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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA24-642

Filed 2 April 2025

Wilkes County, No. 23 CRS 701192

STATE OF NORTH CAROLINA

v.

KELVIN MILTON SMITH, Defendant.

Appeal by Defendant from judgment entered 6 November 2023 by Judge Lori

I. Hamilton in Wilkes County Superior Court. Heard in the Court of Appeals 11 February 2025.

Attorney General Joshua H. Stein, by Assistant Attorney General Reginaldo E. Williams, Jr., for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Wyatt Orsbon for Defendant-Appellant.

CARPENTER, Judge.

Kelvin Milton Smith (“Defendant”) appeals from judgment after a jury convicted him of driving over ninety mph in a forty-five mph zone. On appeal, Defendant argues the trial court erred by: (1) failing to secure a valid waiver of his right to counsel and (2) not providing him with appointed counsel. After careful

review, we conclude Defendant did not knowingly, intelligently, and voluntarily waive his right to counsel. Accordingly, we vacate and remand for a new trial. Because this issue is dispositive, we do not reach Defendant's second argument.

I. Factual & Procedural Background

On 17 March 2023, Officer Dalton Hall, with the Wilkesboro Police Department, issued Defendant a traffic citation for driving over ninety mph in a forty-five mph zone, a Class 3 misdemeanor.

On 5 July 2023, Defendant's case proceeded to trial in Wilkes County District Court. The district court found Defendant guilty of driving over ninety mph in a forty-five mph zone and sentenced him to five days in county jail. Defendant appealed to superior court (the "trial court"). On 5 September 2023, Defendant appeared at an administrative hearing without counsel. During the appearance, Defendant stated, "I would like to ask for a jury trial." The State responded, "[l]et's figure out your attorney status and then we can move it straight to the trial calendar."

Subsequently, the trial court asked the State whether Defendant was being charged with a Class 2 misdemeanor. The State clarified Defendant's charge was a Class 3 misdemeanor. To this, the trial court stated, "[s]o, he's not - - he's not eligible for court-appointed counsel." Following this discussion, the trial court asked if Defendant previously signed a waiver of counsel form, to which Defendant responded, "Yes." After reviewing the waiver form, the trial court instructed Defendant to swear or affirm the contents of the waiver form. On the form, Defendant indicated, by

checking the corresponding box, that he was waiving his right to assistance of counsel and intended to himself.

On 6 November 2023, Defendant appeared without counsel for his jury trial. The jury found Defendant guilty of driving over ninety mph in a forty-five mph zone and the trial court sentenced Defendant to five days in county jail. Defendant gave notice of appeal in open court.

II. Jurisdiction

This Court has jurisdiction under N.C. Gen. Stat. §§ 7A-27(b)(1) and 15A-1444(a) (2023).

III. Issues

The issues are whether the trial court erred by: (1) failing to secure a valid waiver of Defendant’s right to counsel and (2) not providing Defendant with appointed counsel.

IV. Analysis

Defendant asserts, and the State concedes, that the trial court erred by failing to obtain a knowing, intelligent, and voluntary waiver of his right to counsel. We agree.

The Sixth and Fourteenth Amendments to the United States Constitution “guarantee that a person brought to trial in any state [court] . . . must be afforded the right to the assistance of counsel before he can be validly convicted and punished by imprisonment.” *Faretta v. California*, 422 U.S. 806, 807, 95 S. Ct. 2525, 2527, 45 L.

STATE V. SMITH

Opinion of the Court

Ed. 2d 562, 562 (1975). Likewise, under our North Carolina Constitution, “in all criminal prosecutions, every person charged with a crime has the right to . . . have counsel for defense.” N.C. Const. art. 1, § 23; *see also State v. Neeley*, 307 N.C. 247, 251, 297 S.E.2d 389, 392 (1982) (“Whenever a party receives an active prison sentence, no matter how short, he must be afforded the opportunity to have counsel represent him.”).

The right to counsel “is one of the most closely guarded of all trial rights,” *State v. Colbert*, 311 N.C. 283, 285, 316 S.E.2d 79, 80 (1984), and “is of such a character that it cannot be denied without violating those ‘fundamental principles of liberty and justice which lie at the base of all our civil and political institutions,’” *Powell v. Alabama*, 287 U.S. 45, 67, 53 S. Ct. 55, 63, 77 L. Ed. 158 (1932) (quoting *Hebert v. Louisiana*, 272 U.S. 312, 316, 47 S. Ct. 103, 104, 71 L. Ed. 270 (1926)). Indeed, without counsel, “‘even the intelligent and educated layman . . . may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible.’” *Gideon v. Wainwright*, 372 U.S. 335, 345, 83 S. Ct. 792, 797, 9 L. Ed. 2d 799 (1963) (quoting *Powell*, 287 U.S. at 69, 53 S. Ct at 64, 77 L. Ed. 158).

The right to counsel applies at all critical stages in criminal proceedings, including the trial itself. *See State v. Boyd*, 205 N.C. App. 450, 453, 697 S.E.2d 392, 394 (2010). Importantly, a defendant cannot be imprisoned for any crime, including petty offenses, misdemeanors, and felonies, unless he was either represented by

counsel or effectively waived his right to counsel by executing a “knowing and intelligent waiver.” *Argersinger v. Hamlin*, 407 U.S. 25, 37, 92 S. Ct. 2006, 2012, 32 L. Ed. 2d 530, 538 (1972); *see State v. Black*, 51 N.C. App. 687, 688–689, 277 S.E.2d 584, 585 (1981). A valid waiver is important because “when an accused manages his own defense, he relinquishes . . . many of the traditional benefits associated with the right to counsel.” *Faretta*, 422 U.S. at 835, 95 S. Ct. at 2541, 45 L. Ed. 2d at 581; *see also Moran v. Burbine*, 475 U.S. 412, 430, 106 S. Ct. 1135, 1146 89 L. Ed. 2d 410 (1986) (explaining a defendant who manages their own defense without counsel is left alone to face the “prosecutorial forces of organized society”).

