No. COA 17-952 TWENTY-FIRST DISTRICT

NORTH CAROLINA COURT OF APPEALS

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STATE OF NORTH CAROLINA )

 )

 v. ) From Forsyth County

 )

JAMES DANIEL SIMMONS )

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DEFENDANT-APPELLANT’S BRIEF

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DEFENDANT-APPELLANT’S BRIEF

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**ISSUES PRESENTED**

1. Did the trial court commit plain error by allowing the introduction of evidence stemming from the traffic stop of Mr. Simmons where that stop was not supported by reasonable suspicion?
2. Did the trial court err by allowing Mr. Simmons to represent himself where Mr. Simmons’ waiver of his right to counsel was not knowing, intelligent, and voluntary?

**STATEMENT OF THE CASE**

James Daniel Simmons was charged by citation on 13 April 2014 with driving while impaired (DWI) and driving while license revoked (DWLR). (R pp 1-2) Mr. Simmons pleaded guilty to DWI in the District Court in Forsyth County and the state dismissed the DWLR charge. (R pp 12-15) Mr. Simmons appealed to superior court for a trial *de novo*, and the state reinstated the charge of DWLR. (R pp 13, 16)

Mr. Simmons was tried for DWI and DWLR at the 29 August 2016 Criminal Session of the Superior Court in Forsyth County before the Honorable Edwin G. Wilson, Judge Presiding. (R p 1; T pp 1, 23) Mr. Simmons represented himself at trial. (R p 20; T pp 10-16) After the close of all the evidence, the trial court dismissed the DWLR charge. (R pp 1, 24-25; T pp 108-09)

On 30 August 2016, a jury found Mr. Simmons guilty of DWI. (R pp 1, 29; T pp 115-16) The trial court found no aggravating or mitigating factors. (R p 1; T p 122) Based on the jury’s verdict, the trial court sentenced Mr. Simmons for Level Four DWI to 120 days in the misdemeanant confinement program. (R pp 1, 32; T p 122) On 6 September 2016, Mr. Simmons entered written notice of appeal. (R p 32)

**GROUNDS FOR APPELLATE REVIEW**

Mr. Simmons appeals from a final judgment of the Superior Court in Forsyth County pursuant to N.C. Gen. Stat. §§ 15A-1444(a) and 7A-27(b).[[1]](#footnote-1)

**STATEMENT OF THE FACTS**

Officer Timothy Hanks of the Winston-Salem Police Department, a member of that department’s DWI task force, was on duty early in the morning of 13 April 2014. (T pp 13-14) Shortly after 3:30 a.m., Hanks witnessed a car weave slightly within its lane, without crossing into another lane or touching any lines. (T pp 34, 80) Hanks ran the tag on the vehicle and learned that Mr. Simmons, one of the vehicle’s two co-owners, had a suspended license. (T p 34) Upon learning that Mr. Simmons had a suspended license, Hanks turned on his blue lights and pulled over the Mercedes Mr. Simmons owned with his wife. (T pp 8-9, 34, 97)

 Hanks testified that he pulled Mr. Simmons over based on the suspended license, rather than the within-lane movement, and clarified that he never saw who was driving the car. Hanks also explained his belief that he had no legal obligation to determine who was driving, despite the fact that the Mercedes had two registered owners:

Q. You say -- you testified that I swerved a little bit but it’s not in your report?

A. No, sir. I testified that you were weaving some but you never left the lane, never rode nor touched the lines.

Q. [I]sn’t it true that you never pulled up directly beside me?

A. That is true. North Carolina law, for me as a police officer to stop someone requires at a minimum reasonable articulable suspicion. Our courts have held that a police officer at night, on an interstate or whatever highway where they can’t ascertain any information on a driver, has no duty to drive beside them, look over and then confirm. What information they obtained from that computer applies to the person that’s operating the vehicle. The courts have found it’s reasonable for an officer to infer that that is reasonable articulable suspicion to conduct a traffic stop of someone. [It is a] specific case, State v Hess that allows me that authority to do that as a police officer.

Q. You say what allows you to do that?

A. State v Hess, H-E-S-S. It’s a North Carolina Court of Appeals case that came out many years ago.

Q. So at that point in time you didn’t know who was driving the car?

A. That’s correct, I did not. That’s why I asked you when I walked up are you the registered owner because you were on the registration.

Q. Registered as the co-owner?

. . . .

