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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA23-1135

Filed 6 August 2024

Wake County, No. 20 CR 216031-910

STATE OF NORTH CAROLINA

v.

WALTER LEMLEY, JR.

Appeal by defendant from judgments entered 28 April 2023 by Judge Keith O. Gregory in Wake County Superior Court. Heard in the Court of Appeals 15 May 2024.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Rory Agan, for the State.

Sarah Holladay for defendant-appellant.

ZACHARY, Judge.

Defendant Walter Lemley, Jr., appeals from the trial court's judgments sentencing him upon jury verdicts finding him guilty of trafficking cocaine by possession, possession of cocaine, and felony maintaining a vehicle for the keeping or selling of controlled substances. After careful review, we reverse the judgments and remand for a new trial.

BACKGROUND

On 20 October 2020, Raleigh Police Department officers arrested Defendant, and on 25 January 2021, a Wake County grand jury indicted him for trafficking cocaine by possession, possession with intent to sell or deliver cocaine, possession of drug paraphernalia, and maintaining a vehicle for the keeping or selling of controlled substances.

Defendant's case came on for trial beginning on 25 April 2023. The trial court dismissed the drug paraphernalia charge at the close of the State's evidence. The jury found Defendant guilty of the remaining charges. On 28 April 2023, the trial court entered judgments sentencing Defendant to consecutive terms of 35 to 51 months, 10 to 21 months, and 10 to 21 months in the custody of the North Carolina Department of Adult Correction on his convictions for trafficking cocaine by possession, possession of a schedule II controlled substance, and maintaining a vehicle for the keeping or selling of controlled substances, respectively. The trial court also ordered Defendant to pay a \$50,000.00 fine as a result of the conviction of trafficking cocaine by possession.

Defendant gave oral notice of appeal.

DISCUSSION

Defendant raises four issues on appeal. He argues that the trial court (1) erred by denying his motions to dismiss the charge of maintaining a vehicle for the keeping or selling of controlled substances; (2) erred by allowing him to waive his right to counsel and represent himself at trial; (3) committed plain error when it instructed

the jury on maintaining a vehicle; and (4) “plainly erred in admitting hearsay testimony and denied [Defendant] his right to confrontation when the State failed to call either officer who participated in the seizure of the cocaine.” Upon our review, the dispositive issue in this appeal is the trial court’s error in allowing Defendant to waive his right to counsel and represent himself at trial without first informing Defendant of the mandatory minimum \$50,000.00 fine that is imposed upon a conviction for trafficking.

“The Sixth Amendment of the Constitution of the United States as applied to the states through the Fourteenth Amendment guarantees an accused in a criminal case the right to the assistance of counsel for his defense.” *State v. White*, 78 N.C. App. 741, 744, 338 S.E.2d 614, 616 (1986). “[T]he right to counsel attaches and applies not only at trial but also at and after any pretrial proceeding that is determined to constitute a critical stage in the proceedings against the defendant.” *State v. Detter*, 298 N.C. 604, 619, 260 S.E.2d 567, 579 (1979).

“It is well established that the right to counsel . . . also provides the right to self-representation.” *State v. Faulkner*, 250 N.C. App. 412, 414, 792 S.E.2d 836, 838 (2016) (cleaned up); *see White*, 78 N.C. App. at 744–45, 338 S.E.2d at 616 (“Implicit in the right to counsel is the right of a defendant to refuse the assistance of counsel and conduct his own defense.”). However, “[b]efore allowing a defendant to waive in-court representation by counsel,” the trial court must ensure that “constitutional and statutory standards are satisfied.” *Faulkner*, 250 N.C. App. at 414, 792 S.E.2d at 838

(citation omitted).

The “waiver of the right to counsel and election to proceed *pro se* must be expressed clearly and unequivocally.” *State v. Thomas*, 331 N.C. 671, 673, 417 S.E.2d 473, 475 (1992) (cleaned up). “An accused’s waiver of the right to counsel and decision to proceed *pro se* must be a voluntary relinquishment of a known right[,]” and the “record must show that the defendant . . . understood the consequences of his waiver[.]” *White*, 78 N.C. App. at 745, 338 S.E.2d at 616 (citation omitted). “A signed written waiver is presumptive evidence that a defendant wishes to act as his or her own attorney. However, the trial court must still comply with N.C. Gen. Stat. § 15A-1242.” *State v. Jacobs*, 233 N.C. App. 701, 703, 757 S.E.2d 366, 368 (2016) (cleaned up).

In order to protect these important constitutional rights, our General Assembly has enacted N.C. Gen. Stat. § 15A-1242. This statute permits a defendant to proceed without 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(1)–(3) (2023). This statutory mandate that the trial court “properly inform [the] defendant regarding ‘the range of permissible punishments’ ” includes informing the defendant of the “maximum . . . fine for each of the charges” against him. *State v. Taylor*, 187 N.C. App. 291, 294, 652 S.E.2d 741, 743 (2007).

We review de novo the question of whether the trial court complied with N.C. Gen. Stat. § 15A-1242(3). *State v. Frederick*, 222 N.C. App. 576, 581, 730 S.E.2d 275, 279 (2012).

In the present case, the trial court first appointed Patrick Koch to represent Defendant, but Koch withdrew after Defendant missed an initial court date, resulting in Defendant’s rearrest. The court then appointed Crystal Grimes to represent Defendant. On 1 September 2022, Defendant appeared before the Honorable William R. Pittman upon his motion “to ask for appointed counsel again” after Defendant “fired” Grimes on 9 August 2022. Grimes joined in Defendant’s motion, and Judge Pittman allowed Grimes to withdraw. On 6 September 2022, Doug Brown was appointed to represent Defendant.