To ensure adherence to these constitutional principles, our General Assembly enacted section 15A-1242, which “sets forth the prerequisites necessary before a defendant may waive his right to counsel and elect to represent himself at trial.” *See State v. Gerald*, 304 N.C. 511, 517, 284 S.E.2d 312, 316 (1981); N.C Gen. Stat. § 15A-1242 (2023). Specifically, under section 15A-1242, the trial court must conduct an inquiry before allowing a defendant to waive his right to counsel and represent himself. The trial court must verify 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.

The North Carolina Supreme Court has made clear that the trial court’s failure to conduct this required inquiry violates both section 15A-1242 and the Sixth Amendment to the United States Constitution. *See State v. Moore*, 362 N.C. 319, 326, 661 S.E.2d 722, 726–727 (2007) (concluding the defendant’s waiver of his right to counsel was not made “knowingly, intelligently, and voluntarily” because the trial court failed to conduct a “thorough inquiry”). Accordingly, the trial court is required to conduct a thorough inquiry under section 15A-1242 before accepting a defendant’s waiver of his right to counsel, *see State v. Pruitt*, 322 N.C. 600, 603, 269 S.E.2d 590, 592 (1988), and its failure to do so “constitutes prejudicial error requiring the award of a new trial.” *State v. Harvin*, 382 N.C. 566, 581, 879 S.E.2d 147, 157 (2020); *see State v. Doisey*, 277 N.C. App. 270, 275, 858 S.E.2d 133, 137 (2021) (concluding a defendant “need not show prejudice resulting from the trial court’s failure to ensure that he validly waived his right to counsel pursuant to N.C. Gen. Stat. § 15A-1242”).

Here, Defendant was facing imprisonment if convicted. Based on the parties’ stipulation that Defendant had five prior convictions, the trial court found Defendant to have a prior conviction level of III. As a level III misdemeanor charged with a Class 3 misdemeanor, Defendant faced a sentence between one to twenty days confinement. *See* N.C. Gen. Stat. § 15A-1340.23(c)(2) (2023). Accordingly, the trial court was required to conduct a thorough inquiry before allowing Defendant to waive

his right to counsel and represent himself. *See Argersinger*, 407 U.S. at 37, 92 S. Ct. at 2012, 32 L. Ed. 2d at 538.

During the administrative hearing, the trial court asked Defendant to swear or affirm the contents of the waiver of counsel form. The trial court accepted Defendant's waiver without inquiring whether it was knowing, intelligent, and voluntary. Defendant's case then proceeded to trial where he represented himself and was found guilty by a jury. At no point during Defendant's jury trial or the administrative hearing did the trial court inform Defendant of his right to the assistance of counsel, the consequences of his decision to represent himself, or the potential range of punishments. Therefore, the trial court permitted Defendant, who was facing imprisonment, to represent himself at trial without conducting the mandatory inquiry under section 15A-1242.¹ Accordingly, Defendant's waiver was not knowing, intelligent, and voluntary. *See Moore*, 362 N.C. at 326, 661 S.E.2d at 726–27. This prejudicial error warrants a new trial. *See Harvin*, 382 N.C. at 581, 879 S.E.2d at 157.

Defendant's signed, pre-printed waiver of counsel form does not change our conclusion that his waiver was not knowing, intelligent, and voluntary. *See State v.*

¹ It appears the trial court erroneously believed Defendant's prior record of convictions was not significant enough to make him eligible for an active sentence if he were found guilty. For a Class 3 misdemeanor, a defendant's possible maximum sentence is based on his number of prior convictions. *See* N.C. Gen. Stat § 15A-1340.23 (2023). Because Defendant had a prior conviction level of III, his possible maximum sentence was twenty days of confinement. *See* N.C. Gen. Stat § 15A-1340.23(c)(2).

Evans, 153 N.C. App. 313, 315, 569, S.E.2d 673, 675 (2002) (“[E]xecution[s] of [] written waiver[s] [are] no substitute for compliance by the trial court with [section 15A-1242].”). Although written waivers, like the one Defendant executed here, *should* be procured by the trial court *after* conducting a proper colloquy, they are not effective as an alternative to the inquiry itself. *State v. Seymore*, 214 N.C. App. 547, 549, 714 S.E.2d 499, 501 (2011). Stated differently, Defendant’s written waiver does not cure the trial court’s failure to conduct the mandatory inquiry under section 15A-1242. *See State v. Hardy*, 78 N.C. App. 175, 179, 336 S.E.2d 661, 664 (1985) (“Although the court signed a certification indicating that this procedure had been followed, the transcripts, taken at the time the waiver was signed and at the time when defendant entered his guilty plea, show that the proper procedure was not followed.”).

In short, a valid waiver of a defendant’s right to counsel can only occur if the trial court conducts an inquiry under section 15A-1242. *See Pruitt*, 322 N.C. at 603, 269 S.E.2d at 592. Here, the trial court did not conduct any inquiry before allowing Defendant to waive his right to counsel and represent himself. Accordingly, we vacate and remand for a new trial. As this issue is dispositive, we do not reach Defendant’s remaining argument.

V. Conclusion

The trial court prejudicially erred by failing to conduct the statutorily-required waiver of counsel colloquy under section 15A-1242. Accordingly, Defendant is

STATE V. SMITH

Opinion of the Court

entitled to a new trial.

NEW TRIAL.

Judges ZACHARY and MURRY concur.

Report per Rule 30(e).