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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-933

Filed: 5 May 2020

Onslow County, No. 17 CRS 57416

STATE OF NORTH CAROLINA

v.

JOSEPH LEE BYNUM, Defendant.

Appeal by defendant from judgment entered 15 May 2019 by Judge Phyllis M. Gorham in Onslow County Superior Court. Heard in the Court of Appeals 1 April 2020.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Kacy L. Hunt, for the State.

Gilda C. Rodriguez for defendant-appellant.

YOUNG, Judge.

Where the trial court failed to make proper inquiry into defendant's purported waiver of counsel, and lacked an evidentiary basis to find that defendant had forfeited counsel by misconduct, the trial court erred in forcing defendant to proceed to trial *pro se*. We reverse and remand for new trial.

I. Factual and Procedural Background

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On 20 December 2017, Joseph Lee Bynum (defendant) was charged by magistrate's order with assault with a deadly weapon and misdemeanor child abuse. Defendant executed a written waiver of counsel in Onslow County District Court. Defendant was found guilty on both charges and appealed to Onslow County Superior Court. Defendant's appointed counsel subsequently moved to withdraw, citing her acceptance of "a job which requires her withdrawal from all pending Onslow and Duplin County criminal and traffic cases." The trial court granted this motion, and appointed a new attorney. Subsequently, this matter proceeded to hearing, and the new attorney moved to withdraw. The trial court allowed this motion, and after colloquy with defendant, permitted defendant to execute written waiver of counsel.

At the close of the State's evidence, defendant moved to dismiss the charges. The trial court denied this motion. Defendant did not present evidence, and renewed the motion to dismiss. The court found that defendant was not in a supervisory role with respect to the child victim, and therefore dismissed the charge of child abuse; however, the court denied the motion to dismiss the charge of assault with a deadly weapon.

The jury returned a verdict finding defendant guilty of assault with a deadly weapon. The trial court sentenced defendant to 150 days in the custody of the Misdemeanant Confinement Program. The court then suspended that sentence, and sentenced defendant to 24 months of supervised probation.

Defendant appeals.

II. Waiver of Counsel

In his sole argument on appeal, defendant contends that the trial court erred, in violation of statute, by failing to engage in proper colloquy to determine whether defendant's waiver of counsel was knowing, intelligent, and voluntary. We agree.

A. Standard of Review

We review *de novo* the trial court's decision to permit a defendant to proceed *pro se*. *State v. Watlington*, 216 N.C. App. 388, 393, 716 S.E.2d 671, 675 (2011). "Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment' for that of the lower tribunal." *State v. Williams*, 362 N.C. 628, 632-33, 669 S.E.2d 290, 294 (2008) (quoting *In re Greens of Pine Glen, Ltd. P'ship*, 356 N.C. 642, 647, 576 S.E.2d 316, 319 (2003)).

B. Analysis

It is well settled in this State that a defendant may, should he or she so elect, proceed to defend his or her case *pro se*. "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). First, a defendant must express his or her desire to proceed *pro se* "clearly and unequivocally." *Id.* (citation omitted). Second, "the trial court, to satisfy constitutional standards, must determine whether the defendant

knowingly, intelligently, and voluntarily waives the right to in-court representation by counsel.” *Id.* at 674, 417 S.E.2d at 476. An inquiry conducted pursuant to N.C. Gen. Stat. § 15A-1242 “satisfies constitutional requirements.” *Id.* That statute provides that, at a minimum, the trial court must ensure that a 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 (2019).

During the pre-trial hearing on defendant’s second attorney’s motion to withdraw, the trial court engaged in the following colloquy with defendant:

THE COURT: Mr. Bynum, it’s your intention to represent yourself, is that correct, sir?

THE DEFENDANT: Yes, ma’am. I must.

THE COURT: Then I’ll need you to sign a waiver of your right to all counsel.

THE DEFENDANT: Yes.

...

THE CLERK: I need to swear you to the waiver.

THE DEFENDANT: I do not swear on the Bible. If you could give me some other waiver.

THE CLERK: Would you like to affirm?

THE DEFENDANT: I'll affirm.

Defendant then executed a written waiver of counsel.

