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IN THE COURT OF APPEALS OF NORTH CAROLINA

2021-NCCOA-58

No. COA20-42

Filed 2 March 2021

Iredell County, No. 18 CRS 2840

STATE OF NORTH CAROLINA

v.

MADERKIS DEYAWN ROLLINSON

Appeal by defendant from judgment entered 14 May 2019 by Judge Mark Klass
in Iredell County Superior Court.

Attorney General Joshua H. Stein, by Assistant Attorney General John Congleton, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Hannah Hall Love, for Defendant-Appellant.

CARPENTER, Judge.

¶ 1

Maderkis Deyawn Rollinson (“Defendant”) appeals from judgment entered after the trial court found him guilty of one count of assault with a deadly weapon on a government official, possession of up to one-half ounce of marijuana, possession of marijuana paraphernalia, possession with intent to sell and deliver (“PWISD”) a

Schedule II Controlled Substance, maintaining a vehicle for keeping and selling controlled substances, possession of cocaine, and having attained habitual felon status. We find no prejudicial error in part, vacate in part, and remand for new sentencing hearing.

I. Background

¶ 2 On 6 January 2017, a confidential informant told Detective Pitts of the Iredell County Sherriff's Department he could purchase crack cocaine from Defendant. The buy was set up to take place at the Home Depot. When Defendant arrived, Sergeant Hayes and Sergeant Line blocked Defendant's car in with their marked patrol cars. Defendant reversed and bumped Sergeant Hayes' vehicle. Defendant drove forward, hit Sergeant Line's patrol car, and continued to press the gas causing the tires to spin. Defendant threw two bags of cocaine out of his car at the scene, and the rest of the contraband was found in his car and on his person.

¶ 3 On 10 January 2019, a bench trial was held in Iredell County Superior Court before the Honorable Mark Klass. The court dismissed one count of assault with a deadly weapon on a government official for insufficient evidence and found Defendant guilty of the remaining charges. When Defendant's case was called for trial on 13 May 2019, the prosecutor informed the court that "it's [her] understanding that [Defendant] now wishes to elect to have a bench trial instead of a jury trial," and asked the court to have a colloquy with Defendant. Defendant was present and

represented by counsel. The prosecutor then read Defendant's charges including the charge of having obtained habitual felon status. Immediately thereafter, the following colloquy transpired:

Court: Mr. Rollinson, if you will stand up, please.

Mr. Rollinson stands

Court: Do you understand you're charged with the charges she just read to you?

Defendant: Yes, sir.

Court: Do you understand you have a right to be tried by a jury of your peers?

Defendant: Yes, sir.

Court: At this time you wish to waive your right to a jury and have this heard as a bench trial by me?

Defendant: Yes, sir.

Court: If you will sign the appropriate form.

¶ 4

Defendant, defense counsel, and the court signed form AOC-CR-405 ("Waiver of Jury Trial form") declaring Mr. Rollinson provided notice of his intent to waive a jury trial in accordance with N.C. Gen. Stat. § 15A-1201(c) by giving notice on the record in open court. The court did not check either box regarding the court's consent to Defendant's waiver of jury trial. After the court announced its verdict on the

substantive charges, the prosecutor informed the court Defendant had been indicted as an habitual felon.

Prosecutor: I would contend [Mr. Rollinson]’s waived his, the jury trial for both of them. But if you feel like you need to have another colloquy with him about that, we need to have that so we can proceed.

Court: I’ll do that. At this point in the trial it’s a separate trial. The jurors are coming back to hear the habitual felon matter, or you can waive your right to a jury trial and we can proceed.

Defense Counsel: Just one second, please, your Honor.

Brief pause

Defense Counsel: ...[A]fter speaking with my client on an habitual felon hearing, trial, he is not requesting a jury trial on that matter and is comfortable with a bench trial.

Prosecutor: Your Honor, I’m ready to proceed.

Court: Go ahead.

