

No. COA 25-272

DISTRICT TWENTY-TWO

NORTH CAROLINA COURT OF APPEALS

STATE OF NORTH CAROLINA	)	
	)	
v.	)	<u>From Caswell County</u>
	)	
JIMMIE EDWARD JOHNSON	)	

DEFENDANT-APPELLANT'S BRIEF

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STATE OF NORTH CAROLINA	)	
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ISSUE PRESENTED

- I. DID THE TRIAL COURT ERR IN ALLOWING MR. JOHNSON TO PROCEED PRO SE?
- II. DID THE TRIAL COURT ERR IN EXTENDING MR. JOHNSON'S PROBATION WITHOUT MAKING A FACTUAL FINDING THAT THERE WAS GOOD CAUSE TO DO SO?

STATEMENT OF THE CASE

On 16 July 2024, in a Criminal Session of Caswell County Superior Court, defendant-appellant Jimmie Johnson was permitted to proceed *pro se* by the Honorable John Morris.

On 5 August 2024, in a Criminal Session of Caswell County Superior Court, the Honorable R. Stuart Albright found that Mr. Johnson had willfully violated his probation. The trial court imposed a sentence of five months imprisonment and eighteen months of additional probation. Mr. Johnson's active sentence was stayed pending appeal.

No notice of appeal was given. For the reasons discussed in Mr. Johnson's contemporaneously filed petition for writ of certiorari, this Court should exercise its authority to review the merits of this case.

STATEMENT OF GROUNDS FOR APPELLATE REVIEW

Mr. Johnson appeals pursuant to N.C. Gen. Stat. §§ 15A-1347 and 7A-27(b)(4).

STATEMENT OF FACTS

Waiver of Counsel

On 16 July 2024, Jimmie Johnson appeared before the Honorable John Morris without an attorney. (JT p 1) The prosecutor asked for Mr. Johnson to be advised of his right to counsel. (JT p 3) The following exchange took place:

THE COURT: Mr. Johnson, good morning, sir. It appears that your alleged violations are violations of standard conditions of probation. The - - your suspended sentence in this matter appears to be a minimum of 15 months, a maximum of 27 months. With that said...the Court will make inquiries into your representation. If you so qualify, the Court can - - will appoint counsel to represent you. However, you may waive that right to counsel. You can represent yourself or hire your own attorney. What would you like to do?

THE DEFENDANT: Represent myself.

THE COURT: All right. If you will sign a waiver, we'll return back to your case here shortly.

(JT pp 3-4)

After Mr. Johnson signed the wavier form (R p 27), the following exchange took place:

THE COURT: Mr. Johnson, you have signed your waiver and been sworn to your waiver of counsel. Is it your intent to represent yourself?

THE DEFENDANT: Yes, Your Honor.

(JT p 4)

The matter was then continued to the next court date. (JT p 4)

On 6 August 2024, Mr. Johnson returned to court. The following exchange took place with the Honorable Stuart Albright.

THE COURT: Mr. Johnson, I note - - I'm looking at the file, and on July 16, 2024, it appears to me that you waived all counsel and want to represent yourself in front of Judge Morris. Do you still want to represent yourself?

THE DEFENDANT: Yes, sir.

THE COURT: Anything changed?

THE DEFENDANT: No, sir.

THE COURT: He's already waived. I'm not going to do it again.