A. That is correct. Your name was listed below the owner number one information.

Q. So the insurance and the tag and all of that, my name is [on] all of it?

A. Your name was on the vehicle registration. When I run a tag on a vehicle it automatically runs the driver’s license information for the registered owner and that’s how that information -- my computer literally reads to me and tells me audibly, you know, driver’s license suspended or tag expired, things of that nature.

Q. What was the articulable suspicion you say?

A. I stopped you because the registered owner of the vehicle, one of the two registered owners, had a suspended driver’s license.

(T pp 80-82) Shortly thereafter, Hanks again stated that he “was under no burden to pull up beside [the driver]” and confirmed that he “could not ascertain who was driving the car.” (T pp 82-83)

 After pulling Mr. Simmons over, Hanks began to suspect that Mr. Simmons was impaired. Mr. Simmons had glassy eyes; he mumbled; and his breath and car smelled of alcohol. (T p 36) Hanks noticed two beer bottles in the car—a half-empty 22-ounce Budweiser, and an empty 12-ounce Budweiser bottle in a plastic bag. (T p 56) Mr. Simmons eventually told Hanks that he had consumed “about a six-pack,” and the results of a portable breathalyzer test were positive for alcohol. (T pp 56, 58, 78-79) When asked for identification, Mr. Simmons did not produce a driver’s license or North Carolina ID card, but did produce his social security card. (T p 36) Though Mr. Simmons had recently moved in with the car’s co-owner, Mr. Simmons forgot the address. (T pp 37-38)

 Based on the early indications of impairment, Hanks asked Mr. Simmons to perform the three standard field sobriety tests—the horizontal gaze nystagmus (HGN) test; the walk-and-turn test; and the one-leg stand test. (T pp 78-79) Hanks observed six out of six clues on the HGN test, six out of eight clues on the walk-and-turn test, and “numerous” clues on the one-leg stand test. (T pp 46, 53, 79) Based on his observations, Hanks concluded that Mr. Simmons was impaired. (T p 79) Video of the traffic stop, taken from an Axon-brand camera worn behind Hanks’ ear, was admitted as State’s Exhibit 4 and portions were played for the jury. (T pp 70, 73-74)[[2]](#footnote-2)

Following the three standard sobriety tests, Hanks took Mr. Simmons to the police station but allowed him to keep his phone. (T p 58) At the station, Hanks informed Mr. Simmons of his right to refuse to submit to chemical testing and told Mr. Simmons that refusing would result in a one-year revocation of his driver’s license. (T pp 63-64) Mr. Simmons declined to submit to an additional breath test. (T pp 63-64)

 Based on these events, Mr. Simmons was charged by citation with DWI and DWLR. (R p 2) Mr. Simmons was originally represented by an experienced defense attorney, and he pleaded guilty to DWI in district court. (R pp 12-15; T p 4) On appeal to superior court, Mr. Simmons informed the trial judge that he was dissatisfied with his attorney’s performance. (T pp 4-7) Mr. Simmons ultimately told the trial court that he wanted to fire his attorney and wished to represent himself at trial. (T pp 7, 10-11, 16)

 The trial court conducted the waiver colloquy required by N.C. Gen. Stat. § 15A-1242. During that colloquy, the court informed Mr. Simmons that he was charged with DWI, but did not inform him that he would also be tried for the separate offense of DWLR:

THE COURT: You understand that you are charged with driving while impaired and if these -- if you’re convicted you could be imprisoned for a maximum of 24 months and a minimum sentence would be seven days in jail –

Is that correct, Mr. DA?

MR. TAYLOR: Yes, Your Honor -- Your Honor, we actually believe -- we filed notice aggravating -- grossly aggravating factors that we believe would make him a -- sentencing at a level one in this case.

(T p 14) The trial court then reiterated that Mr. Simmons was “charged with driving while impaired in 14-CRS-53555.” (T p 16)

The trial court also attempted to inform Mr. Simmons of the sentence he could receive for DWI. Specifically, the state told the trial court that it would seek to convict Mr. Simmons of Level One DWI based on the existence of a grossly aggravating factor, and the trial court sought to explain the sentences Mr. Simmons could receive for Level One and Level Two DWI:

THE COURT: So it sounds like in District Court you were sentenced to a level two, you could accept that sentence. If you get convicted and the aggravating factors are approved and it turns out to be a level one, the minimum active sentence would be –

What, 30 days?

MR. TAYLOR: Yes, Your Honor.

THE COURT: Okay. I don’t know -- sir, I don’t know whether they’ll be able to prove that or anything I just have to tell you that the maximum --

The maximum would still be 24 months; is that right? It wouldn’t be 36 months because of the date of offense; correct?

