

No. COA12-21

NINETEEN-B JUDICIAL DISTRICT

NORTH CAROLINA COURT OF APPEALS

STATE OF NORTH CAROLINA)

)

v.)

)

From Randolph County

No. 11 CRS 30

ROGER DALE DAVIS, JR.,)

Defendant.)

DEFENDANT-APPELLANT'S BRIEF

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ISSUE PRESENTED

- I. WHETHER THE TRIAL COURT ERRED IN FAILING TO INFORM MR. DAVIS OF THE CONSEQUENCES OF HIS DECISION, THE NATURE OF THE CHARGES AND PROCEEDINGS, AND THE RANGE OF POSSIBLE PUNISHMENTS AS REQUIRED UNDER N.C. GEN. STAT. § 15A-1242 (2009) BEFORE ALLOWING MR. DAVIS TO WAIVE COUNSEL AND PROCEED *PRO SE*.

STATEMENT OF THE CASE

At trial there were two hearings in this matter which are the subject this appeal.¹ (T. March p. 1) (T. May p. 1) Both hearings were scheduled to address the State's report alleging Mr. Davis had willfully violated the terms and conditions of his probation by failing to pay the courts costs and supervision fees associated with his case. (R. p. 33-34) Mr. Davis was on probation as a result of his pleading guilty to four counts of obtaining property by false pretenses on 8 April 2009 (R. pp. 28, 32) In the original judgment ordering probation, the trial court sentenced Mr. Davis to a minimum of 11 and a maximum of 14 months imprisonment and suspended this sentence subject to Mr. Davis's completing his special probation. (R. p. 30).

The first probation violation hearing occurred on 21 March 2011 during the Criminal Session of Superior Court, Randolph County, North Carolina before the Honorable Mark Klass (the "March Hearing"). (T. March p. 1) The second hearing occurred on 16 May 2011 during the Criminal Session of Superior Court of Randolph County, North Carolina, before the Honorable Vance Bradford Long (the "May Hearing"). (T. May p. 1) Mr. Davis was present at both hearings and represented himself. (T. March p. 2, line 11) (T. May p. 3, line 2) At the March Hearing, Mr. Davis admitted to being in willful violation of his probation for

¹ The Record on Appeal in this case contains two transcripts and both transcripts were labeled "Volume I" by the Court Reporter. For ease of citation, the hearing first in time before Judge Klass will be cited as (T. March p. __, lines __) and the second hearing before Judge Long will be cited as (T. May p. __, lines __).

failing to pay the monies due. (T. March p. 4, lines 1-4) Though Mr. Davis admitted the violation, the trial court continued the matter until 11 April 2011 to allow Mr. Davis more time to pay the money. (T. March p. 4, lines 13-21) When this matter was heard on 11 April 2011, the review date was continued to 16 May 2011. (R. p. 41) At the May Hearing, Mr. Davis admitted a second time without the advice of counsel to his being in willful violation. (T. May p. 4, line 6) After discussing further payment options during the hearing, the trial court activated Mr. Davis's sentence. (T. May p. 14, lines 20-21) Mr. Davis thereafter filed timely notice of appeal with the Randolph County Clerk of Superior Court on 23 May 2011. (R. p. 44)

STATEMENT OF THE GROUNDS FOR APPELLATE REVIEW

Mr. Davis appeals from a final judgment in superior court activating his suspended sentence pursuant to N.C. Gen. Stat. §§ 7A-27, 15A-1347 (2009). In the record, there is no documentation indicating Mr. Davis's notice of appeal was served on the State. It appears therefore that this Court may lack jurisdiction over this appeal under the requirements of Rule 4 of the North Carolina Rules of Appellate Procedure. N.C.R. App. P. 4(a)(2) ("Any party entitled by law to appeal from a judgment or order of a superior or district court rendered in a criminal action may take appeal by . . . filing notice of appeal with the clerk of superior court and *servin*g copies thereof upon all adverse parties within fourteen days[.]")

(emphasis added). In the interests of justice, Mr. Davis respectfully requests this Court grant the Petition for Writ of Certiorari filed contemporaneously with this brief should the Court find that Mr. Davis's notice of appeal fails to confer jurisdiction.

