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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-1272

Filed: 7 January 2020

Catawba County, No. 16 CRS 1890

STATE OF NORTH CAROLINA

v.

DELANTE WHEELER

Appeal by defendant from judgment entered 6 August 2018 by Judge Nathaniel J. Poovey in Catawba County Superior Court. Heard in the Court of Appeals 7 August 2019.

Attorney General Joshua H. Stein, by Assistant Attorney General Kimberly N. Callahan, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Amanda S. Hitchcock, for defendant-appellant.

BRYANT, Judge.

Where defendant's waiver of counsel form was acknowledged by defendant and certified by the judge presiding over defendant's probation revocation hearing, we overrule defendant's argument that his waiver of counsel was not voluntary, knowing, and intelligent, and affirm the judgment of the trial court.

STATE V. WHEELER

Opinion of the Court

On 27 October 2016, in Catawba County Superior Court, the Honorable Gregory R. Hayes, Judge presiding, accepted defendant Delante Wheeler's guilty plea to the charge of aiding and abetting in the sale of cocaine and sentenced defendant to an active term of 15 to 27 months. The court suspended this sentence and placed defendant on supervised probation for 36 months. On 18 December 2017, defendant's probation officer filed a probation violation report in Catawba County Superior Court. Per the violation report, defendant violated the following probations: condition not to abscond; failing to report as directed to meet his supervising officer; failing to make a payment toward his outstanding court cost and fees; failing to pay any of his outstanding probation supervision fees; and failing to comply with the installation procedures set forth for electronic monitoring. An order for arrest was issued on 21 December 2017.

This matter came on for hearing during the 6 August 2018 session of Catawba County Superior Court, the Honorable Nathaniel Poovey, Judge presiding. During the hearing, defendant informed the court he had been in Cedar Rapid, Iowa to earn a CDL certification, when "this popped up on [him] and stopped [him] from going forward with the program. So, [he] came back to [North] Carolina and turned [him]self in to take care of the matter." Defendant requested that the court impose "a ninety-day terminal with jail credit."

[Prosecutor]: . . . [Defendant,] you admit that you violated your probation and the willfulness thereof?

[Defendant]: Yes, sir?

Defendant's probation officer was present and recommended to the court that defendant's probation be revoked: the officer had not seen or heard from defendant since 6 December 2017. Defendant acknowledged that the probation officer's statements were true.

THE COURT: I will find that the defendant has willfully violated his probation as alleged in the violation report. I'll order that his probation be revoked. His suspended sentence is activated. It's 15–27. He's got credit for ninety days on the original judgment. I'll give him credit for any other pre-trial confinement which he is entitled to.

Good luck to you, [defendant].

The record reflects that defendant signed an acknowledgement of rights and waiver of counsel form before a deputy clerk of superior court on 6 August 2018 and that the form was certified by Judge Poovey the same day.

On 7 August 2018, defendant wrote a letter to the Clerk of Superior Court indicating his intent to appeal his probation revocation in case number 16 CRS 1890. On 18 December 2018, defendant filed with this Court a petition for writ of certiorari.

Petition for Writ of Certiorari

Recognizing that his written notice of appeal to the Catawba County Clerk of Superior Court was defective, *see* N.C. R. App. P. 4 (2019) ("Appeal in Criminal Cases

– How and When Taken”), defendant filed with this Court a petition for writ of certiorari.

The writ of certiorari may be issued in appropriate circumstances by either appellate court to permit review of the judgments and orders of trial tribunals when the right to prosecute an appeal has been lost by failure to take timely action, or when no right of appeal from an interlocutory order exists, or for review pursuant to N.C.G.S. § 15A-1422(c)(3) of an order of the trial court ruling on a motion for appropriate relief.

N.C. R. App. P. 21(a) (2019). *See also State v. Holanek*, 242 N.C. App. 633, 640, 776 S.E.2d 225, 231–32 (2015) (“In recognition of the fact that her notice of appeal was defective, [the] Defendant has filed a petition for writ of certiorari asking this Court to consider her appeal. . . . We therefore dismiss the appeal, exercise our discretion to grant [the] Defendant’s petition for writ of certiorari, and proceed to address the merits of her arguments.”). We grant defendant’s petition for a writ of certiorari and address the merits of his argument on appeal.

On appeal, defendant argues that the trial court erred by depriving him of his right to counsel. Specifically, defendant contends that the trial court erred by allowing him to represent himself during his revocation hearing without conducting any inquiry into whether defendant’s waiver of his right to counsel was knowing, intelligent, and voluntary. We disagree.