Defendant, defense counsel, and the court signed the Waiver of Jury Trial form declaring Defendant provided notice of his intent to waive jury trial in open court. The court checked the consent box on this form. Three certified, self-authenticating prior felony judgments were admitted without objection. Counsel for Defendant was given the opportunity to ask questions and present evidence; however, no questions were asked, and Defendant presented no evidence in the adjudicatory stage of the

habitual felon trial. Both the State and counsel for Defendant made arguments regarding sentencing. Thereafter, the trial court announced:

Court: Upon consideration of the record, the evidence presented, answers of [Mr. Rollinson], statements of the lawyers, I find there's a factual basis for entry of the plea. [Mr. Rollinson] is satisfied with his attorney, he's competent to stand trial, and the plea is the informed choice made freely, voluntarily, and understandingly. The defendant's plea is hereby accepted by the Court and ordered recorded.

[Mr. Rollinson] having been found guilty of [six substantive charges], and admitting his habitual felon, or pleading to the habitual felon, I consolidate them into one sentence.

¶ 6 The court sentenced Defendant to 101-134 months in prison. After the court announced its judgment, the prosecutor noted, "the only thing is he ... didn't admit the habitual felon." The court responded, "He pled guilty to that." Defendant gave notice of appeal in open court following the entry of judgment.

II. Jurisdiction

¶ 7 Jurisdiction lies in this Court pursuant to N.C. Gen. Stat. § 7A-27(b) (2019).

III. Issues

¶ 8 The issues on appeal are (1) whether the trial court erred in allowing Defendant to waive his right to a jury trial on the substantive charges against him, thereby acting in contravention of N.C. Gen. Stat. § 15A-1201; (2) whether the trial court erred by sentencing Defendant as an habitual felon; and (3) whether the trial

court erred by sentencing Defendant for both possession of cocaine and possession with intent to sell or deliver the same cocaine.

IV. Analysis

A. Waiver of Right to Jury Trial on Substantive Charges

¶ 9 In order to prove the trial court erred by accepting his waiver of the right to a jury trial, Defendant must show: (1) the trial court violated the waiver requirements set forth in N.C. Gen. Stat. § 15A-1201; and (2) Defendant was prejudiced by the error. *State v. Swink*, 252 N.C. App. 218, 221, 797 S.E.2d 330, 332 (2017), *appeal dismissed and disc. rev. denied*, 369 N.C. 754, 799 S.E.2d 870 (2017). This Court conducts a *de novo* review of a question of law to determine whether a trial court has violated a statutory mandate. *State v. Mumma*, 257 N.C. App. 829, 836, 811 S.E.2d 215, 220 (2018).

¶ 10 Defendant argues the trial court erred when it failed to require Defendant's compliance with the notice provision outlined by N.C. Gen. Stat. § 15A-1201(c). The statute allows a defendant charged with a non-capital offense to give notice of his intent to waive his right to a trial by jury in any of the three following ways:

(1) Stipulation, which may be conditioned on each party's consent to the trial judge, [and] signed by both the State and the defendant . . .

(2) Filing a written notice of intent to waive a jury trial with the court . . . within the earliest of (i) 10 working days after arraignment, (ii) 10 working days after service of a

calendar setting under G.S. 7A-49.4(b), or (iii) 10 working days after the setting of a definite trial date under G.S. 7A-49.4(c).

(3) Giving notice of intent to waive a jury trial on the record in open court by the earlier of (i) the time of arraignment or (ii) the calling of the calendar under G.S. 7A-49.4(b) or G.S. 7A-49.4(c).

¶ 11 Defendant gave notice of his intent to waive the right to trial by jury on the substantive charges against him pursuant to N.C. Gen. Stat. § 15A-1201(c)(2) through his filing of a Waiver of Jury Trial form, and through N.C. Gen. Stat. § 15A-1201(c)(3) by announcing his intent in open court. Defendant argues, however, that his notice of intent was not timely because it was given at the time the matter was called for trial. Any such error was invited error and was not prejudicial to Defendant.

