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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-469-2

Filed: 21 July 2020

Lincoln County, No. 18 CRS 050782

STATE OF NORTH CAROLINA

v.

REGGIE JOE BEAL, Defendant.

Appeal by Defendant from judgment entered 18 December 2018 by Judge Robert C. Ervin in Lincoln County Superior Court. Heard originally in the Court of Appeals 5 December 2019, with orders issued 2 March 2020 denying Petition for Writ of Certiorari and dismissing appeal for lack of jurisdiction. By order dated 29 April 2020, the Supreme Court of North Carolina remanded to this Court with instructions to “determin[e] . . . the case on its merits.”

*Attorney General Joshua H. Stein, by Assistant Attorney General Rebecca E. Lem, for the State.*

*Allen, Moore & Rogers, L.L.P., by Warren D. Hynson, for defendant-appellant.*

MURPHY, Judge.

The trial court did not commit structural error when it properly denied indigent Defendant’s request to hire new counsel when that request was made on the

day of trial and the trial court did not employ an incorrect ineffective assistance of counsel standard in denying the request. While it is preferable that the trial court memorialize its findings of fact and conclusions of law in denying such a request, and the trial court should note that granting the request would cause significant prejudice to Defendant or a disruption in the orderly process of justice, memorialization is not required.

An unrelated inadequate Record precludes our review of Defendant's ineffective assistance of counsel claim. We dismiss the claim without prejudice to his right to file a motion for appropriate relief with the trial court.

### **BACKGROUND**

Defendant was indicted for trafficking in methamphetamine by transportation and possession, possession of drug paraphernalia, and driving with license revoked for impaired driving. These charges stem from a 13 March 2018 traffic stop that was initiated due to Defendant driving a truck hauling a trailer with a broken, flashing trailer light, and without a registration plate on the truck or the trailer. Defendant was the sole occupant of the truck, and his driver's license was suspended; he also provided a registration card with a Vehicle Identification Number ("VIN") that did not match the truck. In order to further investigate the VIN numbers on the vehicle's windshield and door, the stopping officer, Sergeant Hoernlen, asked Defendant to exit the vehicle.

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Upon obtaining Defendant's consent, Sergeant Hoernlen searched the vehicle and found a pill bottle wrapped in black tape and containing methamphetamine and sixteen pills, which were later determined not to be a controlled substance. When Sergeant Hoernlen discovered the methamphetamine in the vehicle, officers arrested Defendant, and searched him incident to that arrest. During that search, officers discovered two additional bags of methamphetamine in Defendant's jacket.

Prior to trial, Defendant had the following exchange with the trial court:

[DEFENSE COUNSEL]: Your Honor, in speaking with [Defendant] this morning, he would like to address the Court.

[COURT]: Yes, sir.

[DEFENDANT]: Your Honor, *I'd like to hire my own attorney. I don't feel like I'm being represented quite as good as I could be.* And if he knew my life, you know, I just -- if it's okay with you, *I'd like permission to hire my own attorney.*

[COURT]: Well, I guess my question would be: What, if anything, is it that [Defense Counsel] is not doing that you think he ought to be doing or what he's doing that you think he shouldn't do?

[DEFENDANT]: He was telling me that -- His main thing is never plead guilty to something you're innocent of. And he's represented to me to plead guilty and, you know, to hope that it would be run together, I mean, so...

[COURT]: Anything besides that?

[DEFENDANT]: No, sir, not really.

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[COURT]: Let me ask this question.

[DEFENDANT]: Yes, sir.

[COURT]: What does the State contend the factual basis of the case would be?

[STATE]: Your Honor, this was a traffic stop. He was pulled over. There was a consent search of his person and his vehicle. There was a smaller amount of methamphetamine found in a Carhartt jacket in the back seat and then a larger amount found on his person. It weighed out to be I think 55-point-something grams of methamphetamine that they found in his pocket in the jacket that he was wearing when they searched him. Those are the allegations.

