that

> "[t]he purpose of an indictment . . . is to inform a party so that he may learn with reasonable certainty the nature of the crime of which he is accused[.]" *State v. Coker*, 312 N.C. 432, 437, 323 S.E.2d 343, 347 (1984). The trial court need not subject the indictment to "hyper technical scrutiny with respect to form." *In re S.R.S.*, 180 N.C. App. 151, 153, 636 S.E.2d 277, 280 (2006). "The general rule in this State and elsewhere is that an indictment for a statutory offense is sufficient, if the offense is charged in the words of the statute, either literally or substantially, or in equivalent

> words." *State v. Greer*, 238 N.C. 325, 328, 77 S.E.2d 917, 920 (1953).

*State v. Simpson*, 235 N.C. App. 398, 400-401, 763 S.E.2d 1, 3 (2014).

N.C. Gen. Stat. § 14-132 provides that it is a misdemeanor if any person shall "[m]ake any rude or riotous noise, or be guilty of any disorderly conduct, in or near any public building or facility[.]" N.C. Gen. Stat. § 14-132(a)(1) (2017). Disorderly conduct is further defined in N.C. Gen. Stat. § 14-288.4. Pertinent to this case, the jury was instructed pursuant to N.C. Gen. Stat. § 14-288.4(a)(2), which defines disorderly conduct to include "a public disturbance intentionally caused by any person who . . . [m]akes or uses an utterance, gesture, display or abusive language which is intended and plainly likely to provoke violent retaliation and thereby cause a breach of the peace." N.C. Gen. Stat. § 14-288.4(a)(2) (2017).

As stated above, the warrant for arrest charged defendant with misdemeanor disorderly conduct in a public building in violation of N.C. Gen. Stat. § 14-132(a)(1) as follows: "defendant . . . unlawfully and willfully did CAUSE DISRUPTION IN NATIONWIDE BUILDING AND PROBATION OFFICE, BY CAUSING A DISTURBANCE THAT WAS DISRUPTING CLIENTS AND MANAGEMENT IN THE INSURANCE BUILDING."

Defendant claims this warrant was insufficient to confer jurisdiction on the trial court and his conviction must be vacated because the warrant "alleged neither (1) the elements of the offense it purported to charge; nor (2) the elements of the

lesser-included offense upon which the jury was instructed." Precisely, defendant contends the warrant did not allege that defendant made a rude or riotous noise, that defendant made an utterance, gesture or abusive language intended or plainly likely to provoke retaliation and cause a breach of the peace, or that any disorderly conduct was in a public building.

In response to defendant's argument, the State compares this case to *Dale* and argues the warrant was sufficient to allege both elements of disorderly conduct in a public building under N.C. Gen. Stat. § 14-132(a)(1). The State contends it is irrelevant that the warrant does not allege the elements of the lesser offense in N.C. Gen. Stat. § 14-288.4(a)(2).

In *Dale*, this Court addressed whether a statement of charges that "does not use the words 'rude or riotous noise' but instead states that the defendant did unlawfully 'curse and shout' at police officers in the jail lobby" was sufficient to charge disorderly conduct in a public building in violation of N.C. Gen. Stat. § 14-132(a)(1). *Dale*, 245 N.C. App. at 502, 783 S.E.2d at 226. After analyzing the phrase "rude or riotous noise" and looking at the ordinary definitions of those terms, this Court held "[t]he words in the charging document in this case fit within the definition for the behavior described in the statute and are thus sufficient to confer jurisdiction so that the trial could proceed." *Id.* at 505, 783 S.E.2d at 227. This Court reasoned that "[t]here is no practical difference between 'curse and shout' and 'rude or riotous noise.'

Either phrase provides the defendant more than adequate notice of what behavior is alleged to be the cause of the charges." *Id.* at 504, 783 S.E.2d at 227.

Relying on *Dale*, in this case the State contends that "[t]here is no practical difference between the phrases 'causing a disturbance' and 'rude and riotous noise.' " We disagree. The present case is easily distinguishable from *Dale*.