¶ 12 In *State v. Rutledge*, this Court held:

. . . [t]he filing of a written notice of intent to waive a jury trial on the date of the arraignment and subsequent trial is proper where: (1) the defendant gives notice of his intent to waive his right to a jury trial at the date of trial; (2) consent is given to waive jury trial by both the trial court and the State; and (3) the defendant invites noncompliance with the timeline requirements of N.C. Gen. Stat § 15A-1201(c) by his own failure to request a separate arraignment prior to the date of trial.

State v. Rutledge, 267 N.C. App. 91, 97, 832 S.E.2d 745, 748 (2019).

¶ 13 Nothing in the record before us indicates whether Defendant requested or received a formal arraignment separate from the day of trial. Likewise, nothing in the record indicates when either the calendar setting under N.C. Gen. Stat. § 7A-49.4(b) or the setting of the definite trial date under N.C. Gen. Stat. § 7A-49.4(c) occurred in this case. Consent from both the trial court and the State was made clear by the statements of the judge and prosecutor. Any error arising from technical non-compliance with N.C. Gen. Stat § 15A-1201(e) was invited by Defendant and was not prejudicial to Defendant.

¶ 14 The revocation provision states in relevant part, “. . . the defendant may revoke the waiver . . . within 10 business days of the defendant’s initial notice . . . if the defendant does so in open court with the State present or in writing to both the State and the judge.” N.C. Gen. Stat § 15A-1201(e). Strict compliance with the ten-day revocation period was made impossible by Defendant’s choice to waive his right to jury trial on the actual trial date. Therefore, all three elements of the *Rutledge* test are met in the case at bar. “If Defendant wanted to take advantage of the ten-day revocation rule, he should have given advance notice and requested arraignment prior to trial.” *Rutledge*, 267 N.C. App. at 99, 832 S.E.2d at 749.

¶ 15 Defendant next argues the trial court did not properly engage Defendant in a colloquy as required by N.C. Gen. Stat. § 15A-1201(d). Under subsection (d) of this statute, the judge must both: (1) “[a]ddress the defendant personally and determine

whether the defendant fully understands and appreciates the consequences of the defendant's decision to waive the right to trial by jury" and (2) "[d]etermine whether the State objects to the waiver, and, if so, why." N.C. Gen. Stat. § 15A-1201(d).

¶ 16 Neither N.C. Gen. Stat. § 15A-1201(d)(1) nor applicable case law has established a script for the colloquy that should occur between a superior court judge and a defendant seeking to waive his right to a jury trial. *Rutledge*, 267 N.C. App. at 98, 832 S.E.2d at 748. In fact, this Court has refused to read into law the requirement for a "script" for the colloquy. *Id.*, 832 S.E.2d at 748.

¶ 17 The transcript reflects the trial court judge addressed Defendant personally, asked Defendant whether he understood his right to be tried by a jury of peers, and asked whether he wished to instead have the case heard as a bench trial by the judge. Defendant responded "yes, sir" to all three questions by the trial court judge. Further, the transcript reflects consent to waive jury trial by both the judge and the State. Therefore, both elements of N.C. Gen. Stat. § 15A-1201(d) regarding the required colloquy are met in this case in accord with the precedent of this Court.

¶ 18 Citing *State v. Evans*, Defendant next argues "[t]he execution of a written waiver is no substitute for compliance by the trial court with the statute." 153 N.C. App. 313, 315, 569 S.E.2d 673, 675 (2002). The Court in *Evans* was referring to the statute allowing a defendant's waiver of assistance of counsel and the right to proceed *pro se*. *Id.* at 314, 569 S.E.2d at 674. Here, Defendant's argument that the execution

of the Waiver of Jury Trial form did not properly serve as a substitute for compliance by the trial court with N.C. Gen. Stat. § 15A-1201 is unpersuasive. Defendant was represented by counsel, and Defendant’s counsel signed the Waiver of Jury Trial form certifying that counsel had fully explained all the waiver implications to him. There are no facts in the record before us to indicate Defendant’s waiver of his right to a jury trial was not knowingly, intelligently, or voluntarily waived, or that his waiver was exclusively at the direction of counsel and not his choice. The issue of ineffective assistance of counsel has not been raised on appeal.