“[T]he revocation of [probation] is not part of a criminal prosecution and thus the full panoply of rights due a defendant in such a proceeding does not apply to [probation] revocations.” *Morrissey v. Brewer*, 408 U.S. 471, 480, 33 L. Ed. 2d 484, 494 (1972) (citation omitted); *see also Gagnon v. Scarpelli*, 411 U.S. 778, 790, 36 L. Ed. 2d 656, 666 (1973) (“We thus find no justification for a new inflexible constitutional rule with respect to the requirement of counsel [in a probation revocation hearing].”). However, pursuant to our General Statutes, “[a] probationer is entitled to be represented by counsel at [a probation revocation] hearing . . .” N.C. Gen. Stat. § 15A-1345(e) (2019); *see also State v. Coltrane*, 307 N.C. 511, 514, 299 S.E.2d 199, 201 (1983) (recognizing that section 15A-1345 “was intended to go beyond the federal constitutional right to counsel enunciated by the United States Supreme Court in [*Gagnon*, 411 U.S. 778, 36 L. Ed. 2d 656].”).

“This [statutory] right can be knowingly, intelligently and voluntarily waived; however, waiver cannot be inferred from a silent record.” *State v. Warren*, 82 N.C. App. 84, 85, 345 S.E.2d 437, 439 (1986) (citing *State v. Neeley*, 307 N.C. 247, 252, 297 S.E.2d 389, 393 (1982)); *see also State v. Evans*, 153 N.C. App. 313, 315, 569 S.E.2d 673, 675 (2002) (“Inherent to that right to assistance of counsel is the right to refuse the assistance of counsel and proceed pro se.”).

In considering what protections are to be afforded a probationer who sought to waive the statutory right to counsel at a probation revocation hearing, this Court has

noted that compliance with our General Statutes, section 15A-1242 (“Defendant’s election to represent himself at trial”) “has been held to fully satisfy the constitutional requirement that waiver of counsel be knowing and voluntary.” *Warren*, 82 N.C. App. at 87, 345 S.E.2d at 439 (citing *State v. Thacker*, 301 N.C. 348, 355, 271 S.E.2d 252, 256 (1980) (discussing waiver of counsel during trial for rape, robbery with a dangerous weapon, and crime against nature)).

[Pursuant to section 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).

“When a claim is made relating to the adequacy of the foregoing statutory inquiry, ‘the critical issue is whether the statutorily required information has been communicated in such a manner that defendant’s decision to represent himself is knowing and voluntary.’” *State v. Wall*, 184 N.C. App. 280, 282, 645 S.E.2d 829, 831

(2007) (quoting *State v. Carter*, 338 N.C. 569, 583, 451 S.E.2d 157, 164 (1994) (discussing waiver of counsel during capital murder trial)).

The execution of a written waiver is no substitute for compliance by the trial court with the statute. *State v. Wells*, 78 N.C. App. 769, 773, 338 S.E.2d 573, 575 (1986). A written waiver is “something in addition to the requirements of N.C. Gen. Stat. § 15A–1242, not . . . an alternative to it.” *State v. Hyatt*, 132 N.C. App. 697, 703, 513 S.E.2d 90, 94 (1999).

Evans, 153 N.C. App. at 315, 569 S.E.2d at 675 (alteration in original).

[However,] there is a presumption of regularity accorded the official acts of public officers, such that [w]hen a defendant executes a written waiver which is in turn certified by the trial court, the waiver of counsel will be presumed to have been knowing, intelligent, and voluntary, unless the rest of the record indicates otherwise.

Wall, 184 N.C. App. at 283, 645 S.E.2d at 831–32 (citation omitted).

Here, the record reflects that defendant signed an acknowledgment of rights and waiver before a deputy clerk of superior court on the day of his probation revocation hearing and that on that same day, Judge Poovey—who presided over defendant’s probation revocation hearing—made the following certification as to that acknowledgement and waiver.

I certify that . . . [defendant] has been fully informed of the charges against him/her, the nature of and the statutory punishment for each charge, and the nature of the proceedings against the defendant and his/her right to have counsel assigned by the court and his/her right to have the assistance of counsel to represent him/her in this action; that the defendant comprehends the nature of the

charges and proceedings and the range of punishment; that he/her understands and appreciates the consequences of his/her decision and that the defendant has voluntarily, knowingly and intelligently elected in open court to be tried in this action . . . without the assistance of counsel, which includes the right to assigned counsel and the right to assistance of counsel.

We hold that defendant's assertion that the trial court failed to conduct any inquiry into the waiver of his right to counsel, standing alone is insufficient to rebut the presumption of validity of the waiver signed by defendant and certified by the trial court that his waiver was knowing, intelligent, and voluntary. *See id.* Accordingly, we overrule defendant's argument.

AFFIRMED.

Judges STROUD and DIETZ concur.

Report per Rule 30(e).