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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-109

Filed: 3 September 2019

Catawba County, No. 16CRS2021-23

STATE OF NORTH CAROLINA

v.

GARY LYNN JOHNSON, Defendant.

Appeal by Defendant from judgment entered 10 August 2018 by Judge Carla Archie in Catawba County Superior Court. Heard in the Court of Appeals 6 June 2019.

Attorney General Joshua H. Stein, by Assistant Attorney General Joseph L. Hyde, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender James R. Grant, for Defendant-Appellant.

INMAN, Judge.

Gary Lynn Johnson ("Defendant") appeals from judgments entered upon jury convictions for felony larceny, possession of drug paraphernalia, and attaining habitual felon status. Defendant argues the court (1) lacked jurisdiction because the indictment failed to allege he had either been represented by or waived counsel in his four prior larceny cases; and (2) erred by permitting him to represent himself at trial

without first conducting the thorough inquiry required by N.C. Gen. Stat. § 15A-1242. After careful review, we conclude that the indictment was sufficient but that the trial court failed to conduct the mandatory inquiry and that Defendant is therefore entitled to a new trial.

I. FACTUAL AND PROCEDURAL HISTORY

The record below discloses the following:

On 30 December 2015, an employee at the Wal-Mart Neighborhood Market in Hickory observed a man he identified as Defendant putting merchandise in his coat. The store placed a call to the Hickory Police Department to report a shoplifter. Defendant walked past the registers without paying for any merchandise. As Defendant approached the door, an employee tried to get his attention—hoping to detain him until the police arrived—but Defendant "bolted."

Lieutenant Vidal Sipe ("Lt. Sipe") of the Hickory Police Department noticed a man fitting the shoplifter's description running across Highway 70. Lt. Sipe advised additional officers by radio that he had located a suspect. Another officer stopped Defendant, informed him of the larceny investigation, and asked for consent to search his person. The officer's search revealed a grooming product, reading glasses, a razor, two deodorants, a pair of sunglasses, a crème pie, a Gatorade, and a green cigarette carton. The cigarette carton contained a glass pipe, broken off on one end with burn marks and white powder residue on the interior, and a long, thin metal rod, which

the officer recognized as a device typically used to ingest crack cocaine. Defendant was arrested and brought to Catawba County jail.

On 18 April 2016, the Catawba County Grand Jury indicted Defendant for misdemeanor possession of drug paraphernalia, habitual larceny, and attaining habitual felon status. The Grand Jury later returned superseding indictments on the charge of habitual larceny alleging different items of property stolen but identical predicate larceny convictions.

Defendant initially indicated to the court that he had retained counsel but later was found indigent and assigned Patrick Finn ("Finn") as counsel. Defendant filed a *pro se* motion to dismiss the charges on 13 January 2017, which included a request that Finn be removed as counsel. The court allowed Finn to withdraw on 16 May 2017 and appointed attorney Robert Thomson ("Thomson"). Thomson was present during Defendant's subsequent court appearances.

On 7 March 2018, approximately a month before trial, Defendant petitioned the court to remove Thomson as counsel and allow him to represent himself. The court allowed Defendant to proceed *pro se*, with Thomson as standby counsel.

When Defendant's case was called for trial on 9 April 2018, the following exchange occurred:

> THE COURT: All right, and are you Mr. Johnson?
>
> MR. JOHNSON: I am.

> THE COURT: Mr. Johnson, based upon our hearing yesterday in which you represented yourself, is it still your intention to represent yourself?
>
> MR. JOHNSON: Yes ma'am, I am.

The trial court heard Defendant and the State regarding motions and then, after Defendant consulted with Thomson, advised Defendant:

> THE COURT: All right, let me – I see you consulting with Mr. Thomson, who is your standby counsel. Now, that you have elected, Mr. Johnson, to proceed on your own, the Court is going to look to you, and to you only to respond to my inquiries. Mr. Thompson [sic] is there to the extent that you are unable to represent yourself, he can step in and assist you. But we aren't going to delay this trial over, and over, and over again while you consult with Mr. Thomson. Either Mr. Thomson is going to represent you, or you are going to represent yourself. Do you understand that?
>
> MR. JOHNSON: I do.