¶ 19 Finally, without raising the issue of insufficient evidence, Defendant argues that “[b]ecause the evidence showed Mr. Rollinson did not intend to assault either officer, there is a reasonable probability that a jury would not have convicted him of either count of assault. Therefore, Defendant was prejudiced by the trial court’s failure to comply with N.C. Gen. Stat. § 15A-1201 before proceeding with a bench trial.” The evidence that Defendant pressed the gas pedal and continued to spin the tires on his vehicle after colliding with Sergeant Hayes’ marked patrol car undermines this argument.

¶ 20 This Court finds that no error arose from Defendant’s waiver of jury trial or Defendant’s invited noncompliance with the statutory revocation period allowed by N.C. Gen. Stat. § 15A-1201(e). While the trial court technically erred in failing to check the box on the Waiver of Jury Trial form indicating consent of the court to allow

Defendant's waiver of jury trial, the court's consent to waiver was made clear at trial. Therefore, where the trial judge's consent to waiver was shown through his words in open court, we find no prejudicial error arising from the absence of a check box alone not being populated.

B. Sentencing as an Habitual Felon

¶ 21 Next, we consider whether the trial court erred by sentencing Defendant as an habitual felon. A determination of error here requires a discussion of (1) whether Defendant properly waived his right to a jury trial; and (2) whether the trial court properly found Defendant guilty of attaining habitual felon status, or improperly accepted a guilty plea from Defendant when Defendant did not enter a plea. This Court conducts a *de novo* review of a question of law to determine whether a trial court has violated a statutory mandate. *State v. Mumma*, 257 N.C. App. 829, 836, 811 S.E.2d 215, 220 (2018).

1. Waiver of Right to Jury Trial on Habitual Felon Status

¶ 22 The relevant analysis for the waiver of jury trial is the same as stated above regarding the bifurcated bench trial on Defendant's substantive charges.

¶ 23 Defendant gave notice of his intention to waive a jury trial in open court pursuant to N.C. Gen. Stat. § 15A-1201(c). The transcript shows the trial court complied with N.C. Gen. Stat. § 15A-1201(d)(1), which requires the court to (1) "[a]ddress the defendant personally and determine whether the defendant fully

understands and appreciates the consequences of the defendant’s decision to waive the right to trial by jury” and (2) “[d]etermine whether the State objects to the waiver, and, if so, why.” N.C. Gen. Stat. § 15A-1201(d).

¶ 24 Again, the trial court addressed Defendant personally. (“[Y]ou can waive your right to a jury trial” (emphasis added)). No part of the colloquy suggests Defendant did not understand or appreciate the consequences of the waiver. Although defense counsel answered for Defendant after speaking to him, N.C. Gen. Stat. § 15A-1201(d)(1) does not forbid an answer from counsel on a defendant’s behalf. An answer by counsel on behalf of Defendant does not negate the fact that the trial court judge had otherwise properly complied with the requirement that the judge address Defendant “personally.” Defendant has not raised an issue regarding ineffective assistance of counsel.

¶ 25 The State did not object to the waiver; rather, the transcript shows it was the prosecutor who brought the waiver to the trial court’s attention. Therefore, adherence to the requirements of N.C. Gen. Stat. § 15A-1201(d)(2) were met. Lastly, Defendant again invited noncompliance with the statutory revocation period of N.C. Gen. Stat. § 15A-1201(e) when he, after receiving advice of counsel, chose to waive his right to a jury of his peers on the day of trial.

