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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-99

Filed: 21 April 2020

Alamance County, No. 13 CRS 53245

STATE OF NORTH CAROLINA

v.

DANIEL RICHARD MCCOY

Appeal by defendant from judgment entered 27 June 2018 by Judge Stanley L. Allen in Alamance County Superior Court. Heard in the Court of Appeals 4 December 2019.

*Attorney General Joshua H. Stein, by Assistant Attorney General Tracy Nayer, for the State.*

*Kimberly P. Hoppin for defendant-appellant.*

BRYANT, Judge.

Where the trial court erred by imposing a sentence more severe than defendant's original sentence and by failing to make a thorough inquiry as to defendant's decision to proceed pro se, we vacate defendant's sentence and remand for a new sentencing hearing.

Defendant Daniel Richard McCoy appeals from a 27 June 2018 judgment entered upon remand for resentencing. The underlying factual background for this

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case is set forth in *State v. McCoy (McCoy I)*, No. COA16-1099, 2017 WL 3864013, at \*1 (N.C. Ct. App. Sept. 5, 2017). The procedural history, relevant to the instant appeal, is as follows.

On 2 December 2013, defendant was indicted on charges of first-degree rape, first-degree sex offense with a child, and indecent liberties with a child. The jury was unable to reach a unanimous decision on the first-degree rape charge but returned guilty verdicts on the first-degree sexual offense and taking indecent liberties with a child. The trial court consolidated the offenses for judgment and sentenced defendant in the presumptive range as a prior record level II offender to a term of 240 to 297 months imprisonment. Defendant was ordered to register as a sex offender and to enroll in satellite-based monitoring (“SBM”) for life. Defendant appealed.

Defendant’s first appeal was heard before a panel of this Court, and a written opinion was issued on 5 September 2017. This Court concluded no error was committed at trial but found error where the trial court ordered lifetime satellite-based monitoring and lifetime sex-offender registration. This Court also concluded the judgment sheet was ambiguous as to the proper statutory authority used at sentencing. Accordingly, this Court vacated defendant’s sentence and remanded the case for resentencing.

On 25 June 2018, the resentencing hearing was heard before the Honorable Stanley L. Allen, Judge presiding. Defendant was resentenced in the presumptive

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range as a level II offender to 288 to 355 months of imprisonment for the first-degree sexual offense with a child, and to a consecutive term of 19 to 23 months of imprisonment for the offense of indecent liberties. The trial court also ordered that defendant register as a sex offender for thirty years. Defendant appeals.

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On appeal, defendant argues the trial court erred by I) imposing a sentence more severe than defendant's original sentence in violation of N.C.G.S. § 15A-1335, and II) failing to make a thorough inquiry as to defendant's decision to proceed *pro se* at the resentencing hearing.

As a preliminary matter, we note that the State filed a motion to dismiss arguing that “[d]efendant’s appeal should be dismissed because he has no right to appeal from a sentence within the presumptive range[.]”

Section 15A-1444 (a1) of the North Carolina General Statutes states that a defendant, who has been found guilty, has the right to appeal “the issue of whether his or her sentence is supported by evidence introduced at the trial and sentencing hearing *only if* the minimum sentence of imprisonment does not fall within the presumptive range for the defendant’s prior record or conviction level and class of offense.” N.C. Gen. Stat. § 15A-1444 (a1) (2019) (emphasis added). “Otherwise, the defendant is not entitled to appeal this issue as a matter of right but may petition the appellate division for review of this issue by writ of certiorari.” *Id.*

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Defendant, while acknowledging that his sentence is not appealable as he was resentenced in the presumptive range, has filed a petition for writ of certiorari asking this Court to review his appeal. In our discretion, we allow defendant's petition and review the merits of his appeal.<sup>1</sup>

*I*

First, defendant argues, and the State concedes, that his sentence should be vacated because the trial court imposed a greater sentence on remand than the sentence defendant received at his first trial. We agree.

Pursuant to N.C. Gen. Stat. § 15A-1335 (“Resentencing after appellate review”),

[w]hen a conviction or sentence imposed in superior court has been set aside on direct review or collateral attack, the court may not impose a new sentence for the same offense, or for a different offense based on the same conduct, which is more severe than the prior sentence less the portion of the prior sentence previously served.

*Id.* § 15A-1335. “When multiple sentences are involved, N.C.G.S. § 15A-1335 bars the trial court from imposing an increased sentence for any of the convictions, even if the total term of imprisonment does not exceed that of the original sentence.” *State v. Oliver*, 155 N.C. App. 209, 211, 573 S.E.2d 257, 258 (2002). “However, N.C.G.S. § 15A-1335 does not prohibit the trial court’s replacement of concurrent sentences with

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<sup>1</sup> Having allowed defendant’s petition for writ of certiorari, we dismiss the State’s motion as moot.

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consecutive sentences upon resentencing, provided neither the individual sentences, nor the aggregate sentence, exceeds that imposed at the original sentencing hearing.”  
*Id.*

Here, defendant was originally sentenced to 240 to 297 months imprisonment for first-degree sexual offense and indecent liberties in a consolidated judgment. On remand, defendant was resentenced in two separate judgments—imposing 288 to 355 months imprisonment for the first-degree sexual offense and 19 to 23 months of imprisonment for the offense of indecent liberties to be served consecutively. Defendant’s resentence term amounts to a term of imprisonment greater than his original sentence in violation of N.C.G.S. § 15A-1335. Therefore, his sentence must be vacated and remanded for a new sentencing hearing.