The State presented evidence through the testimony of four witnesses, each of whom Defendant cross examined. Defendant did not present any evidence. The jury found Defendant guilty of felony larceny, possession of drug paraphernalia, and of attaining habitual felon status. The court determined that Defendant had a prior record level of VI for sentencing purposes, and sentenced him to 115 to 150 months in prison.

On 19 April 2018, eight days after the judgment was entered, Defendant filed a timely motion for appropriate relief with the trial court, asserting a number of assignments of error. Defendant's motion for appropriate relief came on for hearing

29 June 2018. The court inquired as to Defendant's intention to represent himself at the hearing, and found that Defendant had made a fully-informed choice to proceed on his own. The court denied Defendant's motion as to each assignment of error except for the calculation of his prior record level, which it adjusted to a prior record level V. The court proceeded with a sentencing hearing and resentenced Defendant to a term of 100 to 132 months in prison. Defendant orally noticed his intent to appeal the denial of his motion for appropriate relief and the court appointed appellate counsel to assist in that regard.

The trial court reopened the matter for hearing 10 August 2018 to reconsider the modification to Defendant's sentence made after hearing the motion for appropriate relief.[1] The court reinstated the prior record level of VI and adjusted Defendant's sentence to 115 to 150 months in prison. Defendant appeals.

II. ANALYSIS

A. Indictment

Defendant first argues the trial court lacked subject matter jurisdiction to try him for habitual larceny because the indictment did not allege an essential element of the offense: that he was either represented by or waived counsel during each of his four prior larceny convictions. A constitutionally sufficient indictment "must allege lucidly and accurately all the essential elements of the offense endeavored to be

[1] The record does not indicate whether the August hearing was conducted upon the State's motion or *sua sponte*.

charged." *State v. Brice,* 370 N.C. 244, 249, 806 S.E.2d 32, 36 (2017) (citations omitted). Failure to do so renders the indictment facially invalid and deprives the trial court of subject matter jurisdiction. *Id.* We recently held in *State v. Edgerton* that representation or waiver thereof in relation to prior convictions is not an essential element of the offense of habitual larceny that must be alleged by the State in an indictment. ___ N.C. App. ___, ___, ___ S.E.2d ___, ___ (2019) (No. COA18-1091). Following *Edgerton*, we overrule Defendant's challenge to the habitual larceny indictment.

B. Knowing and Voluntary Waiver of Right to Counsel

Defendant next argues the trial court erred by permitting him to waive counsel and represent himself at trial without first performing the statutorily mandated inquiry into whether he knowingly, intelligently, and voluntarily chose to proceed without representation. We agree.

This Court reviews *de novo* a trial court's ruling permitting a defendant to proceed *pro se*. *State v. Watlington*, 216 N.C. App. 388, 393-94, 716 S.E.2d 671, 675 (2011).

Our state and federal constitutions guarantee criminal defendants the right to representation by counsel. U.S. Const. amend. VI; N.C. Const. art. I, § 23. Inherent to the right to assistance of counsel is the right to refuse that assistance and proceed *pro se*. *State v. Evans,* 153 N.C. App. 313, 315, 569 S.E.2d 673, 675 (2002). "Before

allowing a defendant to waive in-court representation by counsel, however, the trial court must insure that constitutional and statutory standards are satisfied." *State v. Thomas*, 331 N.C. 671, 673, 417 S.E.2d 473, 475 (1992). The trial court must determine whether the defendant knowingly, intelligently, and voluntarily waives his right to in-court representation by counsel. *Id.* at 674, 417 S.E.2d at 476. This constitutional requirement is satisfied if the inquiry is conducted pursuant to Section 15A-1242 of our General Statutes. *State v. Moore*, 362 N.C. 319, 322, 661 S.E.2d 722, 724 (2008). This statute provides:

> 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).