STATEMENT OF THE FACTS

On 21 March 2011, Mr. Davis appeared in court for a hearing concerning the State's allegations that he had willfully violated the terms and conditions of his probation. (T. March p. 2, line 6). The violations alleged in the State's report were Mr. Davis had willfully failed to pay the monies due as part of his probation. (R. p. 34) At the outset of the hearing, Mr. Davis stated he wanted "represent himself" and the trial court responded, "Do you understand you have a right to be represented by an attorney; if you can't afford one[?]" (T. March p. 2, lines 11-14) Mr. Davis answered "Yes," filled out a Waiver of Counsel form, and was sworn as to its contents. (T. March p. 2, lines 16-22) (R. p. 37) No further discussion appears in the transcript of the March Hearing regarding the consequences of Mr. Davis's decision to decline counsel, the nature of the charges, or the permissible punishments. (*See* T. March pp. 1-5) Proceeding *pro se* at the March Hearing, Mr. Davis admitted to willfully violating his probation and consented to a review date for monetary compliance. (T. March p. 4, lines 3-20)

The probation violation was not heard again until the May hearing where the following colloquy transpired:

THE COURT: Okay. Thank you, ma'am. All right. You [Mr. Davis] signed a big waiver. You signed a waiver that says you give up your right to court-appointed and privately retained counsel. Is that right?

THE DEFENDANT: Yes, sir.

THE COURT: Are you ready to represent yourself?

THE DEFENDANT: Yes.

THE COURT: All right. . . .

(T. May pp. 2-3) No further discussion transpired between the trial court and Mr. Davis concerning the consequences of Mr. Davis's decision to decline counsel, the nature of the charges, and the range of permissible punishments. (See May T. pp. 1-16) Mr. Davis again admitted to willfully violating the monetary conditions of his probation at the May Hearing. (T. May p. 4, line 7)

Almost immediately after Mr. Davis admitted to the violations at the May Hearing, Mr. Davis contradicted the alleged willfulness of his violations several times:

[MR. DAVIS]: I'm working hard on [paying the money]. That's all I can say, Your Honor.

. . .

[MR. DAVIS]: I'm trying my best.

(T. May p. 4, lines 18-19, 21) Mr. Davis offered the trial court receipts of his expenses and stated that he could “have some more [money] this week.” (T. May pp. 4-5) The trial court then engaged in a brief discussion with Mr. Davis as to how much more money he could provide during the week, and Mr. Davis said he could pay “at least” \$150 more. (T. May pp. 5-6) When the trial court asked Mr. Davis why he not yet paid the money for his probation, Mr. Davis responded by again contradicting the alleged willfulness of his probation violation:

Just jobs. I was in the furniture business, sir. I mean, I have applications in all over: restaurants, furniture factories. Where I live at, I don't have any transportation. And where I'm at, there is [sic] no buses that run where I'm at.

(T. May p. 9, lines 20-24) After it became apparent at the May Hearing that Mr. Davis could not pay the entire amount of money necessary to satisfy the terms of his probation, the trial court asked, “Can you borrow this – if I strike the probation fees, can you borrow the rest of the money from your brother?” (T. May p. 9, lines 14-16) Mr. Davis informed the trial court that his brother did not have the money. (T. May p. 9, line 18).

After this discussion, the trial court considered holding Mr. Davis in contempt and holding him in jail until the money could be paid instead of activating Mr. Davis's sentence. (T. May p. 10, lines 10-15) As the trial court began to recite its order, Mr. Davis again contradicted the willfulness of his

violation by saying, “I can get this money paid. I just need -- I just need a couple of weeks or so. I mean, I promise you I can. I've got a little boy I've been trying to take care of.” (T. May p. 11, lines 8-11) Eventually the trial court changed its mind and declined to hold Mr. Davis in contempt; and instead the trial court activated Mr. Davis’s sentence, noting several times that Mr. Davis had already admitted to being in willful violation at the March Hearing after waiving counsel. (T. May p. 12, 14) Mr. Davis thereafter filed timely notice of appeal with the Clerk of Superior Court on 23 May 2011 (R. p. 44)

ARGUMENT

I. THE TRIAL COURT ERRED IN FAILING TO INFORM MR. DAVIS OF THE CONSEQUENCES OF HIS DECISION, THE NATURE OF THE CHARGES AND PROCEEDINGS, AND THE RANGE OF POSSIBLE PUNISHMENTS AS REQUIRED UNDER N.C. GEN. STAT. § 15A-1242 (2009) BEFORE ALLOWING MR. DAVIS TO WAIVE COUNSEL AND PROCEED *PRO SE*.

A. Standard of Review

The issue of whether a defendant has properly waived counsel at trial in compliance with the requirements of N.C.G.S. § 15A-1242 is reviewed *de novo* in this Court. *State v. Watlington*, __ N.C. App. __, __, 716 S.E.2d 671, 675 (2011) (“Prior cases addressing waiver of counsel under N.C. Gen. Stat. § 15A-1242 have not clearly stated a standard of review, but they do, as a practical matter, review the issue *de novo*. We will therefore review this ruling *de novo*.”) (citations omitted).