On 15 December 2022, Defendant appeared before Judge Pittman again, this time on Brown’s motion to withdraw. Defendant explained that he was dissatisfied with Brown’s representation regarding a plea negotiation and stated that he desired to proceed pro se. Defendant also declined to have any attorney appointed to serve as his standby counsel. The trial court granted Brown’s motion to withdraw as counsel and agreed not to appoint standby counsel unless Defendant requested such

assistance. Defendant was then arraigned, and he waived formal reading of the indictment and refused to plead. The trial court entered pleas of not guilty on Defendant's behalf.

On 2 February 2023, Defendant appeared before the Honorable Vince M. Rozier, Jr., who readdressed Defendant's request to proceed pro se without standby counsel. Defendant adamantly and repeatedly reaffirmed his desire to proceed pro se. However, Defendant refused to execute a written waiver of counsel form.

When Judge Rozier questioned him regarding his capacity to represent himself, Defendant asserted that he was competent, was not taking any medications, and was aware of the charges against him. Judge Rozier then explained the maximum sentences that Defendant faced, including for the charge of trafficking cocaine by possession:

THE COURT: . . . The charges identified in the indictment. And are you aware of the potential sentences for those charges? Has that been—

[DEFENDANT]: No, that has not been addressed to me. I'm aware of the sentencing of the trafficking cocaine by possession, the possession of drug paraphernalia of marijuana, and the maintaining a vehicle and/or dwelling place for a controlled substance.

THE COURT: Okay. So, the trafficking, you've been informed of which level trafficking that is, and you know what the maximum is on that?

[DEFENDANT]: Yes, sir.

. . . .

THE COURT: Okay. Because with trafficking, unless there is some other—we call it substantial assistance. Unless there’s any substantial assistance that’s provided, some information given, some effort to assist substantially, then I am bound by whatever that level of trafficking is that is mandatory.

[DEFENDANT]: Thirty-five to 51 months.

THE COURT: Yes. So I don’t even have discretion. . . .

[DEFENDANT]: I understand.

In this exchange, Judge Rozier did not inform Defendant of the mandatory minimum \$50,000.00 fine pursuant to N.C. Gen. Stat. § 90-95(h)(3)(a) if he were to be convicted of the trafficking charge. The State then arraigned Defendant a second time, this time by means of a full and formal reading of the indictment, and Defendant pleaded not guilty to all charges.

The next month, on 30 March 2023, Defendant’s various pretrial motions came on for hearing before the Honorable Keith O. Gregory. At that hearing, Defendant confirmed: “Your Honor, Judge, I do not want stand-in counsel, appointed counsel, or counsel of any sort” and emphasized that he would represent himself. Judge Gregory agreed to “honor [this] request[.]”

Defendant’s case came on for trial on 25 April 2023 before Judge Gregory, and Defendant represented himself. The jury found Defendant guilty of trafficking cocaine by possession, possession of cocaine, and felony maintaining a vehicle for the keeping or selling of controlled substances.

The trial court entered judgments against Defendant for these convictions. With regard to the trafficking conviction, the trial court entered judgment against Defendant in accordance with N.C. Gen. Stat. § 90-95(h), which provides, in relevant part, that:

Any person who sells, manufactures, delivers, transports, or possesses 28 grams or more of cocaine . . . shall be guilty of a felony, which felony shall be known as “trafficking in cocaine” and if the quantity of such substance or mixture involved:

a. Is 28 grams or more, but less than 200 grams, such person shall be punished as a Class G felon and shall be sentenced to a minimum term of 35 months and a maximum term of 51 months in the State’s prison *and shall be fined not less than fifty thousand dollars (\$50,000)*

N.C. Gen. Stat. § 90-95(h)(3)(a) (emphasis added).

As noted above, at no point during the proceedings did Defendant execute a waiver acknowledging that he “[c]omprehend[ed] the nature of the charges and proceedings and the range of permissible punishments” against him that was certified by the trial court. *Id.* § 15A-1242(3). *Cf. State v. Wall*, 184 N.C. App. 280, 283, 645 S.E.2d 829, 831–32 (2007) (“[T]here is a presumption of regularity . . . when a defendant executes a written waiver which is in turn certified by the trial court” (cleaned up)).

Moreover, the record before us does not indicate that the trial court ever advised Defendant of the mandatory minimum fine—much less engaged Defendant in an inquiry about his understanding of that portion of the statutory punishment for

the offense of trafficking cocaine by possession—before permitting him to proceed pro se.

“Failure to conduct the mandatory inquiry under N.C. Gen. Stat. § 15A-1242 is prejudicial error.” *State v. Guinn*, 281 N.C. App. 446, 457, 868 S.E.2d 672, 680 (2022) (citation omitted). Thus, although as to the trafficking by possession charge “the trial court correctly informed [D]efendant of the maximum . . . imprisonment penalty[,]” because the court “failed to inform [D]efendant that he also faced” a mandatory minimum fine, we are bound to reverse the judgments and remand the cause for a new trial on all the charges for which he was convicted in this matter. *Taylor*, 187 N.C. App. at 294, 652 S.E.2d at 743.¹

CONCLUSION

For the reasons set forth herein, we reverse the judgments and remand for a new trial.

NEW TRIAL.

Chief Judge DILLON and Judge ARROWOOD concur.

Report per Rule 30(e).

¹ In so holding, we emphasize that section 15A-1242 pertains to a criminal defendant’s election to proceed pro se at trial generally, such that where the statutorily required inquiry is insufficient as to any charge, a new trial is required on all charges tried together.