Subsequently, at the outset of trial, the court once more engaged in colloquy with defendant regarding waiver. The court asked defendant whether he was under the influence of drugs or alcohol, which he was not; his age, which was forty-eight; his grade level, which was college graduate; and whether he understood that he had the right to counsel, which he did. The court then asked whether defendant wished to have representation. He claimed that he did want an attorney, because the D.A. and police were not cooperating with him. The court pressed defendant, noting that at the pre-trial hearing, he had stated that he did not want his attorney. He explained that he disliked his first attorney, because she “allowed [him] to be placed in jail with an unsecured bond,” which he felt resulted in “false imprisonment[.]” Defendant also asserted that he had no “significant conversation” with his second attorney, and that in fact he did not meet with him at all. He described both attorneys as “dead weight[.]” “deadbeats[.]” and “not doing anything.” Defendant insisted that he had the ability to represent himself, but that not having an attorney to “back [him] up” was “scary.” The court concluded that, given that defendant had gone through two attorneys, that the matter had proceeded for two years, and that defendant had

insisted he was ready to try the case and be done with it, defendant had knowingly, intelligently, and voluntarily relinquished his right to counsel.

Defendant does not challenge the first prong of the analysis, whether his waiver was clear and unequivocal. Rather, he argues on appeal that “the court failed to make any inquiry required of it pursuant to N.C. Gen. Stat. § 15A-1242. The court asked no questions designed to determine whether Mr. Bynum understood the implications of waiving his right to counsel or the punishment that potentially awaited him.” In short, he challenges the second prong, namely whether his waiver was knowing, intelligent, and voluntary.

On appeal, the State argues that defendant’s execution of written waiver creates a presumption that his waiver was knowing, intelligent, and voluntary. Indeed, this Court has long held 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.” *State v. Warren*, 82 N.C. App. 84, 89, 345 S.E.2d 437, 441 (1986); *see also State v. Kinlock*, 152 N.C. App. 84, 89, 566 S.E.2d 738, 741 (2002), *aff’d*, 357 N.C. 48, 577 S.E.2d 620 (2003); *State v. Hill*, 168 N.C. App. 391, 396, 607 S.E.2d 670, 673 (2005). The burden is on defendant to rebut this presumption and show that this decision of the trial court was error; this Court will not presume error otherwise. *Kinlock*, 152 N.C. App. at 89, 566 S.E.2d at 741.

In the pre-trial hearing, prior to defendant's execution of waiver, the trial court's inquiry was cursory. The only question the court asked of defendant was whether it was his intention to represent himself. Certainly, this was insufficient to establish that defendant (1) had been clearly advised of his right to counsel, (2) understood the consequences of a decision to waive counsel, and (3) comprehended the nature of the charges and range of punishments. *See* N.C. Gen. Stat. § 15A-1242. There is nothing in the transcript to suggest that the trial court complied with statute prior to the execution of written waiver.

While it is true that the execution of written waiver creates a rebuttable presumption of knowing, intelligent, and voluntary waiver, that waiver will be presumed "unless the rest of the record indicates otherwise." *Warren*, 82 N.C. App. at 89, 345 S.E.2d at 441 (1986). The total absence from the pre-trial transcript of any inquiry beyond the single question to defendant "indicates otherwise." It easily rebuts the presumption that defendant's execution of the written waiver was knowing, intelligent, and voluntary.

The State argues, however, that the subsequent colloquy at the outset of trial remedied any issues. The State contends, and defendant concedes, that the trial court advised defendant of his right to counsel if he could not afford it, satisfying the first statutory prong.

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The State further argues that, to satisfy the second statutory prong, the trial court “reminded Defendant of statements he made at the pre-trial hearing about how no attorney was competent to represent him and Defendant responded by stating that he has the ability to represent himself.” However, as we have held above, defendant’s statements at the pre-trial hearing were not sufficient to show knowing, intelligent, and voluntary waiver, and the trial court’s reliance upon them to prove otherwise was improper.

The State also notes that defendant acknowledged the trial court’s intent to treat him impartially and not offer legal advice. However, those statements were made after the trial court had already determined that defendant had waived counsel. Accordingly, it is clear that at no point before reaching its determination did the trial court inquire as to whether defendant “underst[ood] or appreciate[d] the consequences of this decision[.]”

