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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-417

Filed: 5 May 2020

McDowell County, No. 17 CRS 000204

STATE OF NORTH CAROLINA

v.

ALEX GREGORY MOORE, Defendant.

Appeal by Defendant from judgment entered 30 October 2018 by Judge Alan Z. Thornburg in Superior Court, McDowell County. Heard in the Court of Appeals 12 November 2019.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Melody R. Hairston, for the State.

Paul F. Herzog for Defendant-Appellant.

McGEE, Chief Judge.

Alex Gregory Moore (“Defendant”) appeals the trial court’s judgment entered following a jury verdict convicting him of felonious burning of a public building. Defendant argues the trial court erred by allowing him to proceed with trial *pro se* where his pre-trial waiver of his right to counsel was not knowing, intelligent, and voluntary. Because Defendant executed a signed, written waiver of his right to

counsel following a proper colloquy at an earlier stage of the proceedings, we find no error.

I. Factual and Procedural Background

Defendant was an inmate in “D Block” of the Marion Correctional Institution (“MCI”) on 15 October 2016. Around 3:00 p.m., correctional officers at MCI responded to a fire alarm in Defendant’s cell. The officers discovered that Defendant had started a fire in his cell using radio batteries and an aluminum chewing gum wrapper. Defendant was transferred to a new cell, where he started a second fire just two hours later using tissue paper.

A grand jury indicted Defendant on 10 April 2017 for felonious burning of a public building in violation of N.C.G.S. § 14-59. N.C.G.S. § 14-59 (2017) (“If any person shall wantonly and willfully set fire to or burn . . . any building owned or occupied by the State . . . , he shall be punished as a Class F felon.”). During a criminal calendaring session on 7 May 2018, Judge Robert S. Albright called Defendant’s case. At the start of the pre-trial hearing, the State announced “we need to address [Defendant’s] attorney status.” Defendant informed the court that he wished to proceed *pro se*. The judge asked Defendant, “why don’t you let me appoint somebody to represent you and see if they can’t work on the case for you and talk to you about how to resolve the case[?]” Defendant refused the judge’s offer to appoint counsel. Subsequently, the judge asked Defendant several times to reconsider his

decision to proceed *pro se*; however, each time Defendant informed the court that he wished to represent himself. The judge asked Defendant a series of questions confirming that Defendant was competent, that Defendant understood his right to representation by an attorney, that he understood the charges against him, and that Defendant understood he faced a “maximum term of imprisonment of 59 months.” Defendant then signed and executed a standard, written waiver expressing his “desire to waive [his] right to the assistance of all counsel and represent [him]self[.]”

Defendant’s case was called for trial on 29 October 2018. Prior to the start of trial, Judge Alan Z. Thornburg addressed Defendant’s decision to represent himself *pro se*. The judge inquired of Defendant and confirmed that he understood his right to assigned counsel and the charges against him. Toward the end of this colloquy, the trial court further informed Defendant that, at Prior Record Level V, the “maximum punishment that [he] could receive – if . . . convicted of a Class F felony, the maximum would be an active term of between 28 and 43 months in custody.” Defendant expressed confusion about the range of punishment, as it was not “what the last judge said” months earlier when Defendant elected to proceed *pro se*. The judge responded, “[w]ell that’s the situation. So you just listen to what I’m telling you.” Defendant reaffirmed that he wished to waive his right to counsel. The trial court requested that Defendant execute a new waiver, but Defendant refused, since he had already signed a waiver of counsel previously. The trial court located the

written waiver of counsel that Defendant had executed on 7 May 2018 in Defendant's court file. The trial court announced in open court: "May 7th, 2018 the defendant did sign the waiver, and the [c]ourt finds that that is valid." Defendant proceeded with trial *pro se*.

The jury found Defendant guilty of burning a public building. The trial court entered judgment on the jury's verdict and sentenced Defendant to 24 to 38 months imprisonment, to run consecutive with the term Defendant was then serving. Defendant gave notice of appeal in open court.

II. Analysis

Defendant contends that the trial court did not conduct a proper N.C.G.S. § 15A-1242 inquiry before his trial began on 29 October 2018 and "erred by allowing [him] to represent himself where [his] waiver of his [constitutional] right to counsel was not knowing, intelligent, and voluntary." Specifically, Defendant asserts that he was not properly advised by the trial court of the maximum time he could serve if found guilty, as required by N.C.G.S. § 15A-1242(3). We agree that the trial court's instruction to Defendant on the potential maximum sentence was an incorrect number; however, we hold that this error did not invalidate the signed, written waiver of counsel that Defendant knowingly, intelligently, and voluntarily executed on 7 May 2018 in accordance with the requirements set forth in N.C.G.S. § 15A-1242.