MR. TAYLOR: Correct, Your Honor. The maximum for the level one is 24 months. The maximum for the level two is 12 months.

THE COURT: So if you’re convicted at a level one, the maximum would be 12 months. If it’s a level two, the maximum would be 24 months. If it’s a level one, the minimum sentence would be 30 days active. And if it’s level two, the minimum sentence would be seven days active. Do you understand that?

(T pp 14-15) Mr. Simmons responded “What? I don’t understand --” before stating that he did understand. (T p 15) Mr. Simmons was never told what sentence he might receive for DWLR, or for Level Four DWI, the offense of which he was eventually convicted.

Mr. Simmons also signed a written waiver of his right to the assistance of counsel. The pre-printed portion of the form he signed provided that “[f]or a waiver of assigned counsel only, both blocks numbered ‘1’ must be checked. For a waiver of all assistance of counsel, both blocks numbered ‘2’ must be checked.” (R p 20) On the written waiver, neither Mr. Simmons nor the trial court checked either box to indicate whether Mr. Simmons was waiving his right to assigned counsel, or to all assistance of counsel.[[3]](#footnote-3)

 After Mr. Simmons chose to represent himself at trial and signed the written waiver (T p 16), the state informed the trial court that it would also proceed on the separate DWLR charge, at least as an aggravating factor:

THE COURT: Just a second.

So you want to proceed on the DWI and the driving while license revoked?

MR. TAYLOR: Your Honor, we’re going to be in a position to have to prove the driving while license revoked for the grossly aggravating factor . . . .

(T p 21) Later, the state clarified that it would proceed on the DWLR charge separately from the DWI offense:

THE COURT: I am still unclear as to whether or not you are proceeding on the driving while license revoked charge.

MR. TAYLOR: We are, Your Honor.

THE COURT: You are asking that it be reinstated

essentially -- I mean that I advise the jury you are also proceeding on the driving while license revoked charge?

MR. TAYLOR: Yes, Your Honor. I believe it actually was reinstated by operation of law when the notice of appeal was given.

THE COURT: That’s what I thought. I just didn’t understand your motion. Okay.

(T p 23) The trial court then informed the jury pool that Mr. Simmons was being tried on both charges. After greeting the potential jurors and introducing the parties, it told them Mr. Simmons was being tried for both offenses and had pleaded not guilty:

The defendant has been charged with driving while subject to an impaired substance and driving while his license was revoked for a prior implied consent offense. These offenses are alleged to have occurred on or about April the 13th, 2014. The defendant has entered a plea of not guilty.

 (T p 25)

 After the close of the state’s evidence, Mr. Simmons moved to dismiss the charges against him, and the trial court denied the motion. (T pp 90-91) After questioning Hanks regarding a prior incident and providing his own account of the traffic stop, Mr. Simmons rested his case as well. (T p 103) The trial court initially denied Mr. Simmons’ renewed motion to dismiss, and the state confirmed that it still intended to proceed on the charge of DWLR. (T p 104) Later, after argument, the trial court dismissed the DWLR charge based on the lack of evidence showing that Mr. Simmons lived at the address to which the notice of revocation had been mailed. (T pp 107-08)

The single charge of driving while impaired was submitted to the jury. (R pp 23, 26, 29; T pp 109, 113) The jury found Mr. Simmons guilty of that offense, and the trial court sentenced Mr. Simmons to 120 days in the misdemeanant confinement program for Level Four DWI. (R pp 29-31; T pp 116, 122)

**ARGUMENT**

**I. The trial court committed plain error by allowing the introduction of evidence stemming from the traffic stop of Mr. Simmons where that stop was not supported by reasonable suspicion.**

 Early in the morning of 13 April 2014, Officer Timothy Hanks “ran the tag” on the Mercedes Mr. Simmons owned with his wife. (T p 34) When he did so, his in-car computer indicated that Mr. Simmons’ license was suspended. However, before he effected the traffic stop, Hanks had no idea whether Mr. Simmons, his wife, or someone else entirely was driving the car. Based solely on the suspension of Mr. Simmons’ license, Hanks pulled over the jointly-owned Mercedes; only then did Hanks obtain evidence that Mr. Simmons was impaired.

 Under these circumstances—where there were two co-owners of the car; one of them had a suspended license; one of them did not; and the stopping officer had no information about who was actually driving—Officer Hanks lacked reasonable suspicion to stop the Mercedes. Because almost all of the evidence presented at Mr. Simmons’ DWI trial stemmed directly from the unconstitutional traffic stop, the admission of that evidence amounted to plain error. Accordingly, this court should vacate Mr. Simmons’ conviction and remand for further proceedings.