*II*

Lastly, defendant argues, and the State also concedes, that the trial court failed to adequately advise defendant of the nature of the charges and range of permissible punishments in response to defendant’s request to proceed *pro se* at his resentencing hearing, in violation of N.C.G.S. § 15A-1242. We agree.

“We review the question of whether the trial court complied with N.C. Gen. Stat. § 15A-1242 *de novo*.” *State v. Frederick*, 222 N.C. App. 576, 581, 730 S.E.2d 275, 279 (2012).

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“The provisions of N.C. Gen. Stat. § 15A-1242 are mandatory where the defendant requests to proceed *pro se*.” *State v. Debnam*, 168 N.C. App. 707, 708, 608 S.E.2d 795, 796 (2005) (citation omitted). Under N.C. Gen. Stat. § 15A-1242, a defendant may proceed with his case without the assistance of counsel, provided that the trial court engages in a thorough waiver inquiry to determine if the defendant:

- (1) [h]as 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) [u]nderstands and appreciates the consequences of this decision; and
- (3) [c]omprehends the nature of the charges and proceedings and the range of permissible punishments.

N.C. Gen. Stat. § 15A-1242 (2019). “First, a criminal defendant’s election to proceed *pro se* must be clearly and unequivocally expressed.” *State v. Watlington*, 216 N.C. App. 388, 393, 716 S.E.2d 671, 675 (2011) (citation and quotation marks omitted). “Second, the trial court must make a thorough inquiry into whether the defendant’s waiver was knowingly, intelligently and voluntarily made.” *Id.*

“The record must affirmatively show that the inquiry was made and that the defendant, by his answers, was literate, competent, understood the consequences of his waiver, and voluntarily exercised his own free will.” *State v. Callahan*, 83 N.C. App. 323, 324, 350 S.E.2d 128, 129 (1986). “In cases where the record is silent as to what questions were asked of defendant and what his responses were, this Court has held, [we] cannot presume that [the] defendant knowingly and intelligently waived

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his right to counsel[.]” *Frederick*, 222 N.C. App. at 582, 730 S.E.2d at 280 (alternations in original) (citation and quotation marks omitted).

In the instant case, defendant’s then-appointed counsel filed a motion to withdraw representation, and that motion came on for hearing before defendant’s resentencing. During the hearing, the trial court spoke with defendant regarding his counsel’s withdrawal, in which defendant clearly and unequivocally informed the trial court that he wanted to represent himself:

THE COURT: Anything else you want to -- either one of you want to say?

[DEFENDANT]: Yes, I -- I have a lot I’d like to say, Your Honor. . . . [W]ith -- the way the attorneys in this area are close, I don’t believe that I can have a fair representation or unbiased representation from any attorney from this area. So, I’d ask, if you’re going to appoint me an attorney, please, be it from outside of this area. And, if you don’t wish to do that, if the Court doesn’t see, in [t]heir wisdom to do that, I’d rather represent myself *pro se* in this matter at this point.

THE COURT: Okay, well, I’m not going to do that, so, then, you can make your decision whether you want to represent yourself or you want to hire a lawyer or have one of the other attorneys as standby counsel.

. . . .

[DEFENDANT]: I rather represent myself and have counsel there[.]

THE COURT: All right.

After this exchange, the trial court then conducted in the following inquiry:

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THE COURT: All right. The - - so where we are is first of all, I need to ask you some additional questions[.]

[DEFENDANT]: Yes sir.

THE COURT: - - that I ask everybody who intends to represent himself or herself.

[DEFENDANT]: Yes sir.

THE COURT: The first thing is, do you understand that, if you represent yourself, you will be held to the same standard as an attorney would be?

[DEFENDANT]: I do.

THE COURT: Do you understand that, if you represent yourself, the [c]ourt cannot give you any legal advice?

[DEFENDANT]: Yes, I understand that.

THE COURT: And do you understand that, if you represent yourself, that the [c]ourt cannot give you any advice as to what course of action to take?

[DEFENDANT]: Oh, yes, sir.

THE COURT: Those are consequences of representing yourself, without being [an] attorney or having a legal education, that sort of thing. So, with those consequences in mind, do you still wish to represent yourself or do you wish to have an attorney appointed to represent you?

[DEFENDANT]: I wish to represent myself.

THE COURT: Thank you. . . .

The record shows that in addition to defendant informing the trial court of his decision to proceed *pro se*, defendant also executed a written waiver of counsel form

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waiving his right to assigned counsel. However, the trial court did not expressly advise defendant about the range of permissible punishments that defendant could face in light of his decision to represent himself. *See State v. Wells*, 78 N.C. App. 769, 773, 338 S.E.2d 573, 575 (1986) (“A written waiver of counsel is no substitute for actual compliance by the trial court with G.S. 15A-1242. The Constitution requires that waiver of counsel be knowing and voluntary and compliance with G.S. 15A-1242 insures that this requirement has been met.”).

While we acknowledge that defendant was provided with standby counsel to assist him during his resentencing, the assistance of standby counsel does not forego the statutory requirements for the trial court to conduct a thorough inquiry. On this record, it is not clear that defendant understood the range of permissible punishments to proceed *pro se*. Therefore, the trial court’s colloquy with defendant is inadequate under N.C.G.S. § 15A-1242.

For the reasons stated herein, we vacate defendant’s sentence and remand for a new sentencing hearing.

VACATED AND REMANDED.

Judges COLLINS and HAMPSON concur.

Report per Rule 30(e).