“We review the question of whether the trial court complied with N.C.[G.S.] § 15A-1242 de novo.” *State v. Frederick*, 222 N.C. App. 576, 581, 730 S.E.2d 275, 279 (2012). A violation of a defendant’s constitutional rights is not ordinarily prejudicial where the error is found to be harmless beyond a reasonable doubt, but “some constitutional rights[—such as the right to counsel—]are so basic to a fair trial that their infraction can never be treated as harmless error.” *State v. Colbert*, 311 N.C. 283, 286, 316 S.E.2d 79, 81 (1984). “It is prejudicial error to allow a criminal defendant to proceed pro se at any critical stage of criminal proceedings without making the inquiry required by N.C.[G.S.] § 15A-1242[.]” *Frederick*, 222 N.C. App. at 584, 730 S.E.2d at 281.

“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.” *State v. Moore*, 362 N.C. 319, 321, 661 S.E.2d 722, 724 (2008) (citations and quotation marks omitted). A defendant must express his intent to waive assistance of counsel “clearly and unequivocally,” and the court must ensure that the defendant’s waiver is “knowing, intelligent, and voluntary” based on a “thorough inquiry” as mandated in N.C.G.S. § 15A-1242. *State v. Simpkins*, ___ N.C. ___, ___, No. 188A19, 2020 N.C. LEXIS 98 (Feb. 28, 2020).

The requirements of N.C.G.S. § 15A-1242 are:

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.G.S. § 15A-1242 (2017) (emphasis added).

Particularly relevant to the present case is the requirement that a defendant comprehends the “range of permissible punishments” he could receive, as Defendant contends he was not properly informed by the trial court of the maximum time he could serve if found guilty. We note that because Judge Albright had already conducted the appropriate inquiry at the pre-trial proceeding, which covered the three substantive elements in N.C.G.S. § 15A-1242, there was no requirement that the trial judge repeat the statutory inquiry on 29 October 2018. *See State v. Lamb*, 103 N.C. App. 646, 649, 406 S.E.2d 654, 656 (1991). However, in an abundance of caution, the trial court again proceeded with the inquiry and requested that Defendant sign a new written waiver. The trial court informed Defendant that he was facing a maximum sentence of “between 28 and 43 months in custody.” By not instructing Defendant on the correct “range of permissible punishments,” the trial court did not conduct the “thorough inquiry” required by N.C.G.S. § 15A-1242.

However, under these set of facts, we hold that the trial court's mistake in the number of months did not affect the validity of Defendant's previously executed waiver of counsel. As this Court stated in *State v. Gentry*, 227 N.C. App. 583, 600, 743 S.E.2d 235, 246 (2013),

we do not believe that a mistake in the number of months which a trial judge employs during a colloquy with a defendant contemplating the assertion of his right to proceed pro se constitutes a per se violation of N.C.G.S. § 15A-1242[3]. Instead, such a calculation error would only contravene N.C.G.S. § 15A-1242[3] if there was a reasonable likelihood that the defendant might have made a different decision with respect to the issue of self-representation had he or she been more accurately informed about 'the range of permissible punishments.'

Defendant argues that N.C.G.S. § 15A-1242(3) is only satisfied if the trial court sufficiently advises a defendant of the "theoretical maximum sentence" that he could receive. In support, Defendant urges this Court to adopt our Supreme Court's discussion of what constitutes the maximum sentence for a crime in *State v. Lucas*, 353 N.C. 568, 596, 548 S.E.2d 712, 730 (2001), *overruled on other grounds by State v. Allen*, 359 N.C. 425, 615 S.E.2d 256 (2005). In *State v. Lucas*, our Supreme Court was tasked with determining what constituted the maximum penalty that could result from the violation of a statutory crime in North Carolina in order to assess the validity of an indictment. *Id.* at 594-96, 548 S.E.2d at 729-30. The *Lucas* Court acknowledged that, "[b]ecause many of the factors that are considered in determining a defendant's sentencing range are uncertain or unknown in the early stages of a

criminal prosecution,” it was sensibly prudent to advise the defendant that “the maximum sentence is that which could be imposed if the defendant were in the highest criminal history category and the offense were aggravated.” *Id.* at 596, 548 S.E.2d at 730. Thus, a defendant should be provided the “theoretical maximum sentence” that could be imposed, rather than a sentence range attributed to a prior record level tendered by the parties, because “[w]arning a defendant of the harshest possible outcome ensures that the defendant is fully advised of the implications of the charge against him[.]” *Id.* In the present case, the maximum punishment for a Class F felony, “if the defendant were in the highest criminal history category[, Prior Record Level VI,] and the offense were aggravated,” *Lucas*, 353 N.C. at 596, 548 S.E.2d at 730, was a range of 41 to 59 months imprisonment, N.C.G.S. §§ 15A-1340.17(c), (d) (2017).

At the criminal calendaring session on 7 May 2018, Defendant repeatedly insisted that he wished to “proceed without a lawyer” despite the judge’s attempts to “tell [him] that’s a bad idea.” The judge confirmed that Defendant was competent and that he understood he had the right to an attorney, and then informed Defendant that he was charged with “a Class F felony punishable by a maximum term of imprisonment of 59 months.” Defendant thereafter orally swore in open court that it was his desire to waive his right to assistance of counsel and represent himself. Defendant then signed a written waiver of counsel. The court then found

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that Mr. Moore has been fully informed of the charge against him as well as the nature of the statutory punishment for the charge, the nature of the proceeding against him, and his right to have counsel assigned by the Court as well as his right to have the assistance of counsel to represent him in this matter. Mr. Moore comprehends the nature of the charge in the proceeding in the range of punishments, that he understands and appreciates the consequences of his decision, and that the defendant, Mr. Moore, has voluntarily, knowingly, and intelligently elected in open court to be tried in this matter without the assistance of counsel, which includes the right to assign counsel and right to assistance of counsel.