1. **Standard of Review.**

Because Mr. Simmons did not object to the introduction of evidence stemming from the traffic stop, this Court reviews for plain error. *See, e.g.*, *State v. Miller*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 795 S.E.2d 374, 376 (2016) (applying plain error review to the admission of evidence obtained during a traffic stop), *disc. rev. allowed* \_\_\_ N.C. \_\_\_, \_\_\_, 802 S.E.2d 732, 732-33 (2017). “For error to constitute plain error, a defendant must demonstrate . . . that, after examination of the entire record, the error had a probable impact on the jury’s finding that the defendant was guilty.” *State v. Hunt*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 792 S.E.2d 552, 559 (2016) (quoting *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012)).

1. **Officer Hanks lacked reasonable suspicion to stop the Mercedes because only Mr. Simmons, and not the car’s co-owner, had a suspended license, and Hanks had no idea who was driving the car.**

“[I]t is well-settled that both Article I, Section 20 [of the North Carolina Constitution] and the Fourth Amendment [to the United States Constitution] prohibit the government from conducting unreasonable searches,” *State v. Mangum*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 795 S.E.2d 106, 112 (2016) (citations and internal quotation marks omitted), and “protect[ ] private individuals from unreasonable governmental intrusions on the individual’s liberty or property,” *State v. Hess*, 185 N.C. App. 530, 532, 648 S.E.2d 913, 916 (2007) (citation omitted). Accordingly, even a temporary detention, such as a traffic stop, violates the Fourth Amendment and Article 1, Section 20 unless the detaining officer has at least “a reasonable suspicion, based on objective facts, that the individual [detained] is involved in criminal activity.” *Id.* at 533, 648 S.E.2d at 916 (citations and internal quotation marks omitted). While reasonable suspicion “is considerably less than . . . a preponderance of the evidence,” it requires “more than an inchoate and unparticularized suspicion or hunch.” *United States v. Sokolow*, 490 U.S. 1, 7, 109 S. Ct. 1581, 1585, 104 L. Ed. 2d 1, 10 (1989) (citations and internal quotation marks omitted). To secure these constitutional protections, “evidence obtained in violation of an individual’s Fourth Amendment rights” must be suppressed and “cannot be used by the government to convict him or her of a crime.” *State v. McKinney*, 361 N.C. 53, 58, 637 S.E.2d 868, 872 (2006).

This Court has previously addressed reasonable suspicion based on the suspension of a driver’s license, though only where the vehicle stopped had a single owner. In *State v. Hess*, this Court considered whether an officer can conduct “an investigatory stop based solely on an officer’s knowledge that an automobile currently being operated is registered to an individual with a suspended or revoked driver’s license.” 185 N.C. App. at 533, 648 S.E.2d at 916. To resolve what was then an issue of first impression in North Carolina, this Court reviewed a number of decisions from courts in other jurisdictions. *See id.* at 533-34, 648 S.E.2d at 916-17 (reviewing cases from Illinois, Minnesota, New Hampshire, Michigan, Maine, Iowa, and Oregon). This Court then joined the vast majority of the states to consider the issue and held that “when a police officer becomes aware that a vehicle being operated is registered to an owner with a suspended or revoked driver’s license, and there is no evidence appearing to the officer that the owner is not the individual driving the automobile, reasonable suspicion exists to warrant an investigatory stop.” *Id.* at 534, 648 S.E.2d at 917. This holding, like the holdings in other states, relied on the assumption that the sole owner of a car is usually the person driving it.

That rationale makes sense when a car has a single owner, but it breaks down when a car has two or more registered co-owners, only one of whom has a suspended license. Under those circumstances—where one registered owner of a car has a suspended license, but the other does not—there is little reason to believe, absent evidence to the contrary, that the car is implicated in criminal activity by simply being on the road. There, the commonsense assumption is that either the co-owner with the valid license, or some other person, is most likely driving the car. To presume otherwise is to assume that license revocations have no discernible effect on driving behavior.