(AT p 3)

Mr. Johnson was then arraigned. (AT pp 3-4)

Probation

Jimmie Johnson was placed on probation following his April 2023 conviction for drug offenses. (R pp 2-18; AT pp 7-8) A violation report was filed in September 2023, alleging that Mr. Johnson violated probation by (1) testing positive for marijuana on 4/18/23 and 5/19/23, (2) failing to complete his court-ordered community service, and (3) being \$500 in arrears in the payment of court fees. (R pp 19-20) A court found Mr. Johnson to be in violation and modified his probation to

include the completion of a CBI class¹ and four days in the county jail.
(R pp 21-24)

This proceeding was initiated on 13 June 2024 when Probation Officer Jack Gaskins filed a new violation report alleging that Mr. Johnson had violated the terms of his probation by (1) testing positive for marijuana on 5/19/23, 12/14/23, 3/7/24, 4/18/24, and 6/6/24, (2) being \$1060 in arrears on court fees, and (3) failing to complete TASC². (R pp 25-26; AT pp 8-16) On cross-examination, Mr. Johnson asked Mr. Gaskins if the reason he was unable to the TASC program was “because I couldn’t read and write.” (AT p 16) Mr. Johnson did not testify, presented no evidence, and did not make a closing statement beyond asserting that he had not yet been able to pay his court fees because he was waiting for a workers compensation settlement. (AT pp 17-19)

The trial court found Mr. Johnson to be in willful violation of probation and ordered Mr. Johnson to serve a five-month split sentence with no credit for time served, to be followed by eighteen additional months of probation. The court left it to the probation officer to decide

¹ Cognitive Behavioral Intervention. *See In re C.G.A.M.*, 193 N.C. App. 386, 389, 671 S.E.2d 1, 3 (2008).

² Treatment Accountability for Safer Communities. *See State v. Brown*, 279 N.C. App. 630, 631, 865 S.E.2d 753, 755 (2021).

whether Mr. Johnson required substance abuse treatment, a curfew, and/or electronic monitoring. (AT pp 20-22)

ARGUMENT

I. THE COURT ERRED IN ALLOWING MR. JOHNSON TO PROCEED PRO SE.

A. Preservation and Standard of Review

Inquiries into whether a defendant's constitutional right to counsel was properly waived have long been reviewed without regard to whether the defendant lodged an objection at trial. *See generally Adams v. United States*, 317 U.S. 269, 275, 63 S. Ct. 236, 240 (1942) (reaching the merits where the defendant enthusiastically insisted upon representing himself at trial). Similarly, where the defendant is prejudiced by the trial court's failure to comply with a statutory mandate in assessing the defendant's request to proceed *pro se*, the issue is preserved for appeal notwithstanding the defendant's failure to object at trial. *State v. Lindsey*, 271 N.C. App. 118, 125, 843 S.E.2d 322, 328 (2020).

The trial court's decision to allow a defendant to proceed *pro se* and waive his right to counsel is reviewed *de novo*. *State v. Watlington*, 216 N.C. App. 388, 393-94, 716 S.E.2d 671, 675 (2011). Prejudice is

presumed and a new trial is required “if the accused is denied counsel at a critical stage of his trial.” *United States v. Cronin*, 466 U.S. 648, 659, 104 S. Ct. 2039, 2047 (1984).

B. Core Principles

Defendants have the right to the assistance of counsel during probation revocation hearings. N.C. Gen. Stat. § 15A-1345(a). This statutory right is intended to exceed the protections of the federal constitutional right to counsel. *State v. Coltrane*, 307 N.C. 511, 514 299 S.E.2d 199, 201 (1983). While some constitutional protections are lowered in the context of probation, this Court has never indicated that the right to counsel is similarly abridged. Indeed, the right to the effective assistance of counsel in probation revocation hearings is “unquestionable.” *State v. Tucker*, 111 N.C. App. 907, 908, 433 S.E.2d 476, 477 (1993).

Any “waiver of counsel must be knowing and voluntary, and the record must show that the defendant was literate and competent, that he understood the consequences of his waiver, and that, in waiving his right, he was voluntarily exercising his own free will.” *State v. Thacker*, 301 N.C. 348, 354, 271 S.E.2d 252, 256 (1980) (citation omitted).

“[W]hether there is a proper waiver should be clearly determined by the trial court, and it would be fitting and appropriate for that determination to appear upon the record.” *Johnson v. Zerbst*, 304 U.S. 458, 465, 58 S. Ct. 1019, 1023 (1938).