B. Applicable Law

Section 15A-1242 of North Carolina's General Statutes 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.G.S. § 15A-1242 (emphasis added). “The inquiry described in G.S. § 15A-1242 is mandatory in every case where the defendant requests to proceed *pro se*.” *State v. White*, 78 N.C. App. 741, 746, 338 S.E.2d 614, 616 (1986) (citation omitted).

When, as in this case, the record shows a defendant has executed “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.” *State v. Warren*, 82 N.C. App. 84, 89, 345 S.E.2d 437, 441 (1986). Thus, if a written waiver is present and “there is *no* evidence in the record that the trial court made a thorough inquiry sufficient to comport with the

dictates of G.S. Sec. 1242, due process requirements have not been met. And even when the court signs a certification indicating that this procedure has been followed, but the record belies that fact, the waiver will be invalidated.” *Id.* at 87, 345 S.E.2d at 439-40 (emphasis in original). This Court has repeatedly held that “[a] written waiver of counsel is no substitute for actual compliance by the trial court with G.S. § 15A-1242[, and] . . . in the absence of . . . the inquiry required by G.S. § 15A-1242, it [is] error to permit defendant to go to trial without the assistance of counsel.” *State v. Cox*, 164 N.C. App. 399, 402, 595 S.E.2d 726, 728 (2004) (citations omitted).

C. Discussion

In this case, there is no evidence in the record showing that the trial court followed all the requirements of N.C.G.S. § 15A-1242 at either the March Hearing or the May Hearing before allowing Mr. Davis to proceed *pro se*. The absence of these mandated statutory inquiries was particularly prejudicial during the March Hearing, because the trial court at the May Hearing relied on the prior admission of willfulness and the prior waiver of counsel in making its findings of fact activating Mr. Davis’s sentence. (T. May p. 13-14) Given that this case was only on for review at the May Hearing and Mr. Davis had already admitted to the violations without counsel, it stands to reason that the March Hearing was the critical time at which the requirements of N.C.G.S. § 15A-1242 should have been satisfied. As the

record shows, there was no discussion at the March Hearing concerning the consequences of Mr. Davis's decision to decline counsel, the nature of the charges, and the range of permissible punishments as required by N.C.G.S. § 15A-1242. (T. March p. 2, lines 9-17)

Given these facts in the record, there appears to be no meaningful distinction between this case and this Court's holdings in *State v. Hardy*, 78 N.C. App. 175, 336 S.E.2d 661 (1985) and *State v. Wells*, 78 N.C. App. 769, 338 S.E.2d 573 (1986). In both *Hardy* and *Wells*, the trial court ensured the defendants understood they were waiving their right to counsel and had the defendants sign a waiver to that effect. *Hardy*, 1985 N.C. App. LEXIS 4282, ***2-4; *Wells*, 78 N.C. App. at 772, 338 S.E.2d at 574. In both cases the convictions were reversed because the transcripts showed the requirements of N.C.G.S. § 15A-1242 had not been addressed as the waiver of counsel form indicated. *Hardy*, 78 N.C. App. at 178, 336 S.E.2d at 664; *Wells*, 78 N.C. App. at 773, 338 S.E.2d at 575. Since the decisions in *Hardy* and *Wells*, this Court has consistently ordered new trials in cases where the record clearly shows that all the inquiries required by N.C.G.S. § 15A-1242 were not made by the trial court. *See, e.g., Watlington*, ___ N.C. App. at ___, 716 S.E.2d at 676 ("We must therefore conclude . . . the trial court erred by failing to conduct an inquiry as required by N.C. Gen. Stat. § 15A-1242 and defendant is therefore entitled to a new trial on his indictment for habitual felon

status.”); *Cox*, 164 N.C. App. at 402, 595 S.E.2d at 728 (“We conclude that in the absence of . . . the inquiry required by G.S. § 15A-1242, it was error to permit defendant to go to trial without the assistance of counsel.”) (citations and quotations omitted); *State v. Hyatt*, 132 N.C. App. 697, 704, 513 S.E.2d 90, 95 (1999) (“[B]ecause it is prejudicial error to allow a criminal defendant to proceed *pro se* without making the inquiry required by N.C. Gen. Stat. § 15A-1242, we must grant this defendant a new trial.”). Since this body of case law appears to be analogous to the facts present in this case, Mr. Davis respectfully contends that he should be entitled to a new trial as well.