As the appellate court system in Illinois has explained, to presuppose that a co-owner with a suspended license is just as likely to drive as the non-suspended co-owner

assumes that vehicle owners whose licenses have been suspended or revoked will not merely flout the law on occasion but will ignore the suspension or revocation entirely. While some vehicle owners may drive as much after a suspension or revocation as they did before, many if not most will either refrain altogether from driving or at least decrease the time spent behind the wheel. . . . **[For that reason, t]he presence of a vehicle on the road is not suspicious merely because one of two co-owners is prohibited from driving; it is to be expected that the co-owner whose license is in force would continue to operate the vehicle.**

*People v. Galvez*, 401 Ill. App. 3d 716, 719, 930 N.E.2d 473, 475 (2010) (citations omitted) (emphasis added). “Thus,” the *Galvez* court concluded, “the State’s argument essentially turns the ‘reasonable suspicion’ standard on its head by starting with the assumption that [the] defendant is likely to have committed a criminal act and working backward from that assumption to glean suspicion from otherwise innocuous circumstances.” *Id.* at 719, 930 N.E.2d at 476. Rather than begging the question, the proper analysis must focus on whether there are good reasons to suspect that the owner with the suspended license is the one behind the wheel, rather than the owner legally permitted to drive.

For these reasons, published cases from jurisdictions to consider this issue have ultimately held that reasonable suspicion does not exist where (1) one co-owner has a valid license, (2) one co-owner does not, and (3) the detaining officer did not discern who was driving the car. *See, e.g.*, *Galvez*, 401 Ill. App. 3d at 719, 930 N.E.2d at 475-76 (holding that there was no reasonable suspicion to stop a car where the car had one male owner with a suspended license, one female owner, and the officer did not see whether the driver was male or female); *State v. Cerino*, 141 Idaho 736, 738, 117 P.3d 876, 878 (Idaho Ct. App. 2005) (holding, where there was a female co-owner and the male co-owner had no Idaho driver’s license, that “the mere observation of a vehicle being driven by someone of the same gender as the unlicensed owner is insufficient to give rise to a reasonable suspicion of unlawful activity”); *see also* *State v. Vitek*, 365 Wis. 2d 608, 871 N.W.2d 867, 2015 Wisc. App. LEXIS 774, at \*7 (Wisc. Ct. App. 27 Oct. 2015) (unpublished) (answering No to the question “Is there reasonable suspicion to initiate a traffic stop where there is more than one owner of a vehicle, but it is unclear precisely how many owners there are, and only one of the owners has a suspended license?”).

Here, after Officer Hanks ran the tags on the Mercedes, he had good reason to believe that Mr. Simmons’ license had been suspended, but little reason to suspect he was the person behind the wheel. Hanks was aware from the very beginning of his investigation that the Mercedes was jointly owned by Mr. Simmons and his wife. (T p 34) In fact, Hanks specifically stated that Mr. Simmons’ name “was listed below the owner number one information,” which indicated that Mr. Simmons’ wife was the primary driver of the car. (T p 81) Presented with this uncertainty, Hanks took no steps to clarify who was driving—even to see whether the driver was male or female—because he believed the Fourth Amendment did not require that he do so before stopping the car. (T pp 80-83) Moreover, he witnessed no other potential traffic violations, testifying that Mr. Simmons “never left the lane” and “never rode nor touched the lines” on the road. (T p 80) Under these circumstances, Hanks could have simply pulled up to see who was driving, or waited for Mr. Simmons to commit even a minor traffic infraction before stopping the car.

In sum, Officer Hanks stopped Mr. Simmons car without reasonable suspicion, and in violation of both the Fourth Amendment and Article I, Section 20 of the North Carolina Constitution. Accordingly, the evidence stemming from that stop should not have been admitted at Mr. Simmons’ trial.

1. **The admission of evidence from the traffic stop amounted to plain error.**

The trial court committed plain error by allowing the admission of evidence stemming from the unconstitutional traffic stop. Virtually every piece of evidence that led to Mr. Simmons’ conviction—including testimony about his physical condition; his admission to drinking earlier in the day; the beer bottles in the car; and the results of the three standardized field sobriety tests—was obtained as a direct result of the unconstitutional stop of the Mercedes he shared with his wife. The only piece of evidence not tainted by this stop was the video showing the jointly-owned Mercedes driving down the highway.[[4]](#footnote-4)

Accordingly, had the trial court properly excluded this evidence, it is more than probable that the state would not have proceeded to trial, much less secured a conviction based on a jury verdict. This Court should therefore vacate Mr. Simmons’ DWI conviction and remand for further proceedings. *See, e.g.*, *Miller*, \_\_\_ N.C. App. at \_\_\_, 795 S.E.2d at 379 (remanding for a new trial where admission of evidence from a traffic stop amounted to plain error).

