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IN THE COURT OF APPEALS OF NORTH CAROLINA

2021-NCCOA-227

No. COA20-679

Filed 18 May 2021

Alamance County, No. 18 CRS 55495-96, 18 CRS 711420

STATE OF NORTH CAROLINA

v.

DEMARIO LAWRENCE MORROW, Defendant.

Appeal by Defendant from judgments entered 24 July 2019 by Judge David T. Lambeth, Jr., in Alamance County Superior Court. Heard in the Court of Appeals 10 March 2021.

Attorney General Joshua H. Stein, by Assistant Attorney General Matthew E. Buckner, for the State.

Irons & Irons, P.A., by Ben G. Irons, II, for the Defendant.

DILLON, Judge.

¶ 1 Demario Lawrence Morrow (“Defendant”) appeals from judgments upon a jury’s finding him guilty of driving while impaired, speeding, resisting a public officer, and felony eluding arrest.

I. Background

¶ 2 In the early morning hours of 13 October 2018, a Haw River police officer

observed a vehicle speeding and initiated a stop. The stop ended prematurely when Defendant fled the scene.

¶ 3 Defendant was charged with a number of crimes as a result of the above encounter. The matter came to be tried in superior court. The jury found Defendant guilty of driving while impaired, speeding, misdemeanor resisting a public officer, and felony flee to elude arrest. Defendant timely appealed.

II. Analysis

¶ 4 Defendant argues that the trial court violated his constitutional rights to counsel and under N.C. Gen. Stat. § 15A-1242 (2018). We disagree.

¶ 5 “[W]e 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). We also review alleged violations of N.C. Gen. Stat § 15A-1242 *de novo*. *State v. Mahatha*, 267 N.C. App. 355, 360, 832 S.E.2d 914, 919 (2019).

¶ 6 A defendant’s right to counsel is constitutionally protected at the federal and state levels. See U.S. Const. amend. VI (“In all criminal prosecutions, the accused shall . . . have the Assistance of Counsel for his defence.”); see also N.C. Const. art. I, § 23 (“In all criminal prosecutions, every person charged with crime has the right . . . to have counsel for defense[.]”). Before a defendant may waive the right to counsel, “the trial court must insure [sic] that constitutional and statutory standards are satisfied.” *State v. Fulp*, 355 N.C. 171, 174-75, 558 S.E.2d 156, 159 (2002). To

this end, our General Statutes require 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 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 his decision; and

(3) Comprehends the nature of the charges and proceedings and the range of permissible punishments.

N.C. Gen. Stat. § 15A-1242.

¶ 7 For the reasoning below, we conclude that Defendant forfeited his right to counsel while the matter was pending in superior court.

¶ 8 Last year, our Supreme Court considered the issue of forfeiture of counsel in *State v. Simpkins*, 373 N.C. 530, 838 S.E.2d 439 (2020). For the first time, the North Carolina Supreme Court held that it was possible for a defendant to forfeit the right to counsel, but only in situations where the defendant committed “egregious misconduct[.]” *Id.* at 535, 838 S.E.2d at 446. Although our Supreme Court did not find that the defendant’s behavior in *Simpkins* rose to the level necessary to forfeit

the right to counsel, it cited sufficient examples from our Court.¹ In *Simpkins*, our Supreme Court concluded that, in sum:

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. at 538, 838 S.E.2d at 447.

¶ 9

In this matter, Defendant forfeited his right to counsel by his behavior during colloquies with the judge presiding. Specifically, Defendant appeared in superior court on 27 February 2019, where the judge advised him of his right to counsel.

¹ See *State v. Brown*, 239 N.C. App. 510, 519, 768 S.E.2d 896, 901 (2015) (concluding that the defendant forfeited his right to counsel where he “refus[ed] to answer whether he wanted assistance of counsel at three separate pretrial hearings” and “repeatedly and vigorously objected to the trial court’s authority to proceed”); see also *State v. Joiner*, 237 N.C. App. 513, 514-15, 767 S.E.2d 557, 558-59 (2014) (concluding that the defendant forfeited his right to counsel where he advised his counsel to withdraw and refused the court’s questions concerning representation in multiple hearings); see also *State v. Montgomery*, 138 N.C. App. 521, 525, 530 S.E.2d 66, 69 (2000) (concluding that the defendant forfeited his right to counsel where he changed counsel three times, refused to allow witnesses to meet with counsel, disrupted proceedings with profanity, and assaulted his attorney).

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During the exchange, the judge repeatedly asked Defendant about his plans for representation to which Defendant was rather unresponsive:

THE COURT: You have the right to have an attorney. If you are able to afford one and would like to hire an attorney, you may do that. If you need the Court to appoint an attorney because you are not able to hire one, then the Court will consider appointing one. If you wish to represent yourself, you may do that.

Which of those options would you choose?

THE DEFENDANT: Your Honor, I ask that the record reflect that I have been ordered to stay here. I have not consented to these proceedings. I'm here through direct -- duress and threat and coercion.

THE COURT: Do you want a lawyer?

