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IN THE COURT OF APPEALS OF NORTH CAROLINA

2021-NCCOA-203

No. COA19-781

Filed 4 May 2021

Gaston County, No. 17 CRS 64058

STATE OF NORTH CAROLINA

v.

JAMES EUGENE PITTMAN, JR.

Appeal by defendant from judgment entered 15 November 2018 by Judge Nathaniel J. Poovey in Superior Court, Gaston County. Heard in the Court of Appeals 17 March 2020.

Attorney General Joshua H. Stein, by Assistant Attorney General Alexandra M. Hightower, for the State.

W. Michael Spivey, for defendant.

STROUD, Chief Judge.

¶ 1

Defendant appeals from his conviction for possession with intent to sell or deliver methamphetamine. Defendant argues he did not waive his right to representation by counsel and was forced to proceed to trial pro se. The trial court concluded Defendant waived or forfeited his right to counsel but did not conduct the mandatory inquiry under North Carolina General Statute § 15A-1242 before requiring Defendant to proceed pro se. Further, while Defendant had previously

waived the right to assigned counsel and attempted to retain counsel, he never expressed any desire to proceed pro se. In addition, Defendant did not engage in serious misconduct resulting in waiver of his constitutional right to counsel. Because Defendant did not waive or forfeit his right to counsel, he is entitled to a new trial.

I. Background

¶ 2 At trial, the State's evidence tended to show that before midnight on 10 November 2017 Gaston County Police Officers learned that two men with outstanding arrest warrants were at Defendant's house, and Defendant had one-fourth of an ounce of methamphetamine in his jacket pocket. Officers arrived at Defendant's house and arrested one individual they were looking for and found Defendant in an outbuilding behind the house. One officer located a plastic baggie containing what was later identified as methamphetamine in Defendant's jacket.

¶ 3 Defendant was arrested on 11 November 2017. At his first appearance before district court on 13 November 2017, Defendant signed a Waiver of Counsel form, AOC-CR-227, Rev. 10/15, and checked box No. 2, indicating that he waived his right

to all assistance of counsel which includes my right to assigned counsel and my right to assistance of counsel. In all respects, I desire to appear in my own behalf, which I understand I have the right to do.

¶ 4 However, the district court checked box No. 1, certifying only that Defendant had "voluntarily, knowingly, and intelligently elected in open court to be tried in this

action: 1. Without the assignment of counsel.” In December 2017, Defendant appeared before the district court again for a bond reduction hearing, where he was represented by counsel.

¶ 5 On 5 February 2018, indictments were issued, charging Defendant with possession with intent to manufacture, sell, and/or deliver methamphetamine, possession of methamphetamine, and knowingly and intentionally keeping and/or maintaining a building for the keeping and/or selling methamphetamine. On 30 May 2018, in superior court, Defendant signed another Waiver of Counsel form, this time AOC-CR-227, Rev. 6/97. Defendant waived only his right to assigned counsel by checking Box No. 1, and the trial court certified that defendant had waived only his right to *assigned* counsel.

¶ 6 Defendant’s case came on for trial before the Honorable Nathaniel J. Poovey at the 12 November 2018 session of superior court, Gaston County. Defendant indicated he was not ready for trial and he had a lawyer, Trippe McKeny, but still owed “him \$700 on the retainer fee and then another \$3,000 additional on top of that.” The trial court discussed this situation with Defendant and determined:

So it sounds like you kind of got yourself in this situation. And so the fact that you’re here today representing yourself without a lawyer is of your own doing. No one else’s but your own. And so to the extent that you want relief from that, that request is denied.

¶ 7 The trial court did not appoint standby counsel, and Defendant represented

himself at all three days of his trial. The State voluntarily dismissed the charge of possession of methamphetamine before trial. The jury found Defendant guilty of possession with intent to sell or deliver methamphetamine and not guilty of maintaining a building for keeping or selling methamphetamine. The trial court ordered a suspended sentence of imprisonment for a minimum six months and a maximum of seventeen months and placed Defendant on supervised probation for thirty months. Defendant filed a written notice of appeal on 30 November 2018. Defendant's notice of appeal was not timely and contained other errors, and Defendant submitted a petition for writ of certiorari to this Court.