**II. The trial court erred by allowing Mr. Simmons to represent himself where Mr. Simmons’ waiver of his right to counsel was not knowing, intelligent, and voluntary.**

 Mr. Simmons was tried for two separate offenses, DWI and DWLR. When Mr. Simmons told the trial court he would like to fire his attorney and represent himself, the trial court conducted the waiver colloquy required by N.C. Gen. Stat. § 15A-1242. However, during that colloquy, the trial court informed Mr. Simmons that he was being tried for DWI, but did not inform him that he was also being tried for DWLR as a separate charge. It was only after he had waived his right to counsel that the state decided to proceed on DWLR as a separate offense. Mr. Simmons was never informed of the sentence he could receive for that offense. In addition, the trial court misinformed Mr. Simmons of the sentence he could receive for the DWI charge, and never instructed him that he could be fined up to $4,000 if he were convicted.

 Accordingly, Mr. Simmons’ waiver of his right to the effective assistance of counsel was not made knowingly, intelligently, and voluntarily as required by the Sixth Amendment and N.C. Gen. Stat. § 15A-1242. This Court should therefore vacate his conviction and remand for further proceedings.

1. **Standard of Review.**

 “The standard of review for alleged violations of constitutional rights is *de novo*.” *State v. Graham*, 200 N.C. App. 204, 214, 683 S.E.2d 437, 444 (2009) (citation omitted). “[This Court also] reviews the question of whether the trial court complied with N.C. Gen. Stat. § 15A-1242 *de novo*.” *State v. Frederick*, 222 N.C. App. 576, 581, 730 S.E.2d 275, 279 (2012) (citation omitted). “Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal.” *State v. Biber*, 365 N.C. 162, 168, 712 S.E.2d 874, 878 (2011) (citation and internal quotation marks omitted).

1. **Mr. Simmons’ waiver of his right to counsel was not made knowingly, intelligently, and voluntarily.**

“The Sixth Amendment,” as applied to the States through the Fourteenth Amendment, “secures to a defendant who faces incarceration the right to counsel at all ‘critical stages’ of the criminal process.” *Iowa v. Tovar*, 541 U.S. 77, 87, 124 S. Ct. 1379, 1387, 158 L. Ed. 2d 209, 219 (2004) (citation omitted). While “[a] person accused of crime . . . may choose to forgo representation[,] . . . any waiver of the right to counsel [must] be knowing, voluntary, and intelligent . . . .” *Id.* at 87-88, 124 S. Ct. at 1387, 158 L. Ed. 2d at 220 (citations omitted). To secure these constitutional protections, our General Assembly has provided 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 this decision; and

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

N.C. Gen. Stat. § 15A-1242 (emphasis added).

This statute requires a “thorough inquiry” to ensure “that constitutional and statutory standards are satisfied.” *Frederick*, 222 N.C. App. at 581-82, 730 S.E.2d at 279 (citations omitted). Accordingly, “[t]he record must affirmatively show that the inquiry was made and that the defendant, by his answers, was literate, competent, understood the consequences of his waiver, and voluntarily exercised his own free will.” *Id.* at 582, 730 S.E.2d at 280 (quoting *State v. Callahan*, 83 N.C. App. 323, 324, 350 S.E.2d 128, 129 (1986)). “A trial court’s failure to conduct the inquiry entitles [the] defendant to a new trial.” *Id.*, 730 S.E.2d at 280 (citation omitted).

For that reason, this court has held that “[i]t is prejudicial error to allow a criminal defendant to proceed *pro se* at any critical stage of criminal proceedings without making the inquiry required by N.C. Gen. Stat. § 15A-1242 . . . .” *Id.* at 584, 730 S.E.2d at 281 (citation omitted). Accordingly, where this Court has concluded that the trial court failed to advise the defendant in accordance with section 15A-1242, it has awarded the defendant a new trial. *See, e.g.*, *id.* at 583, 730 S.E.2d at 280-81 (awarding a new trial where the trial court told the defendant “you can go to prison for a long, long time” and “if you’re convicted of these offenses, the law requires you get a mandatory active prison sentence” without actually telling him the maximum sentence); *State v. Taylor*, 187 N.C. App. 291, 294, 652 S.E.2d 741, 743 (2007) (holding “the trial court failed to properly inform defendant regarding ‘the range of permissible punishments’ that he faced[,]” because “[w]hile the trial court correctly informed defendant of the maximum 60-day imprisonment penalty for a Class 2 misdemeanor, . . . it failed to inform defendant that he also faced a maximum $1,000.00 fine for each of the charges”) (citing N.C. Gen. Stat. § 15A-1242(3)).