To this end, N.C.G.S. § 15A-1242 requires that before a defendant can be permitted to represent himself, the trial court must make a “thorough inquiry,” advising him of (1) the right to counsel as well as the right to court-appointed counsel, (2) the consequences of his decision, and (3) the nature of the charges and the range of permissible punishments. “The inquiry described in G.S. § 15A-1242 is mandatory in every case where the defendant requests to proceed *pro se*.” *Watlington*, 216 N.C. App. at 394, 716 S.E.2d at 675 (cleaned up). A new trial is required when the trial court fails to conduct the appropriate inquiry, even if the defendant has clearly stated his desire to proceed *pro se*. *Id.* at 395, 716 S.E.2d at 676.

C. The Trial Court’s Colloquy with Mr. Johnson Failed to Comply with N.C.G.S. §15A-1242.

The Superior Court Judges’ Benchbook, available at: <https://benchbook.sog.unc.edu/criminal/counsel-issues>, contains several

questions the trial court should ask to comply with §15A-1242, including:

- Are you able to hear and understand me?
- Are you now under the influence of any alcoholic beverages, drugs, narcotics, or other pills?
- Do you know how to read? Write?
- Do you understand that you have the right to be represented by a lawyer?
- Do you understand that, if you decide to represent yourself, you must follow the same rules of evidence and procedure that a lawyer appearing in this court must follow?
- Do you understand that, if you decide to represent yourself, the court will not give you legal advice concerning defenses, jury instructions, or other legal issues that may be raised in the trial?
- Do you understand that I must act as an impartial judge in this case, that I will not be able to offer you legal advice, and that I must treat you as I would treat a lawyer?
- With all these things in mind, do you now wish to ask me any questions about what I have just said to you?
- Do you now waive your right to the assistance of a lawyer, and voluntarily and intelligently decide to represent yourself in this case?

See also State v. Moore, 362 N.C. 319, 327-28, 661 S.E.2d 722, 727

(2008) (approving same).

While the trial court is not required to ask these specific questions verbatim, the failure to ask any questions regarding a defendant's ability to comprehend the proceedings or his understanding of how waiving counsel would impact his trial clearly falls short of the statutory mandate and requires that the defendant receive a new trial. *Watlington*, 216 N.C. App. at 394-95, 716 S.E.2d at 675-76.

When the trial court's colloquy establishes some but not all of the findings required by § 15A-1242, a new trial is still required. *See, e.g., State v. Evans*, 153 N.C. App. 313, 316, 569 S.E.2d 673, 675 (2002) (reversing and remanding for a new probation revocation hearing); *State v. Sorrow*, 213 N.C. App. 571, 577, 713 S.E.2d 180, 184 (2011) (vacating and remanding for a new probation revocation hearing). The signing of the waiver form does not absolve the trial court of its statutory duties under N.C.G.S. §15A-1242. This is particularly true where, as here, the defendant has limited literacy.

In this case, the trial court informed Mr. Johnson that he could hire his own attorney, seek court-appointed counsel, or appear pro se. (JT p 3) This fulfilled the court's obligation as to N.C.G.S. § 15A-1242(1). The trial court further informed Mr. Johnson that if his

probation were revoked, he would face a sentence of 15 to 27 months' imprisonment. (*Id.*) However, Mr. Johnson's probation could not be revoked because the violations alleged were not among the bases included in N.C.G.S. § 15A-1344(a) (commission of a new criminal offense, absconding, two prior confinements in response to violation). Mr. Johnson was not informed of the ways his probation might be modified based on the allegations in the violation report at issue. Thus, the trial court failed to meaningfully comply with N.C.G.S. § 15A-1242(3).