As this Court explained in *Dale*, the statement of charges in that case alleged explicit acts that fit clearly under the "rude or riotous noise" language in N.C. Gen. Stat. § 14-132(a)(1). The allegation in this case, however, that "defendant . . . unlawfully and willfully did CAUSE DISRUPTION . . . BY CAUSING A DISTURBANCE THAT WAS DISRUPTING CLIENTS AND MANAGEMENT . . . [,]" does not allege specific acts "to apprise the defendant . . . of the conduct which is the subject of the accusation." N.C. Gen. Stat. § 15A-924(a)(5) (2017). Moreover, the allegation that defendant "did CAUSE DISRUPTION . . . BY CUASING A DISTURBANCE" is more broad than the "rude or riotous noise" language in N.C. Gen. Stat. § 14-132(a)(1) and, therefore, unlike in *Dale*, does not "fit within the definition for the behavior described in the statute[.]" *Dale*, 245 N.C. App. at 505, 783 S.E.2d at 227. In fact, there are many disruptions or disturbances that do not involve a rude or riotous noise. Thus, the warrant in this case did not charge defendant with disorderly conduct "in the words of the statute, either literally or substantially, or in equivalent words." *Greer*, 238 N.C. at 328, 77 S.E.2d at 920.

For the same reasons, the warrant in this case was insufficient to charge defendant with "disorderly conduct" as defined in N.C. Gen. Stat. § 14-288.4(a)(2). There is nothing in the broad language used in the warrant to suggest defendant made or used "any utterance, gesture, display or abusive language which [was] intended and plainly likely to provoke violent retaliation and thereby cause a breach of the peace." N.C. Gen. Stat. § 14-288.4(a)(2).

Because the facial validity of a criminal pleading is judged based upon the language in the pleading without consideration of the evidence later offered, *see State v. Ellis*, 368 N.C. 342, 347, 776 S.E.2d 675, 679 (2015), we hold the warrant in this case was insufficient to confer jurisdiction in the trial court.

2. Waiver of Counsel

Even if the warrant was sufficient to confer jurisdiction in the trial court, we agree with defendant's second argument that the trial court failed to perform the necessary inquiry concerning his waiver of counsel.

This Court

> has long recognized the state constitutional right of a criminal defendant to handle his own case without interference by, or the assistance of, counsel forced upon him against his wishes. However, before allowing a defendant to waive in-court representation by counsel the trial court must insure that constitutional and statutory standards are satisfied.

*State v. Reid*, 224 N.C. App. 181, 189, 735 S.E.2d 389, 396 (2012) (internal quotation marks and citations omitted). The inquiry required in North Carolina is set forth in N.C. Gen. Stat. § 15A-1242, which provides as follows:

> 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 (2017). "Our Supreme Court has offered a fourteen-question checklist 'designed to satisfy requirements of [N.C. Gen. Stat.] § 15A-1242[.]' " *Reid*, 224 N.C. App. at 190-91, 735 S.E.2d at 396 (quotation marks and citation omitted).

The State concedes the trial court failed to make the inquiry required by N.C. Gen. Stat. § 15A-1242 to ensure defendant's waiver of counsel was knowing, voluntary, and intelligent. We agree the trial court erred.

The only evidence of defendant's waiver are the written waivers signed by defendant in district court and superior court which indicate that defendant waived his right to assigned counsel. However, the parties are in agreement that a waiver

of the right to assigned counsel is not a waiver of all rights to counsel. *See State v. White*, 78 N.C. App. 741, 745, 338 S.E.2d 614, 616 (1986); *State v. McCrowre*, 312 N.C. 478, 480-81, 322 S.E.2d 775, 776-77 (1984). In fact, at the 27 April 2017 administrative hearing, defendant sought a continuance because he did not want to represent himself. Thereby, demonstrating defendant did not intend to waive all rights to counsel.

More importantly, the parties agree that nothing in the record shows that the trial court properly advised defendant on his right to counsel, the consequences of a waiver, or the punishment he faced. Thus, the trial court did not satisfy the inquiry mandated by N.C. Gen. Stat. § 15A-1242.

This Court has held that "[i]t is prejudicial error to allow a criminal defendant to proceed *pro se* at any critical stage of criminal proceeding without making the inquiry required by N.C. Gen. Stat. [§] 15A-1242." *Reid*, 224 N.C. App. at 189, 735 S.E.2d at 396 (quotation marks and citation omitted). Thus, even if the trial court had jurisdiction in this case, defendant is entitled to a new trial.

## III. Conclusion

For the reasons discussed above, the trial court did not have jurisdiction and defendant's conviction for disorderly conduct in a public building is vacated.

VACATED.

Judges BRYANT and HUNTER, JR. concur.

Report per Rule 30(e).