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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-95

Filed: 1 October 2019

Surry County, Nos. 11 CRS 54490, 54495, 705020

STATE OF NORTH CAROLINA

v.

CHRISTOPHER GORDON TAYLOR, Defendant.

Appeal by defendant from judgment entered 21 August 2018 by Judge Anderson D. Cromer in Surry County Superior Court. Heard in the Court of Appeals 4 September 2019.

Attorney General Joshua H. Stein, by Assistant Attorney General Elizabeth Connolly Stone, for the State.

Edward Eldred, Attorney at Law, PLLC, by Edward Eldred, for defendant-appellant.

YOUNG, Judge.

Where the trial court failed to advise defendant of the range of permissible punishments before permitting him to proceed *pro se*, we reverse defendant's conviction and remand for a new hearing.

I. Factual and Procedural Background

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On 8 May 2013, Christopher Gordon Taylor (defendant) pleaded guilty to various drug offenses and driving while license revoked pursuant to a plea agreement whereby the State agreed to consolidate certain offenses for judgment and dismiss other charges. Pertinent to this appeal, the trial court consolidated one count of selling or delivering a Schedule II controlled substance, one count of possession with intent to manufacture, sell or deliver a Schedule II controlled substance, and one count of driving while license revoked for entry of judgment. Defendant was sentenced to a term of 17 to 21 months' imprisonment, suspended on condition that he be placed on supervised probation for 36 months, including 6 months of intensive supervision. The probation period was to begin upon defendant's release from incarceration for other offenses.

On 14 November 2016, the trial court modified defendant's probation by striking the intensive supervision requirement. Thereafter, the court entered orders on 9 October 2017, 5 February 2018, and 25 June 2018 finding that defendant either violated the conditions of his probation or was in willful contempt. Pursuant to those orders, the trial court modified the original judgment to require defendant to serve active terms of 2 days, 30 days, and 30 days, respectively, as conditions of special probation.

On 9 August 2018, a violation report was filed alleging that defendant violated the conditions of his probation by using a controlled substance and by committing a

criminal offense. Specifically, defendant admitted his use of marijuana after he was found to be in possession of items used to defraud drug screening tests on two separate occasions. The violation report was heard in Surry County Superior Court before the Honorable Judge Anderson D. Cromer on 20 and 21 August 2018. At the hearing, defendant indicated that he wanted to represent himself and signed a written waiver of all assistance of counsel. Defendant then admitted to the probation violations. The trial court entered judgment on 21 August 2018 revoking defendant's probation and activating his 17 to 21 month suspended sentence.

Defendant filed a *pro se* notice of appeal on 27 August 2018.¹ Defendant was determined to be indigent, and appellate counsel was later appointed on 11 October 2018.

II. Proceeding *Pro Se*

Defendant's sole argument on appeal is that the trial court erred in permitting him to waive his right to counsel during the probation revocation hearing because the court incorrectly advised him on the range of permissible punishments. The State concedes "that the trial court failed to advise [d]efendant of the full range of permissible punishments to which he was exposed." After careful review, we agree.

¹ We note that there are defects in defendant's notice of appeal, in that the notice does not designate the judgment appealed from or the court appealed to. See N.C.R. App. P. 4(b). Additionally, there is no proof of service of the notice of appeal. See N.C.R. App. P. 4(a)(2). However, the defects are nonjurisdictional, and the State has waived proof of service by participating in the appeal without objection. See *State v. Ragland*, 226 N.C. App. 547, 552-53, 739 S.E.2d 616, 620, *disc. review denied*, 367 N.C. 220, 747 S.E.2d 548 (2013).

In North Carolina, a criminal defendant has a statutory right to assistance of counsel at a probation revocation hearing. N.C. Gen. Stat. § 15A-1345(e) (2017).

Inherent to that right to assistance of counsel is the right to refuse the assistance of counsel and proceed *pro se*. However, the right to assistance of counsel may only be waived where the defendant's election to proceed *pro se* is clearly and unequivocally expressed and the trial court makes a thorough inquiry as to whether the defendant's waiver was knowing, intelligent and voluntary. This mandated inquiry is satisfied only where the trial court fulfills the requirements of N.C. Gen. Stat. § 15A-1242.

State v. Evans, 153 N.C. App. 313, 315, 569 S.E.2d 673, 675 (2002) (citations and quotation marks omitted). Pursuant to 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 (2017). "The execution of a written waiver is no substitute for compliance by the trial court with the statute." *Evans*, 153 N.C. App. at 315, 569 S.E.2d at 675.

In the instant case, the trial court allowed defendant to waive all counsel and proceed *pro se* at his probation revocation hearing after the following colloquy:

THE COURT: You have the right to a lawyer. You can either hire your own or if you can't afford one I'll appoint one for you because you know the consequences of violating probation could be more jail time.