II. Petition for Writ of Certiorari

¶ 8 Defendant's petition acknowledges, "The notice was filed on 30 November 2018, one day after the time to give notice of appeal expired. The notice was not served upon the State and did identify the court to which appeal was taken." "A petition for the writ must show merit or that error was probably committed below. Certiorari is a discretionary writ, to be issued only for good and sufficient cause shown." *State v. Grundler*, 251 N.C. 177, 189, 111 S.E.2d 1, 9 (1959) (citations omitted). In our discretion, we grant Defendant's petition. *See* N.C. R. App. P. 21.

III. Waiver of Counsel

¶ 9 Defendant argues he did not waive his right to counsel, and "the trial court deprived [Defendant] of his constitutional right to counsel by requiring him to

represent himself at trial.” The State argues that Defendant had “waived appointed counsel on two different occasions and never withdrew that waiver[,]” and he thus “lost the right to appointed counsel.” The State then contends that, “[t]his issue was not preserved[,] and this Court should not address Defendant’s lack of retained counsel for the first time here.” The State bases its argument as to preservation on the fact that Defendant did not “attempt to withdraw his waiver of assigned counsel or make a motion to continue his case”

A. Standard of Review

The right to counsel in a criminal proceeding is protected by both the federal and state constitutions. *See* U.S. Const. amend. VI; N.C. Const. art. I, §§ 19, 23. Our review is *de novo* in cases implicating constitutional rights. *See, e.g., State v. Diaz*, 372 N.C. 493, 498, 831 S.E.2d 532, 536 (2019). Accordingly, we review *de novo* a trial court’s determination that a defendant has either waived or forfeited the right to counsel.

State v. Simpkins, 373 N.C. 530, 533, 838 S.E.2d 439, 444 (2020).

B. The Right to Counsel

¶ 10 It is well-established that a defendant has a constitutional right to representation by counsel in a criminal proceeding, and before the trial court may allow a defendant to proceed pro se, it must determine the defendant has “voluntarily and willingly and with full knowledge” of his right waived representation by counsel. *State v. Montgomery*, 138 N.C. App. 521, 524, 530 S.E.2d 66, 68 (2000).

The right to counsel is guaranteed by the Sixth and

Fourteenth Amendments of the United States Constitution and Article I of the North Carolina Constitution. *State v. McFadden*, 292 N.C. 609, 234 S.E.2d 742 (1977). A part of this right includes the right of an indigent defendant to appointed counsel. N.C. Gen. Stat. § 7A-450, *Gideon v. Wainwright*, 372 U.S. 335, 83 S. Ct. 792, 9 L.Ed.2d 799 (1963). A defendant who retains private counsel has a Sixth Amendment right to counsel of his choosing. *McFadden*, 292 N.C. 609, 234 S.E.2d 742. A defendant must be granted a reasonable time in which to obtain counsel of his own choosing, and must be granted a continuance to obtain counsel of his choosing where, through no fault of his own, he is without counsel. *Id.* at 614-15, 234 S.E.2d at 746 (citing *Lee v. United States*, 98 U.S. App. D.C. 272, 235 F.2d 219 (1956)). Finally, a defendant also has a right to represent himself in a criminal proceeding. *State v. Thacker*, 301 N.C. 348, 271 S.E.2d 252 (1980). Before a defendant can waive counsel and represent himself, the trial court must conduct the inquiry required by G.S. § 15A-1242 to make certain that defendant's waiver of counsel is done voluntarily and willingly and with full knowledge of the consequences.

Id.

Given the significant importance of an accused's right to counsel, a defendant must "clearly and unequivocally" express a desire to proceed pro se before we will deem the right to be waived. Upon receiving this clear request, the trial court is required to ensure that the waiver is knowing, intelligent, and voluntary. The court does so by fulfilling the mandates of N.C.G.S. § 15A-1242[.]