While the statute provides no specific requirements for how the trial court makes this inquiry, *State v. Patterson*, 208 N.C. App. 654, 661, 703 S.E.2d 755, 759 (2010), the record must affirmatively show that the court conducted the inquiry and that the defendant's answers show that he is "literate, competent, understood the

consequences of his waiver, and voluntarily exercised his own free will." *State v. Pena*, ___ N.C. App. ___, ___, 809 S.E.2d 1, 7 (2017) (citing *State v. Seymore*, 214 N.C. App. 547, 549, 714 S.E.2d 499, 501 (2011)). A trial court's failure to conduct this inquiry is *per se* prejudicial error. *State v. Sorrow*, 213 N.C. App. 571, 573, 713 S.E.2d 180, 182 (2011). The presence of standby counsel does not alter this requirement or ameliorate presumed prejudice. *State v. Stanback,* 137 N.C. App. 583, 586, 529 S.E.2d 229, 230-31 (2000).

Other than the colloquy between the trial court and Defendant quoted above, the State has identified, and our review of the transcript reveals, no inquiry into Defendant's decision to proceed *pro se*, either during the preliminary hearing on 7 March 2018 or at the outset of the trial itself.

Our Supreme Court has held that a defendant who has previously exercised the right to counsel by having counsel appointed indicates that he has been advised of this right. *State v. Dunlap*, 318 N.C. 384, 389, 348 S.E.2d 801, 804 (1986). So Section 15A-1242 did not require the court at the start of Defendant's trial to again advise him of his right to counsel. However, the court's brief colloquy with Defendant fell short of the statute's remaining requirements that the court perform a thorough inquiry and satisfy itself that Defendant (1) understood and appreciated the consequences of proceeding without counsel and (2) comprehended the nature of the

charges and proceedings against him as well as the range of permissible punishments.

Our review of the record reflects that the trial court's inquiry into Defendant's understanding of the consequences of proceeding without counsel fell short of the statutory mandate. Though not dispositive to what level of inquiry satisfies the requirements of the statute, our Supreme Court has cited approvingly a "checklist" promulgated by the University of North Carolina School of Government. *Moore*, 362 N.C. at 327, 661 S.E.2d at 727. The checklist advises trial courts to ensure defendants understand that (1) they must follow the same rules of evidence and procedure as an attorney; (2) the court will not give legal advice concerning defenses, jury instructions, or other legal issues; and (3) the trial court must act as an impartial judge, will not be able to offer legal advice, and must treat the defendant as it would treat an attorney. *Id.* Though the specific questions in the checklist are not required to satisfy the statute, they "illustrate the sort of 'thorough inquiry' envisioned by the General Assembly." *Id.* In this case, the trial court advised Defendant that it would look to him to answer "inquiries," but did not inform Defendant that he would be held to the same standards as an attorney or that the trial court would be unable to offer him legal advice.

The State cites *State v. Jones*, 220 N.C. App. 392, 725 S.E.2d 415 (2012), to support its contention that the court sufficiently ensured that Defendant understood

the consequences of his decision. The trial court in *Jones,* as in this case, did not advise Defendant that he would be held to the same standards as an attorney or of the court's inability to give legal advice. 220 N.C. App. at 397-400, 725 S.E.2d at 418-19. But in *Jones* the trial court performed an otherwise extensive colloquy, advised the defendant that it was of the opinion that he was making a mistake by choosing to represent himself, and "emphasized that final decisions during trial would be Defendant's responsibility." *Id.* at 400, 725 S.E.2d at 419. This Court held that taken as a whole, the exchanges ensured that the defendant in *Jones* understood the consequences of his decision. *Id.* By contrast, the trial court here did not conduct the "thorough inquiry" required by the statute.

The third prong of Section 15A-1242 requires that the trial court be satisfied that the defendant understands the charges against him and is aware of the possible punishment that he faces. The trial court has an "unequivocal duty to . . . disclose the range of permissible punishments." *State v. Jacobs,* 233 N.C. App. 701, 705, 757 S.E.2d 366, 369 (2014); *see also State v. Callahan,* 83 N.C. App. 323, 324, 350 S.E.2d 128, 129 (1986) ("The statute's requirements are clear and unambiguous. The inquiry is mandatory and must be made in every case in which a defendant elects to proceed without counsel."). The transcripts in this case reflect no attempt by the trial court to advise Defendant of the charges or his possible sentence.

