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IN THE COURT OF APPEALS OF NORTH CAROLINA

2021-NCCOA-338

No. COA20-887

Filed 6 July 2021

Catawba County, No. 20 CRS 572

STATE OF NORTH CAROLINA

v.

WILLIAM MARSHALL SHOOK

Appeal by Defendant from Judgment entered 24 July 2020 by Judge Gregory R. Hayes in Catawba County Superior Court. Heard in the Court of Appeals 9 June 2021.

Attorney General Joshua H. Stein, by Assistant Attorney General Zachary K. Dunn, for the State.

Mary McCullers Reece for defendant-appellant.

HAMPSON, Judge.

Factual and Procedural Background

¶ 1 William Marshall Shook (Defendant) appeals from a Judgment and Commitment Upon Revocation of Probation, finding Defendant had violated his conditions of probation, revoking Defendant's probation, and activating the

suspended sentence. The Record tends to reflect the following:

¶ 2 On 8 June 2020, Defendant, assisted by appointed counsel, entered an *Alford* plea to Felony Possession of Heroin and Felony Possession of Methamphetamine, for which he was sentenced in the presumptive range of six-to-seventeen months, suspended for a term of twenty-four months supervised probation. On 11 June 2020, a probation officer filed a probation violation report in Catawba County, alleging Defendant had violated three conditions of probation by: not reporting, being found in possession of heroin, and committing the criminal offense of Felony Possession of Heroin. Thereafter, on 15 June 2020, Defendant signed a written waiver of assigned counsel.

¶ 3 The probation violation came on for hearing on 24 July 2020 at the Catawba County Superior Court, where Defendant appeared *pro se* after signing an additional written waiver to "all assistance of counsel . . . ." During the hearing, the colloquy regarding Defendant's Waiver of Counsel proceeded as follows:

> [Prosecutor]: Your Honor, I show that [Defendant] has previously waived.
>
> THE COURT: [Defendant], since you waived your right to a court-appointed attorney, was it your intent to hire a lawyer or represent yourself?
>
> THE DEFENDANT: I just want to represent myself, Your Honor.
>
> THE COURT: Do you still want to do that?

> THE DEFENDANT: Yes, Your Honor.
>
> THE COURT: Okay. If you will, indicate that today with a new waiver.
>
> (Sworn to waiver)

This was the extent of the trial court's inquiry as to Defendant's waiver of assistance of counsel. Then, the hearing proceeded as follows:

> [Prosecutor]: [Defendant], are you ready to proceed today?
>
> THE DEFENDANT: I would just like to ask the Court for a bond reduction today.
>
> THE COURT: I think your case is actually set for hearing today, it's not set for a bond reduction.
>
> [Prosecutor]: It is set for a hearing today, Your Honor.
>
> THE COURT: Right. Your case is set for a hearing today, [Defendant], on a violation report that was filed June the 11th, 2020.
>
> THE DEFENDANT: Your Honor, this matter right here I was supposed to have a PC hearing on the second against my will. My attorney on the case continued my case against my will now. I do want my case continued. I wanted to show cause. I have not had my PC yet. My PC --
>
> [Prosecutor]: Your Honor --
>
> THE DEFENDANT: -- doesn't come up again until the 11th.
>
> [Prosecutor]: -- he's talking about his pending charges in District Court.
>
> THE COURT: You're talking about your pending charge of possession --

> THE DEFENDANT: That's what the violations for this case is [sic], Your Honor.
>
> THE COURT: That's one of the violations. You're charged with a new criminal offense of felony possession of heroin and felony possession of intent to sell and deliver heroin.
>
> THE DEFENDANT: Yes, that's the charges [sic] I am speaking of, Your Honor.
>
> . . .
>
> THE COURT: Right. Probation officer was present on June 10th, 2020 when you were charged with possession of heroin.
>
> THE DEFENDANT: Them [sic] charges will be dispositioned on the 11th of next month.
>
> THE COURT: But the law only requires to violate your probation that you commit a new criminal offense.

¶ 4 Defendant then pled "no contest," which the court treated as a denial of the charges. However, in the Judgment Upon Revocation of Probation, the trial court checked off box "2b" indicating Defendant had waived a violation hearing and admitted he had violated the conditions of probation. After hearing testimony from Defendant's probation officer, stating Defendant had failed to report as instructed and was found in possession of heroin, the trial court found Defendant had "violated the valid conditions of probation as set forth on the probation violation report dated June the 11th, 2020[,]" revoked Defendant's probation, and activated the suspended sentence of six-to-seventeen months.

¶ 5 In a letter dated 7 August 2020, Defendant, acting *pro se*, wrote to the clerk's office claiming he "want[ed] to file an appeal" and asking how to do so. Appellate Entries were filed on 21 August 2020 and Defendant was appointed appellate counsel on 29 August 2020. Defendant, through appellate counsel, filed a Petition for Writ of Certiorari on 17 December 2020.

Appellate Jurisdiction

¶ 6 In his Petition for Writ of Certiorari, filed under Rule 21(a)(1) of the North Carolina Rules of Appellate Procedure, Defendant acknowledges, because his *pro se* Notice of Appeal did not include a timestamp, was dated by hand 7 August 2020, and was due on or before 6 August 2020, "it appears [Defendant] failed to take timely action to preserve his right to appeal." In its response to the Petition, the State noted Defendant had "until 7 August 2020 . . . to file his written notice of appeal with the trial court." The State also noted, however, Defendant's "*pro se* document . . . was not titled as a notice of appeal, did not identify the court to which Petitioner wished to appeal, and did not include proof of service on the State." In the Petition, Defendant argues "the trial court did not engage in statutorily mandated colloquy with [Defendant] . . . before allowing him to represent himself[,]" and thus, "[i]f this Court does not allow review by way of certiorari, [Defendant] will have lost his right to review." "[T]he State t[ook] no position on whether certiorari is appropriate."