Simpkins, 373 N.C. at 534, 838 S.E.2d at 445 (citations omitted). North Carolina

General Statute § 15A-1242 provides:

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. Gen. Stat. § 15A-1242 (2019) (emphasis added).

¶ 11 Here, the trial court had this colloquy with Defendant prior to his trial:

THE COURT: Okay. Are you James Eugene Pittman, Jr.?

THE DEFENDANT: Yes, sir.

THE COURT: Mr. Pittman, are you ready for trial?

THE DEFENDANT: No, sir.

THE COURT: Okay. Why not?

THE DEFENDANT: Well, I've been being held in here almost seven months on these charges, on the assault with a deadly weapon and kidnapping, of which I'm not guilty. And I've stressed to the DA that I need a reduced bond so I can get out and pay my lawyer. And he's supposed to be here today. He told my mother he would be here today. I still owe him \$700 on the retainer fee and then another \$3,000 additional on top of that.

THE COURT: Okay. Well, this is my first day ---

THE DEFENDANT: I understand.

THE COURT: --- looking at your case, and so I don't know what the history of it has been. But the DA has placed your

STATE V. PITTMAN

2021-NCCOA-203

Opinion of the Court

case on the calendar this week for trial, and apparently they are ready to proceed.

Now, you've previously waived your right to court-appointed counsel. It looks like that was done back in May of this year. If you had a hard time hiring a lawyer then perhaps you should have asked the Court consider appointing one to represent you. So the idea that you're not ready to go forward based upon your not having the ability to hire a lawyer sounds to me like it's of your own doing.

THE DEFENDANT: No, sir.

THE COURT: How so then? You waived your right to a court-appointed lawyer. The State told you, look, we'll give you a lawyer if you can't afford one. You say, no, no, no, I don't want your free lawyer, I want to go out and hire one on my own. And now you come back saying that, no, I'm not ready to go forward, I haven't had time and haven't had the money to hire a lawyer. Those two things are inconsistent.

Do you understand what I'm saying?

THE DEFENDANT: Yes, sir, I understand what you're saying.

THE COURT: Okay. So how is the fact that you don't have a lawyer right now not of your own doing?

THE DEFENDANT: Well, I had retained Rick Beam and my mother hired another attorney. I came to court in August and I had to fire Rick Beam so Trippe McKeny could take on my case.

THE COURT: Well, I'm not going to get in to why you fired a lawyer that you had already hired.

THE DEFENDANT: Well, I had retained Rick Beam on another charge and he had my cases consolidated onto one docket.

STATE V. PITTMAN

2021-NCCOA-203

Opinion of the Court

THE COURT: Again, I don't want to get into the conversations between you and Mr. Beam. But I will tell you that it's not Mr. Beam, necessarily, that makes the docket, that's the DA's responsibility and statutory authority.

THE DEFENDANT: I understand.

THE COURT: Okay. So what do you say about your case? What are you going to do with it? They are ready to go today.

THE DEFENDANT: Seeing how the State feels that I'm representing myself, they haven't kept me aware of anything. I was indicted and wasn't served with indictment papers. I was not at my indictment hearing. At the time I fell under self[-]representation.

THE COURT: I'm not sure I understand what you mean by that. The indictment was served upon you.

THE DEFENDANT: I was never served with my indictment.

THE COURT: Okay.

THE DEFENDANT: I wasn't at the indictment hearing. I wasn't given a copy of the indictment.

THE COURT: When you say, indictment hearing, what do you mean? There is no such thing as an indictment hearing. You've had a first appearance, if that's what you're talking about. That's when you ---

THE DEFENDANT: Yeah, I've had a first appearance hearing.

THE COURT: Okay.

THE DEFENDANT: But I was never served -- notified that I was being indicted. I was never notified that I was ---

STATE V. PITTMAN

2021-NCCOA-203

Opinion of the Court

THE COURT: I'll not banter back and forth with you about that. The record will speak for itself as to whether or not you've been served with the indictment. Usually it doesn't get this far until you have.