THE DEFENDANT: I ask --

THE COURT: Do you want a lawyer or do you want to represent yourself?

THE DEFENDANT: Am I free to go? If I am not, let the record reflect that I'm not free to go.

THE COURT: Yeah, if you want to go you can but there will be an order for your arrest. So if you want to --

THE DEFENDANT: Am I free to go? If not, let the record reflect that you have ordered me to stay.

THE COURT: I have ordered --

THE DEFENDANT: As done before - -

THE COURT: All right. Let me just stop you right

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now. Okay. You have the right to an attorney if you want one. Do you want an attorney or do you want to represent yourself?

THE DEFENDANT: Am I free to go or are you ordering me to stay?

THE COURT: I'm ordering you to stay until you answer that question.

THE DEFENDANT: I'm not here to answer questions, Your Honor.

THE COURT: All right. Well, you're about to have a contempt hearing if you don't answer a question. You can either represent yourself, hire an attorney or ask -- do you want to represent yourself, hire an attorney or ask for a court-appointed attorney?

THE DEFENDANT: Your Honor, I just ask, am I free to go? If not, let the record reflect that you're ordering me to stay.

THE COURT: We are all on the record on all of this. So what do you want to do about a lawyer? Do you want to represent yourself or do you want a lawyer?

THE DEFENDANT: I'm not here to answer questions, Your Honor, with all due respect.

THE COURT: . . . If you want to have a lawyer, I'm going to give you one. If not, I'm going to let you sign a waiver that you want to represent yourself.

* * *

THE COURT: We have one -- one issue to handle right now and that is, do you want a lawyer or do you not want a lawyer?

After these unsuccessful attempts, the superior court judge concluded that Defendant had forfeited the right to court appointed counsel.

¶ 10 Notwithstanding, on 23 July 2019, the day Defendant's trial was set to begin, the judge gave Defendant another chance by again questioning him about his decision regarding counsel, but Defendant was again unresponsive:

THE COURT: All right. So I'm going to ask you, Mr. Morrow, ask you again before we begin. We had this conversation back in February. And I asked you then if you would like to have the court appoint an attorney to represent you or if you would like to hire an attorney of your choosing. And you refused to participate and answer those questions.

I'm going to ask you again now, sir, before trial, do you wish the Court to appoint an attorney or do you wish to hire an attorney to represent you? Mr. Morrow?

THE DEFENDANT: I don't consent to these proceedings and I do not wish to participate in these proceedings, Your Honor.

* * *

THE COURT: Okay. So you don't wish to participate and, therefore, you're not going to answer my question about whether you'd like me to get you an attorney; is that right?

THE DEFENDANT: Your Honor, I don't wish to proceed. I don't wish to participate in these proceedings.

THE COURT: All right. Do you understand then that the Court would have no choice but to have you

represent yourself if you will not allow the Court to appoint an attorney or ask the Court to appoint an attorney? Do you understand that?

THE DEFENDANT: No, I do not understand, Your Honor. There's still some matters that I cannot get across because you interrupt me every time.

The judge determined that Defendant had forfeited the right to all counsel, and Defendant's jury trial proceeded.

¶ 11 In sum, Defendant's resistance to the superior court's attempt to determine his decision regarding counsel spanned two court sessions. During the February 2019 hearing, the court tried at least ten different times to ask its question concerning Defendant's options for counsel. And five months later, on the day of trial, the court again tried one to two more times before Defendant's trial was set to begin.

¶ 12 Defendant argues (1) that his behavior did not rise to the level of serious misconduct necessary for forfeiture of counsel and (2) that the superior court's offer to appoint counsel for Defendant right before his trial was meaningless, as the court never expressed a willingness to grant a continuance. We disagree with Defendant's contentions.

¶ 13 We conclude that Defendant's behavior rose to the level of serious misconduct envisioned in *Simpkins*. See *Simpkins*, 373 N.C. at 538, 838 S.E.2d at 447. In addition to refusing to answer the court's questions regarding his plans for representation, Defendant repeatedly stated that he did not wish to participate in the

proceedings. As a result, the court was unable to complete its colloquy required under N.C. Gen. Stat. § 15A-1242. Further, Defendant did not retain private counsel by the time his trial was set to begin in July of 2019.

¶ 14 As to Defendant’s second argument, we agree with the State that there was nothing in the record suggesting that the trial court was either hostile or amenable to granting a continuance should it have been requested by Defendant’s appointed counsel. Therefore, there is no reason to conclude that the superior court’s offer of appointed counsel was not meaningful to Defendant.

¶ 15 We conclude that Defendant’s behavior was sufficient to forfeit his right to counsel. Therefore, the trial court did not violate Defendant’s constitutional rights to counsel or rights under N.C. Gen. Stat. § 15A-1242.

III. Conclusion

¶ 16 We conclude that the trial court did not violate Defendant’s constitutional rights to counsel or rights under N.C. Gen. Stat. § 15A-1242.

NO ERROR.

Judges HAMPSON and GRIFFIN concur.

Report per Rule 30(e).