The failure to meet the requirements of section 15A-1242 in this case by the trial court is more than just a mere statutory violation, however. At the May Hearing, the trial court’s discussion with Mr. Davis brightly demonstrates how important the required inquiries under section 15A-1242 are:

[MR. DAVIS]: How much would it take to satisfy the courts by Friday?

THE COURT: Well, let's do it backwards. Let's do it like child support.

[MR. DAVIS]: Yes, sir.

THE COURT: I think I'm gonna go ahead and activate your sentence, and if you can give me the money, I'll let you out.

(T. May p. 10, lines 8-15) This discussion shows the trial court at the May Hearing was open to holding Mr. Davis in contempt instead of activating Mr. Davis's sentence, however, the transcript shows that the trial court eventually felt compelled to activate Mr. Davis's full sentence based on his prior admission at the March Hearing:

THE COURT: All right. Well, Judge Klass found you in viol- -- he found that you were in violation on March 21st, 2011, and continued it to today's date for review of monetary compliance. . . .

(T. May p. 11, lines 12-19)

As this Court has noted, "trial courts have great discretion in probation revocation proceedings. Among other things, the court may revoke the probation and impose the original sentence, revoke the probation and impose a reduced sentence, or continue the defendant on probation." *Warren*, 82 N.C. App. at 88, 345 S.E.2d at 440. Had Mr. Davis been advised that one of his possible punishments could be contempt instead of an activation of his full sentence at the March Hearing, he may have chosen to insist on this option rather than admitting outright to the violations. Instead, as this case currently stands, Mr. Davis has been serving his sentence in full during the pendency of this appeal even though he may now have the funds to pay the probationary fees in full.² In a similar vein, had Mr.

² Even though Mr. Davis will likely serve his entire sentence before an opinion is issued from this Court, this case is not moot since this probation violation can

Davis been advised under N.C.G.S. § 15A-1242 concerning the nature of the charges in full,³ he may have opted to accept court-appointed counsel before summarily admitting the willfulness element of the violations. Willfulness is an essential element of any alleged probation violation, and this element was contradicted by Mr. Davis at several points in the May Hearing as discussed *supra*. *State v. Sellars*, 61 N.C. App. 558, 560, 301 S.E.2d 105, 106 (1983) (“[O]ur Courts have continuously held that a suspended sentence may not be activated for failure to comply with a term of probation unless the defendant's failure to comply is willful or without lawful excuse.”). As these hypotheticals show, it can only be speculated as to what Mr. Davis would have done had he been fully advised under N.C.G.S. § 15A-1242. The prevention of these types of questions is precisely why comports with the mandates of this statute are necessary to achieve the ends of justice. Since no inquiry exists in the record comports with N.C.G.S. § 15A-1242, Mr. Davis respectfully contends that he is entitled to a new trial.

serve as an aggravating factor in a subsequent criminal proceeding. *See* N.C. Gen. Stat. § 15A-1340.16(d)(12a) (2009); *State v. Black*, 197 N.C. App. 373, 377, 677 S.E.2d 199, 202 (2009).

³ Should the State argue that the probation violation report alone was sufficient in this respect, it must be noted that this Court has previously rejected the “argument that every defendant who consents to the terms of probation is charged with constructive knowledge of the implications of a probation violation, and therefore, of a probation revocation proceeding.” *Warren*, 82 N.C. App. at 88, 345 S.E.2d at 440.

CONCLUSION

The record in this case shows the mandates of N.C.G.S. § 15A-1242 were not met. Based on the applicable law and the foregoing argument in this brief, Mr. Davis respectfully requests this Court vacate the judgment below and grant a new trial as to the probation violations alleged in the State's report.

Respectfully submitted, this the 13th day of February 2012.

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CERTIFICATE OF WORD COUNT COMPLIANCE

The undersigned hereby certifies that the portions of this brief required to be counted under Rule 28(j) of the North Carolina Rules of Appellate Procedure contain no more than 8,750 words. In making this certification, counsel is relying on the word count reported by its word processing software (Microsoft Word).

This the 13th day of February 2012.

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CERTIFICATE OF FILING AND SERVICE

The undersigned hereby certifies that on the date below stated a copy of the foregoing brief was electronically filed with the Clerk of the North Carolina Court of Appeals and served on all counsel of record by depositing a copy enclosed in a first-class, postage-paid envelope into a depository under the exclusive care of the United States Postal Service, addressed as follows:

Peggy S. Vincent
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This the 13th day of February 2012.

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