[COURT]: So it would be a case of actual possession, meaning it was in his clothing. And it looks like he's charged with possession -- or trafficking by possession and trafficking by transportation, which would be driving. What's the -- I haven't looked it up in the statute book to see the level of -- what level of trafficking it is.

[STATE]: An F.

[COURT]: Yeah, that's what? 70 to 93 months? Is that right?

[DEFENSE COUNSEL]: Yes, sir.

[COURT]: Theoretically it's possible for somebody who got convicted of both trafficking by transportation and trafficking by possession to get two separate sentences, one to run at the expiration of the other.

[DEFENDANT]: Yes, sir.

[COURT]: So, you know, it is possible. I'm not saying this is what would happen. I'm just saying it could occur under

the law. Which that would be 140 to 186. Is there a plea offer in the case?

[STATE]: I believe the offer was to plead to either one, the transport or possession, but he rejected that in October.

[DEFENDANT]: I believe the way it was brought up then there was some kind of mis -- miswords or something on it that -- because when we come back the last time, they changed it to like -- I think the first time it was -- I don't know -- I don't really remember exactly how it was. But the last time we was in here there was a gentleman [District Attorney] or whatever, and he said there was -- it was down wrong or something. But it had been presented to me wrong or something. But the plea was still the same. I'm not really sure what he was talking about.

[COURT]: That remind you of anything, [Defense Counsel]?

[DEFENSE COUNSEL]: Your Honor, I do recall [another District Attorney] had covered his most recent court date. However, because it did not change the ultimate disposition, I didn't feel it was noteworthy.

[COURT]: The 28 to 200 grams is 90 to 93 months with a \$50,000 fine. Now, if somebody gets convicted of trafficking, it's a mandatory minimum sentence.

[DEFENDANT]: Yes, sir.

[COURT]: The Court doesn't have any authority to impose any other sentence.

[DEFENDANT]: Yes, sir.

[COURT]: The only way you can get out from under a trafficking sentence is to provide substantial assistance to the State, which is basically providing information that facilitates their ability to prosecute somebody else for drug

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offenses.

[DEFENDANT]: Yeah. In other words, work for them.

[COURT]: Providing information, work for them. I mean, that's the way the statute -- the law is set up. The scheme is -- That's about the only way out.

[DEFENDANT]: Yeah.

[COURT]: Because that way then the judge has discretion to do something else besides the 70 to 93 months.

[DEFENDANT]: Okay.

[COURT]: Anything else you want to tell me about [Defense Counsel's] legal services in the case?

[DEFENDANT]: No, sir, not really.

[COURT]: All right. [Defense Counsel], anything you want to tell me about this case, sir?

[DEFENSE COUNSEL]: Your Honor, I've spoken with [Defendant] at length. We have went [sic] over the evidence. I certainly disagree that my services are not up to par. However, I do respect his decision, if the Court decides to grant it.

[COURT]: *The Court in the exercise of its discretion would deny the motion to have removed [Defense Counsel] as your lawyer. You're free to hire a lawyer, but they're going to need to be ready to go to trial today.*

[DEFENDANT]: Okay.

[COURT]: So I suspect that's going to be unlikely if anybody wants to buy into that.

[DEFENDANT]: Yes, sir, I understand.

(Emphasis added).

The jury unanimously found Defendant guilty of trafficking in methamphetamine by transportation, trafficking in methamphetamine by possession, possession of drug paraphernalia, and driving while license revoked. Defendant appealed, and we entered 2 March 2020 orders denying Defendant's *Petition for Writ of Certiorari* and dismissing his appeal for lack of jurisdiction. Our Supreme Court granted Defendant's *Petition for Writ of Certiorari* in its 29 April 2020 order "for the limited purpose of remanding the matter to the Court of Appeals for a determination of the case on its merits." *State v. Beal*, 840 S.E.2d 778 (mem.) (N.C. 2020). We accordingly review this case on its merits.