Pursuant to Rule 21(a)(1) of our Appellate Rules, this Court

> possesses the authority to grant a petition for writ of *certiorari* and review an order or judgment entered by the trial court "when the right to prosecute an appeal has been lost by failure to take timely action . . . ." N.C.R. App. P. 21(a)(1). This Court has allowed for the issuance of a writ of *certiorari* despite technical defects in a notice of appeal by a *pro se* defendant in a variety of circumstances, especially where the State has not been misled by the mistake. *See, e.g.*, *State v. Springle*, 244 N.C. App. 760, 763, 781 S.E.2d 518, 521 (2016) ("[A] defect in a notice of appeal should not result in loss of the appeal as long as the intent to appeal can be fairly inferred from the notice and the appellee is not misled by the mistake." (citations, quotation marks, and ellipsis omitted)). [In *State v. Salter*], the State d[id] not contend it ha[d] been misled by Defendant's faulty Notices of Appeal; therefore, in our discretion, we granted Defendant's Petition for Writ of *Certiorari* . . . .

State v. Salter, 264 N.C. App. 724, 729, 826 S.E.2d 803, 807 (2019) (first and second alterations in original). Likewise, here, in our discretion, we allow Defendant's Petition for Writ of Certiorari. *See id.*

Issue

¶ 7 The dispositive issue on appeal is whether the trial court erred in failing to conduct the required inquiry to ascertain whether Defendant knowingly, intelligently, and voluntarily waived all assistance of counsel before proceeding with the probation revocation hearing.

Analysis

¶ 8 Defendant argues the trial court did not conduct the proper inquiry as provided by our General Statutes to ensure Defendant waived assistance of counsel knowingly

and intelligently. Our Court appears to have concluded that the appropriate standard of review for issues of waiver of counsel is de novo. *State v. Jenkins*, ___ N.C. App. ___, ___, 848 S.E.2d 245, 249 (2020) ("Prior cases addressing waiver of counsel under N.C.[G.S.] § 15A-1242 have not clearly stated a standard of review, but they do, as a practical matter, review the issue *de novo*." (citation and quotation marks omitted)).

¶ 9 Pursuant to N.C. Gen. Stat. § 15A-1242:

> 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). "It is prejudicial error to allow a criminal defendant to proceed *pro se* at any critical stage of criminal proceeding without making the inquiry required by N.C. Gen. Stat. 15A-1242." *State v. Reid*, 224 N.C. App. 181, 189, 735 S.E.2d 389, 396 (2012) (citation and quotation marks omitted). N.C. Gen. Stat. § 15A-1242 thus also applies to probation revocation hearings. *Jenkins*, ___ N.C. App. at ___, 848 S.E.2d at 250 (citation omitted).

¶ 10 "A written waiver is important evidence to show a defendant wishes to act as

[his] own attorney." *Id.* "When 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." *Id.* (quotation marks omitted) (quoting *State v. Warren,* 82 N.C. App. 84, 89, 345 S.E.2d 437, 441 (1986)). "However, '[a] written waiver is something in addition to the requirements of N.C.[G.S.] § 15A-1242, not an alternative to it.' " *Id.* (alterations in original) (quoting *State v. Evans*, 153 N.C. App. 313, 315, 569 S.E.2d 673, 675 (2002)).

¶ 11 Here, not only does the "rest of the record" indicate Defendant's waiver was not made knowingly nor intelligently, but the trial court also failed to meet the thorough inquiry requirement set out by N.C. Gen. Stat. § 15A-1242. *See id.* It is apparent from the transcript that Defendant, despite having twice waived in writing assistance of counsel, did not even know the subject matter of the hearing when he appeared before the Catawba County Superior Court. This fact was further acknowledged by the prosecuting attorney and the presiding judge. Furthermore, before proceeding with the hearing, the trial court did not make the "thorough inquiry" required by statute, but merely asked two questions:

> THE COURT: [Defendant], since you waived your right to a court-appointed attorney, was it your intent to hire a lawyer or represent yourself?
>
> THE DEFENDANT: I just want to represent myself, Your Honor.

> THE COURT: Do you still want to do that?
>
> THE DEFENDANT: Yes, Your Honor.
>
> THE COURT: Okay. If you will, indicate that today with a new waiver.

¶ 12 The State, for its part, concedes this was error and agrees Defendant is entitled to a new probation violation hearing. We agree, and thus vacate the Judgment and Commitment Upon Revocation of Probation and remand this matter for a new hearing.[1]

Conclusion

¶ 13 Accordingly, we vacate the Judgment and Commitment Upon Revocation and remand this matter for a new probation revocation hearing.

VACATED AND REMANDED.

Judges DILLON and ZACHARY concur.

Report per Rule 30(e).

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[1] In addition, both Defendant and the State agree the trial court made a clerical error in the Judgment by checking the box indicating Defendant admitted to violating the conditions of his probation when in fact Defendant entered a plea of "no contest." Because we vacate the Judgment and remand for a new hearing, we need not reach this issue specifically, although we acknowledge this does appear to be the result of a clerical error in the preparation of the Judgment.