Here, a host of problems plagued Mr. Simmons waiver of his right to counsel. First, before the waiver colloquy, the trial court informed Mr. Simmons that “the matter that is before me today is the DWI” without mentioning the separate DWLR charge. (T p 9) Then, in a confused exchange during the waiver colloquy, the trial court again told Mr. Simmons that this was the charge he faced:

THE COURT: You understand that you are charged with driving while impaired and if these -- if you’re convicted you could be imprisoned for a maximum of 24 months and a minimum sentence would be seven days in jail –

Is that correct, Mr. DA?

MR. TAYLOR: Yes, Your Honor -- Your Honor, we actually believe -- we filed notice aggravating -- grossly aggravating factors that we believe would make him a -- sentencing at a level one in this case.

THE COURT: So it sounds like in District Court you were sentenced to a level two, you could accept that sentence. If you get convicted and the aggravating factors are approved and it turns out to be a level one, the minimum active sentence would be –

What, 30 days?

MR. TAYLOR: Yes, Your Honor.

(T p 14) After the waiver colloquy, the trial court again stated that Mr. Simmons was “charged with driving while impaired in 14-CRS-53555.” (T p 16) However, it was not until *after* Mr. Simmons had waived his right to counsel that the state finally assured the trial court that it would proceed on DWLR as a separate charge:

THE COURT: I am still unclear as to whether or not you are proceeding on the driving while license revoked charge.

MR. TAYLOR: We are, Your Honor.

(T p 23) The trial court then informed the jury pool that Mr. Simmons “has been charged with driving while subject to an impaired substance and driving while his license was revoked for a prior implied consent offense.” (T p 25) The state continued to pursue the separate offense of DWLR until the trial court dismissed the charge after the close of evidence. (T pp 108-09) Thus, Mr. Simmons was not sufficiently informed, *before* he waived his right to counsel, of the “nature of the charges” against him. N.C. Gen. Stat. § 15A-1242(3).

 Second, the trial court did not adequately inform Mr. Simmons of the active sentence he could receive for the DWI charge. In addition to the confusing exchange reviewed above, at one point, the trial court misinformed Mr. Simmons of the sentence he might receive:

MR. TAYLOR: Correct, Your Honor. The maximum for the level one is 24 months. The maximum for the level two is 12 months.

THE COURT: **So if you’re convicted at a level one, the maximum would be 12 months. If it’s a level two, the maximum would be 24 months.** If it’s a level one, the minimum sentence would be 30 days active. And if it’s level two, the minimum sentence would be seven days active.

(T p 15) (emphasis added) Thus, the trial court confused the maximum sentences Mr. Simmons might receive under N.C. Gen. Stat. § 20-179(g) (maximum of 24 months for Level One DWI) and (h) (maximum of 12 months for Level Two DWI).

In response, Mr. Simmons told the trial court that he didn’t understand the sentence he might receive:

DEFENDANT: What? I don’t understand –

THE COURT: Hang on. Let me – I’m going to get there.

Do you understand that?

DEFENDANT: Yes, I do.

(T p 15) While Mr. Simmons claimed to understand *something*, in context, it is far from clear whether Mr. Simmons understood the sentence he might receive, or simply understood that they would “get” to the issue eventually. The trial court asked no further questions to clarify or resolve this ambiguity, and it never returned to the question of how much active time Mr. Simmons might receive.

Third, in addition to misinforming Mr. Simmons of the amount of active time he might receive, the trial court never informed him that he could be fined up to $4,000 as a Level One DWI offender, or $2,000 as a Level Two DWI offender. *See* N.C. Gen. Stat. § 20-179(g), (h). The failure to inform Mr. Simmons of the possibility of a several-thousand-dollar fine, by itself, strongly suggests that Mr. Simmons’ waiver was not sufficiently knowing and intelligent. *See Taylor*, 187 N.C. App. at 294, 652 S.E.2d at 743 (2007) (awarding a new trial, in part, because the trial court failed to inform the defendant he could receive a $1,000 fine for each of two charges).

 Fourth, while the trial court at least attempted to inform Mr. Simmons of the sentence he might receive, it never told him how much time he might face if he were convicted of Level Four DWI—the offense of which he was actually convicted and for which he received the maximum sentence. *See* N.C. Gen. Stat. § 20-179 (f)(2) (providing for Level Four punishment for DWI where there are no aggravating or mitigating factors), (j) (providing that Level Four punishment can include an active sentence of no less than 48 hours and no greater than 120 days, and allowing imposition of a $500 fine). Thus, Mr. Simmons was not informed of the sentence he might receive if the state ultimately failed to prove the existence of any aggravating or grossly aggravating factors.