But let me just check and make sure you're -- okay. Looking at the indictment, it was returned by the grand jury on February the 5th, 2018. And with it came a notice of return of the indictment. Looks like you were served with it on -- well, it looks like you were served with a magistrate's order, and you made bond on that, on December the 11th. That's when your bond was lowered, at the district court level. And it looks like you had, maybe, Larry Hoyle at the time.

THE DEFENDANT: He had it unsecured because I hadn't been indicted, to be unsecured.

THE COURT: Okay. You appeared before Judge Pomeroy on May the 30th. That's the same day that you waived your right to court-appointed counsel in superior court.

Madam Clerk, can you come here just one second?

THE DEFENDANT: May 30th of this year?

(Discussion off record)

THE COURT: You still live at [address redacted], in Gastonia?

THE DEFENDANT: Yes.

THE COURT: Okay. That's where they mailed your indictment, and that's how you were served.

(Discussion off record)

THE COURT: Yeah, if it had been returned then it would show that it was returned. But that's -- because you had a lawyer they didn't serve you with it like regular personal service, they would have just mailed it to your address.

STATE V. PITTMAN

2021-NCCOA-203

Opinion of the Court

THE CLERK: And his attorney.

THE COURT: And your attorney would have gotten it too, at the time.

THE DEFENDANT: I didn't retain Larry Hoyle as my attorney. I had him do a -- get my bond reduced. He got it unsecured because I hadn't been indicted yet.

THE COURT: Okay. Well, he was your lawyer. If he did that then by his doing that he would have made an appearance. And so he would have been given the indictment at that point as well because he made an appearance in your case.

THE DEFENDANT: So this is for the possession of methamphetamines and a maintaining a dwelling charge?

THE COURT: Yes, sir, possession with intent to sell and deliver methamphetamine, and then possess methamphetamine. And number three is maintaining a vehicle or place -- maintaining a building, a storage outbuilding, that was used for keeping or selling a controlled substance, methamphetamine. So three charges. Possession with intent to manufacture, sell, and deliver a Schedule II controlled substance is a Class H felony punishable by a maximum of 39 months. And the other two, possession of methamphetamine and maintaining a dwelling place for keeping controlled substances is a Class I felony.

So is there anything else you'd like to say?

THE DEFENDANT: So you're saying I signed a waiver for counsel?[¹]

THE COURT: On May 30th of this year, yes, sir, you signed

¹ On this Waiver of Counsel form, Defendant had waived only the right to *assigned* counsel, not the right to be represented by counsel.

STATE V. PITTMAN

2021-NCCOA-203

Opinion of the Court

THE DEFENDANT: That was not for that charge, that was for what I'm being held on.

THE COURT: Well, you might think that, but you're wrong about that. It was for this charge.

THE DEFENDANT: No, when I went to court on the 30th it was for this -- it was for the charges I'm being held on. They had put all my -- they had told me all my charges had been put on one docket.

THE COURT: That may have been, but you waived your right to a lawyer on the other cases as well. *You certainly waived your right to a lawyer in this case on that day.*

THE DEFENDANT: Trippe McKeny is supposed to be representing me on all of it.

THE COURT: Okay. Well, Trippe McKeny is not here, and he hasn't made a general appearance. And without him coming in and saying that he represents you we -- I mean, if a lawyer represents you, if you've paid him, then he should be here. If he's not then he don't. I don't know what else to tell you there.

THE DEFENDANT: He said he ---

THE COURT: That's between you and Mr. McKeny.

THE DEFENDANT: He got half of what he asked to represent me on all my charges.

THE COURT: Again, that's -- the financial arrangement between you and your lawyer are completely between you and your lawyer. But he's not here, he hasn't made a general appearance for you. I don't know what to tell you.

My questions is, are you ready to proceed, and you said, no.

STATE V. PITTMAN

2021-NCCOA-203

Opinion of the Court

THE DEFENDANT: No.