The trial court wholly failed to fulfill its obligation under N.C.G.S. § 15A-1242(2) to ensure that the defendant "understands and appreciates the consequences" of deciding to proceed *pro se*. Mr. Johnson was not asked if he could hear and understand the court, if he was under the influence of drugs or medication, his age, his educational status, whether he was literate, or whether he suffered from any mental or physical handicaps. He was not informed that if he represented himself, he would be required to follow the same rules of procedure as an attorney and that the trial court would not be able to give him legal advice or other guidance during the proceedings. He was not afforded

the opportunity to ask the trial court any questions before agreeing to waive his right to counsel. Thus, it cannot be said that the trial court conducted “the sort of ‘thorough inquiry’ envisioned by the General Assembly when this statute was enacted.” *Moore*, 362 N.C. at 327-28, 661 S.E.2d at 727.

Nothing in the record suggests that Mr. Johnson understood or appreciated what it would mean to represent himself at the probation revocation hearing. This Court may not presume that Mr. Johnson was otherwise aware of the consequences of his decision. *See State v. Seymore*, 214 N.C. App. 547, 551, 714 S.E.2d 499, 502 (2011) (“the fact that Defendant may have known [these things from other sources] has no bearing on the trial judge’s responsibility to make a thorough inquiry”); *State v. Callahan*, 83 N.C. App. 323, 324, 350 S.E.2d 128, 129 (1986) (“the record must affirmatively show that the inquiry was made.”)

D. A New Probation Revocation Hearing is Required.

All defendants are guaranteed the right to counsel at every critical stage of the criminal process. “Whether a critical stage has been reached depends upon an analysis of whether potential substantial

prejudice to defendant's rights inheres in the particular confrontation and the ability of counsel to help avoid that prejudice. A critical stage has been reached when constitutional rights can be waived, defenses lost, a plea taken, or other events occur that can affect the entire [proceeding]." *State v. Detter*, 298 N.C. 604, 620, 260 S.E.2d 567, 579 (1979) (cleaned up).

By statute, the right to counsel begins "as soon as feasible after the indigent is taken into custody. . . and continues through any critical stage of the action," including pretrial hearings. N.C.G.S. § 15A-942 requires that the trial court ensure the defendant's awareness of his right to counsel at arraignment; *see also State v. Sanders*, 294 N.C. 337, 240 S.E.2d 788 (1978).

Mr. Johnson does not have a high school diploma and is functionally illiterate. (R p 5, AT p 16) Mr. Johnson made no objections, asked only a handful of questions, presented no evidence, and gave no closing statement. Mr. Johnson did not argue that some of the allegations against him were the subject of a prior probation modification and therefore could not reasonably be used as a basis for

this modification³. Mr. Johnson did not give notice of appeal, potentially denying him the possibility of appellate review. Mr. Johnson was without counsel during all critical stages of the probation violation hearing.

Because Mr. Johnson was arraigned and proceeded through his entire probation revocation hearing without counsel and without having made a valid waiver of his right to counsel, prejudice is presumed, and he is entitled to a new hearing.

II. THE COURT ERRED IN EXTENDING MR. JOHNSON'S PROBATION WITHOUT MAKING A FACTUAL FINDING THAT THERE WAS GOOD CAUSE TO DO SO.

A. Standard of Review and Preservation

This issue is preserved for appellate review without objection entered upon the ruling because the trial court failed to comply with a statutory mandate. *See State v. Ashe*, 314 N.C. 28, 39, 331 S.E.2d 652, 659 (1985). “Alleged statutory errors are questions of law, and as such,

³ In 2023, Mr. Johnson’s probation was modified in response to *inter alia*, a positive drug test on 5/19/23 and the failure to pay \$500 in court fees. (R p 20) In the present proceeding, the modification to Mr. Johnson’s probation was based in part on the same conduct. (R p 26, alleging violations in the form of the same drug test and nonpayment of fees including the \$500 previously owed).

are reviewed *de novo*.” *State v. Mackey*, 209 N.C. App. 116, 120, 708 S.E.2d 719, 721 (2011) (cleaned up).