 And fifth, the trial court never informed Mr. Simmons what sentence he might receive based on the DWLR charge—what the maximum active sentence might be if he were convicted only of that stand-alone offense; what would happen if he were convicted of both offenses; or what sorts of fines he might face if he were convicted of one or both offenses.

 In short, at least five problems infected Mr. Simmons’ decision to waive his Sixth Amendment right to counsel. Among other things, he was misinformed of the maximum active sentence he might face; he was not informed of any fines that might be imposed; and he was not informed before he waived his right to counsel that he would be tried on an additional charge. In light of these multiple errors, the trial court hardly conducted the “thorough inquiry” that this Court and N.C. Gen. Stat. § 15A-1242 have required to protect his Sixth Amendment right to the effective assistance of counsel. Accordingly, this Court should vacate Mr. Simmons’ conviction and remand for further proceedings.

**CONCLUSION**

For the foregoing reasons, Mr. Simmons respectfully requests that this Court vacate Mr. Simmons’ conviction and remand for further proceedings.

Respectfully submitted the 9th day of October, 2017.

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**CERTIFICATE OF COMPLIANCE WITH N.C. R. APP. P. 28**

 I hereby certify that Defendant-Appellant’s Brief is in compliance with Rule 28(j)(2)(B) of the North Carolina Rules of Appellate Procedure as it is printed in fourteen point Century Schoolbook and the body of the brief, including footnotes and citations, contains no more than 8,750 words as indicated by the word-processing program used to prepare the brief.

This the 9th day of October, 2017.

By Electronic Submission:

 Aaron Thomas Johnson

 Assistant Appellate Defender

North Carolina State Bar Number 46157

**CERTIFICATE OF FILING AND SERVICE**

I hereby certify that the original Defendant-Appellant’s Brief has been filed, pursuant to Rule 26 of the North Carolina Rules of Appellate Procedure, by electronic means with the Clerk of the North Carolina Court of Appeals.

I further certify that a copy of the above and foregoing Defendant-Appellant’s Brief has been duly served upon Ms. Kindelle M. McCullen, Assistant Attorney General, North Carolina Department of Justice, by electronic means by emailing it to kmccullen@ncdoj.gov.

This the 9th day of October, 2017.

By Electronic Submission:

 Aaron Thomas Johnson

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No. COA 17-952 TWENTY-FIRST DISTRICT

NORTH CAROLINA COURT OF APPEALS

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STATE OF NORTH CAROLINA )

 )

 v. ) From Forsyth County

 )

JAMES DANIEL SIMMONS )

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APPENDIX

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 1-6 *State v. Vitek*, 19

365 Wis. 2d 608, 871 N.W.2d 867,

2015 Wisc. App. LEXIS 774 (Wisc. Ct. App.

27 Oct. 2015) (unpublished)

1. Mr. Simmons filed a *pro se* notice of appeal on 6 September 2016, less than a week after judgment was entered on 30 August 2016. (R p 34) However, this notice of appeal did not specify the court to which he appealed and there is no indication it was served on the state. Because it may not have complied with all the technical requirements imposed by Rule 4 of the North Carolina Rules of Appellate Procedure, Mr. Simmons has also filed a petition for a writ of certiorari. That petition is incorporated herein by reference. [↑](#footnote-ref-1)
2. As Hanks explained at trial, the DVD on to which the video was copied contained five files. (T p 74) The state played only the video showing the traffic stop and an interaction at the magistrate’s office. (T p 74)

On the DVD provided to undersigned counsel, the specific file depicting the traffic stop is labelled “AXON\_Flex\_Video\_2014-04-13\_0332.mp4.” On 29 September 2017, undersigned counsel sent a letter to the Forsyth County Clerk of Court to request that a copy of State’s Exhibit 4, specifically including this file, be mailed to this Court. [↑](#footnote-ref-2)
3. The trial transcript indicates that Mr. Simmons affirmed before signing the waiver. (T p 16) However, there is no signature on the written waiver form to indicate that Mr. Simmons’ waiver was made under oath. (R p 20) [↑](#footnote-ref-3)
4. This Court can now assess for itself whether the video actually shows Mr. Simmons “weaving,” even slightly, within his lane. [↑](#footnote-ref-4)