The State does not concede that the trial court failed to fulfill the requirements of Section 15A-1242(3), but neither does it argue that any exchange recorded in the transcripts was sufficient to inform Defendant of the nature of the charges and proceedings and the range of permissible punishments. Instead, the State looks to evidence in the record of Defendant's actual knowledge of this information as proof that Defendant was sufficiently advised. The State argues that Defendant's stipulation to a number of prior larceny convictions demonstrated a familiarity with the charges and proceedings. Defendant additionally filed a *pro se* motion to dismiss which challenged the constitutionality of the felony larceny statute and acknowledged that it increased his exposure "from 4 months to 204 months, a 5,100 percent increase," and signed an affidavit acknowledging "I have been advised of the charges pending against me . . . and I have been informed of the maximum sentence possible under the General Statutes of the State of North Carolina." We disagree that this evidence alleviated the trial court of its duty to perform the required inquiry.

Actual knowledge by a defendant of the range of possible punishments is irrelevant to this issue. The statute explicitly requires that the "*trial judge make*[] *thorough inquiry* and is satisfied that the defendant" has been advised of and understands this information. N.C. Gen. Stat. § 15A-1242 (emphasis added). This is an affirmative obligation imposed on the trial court, and failure to make this inquiry is reversible error. It is unclear if the State is arguing that evidence of a defendant's

actual knowledge of the range of permissible punishments can relieve the trial court of its duty to inquire, but the State has cited no authority, and we have found none, supporting this proposition.

In *State v. Pena*, the defendant had submitted a document to the trial court indicating that his former attorney had advised him regarding the nature of his charges and the range of permissible punishments. ___ N.C. App. ___, ___, 809 S.E.2d 1, 9 (2017). We held that this evidence did not "negate *the trial court's* obligation to ensure that defendant understood the nature of the charges against him and the potential punishment he faced." *Id.* (emphasis in original). Although the defendant in that case signed a waiver of his right to assigned counsel and it "appear[ed] that the trial court may have conducted a more thorough inquiry," the recording and transcripts were too poor to determine what was said in that inquiry, and we could not affirmatively determine that it satisfied the statutory requirements. *Id.* We held that the defendant was entitled to a new trial. *Id.*

In some cases, we have looked to record evidence outside of the transcripts to determine if Section 15A-1242 was satisfied. However, in each of these cases, the evidence was examined not because it showed that Defendant had actual knowledge of information the trial court was required to provide, but because it showed that the trial court conducted the required inquiry. For example, in *Dunlap* our Supreme Court held that the defendant's exercise of the right to counsel and accepting

representation by appointment indicated that the defendant "had been *advised* of his right to assigned counsel." 318 N.C. at 389, 348 S.E.2d at 804 (emphasis added).

But prior decisions by this Court and our Supreme Court have held that record evidence other than a transcript of the trial court's colloquy with a defendant cannot support a defendant's waiver of his right to representation by counsel. In *State v. Watlington* the State encouraged us to defer to the trial court's decision that Defendant knowingly and voluntarily chose to proceed *pro se* "based upon the trial court's interactions with defendant and . . . the defendant's knowledge of his possible sentence, and his familiarity with the court system." 216 N.C. App. 388, 394, 716 S.E.2d 671, 675 (2011). We were not persuaded by the State's argument and held that because a proper inquiry was not performed, the defendant was entitled to a new trial. *Id.* at 394-95, 716 S.E.2d at 675-76. In *State v. Callahan* the State asserted that the defendant was addressed under Section 15A-1242, but the exchange was not recorded by the court reporter. 83 N.C. App. 323, 324, 350 S.E.2d 128, 129 (1986). Because "the record [was] silent as to what questions were asked of defendant and what his responses were" we held that the defendant was entitled to a new trial, noting that "[a]bsent a transcription of those proceedings, this Court cannot presume that defendant knowingly and intelligently waived his right to counsel." *Id.* at 324-25, 350 S.E.2d at 129.