B. Legal Analysis

N.C.G.S. § 15A-1344(d) provides that a period of probation may only be modified and/or extended prior to expiration “for good cause shown.” Consequently, the Order on Violation of Probation form, AOC-CR-609, requires a court extending a defendant’s probation to find that the extension is “a. for good cause shown, pursuant to G.S. 15A-1344(d)” or “b. with the defendant’s consent, pursuant to G.S. 15A-1342(a) or G.S. 15A-1343.2(d).” In this case, the trial court did not so indicate on the form, nor did it make an oral finding of good cause. (R p 30) Mr. Johnson’s probation could not properly be extended without such a finding.

Similar “good cause” language is used in § 15A-1344(f)(3), which allows for identical changes after the term of probation has expired when “[t]he court finds for good cause shown and stated that the probation should be extended, modified, or revoked.” In the context of § 15A-1344(f)(3), if the trial court fails to make a finding of good cause, the order modifying probation will be vacated or remanded. *See, e.g.*,

State v. Lytle, 287 N.C. App. 657, 883 S.E.2d 655 (2023); *State v. Sasek*, 271 N.C. App. 568, 844 S.E.2d 328 (2020). Mr. Johnson seeks the same result here.

“It is axiomatic that when construing legislative provisions, this Court looks first to the plain meaning of the words of the statute itself. When a statute is clear and without ambiguity, it is the duty of this Court to give effect to the plain meaning of the statute, and judicial construction of legislative intent is not required.” *State v. Morgan*, 372 N.C. 609, 614, 831 S.E.2d 254, 258 (2019) (interpreting § 15A-1344(f)(3)) (cleaned up). In addition, the Court must not interpret a statute “in a manner which would render any of its words superfluous,” instead, “it is presumed that the legislature intended each portion to be given full effect and did not intend any provision to be mere surplusage.” *Id.*

Applying these principles to N.C.G.S. § 15A-1344(d), a finding of good cause is necessary before probation may be extended. To hold otherwise would render the words “and for good cause shown” superfluous. It must be assumed that, because the legislature did not indicate otherwise, that “good cause” has the same effect in § 15A-1344(d) as it does § 15A-1344(f). *See State ex rel. Utilities Com. v.*

Thornburg, 84 N.C. App. 482, 485, 353 S.E.2d 413, 415 (1987). In addition, it is significant that no “good cause” language appears in other sections, such as N.C.G.S. § 15A-1344(e), which controls special probation.

If the order modifying and extending Mr. Johnson’s probation is not remanded due to the failure to comply with N.C.G.S. § 15A-1242, it should be remanded due to the failure to comply with N.C.G.S. § 15A-1344(d). Even if this Court believes the missing finding amounts to no more than a clerical error, the order should nonetheless be remanded so that the record may “speak the truth.” *State v. Smith*, 188 N.C. App. 842, 845, 656 S.E.2d 695, 696 (2008).

CONCLUSION

For the foregoing reasons and authorities, Mr. Johnson respectfully requests that the order modifying and extending his probation be reversed and remanded for a new hearing.

Respectfully submitted, this, the 11th day of April 2025.

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CERTIFICATE OF COMPLIANCE WITH N.C. R. APP. P. 28(J)(2)

I hereby certify that Defendant-Appellant's Brief is in compliance with Rule 28(j)(2) of the North Carolina Rules of Appellate Procedure as it is printed in fourteen-point Century font and the body of the brief, including footnotes and citations, contains no more than 8750 words as indicated by the word-processing program used to prepare the brief.

This, the 11th day of April 2025.

By Electronic Submission:

Sarah Holladay

North Carolina State Bar Number 33987

CERTIFICATE OF FILING AND SERVICE

I hereby certify that the original Contemnor-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 Jeanne Washburn, Assistant Attorney General, North Carolina Department of Justice, by electronic means by emailing it to jwashburn@ncdoj.gov.

This, the 11th day of April 2025.

By Electronic Submission:

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