THE COURT: I don't know how that changes the State being ready to proceed.

THE DEFENDANT: Well, my alleged victim is an eyewitness to that event, my alleged victim that I'm being held in here ---

THE COURT: Your alleged victim -- is that in another case?

THE DEFENDANT: Yes, that I'm being held for, Brandon Michael McDonald.

THE COURT: Okay.

THE DEFENDANT: He was there that night. He's an eyewitness, and so is his ex-girlfriend, Courtney Langley.

THE COURT: Okay. Well, I don't know anything about another case, all I'm looking at is this one right here that the State says they are ready to go forward on. I assume the State is ready to move forward on this?

MR. SMITH: We are, Your Honor.

. . . .

MR. SMITH: I believe the jury will be here at 2:00, Your Honor, is the information I had received earlier.

THE COURT: Okay. So do you have anything else you want to say, Mr. Pittman?

We're going to try your case at 2:00.

(No response)

THE COURT: It seems to me -- just to address some of the things you've said, it seems to me -- and to the extent necessary I will make findings -- that you've waived your

right to a lawyer on at least two occasions. The first time in district court, the second time in superior court. It sounds like you hired a lawyer, Mr. Hoyle, who you say, just for a limited purpose, but I don't see any limited appearance in the court file. Then you say you also hired Rick Beam, and that you fired him later. And now you've tried to hire another lawyer but you haven't had him paid. All the while your case is pending, you're being held in custody, and the State is ready to proceed. So you've waived your right to a lawyer, even though the State was willing to potentially give you one for free.

So it sounds like you kind of got yourself in this situation. And so the fact that you're here today representing yourself without a lawyer is of your own doing. No one else's but your own. And so to the extent that you want relief from that, that request is denied.

I don't -- you haven't asked me for anything else. I've asked if you're ready, you said no. That's too bad, I guess is the long and short of it. The State is ready to go and I'm allowing them to proceed.

THE DEFENDANT: Well, I would been in jail if they wasn't holding me for the charges I'm being held in here on. The detective interviewed me at my house on the 17th. It's not in -- I've seen the motion for the charges I'm being held on, it's not in the report nowhere.

THE COURT: Okay. Well, you can talk to the jury about that at 2:00, if you choose to testify, that is. But I'm sorry that you couldn't make bond. I'm sorry that you say they held you and prevented you, but that's sort of the way the system works. I haven't addressed your bond, I don't know anything about it. If you are being held on this and other cases I could address potentially the bond in this case but probably not on other cases that I don't know anything about.

Do you have clothes?

THE DEFENDANT: No, I didn't -- that's what I'm saying, I didn't even know I was coming to trial today. They ain't

STATE V. PITTMAN

2021-NCCOA-203

Opinion of the Court

kept ---

THE COURT: They have given you notice that your case is on today.

THE DEFENDANT: No, they didn't, no. They didn't say it was a trial date on the notice. They didn't say it was on for trial. They sent me a packet telling me that they sent the methamphetamines off to be tested. That's all the packet said.

THE COURT: They've given you notice, they sent it to the jail.

(Emphasis added.) At this point, Defendant's mother asked to address the trial court:

MS. PITTMAN: I would like to speak, if I may.

THE COURT: You can.

Are you his mother?

MS. PITTMAN: Yes. We obtained a lawyer but we got to pay him \$750 more before he would show up. But he was under the impression, like we was, his trial would be in March.

THE COURT: Okay. The impression was wrong. And if you haven't paid the lawyer in full then you haven't paid a lawyer.

Do you have clothes you [c]an give to him?

MS. PITTMAN: That's what we was told at the last court date, the trial would be March. Well, we looked on line and it said he was up for arraignment today. So we didn't know -- and I didn't know we had to bring clothes. I didn't know that.

....

THE COURT: Okay. All right. Anything else then?

(No response)

THE COURT: No?

MR. SMITH: No, Your Honor.

THE COURT: Anything else, Mr. Pittman?