## **ANALYSIS**

### **A. Structural Error**

Appellant argues the trial court committed structural error by "declining to remove appointed counsel and insisting that any retained attorney be ready to start trial th[e] same day [as Defendant's request to hire counsel of his choice.]" "[S]ome errors should not be deemed harmless beyond a reasonable doubt. These errors [are] known as structural errors." *Weaver v. Massachusetts*, 137 S. Ct. 1899, 1907, 198 L. Ed. 2d 420, 431 (2017).

The purpose of the structural error doctrine is to ensure insistence on certain basic, constitutional guarantees that should define the framework of any criminal trial. Thus,

the defining feature of a structural error is that it affect[s] the framework within which the trial proceeds, rather than being simply an error in the trial process itself.

*Id.* (internal marks omitted). “Thus, in the case of a structural error where there is an objection at trial and the issue is raised on direct appeal, the defendant generally is entitled to automatic reversal regardless of the error’s actual effect on the outcome.” *Id.* at 1910, 198 L. Ed. 2d. at 434 (internal marks omitted).

It is well-settled that the “erroneous deprivation of the right to counsel of choice, with consequences that are necessarily unquantifiable and indeterminate, unquestionably qualifies as structural error.” *United States v. Gonzalez-Lopez*, 548 U.S. 140, 150, 165 L. Ed. 2d 409, 420 (2006) (internal marks omitted).<sup>1</sup>

The most frequently cited Supreme Court of North Carolina case regarding the right to chosen counsel is *State v. McFadden*, 292 N.C. 609, 234 S.E.2d 742 (1977). In *McFadden*, the defendant argued the trial court committed structural error when it denied his motion for a continuance, which forced an attorney unfamiliar with the case to become his counsel on short notice. *Id.* at 611-12, 234 S.E.2d at 744-45. Holding this to be a violation of the defendant’s right to his chosen counsel, our Supreme Court reasoned:

[T]he [S]tate should keep to a necessary minimum its interference with the individual's desire to defend himself in whatever manner he deems best, using any legitimate means within his resources—and that desire can

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<sup>1</sup> For the purposes of this opinion, we will use “right to his chosen counsel” as a moniker for this constitutional right.



constitutionally be forced to yield *only when* it will result in significant prejudice to the defendant or in a disruption of the orderly processes of justice unreasonable under the circumstances of the particular case.

*Id.* at 613-14, 234 S.E.2d at 746 (quoting *People v. Crovedi*, 65 Cal. 2d 199, 208, 417 P.2d 868, 874, 53 Cal. Rptr. 284, 290 (1966)) (alteration in original) (emphasis added).

The right to his chosen counsel is not, however, “for the purpose of obstructing and delaying his trial.” *Id.* at 616, 234 S.E.2d at 747; *see also State v. Chavis*, 141 N.C. App. 553, 562, 540 S.E.2d 404, 411 (2000). In *Chavis*, for example, the trial court denied an indigent defendant’s request for a private attorney, which he made on the morning of his trial. *Id.* We upheld the trial court’s denial of the defendant’s motion, citing lack of any prior efforts by the defendant to retain counsel and the timing of the request as the primary reasons for our decision. *Id.*; *see State v. Goodwin*, 833 S.E.2d 379, 382 (N.C. Ct. App. 2019).

In 2019, we held: “Under our reading of *McFadden*, when a trial court is faced with a [d]efendant’s request to substitute his court-appointed counsel for the private counsel of his choosing, it may only deny that request if granting it would cause significant prejudice or a disruption in the orderly process of justice.” *Goodwin*, 833 S.E.2d at 382. In *Goodwin*, we ordered a new trial because, “by misapprehending the law and employing the incorrect [ineffective assistance of counsel] standard in resolving [the defendant’s] request [for chosen counsel], the trial court failed to properly exercise discretion.” *Id.* We concluded, “[a]ffirming the trial court’s denial

of [the d]efendant's request would implicitly endorse the use of an incorrect standard for the right to [chosen counsel] and a structural error that violated [the d]efendant's Sixth Amendment rights. We must vacate the judgment and remand for a new trial." *Id.* at 382-83.