Defendant was accurately informed of the permissible “theoretical maximum sentence” such that he was fully advised of the charges against him prior to any and all critical proceedings in his case. We note Defendant was not informed of the minimum number of months that corresponded to the maximum possible sentence of 59 months. Nevertheless, Defendant was made aware of the “harshest possible outcome” under *Lucas* and, especially given Defendant’s insistence on self-representation, we cannot say that there is “a reasonable likelihood that . . . [D]efendant might have made a different decision with respect to the issue of self-representation had he [] been more accurately informed about ‘the range of permissible punishments.’” *Gentry*, 227 N.C. App. at 600, 743 S.E.2d at 246. As a result, we hold that Defendant’s waiver of counsel on 7 May 2018 was made knowingly, voluntarily, and intelligently, after being accurately and adequately

informed of the “theoretical maximum sentence” permissible against a defendant convicted of a Class F felony.

This Court has held that “[o]nce given, a waiver of counsel is good and sufficient until the proceedings are terminated or until the defendant makes known to the court that he desires to withdraw the waiver and have counsel assigned to him.” *State v. Hyatt*, 132 N.C. App. 697, 700, 513 S.E.2d 90, 93 (1999). “Indeed, the burden of showing the change in the desire of the defendant for counsel rests upon the defendant.” *Id.* (quotation marks, citation, and brackets omitted). Additionally, this Court has held that once a judge has conducted a proper inquiry and determined that a defendant’s waiver of counsel was knowing and intelligent in satisfaction of N.C.G.S. § 15A-1242, a judge presiding over the trial, different than the judge who conducted the pre-trial inquiry, does not need to conduct another inquiry. *Lamb*, 103 N.C. App. at 648–49, 406 S.E.2d at 655–56. This Court explained:

Defendant argues, however, that Judge Walker’s inquiry did not satisfy N.C.G.S. § 15A-242 because this statute required Judge Allen, as the judge presiding at defendant’s trial, to make the inquiry. Although N.C.G.S. § 15A-1242 states that the “trial judge” must make the inquiry into defendant’s choice to represent himself, we do not read the statute as mandating that the inquiry be made by the judge actually presiding at the defendant’s trial. A thorough inquiry into the three substantive elements of the statute, conducted at a preliminary stage of a proceeding, meets the requirements of N.C.G.S. § 15A-1242 even if it is conducted by a judge other than the judge who presides at the subsequent trial. *See State v. Kuplen*, 316 N.C. 387, 343 S.E.2d 793 (1986) (where judge conducted inquiry at

preliminary hearing on motion to withdraw, statutory requirements of N.C.G.S. § 15A-1242 were satisfied even though different judge presided at trial); *State v. Messick*, 88 N.C. App. 428, 363 S.E.2d 657, *cert. denied*, 323 N.C. 368, 373 S.E.2d 553 (1988) (where an inquiry under N.C.G.S. § 15A-1242 was made by one judge at pretrial hearing, a *de novo* inquiry was not required by second judge who presided at actual trial). In this case, Judge Walker conducted an inquiry at the pretrial proceeding, which covered the three substantive elements in N.C.G.S. § 15A-1242. The fact that Judge Walker did not later preside over defendant's actual trial does not invalidate compliance with the statute. The statute was fully complied with, and it was therefore unnecessary for Judge Allen to repeat the statutory inquiry.

Id.

Therefore, in the present case, “[t]he fact that Judge [Albright] did not later preside over [D]efendant’s actual trial does not invalidate compliance with the statute.” *Id.* The written waiver of counsel that Defendant executed on 7 May 2018, following Judge Albright’s proper inquiry, remained “good and sufficient” until such time as the proceedings terminated or Defendant informed the court of his “desire[] to withdraw the waiver and have counsel assigned to him.” *Hyatt*, 132 N.C. App. at 700, 513 S.E.2d at 93. Defendant made no indication at the 29 October 2018 trial that he wished to withdraw his previously executed waiver. Indeed, Defendant expressed that he had already signed a waiver of his right to counsel and refused the trial court’s request that he “sign the waiver one more time.” The trial court noted that the record contained Defendant’s signed, written waiver from 7 May 2018 and Defendant “request[ed] that his original waiver serve as his waiver.” Thus, because

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Defendant did not move to withdraw his previously executed waiver but, instead, explicitly requested that it remain in effect, we hold that Defendant's 7 May 2018 waiver of counsel remained "good and sufficient" at his 29 October 2018 trial. Defendant's waiver of his right to counsel was made knowingly, intelligently, and voluntarily, and the trial court did not err by allowing him to proceed *pro se*.

NO ERROR.

Judges BRYANT and BERGER concur.

Report per Rule 30(e).