(The defendant shook his head from side to side)

THE COURT: The court reporter can't pick up a shaking of the head.

THE DEFENDANT: No, sir.

THE COURT: All right. Thank you. Okay then, 2:00. Thank you.

¶ 12 Based upon the record and transcript, it is apparent Defendant never waived his right to be represented by counsel; he had waived only his right to assigned counsel. And contrary to the State's argument that Defendant failed to preserve this issue for review by his failure to assert it before the trial court, our review of the transcript clearly indicates Defendant's repeated requests for more time to finish paying the retainer to counsel and to prepare for trial.

¶ 13 The State also argues that "Defendant's dilatory conduct resulted in forfeiture of the right to counsel." Even where a defendant has been properly advised of the right to counsel and has not waived the right, a defendant may forfeit the right by his refusal to participate in the proceeding in a way which obstructs the proceedings and seeks to "prevent them from coming to completion." *Simpkins*, 373 N.C. at 538, 838

S.E.2d at 447.

If a defendant refuses to obtain counsel after multiple opportunities to do so, refuses to say whether he or she wishes to proceed with counsel, refuses to participate in the proceedings, or continually hires and fires counsel and significantly delays the proceedings, then a trial court may appropriately determine that the defendant is attempting to obstruct the proceedings and prevent them from coming to completion. In that circumstance, the defendant's obstructionist actions completely undermine the purposes of the right to counsel. If the defendant's actions also prevent the trial court from fulfilling the mandate of N.C.G.S. § 15A-1242, the defendant has forfeited his or her right to counsel and the trial court is not required to abide by the statute's directive to engage in a colloquy regarding a knowing waiver.

Id.; see also *State v. Blakeney*, 245 N.C. App. 452, 460, 782 S.E.2d 88, 93 (2016) (“The second circumstance under which a criminal defendant may no longer have the right to be represented by counsel occurs when a defendant engages in such serious misconduct that he forfeits his constitutional right to counsel.”).

¶ 14 About six months before trial, Defendant had waived his right to *assigned* counsel, but he did not waive his right to all assistance of counsel. For waiver of the right of counsel to occur, the trial court must make the inquiries required by North Carolina General Statute § 15A-1242 before proceeding with the trial. *Simpkins*, 373 N.C. at 535, 838 S.E.2d at 445. The trial court did not make these inquiries immediately prior to trial, and although we presume Defendant was properly advised when he signed the Waiver of Counsel in May of 2018, he never waived the right to

all assistance of counsel. And although Defendant and his mother both reported his unsuccessful attempt to retain counsel, there is no indication Defendant took any actions to obstruct or delay the proceeding by repeatedly hiring and firing counsel or seeking multiple continuances of his trial. As noted above, the record indicates Defendant was not ready and did not want to proceed to trial without the assistance of counsel. The trial court responded by saying, “That’s too bad, I guess is the long and short of it.”

¶ 15 Defendant’s actions did not rise to a level of “such serious misconduct that he forfeits his constitutional right to counsel.” *Blakeney*, 245 N.C. App. at 460, 782 S.E.2d at 93. Defendant had attempted to retain counsel, but he had not “refuse[d] to obtain counsel after multiple opportunities to do so, refuse[d] to say whether he or she wishes to proceed with counsel, refuse[d] to participate in the proceedings, or continually hire[d] and fire[d] counsel and significantly delay[ed] the proceedings,” *Simpkins*, 373 N.C. at 538, 838 S.E.2d at 447, so there is no indication he had attempted to obstruct the proceeding to a degree which would rise to forfeiture of his right to counsel.

IV. Conclusion

¶ 16 Defendant did not waive his right to counsel after proper advisement under North Carolina General Statute § 15A-1242 and did not forfeit his right by serious

STATE V. PITTMAN

2021-NCCOA-203

Opinion of the Court

misconduct. Thus, Defendant must receive a new trial, and we do not reach his remaining arguments on appeal.

NEW TRIAL.

Judges DIETZ and HAMPSON concur.

Report per Rule 30(e).