As in *Callahan* and *Watlington,* the State in this case asks us to look outside of transcribed proceedings to determine that a satisfactory inquiry was made. The State argues that Defendant's stipulation to his prior larceny convictions indicates his understanding of those convictions and proceedings. Even assuming that this stipulation does demonstrate such a familiarity, Defendant stipulated to these prior convictions *during* his trial. This stipulation could not have been used by the court to determine, at the trial's outset, that Defendant was making a knowing, willing, and voluntary decision to waive counsel.

The State also looks to two documents in the record to show Defendant was advised of the charges he faced and the range of permissible punishments: (1) the affidavit signed by Defendant—and certified by a court official—acknowledging that he had been advised of the pending charges and punishments; and (2) a motion the Defendant filed *pro se* acknowledging that he faced up to 204 months in prison. To the extent that these documents evidence Defendant's actual knowledge of his charges and exposure, they are irrelevant to our analysis. Our task is to determine if this is sufficient evidence to show that the trial court conducted a thorough inquiry.

Similar to the affidavit identified by the State, criminal defendants wishing to proceed *pro se* often execute written waivers of counsel that state, *inter alia*, that the inquiry required under Section 15A-1242 has been performed. *See, e.g., State v. Hyatt*, 132 N.C. App. 697, 703, 513 S.E.2d 90, 94 (1999); *State v. Sorrow*, 213 N.C.

App. 571, 576, 713 S.E.2d 180, 184 (2011). When a defendant executes such a waiver that is in turn certified by the trial court, that waiver is presumed to be knowing, intelligent, and voluntary—that is, that the court has fulfilled the requirements of Section 15A-1242—unless the record indicates otherwise. *State v. Warren*, 82 N.C. App. 84, 89, 345 S.E.2d 437, 441 (1986). However, the written waiver is "something in addition to the requirements of N.C. Gen. Stat. § 15A-1242, not . . . an alternative to it." *Hyatt,* 132 N.C. App. at 703, 513 S.E.2d at 94. The presumption that the inquiry was properly performed is rebutted when the record indicates otherwise. *Id.*

In *Hyatt* the presumption was rebutted because, in reviewing the record, we "failed to discover any statements by the trial court which demonstrate that defendant was informed" of the charges against him, the nature of the proceedings, or the punishment for each charge. *Id.* at 703-04, 513 S.E.2d at 94-95. In *Sorrow* we found "nothing in the record or the transcript indicating that the trial court conducted a thorough inquiry that showed that defendant understands and appreciates the consequences of the decision to proceed *pro se*, and that the defendant comprehends the nature of the charges and proceedings and the range of possible punishments." 213 N.C. App. at 577, 713 S.E.2d at 184 (internal quotations omitted). In both these cases the court's failure to conduct the proper inquiry required a new trial. The inquiry's absence from the trial transcripts rebutted any presumption created by the written waivers.

As in *Hyatt* and *Sorrow*, we hold that the exchange between the trial court and Defendant failed to meet the level of "thorough inquiry" required under Section 15A-1242. Informing a defendant that the court will look to him to answer its inquiries during the trial, without more, is insufficient to ensure that he understands the effect of waiving counsel, and we cannot affirmatively determine from the trial transcripts or the record that any inquiry at all was made into the other requirements of the statute.

III. CONCLUSION

Because the record shows that the trial court made insufficient inquiry into whether Defendant understood the effect of waiving counsel, did not inquire as to whether Defendant understood the charges against him, and did not advise Defendant of the possible punishments he faced, Defendant's decision to proceed *pro se* was not knowing, intelligent, and voluntary. The additional evidence in the record cited by the State at best shows that Defendant had actual knowledge of his charges and possible punishments independent of any colloquy with the trial court. That knowledge is irrelevant to our analysis. Because Defendant was not adequately advised as required by Section 15A-1242 of our General Statutes, we vacate the judgment against him and order a new trial.

VACATED AND REMANDED.

Judges ARROWOOD and COLLINS concur.

Report per Rule 30(e).