With regard to the third statutory prong, the State notes that the trial court informed defendant of the charges against him and the possible punishments, and asked if he understood. It is true that the trial court made this inquiry, but again, this was after the court had concluded that defendant waived counsel. At no point prior to this determination did the trial court inquire as to whether defendant understood the charges against him or punishments therefor.

Notwithstanding these facts, the State argues that the trial court is not required to make its statutory inquiry prior to determining that waiver is knowing, intelligent, and voluntary. The State cites several cases, some unpublished, in an attempt to support its position.

These cases do not stand for the position cited by the State. *State v. Johnson*, ___ N.C. App. ___, 831 S.E.2d 660 (2019) (unpublished), *State v. Pena*, 257 N.C. App. 195, 809 S.E.2d 1 (2017), and *State v. Seraphem*, 90 N.C. App. 368, 368 S.E.2d 643 (1988), do all suggest that a hearing conducted at the outset of trial, after the purported execution of waiver, may remedy any errors in the waiver. However, none of them suggest that the trial court can make its determination that waiver is knowing, intelligent, and voluntary prior to completing its inquiry. To the contrary, the explicit language of the statute provides that “[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 court makes thorough inquiry*” into the statutory factors. N.C. Gen. Stat. § 15A-1242 (emphasis added).

The language of the statute is clear. The trial court cannot make its determination of waiver, and cannot permit a defendant to proceed *pro se*, until after it has completed its inquiry. In the instant case, the trial court made its determination after two cursory colloquys, and only later did it attempt to make inquiry into the remaining statutory prongs. The trial court’s inquiry prior to its

determination did not satisfy the statute, and its inquiry subsequent to its determination could not ratify that decision. Accordingly, we hold that the trial court erred in determining that defendant knowingly, intelligently, and voluntarily waived his right to counsel.

The State argues, nonetheless, that defendant did not merely waive counsel, but did in fact forfeit counsel through his actions. While it is true that a defendant may waive counsel through a clear and unequivocal statement, this Court has also held that a defendant may nonetheless forfeit counsel when he engages in serious misconduct. *State v. Blakeney*, 245 N.C. App. 452, 460, 782 S.E.2d 88, 93 (2016).

However, that rule is typically applied in cases where a defendant demonstrated:

- (1) flagrant or extended delaying tactics, such as repeatedly firing a series of attorneys;
- (2) offensive or abusive behavior, such as threatening counsel, cursing, spitting, or disrupting proceedings in court; or
- (3) refusal to acknowledge the trial court's jurisdiction or participate in the judicial process, or insistence on nonsensical and nonexistent legal "rights."

Id. at 461-62, 782 S.E.2d at 94. In *Blakeney*, the defendant was "uniformly polite and cooperative[,] " "did not . . . behave offensively[,] " and "did not hire and fire multiple attorneys, or repeatedly delay the trial." *Id.* at 463, 782 S.E.2d at 95. This Court therefore held that the defendant's conduct did not constitute forfeiture of counsel. *Id.* at 464, 782 S.E.2d at 95.

In the instant case, as in *Blakeney*, defendant's conduct was uniformly polite and cooperative. The withdrawal of his first attorney was not due to misconduct on defendant's part, but rather due to circumstances of her employment. Nor is it clear that defendant's conduct "repeatedly delay[ed] the trial." Notwithstanding the State's arguments, we cannot agree that defendant engaged in the level of serious misconduct to justify a finding that he has forfeited counsel. As such, even assuming *arguendo* that the trial court found that defendant had forfeited his right to counsel, we hold that it was error to do so.

Because the trial court failed to make sufficient inquiry that defendant's waiver of counsel was knowing, intelligent, and voluntary, prior to holding that defendant had waived counsel and forcing him to proceed *pro se*, we hold that the trial court erred in holding that defendant waived counsel. Because there is no evidence of the serious misconduct necessary to support a determination of forfeiture, we hold that the trial court erred in holding that defendant forfeited counsel. Accordingly, we reverse the trial court's judgment, and remand for a new trial.

REVERSED AND REMANDED.

Judges MURPHY and COLLINS concur.

Report per Rule 30(e).