*Goodwin* is distinguishable from the facts here. The trial court in *Goodwin* applied the incorrect standard in denying the defendant's request for chosen counsel, which violated his right to chosen counsel. In particular, the trial court in *Goodwin* applied an absolute impasse standard and stated "[t]he Court deems there not to be an absolute impasse in regards to this case so far." *Goodwin*, 833 S.E.2d at 381. We further emphasized that "the trial court mistakenly relied upon the absolute impasse standard in ruling on [the defendant's] request for new counsel . . . ." *Id.* at 382. That basis is not true here, where the trial court simply chose not to enter its reasoning into the Record.

While it is certainly preferable for trial courts to memorialize their findings of fact and conclusions of law either orally, in the transcript, or in a formal order, such memorialization is not a requirement in order for us to review for abuse of discretion. *See generally State v. Poole*, 305 N.C. 308, 312, 289 S.E.2d 335, 338 (1982).

As seen in *Goodwin*, although we noted the trial court "made no findings of fact indicating that the timing or content of [the d]efendant's request may have been improper or insufficient," we held that "the trial court committed a structural error

*when it applied* the incorrect [ineffective assistance of counsel] standard in analyzing [the d]efendant's request for new counsel." *Goodwin*, 833 S.E.2d at 382-83 (emphasis added). Here, the trial court did not employ the incorrect ineffective assistance of counsel standard when Defendant moved to hire new counsel, and did not commit structural error or abuse its discretion in denying Defendant's motion.

Further, Defendant was presented with the opportunity to hire private counsel when the trial court said, "[y]ou're free to hire a lawyer, but they're going to need to be ready to go to trial today." Defendant acknowledged the opportunity when he responded with "[o]kay," but he voluntarily proceeded to trial with assigned counsel.

### **B. Ineffective Assistance of Counsel**

Defendant next argues he received ineffective assistance of counsel based on counsel's failure to move to suppress the contraband seized during the search of Defendant's vehicle, as the "consent procured from [Defendant] was illegitimate and unconstitutional as such consent was requested and obtained outside the scope of the stop and in excess of its lawful parameters."

"Generally, a claim of ineffective assistance of counsel should be considered through a motion for appropriate relief before the trial court in post-conviction proceedings and not on direct appeal." *State v. Allen*, 262 N.C. App. 284, 285, 821 S.E.2d 860, 861 (2018). "A motion for appropriate relief is preferable to direct appeal because in order to defend against ineffective assistance of counsel allegations, the

State must rely on information provided by [the] defendant to trial counsel.” *State v. Stroud*, 147 N.C. App. 549, 554, 557 S.E.2d 544, 547 (2001) (internal marks omitted).

Here, our review is limited to the Record “without the benefit of information provided by [D]efendant to trial counsel, as well as [D]efendant’s thoughts, concerns, and demeanor that could be provided in a full evidentiary hearing on a motion for appropriate relief.” *Id.* at 554-55, 557 S.E.2d at 547 (internal marks omitted). Additionally, our Records generally do not contain all of the discovery materials provided by the State.

Accordingly, we decline to review Defendant’s ineffective assistance of counsel claim where “the [R]ecord before this Court is inadequate and precludes our review of whether Defendant’s counsel was ineffective and whether counsel’s errors, if any, were prejudicial.” *Allen*, 262 N.C. App. at 286, 821 S.E.2d at 862. Defendant’s ineffective assistance of counsel claim is dismissed without prejudice to his right to file a motion for appropriate relief with the trial court.

### **CONCLUSION**

The trial court did not commit structural error in declining Defendant’s trial day request to remove appointed counsel. A trial court is not required to enter its reasoning for denying a request to remove appointed counsel and hire new counsel on the day of trial, although such entry is preferable. The trial court also presented

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Defendant with the opportunity to hire private counsel; Defendant acknowledged the opportunity, but voluntarily proceeded to trial with assigned counsel.

We dismiss Defendant's ineffective assistance of counsel claim without prejudice to Defendant's right to file a motion for appropriate relief in the trial court.

NO ERROR IN PART; DISMISSED IN PART.

Judges TYSON and YOUNG concur.

Report per Rule 30(e).