THE DEFENDANT: Yes, Your Honor.

THE COURT: What do you wish to do about a lawyer?

THE DEFENDANT: I'd like to represent myself, Your Honor.

THE COURT: Let me see his file.

(Pause)

THE COURT: Mr. Taylor, you understand that if you're found to be in willful violation on these charges that have been levied against you, you could receive a 90[-]day [confinement in response to violation ("CRV")]?

THE DEFENDANT: Yes, Your Honor.

THE COURT: You've been represented before. You know what you're doing?

THE DEFENDANT: Yes, Your Honor.

Defendant then signed a written waiver of all counsel and swore to his waiver.

The trial court's statement to defendant that he could receive a 90-day CRV was not an accurate representation of the range of permissible punishments he faced.

N.C. Gen. Stat. § 15A-1344 governs the alteration and revocation of probation in response to probation violations. The statute affords the trial court discretion in

dealing with probation violations, but limits the court's ability to revoke probation to certain violations, or to situations where the trial court has already imposed two 90-day CRVs. N.C. Gen. Stat. § 15A-1344(a), (d2) (2017).

In this case, it was alleged that defendant violated general conditions of his probation by (1) using a controlled substance in violation of N.C. Gen. Stat. § 15A-1343(b)(15), and (2) committing a criminal offense in violation of N.C. Gen. Stat. § 15A-1343(b)(1). While the trial court was correct that defendant could receive a 90-day CRV for use of a controlled substance, *see* N.C. Gen. Stat. § 15A-1344(d2), the commission of a criminal offense carried the possibility that the trial court could revoke defendant's probation and activate his suspended 17 to 21 month sentence. *See* N.C. Gen. Stat. § 15A-1344(a) ("The court may . . . revoke probation for a violation of a condition of probation under [N.C. Gen. Stat. §] 15A-1343(b)(1) . . ."). Indeed, the trial court revoked defendant's probation and activated his 17 to 21 month suspended sentence upon defendant's admission that he had violated the condition that he not commit any criminal offenses.

Because the trial court did not accurately inform defendant of the range of permissible punishments, the trial court failed to conduct the inquiry required by N.C. Gen. Stat. § 15A-1242(3). *See State v. Jacobs*, 233 N.C. App. 701, 705, 757 S.E.2d 366, 369 (2014) ("[T]he trial judge had an unequivocal duty to . . . disclose the range of permissible punishments"). Consequently, the trial court erred in concluding

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defendant's waiver of his right to counsel was knowing, intelligent and voluntary. The judgment revoking probation and activating the suspended sentence is reversed, and the matter is remanded for a new probation revocation hearing.

REVERSED AND REMANDED.

Judge DIETZ concurs.

Judge TYSON concurs in the result with separate opinion.

Report per Rule 30(e).

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TYSON, Judge, concurring.

I concur with the result reached by the majority to reverse and remand. I write separately to set forth my basis for this decision.

Defendant was represented by counsel and present at his previous trial where he pled guilty to one count of selling or delivering a Schedule II controlled substance, one count of possession with intent to manufacture, sell, or deliver a Schedule II controlled substance, and one count of driving while license revoked, pursuant to a plea agreement. Defendant was sentenced to a term of 17 to 21 months' imprisonment, which was suspended upon the condition he be placed on and successfully complete supervised probation for 36 months with 6 months of intensive probation. On 14 November 2016, the 6 months of intensive probation was eliminated with Defendant's consent. Defendant was represented in court and personally on notice of the length of his 17 to 21 month active sentence, if his probation were to be revoked.

When Defendant expressed his desire to proceed *pro se*, the trial court explored in detail his knowing and intelligent waiver. The trial court incorrectly informed him that he could possibly serve an active term of 90 days. Under N.C. Gen Stat. § 15A-1242(3), a trial court must be satisfied through inquiry that the defendant “[c]omprehends the nature of the charges and proceedings *and the range of*

permissible punishments.” N.C. Gen Stat. § 15A-1242(3) (2017) (emphasis supplied).

Defendant admitted he violated the condition of probation that he not commit any further criminal offenses and clearly knew the consequences of revoking his suspended sentence.

The error here is the trial court incorrectly provided Defendant with an understated permissible punishment and active sentence if probation were to be revoked at this hearing, before Defendant waived his right to counsel and proceeded *pro se*. *See id.* But for this misstatement by the trial court and given the extensive colloquy between Defendant and the court of his right to counsel, Defendant was clearly on notice from the prior judgment in the earlier case that his active sentence upon probation revocation ranged from 17 to 21 months. *See id.*