2. Lapsus Linguae Regarding Guilty Plea

¶ 26

Defendant argues the trial court's mistake in stating Defendant pleaded guilty to attaining habitual felon status constitutes prejudicial error. We agree that the statement by the trial court that Defendant pleaded guilty to attaining habitual felon status when he did not so plead was error, though not prejudicial error.

“Lapsus linguae is an error in a court's oral findings that does not align with the facts of the case or the court's actual intent. This typically arises where a court's misspoken oral finding appears inconsistent with the court's more carefully crafted and deliberate written finding. In this circumstance, a trial court may conform its written judgment to the court's actual intent, notwithstanding its oral ruling.”

State v. McCurry, 244 N.C. App. 544, 781 S.E.2d 351 (2015) (internal citations omitted). The transcript shows the trial court judge intended to state Defendant was found guilty, not that he pleaded guilty. After inquiring whether Defendant wished to waive his right to a jury trial, the trial court received evidence presented by the State, and provided defense counsel the opportunity to ask questions and to present evidence on behalf of Defendant. The trial court then heard concluding statements from both the State and Defendant. These facts indicate that the trial judge simply misspoke when he stated “[h]e pled guilty to that” in reference to Defendant's habitual felon status charge. Further, the issue was rectified on the written judgment indicating that Defendant received a trial by judge, and where it was correctly

indicated that the trial court “adjudges defendant to be a habitual felon to be sentenced.”

C. Sentencing for PWISD Cocaine and Possession of Same

¶ 27 As to the issue whether the trial court erred by sentencing Defendant for both possession of cocaine and possession with intent to sell or deliver the same cocaine, “[we review alleged sentencing errors for] ‘whether [the] sentence is supported by evidence introduced at the trial and sentencing hearing.’” *State v. Deese*, 127 N.C. App. 536, 540, 491 S.E.2d 682, 685 (1997) (quoting N.C. Gen. Stat. § 15A-1340.14(f) (2011)). Even though Defendant did not object to the sentence imposed, sentencing errors may be reviewed on appeal absent an objection. *State v. Moses*, 205 N.C. App. 629, 638, 698 S.E.2d 688, 695 (2010).

¶ 28 The State concedes the trial court erred in sentencing Defendant for both PWISD cocaine and possession of the same cocaine. We hold Defendant is entitled to a new sentencing hearing. The fact the convictions were consolidated into one judgment for purposes of sentencing did not cure the error. “When the trial court consolidates multiple convictions into a single judgment but one of the convictions was entered in error, the proper remedy is to remand for resentencing . . .” *State v. Hardy*, 242 N.C. App. 146, 160, 774 S.E.2d 410, 420 (2015). Defendant’s conviction for possession of cocaine was consolidated with his other five convictions. It is unclear

what weight the trial court gave each of the separate convictions in calculating the imposed sentence. Therefore, Defendant is entitled to a new sentencing hearing.

¶ 29 Defendant indicated his choice for bench trials on the substantive charges against him and on the issue of his having attained the status of habitual felon. The record provides no indication that Defendant's choice to do so was made unknowingly or without an understanding of the consequences of doing so. Except where noncompliance with the statutory ten-day revocation period was provided by Defendant's own choices, the requirements of N.C. Gen. Stat. § 15A-1201 were met. Defendant has not shown that his choice to waive his right to a jury trial on the day of trial prejudiced him.

¶ 30 Although the judge stated Defendant "pleaded guilty" to attaining habitual felon status, Defendant failed to show the *lapsus linguae* was prejudicial. The trial court properly adjudged Defendant guilty of attaining habitual felon status.

¶ 31 There was no prejudicial error in the bench trials conducted by the trial court. The trial court erred in sentencing Defendant for both PWISD cocaine and possession of the same cocaine. As a result, we vacate and remand for a new sentencing hearing. *It is so ordered.*

VACATED AND REMANDED FOR NEW SENTENCING HEARING.

Judges HAMPSON and JACKSON concur.

STATE V. ROLLINSON

2021-NCCOA-58

Opinion of the Court

Report per Rule 30(e).